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At the Supreme Court

HCI 4677/10

Sitting as the High Court of Justice

In the matter of: **HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger - RA**

Represented by counsel, Adv. Daniel Shenhar (Lic. No. 41065) and/or Sigi Ben-Ari (Lic. No. 37566) and/or Elad Kahana (Lic. No. 49009) and/or Ido Blum (Lic. No. 44538) and/or Hava Matras-Irron (Lic. No. 35174) and/or Leora Bechor (Lic. No. 50217 and/or Martin Kiel (Lic. No. 54087)

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

4 Abu Obeida Street, Jerusalem, 97200

Tel. 02-6283555; Fax. 02-6276317

The Petitioner

v.

Israel Prison Service

Represented by the State Attorney's Office

Ministry of Justice, Jerusalem

The Respondent

Petition for Order Nisi

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

1. Why it should not enable the petitioner to receive the medical files of the individuals represented by it, which will include all medical documentation concerning each and every one of them, of any kind and nature whatsoever, which were recorded or prepared in connection with each and every one of them, in any one of the detention, incarceration and interrogation facilities in which they were held. This, commencing from the date of their detention and until the date the application to receive the medical file is served.
2. Why the respondent should not recognize the rules established by law, pursuant to which it must hand over to each prisoner or former prisoner, who was in its custody, all medical records pertaining to him, from the time he was detained by any of the Israeli security forces, until the time of his release, and act in accordance therewith.

The reasons for the petition are as follows:

The physician-patient relationship – similar to the relationship between a patient and a therapist – is not, in essence and nature, a relationship between equals. The physician, as in our case, has the authority as well as the power, knowledge, skills and tools to diagnose the condition of the patient and treat him. At the same time, the patient, in most cases, lacks the knowledge, skills and tools required to cope with his condition; he needs the physician and depends on him. The welfare, comfort and health of the patient – sometimes his very life – depend on the physician (as stated by Justice Cheshin in AAA 6219/03 **A v. Ministry of Health**, IsrSC 58(6) 145, 150).

1. This petition concerns the important issue of patients' access to medical information concerning them, as managed by the medical institution in which they were treated, in general, and access by prisoners and former prisoners to medical information concerning them which is under respondent's responsibility, in particular.
2. HaMoked: Center for the Defence of the Individual (HaMoked), the petitioner, represents a large number of prisoners and former prisoners, who complain of the manner in which they were treated by the Israeli security forces, when held by them. Within the framework of handling these particular complaints, the petitioner requested the respondent to provide the medical records of the complainants. However, over time, the petitioner has realized that the medical records transferred to it were partial and incomplete, a fact which is contrary to the law, and which makes it difficult for the petitioner to handle the cases of the individuals represented by it *vis-à-vis* the interrogation and judicial authorities.
3. The complainants in this case were arrested by the Israeli security forces in late 2008 and early 2009, and were all transferred to the Petah Tikva detention and interrogation facility, which is under respondent's responsibility. While held in custody therein, this according to affidavits given to counsel acting on behalf of the petitioner, the complainants were treated in a demeaning and inappropriate manner. Consequently, complaints in that regard were sent to various interrogation officials during the summer of 2009.

