At the Supreme Court
Sitting as the High Court of Justice

HCJ 1804/15

_____ Abu Ghnam

Represented by counsel, Adv. Labib Habib
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Tel/Fax: 02-6263212

The Petitioner

v.

GOC Home Front Command
Represented by the State Attorney's Office
Ministry of Justice, Jerusalem
Telephone: 02-6466590; Fax: 02-6467011

The Respondent

Respondent's Response

1. According to the decision of the Honorable Justice Danziger dated March 12, 2015, the respondent hereby respectfully submits his response to this petition. It should be noted that this response is submitted with the approval of the exceptions committee taking into consideration the sanctions taken by the Attorneys Union.

2. This petition concerns an order issued on November 30, 2014, by the respondent, the GOC Home Front Command, by virtue of his authority pursuant to regulations 6, 108 and 109 of the Defence (Emergency) Regulations, 1945 (the "**order**" and the "**Defence Regulations**"). In the order the respondent ordered the petitioner not to enter, not to stay and not to be present in the municipal area of the city of Jerusalem marked on a map which was attached to the order and constitutes an integral part thereof, unless he was permitted to do so by an order issued on behalf of the GOC Home Front Command or according to a summons issued in the framework of an interrogation or legal proceedings under applicable law.

   It should be added that due to special humanitarian reasons raised by the petitioner in the objection submitted by him to the respondent against the order, which concern petitioner's son, the respondent decided to partially accept the objection. Therefore, on February 16, 2015, the

respondent signed an amending order which limited the prohibition imposed on petitioner's presence in Jerusalem and enabled the petitioner to live in his home in a-Tur neighborhood in East Jerusalem. The amending order also stipulated that the petitioner would be allowed to travel to and from his home solely through the route which was marked on the map attached to the amending order, which constitutes an integral part thereof.
The order is valid from November 30, 2014, through April 30, 2015 (the order mistakenly states that it is valid for a period of six months, but according to the dates which appear in the order itself, it is valid for a period of five months).

3. It should be further noted, as will be specified below, that the honorable court denied on March 19, 2015, petitions which were filed by three other East-Jerusalem residents who were removed from the city for a similar period, which raised arguments similar to the arguments raised in the petition at hand.

The severe deterioration of the security situation in Jerusalem during the second half of 2014

4. In the beginning of July 2014, the youth Muhammad Abu Khdeir, from the Shufat neighborhood in East Jerusalem, was murdered by Jewish terrorists. The shocking murder caused the security situation in Jerusalem to severely deteriorate during the second half of 2014, which included, *inter alia*, massive disruptions of public order coupled by stone throwing, fireworks and firebombs attacks against security forces and civilians, and other serious terror attacks of different types (ramming, shooting, stabbing and firebombs throwing). The deteriorating security situation reached its peak in the months of October – November 2014, when a wave of extremely severe terror attacks hit Jerusalem, in which ten people were killed.

5. According to the data of the Israel Security Agency (ISA), in 2014, over **370** terror attacks were carried out in Jerusalem, the vast majority of which occurred during the second half of the year, as compared to about **120** terror attacks throughout 2013 ("terror attack" for this purpose is an incident of firebombs throwing, shooting, stabbing, ramming, etc., as well as an incident in which medium and severe injuries were caused to civilians).

   A simple calculation indicates that the number of terror attacks in Jerusalem in 2014 was **almost three times** higher than their number in 2013.

   In addition, whereas throughout 2013, no one was killed in Jerusalem in terror attacks, during the second half of 2014, **eleven** people were murdered in Jerusalem in terror attacks. The number of people who suffered medium and severe injuries as a result of terror attacks in Jerusalem also increased from **four** throughout 2013, to **thirty five** in 2014.

   Among others, during the second half of 2014, the following severe terror attacks were carried out:

   a. A ramming attack on August 4, 2014, near route 1 in Jerusalem, in which one person was murdered and others were injured. On the very same day a shooting attack was executed by a terrorist who was riding a motorcycle, near the Mount Scopus tunnel. In that terror attack an Israeli soldier was shot and seriously injured.

   b. A ramming attack on October 22, 2014, along the route of the light rail near the Ammunition Hill in which two people were murdered and others were injured.

c. A shooting attack near the Begin Heritage Museum on October 29, 2014, in an attempt to murder Mr. Yehuda Glick, who was seriously injured in the terror attack.

d. A ramming attack along the route of the light rail on November 5, 2014, in which three persons were murdered and others injured.

e. A stabbing and shooting attack on November 18, 2014, in the Har Nof synagogue, in which five people were murdered and others injured.

All terror attacks specified above, in which eleven people were murdered and dozens injured, were executed by residents of the Jerusalem area.

6. Moreover. 2013 was characterized by many order disruption incidents in Jerusalem. According to ISA data, an average of **about 207** order disruption incidents occurred between January and November 2013 ("order disruption" for this purpose includes "clash incidents" with the security forces as well as incidents in which stones and fireworks were thrown etc.).

