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At the Supreme Court Sitting as the High Court of Justice

H CJ 320/98

In the matter of:

1. _____ **Manasra, I.D.** _____
Detainee in a detention facility in Jerusalem
2. **HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger**

both represented by counsel, Att. Andre Rosenthal
and/or Mustafa Yihya
Lic. No. 11864 and No. 20107
4 Aristobulus Street, Jerusalem 94234
Tel. 6250458; Facsimile: 6259626

The Petitioners

v.

The Isarel Security Agency

The Respondent

Petition for Order nisi and an Intermediary Order

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering it to appear and show cause why it forces petitioner 1 (hereinafter: the "**petitioner**") to kneel down during his interrogation, holds him in the "shabach" position, seated on a low chair, his arms handcuffed and stretched behind his back, his head covered with a sack and loud music almost constantly being played while "waiting" to enter the interrogation room, days and nights, thus depriving him of reasonable sleep during each twenty four hours period;

And forces him to stand up next to a wall, his arms handcuffed behind his back, his head covered with a sack, for long periods of time.

A petition for an *intermediary order* is hereby filed which is directed at the respondent ordering it not to act upon any permit, special or other, allowing the use of the above described methods until this petition is heard.

The honorable court is also requested to schedule an urgent hearing of the petition due to its nature.

A copy of this petition is being transferred to the state attorney's office upon filing.

The grounds for the petition are as follows:

1. The petitioner, resident of Bani Na'im, Hebron District, was detained on January 3, 1998 and transferred to the interrogation facility in the Shikma prison on January 8, 1998.
2. a. Immediately upon petitioner's arrival at the interrogation facility in the Shikma prison, he was held in the shabach position, seated on a low chair, his arms stretched behind his back, handcuffed, one arm over the backrest, the other underneath, his head covered with a sack and loud music almost constantly being played, thus depriving him of reasonable sleep during each twenty four period.
- b. The interrogators force him to stand up next to a wall, his hands handcuffed behind his back, his head covered by a sack, for long periods of time.
- c. The interrogators further force him to kneel down in the interrogation room, until he falls down, exhausted.
- d. Petitioner's affidavit is attached hereto and marked P1.
3. The petitioners claim that respondent is not permitted, under the laws of the State of Israel, to use force or violence against the petitioner in order to extort from him a confession or information concerning an offense.
4. The petitioners claim that the respondent acts as if it would not be held criminally liable for any act or omission committed by it within the framework of and in the course of fulfilling its duties.
5. The petitioners side with the scholar, Professor Daniel Statman, who, in his article entitled "*The question of the Definite Morality of the Prohibition to Torture*", **Law and Government**, volume D, July 1997, 161, deliberated over the use of torture against Palestinians suspected of having committed offenses against state security, as opposed to [the treatment of] Jewish detainees, as stated therein:

"If they [the interrogator, the torturer and the judge, A.R.] allowed to torture a Jewish detainee member of the "Kahana Chai" movement under similar circumstances, or a criminal offender known as one of the underworld leaders." (p. 179).

6. The petitioners claim that the use of the above described methods constitutes torture, or, at least, "other acts of cruel, inhuman or degrading treatment" as defined in Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Treaties 1039, which entered into effect *vis-à-vis* Israel on November 2, 1991.

The term "**torture**" is defined in Article 1 of the convention as follows:

"... the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ..."

The honorable court has refrained, until now, from setting the boundaries of the term "torture" and has not yet decided whether these methods fall within the definition of Article 1 or Article 16 of said convention.

7. The respondent has repeatedly invoked the necessity defense, section 34(11) of the penal law, but there is no judicial ruling on that issue.

The petitioners claim that this is a personal defense, which may be used by an individual including an interrogator charged, for instance, with an offense under section 277 of the Penal Law, 5777-1977, as described in CrimA 532/91 **A v. the State of Israel** (not reported):

"Indeed, the state decided upon this difficult issue. On the one hand, it was determined that the use of violence or force is prohibited and may not be used by any person – including an interrogator acting on behalf of the state. By doing so, the state wishes to protect the fundamental values of the mental and physical integrity of any person, including a terrorist who seeks to harm it and its inhabitants. The numerous sections of the penal law express this position. On the other hand, it was determined that any person – including an interrogator acting on behalf of the state – is exempt of criminal liability when the conditions of a certain defense are met."

When the conditions of the defense are met, the exemption applies to the individual interrogator standing trial for breaking the law, and not to the respondent, as a public agency, acting, if not pursuant to a law, at least, in accordance with the law.

8. The petitioners refer, without quoting, to Lord Gardiner's minority opinion dated January 31, 1972, expressed as a member of the Parker Committee established in Great Britain in order to examine the interrogation methods used by the British against the Irish Republican Army.

Lord Gardiner stated, in a minority opinion, that "ill treatment by the police, for the purpose of obtaining information, of suspects who are believed to have such information ..." should not be permitted.

His opinion was adopted by the British government which prohibited, that night, the use of such methods. This honorable court is invited to join this minority opinion.

9. Finally, we return to CrimA 532/91 **A v. The State of Israel** (not reported), where Honorable Justice Barak (as then entitled) held:

"The balancing formula set forth in section 22 of the penal law (currently section 34(11)) gives rise to difficult interpretation problems. These were examined by the investigation committee. They will certainly be examined in future by the courts. Difficult cases do not produce easy solutions and most of the situations are found on the line between the permitted and the prohibited."

10. The honorable court is hereby requested to grant the requested orders and make them absolut.

Jerusalem, January 15, 1998

Andre Rosenthal, Att.
Counsel for the Petitioners