4. When these complaints were handled by the petitioner, the medical officer of the respondent was requested to transfer to the petitioner copies of the medical records of each one of the complainants. After long negotiations between the petitioner and medical officials of the respondent, the latter agreed to transfer to the petitioner copies of said medical records. Thus, during the months that followed, the petitioner started to receive copies of the medical documents, in dribs and drabs. Eventually, out of seventeen requests for receipt of medical material, only in thirteen did the petitioner receive the requested documentation, after more than ten full months elapsed (as of the filing date of this petition).
5. However, even in these thirteen cases, the medical records which were delivered to the petitioner were flawed and incomplete. And what do we mean by that? Firstly, not one of these copies contains any medical information from the date of complainants' arrest by the army, including records of the first medical examination that each one of them underwent. This, although military officials asserted that the relevant medical files were transferred to the respondent, and it is clear that complete medical records must include **all** medical material concerning the complainant, from the time he was in the hands of any of the Israeli security forces.
6. Secondly, the records which were delivered concerning the period during which the complainants were held in the Petah Tikva detention facility, which is the relevant period for the purpose of the complaints, were flawed and incomplete. Thus, in two cases there is no documentation whatsoever of any medical records from the Petah Tikva detention facility, although the complainants were held and examined, then and there, by medical officials on location. In the other cases, the medical records from the Petah Tikva detention facility **seem to be incomplete and flawed**, meaning they do not reflect all of the complaints.
7. Under the law, medical records must contain all of the information concerning the prisoner from the date of his arrest, including summaries of hospitalizations, summaries of examinations performed by physicians from various detention and incarceration units, throughout the incarceration period: from the arrest, through the interrogation by any of the security agencies, and until termination of the period during which the prisoner is held in an incarceration facility under respondent's control.
8. Nevertheless, in a letter dated July 29, 2009, the chief medical officer of the respondent found it necessary to clarify that detainees' medical records would not be delivered in their entirety owing to respondent's policy of not transferring documents concerning third parties other than the respondent, such as the army, the Israel Security Agency (ISA) and the Israel Police. This policy, not to hand over to prisoners, detainees and former prisoners, their complete medical records, is contrary to the provisions of the law and case law regarding the duties of a medical institution concerning the management, safekeeping and delivery of medical records of detainees and prisoners held in respondent's custody.
9. In accordance with the law, as will be more fully elaborated in the legal part of this petition, the medical records of each and every detainee held in respondent's custody must include full documentation, from the time of the arrest until the

time of release, in a clear and orderly manner. These medical records must contain all of the medical information concerning the detainee, including medical history, summaries of hospitalizations, summaries of examinations performed by physicians from various detention and incarceration units during the incarceration period, including the interrogation period, whether conducted by the ISA, the army or the police. **A prisoner, or the complainants in the case at hand, like any other patient, has an unequivocal constitutional right to receive his entire medical records, which should be managed by the respondent in its capacity as the authority that holds the detainee and is in charge of his care, including medical treatment.**

The Parties and Exhaustion of Remedies

10. The petitioner is a human rights organization which, has, for many years, assisted Palestinian prisoners held in prisons in Israel, in having their basic rights upheld.
11. The respondent, the Israeli national incarceration organization, held in its custody all Palestinian complainants represented by the petitioner, during the period relevant to their complaints. As the authority which holds them in custody, the respondent is responsible, *inter alia*, for the medical treatment they receive while in custody, recording it and safekeeping of the medical records.
12. As specified in paragraphs 3 and 4 above, during the months of June and July 2009, the petitioner sent nineteen complaints to various officials, including the Attorney General, the Police Investigation Unit (PIU), the Military Police Investigations Unit (MIU) and the supervisor of the ISA complaints comptroller at the Ministry of Justice. The complaints concerned inappropriate and demeaning treatment of Palestinians held in respondent's custody during the relevant period. These complaints were based on signed affidavits given to the petitioner by the complainants themselves.
13. During processing of these complaints by the petitioner, the need arose to receive the medical files of the relevant individuals, which were in the possession of the respondent. Therefore, on July 20, 2009, the petitioner contacted the respondent's chief medical officer with a request to receive a full copy of the medical file of each of the complainants.

A copy of petitioner's request is attached and marked **P/1**.

14. On July 29 2009, the response of the chief medical officer was received by the petitioner, according to which "the Israel Prison Service (IPS) does not photocopy medical files." Thereafter, the **reason** (!) for the request to photocopy the medical file was requested. The letter further stated that "**material which is not related to the IPS such as IDF detention facilities, interrogation facilities etc. is not transferred by us to external parties**" (my emphasis – D.S.).

