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At the Supreme Court Sitting as the High Court of Justice **HCJ 2150/96**

In the matter of: 1. __________ Harizat, I.D. ___________

2. Hamoked: Center for the Defence of the Individual

Both represented by counsel, Att. Andre Rosenthal

Lic. No. 11864

33 Jaffa Street, Jerusalem 94221

Tel. 250458; Facsimile: 259626

The Petitioner

v.

Attorney General

The Respondent

Petition for *Order Nisi*

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause why he does not press criminal charges against the interrogators of _______ Harizat, deceased.

The grounds for the petition are as follows:

1. A. Petitioner 1 is the brother of the deceased _________ Harizat (hereinafter: the "**deceased**"), who was detained on April 22, 1995 on or about 1:30 a.m. at

his home in Hebron, and was transferred, that night, to a detention facility in Jerusalem. His interrogation commenced at 4:45 a.m. Until 10:30 a.m., the deceased was interrogated by one interrogator, with three additional interrogators alternately participating in the interrogation. During that time he was shaken eight times, while held by the lapel. From 10:30 a.m. to 1:45 p.m., the deceased was interrogated by another interrogator. During this interrogation the deceased was shaken once. From 2:00 p.m. the deceased was interrogated by two other interrogators. During that time the deceased was shaken three times, once as described above and twice while held by his shoulders. His interrogation was stopped at 4:10 p.m., when his interrogators realized the deceased was breathing rapidly and was no longer answering questions. Furthermore, liquid secretion ran from his mouth and nose, in a manner resembling bubbles. The deceased was breathing through his mouth and moaning. A paramedic tried to treat him. The deceased did not respond. He was transferred to the clinic, and at 6:58 p.m. an ambulance arrived to the detention facility to transfer him to the hospital. He died in Hadassah Ein Kerem Hospital on April 25, 1995.

Petitioner's affidavit is attached hereto and marked P1. It should be noted that the affidavit was transferred to the undersigned by facsimile and the Honorable Court is hereby requested to accept it.

B. Petitioner 2 is a human rights organization that has taken upon itself to assist victims of violence, cruelty or deprivation of basic human rights by state authorities (including local authorities), especially those who need assistance in making their complaints to the relevant authorities, including submitting petitions to the Supreme Court sitting as a High Court of Justice either on behalf of a person claiming that his basic rights were violated or as a public petitioner.

2. Following the deceased's death the Police Investigation Unit (hereinafter: the "**PIU**") requested the Magistrate Court in Jerusalem to grant an order directing to perform an autopsy of the body.

3. Dr. Pounder, Director of the Department of Forensic Medicine at the University of Dundee, Scotland, who was present during the autopsy of the deceased's body at the request of the deceased's family, found as follows:

> "He suffered from congenital bone disease which resulted in irregular bony outgrowths which were most obvious around his knees. This congenital bone disease played no part in his death but accounts for his short stature of 151 cm and his slight weight of 44.3 kg.

> Death was the result of injuries and the pattern of injuries was unusual. The pattern of injuries was equally remarkable for what was not present as it was for what was present.
>
> Bruising to the body was almost entirely concentrated on both sides of the upper chest. The only other area of bruising present was on the right ankle…
>
> …
>
> There were no injuries to the neck, face or scalp and there was no fracture of the skull nor of the facial bones. There was a haemorrhage within the skull overlying the brain at the top of the head on the right side (right parietal sub-dural haematoma). A haemorrhage of this type is produced as a result of sudden jarring movements of the head, as a consequence of which shearing forces sever small blood vessels bridging the space between the brain and the inner surface of the skull. Such a haemorrhage may be produced as the result of an impact to the head but in the case of Mt Harizat there was no injury to the head or face to account for it. Such a haemorrhage may also be produced by violent shaking of the person and this is well described in young children ("the shaken baby syndrome"). … Microscopic examination of the brain and eyes, conducted after the autopsy by Israeli pathologists, disclosed the presence of diffuse axonal injury to the brain and retinal injury. This provides further evidence to support the conclusion that the cause of death was violent shaking.
>
> The bruises to the front of the upper chest are consistent with repeated blows, possibly in association with shaking whilst gripping the clothing, or alternatively forceful gripping. The pattern of injuries to the upper chest and the presence of the sub-dural haemorrhage, diffuse axonal injury, and retinal injury taken together indicates that the method of injury was violent shaking.

Copy of Dr. Pounder's opinion is attached and marked P2.

Dr. Hiss, director of the Abu-Kabir Institute of Forensic Medicine, a physician since 1973, pathologist since 1975 and a forensic pathologist since 1981, found in section 13 of his opinion which is based on documents, as follows:

> Since the deceased was shaken a few times during his interrogation on April 22, 1995, it may be reasonably assumed that the fatal damage to his brain was caused by the shaking.