   During the first half of 2014, a very significant decrease was marked in the number of order disruption incidents in Jerusalem, as compared to the number of order disruption incidents during 2013 (**about 50** order disruption incidents per month according to ISA data).

   Following the murder of the youth Muhammad Abu Khdeir, the order disruption incidents in Jerusalem resumed much more forcefully, and according to ISA data, between July and November 2014, **about 300** order disruption incidents occurred per month. In December 2014, additional 100 order disruption incidents took place.

7. Moreover. 2014 was also characterized by **nearly a fivefold** increase in the number of security incidents on Temple Mount: from **22** incidents in 2013 in its entirety to **106** incidents in 2014.

   The significant increase in the number of security incidents on Temple Mount resulted in a significant increase in the need to use police/border police forces on the mountain. The increase in the number of security incidents on Temple Mount has also significantly increased the number of times that Jewish visitors were not permitted access to Temple Mount.

8. All data specified above clearly indicate that during the second half of 2014, the scope, severity and level of murderous terror and popular terror incidents increased sharply, which required the taking of the necessary measures to secure public safety and security.

Coping with the security incidents in Jerusalem during the second half of 2014

9. In an attempt to stop the severe outbreak of violence which engulfed Jerusalem during the second half of 2014, state authorities used mainly the ordinary criminal enforcement measures: detention and interrogation of suspects by the police and security forces, as well as by pressing charges against offenders who took part in criminal activity based on national motives in the city.

   In addition, Israel Polices has significantly reinforced the scope of police and border police forces in the city, particularly in the East Jerusalem neighborhoods.

10. In addition, in the framework of the efforts to restore peace and quiet to Jerusalem and along the exercise of enforcement powers on the criminal level, the Minister of Defense and the GOC Home Front Command exercised **prudently** – the administrative powers vested in them, in a

limited number of specific cases in which it was found that the criminal enforcement measures did not give sufficient solution to the essential security need of restoring security and order to the capital of Israel.

Among the measures taken, the Minister of Defense issued five administrative detention orders for East Jerusalem residents, and six orders according to regulation 119 of the Defence Regulations.

11. In the context of this petition it should be noted that the GOC Home Front Command issued on November 30, 2014 – by virtue of his authority according to regulations 6, 108 and 109 of the Defence Regulations – **five** orders prohibiting the presence of five East Jerusalem residents in the municipal area of Jerusalem for a period of five months (until April 30, 2015).

12. The objections submitted by four of the removed persons against the orders which were issued against them were fully rejected by the GOC Home Front Command, and therefore petitions were filed on their behalf with this honorable court (HCJ 703/15, HCJ 704/15, HCJ 978/15 and HCJ 1086/15). The petitioner in HCJ 978/15 also filed a petition against an order issued by the GOC Home Front Command prohibiting him from staying in the Judea and Samaria area for a period of about six months (HCJ 1664/15).

    The above mentioned five petitions were heard on March 16, 2015, by a panel presided by the Honorable President Naor.

    Upon the termination of the hearing, the legal counsel of the petitioner in HCJ 1086/15 notified that the petitioner did not wish the honorable court to review the privileged information underlying the order against him, and that the petitioner retracted the petition. The petition in HCJ 1086/15 was deleted.

    On March 19, 2015, judgment was given in the petitions in HCJ 703/15, HCJ 704/15, HCJ 978/15 and HCJ 1664/15. The honorable court denied the four petitions which had practically raised the same principle arguments raised in the petition at hand.

    A photocopy of the judgment in HCJ 703/15, HCJ 704/15, HCJ 978/15 and HCJ 1664/15 is attached and marked **RS/1**.

13. The objection submitted by the fifth resident – **the petitioner at hand** - was partly accepted by the military commander – and the prohibition established by the order which was issued against said resident was limited, in a manner that the prohibition imposed on his presence in the Jerusalem area for a period of five months remained in force, but he was nevertheless permitted to live in his home in the A-Tur neighborhood in East Jerusalem, to which he was allowed to arrive through a specific access road only.

14. It should be noted that in view of the special sensitivity of Temple Mount, in the framework of handling the security incidents which took place on the mountain in 2014, additional administrative powers were exercised, such as a prohibition imposed on certain rioters from entering Temple Mount, as well as declarations by the Minister of Defense of certain entities as un-authorized associations, by virtue of the authority of the Minister under regulation 84 of the Defence Regulations.

15. We wish to update that since December 2014, following the intensive activity of the police and the security forces, the number of terror attacks and riots in Jerusalem has gradually and

significantly decreased. However, the current tranquility is only relative, as attested by the additional ramming attack which occurred in Purim, Friday, March 6, 2015.