A copy of the response of the chief medical officer is attached and marked **P/2**.

15. Following this response, an additional letter was sent to the chief medical officer, which emphasized the fact that petitioner's lawyers represented the Palestinian residents, on whose behalf particular complaints had been submitted to the relevant officials. Accordingly, the respondent's chief medical officer was again requested to provide HaMoked, as legal counsel to each and every one of the complainants, a full copy of the medical file of each complainant.

A copy of petitioner's response letter, which was also sent by registered mail on August 3, 2009, is attached and marked **P/3**.

16. On August 5, 2009 a response was received from the respondent's chief medical officer, scrawled by hand on petitioner's request to the effect that "there is still no answer to my question. Why the entire! (*sic* – D.S.) medical file? I would like to know exactly what you want to photocopy".

A copy of the response of the chief medical officer is attached and marked **P/4**.

17. Petitioner's response was sent on the following day, August 6, 2009, specifying the legal grounds underlying petitioner's request to receive full copies of the medical files of the Palestinian complainants.

A copy of petitioner's response dated August 6, 2009 is attached and marked **P/5**.

18. On August 17, 2009 a representative from the bureau of the chief medical officer contacted petitioner's legal counsel and informed that following the above correspondence, the respondent's chief medical officer decided to approve the transfer of copies of the relevant medical files to petitioner. The representative further confirmed that the photocopying and delivery of the files would take about six months. She was specifically told that a copy of the **complete** medical file of each and every complainant was requested. To assist her, it was agreed that the petitioner would advise her where each complainant was being held at the time, or whether he had already been released from respondent's custody. Finally, it was agreed that when the medical file was delivered to the bureau of the chief medical officer, the petitioner would be advised of the fee payable for each copy, and that following such payment, the copy would be transferred to the petitioner.

A copy of petitioner's letter dated August 18, 2009, specifying where the complainants were incarcerated, is attached and marked **P/6**.

19. Thus, a long process in which the medical files of the complainants were transferred to the petitioner in accordance with the above specified procedure began. The slow transfer of the copies of the files commenced in September 2009, and continues to this day, about nine months since the submission of the first request to receive copies of the medical files.
20. At the same time, a letter from the legal advisor of the military police was received in petitioner's offices. The letter was sent to the petitioner within the framework of negotiations which were conducted with military officials concerning the transfer of the medical files of the same complainants whose medical files were requested from the respondent. The letter specifically stated

that **"The detainees specified in your request were transferred to the custody of the IPS, together with their medical files. The military police does not have copies of the medical files of the detainees, and therefore you should contact the IPS on this matter"** (all emphases in this petition are mine – D.S.)

A copy of the letter of the legal advisor of the military police, dated October 20, 2009 is attached and marked **P/7**.

21. As the process of the transfer of the copies of the medical files by the chief medical officer to the petitioner continued, the petitioner sent him a letter dated April 13, 2010, in which it specified four medical files the copies of which had not yet been transferred to the petitioner, despite the fact that about eight months had elapsed from the date of the initial request in this matter. In addition, two cases were mentioned, in which copies of irrelevant medical files had been transferred.

A copy of the letter is attached and marked **P/8**.

22. After the elapse of many months, the situation, as it appears from a review of the copies that have been received by the petitioner, is not encouraging: of seventeen relevant requests **only one file contains complete medical records**, both from the period during which the complainant was held by the army, as well as from the interrogation period in the detention facility in Petah Tikva. In all other files no medical information whatsoever concerning the period of arrest by the army has been received. With the exception of one file, the records which were transferred from the Petah Tikva detention facility were **incomplete** (as compared with complainants' affidavits, and also as compared with the procedure for the admission of detainees to this facility, which includes an initial medical examination, records of which were not provided). In three files no medical information relevant to the complaints was received, as medical files pertaining to **previous arrests** were delivered; and in one file no medical information has been delivered yet.
23. In view of the above, the petitioner decided to write to the legal advisor of the respondent, to describe to him the chain of events as specified above, to advise him of how gravely the petitioner regards this state of affairs, and to emphasize the fact that the legal arrangements in this matter were in favor of the petitioner. Until the filing date of this petition, no response to this general request has been received in petitioner's offices.

