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At the Supreme Court in Jerusalem
Sitting as the High Court of Justice

HCJ 11447/04
HCJ 1081/05

Before The Honorable President A. Barak
The Honorable Justice A. Grunis
The Honorable Justice E. Chayot

The Petitioners in HCJ 11447/04: **1. HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger (Reg. Assoc.)**
2. S.A.

The Petitioners in HCJ 1081/05: **1. HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger (Reg. Assoc.)**
2. K.R.

v.

The Respondents in
HCJ 11447/04 and HCJ 1081/05: **1. The Attorney General**
2. The Judge Advocate General

Petition for Granting of Order Nisi

Date of session: 12 Nisan 5765 (21 April 2005)

On behalf of the Petitioners
in HCJ 11447/04 and HCJ 1081/05: Attorney Yosef Wolfson
Attorney Gil Gan-Mor

On behalf of the Respondents
in HCJ 11447/04 and HCJ 1081/05: Attorney Aner Helman
Attorney Gil'ad Shirman

Judgment

President A. Barak

The petitions involve the Petitioners' demand that an investigation be opened following their complaints of torture and degradation that they allegedly underwent while they were detained and interrogated in the secret facility known as Facility 1391 (hereinafter: the Facility).

1. Petitioner 2 in HCJ 11447/04 is a young male resident of Nablus (hereinafter: Complainant 1). Complainant 1 was detained (on 21 January 2003) and brought to the Facility (on 29 January 2003), which is located on a secret army base in the center of the

country. Complainant 1 was held in the Facility for about a month (until 24 February 2003). At the end of his interrogation, he was tried for aiding a wanted person, and served an 18-month prison sentence. Petitioner 2 in HCJ 1081/05 is also a resident of Nablus (hereinafter: Complainant 2). Complainant 2 was arrested (on 5 December 2002) and taken to the Facility (on 11 December 2002). He remained in the Facility for about three months (until 5 March 2003). At the end of his interrogation, he was tried for possession of firearms and served an 18-month prison sentence.

2. In 2003, Petitioner 1 (hereinafter: HaMoked: Center for the Defence of the Individual) filed petitions (HCJ 8696/02) seeking to locate a number of residents of the Territories who had been detained by security bodies and interrogated in the secret facility. The affidavits of the two complainants relating to the detention and interrogation conditions in the Facility were attached (in September 2003) to the petition. That petition was denied because the petitioners were moved out of the secret facility at the conclusion of their interrogation. Following that petition, HaMoked: Center for the Defence of the Individual filed another petition (HCJ 9733/03), which dealt with the secret facility and the interrogation and detention conditions in the Facility. In that petition, an Order Nisi was issued on the question of the secrecy of the Facility's location. Indeed, this question is currently being heard in this court in HCJ 9733/03. Regarding the interrogation and detention conditions, it was held that the petition was premature and too general, and that the ordinary proceedings needed to be exhausted before making petition to this court. Following that ruling, HaMoked: Center for the Defence of the Individual (at the end of 2003) wrote to Respondent 2 and to the Department for the Investigation of Complaints by General Security Service Interrogees (hereinafter: DICI) requesting that they investigate the suspicions arising from the complainants' complaints. Respondent 2 and DICI informed HaMoked: Center for the Defence of the Individual that it found no reason to open a criminal investigation and examination. The petition questions the Respondents' judgment in making that decision. In addition, the petitioners contend that the preliminary inquiry conducted by the Respondents was insufficient. The Petitioners also request that the conclusions of the investigation be made public.
3. The petitions raised a number of contentions relating to the detention and interrogation conditions that the two complainants faced. It was contended that interrogation powers were exercised by persons who were not Police or General Security Service [GSS] interrogators, and thus were not empowered to interrogate detainees. It was argued that

