At the Supreme Court
Sitting as the High Court of Justice

HJC 703/15

In the matter of:

1. **_____ Darwish, ID No. _____**

2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**
Represented by counsel, Adv. Andre Rosenthal
15 Salah a-Din St., P.O.Box 19405, Jerusalem 91194
Tel: 6280458, Fax: 6221148

The Petitioners

v.

GOC Home Front Command
Represented by the State Attorney's Office

The Respondent

Petition for *Order Nisi*

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause, why he should not revoke a removal order which was issued against petitioner 1, _____ Darwish, on November 30, 2014, according to which he "shall not enter, shall not stay and shall not be present in the municipal boundaries of the city of Jerusalem" until April 30, 2015. A copy of the removal order is attached hereto and marked **P/1**.

The grounds for the petition are as follows:

1. a. Petitioner 1, is twenty four years old. He was detained by the Israel Police on November 14, 2014, and was released three days later, on November 16, 2014. The appellant was engaged to be married by the end of April of last year, and the wedding ceremony is about to take place by the end of the up-coming summer. Prior to the issue of the order he had two jobs, a supervisor in the family's bus company between Al 'Isawiya and the center of Jerusalem and a hotel guard. He has no interest in harming state security, public safety and public order, and his entire energy is focused on establishing his family next year.

b. On October 31, 2013, petitioner 1 was sentenced to ten months imprisonment following a conviction of being a member of a terror organization; On December 8, 2011, he was sentenced to

eleven months imprisonment after he was convicted of an attempted assault and of causing bodily injury by two or more, of participation in a riot and of maliciously causing damage to property; On July 21, 2009, he was sentenced to twelve months imprisonment after he was convicted of providing an article to a terror organization; giving money to a terror organization, holding propaganda in favor of a terror organization and publicly supporting a terror organization.

c. The removal order was delivered to petitioner 1 on December 3, 2014. Petitioner's affidavit is attached hereto and marked **P/2**.

2. Petitioner 2 is a human rights organization, which has taken upon itself to assist, among other things, Palestinians, victims of cruelty or deprivation by state authorities, including by protecting their rights before the authorities, either in its own name as a public petitioner or as counsel for persons whose rights have been violated.

3. On December 8, 2014, following the request of petitioners' counsel, the Israel Security Agency (ISA), delivered an open paraphrase regarding the petitioner, which stated as follows: "The above captioned individual is an activist in the terror organization the Popular Front for the Liberation of Palestine. His activity is mainly concentrated in the village of Al 'Isawiya and includes participation in and leading of popular terror attacks, disorders in the area in which he resides." A copy of this open paraphrase is attached hereto and marked **P/3**.

4. On December 9, 2014, an objection was submitted against the issue of the order. A copy of the objection is attached hereto and marked **P/4**.

5. On December 14, 2014, petitioners' counsel was informed that the respondents authorized the deputy of the Head of the Divisions Branch at the Military Advocacy General, Lieutenant Colonel Udi Sagi, to act as his representative for the purpose of hearing the objection against the removal order.

6. a. On December 22, 2014, the hearing took place in Ofer camp. It should be noted that initially the hearing was scheduled to take place in military camp in Ramleh, but following the request of petitioners' counsel for the arrangement of the presence of petitioner 1 in the hearing, it was decided to transfer the hearing to the Offer camp. Petitioners' counsel wanted to know whether the respondent intended to provide interpretation services during the hearing. On December 18, 2014, a written response was given according to which:

> "3. Furthermore, and as I informed you in our telephone conversation, **no interpretation services will be rendered during the hearing**."

b. Following said response, an urgent petition was filed with this honorable court, HCJ 8706/14 **HaMoked for the Defence of the Individual founded by Dr. Lotte Salzberger v. GOC Home Front Command,** against respondent's decision not to provide interpretation services during the hearing.

c. The petition was filed with the honorable court around 17:00; A copy of the petition was delivered to the State Attorney's Office prior to its filing with the court.

d. Around 18:00, even before the decision of the honorable court was given, notice was received from the State Attorney's Office that interpretation services would be provided during the hearing in the matter of the petitioner and others like him. The petition was withdrawn. A copy of the judgment is attached hereto and marked **P/5**.

7. a. On January 8, 2015, notice was given by respondent's legal advisor that "Your clients are about to be summoned to an interrogation within the next few days, upon the conclusion of which and according to the findings thereof, decisions in the above objections will be made by the GOC Home Front Command."

