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At the Supreme Court Sitting as the High Court of Justice

HCJ 8024/14

HCJ 8025/14

Before:

**Honorable Justice E. Rubinstein
Honorable Justice Y. Danziger
Honorable Justice N. Sohlberg**

The Petitioners:

1. **Hijazi**
2. **Hijazi**
3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

v.

The Respondent:

GOC Home Front Command

Petition for *Order Nisi* and Interim Order

Session date:

9 Kislev 5775 (December 1, 2014)

Panel secretary:

Gilad Zohari

Typist:

Ziva

Representing the Petitioners:

Adv. Labib Habib, Adv. Muhammad Mahmud

Representing the Respondent:

Adv. Yochi Genesin, Adv. Avinoam Segal-Elad

Protocol

Adv. Habib:

I request in the beginning of the hearing to submit an engineering opinion a copy of which was transferred.

Honorable Justice E. Rubinstein:

I would like to note that last week a general petition was filed regarding house demolition which is scheduled for a hearing on Wednesday together with two specific petitions, and therefore I assume that as far as timeline is concerned, judgments will be given more or less at the same time.

Adv. Segal Elad:

There is no objection for the submission of the opinion.

Adv. Habib:

It is difficult to appear in these petitions. On the one hand there is a very fundamental human and moral understanding upon which the system is based that people are not injured only because a family member, a son or parent, committed a horrible crime. It is a fundamental principle and one should not study law to understand it. It is inside us, it constitutes part of our basic morals, not to mention the fact that it also constitutes part of the law and all religions that people are not injured due to kinship and people are not injured and in order to deter others. If you start with such a thing you can never know where to stop. One can say that if you kill the family members it will deter potential terrorists.

Honorable Justice E. Rubinstein:

The question is whether the circumstances... Counsel knows that on the legal level for many years it was approved with discomfort, and in general we are going through difficult times and regulation 119 is used. We are talking about respondents' argument that this demolition or sealing or partial demolition, as troubling as it may be, creates deterrence. This is the argument. An attempted stabbing attack was also committed and the argument is that deterrence is imperative.

Adv. Habib:

Therefore I said that it was difficult to appear in these cases – on the one hand approval is granted for the use of regulation 119, for the demolition and sealing of houses, but if we balance the two things, the court must and should be very precise and examine things with a magnifying glass with the same feeling of discomfort, so that where the demolition may be canceled and the severity of the injury alleviated, it would be so done. Destruction of a family home is not only an injury to property. It is a curse. "May your house be destroyed" means may your world collapse. In any event, there is a severe violation of the sense of justice that injury is caused to someone who did not sin, which requires a very meticulous examination. When you read the State's response you do not get the sense of any discomfort. The State does not say that it knows that the family was not involved but that they must. There is no difficulty in the execution of this thing and there is no sense of compassion but they do it as if it was a natural thing, and it becomes normal [to destroy] the family home of a terrorist. Everything is labeled and painted in the same color, and the deeds of the son who has already been killed are considered... and the family and its house are painted in the same color. These may be nuances but they show that there is no sense of 'no choice' but rather a sense that it is the natural thing to do. It became the norm.

Honorable Justice E. Rubinstein:

Counsel himself knows that during a long period of time this thing was not used following the committee. This deed with we are concerned and the other one, these are not minor things and became a routine.

Adv. Habib:

I am not trying to justify or defend the deeds but there is no connection between the family and the deeds.

Honorable Justice N. Sohlberg:

The respondents emphasized that it was not the norm and that the option to use [this measure] would be considered only when there was an extreme change of circumstances. It is not the norm.

Adv. Habib:

In the margins between the general approval of the court to use this sanction and the obligation to act proportionately, I must raise the question of whether this deed should be treated like all other deeds, and I am not trying to justify or belittle the severity of the deed, but are we concerned here with a nationalistic terror attack or in an event in which a person attacks his victim due to his political views.

Honorable Justice E. Rubinstein:

What is the difference between a political and nationalistic position?

Adv. Habib:

If a Jew attacked a Jew we would not have called it a terror attack but rather an attempted political assassination. Assuming that within the turmoil of violence which we currently experience, an attempted assassination takes place due to a difference of opinions concerning the Al Aqsa mosque and the injuring party is Jewish. Would the state in such an event ... destroy his house? No. When that person shot Mr. Glick he was not looking merely for a Jewish victim because there were additional people there in the Begin Center. He specifically picked that person and presented to him his political position and therefore it is a political act and it should not be included in the mass of nationalistic terror attacks. We, as jurists, must be very precise when we examine the situation and generalizations should not be made.

Typist: Ziva

Adv. Habib:

In the event of a criminal murder, had that person's home been demolished? Certainly not.

Honorable Justice E. Rubinstein:

There are three levels. There is a legal level and a family level. Is there justification under the circumstances of the matter... If the resolution in these two levels is against the intervention of the court... how we do it in the least injurious manner while maintain the deterring effect and at the same time less injurious. With respect to the third level, Counsel brought with him an opinion of A., an Israeli engineer. I gather that this is something that can be discussed with respondents' representatives, who received this document, and see how what is the best way to do it, assuming that the two previous hurdles were cleared. Counsel will conclude.

Adv. Habib:

I think that the argument I raised should be considered. I will not repeat it. I clarified the main point. This is how I see things. I request the court to take things into consideration. In the same manner that, with all differences and distinctions, nobody thought to demolish the house of the person who murdered the Prime Minister of Israel.

Honorable Justice N. Sohlberg:

The deterring issue is the one which makes the difference. Whether there is need to deter or not.

Adv. Habib:... Doesn't the fact that Israeli residents are concerned have any meaning? Doesn't the fact that they have an Israeli status, that they are not residents of an occupied territory but rather residents of an area which was annexed and were given a blue ID card, doesn't it give the family, and I am talking only about the family, doesn't it give them a greater civil immunity? Doesn't their status have any meaning? Are they just Palestinians without any additional legal definition when this measure is considered? The fact that they are residents of Jerusalem should be given weight. If not to cancel the injury, it should be at least said that the house would not be demolished but only sealed. For the family it is the same punishment...

How can one come and demolish? We are talking about unstable structures, dilapidated houses. It is unfair and unequal... It should be considered with the same sense of discomfort which was mentioned. We do not understand, as was written in the opinion, how can a ground floor be demolished while there is another floor above it. It puts the entire structure at risk. It certainly puts at risk the top floor and we assume that this apartment is going to be detonated to make an example out of it. We are of the opinion that if residency in Jerusalem or residency in Israel does not give the family immunity against the demolition of its home, if it does not replace it with sealing, the demolition should at least be executed in a controlled manner which would not injure the top floor. We request, at least as an alternative remedy, that the State reveals its cards and enables us to see the opinion beforehand. I will not repeat the arguments in the next petition.

What [is the difference] between residents of Jerusalem who are not aware of the son's actions and the residents of the occupied territories? We should be at least heard with respect to the method of the demolition. The court should be very strict with the State. The response does not really comfort us. The statement contained in section 23 thereof "an attempt will be made to minimize significant damage". It is not best efforts and not any damage, but only a significant damage. It gives no comfort because in the past in Jerusalem, even when sealing were concerned, severe damages were caused to structures as a result of sealing in the past.

The regulation is exercised only against Palestinians although there were not less severe terror attacks in the opposite direction. In view of the difficult times in which we live, when the Palestinian and Arab population also suffers from incitement and injury and other things which are well known, doesn't a demolition of a family home justify or at least gives a sort of inhibited approval for the infliction of injury on this population, on its homes, for the execution of 'price tag' operations, for the burning of mosques, for all such actions which should not be encouraged, instead of explicitly establish one principle that injury should not be inflicted on innocent people, neither on their person nor on their property, whatever their sons might have done. It is an iron-clad rule which we request to respect.

Adv. Segal:

The decision was made following a rising tide of terror attacks which commenced in Judea and Samaria and spread over to Jerusalem and other areas. I will not elaborate. Judgments were recently given, such as the Qawasmeh judgment and this issue is quite clear and there is no need to elaborate on it. With respect to the argument that the authority must be used in a very limited manner, the argument as if it is exercised as a daily routine, that we issue orders in each incident, is factually erroneous. Since 2005, this measure was used twice. In 2008 when similar terror attacks to the current ones were executed, a ramming attack and a terror attack in a synagogue. We specified the extreme change of circumstances which requires an extreme change and deterrence. The court accepted [this argument] and since then additional terror attacks were executed.

Honorable Justice Y. Danziger:

The question is whether precisely this fact, that regardless of the two demolitions which were executed following our two judgments in the last six months, the number of terror attacks has not diminished but has rather proliferated, doesn't it weaken the argument concerning the deterring effect of the demolition?

Adv. Segal:

We cannot prove how many attacks were prevented. Eventually according to the professional agencies this measure does deter. My colleague stood here and explained the great significance that a demolition of a home had, and it is precisely the reason for the deterring effect that this measure has. The proposal was presented by the Chief of Staff. Unfortunately we are in the midst of a rising tide of terror attacks. We hope it is not a large tide and that it would stop. We don't know how many potential perpetrators we have deterred. In this regard the authority is used in a limited manner in connection with murderous attacks... My colleague's argument is almost outrageous... that when a political matter is concerned it should be treated differently. The recent incitement involves Temple Mount and Al aqsa, and to say that it is being disregarded is an outrageous argument...

Honorable Justice E. Rubinstein:

There is an argument that a distinction should be drawn between the residents of Jerusalem and the residents of the Area, and concerning the engineering aspect of the action.

Adv. Segal:

There is ample case law concerning demolition. In HCJFH an attempt was made to argue that it could not be exercised as a belligerent measure. Therefore, there is no doubt that... regulation 119 applies to Jerusalem.

Honorable Justice E. Rubinstein:

It was before 2008 because President Barak retired in 2006.

Adv. Segal:

2161/06 I think that the judgment was given in 200 [sic]. