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At the Supreme Court
Sitting as the High Court of Justice

H CJ 70724-08-04

1. _____ al-'Ajur, ID ----
2. _____ al-'Ajur, ID ---- (minor)

Represented by counsel, Adv. Nadine Abu Arafeh et al.
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The Petitioners

v.

1. **Israel Defense Forces**
2. **Chief Military Police Officer**
3. **Commissioner of Israel Prison Service**
4. **National Security Council**
5. **Attorney General**
6. **Military Advocate General**

Represented by the State Attorney's Office
Ministry of Justice
Telephone: 073-3925084; Fax: 02-6467011

The Respondents

Respondents' Preliminary Response

1. According to the decision of the honorable Justice R. Ronen dated September 4, 2024, and a one day extension according to the court's decision, the Respondents hereby respectfully submit their preliminary response to the petition, as follows.
2. The Petition at hand captioned as a "Petition for writ of Habeas Corpus" concerns Petitioners' request that the Honorable Court issues an *order nisi* directed at the Respondents them ordering them as follows:
 - a. Inform the families of the Petitioners, a father and his **five years old** daughter, Gaza Strip residents, who were held by the military as of March 24, 2024, when the military burst into the family's home, and whose whereabouts and holding place since then are unknown; where

they are held, who holds them and according to which law; to the extent they were released or transferred to another body – when, where and to whom and what is known about their current whereabouts. Have both of them or either one of them passed away while held by the military; if this is the case when and in what circumstances; To the extent the Petitioners are no longer alive we wish to know where their bodies are held and by whom. To the extent that the Petitioners are unlawfully held by an Israeli authority, **including, *inter alia*, in a detention facility which is not a declared detention facility**, the Honorable Court shall be requested to issue an order for their immediate release.

- b. Order the Respondents to check whether the Petitioners are held in an undeclared incarceration facility, since the cases in which people are arrested and held in undeclared incarceration facilities are increasing, and it seems that the answer "there is no indication of incarceration" arises from non-registration of detainees in undeclared incarceration facilities, as well as from non-registration in official facilities.
 - c. Decide once and for all which body is responsible for providing information about the holding place of the Petitioners and others in their condition; disclose the identity of the bodies holding information about the location in which the Petitioners and others in their condition are held.
3. In a series of responses to a series of *Habeas Corpus* petitions which were filed¹ since the "Iron Swords" war broke out, the respondents explained that during the "Iron Swords" war the security forces have arrested, *inter alia*, Gaza Strip residents in the course of combat activities which were carried out within the Gaza Strip.

It was also clarified that said detainees were held according to Israeli law, either according to the Incarceration of Unlawful Combatants Law, 2022 (hereinafter: the "**Unlawful Combatants Law**") or pursuant to criminal arrest warrants; in general, they are initially held in military incarceration facilities while the need to continue holding them in custody is examined; if there is a need to continue holding them in custody they are transferred to the facilities of the Israel Prison Service.

4. The petition alleges that about six months ago, on March 24, 2024, soldiers burst into the home of the al-'Ajur family located behind the Al-Shifa hospital "the soldiers fired at the inhabitants, injuring several family members, including Petitioner 2 and her mother. Thereafter, the soldiers took the minor daughter to another room to treat her injured shoulder... they ordered Petitioner 2's mother to leave the house... Petitioner 1 was left alone in the room" and since then, they have allegedly disappeared.

It emerges from the Appendix which was attached to the petition that on July 23, 2024 HaMoked sent an email message to the Incarceration Control Center's email address

¹ For instance: H CJ 1800/24; H CJ 1882/24; H CJ 1883/24; H CJ 1885/24; H CJ 1886/24; H CJ 1896/24; H CJ 1898/24; H CJ 2216/24; H CJ 2254/24; H CJ 2510/24; H CJ 2514/24; H CJ 2516/24.

requesting to locate Petitioners' whereabouts and to coordinate a lawyer's visit for them as soon as possible, noting that the Petitioners were arrested in the Gaza Strip near Al-Shifa hospital in the presence of their family members who were requested to leave the place. It is alleged in the petition that said request was sent based on the family contacting HaMoked.

5. It also emerges from the petition and the documents which were attached to it that on the following day, July 24, 2024, a response was received from the military police stating that "[...] following an examination which had been conducted no indication of Petitioners' arrest or incarceration was found...".
6. In addition it was alleged in the petition that "Notwithstanding the Incarceration Control Center's response, Petitioner 1's wife was informed by a detainee who was released from "Sde Teiman" facility that her husband was held with him in the same facility, since he had heard the prison guards calling Petitioner 1 in April 2024. In addition, she heard from another source that her husband was held in Ketziot prison" (Section 8 of the Petition).
7. Without derogating from any of the state's arguments concerning the matter, and without expressing any position with respect to future applications, while formulating a response to the petition an examination in Petitioners' matter was conducted, from which the following arises.
8. The military police officials informed that military police bodies have no indication of Petitioners' present or past arrest or incarceration by the military bodies.
9. The Respondent further update that Israel Prison Service officials informed that "In an examination conducted in the computerized system of Israel Prison Service in the framework of HCJ 70724-08-24 no registration of the above was found in the systems according to the details provided and therefore there is no indication of Petitioners' incarceration by the Israel Prison Service."

