At the Military Court
Judea (Ofer)

4735/13

In the matter of: **Dr. _____ Sarawi, ID No. _____**

represented by counsel, Adv. Tal Steiner (Lic. No. 62448) and/or Hava Matras-Irron (Lic. No. 35174) and/or Sigi Ben Ari (Lic. No. 37566) and/or Daniel Shenhar (Lic. No. 41065) and/or Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Bilal Sbihat (Lic. No. 49838) and/or Anat Gonen (Lic. No. 28359)

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 Appellant

v.

Military Commander of the West Bank Area

The Respondent

Appeal against a Confiscation Order pursuant to Regulation 147(a) of the Defence (Emergency) Regulations, 1945

The honorable court is hereby requested to revoke the confiscation order issued by the military commander, by virtue of which petitioner's money, in the sum of 1,000 Jordanian dinars (approximately NIS 5,000), was confiscated.

And the following are the grounds of the Appeal:

1. The Appellant, who was born in 1983, is a Palestinian resident of the Nablus. The appellant comes from an impoverished family. She graduated high school with honors and won a scholarship for

medical studies in Jordan. In 2008 the appellant completed her medical studies in Jordan with honors and was qualified as a general practitioner. In 2009 the appellant commenced her pediatric residency at the "Jordan" hospital in Jordan. During her residency, the appellant also works at the hospital as a counselor of foreign physicians who undertake their residency at the hospital, and she is responsible for giving new physicians at the hospital guidance and consultation, for training them and for the coordination of their shifts.

A copy of appellant's qualification certificate to practice medicine is attached as Exhibit 1.

A copy of a certificate attesting to appellant's work at "Jordan" hospital in Jordan is attached as Exhibit 2.

2. On January 31, 2013 the appellant crossed Allenby Bridge on her way to the West Bank, to visit her parents. The appellant had in her possession a sum of money of 1,000 Jordanian Dinars she had saved from her salary and which she had intended to give to her elderly and impoverished parents to help them make ends meet.

3. When she crossed Allenby Bridge, the appellant was taken for an interrogation by an Israeli Security Agency (ISA) agent, who did not identify himself to her and who interrogated the appellant about the source of the money which she was carrying with her. The appellant explained that the she had saved said sum of money from her salary as a physician, during five months of work, and that she brought the money for her family in Nablus to assist them in their livelihood. Notwithstanding the above, the ISA agent told the appellant that her money would be confiscated, and gave her a confiscation form concerning the seizure of said sum of money. The form stated that appellant's money was confiscated on "suspicion of transfer of funds to an unauthorized association."

A copy of the confiscation form which was given to the appellant at Allenby Bridge is attached as Exhibit 3.

4. To complete the picture, it should be pointed out that the military commander banned appellant's exit and refused to let her go back to her home and work in Jordan; and that only following a petition which was filed with the Supreme Court sitting as the High Court of Justice (HCJ 1490/13 **Sarawi v. Military Commander of the West Bank Area)** she was allowed to travel abroad.

5. On March 21, 2013 HaMoked sent a letter on appellant's behalf to Major Barak Siman Tov, head of the population registration division at the legal advisor's office, in which it has demanded that appellant's money be returned to her without delay. The confiscation form which was given to the appellant at Allenby Bridge was attached to the letter.

A copy of HaMoked's letter dated March 21, 2013 is attached as Exhibit 4.

6. After the elapse of three weeks, and since no answer has been received, HaMoked sent a reminder letter on April 11, 2013.

A copy of HaMoked's letter dated April 11, 2013 is attached as Exhibit 5.

7. After the elapse of three additional weeks, and since no answer has been received, HaMoked sent another reminder letter on May 2, 2013.

A copy of HaMoked's letter dated May 2, 2013 is attached as Exhibit 6.

8. On July 24, 2013 the undersigned spoke with First Lieutenant Oren Liber, an officer at the legal advisor's office. The officer advised the undersigned that the issue of money confiscation was handled by Major Udi Sagi, his superintendent officer, and that an attorney named Hillal Jaber has already contacted them in appellant's matter. In addition, the officer said that the military commander issued a confiscation order regarding appellant's money, and that said order was forwarded to Advocate Jaber. Finally, the officer said that a written account of the above has, ostensibly, been sent, by letter, to HaMoked's offices already in May.

