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At the Supreme Court Sitting as the High Court of Justice

HCJ 6696/02

HCJ 6738/02

HCJ 6739/02

HCJ 6740/02

HCJ 6741/02

HCJ 6742/02

HCJ 6743/02

HCJ 6744/02

HCJ 6745/02

HCJ 6746/02

Before:

Honorable President A. Barak
Honorable Deputy President S. Levin
Honorable Justice E. Rivlin

The Petitioners in HCJ 6696/02:

Amar et al.

The Petitioners in HCJ 6738/02

Tzalhi et al.

The Petitioners in HCJ 6739/02

Jaradat et al.

The Petitioners in HCJ 6740/02

Mahmid et al.

The Petitioners in HCJ 6741/02

Malash et al.

The Petitioners in HCJ 6742/02

Sweitat et al.

The Petitioners in HCJ 6743/02

Ahmad et al.

The Petitioners in HCJ 6744/02 Daraghmeh et al.

The Petitioners in HCJ 6745/02 Razem et al.

The Petitioners in HCJ 6746/02 Jabali et al.

v.

The Respondent: Commander of IDF Forces in the West Bank

Petitions for *Order Nisi* and Interim Order

Session date: 27 Av 5762 (August 5, 2002)

Representing the Petitioners in HCJ 6696/02 Adv. Andre Rosenthal
and HCJ 6738/02:

Representing the Petitioners in HCJ 6739/02, Adv. Khatib Hanan
HCJ 6740/02, HCJ 6741/02, HCJ 6742/02,
HCJ 6743/02, HCJ 6744/02, HCJ 6745/02 and
HCJ 6746/02 :

Representing the Respondent: Adv. Shai Nitzan

Judgment

President A. Barak

1. The petitioners are family members of terrorists – terrorists who carried out extremely devastating terror attacks. The terrorists are responsible for hundreds of people killed and wounded. The petitioners are concerned that the houses in which they live – and in which said terrorists have lived – will be demolished by the respondent. They applied to this court. They request that the respondent will be compelled to give them an advance notice – should he decide to demolish their houses – so that they will be able to appeal the decision beforehand, to him and to us. The court issued (on August 4, 2002) an order for the receipt of the State's immediate response. At the same time an Interim Order was issued. On the following day (today, August 5, 2002) the arguments of the parties were heard.
2. Upon the commencement of the hearing it was clarified that the petitions were limited only to the issue of the right to a fair hearing. For this purpose we must therefore assume – an assumption which should be further reviewed – that the respondent has the authority to order to demolish petitioners' houses. Based on this assumption, the question is whether the respondent must give the petitioners the right to make their arguments, in advance, against the exercise of such authority. Petitioners' counsels emphasize the importance of the right to a fair hearing and

respondent's obligation to refrain from exercising his authority before petitioners' arguments are heard by him. However, the exception to the rule is that a prior notice of a demolition should not be given and the right to a fair hearing should not be granted if consequently the lives of the soldiers will be put at risk and the action may be frustrated. On this issue respondent's counsel notes that:

"Giving such warning, of contemplated operational activity in a hostile area, may put in real risk and danger the lives of our forces, and may even frustrate the success of the action, since the warning will enable the enemy to mine the relevant houses, to ambush the force which is about to enter them etc. Incidents of this sort have occurred over the last few months in different places throughout the Occupied Palestinian Territories (OPT). For these reasons, as a general rule, no military force which carries out a combative-military activity in a hostile area gives prior notices of the operational activity it intends to carry out, and for the same reasons the commander of IDF forces in the Judea and Samaria Area should not be compelled to give such prior notices, which may put in real risk and danger the lives of its soldiers and to frustrate the success of the action.

This double concern, that the soldiers may be put in risk and that said operational activity may be frustrated, underlies respondent's decision not to give a prior warning."

However, each case will be examined on its merits, against the backdrop of the security circumstances that will be in effect at that time. If the respondent is of the opinion that a certain risk may be taken and that a prior warning may be given, he will act accordingly. The respondent has so acted in the past and will so act in the future. Respondent's position therefore is that he can not give a sweeping undertaking which will apply to all cases. Each case will be examined in view of its circumstances. Is this position lawful?

3. The State of Israel is in the midst of warfare activities. The military carries out different warfare actions the purpose of which is to restore safety to the Area and to the State. Amongst these actions – and due to their deterring nature – the military wishes to demolish houses in which terrorists who caused killing and bloodshed were living. We were not requested and we shall not express any opinion concerning the necessity and effectiveness of the demolition actions. This issue is to be determined by the military, as it constitutes part of the entire warfare activity. As stated above, our assumption is that these deterring actions are within the powers and authorities of the military. The question is whether, before the military carries out the demolition actions, it should give the petitioners the right of fair hearing?
4. A person's right to be heard before injury is inflicted upon his person or property, is a fundamental right. This court has so held in a long line of judgments (see: H CJ 3/58 **Berman v. Minister of Interior**, IsrSC 12 1493, 1503; H CJ 290/65 **Eltagar v. The Mayor of Ramat Gan**, IsrSC 20(1) 29,33; H CJ 654/38 **Gingold v. the National Labor Court**, IsrSC 35(2) 649, 654; CrimApp 768/80 **Shapira v. State of Israel**, IsrSC 36(3) 337, 363; H CJ 4112/90 **The Association for Civil Rights in Israel v. GOC Southern Command**, IsrSC 44(4) 626, pages 637-638; H CJ 5621/96 **Micha Herman v. The Minister for Religious Affairs**, IsrSC 51(5) 791, 816; See further: Zamir: **The Administrative Authority** (1996) 793). This right applies not only in the territory of the State of Israel. It also applies in the Area (see H CJ 5973/92 **The Association for Civil Rights in Israel v. Minister of Defence**, IsrSC 47(1) 268). It applies in

