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## **The Jerusalem Magistrates Court**

**CC 6879/07 Fakhuri *et al.* v. Romanenko *et al.***

**Before the Honorable Deputy President Irit Cohen**

**The Plaintiffs**

- 1. \_\_\_\_\_ Fakhuri**
  - 2. \_\_\_\_\_ Fakhuri**
- Represented by counsel. Adv. Muaiad Mi'ari

**v.**

**The Defendants**

- 1. Igor Romanenko**
  - 2. Michael Ben Arush**
  - 3. Roi Barzilai**
  - 4. State of Israel - the Israel Police**
- Represented by the Jerusalem District Attorney's Office (Civil)

### **Judgment**

1. The claim before me concerns compensation for damage caused to the Plaintiffs in the course of an incident that took place on June 3, 2003 during which Plaintiff 1 was allegedly humiliated and beaten by a number of police officers in the vicinity of the Lions Gate while passing through with his son, Plaintiff 2.
2. The Defendants do not deny that the incident occurred, but claim that the account given by Plaintiff 1 is far from true. Defendant 4, similarly, does not deny that the conduct of the police officers, or some of them, towards Plaintiff 1 was flawed, as concerns the manner in which he was searched. It does allege that the search of the Plaintiff was not unlawful in itself, but only the manner in which it was carried out.

3. The Defendants contend that the police officers had no reason to harass Plaintiff 1 specifically, and that if it were not for his antagonistic behavior towards them, his initial refusal to present an identity card and his attempt to leave the area before the inspection of the identity card was completed, the police officers would not have searched him, an act that led to his violent behavior and detention.
4. The Defendants deny the Plaintiffs' claim of violence towards Plaintiff 1, apart from the need to restrain him in light of his violent resistance to a search.
5. Defendant 3 was the subject of a disciplinary proceeding and was reprimanded by his commander for his conduct during the incident.
6. The Plaintiffs and Defendants 1-3 testified.
7. The Plaintiffs submitted the expert opinion of psychiatrist, Dr. Omaima Farhat as evidence on their behalf.
8. The Defendants submitted the expert opinion of psychiatrist, Dr. Anneke Ram, as evidence on their behalf.
9. Dr. Gideon Razoni was appointed psychiatric expert on behalf of the Court.

### **The Plaintiffs' Testimony**

10. Plaintiff 1 stated in his affidavit that on June 3, 2003 he walked with his son, Plaintiff 2, towards the al-Aqsa Mosque through the Lions Gate (Section 3 of the affidavit of Plaintiff 1). A police officer and a number of Border Police officers stood at the entrance to the gate. The police officer asked the Plaintiff to present his identity card. When the Plaintiff showed the card to the officer, the officer mocked him saying "look at that mug of yours" (Section 3b of the affidavit of Plaintiff 1). An argument developed between Plaintiff 1 and the officer due to the officer's behavior, at the end of which the police officer stated that he wanted to search the Plaintiff (section 3c of the affidavit of Plaintiff 1).
11. Plaintiff 1 stated in his affidavit: "**I agreed to a search on condition that the search take place at the station and not in the street in front of passersby and particularly not in front of my son who was only 10 years old at the time. It must be noted that there is a police station where a search can be conducted a few meters from there, only 3-5 meters. When I told the police office to conduct the search there, he said that he did not have the key and that if I did not comply he would use force**" (section 3c of the affidavit of Plaintiff 1).
12. The Plaintiff also stated: "**As aforesaid, the police officer refused to conduct the search in a secluded place and asked me to move the boy way. I asked him why and the police**

**officer replied “so that he does not see what we are about to do to his father”. The police officers spoke among themselves and the police officer asked the two Border Police officers to put my face against the wall. The police officer said “put him against the wall and if he resists we’ll say that he attacked you”** (section 3c of the affidavit of Plaintiff 1).

13. According to the Plaintiff’s affidavit: **“Two Border Police officers grabbed me and pushed my head against the wall. As a result I was injured on the left side of the head and the left shoulder. Suddenly, and for no reason, the Border Police officers beat me all over my body, including and mostly on the right lower back and upper back”** (section 3d of the affidavit of Plaintiff 1).
14. The Plaintiff testified that **“Following the beating, a police patrol car was called. There were two soldiers inside. They transferred me and my son and two Border Police officers to the Kishle police station where I was questioned on suspicion of assaulting a police officer!!”** (section 2e of the affidavit of Plaintiff 1).
15. Plaintiff 1 stated that the investigator did not record his full statement, disregarding the part of the statement that referred to his assault by the police officers. For this reason, he refused to sign the statement at the end of the interrogation (section 3f of the affidavit of Plaintiff 1).
16. It cannot be understood from the Plaintiff’s affidavit whether a search was ultimately carried out. In the statement collected from him on the day of the incident on suspicion of assaulting police officers he said that the police officers stated that he attacked them after the search (lines 39-40 of the statement).
17. The police officer the Plaintiff refers to in his affidavit is Defendant 3, Roi Barzilai. The Border Police officers are Defendants 1 and 2, Igor Romanenko and Michael Ben Arush. For the sake of convenience, the Defendants will be referred to by their names.
18. In the affidavit collected on the day of the incident, the Plaintiff stated that Roi Barzilai asked him to stand with his face to the wall (line 17 of the affidavit). He said that he would not stand with his face to the wall (line 18 of the affidavit), following which, Roi Barzilai said he wanted to conduct a search (line 19 of the affidavit). The Plaintiff asked that they take him to the station for the search. An argument developed whether the search would be conducted at the site of the incident (line 22 of the affidavit) and the Plaintiff asked that the search not be conducted in the presence of his son.
19. According to the Plaintiff’s testimony, Igor Romanenko held his arms from behind, and the second officer kicked him (line 30-31 of the statement).
20. Plaintiff 2 stated in his affidavit that he remembers walking with his father for prayers at the al-Aqsa Mosque (Section 5 of the affidavit of Plaintiff 2). He saw the police officers

attack and begin to beat his father. He was frightened and began to cry and shout like crazy (section 7 of the affidavit of Plaintiff 2).

