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At the Supreme Court Sitting as the High Court of Justice

HCJ 124/09

Before: Honorable Justice E. E. Levy
Honorable Justice A. Grunis
Honorable Justice M. Naor

The Petitioner: Taysir Dwayat

v.

The Respondents: 1. Minister of Defence
2. GOC Home Front Command and the Military
Commander

Petition for Order Nisi

Session date: 20 Adar 5769 (March 16, 2009)

Representing the Petitioner: Adv. Hussein Gnaim

Representing the Respondents: Adv. Aner Helman

Judgment

Justice E. E. Levy:

1. At noon time, on 29 Sivan 5768 (July 2, 2008), while driving a massive bulldozer, Hussam Taysir Ibrahim Dwayat ran over passers-by in Jaffa Street, Jerusalem. He had one goal – to kill and destroy to the largest possible extent. Three Israelis, whose sole sin was that they were going about their daily business on the capital's main street, were killed by him and dozens of others were wounded. One of the victims, the late Bat Sheva Unterman, managed to save her baby girl from the car which was crushed by the bulldozer on its deadly rampage.

2. Four months later, the security authorities decided, by virtue of their power according to regulation 119 of the Defence Regulations (Emergency), 1945, to destroy the terrorist's residential apartment. Dwayat resided with his wife and two young children on the first floor of an apartment building, which had been built by his father and in which his extended family resides. The demolition order, which has not yet been executed, referred to that floor only and did not concern any other parts of the building. The petition before us, which concerns this order, was filed by the father, who claimed that his son was only a permitted tenant in the house which belonged to him, that he had financed its construction by himself, and that "he has not yet been presented with evidentiary and/or factual infrastructure that the alleged actions of his son were carried out from nationalist motives." (paragraph 7 of the petition). According to the father, such disproportionate and unreasonable harm should not be inflicted upon his property, as he was not responsible for the actions of his son, and all of the above not by an order of a judicial instance but rather by a draconian proceeding initiated without giving the petitioner the right to make his arguments before the security forces. The father continues to argue that the decision to demolish would not have been made were it not for pressures exercised by extremists "whose activity in this country, is manifested only in creating hatred between the various sectors of the population" (paragraph 10 of the petition). Furthermore, the policy of demolishing terrorists' houses is discriminatory, as it is solely aimed at Arabs, while Jewish terrorist groups are treated softly. Finally, it was argued that the partial demolition of the structure would put the entire building at risk.
3. The respondents, on the other hand, emphasize the need to demolish for security reasons, which derive from the need to deter others from following Dwayat's steps, particularly now, when it seems that the involvement of residents of East Jerusalem in terror attacks is increasing again. According to the State, this element of deterrence is so vital in the effort to stop Palestinian terrorist activity, that in addition to directly harming the terrorists or their property, there is no alternative but to also have their relatives who live with them pay the price. As to the argument concerning discrimination, the State replies that although there is also Jewish terrorism, it may not be compared with Palestinian terrorism neither in scope nor in the public support it gets. It was specifically argued that the petitioner had full opportunity to appeal the demolition order before the final decision had been made, and that he has indeed exercised his said right by having filed the appeal which was reviewed on its merits and rejected. Technically, the decision was based on the opinions of engineering experts who had determined that said part of the building could be demolished without putting its other parts at risk.
4. I do not think that we will be able to grant the petitioner the relief requested by him. The security forces' use of the emergency regulations, for as long as they are in force and for as long as the Knesset does not find it necessary to have them replaced with a more updated

arrangement, should be made proportionately and for an appropriate purpose only (HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485, 490 (1996)). I am of the opinion that these requirements were met in petitioner's case. The appropriateness of the cause may not be disputed. The need to deter potential terrorists, who are often swept by a wave of terror which commenced by the act of a single person and threatens to carry others away with it, is evident. I see no room to intervene with the security forces' conclusion that deterrence is a major element in the struggle against this horror, and it is difficult to imagine that this position would be disputed by anyone. The main question therefore lies with the proportionality element, and it concerns the proportion between the demolition and the desirable purpose, on the one hand, and whether a less severe action than demolishing terrorists' houses and Dwayat's house in particular, could have been taken.

