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At the Supreme Court
Sitting as the High Court of Justice

H CJ 2969/15

In the matter of:

1. _____ **Omar, Stateless (Prisoner No. _____)**
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

All represented by counsel, Adv. Daniel Shenhar (Lic. No. 41065) and/or Sigi Ben Ari (Lic. No. 37566) and/or Hava Matras-Irton (Lic. No. 35174) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Bilal Sbihat (Lic. No. 49838) and/or Anat Gonen (Lic. No. 28359) and/or Abir Jubran-Dakawar (Lic. No. 44346) and/or Nasser Odeh (Lic. No. 68398)
Of HaMoked Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger
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Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **Commander of the Israeli Military Forces in the West Bank**
2. **Chief Military Police Officer**
3. **Israel Prison Service Commissioner**
4. **Israel Police Commissioner**

Represented by the State Attorney's Office,
29 Salah a-Din, Jerusalem 91010

The Respondents

Petition for Writ of Habeas Corpus

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause as follows:

- a. To respondent 1 - why he does not notify the family of petitioner 1 (hereinafter: the **petitioner**) what happened to the petitioner, who was detained by Israeli security forces on August 3, 2014, and whose whereabouts are presently unknown; if he is being held by him or by anyone acting on his behalf – where he is being held and pursuant to which law; and if he was released or

transferred to another agency – when, where, to whom, and what he knows about the current location of the petitioner. To the extent that the petitioner is being unlawfully held by an Israeli authority, the court is requested to order his release.

- b. To respondent 2 – why he does not maintain updated information concerning the detention and place of detention of each and every detainee, resident of the Occupied Palestinian Territories, (OPT) who is being held by any of the state's authorities.
- c. To respondents 3 and 4, if the petitioner is being held by either of them – why they do not keep record as required by law, and in real time, of the place of detention of the detainee.

Request for Urgent Hearing

The honorable court is requested to schedule an urgent hearing in the petition.

This petition concerns the most fundamental right of a detainee detained by soldiers or other Israeli security forces, that the fact of his detention and his whereabouts be known. This right is a condition for exercising the detainee's other rights - the right to legal counsel, the right to challenge the conditions of his detention and so on. The detainee's family also has the right to know what has happened to him and where he is being held.

The law provides that notification of the place of detention of a detainee shall be given to his family *without delay*. To date, petitioner's family does not know where her loved one is being held.

The family's uncertainty, concern, and anxiety grow with the passage of time. The passing time also frustrates – minute by minute – the exercise of the most fundamental rights of a detainee who is in custody and is unable to protect his interests by himself.

If the petitioner is still in the hands of state authorities, the family is entitled, by law, to know *immediately* where he is being held and to appoint an attorney to represent him in the detention proceedings. If he is no longer in state hands, the state must *urgently* provide any information that will assist in locating and protecting him, if necessary.

In a number of *habeas corpus* petitions filed by petitioner 2 with this honorable court regarding residents of the OPT detained by soldiers or other Israeli security forces, the court set a *maximum period of twenty-four hours* in which the respondent was required to respond to the petition, for instance, in HCJ 2878/13 **Nasser et al. v. Commander of IDF Forces in the West Bank**.

The grounds for the petition are as follows:

Petitioner's Matter

1. The petitioner is 18 years old and a resident of the Qarawat Bani Zeid village in the District of Ramallah. He was taken from his home in the early hours of morning of August 3, 2014. Since then the petitioner is held by the Israeli authorities, and has even been sentenced for two and a half years in prison.
2. On April 19, 2015, petitioner's family requested petitioner 2 (hereinafter: **HaMoked**), to assist it to locate the petitioner after it received information that he has apparently been transferred from Ofer prison to another detention facility, unknown to it, in the end of March 2015.

3. After HaMoked received additional details from petitioner's family (due to the fact that the petitioner has no status in the West Bank) it submitted a specific request, which included the entire details which were known to it at that time, to the control center of respondent 2 (hereinafter: the **control center**). Said request was submitted on April 20, 2015. On April 21, 2015, the imprisonment control center replied that the petitioner "was not located, due to lack of details."

A copy of the imprisonment control center's reply is attached and marked **P/1**.

4. In view of said peculiar reply (and note, this case concerns a sentenced prisoner, who had been detained a long time before HaMoked submitted a request in his matter), HaMoked had to turn to the State Attorney's Office and demand that the petitioner be located forthwith.

A copy of HaMoked's letter to the State Attorney's Office dated April 21, 2015, is attached and marked **P/2**.

5. In the evening hours of April 21, 2015, the reply of the State Attorney's Office was sent to HaMoked's offices; the reply was outrageous. It only stated that the petitioner was indeed held in the custody of the Israel Prison Service (IPS). However, the incarceration facility in which the petitioner was held was not specified.

A copy of the reply of the State Attorney's Office dated [*sic*] is attached and marked **P/3**.