16. It should be noted, that according to security agencies, the stabilization and strengthening of a relative calmness in Jerusalem, in the attainment of which extensive efforts are invested, requires to continue to prevent, for the time being, the presence of the petitioner in Jerusalem (other than in his home in A-Tur neighborhood).

The main facts concerning petitioner's specific case

17. The petitioner, borne in 1977, is a resident of the A-Tur neighborhood in East Jerusalem.

18. According to information in ISA possession, the petitioner is a terror organization – Hamas – activist, and is involved in violent activity in Temple Mount against the security forces.

19. On April 23, 2014, the Jerusalem Magistrate Court removed the petitioner from Temple Mount for a 90 day period, in the context of a decision to release the petitioner from detention, subject to certain conditions.

    A photocopy of the decision of the Jerusalem Magistrate Court dated April 23, 2014, is attached and marked **RS/2**.

20. In addition, between the dates June 26, 2014 – October 25, 2014, the petitioner was prohibited from entering and staying in the Temple Mount complex, according to an order issued by the respondent by virtue of his authority pursuant to regulations 6, 108 and 109 of the Defence Regulations.

    A photocopy of the order dated June 26, 2014, is attached and marked **RS/3**.

21. On November 30, 2014, as petitioner's involvement in prohibited activity continued, and as it became clear that petitioner's removal only from Temple Mount was not sufficient for safeguarding public security and safety in Jerusalem, the GOC Home Front Command issued an order, by virtue of his authority under regulations 6, 108 and 109 of the Defence Regulations, whereby the petitioner was ordered not to enter, not to stay and not to be present in the municipal area of the city of Jerusalem, marked on a map which was attached to the order and constituted an integral part thereof, unless he was permitted to do so by an order issued on behalf of the GOC Home Front Command or according to a summons issued in the framework of an interrogation or legal proceedings under applicable law.

    The order entered into effect on November 30, 2014, and is valid until April 30, 2015 (the order mistakenly states that it is valid for a period of six months, but according to the dates which appear in the order itself, the order is valid for a period of five months).

    A photocopy of the order dated November 30, 2014, was attached as **Exhibit P/2 to the petition**.

22. On December 11, 2014, the petitioner submitted to the respondent an objection against the order.

    A photocopy of the objection was attached as **Exhibit P/3 to the petition**.

23. The petitioner was given the opportunity to raise his arguments against the orders also orally, and an oral hearing in the objection took place on December 22, 2014, before Lieutenant Colonel Udi Sagi.

    Photocopies of the transcript of the oral hearing in the objection, and a printout of the transcript made for the convenience of the honorable court are attached and marked **RS/4**.

24. As indicated by the facts of an indictment filed on February 9, 2015, against the petitioner with the Jerusalem Magistrate Court (CrimC 19037-02-15), on December 24, 2014, only two days after his objection was heard and before a decision was given therein – on or about 09:30 – the petitioner was arrested for having committed the offense of a breach of a lawful order, **as he took the law into his own hands** and stayed in his home in A-Tur neighborhood within the city of Jerusalem, contrary to the order being the subject matter of this petition.

    A photocopy of the indictment which was filed against the petitioner is attached and marked **RS/5**.

25. In any event, following arguments which were raised in the oral hearing in the objections of the five individuals who were removed from Jerusalem, it was decided to summon the petitioner for a police interrogation. According to information provided by the police, efforts to locate the petitioner in mid January 2015, including through his legal counsel – were unsuccessful.

26. On February 16, 2015, a reasoned response to petitioner's objection was delivered, which notified that the military commander decided to partially accept the objection due to special humanitarian circumstances raised by the petitioner in the context of his objection before the respondent against the order, which concerned petitioner's son.

    Therefore, on February 16, 2015, the respondent signed the amending order which limited the prohibition imposed on petitioner's presence in Jerusalem and permitted him to stay in his home in A-Tur neighborhood in East Jerusalem. The amending order also stipulated that the petitioner would be allowed to travel to and from his home solely through the route which was marked on the map attached to the amending order, which constitutes an integral part thereof.

    A photocopy of the notice dated February 16, 2015, of the decision made by the GOC Home Front Command in petitioner's objection was attached as **Exhibit P/4 to the petition**.

    A photocopy of the amending order dated February 16, 2015, was attached as **Exhibit P/5 to the petition**.

27. On March 11, 2015, the petitioner filed the above captioned petition with the honorable court.

The Legal Argument

28. The respondent will argue that the petition should be dismissed

    in limine since the court should not grant an equitable remedy to a petitioner who takes the law into his own hands. And beyond need also **on its merits**, in the absence of any cause for intervention in respondent's decision.

Dismissal of the petition *in limine* for taking the law into one's own hands

29. As described above, the petitioner decided to take the law into his own hands and enter Jerusalem despite the fact that he was prohibited from doing so by order, only two days after he had presented his arguments in the framework of the oral hearing of his objection against the order. Due to his violation of the order, criminal proceedings are currently pending against the petitioner in the Jerusalem Magistrate Court.