### **The Defendants' Testimony**

21. Michael Ben Arush and Igor Romanenko served in the Border Police on the relevant date. They were stationed at a post in the Lion's Gate along with Roi Brzilai (section 3 of the affidavits of Michael Ben Arush and Igor Romanenko).
22. The assignment of Defendants 1-3 was to secure the area and inspect suspicious persons, prevent hostile terrorist actions, and maintain order (section 3 of the affidavits of Michael Ben Arush, Igor Romanenko and Roi Barzilai).
23. Roi Barzilai testified: **"In the afternoon, a suspicious looking person appeared. I approached him and asked him to present an identifying document for a routine check. The Plaintiff did not heed the request and said things like "who are you anyway" while making faces and behaving in a restless and uncooperative manner. I repeated my request and asked him why he was making faces. The Plaintiff gave me the identity card while continuing to exhibit impatience and shouting"** (section 4 of the affidavit of Roi Barzilai).
24. Roi Barzilai testified: **"I asked the Plaintiff to stand aside and calm down while I check his identity card on the computer terminal. The Plaintiff said that he was in a hurry and intended to go and, as far as he was concerned, the identity card could remain with me until after the prayer, and began advancing. I called on the Plaintiff to stop. The two Border Police officers who were with me and saw the situation came towards him"** (section 5 of the affidavit of Roi Barzilai).
25. Michael Ben Arush testified that **"the Plaintiff began to quarrel with Roi and an argument developed. The Plaintiff gave him his identity card and Roi told him to calm down and stand aside while he checked the card on the computer terminal but the Plaintiff adamantly refused"** (section 4 of the affidavit of Michael Ben Arush).
26. According to Igor Romanenko's affidavit: **"An argument developed between Roi and the Plaintiff and from it, and his behavior, it was apparent that he was unhappy about being asked to identify himself and about the fact that we are delaying him. The Plaintiff appeared anxious and rushed"** (section 4 of the affidavit of Igor Romanenko).
27. Michael Ben Arush testified that: **"At this stage, in light of the Plaintiff's suspicious behavior, we wanted to conduct a general, external body search. This is a short, standard body search in full clothing whose purpose is to verify that there are no**

**firearms and other dangerous objects**” (Section 5 of Michael Ben Arush’s affidavit). Igor Romanenko stated similar things. According to his affidavit, this search is similar to those that are sometimes carried out at the entrance to closed compounds whose purpose is to verify that there are no firearms or dangerous objects. (section 5 of Igor of the affidavit of Igor Romanenko).

28. Michael Ben Arush testified that: **“The Plaintiff objected to having the search conducted there and began shouting. There is a closed post at the Lions Gate, however, that day it was closed and we did not have the key and were not permitted to leave the post. I approached him with Igor and we asked him to turn around. The Plaintiff became disorderly and even kicked Igor in the knee. In order to restrain the Plaintiff, Igor and I grabbed him, each holding one arm; I grabbed his left arm and Igor the right and we put him against the wall”** (section 6 of the affidavit of Michael Ben Arush).
29. Igor Romanenko testified that: **“The plaintiff objected to having the search conducted there because as it was a public place. There is a closed post at the Lions Gate, however, that day it was closed and we did not have the key, and we were not permitted to leave the post. I explained to the Plaintiff that this the search would be an external, superficial search. The Plaintiff continued to shout and act in a disorderly fashion. I approached him with Michael and we asked him to turn around. He pushed us. In reaction Michael and I grabbed him, each of us held one arm. I grabbed his right arm and Michael the left. We bent his arms and put him against the wall in order to restrain him. The Plaintiff continued to resist and kicked with his legs. One of the kicks struck my left knee”** (section 6 of the affidavit of Igor Romanenko).
30. Roi Barzilai stated that he asked the Plaintiff to turn around and not move in hopes that he would calm down and that **“the Plaintiff pushed the Border Police officers who approached him and, in reaction, they seized him by the arms and placed him against the wall. The Plaintiff continued to resist and even kicked one of the Border Police officers in the knee”** (section 5 of the affidavit of Roi Barzilai ).
31. Michel Ben Arush and Igor Romanenko emphasized in their affidavits that: **“Apart from grabbing his arms and putting him against the wall, we did not employ any violence whatsoever against the Plaintiff in the course of the entire incident”** (section 7 of the affidavits of Michael Ben Arush and Igor Romanenko).
32. Roi Barzilai stated that: **“I wish to emphasize that I did not touch the Plaintiff at all and that I was a short distance from him. Michael and Igor only grabbed the Plaintiff by the arms and put him against the wall. We did not employ any other force or violence whatsoever in the course of the entire incident”** (section 8 of the affidavit of Roi Barzilai).
33. Ben Arush and Romanenko stated that: **“In view of his violent conduct, we informed the Plaintiff that he would be taken to the station for assaulting an officer and called a**

**police patrol car to take him for further processing at the David District Station. Prior to the arrival of the patrol car, and before he would be put in the patrol car and driven to the station, we conducted a superficial, external, search of the Plaintiff**” (section 8 of the affidavits of Michael Ben Arush and Igor Romanenko).

**“When the patrol car arrived, the Plaintiff was put in it without force and from there he was taken for further processing at the station”** (section 9 of the affidavits of Michael Ben Arush and Igor Romanenko).