the complainants were moved to the Facility with a sack over their heads; were not informed where they were being taken; were subjected to inhuman detention conditions in the Facility; were not provided proper medical care in the Facility; and physical force was used against them. It was also argued that forbidden interrogation methods were used and that the complainants were degraded. It was further mentioned that the GSS interrogators promised to improve the conditions of the complainants' detention if they cooperated during their interrogation. In addition, particular contentions were raised regarding each of the complainants. In a letter from HaMoked: Center for the Defence of the Individual to Respondent 2, one of the contention raised stated that Complainant 1 was being kept in a cell no longer than the mattress, the walls were dark, and the cell was poorly lighted. He contended that the cell did not have a toilet, but in its place was a plastic pail in which he was supposed to relieve himself. Complainant 1 stated in his affidavit that he was given clothes that were too big for him, and was not given underwear. He also suffered from extreme cold; he was not given the opportunity to shower for 10 days; the guard used to wake him up at night with shouts and pounding. Upon his arrival at the Facility, he was completely undressed in front of ten soldiers; in the letter from HaMoked: Center for the Defence of the Individual to DICI, it is contended that Complainant 1 was interrogated for three days without giving him a chance to sleep. He was tied to a chair in the *shabah* position, and was beaten up in a degrading way by his interrogators, who pressed their feet against his genitals.

4. Similar contentions were raised regarding Complainant 2. It was contended that he was held in isolation during his detention. His cell was small (1.2 meters wide and two meters long). The walls were black, the lighting poor, there were no windows or ventilation, and a hole in the floor served as a toilet. It was also contended that it was damp and extremely cold in the cell. The cell did not have running water to drink and clean the cell. After some time passed, he was moved to a similar cell, even smaller, which had a black pail in which he was to relieve himself. For a month and a half, he was not given a clean change of clothes. As a result of his stay in the cell, Complainant 2 suffered severe stomach pains and a skin disorder (scabies). He did not shower once during his entire period of detention. During his period of detention, he recalls only two walks in the yard, which he was permitted to take only after he complained of the skin disorder. At night, the guards banged on the door to wake him; in HaMoked: Center for the Defence of the Individual's letter to DICI, similar contentions are made. Complainant 2 also declared in his affidavit that he was interrogated, immediately upon his arrival at the Facility, for five days

without being allowed to sleep. During the interrogation, he was made to sit on a stool without a backrest.

5. The Respondents' response stated that the Facility, declared a military prison, is used for interrogations in special cases and for detainees who are not residents of the Territories. The Facility is situated in a secret army base, which is the reason its location is kept secret. The Facility is not used, as a rule, for detention. In recent years, a limited number of detainees were held there. This was true, except for a period of about one year, from April 2002 to March 2003, when the Facility was used temporarily by the GSS because of the shortage of interrogation sites, a result of the security situation and Operation Defensive Shield. In the past two years, the Facility returned to its earlier purpose, and the number of detainees held there was limited; the interrogators and the guards in the Facility must act in accordance with binding procedures. A person is brought to the Facility in a manner prescribed by Military Police procedures. However, on their way to the Facility, dark blindfolds cover their eyes. This is done to maintain the secrecy of the Facility's location. A similar procedure is used when the detainees are taken from their cells to interrogation or for medical examinations inside the Facility. This is done to prevent the detainees from learning the layout of the Facility. Upon arrival in the Facility, an external search is made of the detainee and he undergoes a medical examination while dressed in his underwear. The size of a standard cell in the Facility is 4.5 square meters, and it is intended for two detainees. There are four smaller cells, of 3.7 square meters, which are designed to hold only one detainee. There are also a few larger cells. All the cells have a ventilation system. The detainees receive three meals a day. The food comes from the Facility's kitchen, which also serves the soldiers in the Facility. The food includes at least one hot meal a day. In the winter, the detainees receive a hot drink with breakfast and supper. Every detainee in the Facility receives personal items, including clean clothes, underwear, a towel, and the like. Every week, the detainee receives a new set of clothes, and underwear and towels are replaced as necessary. Blankets are changed once a month. Once a day, the detainees are allowed to shower. The head of the interrogation team has the authority to postpone a shower for up to three days. Shaving and haircut are given as necessary. The detainees are given cleaning substances with which to clean the cells and bathrooms. In most of the cells, the detainee has a "Turkish" bathroom, with a drain system. Two cells have [regular] toilet bowls. Four cells have chemical toilets. Most of the cells have running water, although the stream of water is controlled by the guards. The procedures provide that every cell always has a pitcher of

drinking water. A sanitation check of the Facility is made daily by a medic, and once a week by a physician. Notification of detention of a person in the Facility is given to the relevant officials. The detainee's family is given an address to which they can refer. Subject to interrogation needs, the detainees are allowed to send and receive mail. The detainees in the Facility are allowed to meet with attorneys and/or with representatives of the Red Cross, unless legal grounds prevent that. These meetings are held outside the Facility. Ongoing review of the condition of the Facility and the conditions in which detainees are held is made by IDF officials and by the Judge Advocate General's office. Other officials also visit the Facility, among them officials from the State Attorney's office, the Attorney General, Knesset members, and ministers of justice.