B. On January 18, 2015, petitioner 1 was summoned and accused of a host of general suspicions without any details. In response, the petitioner stated that he was not a member of any organization or movement (line 23); and denied that he was a "supporter" of any one of the organizations - Palestine Liberation Organization (PLO), Hamas or the Popular Front (line 25).

No specific accusation was made against him, no date, location or certain act were mentioned and in fact, the petitioner was not given any opportunity to provide details to refute the suspicions. A copy of the transcript of the questions and petitioner's answers is attached hereto and marked **P/6**.

8. On January 22, 2015, the respondent decided to deny the objections. A copy of his response, which was obtained by petitioners' counsel on January 25, 2015, is attached hereto and marked **P/7**.

Defence (Emergency) Regulations, 1945

9. a. The Defence (Emergency) Regulations, 1945, were promulgated by virtue of section 6 of a British enactment of 1937, Palestine (Defence) Order in Council, 1937. The Defence (Emergency) Regulations, 1945, are not primary legislation.

b. On the eve of Great Britain's departure of Palestine, on May 12, 1948, The Palestine (Revocations) Order in Council, 1948 was enacted, which entered into effect before May 15, 1948 and canceled the Palestine (Defence) Order in Council, 1937 in its entirety.

Section 2(2) of The Palestine (Revocations) Order in Council, 1948 provides that:

> "The Orders in Council specified in the Schedule to this Order are hereby revoked to extent specified in the second column of the Schedule."

The Palestine (Defence) Order in Council, 1937 was canceled in its entirety.

Namely, on the eve of the establishment of Israel, Britain canceled the Palestine (Defence) Order in Council, 1937, and as a result of the revocation of the primary statute, the Defence (Emergency) Regulations, 1945, were also revoked.

c. Section 2(2) of the Palestine (Defence) Order in Council, 1937 provides that:

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

d. Section 4 of the Palestine (Defence) Order in Council, 1937 provides that:

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

e. Section 36 of the Interpretation Law of 1889, which applies to the above quoted British statutes, provides:

> "(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."

On the date on which the state of Israel was erected, the Defence (Emergency) Regulations, 1945, were no longer lawful.

10. a. Section 11 of the Law and Administration Ordinance, 5708-1948, which was enacted by the state of Israel, provides as follows:

> "11. The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such changes which may arise from the establishment of the State and its authorities.
>
> 11A. (a) An unpublished law has no effect and never had any effect.
>
> (b) "Unpublished law" in this section, means a law within the meaning of the Interpretation Ordinance, 1945[1], which has been purportedly enacted during the period between Kislev 16, 5708 (November 29, 1947) and Iyar 6, 5708 (May 15, 1948) and which was not published in the Palestine Gazette despite it being a law of a category, the publication of which in the Palestine Gazette was, immediately prior to that period, obligatory or customary."

b. On May 4, 1948, the Attorney General, Mr. Gibson, published a notice in the official gazette which was entitled "Legislation enacted and Notices issued which have not been Gazetted" as follows:

> "Owing to conditions prevailing in Palestine, it has not been practicable to publish the Palestine Gazette since the issue of Gazette No. 1666 of Wednesday the 28th April, 1948. To meet this difficulty an Order of the High Commissioner under the Palestine Order in Council, 1948, was enacted on the 29th of April, 1948, which dispensed with the legal necessity for Gazetting certain legislation and notices, leaving the manner of their publication to be decided by the High Commissioner…"

c. The above indicates that before the termination of the British Mandate, due to the situation in Palestine, the British sovereign took the necessary measures to ascertain the validity of certain legislation, notwithstanding the fact that such legislation was not published.

d. Section 4 of the Defence (Emergency) Regulations, 1945, also provides that publication in the official gazette is not required. The section reads as follows:

> "(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 purpose of, the Order in Council, or any provision contained in, or having effect by

[1] The Interpretation Ordinance [New Version]

> 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**.
>
> ….
>
> (4) … any order, direction, requirement, notice or appointment under any Regulations (including these Regulations) made under the Order in Council, may if the authority making or issuing the same thinks fit, but subject to the provisions of any such Regulations, be **made or issued orally**.
>
> ….
>
> (6) Any power conferred by any Regulations (including these Regulations) made under the Order in Council, to make or issue any order, direction, requirement, notice or appointment shall be construed as including a power, exercisable in the like manner and subject ti the like conditions, if any, to **revoke** or vary any such order, direction, requirement, notice or appointment."

e. The petitioners argue that there was no obligation or custom to publish any provisions which pertain to the Defence Regulations, including the revocation thereof.