34. Roi Barzilai’s affidavit also indicates that in view of the Plaintiff’s conduct, he called a patrol car and informed him that he was being detained for questioning. The police officers conducted a short, external body search in order to verify that there were no firearms prior to placing him in the patrol car and taking him to the station (section 6 of the affidavit of Roi Barzilai).
35. Michael Ben Arush filled an operational report concerning the incident and a report on the detention. Igor Romanenko and Roi Barzilai gave statements to the police on the day of the incident.

#### **Complaint Filed by the Plaintiff to the Department for the Investigation of Police (DIP)**

36. On June 22, 2003, the Plaintiff filed a complaint to the Department for the Investigation of Police (DIP) through HaMoked: Center for the Defence of the Individual demanding that the incident be investigated and that those involved be brought to justice. The complaint is attached to the Plaintiff’s affidavit and marked A.
37. On February 5, 2003, a response was received from the DIP stating that it a decision had been made to close the file and discontinue the investigation due to public interest considerations (the response was attached to the Plaintiff’s affidavit and marked Appendix G).
38. HaMoked: Center for the Defence of the Individual submitted an appeal to the Attorney General and on May 31, 2004, the Attorney General’s reply was received stating that a decision had been made to reopen the file (the reply was attached to the Plaintiff’s affidavit and marked as Appendix J).
39. Roi Barzilai was brought to a disciplinary proceeding on charges of abuse of power. At the end of the proceeding he received the following reprimand from his commander:

**“The police officer was summoned to a commander’s reprimand proceeding due to the fact that on June 3, 2003, while on duty with two Border Police officers at the Lions Gate, he inappropriately detained the Plaintiff who was passing through the gate with**

**his 10-year-old son. During the detention, he ordered the Plaintiff to turn around and face the wall with his arms raised, thus violating his dignity and privacy”**

The reprimand also stated:

**“You are hereby given a commander’s reprimand for inappropriate conduct in that by virtue of the action itself you degraded and violated the Plaintiff’s dignity in front of his son, in a public place with no justification, and contrary to regulations...”**

### **Defendants’ Accounts**

40. Significant contradictions were found in the Defendants’ accounts on a number of fundamental issues.
41. Michael Ben Arush stated, as aforementioned, that in view of the Plaintiff’s suspicious behavior, they decided to conduct an external, physical search (section 5 of the affidavit). Similar statements were made by Igor Romanenko. According to Romanenko’s affidavit, this was the kind of search that is conducted at times at the entrances to closed compounds, sports halls etc. whose purpose is to verify that there are no firearms and dangerous objects (section 5 of the affidavit).
42. During his cross examination, Michael Ben Arush replied that Roi Barzilai was the one who asked that the Plaintiff be searched (page 5 of the transcript).
43. According to the statement given by Roi Barzilai on the day of the incident, he did not ask that the Plaintiff be searched (line 25 of the statement). He repeated this during cross examination and responded that **“I was not interested in searching him, as long as I don’t have a specific suspicion, I have no reason for searching of him”** (page 17 of the transcript).
44. When Michael Ben Arush’s attention was drawn to the fact that Roi Barzilai recounted in his first statement that he did not ask that the Plaintiff be searched, Michael Ben Arush replied that he stated this on the basis of what he remembered and perhaps his memory deceived him in light of the long time that had elapsed (page 7 of the transcript). When his attention was drawn to the fact that in the affidavit he did not write that Roi asked for a search to be conducted but that **“we wanted to conduct a search”** he replied; **“we wanted to, it is relatively general, it could have been any of us, even Roi”** (page 7 of the transcript).
45. The search was not mentioned in any way in the operational report Michael Ben Arush prepared. When he was asked about this, he replied that he was relatively new to the service (page 6 of the transcript).

46. In the statement given by Igor Romanenko on the day of the incident it was indicated that a search was conducted (lines 17-18 of the statement). It was not indicated who conducted the search.

47. When asked if he requested a search of the Plaintiff, Romanenko replied: **"Yes, I do not remember if I personally did. I remember that he was asked to turn around to be searched"** (page 19 of the transcript).

When Igor Romanenko was told during cross examination that Roi claimed that he did not ask search be conducted, he replied: **"From what I remember of the regulations, I am authorized to conduct a search of a person who appears suspicious to me. The attitude of the team was not that a regular police officer orders a search and we conduct it, but that each one, according to his discretion, may conduct a search"**.

In reply to the Court's question concerning what discretion was employed in this case, Romanenko replied: **"the person did not behave properly, he wanted to create a ruckus, we wanted to search him to make sure that he was not hiding something, and why he was acting that way. This was a very routine procedure at that time and in that location"** (page 20 of the transcript).

48. In the statement given by Roi Barzilai on the day of the incident he recounted: **"And then the Border Police officers thought that the whole matter was getting out of hand. They saw it and told the suspect to stand aside. He stood there. I asked him not to move. He replied: "I am not standing here. Open the post and search me there"** (lines 11-15 of the statement).

49. In reply to the question whether the Border Police officers did not want to conduct the search either, Roi Barzilai replied: **"None of us wanted to conduct the search at that time"** (page 17 of the transcript).

50. In his primary affidavit, Roi Barzilai stated that he asked the Plaintiff to turn around and not to move to calm him down (section 5 of the affidavit of Roi Barzilai affidavit). When he gave his statement to the police, he was asked why he had told the Plaintiff to turn around and face the wall if he did not want to search him. He replied: **"I wanted him to calm down. He was swearing in Arabic and Hebrew and my intention was to end the examination as quickly as possible and release him if he was not wanted"** (line 9-12 of the statement). This was also the account he gave during his cross examination (page 11 of the transcript).

