ANDRE ROSENTHAL | ADVOCATE

December 9, 2014

To:
GOC Home Front Command
By Fax

Dear Sir,

Re: Objection to Assigned Residence Order issued against my client, _____ Ghul, ID. No. _____

Validity of the Defense (Emergency) Regulations 1945

1. The appellant argues that no competency exists under the Defense (Emergency) Regulations 1945 to issue the Order.

2. A. According, to the ruling in HCJ 5211/04 **Vaanunu v. GOC Central Command**

> 6. The Defense Regulations constitute primary Mandatory legislation, which, upon the establishment of the State, became part of Israeli law pursuant to the provisions of Section 11 of the Law and Administration Ordinance, 5708-1948.

B. The British sovereign revoked the Defense Regulations on the eve of its departure from Eretz Yisrael Palestine by an Order in Council revoking the Palestine (Defence) Order in Council, 1937, in full. The following appears in the introduction to the Defense (Emergency) Regulations 1945:

> In exercise of the powers vested in the High Commissioner by Article 6 of the Palestine (Defence) Order in Council, 1937, and of all other powers enabling him, the Officer Administering the Government hereby makes the following regulations:…

I.e., the Defense (Emergency) Regulations 1945 were enacted pursuant to Article 6 of the Palestine (Defence) Order in Council, 1937.

Section 2(2) stipulates:

> The Interpretation Act shall apply for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

Section 4 stipulates:

> His Majesty may from time to time revoke, add to, amend or otherwise vary this Order.

C. On April 29, 1948, His Majesty exercised his powers under Section 4 above, stipulating the following in Section 3(2) of the Palestine Act, 1948:

> Subject to the provisions of this section, any other enactment of the Parliament of the "United Kingdom which, immediately before the appointed day, applies or extends to Palestine, whether by virtue of any Order in Council or otherwise, shall cease on the appointed day to apply or extend to Palestine;…

D. On May 12, 1948, His Majesty issued The Palestine (Revocations) Order in Council, 1948, stipulating in Section 2(2) thereof as follows:

> (2) The orders in Council specified in the Schedule to this Order are hereby revoked to the extent specified in the second column of the Schedule.

The Schedule ends with: Palestine (Defence) Order in Council, 1937.

The second column of the Schedule ends with: The whole Order.

E. The commencement of The Palestine (Revocations) Order in Council was scheduled for May 14, 1948.

F. Section 36 of the Interpretation Act of 1889, which applies to the matter at hand stipulates:

> (2) Where an Act passed after the commencement of this Act, or any Order in Council, ... is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.

G. This means that the Defense (Emergency) Regulations 1945 ceased to constitute valid law on May 14, 1948, and were no longer in existence in Palestine.

3. To overcome the fact that at the time of the establishment of the State of Israel the Defense (Emergency) Regulations 1945 were no longer valid law, the State of Israel enacted Section 11a(b) of the Law and Administration Ordinance, 5708-1948, which stipulates that a secret law is not valid. Section 11(a)b of the Ordinance stipulates as follows:

> 11a. (a) A secret law has no validity and has never been valid.
>
> (b) For purposes of this Section, a "secret law", means a law in its meaning under the Interpretation Ordinance 1945, that was to pass between 16 Kislev 5708 (November 29, 1947) and 6 Iyar 5708 (15 May, 1948), and was not published in the *Official Gazette*, despite being the type of law that, at the time, was published in the *Official Gazette* by law or custom.

According to the final clause of Section 11a(b), since there is no duty to publish the Defense Regulations, as stipulated in Section 4 of the Defense (Emergency) Regulations 1948, the Regulations are null and void.