30. The honorable court held more than once that a petitioner who takes the law into his own hands – his petition should be dismissed *in limine*. "The court will not open its doors for a person who takes the law into his own hands, pays no respect to the provisions of the law and wishes to impose on the authority established facts. The prohibition against taking the law into one's own hands constitutes part of a broader rule which requires that a litigant who turns to the court and applies for remedy, acts with clean hands (…). This rule is defined as a threshold condition when a petition is filed with the High Court of Justice or the Court for Administrative Affairs. Therefore, a petition of a litigant who does not act with clean hands may be dismissed *in limine* without having his arguments heard on their merits. [HCJ 3483/05 **D.B.S. Sattelite Services (1998) Ltd. v. Minister of Communication**, TakSC 2007(3) 3822 (2007)].

    It was also so held in HCJ **Vaaknin v. Israel Land Administration** (reported in the Judicial Authority Website, given on November 27, 2007), where the words of the Honorable Justice (as then titled) Cheshin in HCJ 8898/04 **Jackson v. Military Commander in the West Bank Area**, TakSC 2004(4) 609 (2004), were cited with consent as follows:

> "This court held, in a host of judgments that a petitioner who takes the law into his own hands – should not be given the requested remedy and his petition should be dismissed *in limine*:
>
> > A rule from ancient times is that the High Court of Justice will not give remedy to those who take the law into their own hands. A person must decide in his heart if he requests remedy from the court or if he takes the law into his own hands. One cannot do both at the same time. Namely, the court will not give remedy to a person who turns to the court and at the same time takes the law into his own hands and wishes to impose established facts on the other party. This is a fundamental ruling in our jurisprudence and its logic is self evident. The petitioners breached said ruling, and for this reason we see no justification to hear their petition (HCJ 8898/04 **Jackson v. Military Commander in the West Bank Area** (not reported, October 28, 2004))."

    And see also, among many others: HCJ 1547/07 **Bar Kochva v. Israel Police**, TakSC 2007(3) 433 (2007); HCJ 7697/03 **Tanenberg v. State of Israel – Minister of Defense**, TakSC 2003(3) 2302 (2003); HCJ 6102/04 **Sheik 'Ali Mu'adi v. Minister of Interior**, TakSC 2005(3) 3926 (2005); HCJ 851/06 **Amona Cooperative Agricultural Association for Settlement v. Minister of Defense**, TakSC 2006(1) 1138 (2006).

31. In view of said well rooted rule, respondent's position is that the honorable court should not grant the petitioner at hand, **who took the law into his own hands**, equitable relief, and it is sufficient for the denial of the petition.

Beyond need – the petition should be dismissed on its merits

The normative Infrastructure

32. The normative source for the authority of the GOC Home Front Command to issue orders prohibiting a person from staying in a certain area within state limits, is embedded in regulations 108-109 of the Defence Regulations, which were made part of Israeli law by virtue of section 11 of the Law and Administration Ordinance, 5708-1948 (hereinafter: the **Law and Administration Ordinance**).

33. Regulation 109 of the Defence Regulations provides, in its Hebrew version, as follows:

> "(1) A Military Commander may make, in relation to any person, an order for all or any of the following purposes, that is to say —
>
> (a) **for securing that, except in so far as he may be permitted by the order, or by such authority or person as may be specified in the order, that person shall not be in any such area in Israel as may be so specified**;
>
> (b) for requiring him to notify his movements, in such manner, at such times and to such authority or person as may be specified in the order;
>
> (c) prohibiting or restricting the possession or use by that person of any specified article;
>
> (d) imposing upon him such restrictions as may be specified in the order in respect of his employment or business, in respect of his association or communication with other persons, and in respect of his activities in relation to the dissemination of news or the propagation of opinions.
>
> (2) If any person against whom an order has been made as aforesaid contravenes the terms of such order, he shall be guilty of an offence against these Regulations" [Emphasis added – the undersigned].

Regulation 108 of the Defence Regulations provides, in its Hebrew version, the objectives for which such an order may be issued as follows:

> "An order shall not be made by the Minister of Defense or by a Military Commander under this Part in respect of any person unless the Minister of Defense or the Military Commander, as the case may be, is of opinion that it is necessary or expedient to make the order for securing the public safety, the defense of Israel, the maintenance of public order or the suppression of mutiny, rebellion or riot."

34. The Defence Regulations were promulgated by the High Commissioner by virtue of the powers vested in him under Article 6 of the King's Order in Council (Defence), 1937, which provides, in section (1) of its English version, as follows:

"The High Commissioner may make such regulations (in this Order referred to as "Defence Regulations") as appear to him in his unfettered discretion to be necessary or expedient for securing the public safety, the defense of Palestine, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community."