51. Roi Barzilai was brought to a disciplinary proceeding and reprimanded. The reprimand refers to the manner in which the Plaintiff's detention was carried out and does not mention the search.

52. Roi Barzilai testified about a search of Plaintiff 1 conducted before he was placed in the police patrol car (page 15 of the transcript), however, this does not refer to the same search.
53. In reply to the question on who conducted the actual search, Michael Ben Arush replied: **“Igor and I. I do not remember who exactly, but Igor and I seized him and conducted the search, I do not remember which one of us conducted the search”** (page 10 of the transcript).
54. Igor Romanenko does not remember who conducted the search (page 22 of the transcript).
55. Michael Ben Arush testified that Roi had no physical contact with the Plaintiff (page 9 of the transcript).
56. In light of the contradictions in the Defendants’ accounts and Roi Barzilai’s insistence that there was no cause for a search, no need for a search, and that no search was conducted, it is not possible to accept the contention of the Defendants’ counsel according to which the decision to conduct a search resulted from the suspicious conduct of Plaintiff 1 and his refusal to identify himself.

### **Was Force Used**

57. According to the Plaintiff’s affidavit: **“Two Border police officers grabbed me and pushed my head against the wall. As a result, I was injured on the left side of the head and the left shoulder. Suddenly, and for no reason, the Border Police officers beat me all over my body, including and mostly on the right lower back and the upper back”** (section 3d of the affidavit of Plaintiff 1).
58. In the operational report prepared by Michael Ben Arush on the day of the incident he was required to indicate whether he used force during the incident. In the relevant place, Michael Ben Arush added the word **“reasonable”** next to the words “use of force”, and noted that force was employed. In the description of the incident specified in the report there is no mention of the use of force against Plaintiff 1 and no description of the force that was employed.
59. In reply to the question on why he employed force against the Plaintiff, Igor Romanenko replied: **“Simply because he refused to let us search him”** (page 19 of the transcript). Later he was again asked this and replied: **“when we asked him to turn around he pushed us and said he objected”**. In reply to the question how the Plaintiff pushed, Romanenko replied: **“I do not remember”** and demonstrated pushing with two hands (page 21 of the transcript).
60. Michael Ben Arush’s account regarding the pushing is different. In reply to the question how exactly the Plaintiff pushed them, Ben Arush replied: **“We asked him to move to the side a bit so it would not take place on the street. We wanted to conduct the search in**

**a concealed place, it was Igor and I, and he turned around demonstratively, hitting us, and when we grabbed him by the hands, he kicked Igor. The push took place during the demonstrative turn**” (page 8 of the transcript). He later stated: **“when he turned around, because we were close to him, the contact generated the push”** (page 9 of the transcript).

61. Roi Barzilai had a third version of the pushing. In the statement he gave the police on the day of the incident he stated that: **“one of the Border Police officers asked him to stop being insolent, they were close to one another. In response, the suspect pushed the Border Police officer and then two Border Police officers restrained him. After he calmed down, they let go of him”** (lines 15-18 of the statement).
62. In the statement, Roi wrote that the Plaintiff pushed one of the Border Police officers. In the affidavit, he wrote that he pushed both. In reply to the question which is correct Roi said: **“I do not know. It is possible that the statement is more correct because it was given soon after the event”** (page 14 of the transcript).
63. Contradictions were also found regarding the account according to which the Plaintiff kicked Michael Ben Arush and Igor Romanenko.
64. Michael Ben Arush stated that: **“...I approached him with Igor and we asked him to turn around. The Plaintiff became disorderly and even kicked Igor in the knee. In order to restrain the Plaintiff, Igor and I grabbed him each holding one arm; I grabbed his left arm and Igor the right arm and we put him against the wall”** (section 6 of the affidavit of Michael Ben Arush).
65. Romanenko gave a different account in his statement to the police. According to his account, the Plaintiff kicked them when he was already standing with his back to them, and after Igor bent his right arm and Michael bent his left (lines 7-9 of the statement).
66. Plaintiff 1 testified, as aforementioned, that: **“The police officer told them to seize me, and if he [sic] resists, we’ll say that he [sic] assaulted you. They put me against the wall and beat me”** (page 14 of the transcript).

My finding that it is doubtful whether there was justification to conduct a search of the Plaintiff, also reflects on the argument made Defendants’ counsel in their summation to the effect that no violence was employed at any of stage of the incident other than taking hold of the Plaintiff’s hands and placing him against the wall due to his violent resistance to the search.

67. I prefer the testimony of Plaintiff 1, according to which violence was employed against him during the incident. However, I sensed that the Plaintiffs exaggerated in their description of the violence, *inter alia*, due to the inconsistency of the accounts given by Plaintiff 1 and the general testimony of Plaintiff 2.

68. In his primary affidavit, Plaintiff 1 stated that Igor Romanenko and Michael Ben Arush seized him and pushed his head against the wall, and that as a result he was injured in the head and left shoulder. In addition **“Suddenly, and for no reason, the Border Police Officers beat me all over my body including and mostly on the right side of the lower back and the upper back”** (section 3d of the affidavit of Plaintiff 1).

69. In the statement collected from Plaintiff 1 by the police there are two versions of the assault. At the beginning of the statement he reported that Igor Romanenko held his arms from behind and the second police officer kicked him in the back with his leg (lines 30-31 of the statement). Later, he reports that Roi Barzili held his arms from behind while both Border Police officers assaulted him (line 38 of the statement).

In reply to the question who hit him, Plaintiff 1 said during his cross examination: **“I do not know, I was with my face to the wall”** (page 14 of the transcript).