6. The Respondents' response also relates to the specific contentions made by the petitioners. These comments are based, in part, on the records kept in the Facility; the Military Police diary, which includes documentation on the actions taken by Military Police officers on each shift; the medical file, in which the medical examinations of each person complaining of a problem are documented; the sanitation diary, which describes the sanitation reviews conducted in the Facility by physicians; the control report – internal-control reports intended to verify compliance with the procedures in the Facility. The Respondents' review resulted in a number of findings. For example, it was found that no complaint had been made by Complainant 1 regarding his detention conditions, including the size of the clothes given him. Regarding the conditions, the cell's walls are painted a dark gray, and not black, as contended. Indeed, the cells do not receive sunlight, but are lit by standard light bulbs. The Respondents' records indicate that he was kept in four different cells during his detention. This contradicts his contention that he was kept in one cell throughout his detention. The isolation of Complainant 1 was requested for interrogation purposes. Regarding the conditions in which he was held, the Respondents' documentation indicates that Complainant 1 remained in his cell most of the time, and that the cell had an ordinary “Turkish bathroom”. For a short time, he was held in a cell with a chemical toilet. Documentation of the sanitation checks indicates that all the bathrooms was cleaned daily and disinfected once a week. Complainant 1 was checked regularly by different physicians and was given proper medical services. Complainant 1 contended that the guards did not let him sleep at night. According to the Respondents, the procedure in the Facility calls for a Military Police officer to pass by an occupied cell once an hour, but without waking the detainee. No basis was found for the contention that Complainant 1 was undressed in a degrading way in front of ten soldiers. Complainant 1

underwent, according to Respondents' check, the regular intake procedure for a detainee in the Facility, which includes undressing down to his underwear. However, the head of DICI directed the General Security Service to formulate less harsh procedures regarding the arrival and intake of detainees at the Facility. No evidence was found regarding violent treatment of Complainant 1 in his interrogation. In the course of the Respondents' investigation, Complainant 1 was called to testify before the DICI on this point. His comments were refuted. For example, Complainant 1 failed to describe the head of the interrogation team who treated him violently.

7. Complainant 2 complained to facility officials only once. On 13 February 2003, he complained to the physician in the Facility that he had not been issued a change of underwear for a month. Following the complaint, an investigation was made by the Facility's operations officer. Also, regarding the commencement of his interrogation, there is a disparity between his affidavit in the petition and the complaint of the [Public] Committee against Torture, which was submitted in May 2003. In the affidavit, he contends that the intensive interrogation, including sleep deprivation for five days, began immediately upon his arrive in the Facility. In the second document, it is alleged that Complainant 2 was not interrogated in the first sixteen days that he was at the Facility. Another factual disparity is found in Complainant 2's contention that he was allowed two walks in the yard, and that only after he complained of a skin disorder. According to the Respondents' documentation, the complaint was taken to the yard for a walk at least three times, and that they were not related to a medical problem. The Respondents contended, contrary to the affidavit made by Complainant 2, at a certain time, following the intensive interrogation that he had undergone, Complainant 2 was kept in a cell with another detainee. Furthermore, the isolation of Complainant 2 was needed to meet the needs of the interrogation and out of concern that he might transmit the alleged skin disorder to another detainee. Regarding the sanitary conditions, it was contended that during most of the time he was in the Facility, Complainant 2 was kept in a cell with a "Turkish bathroom" connected to a drain. For a short time, Complainant 2 was kept in a cell with a chemical toilet. It was not found that the guards woke Complainant 2 at night, unlike the routine checks of the cells that have to be made hourly. As regard Complainant 2's contentions regarding medical matters, the Respondents' records show that Complainant 2 was checked by various physicians about thirty times during his stay in the Facility. His complaints of stomach pains were attended to. The physicians' diagnosis stemmed the development of a skin disorder (scabies). Regarding the interrogation itself, it appears

from the Respondents' findings that the complainant was in fact interrogated intensively in light of the serious suspicions against him. However, the interrogation did not last for five days during which he was deprived sleep, as mentioned in the petition. Rather, Complainant 2 was given rest breaks during the interrogation. Complainant 2 confirmed, in a conversation with DICI, that violence was not used against him during the interrogation. The Respondents mentioned that, following their investigation, a matter arose that had not been mentioned by Complainant 2, which needed a further check by DICI, the findings of which will be provided to the State Attorney's office for examination.