35. The Defence Regulations were made part of the laws of state of Israel by virtue of section 11 of the Law and Administration Ordinance, which provides that:

> "The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such changes which may arise from the establishment of the State and its authorities."

36. According to case law, the normative status of the Defence Regulations in the state of Israel is that of primary legislation, and the honorable court held many times that the Defence Regulations were in force also at this time (see for instance: HCJ 680/88 **Schnitzer v. Chief Military Censor**, IsrSC 42(4) 617 (1989); HCJ 10467/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1) 810 (2003)).

The ruling concerning the status and validity of the Defence Regulation, in general, and of regulation 109 in particular, was summarized in HCJ 5211/04 **Vanunu v. GOC Home Front Command**, IsrSC 58(6) 644 (2004) (hereinafter**: Vanunu**), as follows:

> "6. The Defence (Emergency) Regulations, 1945 are primary Mandatory legislation, which upon the establishment of the State of Israel became - by virtue of section 11 of the Law and Administration Ordinance, 5708-1948 – part of Israeli law. Shortly after the establishment of the State it was argued before the Supreme Court that the Defence Regulations should be repealed (as required by the latter part of section 11 of the Ordinance), due to "the changes arising from the establishment of the State and its authorities". Rejecting this argument, the court ruled that the Defence Regulations remained in force and had been incorporated into Israeli law, and it was up to the legislature to change or repeal them (HCJ 5/48 **Lion v. Gubernik**, IsrSC 1 58). Over the years this ruling was reinforced many times; see, for instance, HCJ 680/88 **Schnitzer v. Chief Military Censor**, IsrSC 42(4) 617; and recently HCJ 10467/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1) 810). Petitioners' attorneys argued before us that the court's ruling according to which the Defence Regulations were part of Israeli law was mistaken, and that in any case it was time to abandon it, as it ran contrary to the values of the State and human rights as embodied in the Basic Law: Human Dignity and Liberty.
>
> …
>
> 7. I am not persuaded by the arguments of petitioners' attorneys, namely, that the orders issued against the petitioner constitute a

sufficient cause to reconsider the justification of the rulings established in **Lion** and **Bialer**. Over the past five decades the court has time and again repeated these decisions, adopted them and invoked them, so that they have become well-established rulings. For the court to deviate from such entrenched rulings it must be persuaded that there are weighty reasons for doing so. In the absence of such reasons, the best the court can do is to refer the petitioners to the legislature; (compare:…). Petitioners' attorneys did not offer weighty arguments to justify a reconsideration of the **Lion** and **Bialer** rulings.

Furthermore: even if the court accepted petitioners' argument that the Defence (Emergency) Regulations and regulation 6 of the State of Emergency Regulations (Exit from the Country) were not primary legislation, this would not be sufficient to abrogate them. Even if it were true that despite their incorporation into primary legislation they remained secondary legislation, they constitute in any event "protected laws" which section 10 of Basic Law: Human Dignity and Liberty secures from abrogation…

However, even if we were not faced with the obstacles that bar us from intervening in the binding validity of the State of Emergency Regulations, I would not accept petitioners' argument that the regulations must be repealed because they are clearly unreasonable. True, the implementation of emergency legislations - the ones that concern the present case and others that do not - injures not only the rights of individuals against whom they are implemented, but also injures the values that Israel, as a Jewish and democratic state, is obliged by its basic legislation to respect. Unfortunately, the implementation - like the very existence - of the emergency legislation is sometimes imperative, due to the fact that the State of Israel is still subject to danger and threats from within and without; and if this necessity was not so widely established, the case of the present petitioner attests to it. This does not mean that in actually implementing the emergency legislation the authority is free to ignore the basic rights of the affected individuals. The rule is that while the Basic Law has not derogated from the force of the protected laws, it does influence their interpretation. The same rule applies to emergency legislation. This means that though the Court does not examine the status of the emergency legislation while considering the tests of the limitation clause set in section 8 of the Basic Law, the Court is obliged to examine the justification of the implementation of an emergency legislation provision, as in the present case. That is to say, in its examination the court should not focus on the reasonableness of the given provision in the emergency legislation, as such, but rather on the justification of its implementation in the specific case brought before it. The court must base its examination on two criteria: whether the application of the emergency provision to a particular individual in the given circumstances meets its general purpose; and whether the injury caused to the individual by its application satisfies the test of

proportionality.