The questions the Plaintiff was asked during his interrogation reveal that he complained that he had been hit in the back and stomach (line 34 of the statement).

In the cross examination he replied: **“punches to the back and stomach. I was also hurt in the face and the shoulder by the wall, and also in the lower back** (page 14 of the transcript).

In reply to the question whether he needed medical treatment, the Plaintiff replied in his interrogation that his shoulder was hurting because the police officer had grasped him there (lines 42-43 of the statement).

70. The description of the incident, as it appears in Dr. Omaila Farhat’s opinion, is far graver than that the description provided by Plaintiff 1 in court:

**“The soldiers demanded to search the father. The father asked that the search be conducted in private and not in the presence of his son, who appeared frightened by the situation. His request was not heeded and physical force was employed against the father who was beaten with the butt of a weapon and whose face was crushed against the wall.”**

71. Plaintiff 2 testified that he saw the police officers set upon his father and begin to beat him. He was frightened and began to cry and shout like crazy (section 7 of the affidavit of Plaintiff 2). During cross examination he replied that he does not remember how many police officers were present (page 27 of the transcript). In reply to the question whether he remembers how his father was beaten, Plaintiff 2 said: **“they pushed him against the wall and beat him”** (page 27 of the transcript).

72. In the expert opinions of Dr. Razoni and Dr. Ram there is no explicit description of the incident. Dr. Razoni referred, in his cross examination, to the account given by Plaintiff 2 and said that the descriptions he gave were clear and precise and consistent with the general picture (page 16 of the transcript).
73. The Plaintiff attached to his affidavit a medical document given to him a day after the incident. The document is not fully legible, however, it is possible to understand that the Plaintiff complained of pain in the head, shoulder and neck and a scrape. It is not possible to understand from the document where he was scraped.

### **Causes of the Incident**

74. According to the Plaintiff's affidavit, when he presented his identity card to the police officer, the officer said to him mockingly "look at that mug of yours" and that due to the police officer's conduct, an argument developed between him and the police officer at the end of which the officer stated that he wanted to conduct a search of the Plaintiff (section 3c of the affidavit of Plaintiff 1).
75. In reply to the question how he reacted to what the police officer said after he gave him his identity card, the Plaintiff replied in his cross examination: "**I asked why he was speaking this way and requested that he speak politely. He said that he would talk any way he wanted and afterwards an argument developed and he said he would do what he wanted and hold me for hours**" (page 14 of the transcript).
76. In his police interrogation, Roi Barzilai stated that one of the Border Police officers asked the Plaintiff to stop being insolent (line 16 of the statement). In reply to the Court's question whether that was the trigger for the incident, Roi Barzilai replied: "**I do not remember, but it could very well have been. In reply to the question of counsel for the Plaintiffs as to whether I understood the question, I say yes, and it could have been, and I do not remember exactly what happened**" (page 16 of the transcript).
77. Igor Romanenko said in his statement that when Roi asked for an identity card, the Plaintiff "made faces". When he was asked what "making faces" means, he replied: "**my statement was written around a decade ago. It is hard for me to answer the question**". When asked by the Court about the meaning of this expression, he replied "**maybe he made faces to show that he was not pleased**" (page 20 of the transcript).
78. Roi Barzilai said in his statement that in the course of the incident, the Plaintiff shouted and swore (lines 23-24 of the statement). Romanenko stated at his police investigation that: "**he murmured things in Arabic that sounded like swear words to me**" (lines 23-24 of the statement).

79. The medical document reveals that the Plaintiff stated that he was involved in an argument/quarrel.
80. During his cross examination, Plaintiff 1 was asked: “**if you had simply given your identity card and waited, allowed them to finish their inspection, they would have returned the card to you and the incident would not have occurred**”, and the Plaintiff replied: “**if he had spoken nicely to me and had not said what is this face, everything would have gone all right**” (page 13 of the transcript).
81. The evidence reveals that an argument developed between the parties and that apparently voices were raised.
82. This does not justify the conduct towards the Plaintiff, including the search and the violence that was employed against him, for which the Defendants are liable for damages to the Plaintiff.
83. However, the conduct of Plaintiff 1, as specified above, partially contributed to the Defendants’ culpability and that will be reflected in the amount of compensation that will be awarded.

Article 65 of the Tort Ordinance states:

**Where a defendant is at fault for damage, but the fault was brought about by the conduct of the plaintiff, the court may exempt the defendant from liability to pay compensation or may reduce the amount of compensation payable, as the Court may think just.**

Conduct that exempts a defendant from liability to pay compensation or reduces it was raised in CA 47/57 **Ganot v. Niederhoffer**, IsrSC 12(2) 1235 (1958).

**This conduct must be viewed, under the circumstances of the matter, and in principle, as the source of the wrong, or at the very least, one of its primary sources.**

In CA 668/71 **Morgenstern v. Dimenstein**, IsrSC 26(2) 841 (1972) it was stated:

**In other words, this vexing conduct may elicit the same response seen in this case from an ordinary person and does not, in the circumstances of the matter, cross the boundary of reasonability and necessity.**

Additionally concerning this matter, see CA 667/77 **Dadon v. Atias**, IsrSC 32(2) 169 (1978).

In the Dadon case compensation was reduced by 50% due to the Plaintiff's vexing, aggressive and impolite conduct.

