

The Supreme Court of Israel
HCJ 9416/10
Sitting as the High Court of Justice

1. Adalah – The Legal Center for Arab Minority Rights in Israel
2. The Public Committee against Torture in Israel
3. Physicians for Human Rights – Israel
4. Al Mezan Center for Human Rights

**Represented by Adv. Abeer Baker and/or Hassan Jabareen and/or Orna Kohn and/
or Suhad Bishara and/or Sawsan Zaher and/or Fatmeh El-'Ajou and/or Haneen
Naamnih of Adalah – The Legal Center for Arab Minority Rights in Israel.**

Petitioners
-v.-

1. The Ministry of Public Security
2. The General Security Service

Represented by the State Attorney's Office, 27 Salah-a-Din St., Jerusalem

Respondents

Petition for *Order Nisi*

**This is a petition for an order nisi, whereby the Honorable Court is requested to
order the Respondents to show cause:**

a) Why Article 17 of the Criminal Procedure Law (Interrogation of Suspects) – 2002, which exempts the police from conducting audio and video recording of the interrogation of persons suspected of security offenses, should not be repealed on the grounds that it is discriminatory and unconstitutional;

b) Why Respondent 2 should not be obliged to conduct video recording of interrogations of persons suspected of security offenses and suspects regarding whom video recording is required in accordance with the Criminal Procedures Law (Interrogation of Suspects) – 2002.

The following are the grounds for this petition:

Introduction and summary of petition

1. This petition concerns the Petitioners' demand to revoke the sweeping exemption granted to the state's interrogating authorities, the police and the General Security Service (hereinafter – GSS) from the requirement to make audio and video recordings of interrogation of persons suspected of security offenses. The police are exempted from the audio and video recording requirement stipulated in Article 17 of the Criminal Procedures Law (Interrogation of Suspects) – 2002, which the Court is requested to declare void. According to the policy that it has set for itself, the GSS, which operates de facto as an interrogating authority, considers itself absolutely exempt from the audio and video recording requirement.

2. Under the Criminal Procedures Law (Interrogation of Suspects) 2002 (hereinafter: the Interrogation of Suspects Law), audio and video recording is obligatory in certain cases, where faithful documentation of the interrogation process has special importance in preventing violations of the law and miscarriages of justice. Examples of such cases include interrogations recorded in writing in a language other than that in which they were conducted; interrogations of suspects with disabilities; interrogations conducted in sign language; and interrogations of persons suspected of serious offenses carrying a sentence of over ten years' imprisonment. While the law attaches importance to recording interrogations of individuals suspected of serious offenses, this approach does not apply to interrogations of security suspects, although security offenses are typically considered particularly serious. [...]

3. In May 2009, the UN Committee Against Torture sharply criticized Israel for the sweeping exemption granted by the Interrogation of Suspects Law regarding the audio or video recording of interrogations of security suspects. The Committee recommended that the State give priority to expanding the requirement for video recording, due to its importance in preventing torture and enforcing the law vis-à-vis the various interrogation officials:

Video recording of interrogations is an important advance in protection of both the detainee and, for that matter, law enforcement personnel. Therefore, the State party should, as a matter of priority, extend the legal requirement of video recording of interviews of detainees accused of security offenses as a further means to prevent torture and ill-treatment.

4. [...] [As the legislative history of the Interrogation of Suspects Law shows], the legislature emphasized that audio and video recording was intended not only to protect suspects' rights, but also to help uncover the truth. Recording also serves as an effective mechanism against attempts by interrogators to exceed the powers granted to them by law, particularly the exercise of illegitimate methods of interrogation. [...]

5. In the legal section of the petition, the Petitioners will argue that granting the police and the GSS a sweeping exemption from recording the interrogations of security suspects compromises suspects' constitutional rights to personal liberty, due process, equality and dignity, contrary to the provisions of the limitation clause.

6. Exemption from recording suspects' interrogations does not comply with the legality requirement in the limitation clause ("in accordance with the law"). Article 17 of the Interrogation of Suspects Law provides that interrogations of persons suspected of committing security offenses are not to be recorded, but does not make clear precisely which offenses are to be considered security offenses and which are not. This fundamental regulation is detrimental as it was formulated in an ambiguous manner, lacking details concerning its substance and also clear guidelines, standards or clear criteria regarding the implementation of the regulation it is meant to anchor. This form of legislation is not constitutional and does not meet the demands of the limitation clause, which mandates that the harm to a constitutional right be "in accordance with the law". As a result of this ambiguity, the respondents acquire powers that were not given to them and, in practice, they dictate to the court the bounds of the tools it can employ in carrying out its work.