times of tranquility. It applies in times of belligerent activities. It also applies to the demolition of houses in which terrorists live, whether in times of tranquility or in times of belligerent activities. However, like any other right it is not an absolute right. This is a right of a relative nature. It does not apply in special and extraordinary circumstances (see CrimApp 768/80 **Shapira v. State of Israel**, IsrSC 36(3) 337, 365). One of these extraordinary and exceptional cases in which there is no place to grant the right to a fair hearing, is the case in which the injury to one's person or property occurs in the course of a military-operational action which is carried out within the framework of belligerent actions of the military (see HCJ 2977/02 **Adalah: The Legal Center for Arab Minority Rights in Israel v. The Commander of IDF forces in the Judea and Samaria Area** (not published)). It was so held by President Shamgar, who has noted:

"Certainly there are military-operational circumstances, in which the conditions of time and place or the nature of the circumstances are inconsistent with judicial review; for example, when a military unit is engaged in an operational action, in which it must clear away an obstacle or overcome resistance or immediately respond to an attack on military forces or on civilians which occurred at the time, or such other circumstances, in which the competent military authority requires that an immediate action be taken for operational reasons. By the very nature of the matter, in circumstances such as these there is no place for delay in the military action, the performance of which is required forthwith" (HCJ 358/88 **The Association for Civil Rights in Israel et al. v. GOC Central Command et al.** IsrSC 43(3) 529, 540).

This rule also applies to demolition of buildings in the course of military-operational activity (see HCJ 4112/90 **The Association for Civil Rights in Israel v. GOC Southern Command**, IsrSC 44(4) 626, 640). For this matter it makes no difference whether the injury caused to the property is a by-product of the military activity or whether the injury caused to the property is the deterring goal underlying the military action. It is our assumption - that in both cases - these are operational actions which are required for the protection of the Area and the State, which are within respondent's power and authority.

5. The inapplicability of the right to a fair hearing in the event of a military-operational action derives from the balance between the right of the individual to a fair hearing due to an injury to his person or property on the one hand, and the crucial public interest that the military action be carried out – an interest which is based, *inter alia*, on the concern to the soldiers' safety and lives – on the other. Therefore, if there is a serious concern that the grant of the right to a fair hearing may put the lives of the soldiers at risk and frustrate the action itself, the crucial warfare needs override the right to a fair hearing. But where the danger (to the soldiers) and the probability (that the action be frustrated) are non-existent, the right to a fair hearing is restored and should be exercised, even in cases of warfare actions. Therefore, if in the circumstances of a specific case the lives of the soldiers or the success of the action are not at real risk, the right to a fair hearing should be upheld. Furthermore: even where the right to a fair hearing may not be fully exercised, all measures should be taken to have it partially exercised, such as a hearing before the military commander who is present on site before damage is caused to the property. Finally, the more the right to a fair is deferred in situations of a crucial military need, the greater becomes the need to ensure that the information in the possession of the military commander is reliable and substantiated and that the circumstances which justify the use of the operational measure actually exist.

6. The conclusion arising from this normative framework is that a predetermination can not be made according to which due to warfare actions a right to a fair hearing should in no event be granted to any person opposing the demolition of a building in which a terrorist who has carried out devastating terror attacks which caused killing and bloodshed, was living. Similarly, a predetermination can not be made according to which, notwithstanding warfare actions, the aforesaid right to a fair hearing should always be granted. It all depends on the circumstances of the case and the proper balance between the right to a fair hearing, on the one hand, and the risk (to the soldiers) and the probability (to carry out the action), on the other.
7. The petitions before us are general. They do not draw a distinction between this case and the other. We are requested to give a general decision which will apply to all cases. We are unable to do this. As stated above, it all depends on the circumstances of the case. There will certainly be cases in which it will be justified not to grant the owner of the property the right to a fair hearing. There will be cases in which the respondent will be obligated by law to grant the right to a fair hearing. The responsibility in that regard is imposed on the defendant, as we are unable – beyond our general analysis above – to hold in advance which rules will apply to each and every case.

The petitions are hereby rejected.

The President

Deputy President

I concur

Deputy President

Justice Rivlin

I concur

Justice

Rendered today, 28 Av 5762 (August 6, 2002)

President

Deputy President

Justice