

In the matter of:

**HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger – Registered Organization**

Represented by counsel, Att. Daniel Shenhar (Lic. No. 41065) and/or Sigi Ben Ari (Lic. No. 37566) and/or Elad Cahana (Lic. No. 49009) and/or Ido Blum (Lic. No. 44538) and/or Hava Matras-Irton (Lic. No. 35174) and/or Noa Diamond (Lic. No. 54665) and/or Nimrod Avigal (Lic. No. 51583) and/or Benjamin Agsteribbe (Lic. No. 58008)

Of HaMoked Center for the Defence of the Individual, founded by Dr. Lotte Salzberger

4 Abu Obeida St., Jerusalem 97200

Tel: 02-6283555; Fax: 02-6276317

The Petitioner

v.

- 1. The Supervisor of the Inspector of Interrogees' Complaints, Ministry of Justice**
- 2. The Israel Security Agency**

Both represented by the State Attorney's Office

Ministry of Justice, Jerusalem

The Respondents

Petition for Order Nisi

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause why they do not transfer to the petitioner the interrogation materials which served as the basis for their decision to close the investigation files concerning complaints submitted by petitioner's counsel, of alleged torture and/or inhuman and/or degrading treatment of Palestinian detainees during interrogation.

The grounds for the petition are as follows:

Under the Basic Law: Human Dignity and Liberty, enacted in 1992 a person's right to a fair criminal proceeding is regarded as a basic constitutional right, mainly under section 5 of the basic law, which sets forth the right to personal liberty and sections 2 and 4 of the basic law, which set forth the right to human dignity. Under the provisions of section 11 of the basic law, all state authorities – the legislative, executive and judicial authorities – are bound to respect the rights enshrined in the basic law (FH 3032/09 **Baranes v. The State of Israel**, IsrSC 56(3) 354, 375).

1. This petition concerns the refusal of the investigating and examining body to transfer to complainants the interrogation materials which served as the basis for its decision to close the investigation files.
2. HaMoked: Center for the Defence of the Individual (hereinafter: **HaMoked**), the petitioner, represents several Palestinians, residents of the West Bank, who experienced violence and abuse possibly amounting to torture, when interrogated by the agents of respondent 2 (hereinafter: **ISA**).
3. Within the framework of the handling these complaints, the petitioner applied to respondent 1 (hereinafter: **IIC supervisor**) who is the Ministry of Justice official who is in charge of the Inspector of Interrogees' Complaints (**IIC**) in the ISA. The purpose of these applications was to uncover the truth concerning the circumstances of the interrogation of the complainants, and if the complaints are found to have merit, to have the offenders who broke the law punished.
4. The relevant complainants were detained by the Israeli security forces in late 2008 and early 2009, and were all transferred to the detention and interrogation facility in Petach-Tikva. Based on affidavits taken by lawyers working on behalf of HaMoked in the spring of 2009, complaints were sent out to the IIC supervisor during the months of June and July of that year.
5. The IIC delayed handling the complaints. An entire year passed from the date such complaints were submitted before HaMoked received only answers concerning only a few files. Due to this conduct, HaMoked had no alternative but to turn to this court as specified below.

HCJ 6138/10

6. On August 19, 2010 HaMoked filed the above petition, in which it complained of the IIC supervisor's prolonged disregard of most of the complaints which were the subject matter of the petition.

7. Soon after the above petition was filed, the IIC supervisor began to slowly send HaMaoked, in "dribs and drabs", responses to the complaints. From August 2010 through January 2011, HaMoked received responses to all of the complaints. **All responses were similar in spirit – the investigation file was closed due to the fact that the complaint was found to be "without merit".** The investigation materials which served as the basis for making the decisions to close the files were not attached to the responses.
8. In the State's preliminary response to the petition, which was submitted on January 9, 2011, the court was requested to dismiss the petition, due to the fact that all required responses were provided. The court dismissed the petition in its judgment dated January 12, 2011.
9. In view of the above, the complainants had nothing left to do but to try to understand what had caused the investigating body to stop handling the complaints and plan their steps accordingly. In this spirit, HaMoked applied to the IIC supervisor on behalf of twelve of the complainants, requesting to receive the interrogation materials which served as the basis the decision to close the files.
10. The IIC supervisor denied HaMoked's requests in each and every one of the twelve files. After receiving these negative responses, HaMoked sent a general letter to the IIC supervisor in which it argued that it seemed that important aspects of the matter had not been properly considered, including the duties imposed upon the IIC supervisor as an administrative authority, such as the duty to substantiate its decision and the rights of the complainants as injured parties. Despite the exchange of many letters with the IIC supervisor during the last months, the refusal to transfer the investigation materials to HaMoked's for review, still stands.
11. This refusal severely infringes upon complainants' right to challenge the decisions of the investigating bodies, actually leaving the ISA agents, who have allegedly broken the law, beyond the reach of external and independent scrutiny. Such inability to shed light over the interrogators' conduct opens the door to a sweeping violation of the law. Therefore, the intervention of the honorable court is required.