5. The initial burden to show that a governmental act is proportionate, should usually be imposed on the administrative authority. Having met it, the party contesting it may show that it has no merit (HCJ 366/03 **Commitment to Peace and Social Justice Society v. Minister of Finance**, paragraph 18 of my judgment (not yet reported, December 12, 2005); HCJ 6427/02 **Movement for Quality Government in Israel v. The Knesset** paragraph 21 of the judgment rendered by the President A. Barak, (not yet reported, May 11, 2006)). On the issue of demolition of terrorists' houses it has been held in the past and recently again, that the security forces had shown that the measures exercised were proportionate. The conclusion that the demolition had a deterring effect was more than substantiated (HCJ 6996/02 **Za'arub v. IDF Commander in the Gaza Strip**, IsrSC 56(6) 407, 410 (2002); HCJ 8262/03 **Abu Salim v. IDF Commander in the West Bank**, IsrSC 57(6) 569, 574 (2003); that it carried a special weight among the exercised measures (HCJ 10467/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1) 810, 814 (2003)); and that in view of its contribution to the most important value of all – saving human lives, it successfully passed the general benefit balance (HCJ 9353/08 **Abu Dheim v. GOC Home Front Command** (not yet reported, January 1, 2009)). And it was so written by Justice E. Rubinstein:

Sealing or demolishing the terrorists' houses is not a matter of exhilaration, exhilarating punishment or exhilarating revenge, although the feelings of every descent man extremely rebel when someone takes an innocent fellowman's life out of blind animosity. If the demolition had derived only from bad feelings, worse than the inferno – it would not have been accepted in a proper law-abiding state. But we are concerned and this is the emphasis, with the issue of the benefit in a forward-looking perspective [*ibid*, in the first paragraph of his judgment].

Case law also discusses the legitimacy of the demolition, as it mainly harms the terrorist's family members, who did not take part in the deadly act executed by him and *prima facie* could not have stopped him. It was held that in this matter too, the deterrence aspect prevailed. Justice J. Turkel wrote on this issue as follows:

Despite the judicial rationales, the idea that the terrorists' family members, that as far known did not help him nor were aware of his actions are to bear his sin, is morally burdensome... But the prospect that the demolition or sealing of a house shall prevent future bloodshed compels us to harden the heart and have mercy on the living, who may be victims of terrorists' heinous acts, more than it is appropriate to spare the people dwelling in the house. There is no other way. [HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289, 294 (2003)).

6. Evidently, all of the above cannot relieve the security forces and thereafter the court, of the obligation to review each and every case on its merits. At this stage, the appellate tribunal and the court hearing the case should consider appellant's claims concerning the lack of proportionality of the demolition act. Support for these claims may be found in undermining the basis, both factual and normative, upon which the State establishes its position that there is no alternative in the fight against terror, but to take such an extreme measure as a house demolition, in the specific case before it.

I am of the opinion, that in the case before us petitioner's claims – which were duly presented in his appeal as in his substantiated petition before us, do not meet this burden. The petitioner has not raised any claim that may undermine the deterring effect of the demolition act. He was unable to destroy the basis for the State's claim that this measure could not be set aside in the efforts to achieve the desirable goal – reducing the harms of terror, especially in view of the fact that this is only a partial demolition with moderate effects. The reasons he has raised concerning the harm inflicted upon him and his family – a harm which cannot be disregarded, are not comparable with the chance that such an action would deter others from joining the path of bloodshed. His argument concerning discrimination, which in and of its nature an 'abuse of process' argument, cannot take root in the soil deeply plowed by the wheels of the bulldozer which was driven by his son.

I therefore suggest to my colleagues to reject the petition and cancel the interim order which was rendered.

Justice

Justice A. Grunis:

I concur.

Justice

Justice M. Naor:

I concur

Justice

Decided, as aforesaid, in the judgment of Justice E. E. Levy

Rendered today, 22 Adar 5769 (March 18, 2009).

Justice

Justice

Justice