7. The Petitioners will also argue that suspects' constitutional rights are being compromised for an inappropriate purpose, according to both subjective and objective criteria. The Respondents claim that when conducting interrogations of security suspects, they employ special interrogation methods that cannot be revealed for the sake of the detainee's wellbeing and in the interests of the interrogation. Even assuming that, objectively speaking, the purpose of the exemption is to prevent exposure of interrogation methods, the Petitioners argue that compromising suspects' constitutional rights in order to conceal methods of interrogation methods is inappropriate. Interrogation methods are subject to the principles of transparency and monitoring and must also be legally accountable. Whoever employs them must be prepared to reveal them to the degree necessary when it is so demanded,

rather than conceal them in a sweeping manner that precludes the possibility of determining their legality.

8. The Petitioners further argue in this petition that even if the purpose of granting an exemption from recording interrogations of suspects is considered justifiable, it should be annulled because it violates suspects' constitutional rights beyond what is necessary. The Petitioners will emphasize that the exemption from recording the interrogation of persons suspected of committing security offenses does not meet the requirements of any of the subtests of proportionality, as they have been handed down in the rulings of this Honorable Court.

9. As for the first subtest, the suitability test, the Petitioners will argue that exemption from recording interrogations lacks any logical connection to the Respondents' purported aim. Firstly, the measure chosen to achieve the aim is arbitrary and unfair, which alone suffices to negate its logical connection to the objective [...]. Secondly, an exemption from recording interrogations may increase the likelihood of suspects' welfare being compromised, and does not serve the interest of the interrogation, as it is also in the interest of the interrogation that it should be fair and subject to oversight.

10. Similarly as regards the second subtest, the extensiveness test, the Petitioners will argue that the exemption from recording interrogations of suspects is sweeping: it applies to both minors and adults, and to any suspicion defined as security-related, without enumeration of the relevant suspicions and offenses. [...]

11. Moreover, the arbitrariness of the exemption from recording suspects' interrogations is also manifested in its implications for security suspects, who are subject to other severe restrictions during interrogation. Interrogations of security suspects are characteristically harsh, with minimal possibility of timely, full and transparent judicial review. The suspect is usually prevented from meeting an attorney for protracted periods of time; the interrogations are by nature long, arduous and exhausting; the hearing on extension of detention is done in camera, behind closed doors; gag orders are routinely issued for almost every interrogation; and detention is extended while suspects are also prevented from receiving visits, wholly isolated from human contact apart from with their interrogators. Suspects are held in very harsh physical interrogation conditions [...] and video recordings of interrogation proceedings are the only mechanism to prove claims of illegitimate methods of interrogation used against them.

12. The Petitioners will argue that the third subtest, that of narrow proportionality, is not met in this case either. The exemption from recording interrogations fails to strike an appropriate balance between the benefit it may produce and the damage caused as a result of violating the right. Violating constitutional rights harms not only the

suspect but also basic democratic values [...], such as the principle of the separation of powers, the rule of law, fairness of criminal proceedings, and the public's trust in the judicial process. Exemption from recording interrogations undermines a priori the possibility of judicial review and oversight of the interrogation process, as well as the validity of the evidence brought before the Court during the criminal trial. In fact, a sweeping exemption from recording interrogations of suspects casts a priori doubts on any result reached by the judicial system.

13. Even countries notorious for abusing suspects' rights in the name of the War on Terror record interrogations of security suspects. Despite the reprehensible detention and imprisonment conditions at Guantanamo Bay, for example, numerous guidelines have been issued governing the recording of interrogations carried out there; evidence indicates that interrogations of security suspects are videotaped. The latest development in this regard are guidelines issued by the US Department of Defense in May of 2010 that explicitly require audio-video recording of all interrogations of suspects held by the Department of Defense (DoD) or the military. [...] The objective of the guidelines is to provide conclusive evidence for trial in cases where there exist inconsistencies in testimony or claims of false confessions. The policy is as follows:

It is a Department of Defense (DoD) policy that [...] an audio-video recording shall be made of each strategic intelligence interrogation of any person who is in the custody or under the effective control of the DoD or under detention in a DoD facility, conducted at a theater-level detention facility. [...]

14. Australia has similarly set a requirement to record interrogations of security suspects. This requirement is anchored in the need to balance between human rights and the needs of national security.¹

15. The Petitioners will argue that the sweeping exemption from recording interrogation proceedings in security cases irrevocably violates the rights and the very humanity of detainees. It damages the judicial process and the semblance of justice, and immeasurably damages the public's trust in the authorities and the judicial system. Even if violation of the detainee's dignity during interrogation cannot be remedied, tools should at least be provided that expose the manner in which his or her rights were violated during interrogation. [...]

[...]

