At the Supreme Court
Sitting as the High Court of Justice

HCJ 978/15

In the matter of:

1. **____ al Ghul, 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, ___ al Ghul, 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. Petitioner 1, ___ al Ghul, a thirty one years old bachelor, has been working for a public health association for six years. He intends to get married next May. By the end of 2006 he was sentenced by the Judea military court one year imprisonment for disorderly conduct and membership of an unauthorized association, offenses from March 2006. Since then the petitioner was not put to trial; about three years ago he was interrogated by the Israel Security Agency (ISA). The petitioner lived – prior to the issue of the order - with his family in Ras al 'Amud.

   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 status and 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, the ISA delivered an open paraphrase regarding the petitioner, which stated as follows:

> "1. The above captioned individual is a main activist in the Popular Front and maintains relations with senior Popular Front activists.
>
> 2. The above captioned individual was summoned for an interrogation because he actively participated in violent incidents in Shuafat after the murder of the youth Muhammad Abu Khdeir."

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 February 2, 2015, petitioner 1 was summoned for an interrogation, but in fact, no specific suspicion was raised against him, other than a general statement that he was suspected of being a member of an "unauthorized association". In line 28 petitioner 1 was told that "the interrogation material indicates that you are involved in popular terrorism in Jerusalem." In line 34 the interrogator states "I tell you that you are constantly involved in leading the activity of the Popular Front in Jerusalem"; In line 37 petitioner 1 was told "I tell you that you have connections with activists of the Popular Front in the West Bank." Everything is very general, without any possibility to address actual suspicions. No specific accusation was made against him, no date, place or specific action and in fact petitioner 1 was not given any opportunity 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 February 5, 2015, the respondent decided to deny the objection. A copy of his response, is attached hereto and marked **P/7**.

Defence (Emergency) Regulations, 1945

9. a. 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. The Defence (Emergency) Regulations, 1945, were promulgated by virtue of section 6 of a British enactment of 1937. Namely, on the eve of the establishment of the State of Israel, Britain revoked the Palestine (Defence) Order in Council, 1937, and by virtue of said revocation, the Defence (Emergency) Regulations, 1945, were also revoked.

b. 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."

c. 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."

d. 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.

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 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**.

[1] The Interpretation Ordinance [New Version]

….

(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 provisions which pertained 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 another respondent in the West Bank, unlike the case at hand which concerns the use of regulation 109.

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, was required 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, but did not undergo any legislative procedure prior to their publication. 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". Namely, the publication in the *official Gazette* (of the state of Israel) I a publication of an enactment which, at the date of the publication, was no longer a valid law. The failure to publish 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.

Petitioners' comments to respondent's response to the objection

13. a. In section 10 of the response, Exhibit P/7 of the petition, the respondent reiterates his argument that the Defence (Emergency) Regulations, 1945 are primary legislation.

Section 6(1) of the Palestine (Defence) Order in Council, 1937 unequivocally stipulates that the High Commissioner has the power to promulgate regulations. As originally stated:

> "6. (1) The High Commissioner may make such regulations (in this Order referred to as "Defence Regulations") as appear to him in his unfettered discretion to be necessary or expedient for securing the public safety, the defence of Palestine, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for securing the essentials of life to the community."

It is not at all clear how the respondent can state, in view of the explicit words of the enabling legislator that we are concerned with primary legislation.

b. Section 15 states that there is "solid evidence which indicates of the actual risk posed…". As specified above, the petitioners received a paraphrase, Exhibit P/3, and open questions, Exhibit P/6, but "solid evidence" was not received. The respondent may have possibly intended to refer to "administrative" evidence, in which case reference should have been made to "privileged information" rather than to "solid evidence". To the extent there is solid evidence we request to receive same prior to the hearing so as to give petitioner 1 the opportunity to address the suspicions.

c. In section 17 the respondent refers to the argument concerning the quality of the privileged information. According to the petitioners the credibility of the source is determined by the Israel Security Agency (ISA) rather than by the court. The petitioners argue that it is the expertise of the court to determine the credibility of the witnesses appearing before it. In the case at hand, the ISA, which meets the informant, determines whether or not he is reliable; rather than the court.

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.

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 appellant's liberties. 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 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. 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 February 8, 2015.

(signature)

_____

Andre Rosenthal, Advocate
Counsel to the petitioners