

Translation Disclaimer: The English language text below is not an official translation and is provided for information purposes only. The original text of this document is in the Hebrew language. In the event of any discrepancies between the English translation and the Hebrew original, the Hebrew original shall prevail. Whilst every effort has been made to provide an accurate translation we are not liable for the proper and complete translation of the Hebrew original and we do not accept any liability for the use of, or reliance on, the English translation or for any errors or misunderstandings that may derive from the translation.

At the Supreme Court

HCJ 8696/07

Sitting as the High Court of Justice

Re: 1. _____ **Mishi**
2. **HaMoked: Center for the Defence of the Individual founded by Dr. Lute Salzberger - registered non profit organization**

Represented by attorneys Yadin Elam (lic. no. 39475) and/or Sigi Ben-Ari (lic. no. 37566) and/or Abeer Jubran (lic. No. 44346) and/or Yossi Wolfson (Lic. No. 26174) and/or Yotam Ben Hillel (lic. No. 35418) and/or Hava Matras- Iron (lic. no 35174) and/or Ido Blum (lic. No. 44538)

Of HaMoked: Center for the Defence of the Individual founded by Dr. Lute Salzberger

4 Abu Ovadiah Street, Jerusalem, 97200

Tel:02-6283555 Fax: 02-6276317

The Petitioners

v.

1. **Commander of the Army Forces in the West Bank**
2. **Commissioner of the Israel Prison Services**

The Respondents

Petition for Writ of Habeas Corpus

A petition is hereby filed for an Order Nisi which is directed at the respondents and ordering them to appear and show cause:

- A. For respondent 1 – why they will not inform the family of petitioner 1 (hereinafter: the “**petitioner**”) what has been the fate of the petitioner, who was arrested by the Israeli security forces **and whose whereabouts as from 11 October, 2007 are not known**; if he is held by him or by someone on his behalf - where he is being held and by virtue of which law; and if he was released or transferred to another factor – when, where, to whom, and what is known about his whereabouts today. In the event that the petitioner is being held by an Israeli authority unlawfully, the court is requested to order his release.

B. For respondent 2 – why they did not register at the actual time and as prescribed by law, the place of detention of the detainees and their final destination in the event of their transfer.

Request for Urgent Hearing

The honorable court is requested to hold an urgent hearing in this petition

This petition is concerned with the most basic rights of a detainee, who has been arrested by soldiers or by other Israeli security forces within the course of their activities in the West Bank, that his place of detention be known. Only through this right may the detainee realize his other rights – to a legal representative, to intervention in his detention conditions, etc. This right also incorporates the right of the detainee's family to know what their son's fate was and where he is being held.

The law dictates that notice of the place of detention of the detainee shall be delivered to a person related to him without delay. The detainee's family does not know where he is being held.

The passing of time increases the uncertainty with which the family must live, its worries and its fears. The passing of time also frustrates – at every passing moment – the realization of the most basic rights of a person under custody who is powerless to defend his case on his own.

If he is still in the custody of the state's authorities, the family is entitled by law to be immediately informed of his whereabouts and to appoint an attorney who will represent him during detention proceedings. If he has left the custody of the state, it is the state's duty to supply urgently any information that will help to locate him, and to defend him where necessary.

In a number of *habeas corpus* petitions that were filed by petitioner 2 to this honorable court in the matter of residents of the territories who were arrested by soldiers or by other Israeli security forces, the court has determined a **maximum** period of **24 hours** as the limit for the respondent to reply to the petition. This, for example [was applied] in H CJ 8352/02 **Habaiba et al. v. Commander of IDF Forces in the West Bank**

The grounds for the petition are as follows:

The petitioners' case:

1. The petitioner was born in 1984 and is a resident of the Tul Karem refugee camp.
2. The petitioner was arrested on 5 October, 2007 while staying at his friend's house in the Iskar El Jadid refugee camp, in the Nablus region.
3. On 7 October, 2007 the petitioner's family applied to petitioner 2 (hereinafter "**HaMoked**") asking it to assist them in clarifying where the petitioner was being held by the security forces. From an investigation by HaMoked it emerged that after his arrest the petitioner was brought to the Samaria temporary holding facility and on 6 October, 2007 the petitioner was transferred to the Kishon prison.
4. On 14 October, 2007 the petitioner's family approached HaMoked for a second time seeking to locate him. On that same day HaMoked applied in writing to the Command Center at the Military Police Head Officer's Headquarters (hereinafter the "**CC**") requesting assistance locating the petitioner. Since HaMoked did not receive any answer to its application from the CC, the petitioner last night (15 October, 2007) set up a number of telephone conversations with the CC. In each of the conversations HaMoked was told that the CC was unsuccessful in locating the petitioner's place of detention.
5. When it was unsuccessful in clarifying the petitioner's place of detention through the CC, HaMoked applied to the Imprisonment Control Center of the Israel Prison Services (hereinafter: the "**IPS**"). The IPS informed HaMoked that **the petitioner was already transferred on 11 October, 2007 from the Kishon prison to another place but they did not know where the petitioner was transferred.** The Kishon prison itself also informed HaMoked that the petitioner was transferred to another unknown place.
6. In an attempt to clarify the whereabouts of the petitioner HaMoked also applied to the Sharon prison and the prison at the Russian Compound in Jerusalem. These two prisons contain a computer terminal that is connected to the Israel Police. Both these places informed HaMoked that the petitioner was not in their custody and that he did not appear in the Police terminal.
7. HaMoked is a human rights organization that assists residents of the occupied territories who have been deprived of their rights by the respondents. Among other

things its activities include assistance in locating the place of detention of detainees who were arrested by the Israel security forces.

The Legal Argumentation

Notice of place of detention

8. There is no need to overstate the importance of the right of relaying information about a person's arrest and the place where he is being detained. This right is a basic right – both of the prisoner and of his family members. This right constitutes a part of the basic right to human dignity. A governmental system that is not scrupulous about the maintenance of such a right but instead conceals persons under its custody from their family members for significant periods of time, acts with cruelty and seriously harms the human character of the detainee and of his family members. As the then Deputy Chief Justice of the Court Menachem Elon declared in H CJ 670/89 **Odeh et al. v. Commander of. IDF Forces in the Judea and Samaria Region**, *Piskei Din* 43(4), 515, 517:

“The obligation to give such notification stems from a fundamental right accorded to a person who is lawfully arrested by the competent authorities, to inform his relatives of his arrest and his place of detention so that they will be apprised of what befell their detained relative, and how they are able to proffer him the assistance he requires in order to safeguard his liberty. This is a natural right derived from human dignity and general principles of justice, and accrues both to the detainee himself and to his relatives”

9. From this basic right we may derive an obligation upon the appropriate authorities to deliver this information to the detainee and to his family members. This obligation is also set forth in common law and in precedent. Section 78A(b) of the Order Regarding Defense Regulations (Regulation No. 53) (Judea and Samaria) (No. 1220), 5748-1988, which amended the Order Regarding Defense Regulations (Judea and Samaria) (No. 378), 5730-1970, states that:

"Where a person is detained, notification of his arrest and whereabouts shall be made without delay to a relative, unless the detainee requests that such notification not be given." (all emphases mine- Y. E.)

In HCJ 6757/95 **Hirbawi et al. Commander of IDF Forces in Judea and Samaria**, (unreported), the honorable court sanctioned as a judgment the arrangement reached by the parties, in terms of which:

“A) Upon the detention of a person who is a resident of the region, notification on his detention and on his place of detention will be delivered without delay by telephone to a telephone number that the detainee gives to the detaining official.

The detaining official will provide said telephone notification, and will record on a form prepared for this purpose the details of the notification that he conveyed and the particulars of the person who received the notification.

In the event that the detainee so requests, notification by telephone will also be conveyed to an attorney whose names and details are provided by the detainee and the detaining official will inform the detainee of this right.

Where the detainee requests that notification by telephone or otherwise not be conveyed, the request shall be recorded on the form.

Where the detainee did not provide details for the delivery of notification by telephone a post card will be sent, at the time of his detention, to his relatives at the address that the detainee provide.

B) The IDF’s Control Center (whether this actually involves the control center or any other entity) will receive from all entities (IDF, the Police Force, the IPS) updated information once a day on the arrest and place of detention of a detainee, in a manner that enables it to locate the detainee, upon written request by an external person or entity.