A copy of petitioner's letter dated April 26, 2010 is attached and marked **P/9**.

In view of the above, the petitioner has no alternative but to turn to this honorable court.

The Legal Argument

The normative framework – the obligation to document and keep medical records

24. The obligation, imposed on physicians and various medical institutions, to document the course of the medical treatment given to a patient, was established in section 17A of the Patient's Rights Law, 5756-1996 (hereinafter: the **Law** or the **Patient's Rights Law**), which provides as follows:

A care provider shall document the course of the medical treatment by medical records; the medical records shall include, *inter alia*, details identifying the patient and the care provider as well as medical information on the medical treatment received by the patient, his medical history as provided by him, a diagnosis of his current medical condition and treatment instructions.

25. Section 17(B) of the Law provides that the responsibility to manage and keep the medical records is imposed on the care provider and on the director of the medical institution:

The care provider, and in a medical institution – the director of the institution, are responsible for the ongoing and updated management of the medical records and its safekeeping in accordance with prevailing law.

26. Section 6 of the Prison Ordinance [New Version], 5732-1971 (hereinafter: the **Prison Ordinance**), imposes upon a physician in a detention facility the obligation to perform an initial medical examination of a detainee admitted to the facility, and to document the results of the examination:

As soon as possible after having been admitted, each prisoner will be examined separately by a physician, and until so examined he will be, to the extent possible, separated from other prisoners. The physician will record the prisoner's medical condition and other details which were prescribed.

27. Section 74 of the Prison Ordinance also deals with the duties of physicians in detention facilities under respondent's control. Sub-paragraph C thereof provides that "The physician will examine each prisoner upon his admission and before his release, and record his medical condition and details pertaining thereto as specified in the regulations".

28. Section 4 of the Prisons Service Commission Ordinance 04.44.00 entitled "the medical treatment of a prisoner" (hereinafter: **the ordinance regarding medical treatment of a prisoner**), provides that a medical file shall be managed for all prisoners:

- a. A medical file shall be kept for each prisoner.
- b. The physician shall record in the prisoner's medical file his complaints, the findings of the medical examination, the diagnosis, the course of treatment and any medical examination ordered by the physician. The physician's instructions will be recorded in the

physician order journal in legible hand writing for each prisoner separately, and will be approved upon termination of the patients' roll-call with the physician's signature and seal.

Thus, for the purpose of the case at hand, the respondent is considered to be a "care provider" and a "medical institution", as defined in the Law, with all ensuing obligations imposed on a care provider and a medical institution by law.

29. The Prisons Service Commission Ordinance 04.29.00 "Admission of a Prisoner to Prison", prescribes, in section 8I thereof, rules concerning a prisoner being admitted to prison, who already has a medical file or other medical documents:

The prisoner's medical file will be transferred to the clinic so that the documents may be reviewed and treatment may be given in accordance therewith. If the prisoner arrives without a social file or a medical file but with relevant documents, social or medical, the material will be transferred in a closed envelope to the clinic/head of treatment division – as the case may be.

30. International humanitarian law also addresses this issue. Article 16 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, of August 12, 1949, provides that parties to a conflict are obligated to manage, with respect of any wounded or sick person falling into their hands, medical records, which includes, beyond the patient's identification particulars, a detailed account of his medical and physical condition and the treatment he received.
31. Case law also refers to the obligation to document the course of treatment given to the patient in medical records. Accordingly, the importance of keeping medical records for patients was addressed by Vice President Or as follows:

Such documentation is very important for the purpose of giving the patient further treatment in the future, as well as for the purpose of giving the patient the opportunity to know, as he has the right to know, his medical condition and the medical treatment given to him, **and also as evidence, if required, of the nature and particulars of the treatment received by the patient** (words of Vice President Or in CA 6948/02 **Adana v. The State of Israel**, IsrSC 58(2) 535, 542).