The Parties

12. The petitioner is a human rights organization, acting for many years vis-a-vis the State's authorities, to protect the rights of Palestinians in the Occupied Palestinian Territories (OPT), including Palestinians detained by the Israeli security forces.
13. Respondent 1, the IIC supervisor in the Ministry of Justice, is in charge, on behalf of the Attorney General, of reviewing the results of inquiries into complaints by ISA interrogees. As a general rule, interrogees' complaints are

examined by the IIC, who is an ISA employee, and the results of such examinations are reviewed by the IIC supervisor, who is an attorney. The IIC supervisor is the official who responded to HaMoked's complaints, and he is the official who refuses to transfer to HaMoked the interrogation materials which served as the basis for his decisions to close the investigation files.

14. Respondent 2, the Israel Security Agency, is responsible, under applicable law, for protecting and maintaining the security of the State of Israel and its institutions. Agents working on its behalf, interrogated the complainants relevant to this petition, and the complaints which were forwarded to the IIC supervisor involve the alleged actions of these agents. The investigation materials, which HaMoked wishes to obtain on behalf of the complainants, were transferred by him to the IIC supervisor.

Exhaustion of Proceedings

15. As indicated above, after HaMoked received the IIC supervisor's notices that the investigation files concerning the complaints filed by the complainants were closed, it applied, on behalf of twelve of the complainants to the IIC supervisor, requesting to receive the investigation materials which served as the basis for the decision to close the investigation files. The answers of the IIC supervisor – all in the same spirit – denial of HaMoked's requests due to the fact that the materials were under an all-embracing privilege - were given to HaMoked with respect of each of the requests. In five of the files, the IIC supervisor suggested that HaMoked's representatives come to her office where they would be given access to some of the materials.

Copies of the IIC supervisor's answers are attached and marked **P/1a-1**.

16. In view of the above, on February 17, 2011, HaMoked sent a general letter to the IIC supervisor regarding all of the answers, in which it rejected the supervisor's claim that all interrogation materials were under an all-embracing privilege. In said letter, the IIC supervisor was requested to transfer to HaMoked the interrogation materials which served as the basis for the decision to close the investigation files.

Copy of HaMoked's letter dated February 17, 2011 is attached and marked **P/2**.

17. Since no response was received by HaMoked to its above general request, an additional letter in that matter was sent to the IIC supervisor on April 6, 2011.

Copy of HaMoked's letter dated April 6, 2011 is attached and marked **P/3**.

18. No response was received to this second request either. Therefore, HaMoked was forced to contact the IIC supervisor for the third time. In this letter, HaMoked even suggested that a date be coordinated between HaMoked representatives and the IIC supervisor, on which the former would come to the

supervisor's office and receive access to the interrogation materials, as suggested by her in five of the twelve files.

Copy of HaMoked's letter dated July 11, 2011 is attached and marked **P/4**.

19. Two additional reminders were sent since then – on August 24, 2011 and on October 17, 2011. Notwithstanding the repeated requests, no response was received from the IIC supervisor.

Copy of the letter dated August 24, 2011 is attached and marked **P/5**; Copy of the letter dated October 17, 2011 is attached and marked **P/6**.

In view of all of the above, it seems that the investigation and examination bodies are determined not to transfer the interrogation materials which served as a basis for the decision to close the investigation files to the complainants, for their review. Numerous requests submitted by HaMoked in this matter were to no avail. Therefore, the petitioner had no alternative, but to turn to this honorable court.

The Legal Argument

Everybody is subject to the law, the citizen and all state authorities: members of the executive, the legislature and the judiciary and no authority is above the law (Eliad Shraga and Roi Shachar, **Administrative Law: Basic Principles**, page 123).