The Special Importance of Making Audio and/or Video Recordings, Particularly of the Interrogations of Security Suspects

¹ Wayne T. Westling, Vicki Waye, "Videotaping Police Interrogations: Lessons from Australia," *American Journal of Criminal Law*, Summer 1998, vol. 25:493.

a. Security offenses are defined as serious offenses

35. [...] Granting exemption from recording interrogations in serious offenses misses the purpose of the Interrogation of Suspects Law, which is, as stated by the legislature, to require videotaping interrogations precisely when the alleged offense is serious. This law's attitude toward security offenses is particularly severe. Thus it is not clear why the criterion of the gravity of the offense and the concern for miscarriage of justice precisely as regards serious offenses excludes what are considered to be security offenses.

b. The identity of the population of suspects in security offenses increases concerns over violations of their rights

36. Virtually all security suspects are Palestinians, and most of them are residents of the West Bank or Gaza Strip. Most are not fluent Hebrew speakers. Their national difference and non-fluency in Hebrew, in addition to the nature of the alleged offenses, lower their status as suspects and increase concerns that their rights may be violated. Therefore, the degree of protection required for this group of suspects should be increased.

c. There is increased likelihood that torture and other unacceptable methods of interrogation may be used against security suspects

37. Persons suspected of security offenses are more vulnerable to violation of their rights and to illegal methods of interrogation being used against them. Most complaints of the use of torture and unlawful methods of interrogation come from security suspects, virtually all of whom are Palestinian. Complaints of the use of illegal interrogation methods continually arrive at the offices of Petitioner 2, which is primarily involved in this matter and in monitoring what occurs in interrogation cells. In the past year alone, Petitioner 2 has received over 150 complaints raising serious allegations of the use of unlawful methods of interrogation against suspects [...].

38. Investigations into suspects' complaints regarding use of unlawful interrogation methods are at times closed due merely to the inability to prove the suspect's claims. Israel has argued before the UN Committee Against Torture that one reason that suspects' claims of illegal methods of interrogation are not fully investigated is the difficulty in providing evidence to substantiate them. [...]

The Legal Argument

44. The Petitioners will argue that granting the police and GSS a sweeping exemption from recording interrogations of security suspects violates their constitutional rights to personal liberty, due process, equality and dignity, contrary to the provisions of the limitation clause. Such an exemption a priori undermines any possibility of

judicial review or supervision of the interrogation process, as well as the validity of evidence brought before the Court during the criminal trial. Absence of monitoring of interrogating authorities is a certain recipe for false confessions extracted from suspects and the use of illegal methods of interrogation, since the Court lacks the ability to control the interrogation process either while it is in progress or retroactively.

Violation of suspects' constitutional rights to personal liberty, due process and dignity

45. Depriving the suspect of personal liberty means that he or she is no longer free but under the control of the interrogating authorities. This denial of liberty constitutes a violation of the right to personal liberty grounded in Article 5 of Basic Law: Human Dignity and Liberty. [...]

46. Due process during interrogation, detention and trial is one guarantee that denial of liberty is proportionate. Due process guarantees that the factual and legal truth is revealed and ascertained in criminal and administrative proceedings. Ascertaining the truth is a prerequisite of upholding substantive law and enforcing its norms. [...]

Violation of the suspect's constitutional right to equality

49. A security suspect is entitled to all the constitutional protections that apply to suspects as such. As far as his or her rights as concerned, what is relevant is his or her status as a suspect, not the nature of the alleged offenses. Sweeping differentiation between suspects on the basis of the alleged offenses is by all accounts a violation of the principle of equality before the law that lies at the heart of the criminal process.² [...]

51. Israel is party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1965. According to Article 5 of ICERD, State Parties undertake to prevent and eliminate racial discrimination and to guarantee the right of everyone to equality before the law, without distinction as to race, national or ethnic origin. As a result, State Parties are obliged to eliminate all forms of legislation that allow discrimination under law, including security legislation, and to ensure equal protection by domestic laws. The UN Committee on the Elimination of Racial Discrimination interpreted this article such that all forms of indirect discrimination against a group of persons suspected of terrorist offenses are prohibited. [...]

On the obligation to act equally and without discrimination towards all suspects in criminal proceedings, see Articles 2 (1), 14 (3) and 2 of the International Covenant on Civil and Political Rights (ICCPR).

² HCJ 11163/03, *The High Follow-Up Committee v. The State of Israel* (Nevo, 27 February 2006), Article 18 of Justice Barak's judgment; HCJ 332/87, *Ben Shlomo v. Minister of the Interior*, PD 43(3) 353, 356 (1989).