The "emergency document" which was mentioned in section 4(1) above refers to an Act of Parliament or legislation on behalf of the King. Section 4(2) explicitly states that the publication of such document is not necessary. According to the petitioners, the revocation is legislation of the sovereign, the King of England, and according to simple interpretation rules, there was no need to publish it in the official gazette. Section 4(4) provides further that any such legislation may be issued orally, and section 4(6) refers to any kind of order, including an order to revoke.

f. It should be remembered that the Defence (Emergency) Regulations, 1945, are not primary legislation. The Palestine (Defence) Order in Council, 1937, is the primary legislation, and the Defence (Emergency) Regulations, 1945, are regulations promulgated pursuant to section 6(1) of the primary legislation.

11. The argument concerning the revocation of the Defence (Emergency) Regulations, 1945, was raised in HCJ 7733/04 **Nasser and HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger v. IDF Commander in the West Bank.** In paragraph 5 of the judgment, this honorable court held as follows:

> "Having reviewed the material before me, I came to the conclusion that the petition should be denied, without the need to discuss, within the framework of this petition, the array of complex arguments raised by the petitioners. … In addition, the denial of this petition does not constitute a denial of any of petitioner's legal arguments, all of which are reserved should he decide to file an additional petition, subject to change of circumstances."

The above case concerned the use of regulation 119 by the IDF Commander in the West Bank.

12. a. In HCJ 5211/04 **Va'anunu v. GOC Home Front Command**, the petitioners argued that the revocation of the Defence (Emergency) Regulations, 1945, is mandated in view of the last part of section 11 of the Law and Administration Ordinance, namely "… [the] changes which may arise from the establishment of the State and its authorities." This argument was rejected by this honorable court.

b. In HCJ 10467/03 **Sharbati v. GOC Home Front Command,** it was sweepingly argued that the Defence Regulations should be revoked because they did not befit the state of Israel. The court held that the power to revoke them was vested in the Knesset.

c. In HCJ 243/52 **Bialer v. Minister of Finance,** the court held that once the validity of Emergency Regulations were extended by law and their extension was approved by the Knesset, they assume the status and validity of an actual law.

> "This means that at least from the day on which the extension law entered into force, said regulations became legal and valid." (page 429).

The Defence (Emergency) Regulations, 1945, have never been extended by the Knesset and were not enacted by it.

d. In HCJ 37/89 **Osem Food Industries Ltd. v. Minister of Commerce and Industry**, it was held as follows:

> Another argument of the petitioners is that the Regulations, pursuant to which the order was issued, were null and void, as they were not enacted to achieve the objectives listed in Section 9(a) of the Law and Administration Ordinance.
> However, in HCJ 243/52 [2] it was held that once the Knesset extended the validity of the Emergency Regulations by law, they assumed the status of an actual law and it was no longer possible to re-examine the relation between them and the enabling statute pursuant to which the Regulations were promulgated. I was not convinced, therefore, that there is a justification in this case to deviate from the rule set forth in HCJ 243/52 [2]."

e. In HCJ 4472/90 **Oranit Local Council v. Minister of Finance**, it was held as follows:

> "It is an established rule that when the legal validity of secondary legislation is extended by a law of the Knesset, it becomes primary legislation (see, initially: HCJ 243/62 [2], page 429 and most recently: HCJ 37/89 [3], page 120). This rule, which was established in connection with Emergency Regulations, also applies to ordinary secondary legislation."

f. There is no law which extends the legal validity of the Defense (Emergency) Regulations, 1945. The Regulations themselves were published in the *Official Gazette* No. 1442 on September 27, 1945, in the second schedule, page 885. According to the petitioners they are null and void.

g. The argument which is raised in this petition has never been addressed by case law. The Regulations themselves state that any "emergency document" which contains provisions pursuant to the Order in Council, do not require publication. Namely, their revocation in the Order in Council is, by definition, an "emergency document". The fact that the revocation of the enabling

law was not published in the *Official Gazette* during the period specified in section 11A(b) of the Law and Administration Ordinance, cannot revive a statute which was revoked. As stated above, Regulation 4(2) of the Defense (Emergency) Regulations, 1945, stipulates that there is no need to publish an "emergency document" by virtue of the Regulations for the purpose of giving it effect.