Section 4 of the Defense Regulations stipulates as follows:

> 4. (1) In this regulation, the expression "emergency document", means any document purporting to be an instrument (whether legislative or executive) made or issued in pursuance of, or for the purposes of, the Order in Council, or any provision contained in, or … having effect by virtue of, any Regulations made under the said Order, including these Regulations.
>
> (2) It shall not be necessary to publish any emergency document in the Gazette.
>
> (3) Where a time, date or occasion is specified in an emergency document as the time, date or occasion on which it is to come into force, it shall come into force accordingly. In any other case, the document shall come into force on the date on which it is dated or made.

Section 4(4) provides for issuing directives, of any kind, orally.

Section 4(6) stipulates the obvious, i.e., the power to revoke any directive.

It is argued that since it was not necessary to publish the revocation of the Regulations, as stipulated in the Regulations themselves, whether or not they were published in the *Official Gazette* is immaterial and Section 11a of the Law and Administration Ordinance does not refer to the Defense (Emergency) Regulations 1945 since their revocation does not require any sort of publication.

Section 4(1) defines the expression "emergency document", which includes any document, including an Order in Council regarding their revocation.

4. This argument was not raised in HCJ 5211/04 **Vaanunu v. GOC Central Command** quoted above. The petitioners there maintained that the Regulations must be revoked due to the final clause in Section 11 of the Law and Administration Ordinance to the effect that … "such modifications as may result from the establishment of the State and its authorities".

5. In HCJ 10467/03 **Sharbati v. GOC Home Command** it was broadly argued that the Defense Regulations must be revoked as they were inappropriate for the State. The Court ruled that their revocation was a matter for the Knesset.

6. In HCJ 243/52 **Bialer v. Minister of Finance,** the Court ruled that once there is a law extending the validity of the Emergency Regulations, "it appears to us as certain beyond a doubt that 'by the very act of raising this argument' which Petitioner's counsel has raised, in and of itself and by definition leads to its negation. This is obvious because the moment the Knesset extends the 'validity' of the Emergency Regulations regulated by a certain minister, by passing a 'law', it thereby expresses its view that it these Regulations are desirable. Not only that, but it gives them, for the time they are in effect, the seal of approval and the validity of an actual law. This means that at least from the day the extension law under discussion came into effect, the Regulations became legal and valid". (p. 429.)
   The Defense (Emergency) Relations, 1945 have never been extended by the Knesset and were only published in the State of Israel's *Official Gazette*.

7. In HCJ 37/89 **Osem Food Industries Ltd. v. Minister of Commerce and Industry**, which concerned the relationship between a regulation that was drafted and approved by the Knesset and the enabling statute, the Court ruled that there is no possibility to examine the relationship between the law and the regulations. However, the question of the legality of the law itself was not examined – in this instance the Emergency (Defense) Regulations, 1945. There it was determined that:

   > Another argument by the petitioners is that the Regulations, pursuant to which the order was issued, were null and void as they were not enacted to achieve any of the aims listed in Sec. 9(a) of the Law and Administration Ordinance. However, in HCJ 243/52 [2] the Court ruled that once the Knesset extended the validity of the Emergency Regulations by law, they assumed the status of actual law and there is no possibility of reexamining the connection between them and the enabling statute pursuant to which the Regulations were promulgated. I have not been convinced, therefore, that there is a justification in this case to deviate from the rule set forth in HCJ 243/52 [2].

   The argument raised here was not raised there and therefore has not been granted a judicial decision

8. A. In HCJ 4472/90 **Oranit Local Council v. the Minister of Finance**, the Court ruled: "It is an established rule that when the legal validity of secondary legislation is extended by a Knesset law, it becomes primary law (see, first: HCJ 243/62 [2], p. 429 and most recent: HCJ 37/89 [3], on p.120). This rule, which was determined regarding the Defense (Emergency) Regulations, also applies to regular secondary legislation".

   B. However, as stated above, there is no law extending the legal validity of the Defense (Emergency) Regulations 1945. The Regulations themselves were published in *Official Gazette* No. 1442 on September 27, 1945 in the second schedule, at p. 885, but underwent no legislative process prior to publication. They are null and void.