### **The Damage caused to Plaintiff 1**

84. A number of court ruling referred to the amount of compensation appropriate in cases of non-pecuniary damage which is unaccompanied by physical injury. In a ruling concerning an incident during which police officers illegally assaulted an individual, employed physical and verbal violence, searched him and detained him unlawfully, and caused his unjustified detention for 46 hours, the defendants were ordered to pay compensation for non-pecuniary damage in the amount of 40,000 NIS (CA (Jerusalem District Court) 1311/00 **Judah v. Abraham** (published in the Maagarim, December 17, 2000).
85. In a decision delivered by the Jerusalem Magistrates Court in CC 8090/01 **Safdi v. Ran** (published in Maagarim, June 28, 2006), a compensation payment totaling 40,000 NIS was awarded in a case concerning assault and limitation of liberty.
86. In CC (Jerusalem Magistrates Court) 7793/05 **Katzin v. Avitan** (published in Maagarim June 8, 2006), a compensation payment totaling 15,000 NIS was awarded in a case of assault for pain and anguish in addition to punitive damages totaling 10,000 NIS.
87. In CC (Jerusalem Magistrates Court) 1279/05 **Cohen v. Kazka** (published in Maagarim April 12, 2007), a compensation payment totaling 35,000 NIS was awarded for pain and anguish following assault.
88. In CC (Jerusalem Magistrates Court) 16051/08 **Natura v. Natura** (published in Maagarim May 17, 2010), also delivered by me, the plaintiff was awarded the sums of 20,000-30,000 NIS for three incidents of assault.
89. In CC (Jerusalem Magistrates Court) 8545/09 **Hassan v. the Israel Police** (published in Maagarim April 29, 2014), a compensation payment totaling 50,000 NIS was awarded for non-pecuniary damage to a person was called derogatory names and assaulted by a police officer, breaking his nose.
90. As I wrote in the ruling delivered in the **Safdi** matter, it is possible to learn about compensation without proof of damage from the provisions set in various laws, for example Article 7a(b) of the Prohibition of Defamation Law 5725-1965; Article 5 (b) of the law on the Prohibition on Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000; Article 10 of the Equal Opportunities in Employment Law 5748-1988. In these laws it was established that a court can award compensation without proof of damage for a total of up to 50,000 NIS. These articles

include unique, explicit provisions regarding specific matters, but it is possible to learn from them about the scope of appropriate compensation.

91. I award Plaintiff 1 compensation in the sum of 20,000 NIS for non-pecuniary damage.
92. The compensation takes into account the violence employed against the Plaintiff, and the unnecessary search and detention. The compensation also takes the conduct of the Plaintiff into account.
93. The sum is set as of today and no linkage differentials and interest are to be added thereto.
94. The material submitted does not support the claim made by Plaintiff 1 that he was absent from work and suffered a loss of income due to the incident.

### **Plaintiff 2**

95. There is no dispute that Plaintiff 2 was present at the place of the incident at the time. According to the statements of the Plaintiffs, he was taken to the police station along with Plaintiff 1.
96. According to Dr. Omaila Farhat's opinion, Plaintiff 2 suffered a permanent disability at the rate of 10% due to the incident.
97. According to Dr. Anneke Ram's opinion, Plaintiff 2 developed separation anxiety and increased dependency during his childhood, and it is possible that the isolated incident that is the subject of the claim temporarily exacerbated his condition, given his special sensitivity.
98. In his opinion, Dr. Gideon Razoni determined that following the incident, the Plaintiff suffered symptoms and signs that corresponded to a mental disability at the rate of 10% for five years.
99. The Defendants argue that Plaintiff 2 is a secondary victim who comes under the **Alsuha** precedent established in LCA 444/87 **Alsuha v. the Dahan Estate**, IsrSC 34(3) 397 (1990) applies, and as he does not meet the conditions set by this practice, his claim must be rejected.
100. The Defendants' contention that Plaintiff 2 is a secondary victim and does not meet the conditions of the **Alsuha** practice was raised after the hearing of the evidence and, according to the Plaintiffs, this constitutes a forbidden expansion of the bounds of the claim.

The Plaintiffs claim that had the claim been raised at an earlier stage, Plaintiff 2 would have undoubtedly chosen to continue to conduct the case in a different manner. He alleges that

the decision not to question the experts, particularly the court appointed expert, as well as the decision not to summon certain witnesses, derived from these considerations and were based on the situation of the case at the time.

The Plaintiffs refer to the interim decision given in CC (Tel Aviv District Court) 1505/99 **State of Israel v. Ben Baruch** (published in Maagarim on March 17, 2003). In this matter, the contention concerning the absence of the grounds established in the **Alsuha** case was first raised in the framework of the calculation of the damage submitted on behalf of the state, and the Court indicated that the timing of the argument may have possibly sufficed to bring about its dismissal, but ruled that under the circumstances of the incident the contention must also be rejected on its merits.

101. On the merits, the Plaintiffs allege that the description of the incident reveals that both Plaintiffs were treated in a violent and degrading manner by the Defendants and that both were directly harmed by their actions or omissions. They claim that they were unlawfully detained, degraded, threatened, rushed to the police station, and experienced things they should not have experienced at the hands of the Defendants.
102. In reply to the Plaintiffs' contention, the Defendants argue that the Plaintiffs were the ones who expand the bounds of the claim by alleging that Plaintiff 2 is a direct victim. They argue that the circumstances of the case clearly demonstrate that the alleged harm caused to Plaintiff 2 was caused due to his presence, and the fact that he witnessed the incident, and that no claim was made that he was directly harmed by the police officers. The Defendants further allege that Plaintiff 2 was not checked by the police officers, that he was not searched or detained and that, in any event, there was no physical or verbal contact between him and any of the police officers in the course of the incident.
103. The Statement of Claim refers to Plaintiff 2 as a direct victim and not as a secondary victim.

In Section 23 of the Statement of Claim it was alleged that: “[B]ecause of and due to the above incident, Plaintiff 2 suffered grave mental harm that is manifested in anxiety attacks, depression, incontinence, inability to sleep...and additional psychological disorders...” .