C) The IDF's Control Center will provide details from the said information in response to a written request of public organizations that deal in such matters and/or upon the request of an attorney representing the detainee and his family.

Following the making of the written request the requesting party may obtain the information by telephone

D) IDF officials will check with officials of the Palestinian Authority on the feasibility of providing the said information also to the D.C.O., so that the said information also can be delivered through its auspices."

10. Therefore there is a duty upon the authority arresting a person from the region to deliver to the detainee's family a notice, whether by telephone or by any other means, of the fact of his arrest and the place of his detention. To back up this obligation, a mechanism has been determined that would enable the families to apply to organizations such as HaMoked and to attorneys, in order to receive updated information about the place of detention of their loved ones, and this by means of the IDF's Control Center.

11. The subject of locating detainees and the functioning of the CC has also been dealt with in the decision of the honorable Registrar Boaz Okun in HCJ 9332/02 **Jarar v. Commander of the IDF Forces**, In his decision the Honorable Registrar writes:

"The provision of information is a means of control and supervision, but it is important from a human perspective in that the detainee loses control over his life in a single moment. **The importance of thorough reporting to the relatives whose family member disappeared "without explanation" cannot be exaggerated. Giving public notification is a guarantee against misuse of the state's capability to detain individuals, and prevents unrestrained use of this capability.**

Indeed, the power of the state, regardless of how good its intentions may be, is great. Without reporting, this power might get out of control, even when explained by security considerations. Concession or flexibility intrinsically entails risks. Experience teaches us that the excessive use of power, which is not timely eradicated, creates a new reality. The power is not like a boomerang; when it is released, it does not return. Therefore, the authority is ordered to give meaningful attention in all matters related to the exercise of detention powers. This attention requires immediate reporting of the detention.”

The petitioner’s registration at the place of detention

12. There is no need to overstate the importance of the detainee’s right that his place of detention shall be clear and certain to everyone. Recording the detainee at his place of detention is an essential condition for realizing his rights. It is only through this that his family and attorney shall be able to verify with those in charge of his place of detention, his status, his health situation, the conditions of his detention, and if and when they may meet with him, and the like. Only through this are they able to work towards realizing his rights as a detainee. Even a detainee’s right to be present at legal proceedings that are conducted against him is dependent upon the orderly recording of his name at his place of detention.
13. Non - recording of the petitioner at his place of detention seriously harms his and his family’s basic rights. A governmental regime that is not scrupulous about the recording of the detainee at his place of detention and on the ability of receiving ongoing information on the basis of this recording does not fulfill its obligation and is derelict in its duties.
14. Because of the supreme importance inherent in the recording of the detainee at his place of detention, the obligation to record is set forth in primary legislation. Section 4 of the Prisons Ordinance (New Version) 5732-1971 determines that :

“When a person is received at the prison the chief warden of the prison shall see to it that the details that have been determined with respect to him have been recorded.”

15. In our case it turns out, apparently, that after the petitioner was transferred from Kishon prison to another place, he was not recorded at the new place to which he was brought. Even the recording at the Kishon prison itself according to which the petitioner was transferred on 11 October, 2007 to another place does not include any information about the final destination of the transfer. A recording such as this does not allow a surveillance of the petitioner's current place of detention.

Hence the second relief requested in the petition, which is concerned with drawing lessons from the present case, **which is not the first case which HaMoked has encountered that involves a failure by the respondents to scrupulously follow the procedures that have been laid out in the Law**, and to scrupulously follow the procedures which will prevent the disappearance of detainees such as the petitioner.

16. Because of its very nature this petition is not supported by the petitioner's affidavits and powers of attorney, aside from an affidavit (and power of attorney) on behalf of HaMoked with regard to its receiving information about the petitioner at its offices and with regard to its activities in this case.

For these reasons the court is urgently requested to issue an order nisi as requested at the beginning of this petition, and after receiving the respondent's response, make it absolute, and to order the respondent to pay the Petitioners' costs and attorney fees.

16 October, 2007
(T. S. 52467)

Yadin Elam
Counsel for the Petitioners