   C. This argument was never addressed in case law. The Regulations themselves state that any "emergency document" containing provisions pursuant to the Order in Council do not require publication. I.e., their revocation in the Order in Council is, by definition, an "emergency document". In other words, publication in the *Official Gazette* (of the State of Israel) is publication of something that no longer exists and the fact that it was not published in the *Official Gazette* at the time specified in Paragraph 11a(b) of the Law and Administration Ordinance cannot be a statute that has been revoked by its own provisions. As stated above, Regulation 4(2) of the Defense Regulations stipulates that provisions pursuant to the Regulations need not be published in order to become valid.

Alternative Arguments

9. The Order fails to meet the limitations clause in Section 8 of Basic Law: Human Dignity and Liberty which stipulates as follows:

> There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by law, as indicate, pursuant to explicit authorization therein.

   Regulation 108 of the Defense (Emergency) Regulations, 1945 is not befitting of the values of the State of Israel since it provides for restricting the liberties of a resident on the basis of secret information without allowing him to confront the allegations against him since they remain concealed from him. The resident does not have the opportunity to effectively defend himself without knowing against what.

10. The classified information comes from intelligence gathering based on the informant's dependency on his handler. The weakness of the informant, for example, his need to obtain certain permits, favors from the state, or any other weakness, is exploited by the handler in order to mobilize and force the informant to provide the information. Naturally, the informant has an inherent interest in passing on the information, including inaccurate information. Even if the information from a number of informants is cross-checked, each of them is afflicted by the same weakness, and the accuracy of the information is questionable. So long as the information is based solely on HUMINT, classified information is not sufficient for denying or restricting the liberties of the appellant. The reciprocal relationship between the informant and the handler are vital factors which must be taken into account before the decision is made, apparently by the

Israel Security Agency (ISA), that there are several, reliable sources. The quid-pro-quo received by the informant, in the form of favors or financial payment, is a parameter that must be taken into consideration. In the overwhelming majority of cases, these sources of HUMINT have never appeared before a judicial instance that determined how reliable they were. After all, it is the judicial instance that is authorized, according to the rules of law, to determine the reliability of witnesses and not an ISA handler, as is the situation in this case

11. A. The Order is marked by extreme unreasonableness when it declares that the appellant is prohibited from being present anywhere within the borders of Jerusalem. The prohibition is broad and disproportionate.

    B. The appellant, 31, a bachelor, has been working for the Public Health Association for six years. He intends to get married in upcoming May. In late 2006, he was sentenced by the Judea Military Court to one year in prison for disturbing public peace and membership in an unauthorized organization, offenses committed in March 2006. The appellant has not been tried since. He was questioned by the ISA about three years ago. Prior to the issuance of the order, the appellant lived with his family in Ras al-Amud.

    C. On December 8, 2014, we were given, at our request, an unclassified abstract according to which the appellant is "a leading member of the Popular Front". We presume this classified material is exclusively HUMINT.
    With respect to the added phrase "indicated during interrogation", we repeat our contention that if there is evidence tying the appellant to illegal activity, he should be indicted. The abstract indicates that he had been incriminated. Neither this incrimination, nor the allegations have been presented to the appellant before issuance of the assigned residence order was decided.
    According to case law, even in cases of administrative detention, the detainee must be interrogated so that he may address the allegations against him.
    In the case at hand, as stated, he was last interrogated some three years ago.
    That is, he was not presented with the allegations against him and was given no opportunity to refute them. The fact that a hearing was held after the fact does not remedy this flaw that goes down to the root of the matter. For this reason, the Order should be revoked.

12. The term of the Order does not meet the test of proportionality.

13. Therefore, the Order must be revoked in full, having been issued *ultra vires*, or, alternatively, the term stipulated in the Order must be reduced due to its excessive impingement on the appellant's liberties.

Sincerely

Andre Rosenthal | Advocate