In Section 26 of the Statement of Claim it was alleged that: ” **Moreover, because of and due to the above incident, the Plaintiffs have suffered from an indescribably severe harm to their dignity and self-esteem ensuing from the feelings of humiliation, helplessness, fear and abandonment they experienced during the incident and thereafter.**”

104. In the Defendants' Statement of Defense there was not contention that Plaintiff 2 was a secondary victim. The contention was first raised after the evidence was heard and

constitutes a prohibited expansion of the bounds of the claim, as maintained by the Plaintiffs, and this, prima facie, suffices to dismiss the argument.

105. However, the argument must also be dismissed on its merits as the evidence reveals that the damage to Plaintiff 2 was not caused solely by his exposure to the harm inflicted on his father, but because he himself was part of the incident. He was taken away from his father, and was afraid that he would never see him again, and experienced distress, helplessness and the inability to protect his father and himself during the incident.

106. Plaintiff 2 testified that the bond between him and his father is very strong and that his father is “everything” to him (section 4 of the affidavit of Plaintiff 2). According to the affidavit: **“I stood there, shocked by what I saw, and none of the police officers cared about me!!! They saw me crying and yelling like crazy, but continued doing what they were doing, and I felt each blow my father received as if I was receiving it!!!”** (section 8 of the affidavit of Plaintiff 2).

He also stated: **“I remember that at some point, they took me and my father to the police station and left me alone in a room that only contained chairs. I waited there for a long time and each minute was like an hour to me!! I remember that at the time I did not know what was happening with us and why all this was happening at all, and I was afraid that my father would never return to me!!! The uncertainty and the lack of knowledge about what was happening only intensified my fear and the thought that I would never see my father again!! This thought broke me and caused me to cry again”** (section 9 of the affidavit of Plaintiff 2).

After a long wait the father returned and they both left the police station (section 10 of the affidavit of Plaintiff 2).

107. In reply to the question what he did when his father was taken to the police, he replied: **“I was very frightened for my father, that he would not come back to me”** (page 27 of the transcript). He was with his father when the father was taken away (page 27 of the transcript). According to the testimony of Plaintiff 2: **“I suffered because I could not help him”** (page 29 of the transcript).

108. The following is a description of the incident and its results based on the experience of Plaintiff 2, as it appears in Dr. Anneke Ram’s opinion:

**“...the image that was most etched in his memory is that ‘he cried the entire time because he was taken away from his father and that he wanted to be near his father the entire time. He was afraid that he would never see his father again and he was all he had in the world’. He suffers from only one fear ever since, the thought that ‘they would come and take father away’. This fear only arises when he sees police officers or if he hears or witnesses incidents that may lead to confrontations between people and the police”** (page 3 of the opinion).

109. Dr. Razoni wrote the following in the section on the examination in his opinion:

**“He describes in detail the incident that took place when he was ten during which his father was detained, how he felt helpless when his father was beaten by the police officers (particularly as his mother was not in the background)...”**

110. The Defendants quote from page 4 of Dr. Omaima’s opinion where it was stated that: **“It appears that five years ago he was exposed to a traumatic event during which he saw soldiers attacking his father and abusing him physically and emotionally. Yasser was not harmed directly in the incident but he responded badly when there was a serious threat to his father’s life”**.

The Defendants disregard other sections of the opinion which concern the involvement of Plaintiff 2 in the incident and the ramification it had on him.

On page 2 of Dr. Omaima’s opinion it was stated: **“During the abuse of the father, Yasser stood and cried, and was observed to be in a state of considerable psychological and physical agitation”**. On page 4 of the opinion it was stated: **“At that moment he felt helpless due to his inability to defend his father and himself which aggravated his condition and his response to the incident”**.

111. In the Defendants’ affidavits and in the operational report prepared by Michael Ben Arush following the incident there is no reference to the presence of Plaintiff 2 during the incident.

In a statement he gave on the day of the incident, Igor Romanenko was asked if the Plaintiff was alone and he replied: **“his son was with him”** (lines 20-21 of the statement). Roi Barzilai was asked if the son of Plaintiff 1 was with him and he replied affirmatively (line 6 of page 2 of the statement).

In reply to the question why it was not indicated in the operational report that the Plaintiff was with his son, Michael Ben Arush replied: **“I do not remember, not that I did not see, I do not remember this”** (page 8 of the transcript).

112. The evidence provided by Defendants 1-3 reveals that they disregarded the presence of Plaintiff 2 who was with his father.

113. I, therefore, accept the Plaintiffs’ description of the condition of Plaintiff 2 and his involvement in the incident.

114. If the Defendants’ contention that Plaintiff 2 is a secondary victim had been accepted, it would have been possible to dismiss his claim as, in view of Dr. Razoni’s determination, his temporary disability did not exceed 10% and there is no permanent disability and he,

therefore, does not meet the fourth criterion concerning the gravity of the mental harm (regarding this see CA 3798/95 **Hasneh v. Khatib** IsrSc 49(5) 651 (1996)).

### **Damage Incurred by Plaintiff 2**

115. Plaintiff 1 stated: **“Because of and due to the aforementioned grave incident, my son, Plaintiff 2, began to suffer from anxiety attacks and from various mental disorders that are manifested in the inability to sleep, depression, incontinence and more”** (section 5 of the affidavit of Plaintiff 1).
116. Plaintiff 2 testified that due to the incident he suffered grave psychological harm which is manifested in anxiety attacks, depression, incontinence, nightmares, and bad memories (section 11 of the affidavit of Plaintiff 2).
117. Plaintiff 1 stated that: **“Because of and due to the aforementioned incident I and my son underwent treatment and received a great deal of help from relatives, all in light of the severe bodily and emotional harm”** (section 20 of the affidavit of Plaintiff 1).
118. A referral for professional counseling, made by the family doctor on June 5, 2003 was attached to the affidavit of Plaintiff 2. The referral indicated that following an emotional incident, Plaintiff 2 does not sleep at night and suffers from Anorazis.