Copy of this opinion is attached and marked P3.

4. Following the PIU investigation, the State Attorney at the time, with respondent's consent, adopted the recommendations submitted to her and took disciplinary action against one of the deceased's interrogators for having shaken the deceased not in accordance with the guidelines of the Israel Security Agency [ISA, formerly known as the General Security Service or Shin Beit, translator’s note]. This interrogator apparently shook the deceased while holding his shoulders; other interrogators shook the deceased while holding his lapel.

5. Following this decision, and after additional findings concerning the interrogation were obtained, petitioner 1 filed an appeal in accordance with section 64 of the Criminal Procedure Law [Consolidated Version], 5742-1982, on October 17, 1995. A copy thereof is attached hereto and marked P4.

6. On February 6, 1996, respondent's decision to reject the appeal was received by petitioners' counsel. A copy thereof is attached and marked P5.

7. The respondent determined that he did not have sufficient evidence to substantiate the causal connection between the manner by which the deceased was interrogated and his death; meaning, that it was impossible to prove who, amongst the deceased's interrogators, was the one who caused the deceased's cerebral concussion, which eventually caused his death.

   To that matter see the words of Mr. Nitzan, respondent's counsel, in a statement given before the hearing in HCJ 5380/95 **The Public Committee Against Torture in Israel v. the Attorney General et al.:**

   > 17. This is coupled by an additional reason pertaining to the difficulty in proving, at the level of certainty required by criminal law, that there was a causal connection between the action of any one of the interrogators and the deceased's death.

8. A. The petitioners claim that the respondent's decision not to press criminal charges against the deceased's interrogators derives mainly from the fact that his interrogators followed ISA internal guidelines allowing to shake interrogees. It is presumed that in accordance with such guidelines, an interrogee may be shaken while held by his lapel, but may not be shaken while held by his shoulders. Since the PIU investigation indicated that only one interrogator had shaken the deceased while holding his shoulders, a complaint

was filed only against that person and disciplinary action was taken against him.

B. The status of these guidelines, which allow causing physical suffering to interrogees, was never examined in any legal proceeding. Past attempts to have them reviewed by this court have failed.

C. To that matter see the words of Mr. Nitzan in the statement given by him within the framework of said HCJ 5380/95:

> 16. Since the shaking method was used within the framework of the "necessity" defense, as explained above, and since the investigative material shows that no one foresaw – nor could have foreseen – that as a result of the use of this method the deceased would expire or suffer other severe damage, the PIU concluded that criminal charges should not be pressed against any one of the deceased's interrogators.

9. There is no dispute that the deceased was a victim of "grievous harm" as defined in section 34(24) of the Penal Law, 5737 – 1977. Furthermore, there is no dispute that ISA interrogators caused this grievous harm.

    A. Pressure exerted by a public servant against a person in order to extract a confession to an offense or information is defined in section 277 of the penal code as an offense.

    B. Causing grievous harm to another unlawfully is forbidden under section 333 of the penal law.

10. Within the framework of HCJ 3846/95 **Harizat v. the Police Investigation Unit,** petitioner's counsel received excerpts from statements made by ISA interrogators regarding their state of mind during the interrogation. This document indicates that in the past, no interrogee had collapsed as a result of shaking. Section 7 of a letter sent by Attorney Shendar, director of the PIU to Attorney Arad, which was forwarded as a response to the above HCJ, states as follows:

    > Such or any similar event has never occurred in the past and this is the first time that an interrogee collapses and dies as a result of the use of such method in an interrogation.

    The words were carefully chosen and it was not without reason that the words "an interrogee collapses and dies" were written down; meaning that there were

cases in the past where an inerrogee has collapsed, but until the deceased's case, as these interrogators claim, no interrogee has died.

A copy of this document is attached hereto and marked P6.

11. The petitioners claim that the fact that it is impossible to determine who amongst the deceased's interrogators is the one who caused the initial cerebral concussion which eventually lead to the interrogee's death, is not relevant. In accordance with the provisions of section 29(b) of the penal law:

    > Participants in the commission of an offense, while perform acts for its commission, are joint perpetrators, and it is immaterial whether all acts were performed jointly, or some were performed by one person and some by another.

12. A. Within the framework of his discretion, the respondent should first examine the existence of *prima facie* evidence as well as a public interest in pressing charges. In this case the respondent determined that there was *prima facie* evidence but has further determined that the interrogators could claim, in their defense, that they had acted within the framework of section 34(11) of the penal law and that they could rely on the necessity defense.

    The petitioners claim that only in cases where the facts are unequivocal and cannot be otherwise interpreted, may the necessity defense be taken into account as part of the respondent's considerations as to whether or not charges should be pressed.