9. The undersigned advised the officer that no letter has been received in petitioner's matter from the legal advisor's office. Therefore, the officer sent to HaMoked's offices a letter dated May 8, 2013, which stated that the appellant was represented as aforesaid by Advocate Jaber, and that HaMoked's representatives "may be updated with him on the proceeding concerning the money."

A copy of respondent's letter dated May 8, 2013, which was received on July 24, 2013, is attached as Exhibit 7.

10. On August 7, 2013, the undersigned spoke with Advocate Hillal Jaber, who told her that he had ceased handling appellant's matter a few months earlier in view of the fact that they had failed to reach an understanding concerning his legal fees. Advocate Jaber insisted that no confiscation order was sent to him by the military commander, and that in fact, he had never received any response to his letters in appellant's matter.

11. Therefore, on that very same day, HaMoked sent a letter on behalf of the appellant to Major Udi Sagi, head of terror and criminal division at the legal advisor's office, and demanded again that appellant's money be returned to her. A signed power of attorney, a confirmation concerning appellant's work at the hospital in Jordan, and the confiscation form which was given to the appellant at Allenby Bridge were attached to the letter.

A copy of HaMoked's letter dated August 7, 2013 is attached as Exhibit 8.

12. On August 13, 2013 respondent's response dated August 12, 2013 was received in HaMoked's offices. In his letter, the respondent notified that on April 14, 2013 the military commander issued an order for the confiscation of appellant's money by virtue of his authority under regulations 84 and 120 of the Defence (Emergency) Regulations, 1945 (hereinafter: the **Defence Regulations**) since "according to reliable and substantive intelligence information presented to him – the funds belonged to an unauthorized association." A copy of the confiscation order, signed by Major General Nitzan Alon of April 14, 2013, was attached to the letter.

A copy of respondent's letter dated August 12, 2013 is attached as Exhibit 9.

13. Hence, this appeal.

The Legal Argument

14. The appellant will argue that the confiscation of her money was made unlawfully, since such confiscation was made by the respondent without authority, with a severe violation of appellant's right to a hearing, and in without lawful cause, all as specified below:

The confiscation was made without legal cause pursuant to regulation 84

15. According to the confiscation order which was given to the appellant, her funds were confiscated pursuant to regulations 84 and 120 of the Defence Regulations.

16. It should be noted that according to the rulings of this court, the most appropriate regulation in cases such as the case at hand is regulation 84(2)(b), since the purpose of regulation 120 is punitive, and is directed towards an individual, as opposed to a preventive purpose which is directed towards an organization:

> Regulation 120 is a quasi punitive regulation. It enables the military commander to confiscate the personal property of a person who has committed an offence involving violence or a military court offence. It does not concern the confiscation of funds or property of the terror organization, but rather the funds and personal property of an individual who, for instance, committed offences involving violence, for the terror organization. **In the case at hand, regulation 120 should not have been use at all. The funds in question do not belong to a person whose property is sought to be confiscated due to the fact that he has committed offences involving violence, and no evidence was brought in that respect. We are concerned with a confiscation of funds which, according to the security authorities, belong to the terror organization itself**. The appropriate regulation which should be used in this case is regulation 84(2)(b), rather than regulation 120.
>
> (Judgment rendered by Lieutenant Colonel Zvi Lekach dated November 21, 2012, Sole Judge Case (Judea and Samaria Area) 2169/12 **Ahmad Fadel Ahmad Hassin v. Commander of IDF Forces in Judea and Samaria**, emphasis added, T.S.).

17. In our case, like in **Hassin**, the respondent did not specify pursuant to which regulation the confiscation was of the funds was made, either regulation 84 or regulation 120. In any event, in the context of regulation 84, the appellant insists that the amount of money which she carried with her on January 31, 2013 originated from her own personal property, an amount which was saved from her salary as a physician in Jordan, and which was intended to assist her family which lives in Nablus. The appellant has no connection whatsoever with any unauthorized association, nor does she render services to any such association.

18. **Hence, there is no lawful cause for the confiscation of appellant's money, a modest amount which was saved, penny to penny, from her salary, in order to assist her impoverished family in Nablus**.

<u>Lack of lawful authority to confiscate pursuant to regulation 120</u>

19. As specified above, the order which was given to the appellant also mentions regulation 120 as a source of authority (alternative? Additional?) for the confiscation of her money by the military commander.

20. Regulation 120 authorizes the Minister of Defence to direct by an order the confiscation, in favor of the government of Israel, of the property of any person as to whom the Minister of Defence is satisfied that he has committed, or attempted to commit, or has abetted to the commission of, or has been an accessory after the fact to the commission of, any offence against these Regulations "involving violence or intimidation or any Military Court offence."

21. However, with respect to the petitioner it has neither been argued – nor proved – that she has committed any offence against any of the above Regulations. The only argument which was made in her regard was that the money which was in her possession did not belong to her, but rather to

"an unauthorized association." It was so argued in the confiscation form which she received at Allenby Bridge; and it was so argued in the confiscation order itself.

22. **Hence, the confiscation of appellant's funds pursuant to regulation 120 was made without authority, since the appellant has not committed, and it was not argued that she has committed, any offence against the Defence Regulations – and hence, regulation 120 does not apply to her case**. It seems that the military commander tried to "borrow" the rational for the confiscation of funds pursuant to regulation 84 and implement it under the circumstances of regulation 120 – something which may not be done.

The appellant was deprived of the right to have a hearing

23. The petitioner, whose property was confiscated according to respondent's decision, is entitled that the decision in her case be made in a proper administrative manner and that the grounds for said confiscation be disclosed by the respondent, and the rational is clear: **if the reason for the refusal is not disclosed, the person who was injured by the decision will not be able to refute the allegations raised against him, and his protected rights may be restricted without any scrutiny or inspection.**

24. Even when the reasoning is limited in scope due to security considerations, it does not necessarily result in a complete nondisclosure of the reasons.

> An exemption from disclosure of reasons, facts or documents when the disclosure may infringe on state security or its foreign relations is acceptable to the legislator and the court in various contexts. And if a question arises, it does not relate to the exemption itself, but rather to the scope of the exemption. On the one hand, it is reasonable that a public servant will not have to disclose the grounds for his decision if it may infringe on state security or its foreign relations. However, on the other hand, **it does not necessarily result in a complete nondisclosure of the reasons**.
>
> (I. Zamir, **The Administrative Authority** (volume B, 5756), page 917; emphases added, T.S.).

And furthermore:

> Even when a standard decision is concerned, the authority does not fulfill its obligation by giving the reasons underlying its decision in a general and laconic manner, providing only the "caption" of its reasons with no specific and pertinent reference to the circumstances of the case at hand. **This means that a notice stating "your application is denied for security reasons" – is not sufficient**.
>
> (Y. Dotan, "The Duty to give Reasons in Administrative Law" 19 **Mechkarey Mishpat** (5762) 5, 37; emphases added, T.S.).

25. The duty to give reasons does not apply only by virtue of this procedure or another, and this is not a formal matter: this is a duty which governs the basic principles of administrative law as an inherent part of the right to a fair hearing and a person's right to be advised of the authority's allegations and present his position before the authority.

26. Relevant to this matter are the comments of the honorable Justice (as then titled) Barak:

> The case before us demonstrates the great importance that should be attributed to a strict adherence to the rules concerning the right to a fair hearing. Since the petitioner has not been given the opportunity to hear the complaints against him and to present his own position, he became convinced that the considerations of the authorities were inappropriate and discriminatory and his trust as a citizen in the government was undermined.
>
> The rules concerning the right to a fair hearing are aimed at preventing this state of affairs, since the purpose thereof is not only to ensure that in practice justice is made with the injured individual, but also to ensure that the trust of the public in good governance is maintained…
>
> This right is not only a formal procedure of invitation and hearing. The right to be heard means the right to a fair hearing (HCJ 598/77, page 168). The meaning of this right is to give a proper opportunity to respond to information which was obtained and which may affect a decision which concerns petitioner's matter (see: HCJ 361/76).
>
> Therefore, the right to be heard is not properly exercised, if the applicant is not advised of the information which was obtained in his matter and is not given the opportunity to properly respond thereto.
>
> (HCJ 656/80 **Saleb Abu Romi v. Minister of Health**, IsrSC 35(3) 185, 190).

27. Even when respondent's decision is based on intelligence information, which allegedly may not be disclosed, the respondent is obligated to describe the information attributed to the person with respect of whom a decision was made, with as many details as possible, or else, the ability of said person to defend himself is significantly impinged on and his right to be heard is restricted:

> **The hearing should be conducted following a detailed notice which specifies, to the maximum extent possible, the basis for the intent to deny the application, so that the applicants will be able to adequately prepare themselves therefore**. The value of the right to be heard is significantly reduced without such prior notice, upon the provision of which the applicants may exhaust the hearing conducted to them. In this context it has already been said by Justice (as then titled) Landau, that "The allegations of the other party may be refuted only when they are known; a Sphinx may not be argued with" (HCJ 111/53 **Kaufman v. Minister of Interior**, IsrSC 7 534, 541).

> Nevertheless, it is clear that in many cases the opinion of the security agencies is based on privileged intelligence information, which may not be disclosed to the applicants. These are the facts of life under the Israeli – Palestinian circumstances. **In these cases an effort should be made to prepare a paraphrase of the material, with as many details as possible, with an attempt not to provide only laconic statements. In the confrontation between the individual and the authority the balance of power is never even, and the above applies even more forcefully in cases in which the material concerning the applicant is unknown to him. An effort should be made to limit this restriction to the required minimum.**
>
> (AAA 1038/08 **State of Israel v. Hassin Ghabis**, reported in Nevo, Judgment dated August 11, 2009).

28. This basic right, which imposes clear duties, is also entrenched in international law (see Articles 1, 2 and 7 of the Universal Declaration on Human Rights; Articles 27 and 147 of the Fourth Geneva Convention; Articles 2, 4 and 14 of the International Covenant on Civil and Political Rights; Article 2 of the International Covenant on Economic, Social and Cultural Rights; Articles 6 and 13 of the European Convention on Human Rights; etc).

29. The importance of the right to be heard in proceedings concerning confiscation of assets was more forcefully referred to in the matter of **Kadi and Al Barakaat International Foundation v. Council and Commission**, where it was held that the violation of petitioners' right to be heard before the decision to freeze their assets, which, in turn, lead to the violation of their right for judicial review of said decision, should result in the annulment of said decision and of the regulation pursuant to which it was made:

> 348. **Because the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them** nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage. Therefore, **the appellants' rights of defence, in particular the right to be heard, were not respected**.
>
> 349. […] the appellants were also unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature, with the result that it must be held that their right to an effective legal remedy has also been infringed.
>
> […]
>
> 353. It follows from all the foregoing considerations that **the pleas in law raised by Mr Kadi and Al Barakaat in support of their actions for annulment of the contested regulation** and alleging breach of their rights of defence, especially the right to be heard, and of the principle of effective judicial protection, **are well founded**.

> (Case C-402/05 P and C-415/05, P. **Kadi and Al Narakaat International Foundation v. Council and Commission** [2008] ECR I-6351, emphases added, T.S.).

(for further reading regarding the Kadi Judgment and its ramifications see also:

J. Kokott and C. Sobotta, The Kadi Case – Constitutional Core Values and International Law – Finding the Balance? The European Journal of International Law, Vol. 23 no. 4).

30. **In the case at hand, the confiscation order which was given to the appellant did not specify the grounds for the confiscation,** other than the laconic statement that her funds, ostensibly, belonged to an unauthorized association. **This statement was not supported by any evidence** or paraphrase which ostensibly supported said decision. The appellant was not given any opportunity to make her arguments concerning respondent's decision, or to present any evidence to refute it. Thus, appellant's right to be heard was severely violated.

31. **In addition, the confiscation order does not make any mention of appellant's right to appeal the order before this honorable court**, a right which arises from the language of regulation 147A (Amendment No. 15), 1947. Pursuant to this regulation, an "appeal" may be instituted with the court regarding confiscations made within the framework of an administrative proceeding, within three months from the date the confiscation was made known to the property owner, or from the date of its publication in the official gazette (and see the analysis of the court concerning the authority of the appeal which arises from this regulation in A (Judea and Samaria Area) 84/10 **Tagrid Shibli v. The Legal Advisor of the Judea and Samaria Area**, paragraph B(3)(a) of the judgment of Major Amir Dahan dated August 26, 2010, and the court's analysis of this issue within the framework of the above mentioned Appeal (Judea and Samaria Area) 2169/12).