13. a. The security legislation which regulates IDF's control in the West Bank, recognizes the existence of a *lacuna* with respect to the use of the Defence (Emergency) Regulations, 1945. Shortly after sovereignty was assumed by the military commander, an Order concerning Interpretation (Additional Provisions)(No. 5), Order No. 224 was issued, which was replaced – without any changes – by section 9D of the Order concerning Interpretation [Consolidated Version](Judea and Samaria)(No. 1729), 5774-2013. This section provides as follows:

> 9D. (a) In this section –
> (1) the "Official Gazette" – as defined in the Interpretation Ordinance, 1945;
> (2) "Unpublished law" - any act of legislation, which has been purportedly enacted during the period between the Kislev 16, 5708 (November 29, 1947) and Iyar 6, 5708 (May 15, 1948) and which was not published in the Official Gazette despite it being a act of legislation of a category, the publication of which in the Official Gazette was, immediately prior to that period, obligatory or customary.
> (b) For the avoidance of doubt it is hereby stated that an Unpublished Law has no effect and never had any effect.
> 9E. (a) In this section "emergency legislation" – as defined in Regulation 3 of the Defence (Emergency) Regulations, 1945.
> (b) For the avoidance of any doubt it is hereby clarified that emergency legislation is not impliedly revoked by later legislation which is not emergency legislation.
> (c) Emergency legislation may be revoked only by legislation which explicitly stipulates that such legislation is revoked, specifically citing the name of such legislation.
> (d) Emergency legislation which was in effect in the Area after Iyar 5, 5703 (May 14, 1948), will continue be in effect from the Effective Date onwards, as if enacted as security legislation, unless explicitly revoked having its name cited, as specified in section 2(b), before the Effective Date or thereafter.

The words which appear in the last part of section 9E(d), namely, "unless explicitly revoked having its name cited" constitute an added condition for the revocation which does not appear in the laws of the State of Israel. As specified above, the revocation procedure of the Defence (Emergency) Regulations, 1945, does not include the phrase "having its name cited".

b. Had the legislator of security legislation been of the opinion, in 1967 that the provisions of section 9D(2)(b) – a copy of section 11A of the Law and Administration Ordinance, 5708-1948 – were sufficient to regulate the continued applicability of the Defence (Emergency) Regulations, 1945 in the West Bank, there would have been no need to add the provisions of section 9E(d).

Alternative Arguments

14. The Order fails to meet the limitation clause in Section 8 of the 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 indicated, pursuant to explicit authorization therein."

Regulation 108 of the Defense (Emergency) Regulations, 1945, does not befit the values of the State of Israel since it enables to limit the liberties of a resident on the basis of privileged information, without giving him the opportunity to confront the allegations brought against him since they remain privileged and unknown to him. It is impossible to effectively defend one-self without knowing against what.

The interrogation of petitioner 1, in which the deeds attributed to him were not specified and in which he was interrogated only generally, cannot be considered as an actual interrogation, and it seems that it was conducted only to refute petitioner's arguments which were raised in the objection and for the record only.

15. The privileged information derives from intelligence work and is based on dependency relations between the informant and the agent. The weakness of the source, such as his need to obtain certain permits or benefits from the state, or any other weakness, are used by the agent to induce and obligate informants to provide information. Naturally, the source has an inherent interest to provide information, including inaccurate information. Even if the information is obtained from several sources, each source has the same weakness and the reliability of the information is dubious. For as long as the information is based on human sources, such privileged information cannot justify the deprivation or limitation of the freedom of movement of the appellant. The inter-relations between the source and his agent are essential details which must be taken into consideration, before a determination is made, apparently by the Israel Security Agency (ISA), that the sources are firm and reliable. The consideration received by the source, by way of a benefit or monetary payment, is also a parameter which should be taken into account. Said human sources, in the vast majority of cases, never appeared before a judicial instance which confirmed their reliability. Obviously, it is the judicial instance which is vested with the authority, according to the law, to determine the reliability of a witness, rather than an ISA agent, as was done in the case at hand.

16. The Order is marked by extreme unreasonableness as it stipulates that the appellant is prohibited from being anywhere within the boundaries of Jerusalem. The prohibition is too broad and disproportionate.

17. The duration of the Order does not meet the proportionality test.

18. The process in which the hearing was held after the removal order was issued and in which the decision in petitioner 1's objection was given more than two months after the date on which the order was issued, is not a due process and it excessively violates petitioner's basic rights, in view of the fact that at the time of the hearing in the objection as well as at the time of the hearing in this petition, the removal order is in force and petitioner 1 is not present within the municipal boundaries of Jerusalem.

The petitioners will argue, in the alternative, that notice should have firstly been given of the intention to issue a removal order, a hearing should have been held, and only then a decision to issue the order itself could have been made, and not as was done in the case at hand.

19. Therefore, the honorable court is requested to issue an order as requested and make it absolute; alternatively, the honorable court is requested to significantly reduce the applicability and duration of the order.

Jerusalem, today January 28, 2015.

(signature)

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Andre Rosenthal, Advocate
Counsel to the petitioners