Investigation Standards under International Law – The Obligation to Conduct an Investigation in Transparency

20. As the above described facts indicate, the complaints submitted by HaMoked on behalf of the complainants who claimed that they had been treated in a degrading and inhuman manner amounting to torture when interrogated by ISA agents, were closed on a wholesale basis by the IIC supervisor. We seek to challenge the practice pursuant of not transferring interrogation materials to the complainants after the examining body has decided to close the investigation files.
21. The complainants claim that they were subjected to unbearable interrogation conditions, constituting, *prima facie*, a violation of the absolute prohibition to use any kind of torture and/or inhuman and/or degrading treatment during interrogation imposed under international law. These complainants, Palestinian residents of the West Bank, are "protected persons" as this term is defined in the Fourth Geneva Convention of 1949, and are therefore entitled to have their rights protected by the occupying power, Israel in this case.
22. Israel signed and ratified its signature on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Israel signed and ratified its signature on the International Covenant on Civil and Political

Rights which prohibits, in Article 7 thereof, the use of torture during interrogation. Article 4(2) of the Covenant provides that no derogation is permitted from such prohibition even in time of declared public emergency.

23. Along with the absolute prohibition on torture, international law imposes an obligation to investigate any violation thereof. International law often emphasizes that in exercising their obligations, states should punish any person suspected of having breached the prohibition on torture. Article 12 of the convention against torture provides that:

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

24. This Article was interpreted by the committee against torture, in charge, on behalf of the UN, of the implementation of the convention against torture, and by international tribunals and human rights experts, as imposing an obligation to conduct an **effective** investigation. International law does not merely impose an obligation to conduct an investigation, but rather sets forth a wide array of standards applicable to an investigation. Accordingly, the reliance of the investigating body on materials which remain concealed from the complainant after the investigation file was closed, does not meet these standards by any means.

25. The relevant standards in this matter are the special standards required in the investigation of various torture offenses. These standards were set forth in the Istanbul Protocol, submitted to the UN High Commissioner of Human Rights in August 1999 (Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment). The manual sets forth the minimum standards applicable to the investigation and documentation of torture. The state must ensure, *inter alia*, that the investigators inform the complainants or their legal counsel of any development in the investigation or of any hearing that is to be held in that matter, **and that maximum transparency is maintained in the process** (Article 80).

26. These standards, including the transparency standard, were broadly discussed in the judgments of various international tribunals. Among others, the European Court of Human Rights held in the matter of **Isayeva v. Russia** (ECHR judgment from February 24, 2005, 57947/00) in paragraph 213:

For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may vary from case to case. **In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests** (see *Gulec v. Turkey*, cited above, p. 1733, § 82;

Ogur v. Turkey, cited above, § 92; *Gul v. Turkey*, cited above, § 93; and Northern Irish cases, for example, *McKerr v. the United Kingdom*, cited above, § 148).

27. It should be pointed out that the above judgment was rendered in a complaint of a resident of Chechnya in Russia, which was submitted against the Russian authorities concerning the torture of her husband, which resulted in his death. The same standards of proper investigation should be implemented in Israel. For an additional judgment of the European court concerning the rights of Kurdish citizens harmed by an investigation concerning the violation of their rights during the dispute with Turkey, an investigation that was conducted in complete darkness without transparency and was therefore disqualified by the court, see **Ahmet Ozkan v. Turkey**, ECHR judgment from April 6, 2001, 21689/93, para. 85-90.
28. Accordingly, the basic legal principle applicable in this case – the principle that the law should be interpreted in accordance with its purpose – supports conducting an effective and transparent investigation which may lead to the identification, trial and punishment of the offenders. Several rules applicable to investigations stem from this normative premise intended to ensure an effective investigation that would uncover the truth and lead to charges being pressed against the offenders.
29. The investigating state has an obligation to expose, to the extent possible, the findings of the investigation. The transparency element is intended to increase public trust (and especially the trust of the victims' families) in the investigating bodies and to ensure that their conducts is efficient and honest. The conduct of the IIC supervisor, the total refusal to disclose to the complainants the investigation materials which served as the basis for the decision to close the investigation files, shuts the door on the complainants and does not enable them to challenge the decision to close the files thus, constituting a clear violation of this obligation.