8. The Respondents further contend that the complainants' failure to submit a complaint prior to their first petition to this court (HCJ 8696/02; HCJ 9733/03) has impaired their credibility, and made it harder to investigate the complaints. The Respondents add that the court should sparingly interfere with the discretion on opening investigations and prosecutions. In the present case, it is argued, there are no exceptional circumstances that warrant such interference in the Respondents' discretion. The Respondents' decision not to open a criminal investigation is justified in the circumstances herein, *inter alia*, because of results of the preliminary inquiry that was made, the detailed response of the Respondents, the poor credibility of the complainants, the time that has passed since the incidents took place (more than two years), and the minimal likelihood that a prosecution would take place. The Respondents also note that, as part of the inquiry into the incident, a number of procedures in the Facility were changed, and measures were taken to increase supervision of the Facility's staff.
9. The petition attacks the Respondents' discretion in deciding not to open a criminal investigation following the petitioners' complaints. Indeed, the Respondents cannot completely ignore the petitioners' complaints. The Respondents must examine complaints that they receive and explain their decision in the matter after they exercise their discretion (compare: CA 1678/01, *the State of Israel et al. v. Weiss et al.* (unpublished), Paragraph 13 of the judgment). The Respondents' decision must be made in accordance with the principles of administrative law and in good faith, honestly, without discrimination, and be reasonable (HCJ 935/89, *Ganor et al. v. The Attorney General et al.*, *Piskei Din* 44 (2) 485, 507-508). However, the discretion granted to the Respondents in the matter of opening a criminal investigation is broad (compare: HCJ 1689/02, *Nimrodi v. The Attorney General et al.*, *Piskei Din* 57 (6) 49; HCJ 2644/94,

Perchik et al. v. The Attorney General, Piskei Din 48 (4) 341). It should be noted that, in this matter, the discretion that Respondent 2 (the Judge Advocate General) must exercise is similar, as a rule, to that which Respondent 1 (the Attorney General) must exercise (HCJ 6009/94, *Shafran et al. v. The Judge Advocate General et al., Piskei Din 48 (5) 573, 584*; HCJ 5960/98, *Shalpuberski et al. v. Minister of Defence et al., Piskei Din 55 (1) 552*).

10. In our case, we did not find reason to interfere in this discretion of the Respondents. The process used by the Respondents in deciding not to open a criminal investigation was proper (compare: HCJ 6781/96, *Olmert v. The Attorney General, Piskei Din 50 (4) 793, 807-808*). They reached their decision after conducting an inquiry into the matter, the principal findings of which are delineated above. Their decision has a factual foundation (compare: HCJ 2534/97, *Yahav v. The State's Attorney et al., Piskei Din 51 (3) 1, 31-32*). In the circumstances, the Respondents' decision is not unreasonable. The petitioners also attack the validity of the preliminary inquiry that the Respondents made to support their decision. Indeed, it is hard to set criteria as to the scope and nature of the inquiry. The thoroughness of the inquiry will be derived from different variable considerations in the circumstances of each case (compare: HCJ 3993/01, *The Movement for Quality Government in Israel v. The Attorney General* (unpublished), Paragraph 4). Clearly, credibility of the complainant is a relevant consideration in this matter. In the present case, I am confident that the scope and nature of the inquiry, as set forth in the Respondents' response, were reasonable. The Respondents' detailed response also renders moot the Petitioners' demand that the findings of the inquiry be made public.

Therefore, the petitions are denied.

The President

Justice A. Grunis

I concur.

Justice

Justice E. Chayot

I concur.

Justice

It is decided as stated in the opinion of the President A. Barak.

Given today, 7 Siwan 5765 (14 June 2005).

[signed]

The President

[signed]

Justice

[signed]

Justice