32. On this matter see also the words of Justice Strasberg-Cohen in CA 1/01 **Mordechai v. Clalit Health Fund**, IsrSC 56(5) 502, 507:

Many judgments of this court have established the duty of physicians to document medical findings and treatments in real time to enable ongoing, proper and responsible monitoring of any developments for the purpose of making suitable decisions **and so that the records may be used as authentic and weighty evidence of previous actions.**

33. In our case, the respondent, which is responsible, by virtue of its legal authority, for the entire medical apparatus in its facilities, including the various detention

facilities in which the complainants, represented by the petitioner, were held, falls within the definition of the Patient's Rights Law pertaining to a director of an institution, which is responsible for managing and safeguarding prisoner's medical records. Therefore, it is respondent's responsibility to manage the medical records of the prisoners and to document and manage therein all medical material, from the beginning of the period during which the prisoner was held in custody and until its termination.

The right to receive a copy of all the medical information contained in the medical record

34. The prisoner, or former prisoner, like any other patient, has a fundamental right to receive all the medical information concerning his matter. The medical information should be managed by the respondent, which is the authority that holds the prisoner and is in charge of his care, including, medical treatment. Thus, such information should be transferred, in its entirety, to the prisoner, upon his request.
35. A person's right to receive the medical records concerning him was explicitly and unequivocally established in section 18(a) of the Patient's Rights Law, which provides as follows:

A patient is entitled to receive from the care provider, or from the medical institution, medical information from the medical records concerning him, including a copy thereof.

36. This is also the spirit of section 14 of the ordinance on medical treatment of a prisoner:

As a general rule, a prisoner is entitled to review the medical information concerning him which is held by the prison authority subject to the Patient's Rights Law and the Freedom of Information Act.

37. It was so held by Justice Cheshin in AAA 6219/03 **A. v. The Ministry of Health**:

This is the general context in which the right of the patient to receive information about his medical condition, both physical and mental, finds its place. And on this issue, similar to other issues in law and in life, a close examination will reveal the forces at play, each pulling in its own direction. On this side, one finds, in full force and glory, human dignity, human liberty and the autonomy to which each person is entitled as a human being. In principle, a human being is the master of his own body and mind, and his direct connection with his body and mind entitles him, *prima facie*, to receive information about his body and mind. **Information held by a physician concerning a patient is held by him in trust for the patient, and hence, again – *prima facie* – such information should be made available to the patient, at his request.** This applies to information as well as to all actions taken by the physician in connection with the patient – actions which should be transparent to the patient. In so doing, the autonomy of the patient is

preserved; His right to his body and mind is protected..." (IsrSC 58(6) 145, 150).

38. In CrimApp 909/05 **Jaber v. The State of Israel**, IsrSC 59(2) 755, 758, Justice Rubinstein held that a patient's right to receive medical information enjoys constitutional status and is established in Basic Law: Human Dignity and Liberty:

Knowledge concerning a person's health is, in my opinion, part of his human dignity since we are concerned with one of the most basic elements of his being and life, and even more so when it concerns his liberty.

39. To be precise, a patient's right to receive medical information is inclusive and broad, and should be interpreted accordingly when the provisions of section 17 of the Patient's Rights Law are implemented. This section provides that a care provider must document the course of treatment in medical records, and the record should include, *inter alia*, medical information concerning the medical treatment which was given, **the medical history of the patient**, diagnosis of his medical condition and treatment instructions. This, in view of the definition of the term "medical record" in section 2 of the Law, which includes the entire medical file of the patient which contains all the medical documents that concern him.
40. It seems that in our case the respondent refuses to implement the provisions of the law concerning the transfer of medical information at the request of individuals who were held in the past, or who are still being held, in its custody. The transfer of incomplete and partial medical information, which does not reflect the medical treatment in its entirety throughout the relevant period with respect of which the medical information was requested, and during which the prisoners were held by the Israeli security forces, is contrary to the letter and spirit of the law, as well as to the rule established by this honorable court.