37. The question of whether or not it is justified to restrict the freedom of movement of the individual in a democratic state, by using administrative measures such as the measure established in regulation 109 of the Defence Regulations, was discussed by the honorable court in HCJ 6358/05 **Vanunu v. GOC Home Front Command**, TakSC 2006(1), 320 (2006), as follows:

> "Nevertheless, the right of the individual to freedom of movement and personal liberty is not absolute. Its implementation by law is relative, and it is subject to limitations where it should be balanced against essential and contradicting social interests and values. The most conspicuous of these values is the interest to protect state security. Public safety and security is a fundamental value for the existence of a human society. In its absence, society cannot survive, and the individual cannot materialize his life as such and have his basic rights upheld. Under certain circumstances complete freedom of movement may put public safety at risk. Therefore, the legislator granted the competent authority powers which enable it to limit the personal liberty and movement of an individual within the country as well as in the entry into and exit therefrom, for the purpose of securing state security. Case law recognized the importance of the security value as a general public interest which may defeat, under certain circumstances, the right to freedom of movement. The acceptable legal concept is that in the conflict created between the right of the individual to fully materialize his personal liberty and a conflicting public interest, balancing should be made, in the framework of which the conflicting values are weighed and their relative weight is evaluated. The proper intersection point, the product of said balancing, will determine which value, among the conflicting values, prevails, and whether it is possible and proper, in the hierarchy of the relative strengths of the conflicting values, to uphold one value while abrogating the other, or uphold both values subject to the determination of the proper relations between them. In the conflict between freedom of movement and public security vertical balancing was made, which regards security as a prevailing value (HCJ 448/85 **Daher v. Minister of Interior**, IsrSC 40(2) 701; **Horev**, *ibid*, page 37). However, even when vertical balancing is made, the injury inflicted on the individual should be limited to the maximum extent possible, without jeopardizing the security purpose, and under certain circumstances certain risks may have to be assumed in that regard." (*Ibid*., paragraph 11 of the judgment).

38. Hence, the status of the Defence Regulations remained in full force throughout the years of the state, as well as after the enactment of the Basic Law: Human Dignity and Liberty, which affects the manner by which the Defence Regulations are interpreted and used. The honorable court shortly commented on the above in its judgment in HCJ 8084/02 **Abassi v. GOC Home Front Command**, IsrSC 27 (2) 55 (2003), as follows:

> "Respondent's actions are entrenched in regulation 119 of the Defence (Emergency) Regulations. These regulations are "… law (*din*) in force prior to the commencement of the Basic Law (section 10 of the Basic Law: Human Dignity and Liberty), and therefore, the Basic Law cannot infringe on their validity. The power to revoke or amend them is therefore vested with the legislator. Nevertheless, the interpretation of the regulations should be made against the backdrop of the basic laws.

> Therefore, the power vested in the respondent under regulation 119 should be exercised proportionately (See HCJFH 2161/96 **Sharif v. GOC Home Front Command**…)"

39. In conclusion of this issue, it should be noted that indeed, in several cases, the Knesset revoked certain provisions of the Defence Regulations. Thus, for instance, and considering petitioner's arguments concerning his ostensible expulsion, it should be emphasized that the Defence Regulations which were revoked included, *inter alia*, regulation 112 of the Defence Regulations which constituted the lawful source for said authority (section 12 of the Emergency Powers (Detentions) Law, 5739-1979); in addition the Defence Regulations which limited the immigration (*Aliya*) of Jews to Israel were revoked (section 13(a) of the Law and Administration Ordinance); The regulation permitting judicial corporal punishment of whipping was abolished (section 2(b) of the Punishment of Whipping (Abolition) Law 5710 – 1950); and the regulation permitting the denial of the right to leave the country without a permit (section 3 of the Emergency Regulations (Foreign Travel) (Amendment) Law 5721-1961).

    Other Defence Regulations were abolished upon the enactment of new laws which regulate issues that were regulated in the past by the Defence Regulations – see for instance: section 27(c) of the Emergency Land Requisition Law of 5710-1949; Section 25(a)(3) of the Explosives Law, 5714-1954; and the Emergency (Detentions) Law, 5739-1979.

40. It should be further added that about a year and-a-half ago the Government submitted to the Knesset a bill for the amendment of the Defence Regulations (Emergency)(Revocation of Regulations), 5773-2013 (Government bill 5771 (782) page 992, July 2, 2013). The bill proposes to abolish certain Defence Regulations including regulations 108-109.

    It should be noted that the revocation of the Defence Regulations according to said bill is conditioned upon the enactment of the Fight against Terrorism Law. The proposed Fight against Terrorism Law is about to assemble under one roof the main legislative arrangements concerning the fight against terrorism. The proposed Fight against Terrorism Law is meant, *inter alia*, to replace some of the current arrangements which exist in various enactments, and promulgate, *in lieu* thereof, new arrangements which reconcile with the basic laws on human rights (see on this issue the explanations to the bill, pages 992-994). As to the alternative arrangement proposed for Defence Regulations 108-109, see section 120 of the proposed Fight against Terrorism Law, 5771-2011 (Government bill 5711 (611), page 1408, July 27, 2011)).

    Nevertheless, the Regulations pursuant to which the order was issued in petitioner's matter remained in force, and therefore, there is no preclusion which prevents the use thereof, in appropriate cases.