Additionally, a document compiled by the neuropsychiatrist, Dr. Mustafa Muj’ahad, on December 31, 2008 was attached to the affidavit. In the document he states that Plaintiff 2 was treated by him from October 13, 2003 (approximately four months after the incident) due to enuresis. According to the document, Plaintiff 2 was agitated and had difficulty sleeping, suffered from nightmares and anxiety and exhibited a phobia of Israeli soldiers and police officers. He was treated during four visits spanning a period of eight months until most of the symptoms disappeared. However the phobia, anxiety and avoidance of police officers and soldiers remain.

According to the letter, Plaintiff 2 was given medication, and he and his family received psychiatric medication.

119. The document compiled by Dr. Mujahed was seen by Dr. Razoni, without an objection on the part of the Defendants. The Defendants, in addition, did not object to the appending of the document to the affidavit of Plaintiff 2, and their counsel questioned Plaintiff 2 on its content (page 30 of the transcript). In light of this, I dismiss the Defendants’ claim, first raised during the summations, that the document is not admissible as evidence as it should be submitted by Dr. Mujahed.
120. The document was prepared by Dr. Mujahed after Dr. Omaima Farhat provided her opinion. According to her opinion, Plaintiff 1 told her that Plaintiff 2 was not treated by a

psychiatrist or a psychologist after the incident despite the fact that he was referred for treatment because the enuresis embarrassed him, and that he did not agree to return for psychological treatment (page 3 of the opinion).

121. Plaintiff 1 did not provide a clear reply to the question of when they sought treatment by Dr. Mujahed. He initially replied that they approached him “**a few days after the whole mess**” (page 8 of the transcript, line 3). When asked whether it is possible that the first time they met Dr. Mujahed was 5 years after the incident, he replied: “**anything is possible**” (page 8 of the transcript, line 11).
122. In reply to the question how many times they saw Dr. Mujahed, Plaintiff 1 stated that he does not remember. When asked to estimate the number of visits, he replied that they saw him many times, but not more than ten. He did not remember when they last met with Dr. Mujahed for treatment (page 8 of the transcript).
123. Plaintiff 1 does not remember how much Dr. Mujahed’s treatments cost. In reply to the question of whether he has receipts, he replied that maybe he has one or two (page 9 of the transcript). No receipts were submitted as evidence.
124. Plaintiff 2 testified that he had several meetings with a psychiatrist (page 29 of the transcript). He does not remember his name, the address of the clinic, does not know if the clinic is in Jerusalem or Bethlehem, and does not remember what took place at the meetings. Sometimes he went alone (page 29 of the transcript).
125. It is not clear why Dr. Farhat, who submitted an opinion on behalf of Plaintiff 2, was not given details regarding the treatment with Dr. Mujahed and why they approached him in order to receive the confirmation only after she submitted her opinion. However, there is no reason not to accept the content of the Dr. Mujahed’s document regarding the treatment the Plaintiff.
126. Plaintiff 1 testified that “**there was a long story with the doctors**” (page 8 of the transcript). According to Dr. Mujahed’s letter, Plaintiff 2 received medication and he and his family received psychiatric medication. No documents supporting visits to physicians and medical treatments were submitted apart from the referral letter of June 5, 2003 and the document prepared by Dr. Mujaead.
127. According to Dr. Razoni’s opinion, the nightmares and enuresis persisted for five years.
128. According to Dr. Omaima Farhat’s opinion, the Plaintiff suffered from night enuresis every night for a year and a half before it spontaneously disappeared prior to her September 2008 examination, that is in March 2007, approximately four years after the incident.
129. Dr. Mujahed’s letter states that most of the symptoms disappeared approximately eight months after treatment by him, that is approximately two years after the incident.

130. It appears that the Plaintiffs exaggerated the description of their complaints to Dr. Razoni.
131. Nonetheless, Dr. Anneke Ram in her opinion also agrees that there was a temporary deterioration. According to her opinion: **“It is possible that the isolated incident that is the subject of the claim, led to a temporary but passing deterioration in his condition in light of his special sensitivity, but not to the extent that would make it possible to determine permanent mental disability...”** (page 5 of the opinion).
132. Dr. Ram’s opinion does not refer to the period of time during which the temporary deterioration occurred.
133. I accept Dr. Razoni’s opinion according to which a degree of temporary disability of 10% was caused to the Plaintiff. In light of the aforesaid regarding the exaggeration of the complaints and in light of the contents of the document prepared by Dr. Mujahed, the period of temporary disability will be set at three years.
134. I award Plaintiff 2 the sum of 40,000 NIS for non- pecuniary damage caused him due to the incident and the temporary disability he suffered. This sum is set as of today and no linkage differentials and interest may be added thereto.

### **Summary**

135. The Defendants will pay the Plaintiffs the sums awarded to them.
136. The Defendants will pay the Plaintiffs legal fees in the sum of 14,160 NIS.
137. Furthermore, the Defendants will refund the Plaintiffs trial costs in addition to linkage differentials and interest from the date each expense was incurred.
138. The Defendants must pay these sums to the Plaintiffs within 30 days of today.

**Given today, 12 Elul 5774, September 7, 2014, in the absence of the parties.**

[signed]  
Irit Cohen, Vice President