32. As noted above, the confiscation order which was given to the appellant makes no mention of her right to appeal the decision of the military commander, and the decision to confiscate appellant's funds is present as *fait accompli*.

<u>Absence of lawful causes for confiscation</u>

33. Beyond appellant's arguments concerning lack of lawful authority to confiscate her funds, and the violation of her right to be heard, as specified above in length, the appellant will also argue that there was no substantive cause to confiscate her funds.

34. The confiscation order which was given to the appellant states that her funds are confiscated due to "intelligence information" which, ostensibly proves that these funds belong to an unauthorized association. Thus, the order is based on the confiscation cause established in regulation 84. The court held that in this context – confiscation of funds under the Defence Regulations – the standards which were established in a parallel Israeli legislation should be applied, namely, the Prohibition of Financing Terrorism Law, 5765 – 2005, since –

> These standards reflect the need to balance between proprietary rights and the fight against the financing of terrorism, and there is no reason to apply different standards to the Area and to Israel on this issue which concerns infringement of proprietary rights. Indeed, the Prohibition of Financing Terrorism Law does not apply directly to the Area, but I see no preclusion for the application of the same criteria, by which a similar decision made by the competent authority in Israel would have been examined, as a standard for the examination of respondent's

> decision. **Therefore, although this law does not apply directly, the standards established by it may be adopted as a criterion for the examination of respondent's decision, as aforesaid, based on the need to protect legitimate proprietary rights**.
>
> (The above mentioned Sole Judge Case (Judea and Samaria Area) 2169/12; emphases added; T.S.).

35. The Prohibition of Financing Terrorism Law establishes three standards: do the funds actually belong to an unauthorized association; have such funds been somehow "transformed" in a manner which severed them from the unauthorized association; or does a third party have any rights in such funds, which defeat the demand of the military commander to confiscate them.

36. As specified above, the appellant insists that the funds which were in her possession on January 31, 2013 originate from her own personal property, an amount saved by her from her salary as a physician. The appellant has no connection with any unauthorized association and she does not render services to any such association.

37. Hence, the confiscation of the funds does not comply with the first standard which was established for the examination of the lawfulness of the confiscation, in view of the fact that the funds do not originate from the property of an unauthorized association.

38. And note: even if it is proved that the funds did indeed originate from the property of an unauthorized association, the appellant has no knowledge of same, and her receipt of the funds – as aforesaid, in consideration for her work as a physician – cuts off any connection between the origin of the funds and their current purpose:

> I cannot accept respondent's position according to which the mere fact that Hamas funds are concerned is sufficient to defeat any proprietary right, **as distanced as it may be from the origin of the funds and regardless of the good faith of the person who has received the funds and the consideration given**. This position seems to contradict the approach according to which the proprietary rights of the residents of the Area must be well protected. In my opinion, an approach which grants protection to legitimate proprietary rights is compatible with the standards which were applied by the Supreme Court in similar cases in which the authorities pursuant to said regulation 84 were discussed.
>
> (The above mentioned Sole Judge Case (Judea and Samaria Area) 2169/12; emphasis added).

39. Hence, the confiscation of appellant's funds was unjustifiably made, and it impinges on appellant's right to own property, which is a fundamental right recognized by both the internal Israeli law and the customary international law which applies to the OPT (and see: Section 3 of the Basic Law: Human Dignity and Liberty; Regulation 46 of the Hague Regulations; HCJ 10356/02 **Hess v. Commander of IDF Forces**, IsrSC 58(3) 443; HCJ 7957/04 **Mara'abe v. The Prime Minister of Israel**, IsrSC 60(2) 477).

40. **In the case at hand, the confiscation of the funds also severely affects the condition of appellant's impoverished family. The funds confiscated from the appellant, which were saved penny to penny from her salary, were meant to be handed over to appellant's parents, to assist them to make ends meet**.

In view of all of the above, the court is hereby requested to abolish the confiscation order issued by the military commander for appellant's funds, and to order that the sum of 1,000 Dinar which were taken from her be returned, together with interest and linkage differentials, from the confiscation date and until the funds are actually returned to her.

August 29, 2013

_____
Tal Steiner, Advocate
Counsel to the petitioners

[File No. 77209]