The respondent's duty to act within reasonable time

41. One of the fundamental principles of administrative law is the duty of an administrative authority to respond to requests submitted to it within a reasonable amount of time. Efficient and expeditious handling of requests is one of the foundations of good governance. The respondent must handle requests submitted to it fairly, reasonably and expeditiously.

A competent authority must act reasonably. Reasonableness also means following a reasonable schedule (HCJ 6300/93 **The Institute for Training of Female Rabbinical Court Pleaders v. The Minister of Religious Affairs**, IsrSC 48(4) 441, 451).

42. This duty is also established in section 11 of the Interpretation Law, 5741-1981, which provides:

Any power or obligation to perform an act where no time for the performance thereof is prescribed - shall mean that there is a power or

obligation to perform it in due haste and to perform it again from time to time as required by the circumstances.

43. In accordance with section 2(a) of the Administrative Procedure Amendment (Statement of Reasons) Law 5719-1958, a public servant is obligated to respond to a request to exercise legal authority within 45 days from the date the request was received.
44. Relevant to this matter are the words of Justice Melcer in HCJ 2390/10 **Alaa Hlehel v. The Minister of Interior**, TakSC 2010(2) 2535, 2538:

In the case before us, we found two significant cumulative flaws in the conduct of the Minister of Interior... the first one being that no final decision was made in the case of Hlehel until after he filed his petition before us, although his request was submitted in a timely fashion and many reminders were sent on his behalf. **The failure to make a decision within reasonable time is *prima facie* problematic and has many ramifications in administrative law** (see: section 2 of the Administrative Procedure Amendment (Statement of Reasons) Law 5719-1958).

45. In our case, respondent's conduct concerning petitioner's requests to receive the medical material regarding the complainants represented by it, all serving prisoners, or individuals who were recently released from jail, is problematic, to say the least. And what do we refer to? The medical records are transferred to the petitioner at an outrageously slow pace, as specified in the section on exhaustion of remedies in this petition. Some requests to receive information have not yet been answered, although many months have elapsed from the date they were initially submitted; and because the material that has been handed over, is in the most part, incomplete, the lengthy duration of the process by which the material is transferred, may create a situation in which by the time the relevant material is delivered, it will be too late to exhaust the complaints submitted in the cases of the complainants represented by the petitioner, a fact that will severely violate their rights.

Conclusion

46. In conclusion, the law obligates the respondent to maintain full medical records regarding all prisoners in its control, from the time of their arrest.
47. The petitioner further argues that such medical records must contain all the information concerning the prisoner from the time of his arrest, including: summaries of hospitalizations, summaries of examinations performed by physicians from various incarceration and detention units, throughout the term of his incarceration, including from periods during which he was held and/or interrogated by the ISA, the army or the police.
48. Hence, this petition proves that respondent's policy of not providing the complete medical records of a prisoner at his request, including documents concerning

medical treatment undergone by the prisoner and medical examinations performed by various physicians while held in the custody of Israeli security forces, breaches the provisions of the law governing this matter. This breach harms the complainants represented by the petitioner, due to the absence of a proper factual infrastructure regarding their medical condition at the time of their arrest.

This petition is supported by the affidavit of petitioner's member of staff.

In view of all of the above, the honorable court is hereby requested to grant an *order nisi* as requested and after hearing respondent's response make it absolute. The honorable court is also requested to charge the respondent with petitioner's expenses and legal fees.

Jerusalem, June 16, 2010

Daniel Shenhar, Adv.
Counsel for the Petitioner

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