The Right to Review Information in an Investigation File Under Israeli Law

30. The right to review investigation materials in criminal proceedings is set forth in section 74 of the Criminal Procedure Law [Consolidated Version], 5742-1982 providing that after the filing of an indictment for a felony or a misdemeanor, the defendant and his defense attorney, are entitled at any reasonable time, to review the investigation material and the list of material gathered or recorded by the investigating authority that pertains to the indictment, and to make a copy thereof. The right to review investigation materials under this section applies only after the filing of an indictment, as stated in this section.
31. However, the late Prof. Zeev Segal, in his book **The Right to Know in Light of the Freedom of Information Act**, in page 18, holds that:

The arrangement set by the legislator is not necessarily a comprehensive arrangement intended to prevent review of police investigation materials even before the filing of an indictment. The legislator's acknowledgement of the defendant's right to review investigation materials after the filing of an indictment does not prevent the prosecuting authorities from enabling **a suspect, a complainant, or the victim of the offense to review the investigation materials**, also before the filing of an indictment **or after the investigation file was closed and a decision not to file an indictment was made.**

32. It is also argued that beyond the boundaries of section 74, complainants who may be victims of an offense committed by ISA agents, have the right to review the investigation materials found in the investigation files which the investigating body decided to close.
33. First, similar to any other administrative authority, the respondents in this petition have an obligation to exercise their discretion in good faith, fairly, equally and reasonably. This also applies to decisions made by the IIC supervisor in the Ministry of Justice, as to whether or not information from an investigation file should be disclosed.
34. In this spirit the State Attorney issued directive number 14.8, concerning requests submitted by different parties to review information found in an investigation file. Although this directive concerns a police investigation file, for the purpose of this case, a direct line may be drawn between a police investigation and an investigation conducted by an official in the Ministry of Justice concerning suspicions of severe offenses committed by ISA agents, "*in lieu*" of a police investigation. This directive provides, in section A4, that:

As a general rule, a citizen has the right to inspect documents found in the hands of the authorities, if he can show a legitimate interest, by reason of which the inspection is requested, and provided that this does not severely infringe upon another legitimate interest.

35. Individuals who complain of cruel treatment during ISA interrogations have a perfectly legitimate interest. They comply with the criterion set by the State Attorney in the above directive (section B(a)3) pursuant to which "If the interest for which the inspection is requested, is directly connected to the handling of the criminal proceeding with respect to which the investigation material was gathered, such an interest must be given considerable weight. **This is the case when the police decides to close an investigation file and the complainant wishes to appeal the decision or file a petition with the High Court of Justice concerning the decision to close the file, and he wishes to review the material for that purpose.**"

36. How can the complainants challenge the decision of the IIC supervisor to close the investigation files in their matter, either by contacting the Attorney General or by filing a petition to the High Court of Justice against the IIC supervisor, if they do not have access to the materials which served as a basis for closing the files? The refusal to give them access to the investigation materials denies their right to due process.
37. Evidently, a complainant has the right to review the investigation materials concerning his case. The the complainant's personal right to review investigation materials stems from the authority's role as a trustee of the public and is mainly derived from the right to a hearing and the obligation of the administrative authority to act transparently. It also stems from the general right to have access to information held by administrative authority and where the authority wishes to prevent review, it bears the burden of proof. This was held by Honorable Justice Arbel in HCJ 93/06 **D.N. Kol Gader Ltd. et al. v. The Minister of Industry, Trade & Labor** TakSC 2011(3), 2060, in paragraph 30 of her judgment (hereinafter: **D.N.**). She further held therein that:

In some cases, the legislator explicitly acknowledged the personal-individual right of review, as provided for in section 74 of the Criminal Procedure Law and in section 13 of the Privacy Protection Law, 5741 – 1981. However, the rule which was established many years before the enactment of the Freedom of Information Act, is that **even when it is not specifically provided for by law, a person has the right to review materials which concern him and which were gathered by the administrative authority using the powers granted to it by law.**

38. The right of review *is a condition sine qua non* for establishing complainants' right to a hearing – a hearing concerning the decision to close the investigation files in their matter. The courts have also acknowledged the connection between the right to a hearing and the right to review personal information *before* the administrative decision is made (HCJ 4914/94 **Turner v. The State Comptroller**, IsrSC 49(3) 771). This petition concerns the right of review for the purpose of examining the possibility of exercising the right to a hearing regarding personal information *after* the administrative decision was made, i.e., the decision to close the investigation file. Justice Arbel held, in paragraph 31 of her judgment in **D.N.**, concerning a private request to review material which served as the basis for the authority's decision to impose a fine (i.e., **after the administrative decision was made**), as follows: "I do not think that the rule applicable in this case is different. The need to review the material at this stage in order to establish an argument is not materially different from the need to review before the administrative decision is made."