Violation of constitutional rights is contrary to the terms of the limitation clause

1. Violation not in accordance with the law

52. The Petitioners will argue that the violation of suspects' rights is not in accordance with the law, and is null and void. The exemption from recording interrogations is grounded in the law in an ambiguous manner, and does not meet legal requirements. The GSS, acting as an interrogating authority, has exempted itself from the obligation to record interrogations, in the absence of authorizing legislation. [...]

2. The purpose of the exemption is inappropriate

58. The Petitioners will argue that both the subjective and objective purposes behind the exemption from documenting interrogations of security suspects are inappropriate. Consequently, the exemption must be annulled for this reason alone. [...]

64. The Petitioners will argue that in view of the magnitude of the violation of suspects' constitutional rights, the violating rule must fulfill a substantial social objective in order for it to be considered valid. The Respondents have not indicated any substantive interest or urgent need to justify the purpose of the exemption. [...] The interests which the Respondents aim to protect are meant to fulfill a single objective: to remove interrogation facilities from the eyes of the judges and from any other essential control mechanism. Methods of interrogation are subject to accountability, and whoever employs them must be prepared to reveal them when so demanded. [...]

3. The violation of constitutional rights is disproportionate

66. The Petitioners will argue that the Respondents' failure to record interrogations of security suspects violates suspects' constitutional rights to liberty, due process, dignity and equality to an excessive degree. [...]

70. [...] Legislative measures that violate a constitutional right will be determined to be appropriate only if the objective of the law cannot be achieved by other means that involve a lesser violation of rights. The Petitioners emphasize that the Respondents chose an arbitrary measure that indiscriminately negates a priori any possibility of recording suspects' interrogations. Fulfilling the aims to which the Respondents aspire may be done in other, less harmful ways.³ [...]

75. In the Anonymous case, in which this honorable Court unanimously invalidated a law that allowed security suspect detention hearings to take place in the absence

³ See HCJ 3969/06, *Head of Dir Samet Council v. IDF Commander (Nevo)*, 22 October 2009; HCJ 2056/04, *Beit Suriq Village Council v. The Government of Israel*, PD 58(5), 807; HCJ 8276/05, *Adalah v. The Minister of Defense (Nevo)*, 12 December 2006).

of the suspect or his or her representative, Justice Rivlin asserted that the concern for the integrity of suspects' rights and for the Court's ability to administer justice is greatly increased in the case of security suspects, whose ability to defend themselves in detention proceedings is limited in view of the various measures that may be employed against them. [...]

Violation of the principle of separation of powers and the Court's ability to conduct judicial review

79. Conducting judicial review of interrogation and detention proceedings is a supreme principle and cornerstone of detention law, prompted by the Basic Law: Human Dignity and Liberty. The Court's most important mission is to ascertain the truth. However, the Court's function is not only to ascertain the truth but also to monitor the investigating authority and its conduct in interrogations, which are also intended to uncover the truth. Judicial review is a necessary measure to protect persons from arbitrary detention, and an essential condition for defending the right to liberty against unwarranted violation by continued imprisonment based on false confessions and invalid evidence. [...]

Violation of the requirements of transparency and oversight that are imposed on the state in general, and the interrogating authorities in particular:

84. The interrogating authorities, like any other authority and perhaps even more so, are obliged to operate in a transparent manner, allowing their actions to be subject to public scrutiny and monitoring. The possibility of exposing the conduct of the interrogating authorities may strengthen the public's belief that the authority is doing the duty in which it was entrusted without discrimination or bias [...]. The interrogators' knowledge that his words and actions are being recorded and may be subject to judicial review will doubtlessly bring about calculated restraint in his behavior and cause him to adhere to the limits of what is allowed and prohibited during interrogation. [...]

87. The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires states to use effective judicial measures to prevent torture (Article 2(a)). The state's obligation to prohibit torture or cruel treatment against detainees and to take action to prevent these acts includes the obligation to maintain effective and appropriate monitoring mechanisms. Exemption from making recordings of suspects' interrogations specifically as pertains to serious offenses constitutes a grave violation of Israel's obligations under Article 11 of the Convention Against Torture. Article 11 requires that each state party keep under systematic review of detention and interrogation practices, with the objective of preventing any form of torture and degradation.

See also: Article 15 of the Convention Against Torture and Articles 7 and 10 of the International Covenant on Civil and Political Rights (ICCPR).

88. Thus, exemption from making audio and video recordings of security suspects' interrogations violates suspects' constitutional rights, as well as other democratic principles, beyond that which is necessary. The value of due process and a fair criminal trial without discrimination between suspects is of great magnitude, outweighing any other interest that is involved in the interrogation.

Based on these arguments, the Honorable Court is requested to grant an order nisi, as requested at the outset of this petition and, following receipt of the Respondents' response, to make it absolute.

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Representing the Petitioners
20 December 2010