6. In view of the above, HaMoked had to contact the State Attorney's Office on April 22, 2015. HaMoked argued that in HCJ 6757/95 **Hirbawi et al. v. Commander of IDF Forces** a rule was established concerning the control center's role in the location of Palestinian detainees, and that since that time HaMoked used to contact the control center for the purpose of locating Palestinian detainees and prisoners. It was further stated that in view of the fact that petitioner's family members were precluded from visiting him in prison, and could not contact him by phone or otherwise, the authorities were obligated to immediately advise where he was being held.

A copy of HaMoked's letter is attached and marked **P/4**.

7. On the same day the reply of the State Attorney's Office was received. The reply did not contain the requested information concerning the incarceration facility in which the petitioner was held, but rather referred HaMoked to the control center, to be provided with the requested information by the latter.

A copy of the reply of the State Attorney's Office dated April 22, 2015, is attached and marked **P/5**.

8. Following said response, HaMoked had to contact once again the control center to eventually receive the requested information (which is so basic) concerning the petitioner's whereabouts. The reply of the control center was not satisfactory; it stated that "according the details we have received regarding the above person, he is being **likely** held in Megido." (the emphasis appears in the original – D.S.).

A copy of the control center's reply dated April 22, 2015, is attached and marked **P/6**.

9. In view of the fact that said reply also consisted of a peculiar and troubling element (what does the expression "likely" mean in the context of the incarceration facility of a prisoner?), petitioner's family was very concerned. Therefore, HaMoked contacted the control center again on April 28, 2015, hoping to receive reliable and conclusive information concerning the petitioner's incarceration place. It should be emphasized that said request referred to the same details which were provided by the control center in its reply dated April 22, 2015, namely, petitioner's fictitious identification number/prisoner number). The hope was that following the above described chain of events, the control center would understand the obligations imposed on it and take action for the purpose of locating the specific incarceration place of the petitioner.
10. However, the hopes were dashed. On April 29, 2015 the control center's reply was received, according to which the petitioner "was not located".
11. Hence, as of the filing date of this petition, the imprisonment control center was unable to locate the petitioner, despite the fact that **almost ten days passed from HaMoked's first request in his matter, and despite the urgent request which was submitted to the State Attorney's Office.**
12. Petitioner 2 is a human rights organization which assists Palestinian residents of the West Bank whose rights were violated by the respondent. Its activities involve, *inter alia*, providing assistance in locating detainees detained by Israeli security forces.

Legal Argument

Notification of Place of Detention– Obligation of Respondents 1 and 2

13. The right to be notified of a detention of an individual and of his whereabouts cannot be overstated. This is a fundamental right - both of the detainee and of his family. It constitutes a part of the fundamental right to human dignity. A regime that does not strictly enforce it, but rather conceals persons in its custody from their relatives for substantial periods of time acts cruelly and severely injures the very humanity of the detainee and his family.
14. Section 53(A) of the Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651) 5770 – 2009 states that:

"Where a person is arrested, notice of his arrest and whereabouts shall be given without delay to a person related to him, unless the detainee requested that such notice not be given". (all emphases in the petition have been added – D. S.)
15. The aforesaid right to receive notification was also recognized by this honorable court as a fundamental right. As stated by Vice-President, M. Elon in HCJ 670/89 **Odeh et al. v. Commander of IDF Forces in Judea and Samaria**, IsrSC 43(4) 515, 517:

"The obligation to give such notification stems from the fundamental right a person who has been lawfully detained by the competent authorities has to have these authorities inform his relatives of his detention, so that they know what happened to their detained relative and how they can provide him with the necessary assistance he requires in order to protect his liberty. **This is a natural right, deriving from human dignity and general principles of justice, and is afforded both to the detainee himself and to his relatives".**

16. In 1995, after the imprisonment control center failed to fulfill its obligations, HaMoked filed a petition to the High Court of Justice (HCJ 6757/95 **Hirbawi et al. v. Commander of IDF Forces in Judea and Samaria**, (not reported) (hereinafter: **Hirbawi**). In the framework of these proceedings, the Supreme Court gave the effect of a judgment to an arrangement reached by the parties, as follows:

"a) Upon the detention of a person who is a resident of the Area, **notification of his detention and place of detention will be delivered without delay** by telephone to a telephone number provided to the detaining official by the detainee.

The detaining official will give such telephone notification, and will record, in a form prepared for this purpose, the details of the notification he has given and the details of the person who received the notification.

In the event that the detainee so requests, notification by telephone will also be given to an attorney whose name and details will be provided by the detainee. The detaining official will inform the detainee of his above right...

b) **The IDF control center** (be it the control center or another body) **will receive from all bodies... updated information regarding the detention and place of detention of a detainee, once daily, so that the detainee may be located** in response to a written request from an external person or body.

c) **The IDF control center will provide details from said information in response to written requests submitted by public organizations dealing with such matters** and/or in response to written requests submitted by counsel to the detainee or his family.

Following delivery of a written request, the requesting party may obtain the information by telephone."

17. In HCJ 8435/12 ____ **Abu Sal v. The Military Commander** (Judgment dated August 22, 2013), the respondents (who are the same respondents in this petition) informed that the work procedures of the imprisonment control center were clarified to prevent situations in which detainees "disappear". These new procedures are quoted in paragraph 4 of respondents' response dated February 25, 2013:

Firstly, it was stipulated that if the detainee was not held by the IPS, the Israel Police and the command military incarceration facilities in Judea and Samaria, the seven regional brigades in charge of the different areas in Judea and Samaria which are responsible for the operations of the military forces that make detentions in Judea and Samaria – should be contacted, to inquire whether the detainee was detained by any of said regional brigades and has not yet been transferred to the above specified agencies (*sic* – D.S.) which hold detainees in the Judea and Samaria Area.

Secondly, following the examination with the regional brigades and in the event that the detainee was not located in any one of them, an

examination shall be made *vis-à-vis* the military police in the IDF commands (northern, southern and central) to inquire whether the detainee was taken to a hospital located in the region of any of the above commands.

18. Thus, it is the obligation of respondent 1 to notify the detainee's family of his detention and his place of detention, either by telephone or by any other means. It is the obligation of respondent 2 to maintain updated information concerning the detention and place of detention of each and every detainee. In support of this obligation, a mechanism was established to enable families to turn to organizations like HaMoked and to attorneys, in order to obtain updated information regarding the whereabouts of their loved ones through the control center.
19. The issue of detainees' location and the functioning of the control center was also discussed in the decision of the Honorable Registrar Boaz Okon in HCJ 9332/02 **Jarar v. Commander of IDF Forces**. In his decision, the honorable registrar writes:

The provision of information serves as a measure for monitoring and control, but for a detainee, who, all of a sudden loses control of his life, it also has a humane significance. **The importance of the notification to the family whose relative disappeared "without explanation" cannot be overstated. Ensuring detention is public guarantees that the power to detain is not abused and prevents uncontrolled use of such power.** Indeed, the power of the state is immense, be its intentions as benevolent as they may be. Without notification, this power may go unchecked, even if its use is supported by security reasons. There are obvious risks attached to concessions or flexibility. Experience shows that excessive use of power, which is not uprooted promptly, creates a new reality. Power, unlike a boomerang, does not return once it is released. Therefore, the authority should exercise utmost diligence where the exercise of detention powers is concerned. **This diligence requires immediate notification of the detention.**"

20. Hence, the two initial remedies requested in the petition involving the obligation of the respondents to give notification of the detention and whereabouts of a person and the obligation of respondent 2, through the control center, to maintain updated information concerning the detention and place of detention of each and every detainee held by any state authority.

Keeping Record of the Petitioner in the Place of Detention

21. It is clear that each and every detainee has the right to have his place of detention clearly known to all. The exercise of the detainee's rights depends on record being kept in his place of detention. Only then can his family and attorney check with the officials in charge of the place of detention on his status, medical condition, detention conditions, if and when he can be visited, etc. Only then can they act to ensure his rights as a detainee are upheld. The right of a detainee to be present at the legal proceedings conducted against him also depends on proper record being kept in his place of detention.
22. The failure to keep proper record of a detainee in the place of detention severely infringes upon the fundamental rights of the detainee and his family. A state authority which fails to strictly comply with the requirement to keep record of a detainee in the place of detention and to provide updated information based on such records, does not fulfill its obligations and abuses its power.

23. The obligation to keep proper record of detainees is mandated by statute both with respect to detainees held by respondent 3 as well as detainees held by respondent 4.

Keeping Record of Detainees Held by Respondent 3

24. Due to the utmost importance attributed to the requirement to keep record of a detainee in his place of detention, this obligation was established in primary legislation. Section 4 of the Prison Ordinance (New Version) 5732-1971 provides that:

"Upon admission of any person to prison, the chief warden shall have the prescribed particulars pertaining to such person recorded".

25. Chapter 5 of the Israel Prison Service Provisions (Section 5.06) provides:

"An updated and precise record shall be kept in prison with respect to each prisoner held therein..."

Keeping Record of Detainees Held by Respondent 4

26. The provisions concerning the obligation to keep record of detainees held by respondent 4 are yet stricter and farther reaching than those applicable to detainees held by respondent 3. Section 3A(2) of the National Headquarters Orders 12.03.01 entitled "Handling Detainees in the Detention Facility" provides:

"A person shall not be held in a detention facility before the person in charge of the investigation or the detention notifies his family of the detention, and before an officer interviews him and advises him of his right to contact an attorney".

27. Hence, the third remedy requested in this petition, concerning drawing conclusions from the case at hand, **which is not the first case in which HaMoked has encountered a failure on the part of the respondents to comply with the procedures set forth in the law**, and strict compliance with procedures which will prevent the disappearance of detainees, such as the petitioner.

28. Due to its nature, this petition is not supported by an affidavit and power of attorney given by the petitioner. Attached to this petition is an affidavit and power of attorney given on behalf of HaMoked relating to the receipt of information regarding the petitioner in its office and to the actions that it has taken in this matter.

For the above reasons, the honorable court is requested to urgently issue an *order nisi* as requested, and after receiving respondent's reply, make the order absolute, and to order the respondent to pay trial costs and attorneys' fees.

Jerusalem, April 30, 2015

Daniel Shenhar, Adv.
Counsel to the Petitioners

(File No. 87241)