To conclude this chapter, it should be pointed out that the decision of the IIC supervisor in our case is conclusive. The fact that this decision is conclusive necessarily projects upon the obligation that should be imposed on the IIC

supervisor to disclose the material that served as the basis for making the decision. Shutting the door on the complainants in our case fatally impairs, once again, their ability to exercise their rights.

The Conduct of the IIC Supervisor Undermines the Principle of Separation of Powers and the Ability to Exercise Judicial Review

39. The exercise of judicial review over an investigation proceeding is a fundamental principle governing the laws of investigation and detention, in view of the principles set forth in Basic Law: Human Dignity and Liberty. The purpose of judicial review is to ensure that the investigation bodies exercise their powers fairly and without prejudice. Judicial review secures the protection of the rights of complainants claiming to have been injured by the conduct of the detaining and investigating bodies. For this matter see HCJ 6055/95 **Zemach v. The Minister of Defense et al.**, IsrSC 53(5) 241, 262; ADA 10/94 **A. v. The Minister of Defense**, IsrSC 53(1) 97, 105.
40. In ADA 2/86 **A. v. The Minister of Defense**, IsrSC 41(2) 508, Justice Bejski adopted the view expressed by Prof. Y. H. Klinghoffer (in his article "Preventive Detention for Security Reasons", **Mishpatim** 11 (5741) 286), that "Judicial review serves as a guarantee against arbitrariness at the administrative authority." In HCJ 2320/98 **al-'Amla v. The Commander of IDF Forces**, IsrSC 52(3) 346, 362 the importance of thorough and efficient judicial review was emphasized: "Judicial review is liberty's line of defense and it should be carefully safeguarded."
41. The complainants in this petition may request the court to examine the conduct of the investigating bodies that have decided to close the investigation files in their cases. Such a request would give the court an opportunity to examine the interrogation practices of ISA agents, as well as the process of investigating complaints concerning the violation of the rights of interrogees who were subjected to such interrogations. This opportunity however becomes purely theoretical in view of the fact that the complainants have no ability to review the material which served as the basis for the decision to close the investigation files. With no ability to review the material, there is no ability to plan any future steps which may be required, if any. Seeking the assistance of this court becomes impossible under such circumstances. Thus, the court is deprived of the opportunity to scrutinize a crucially important and powerful investigation and examination body of the State of Israel.

Conclusion

42. Investigation authorities, like any other authority, and possibly even more so, have an obligation to act in a transparent manner and to have their operations subjected to supervision and scrutiny. This obligation is well established in international law, which is binding upon the Israeli investigation authorities investigating suspected torture during ISA interrogations of Palestinian detainees.

43. The conduct of the investigation bodies referred to herein is anything but transparent. This takes place behind a curtain, concealed from the public eye and even from the eye of this honorable court. Investigations conducted in the dark raise grave concerns of discrimination and harmful conduct, the sole purpose of which is to protect the investigating body, the powerful body in this case, instead of protecting the complainants, the weak parties in the balance of powers relevant to this case.
44. Reviewing the investigation materials will enable the complainants to ascertain whether their complaints were thoroughly reviewed and examined without prejudice. It will enable them to request this court to scrutinize the conduct of the investigation bodies. The sweeping deprivation of the right to review the investigation materials infringes upon the rights of the complainants and the visibility of justice in the conduct of the investigation authorities of the State of Israel. In these circumstances, it seems that only the intervention of this honorable court may change the situation, so that the rule of law shall be reinstated and will apply to each and every one of the state authorities.

This petition is supported by the affidavit of the petitioner's employee.

In view of the above, this honorable court is hereby requested to issue an Order Nisi as requested and after hearing the respondents' response, make it absolut. In addition, the honorable court is requested to obligate the respondent to pay petitioner's costs and expenses, including attorney's fees.

Jerusalem, October 31, 2011

Daniel Shenhar, Att.
Counsel for the petitioner

(Our file 69715)