    B. In this case, the document submitted by Attorney Shendar, PIU director, to the Magistrate Court, within the framework of the case concerning the inquiry into the circumstances of the deceased's death, provides as follows:

    > 6. The investigation conducted by the PIU indicates that the deceased, who was detained early that day, was interrogated in connection with activity in an Izz-ad-Din al-Qassam cell in Hebron, and in connection with his relationships with the leaders of the cell, to which many murders are attributed. During his interrogation, the interrogators held his clothes, in the front part of his body, and shook him. They repeated this action until the afternoon.

    C. Section 34(11) of the penal law provides as follows:

    > No person shall bear criminal responsibility for an act that was immediately necessary in order to save his own or another individual's life, freedom, person or property from a real danger of severe injury,

> due to a given state of affairs during the commission of the act and such person had no alternative but to commit the act.

D. The petitioners claim that the respondent has not exercised his discretion properly in determining that the deceased's interrogators, who have committed criminal acts against the deceased, may rely on the necessity defense. The respondent was too quick to waive the legal requirement concerning an immediate necessity to save a person's life, or real danger of severe injury. In so doing, the respondent has taken into account an extraneous consideration, and for this reason too, this Honorable Court should intervene.

E. The petitioners claim that the respondent's failure to serve an indictment simply because the accused might invoke any one of the defenses set forth in law is unreasonable, and in the case at hand, a decision made based on such a consideration is unreasonable. The mere fact that an accused might claim at the commencement of his trial that he is mentally incompetent does not prevent, in and of itself, serving an indictment. Only after the district psychiatrist determines that such an accused is unable to differentiate between right and wrong would proceedings be stayed by the court adjudicating the case. The respondent did not initiate any psychiatric evaluation before serving the indictment.

F. This Honorable Court has already expressed its opinion that in the event that the attorney general concludes that "the alleged facts, even if fully proved, do not legally constitute a criminal offense", the court may intervene relatively easily. Honorable Justice Bach has so determined in HCJ 223/88 **Sheftel v. the Attorney General et al.** IsrSC 43(4) 356, page 368 opposite the letter D:

> If respondent 1 determines that there is sufficient *prima facie* evidence to factually establish the suspicion against the defendant, but he is of the opinion, that in accordance with the interpretation of the law, an indictment may not be served for such acts, then, in principle, this court may, without special difficulty, intervene in such a decision, if it is convinced, that the attorney general was wrong in his interpretation of the law.

G. The petitioners further claim that respondent's determination that the deceased's interrogators may rely on the necessity defense, includes an additional determination, which is that in addition to the disciplinary offense, the interrogators also committed criminal offenses during the interrogation of the deceased.

13. The respondent did not exercise the powers granted to him under criminal law based on independent discretion. The petitioners claim that he gave excess weight to the fact that the case involves interrogators acting for the ISA. Thus, he has violated a basic value of our system, the equality of all persons before the law.

14. A. The petitioners claim that the respondent gave the ISA guidelines concerning interrogation methods status which was not granted to them by law.

    B. The petitioners claim that the respondent was subject to the instructions and policy of the Minister of Defense and the Prime Minister who is the person responsible, under the law, for ISA activities.

15. The petitioners wish to point out that an *order nisi* was granted in a public petition concerning the failure to press criminal charges against the interrogators of the deceased. The case is HCJ 5380/95 **The Public Committee Against Torture in Israel and Israeli-Palestinian Physicians for Human Rights v. Attorney General et al.;** A copy of the *order nisi* is attached hereto and marked P7.

16. Therefore the Honorable Court is hereby requested issue an order instructing the respondent to appear and show cause why he does not press criminal charges against the deceased's interrogators and render such order absolute.

Jerusalem, February 21, 1996

[signed]

Andre Rosenthal, Adv.

Counsel for the petitioners

Affidavit

I, the undersigned, __________ Harizat, having been warned to state the truth and that I shall be subject to the penalties prescribed by law should I fail to do so, hereby state in writing as follows:

1. I am the petitioner in the petition attached hereto.

2. To the best of my knowledge and based on the documents which were made available to me, the facts in section 1 of the petition are true.

3. After the content of my affidavit was translated into Arabic, I hereby declare that this is my name, this is my signature and the content of my affidavit is true.

[signed]

____

Declarant's signature

I hereby confirm that on February 27, 1996, the above, who has identified himself by identification card number _____________, appeared before me, Adv. Adam Al-Tamimi, License No. 569, and having warned him to state the truth and that should he fail to do so he would be subject to the penalties prescribed by law, he confirmed to me that the content of his above statement was true and signed it.

[signed]

____

Advocate