<u>As to the arguments against the grant of the right to be heard *ex post factum*</u>

41. The petitioner argues against the fact that he was granted the right to raise his arguments only after the order entered into effect.

42. With respect to the grant of the right to be heard only after the order was issued, the respondents will argue that in view of the serious security situation which existed in Jerusalem by the end of November 2014, it was imperative for the immediate prevention of the severe risk posed by the petitioner, and the concern that the grant of the right to be heard in advance would enable the petitioner to escape the authorities, and thwart the need to give the order an immediate effect.

43. Indeed, the customary rule in administrative matters is that the person injured by the administrative procedure should be heard before the procedure is carried out. However, in a host of judgments, the honorable court held that in exceptional cases, where the grant of the right to be heard prior to the execution of the administrative procedure, may frustrate the purpose of the

procedure and cause the realization of the risk which the administrative procedure was designed to prevent, a hearing in retrospect may be sufficient.

It was so held in HCJ 3486/94 **Masalha v. Planning and Building Committee**, IsrSC 48(5) 291 (1994):

> "In these or similar cases, a preliminary hearing does not reconcile with the nature of the authority or with the purpose of the law, or it may frustrate the proper functioning of the administrative authority, or materially prejudice another important interest. The balancing of interests in such cases shows that the injury caused to the person as a result of a hearing in retrospect is not as weighty as the injury caused to another interest as a result of a preliminary hearing. Therefore, in such cases, a person should be satisfied with a hearing in retrospect."

44. In cases such as the case at hand there is an inherent concern that the grant of the right to be heard before the decision is made may frustrate, and at least create an opportunity to frustrate the order. Namely, in such cases there is a concern that the grant of the right to be heard before the decision is made will cause the person against whom the order is directed to avoid receiving it and continue with his prohibited security activity, which will actually thwart the realization of the order and particularly, its immediate – **and required** – entering into effect.

45. The respondent wishes to draw the attention of the honorable court to arguments similar to those raised by the petitioner at hand, which were denied in HCJ 4348/10 **Ofan v. GOC Home Front Command** (reported in the Judicial Authority Website, June 29, 2010; hereinafter: **Ofan**), as follows:

> This applies also to petitioner's argument that the order should be revoked in view of the fact that he was not given the opportunity to be heard before it was issued. The state representative responded to said argument by saying that under the circumstances, the conduct of a hearing before the decision was made would have actually frustrated the realization of the order, and therefore it was justified to hold a hearing in retrospect, by submitting an objection to the respondent, a right which was indeed realized by the petitioner. The state representative also noted that when the order was served on the petitioner, he was taken for an interrogation by the Israel Police where he was presented with the suspicion that he participated in a disorderly conduct and incitement against Arab population in Pisgat Zeev neighborhood, a suspicion to which the petitioner refused to refer. As is know, fundamental principles from ancient times are that the administrative authority may not violate a person's right unless it has previously granted him the opportunity to present his arguments before it (HCJ 3/58 **Berman v. Minister of Interior**, IsrSC 12 1493, 1508 (1958)). In view of the fact that the hearing, by its nature, is intended to influence the decision, the main road is to conduct a preliminary hearing, before the decision (HCJ 654/78 **Gingold v. National Labor Court**, IsrSC 35(2) 649, 655-656 (1979)). However, this court has long recognized in its judgments - the exceptional possibility - of holding a hearing in retrospect. On this issue it was held in HCJ 2911/94 **Baki v. Director General of the Ministry of Interior**, IsrSC 48(5) 291 (1994) (hereinafter: **Baki**), that a hearing may be held after the administrative authority made its

> decision only in exceptional cases, in which "a preliminary hearing does not reconcile with the nature of the authority or with the purpose of the law, or it may frustrate the proper functioning of the administrative authority, or materially prejudice another important interest." (Ibid., page 305; and see also: HCJ 4706/02 **Salach v. Minister of Interior**, IsrSC 56(5) 695, 707 (2002); AAA 1038/08 **State of Israel v. Ghabitz**, paragraph 27 of the judgment of Justice Rubinstein ([reported in Nevo], August 11, 2009)). It is clear that in the case at hand a prior hearing could not have been held, since had the petitioner known of the intention to issue the order against him prior to the decision, a material risk existed that he would have avoided receiving it, as he did with respect to a previous order which had been issued against him in the Area, and in so doing would have thwarted the important purpose of the order, as described above. Moreover, the respondent had a material basis to assume that the petitioner was also trying to avoid service of the current order and in any event, a preliminary hearing would have thwarted the purpose of the order or the service thereof. Under these circumstances, the exception established in **Baki,** according to which a later hearing could be held, which in the case at hand was given by granting the opportunity to file an objection against the decision to issue the order. Considering the above, and in view of the entire circumstances described above, we are of the opinion that in connection with the order being the subject matter of the petition at hand, there was no other alternative but to hold a hearing in retrospect for the petitioner, and therefore, from this aspect as well there was no flaw in the issue of the order." [*ibid.*, paragraph 5 of the judgment; emphasis added – the undersigned].

46. Considering the above – in view of the nature of the authority; the purpose of the enactments pursuant to which it was exercised, and particularly in view of the exigent security need to give the order immediate effect – respondent's position is that there was no flaw in the grant of an opportunity to file an objection against the order with the respondent by way of a "hearing in retrospect" (see on this issue also paragraph 15 of the judgment in HCJ 703/15, HCJ 704/15, HCJ 978/15 and HCJ 1664/15).

47. Under these circumstances, the respondent will argue that petitioner's arguments on this level do not reveal any cause for intervention with the order issued by the respondent in this case.

As to the argument concerning the failure to disclose the facts and information underlying the order

48. The petitioner argues that the facts and information underlying the order were not disclosed to him, and therefore his ability to challenge the allegations raised against him was prejudiced.

49. The respondent will argue that this argument should be rejected.

50. The petitioner received an open paraphrase which specified the reasons for the issue of the order against him, according to which he was a terror organization (Hamas) activist, involved in violent activity in Temple Mount against the security forces.

    The respondent will argue that the open paraphrase specifies, to the extent possible for reasons of privileged information, the actions attributed to the petitioner due to which the order was issued, and that the paraphrase which was given to the petitioner is sufficient and proper under the

circumstances (see a similar matters: the **Ofan** case; the judgment in HCJ 703/15, HCJ 704/15, HCJ 978/15 and HCJ 1664/15).

Moreover. In petitioner's police interrogation, he was confronted with the suspicions raised against him in a manner which adds to the content of the paraphrase.

51. The respondent will argue that the information accumulated in petitioner's matter is reliable and cross-referenced, and that the order was issued based on solid administrative evidence.

    To the extent the court finds it necessary, and subject to petitioner's consent, the respondent will present before the honorable court the privileged information in the possession of security agencies in petitioner's matter, *in camera* and *ex parte* only.

As to the arguments against the proportionality of the order

52. The petitioner argues that the scope and duration of the order are not proportionate.

53. The order issued against the petitioner was intended to prevent the risk posed by the petitioner to the security and public safety in Jerusalem.

    As to the risk posed by petitioner's presence in Jerusalem, it should be clarified that according to the privileged information accumulated in petitioner's matter, he had not ceased his negative security activity even during the period in which he was prohibited from entering Temple Mount. It was therefore concluded that his removal from Temple Mount alone was not sufficient to prevent the threat posed by him to the security and public safety in Jerusalem, and that under the circumstances of the matter his removal from the entire city was required.

54. As aforesaid, having considered petitioner's objection and due to the special humanitarian circumstances, the respondent decided to partially accept petitioner's objection, and allow him to return to live in his home.

    However, the military commander concluded that the petitioner could not be permitted to stay in the other parts of Jerusalem, with the exception of his own home, for decisive security reasons. The military commander also concluded that under the circumstances of the matter there was no room to shorten the order's five month term.

55. The respondent will argue that considering petitioner's actions underlying the order issued against him, his removal from Jerusalem for a period of five months (other than from his private home as of February 22, 2015) is completely proportionate, and that there is an absolute security need to remove the petitioner from all other parts of Jerusalem for the period stipulated in the order.

56. The respondent will argue that it is clear and obvious that the injury inflicted on the petitioner at hand is significantly smaller than the injury inflicted on the other four residents against whom similar orders were issued. Said four residents were prohibited from staying in East-Jerusalem for the same period. The petitioner, however, was permitted, commencing from February 22, 2015, to return to live in his home in A-Tur neighborhood in Jerusalem.

    Therefore, with respect to the injury inflicted on the petitioner, the words of the court in paragraph 16 of the judgment in HCJ 703/15, HCJ 704/15, HCJ 978/15 and HCJ 1664/15, apply even more forcefully to our case:

> With respect to the proportionality issue, this case concerns a removal rather than a detention, for a short and not very long period. See recently HCJ 1656/15 **Etinger v. Military Commander of the West Bank Area** (March 16, 2015), where the removal was for a longer period, and

obviously, each case according to its circumstances. And simply, as was stated more than once, there is no room to compare this sanction with more severe ones.

Conclusion

57. The respondent will argue that the petition should be dismissed *in limine* in view of the fact that the petitioner took the law into his own hands, and beyond need, also on its merits, in the absence of any cause for the intervention of the honorable court.

58. The facts specified in this response are supported by the affidavit of "Arik", Head of the ISA Counter-Terrorism Branch in Jerusalem.

Today, Nissan 9, 5775

March 29, 2015

(signed)

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Aner Helman, Advocate
Deputy Manager of HCJ Department
At the State Attorney's Office