A photocopy of Israel Prison Service notice dated September 3, 2024 is attached and marked RS/1.

10. It should be noted that in the response to the petition at hand which is captioned as a *Habeas Corpus* petition, the question of Petitioners' incarceration was examined by the military bodies and no indication was found of their present or past arrest or incarceration; and no indication was found of Petitioners' incarceration by the Israel Prison Service; therefore there can be no indication that the Petitioners died after they had been arrested by the military.
11. It should also be noted with respect to the second remedy requested in the petition, that the basis for Petitioners' assumption that the IDF or the state authorities hold Gazan detainees in undeclared incarceration facilities is not clear, and the petition does not even try to substantiate this assumption, while as clarified in Section 3, these detainees are held according to Israeli law, either according to the Unlawful Combatants Law or pursuant to criminal arrest warrants; and in general, they are initially held in military incarceration facilities while the need to continue holding them in custody is examined; and if there is

a need to continue holding them in custody they are intended to be transferred to the facilities of the Israel Prison Service.

12. In any event, with respect to these allegations, they were not included in the exhaustion of remedies letter sent by the Petitioner and it justifies the dismissal of these allegations *in limine*. In fact, the Petitioners raise their arguments in this regard for the first time in the petition at hand without expressing them earlier in their communications with the state authorities, which exhausted themselves in the request to receive information of Petitioner's holding place. Therefore, and according to case law, these arguments should be dismissed *in limine* since they are clearly flawed by the failure to exhaust remedies. The Honorable Court clarified this issue in its judgment in HCJ 2433/24 **Berzon-MacKie v. The Prime Minister** (April 1, 2024):

"6. Naturally, **the threshold requirement of prior application to the relevant authority shall be met if said application "presents the allegations and claims underlying the petition,** even if the same level of specification or legal preparation should not be expected at that point" (Daphne Barak-Erez, Administrative Law, Volume D 349 (2017) (the emphases do not appear in the original – OG); see also HCJ 2894/21 United Laundries – Eilat 1994 Ltd. v. Prime Minister's Office (April 28, 2021)). **In the absence of conformity between the prior application and the legal pleading – the objectives of the exhaustion of remedies obligation, including promoting the possibility of narrowing down the dispute and sometimes even rendering the litigation redundant, shall not be realized** (see HCJ 2817/21 Mizrahi v. The Government of Israel (April 27, 2021); HCJ 2895/21 Kotenko v. The Ministry of Education, paragraph 4 (April 29, 2021))" (Emphasis added – the undersigned).

13. In this context, it is important to emphasize that the obligation to exhaust remedies applies to the petitioner entering the court's gates, and the exhaustion of remedies obligation cannot be satisfied by referring to applications made by other bodies. This was stressed by the Honorable Court in a series of judgments, and for this matter see one of many others:

"[...] It is well known that applications submitted to the administrative authority by others do not exempt the petitioner itself from its obligation to apply to the administrative authority, while according to case law, a petitioner cannot rely in the petition on applications of others to the administrative authority and on the answers given to them, without having applied to the authority by itself. Therefore, the petition is dismissed *in limine*." (HCJ 9074/09 Banai v. The Insurance Supervisor at the Ministry of Finance (February 7, 2010).

14. In these circumstances, the requested remedies in the petition are irrelevant; On the basis of the aforementioned rule, the Respondents shall argue that the petition at hand should be dismissed.

15. For this matter see the recent judgment in HCJ 201610-08-24 **Hajaj v. Israel Defence Forces** (August 25, 2024) where it was held as follows:

"After we have examined the additional issues presented by petitioner's counsel – we found no reason to issue an order. In fact, the main issues which were raised in the petition have already received a proper answer from the Respondents in the preliminary response. Contrary to the argument of petitioner's counsel, we did not get the impression that their answer was vague. It should also be added that the additional issues raised by petitioner's counsel are of a general nature and deviate in part from the boundaries of the petition which was filed, as well as from the application which was made as part of the exhaustion of remedies prior to the filing of the petition – and therefore they should not be examined in the framework of the proceeding at hand. In view of the above, the petition at hand has exhausted itself.

In conclusion: the petition is dismissed. No order as to costs."

See also the judgements in HCJ 5474/24 **Laban v. Israel Defence Forces** (September 2, 2024); HCJ 3549/24 **Dardsawi v. Israel Defence Forces** (May 2, 2024); HCJ 2656/24 **'Awadallah v. Israel Defence Forces** (July 3, 2024).

16. The facts specified in this Response concerning the Military Police shall be supported by the affidavit of First Lieutenant Shani Alexandroni, Operations Officer Enemy Incarceration Department at the Military Police.

Today, 3 Elul, 5784
September 6, 2024

Matan Steinbuch, Adv.
Deputy in the HCJ Department
State Attorney's Office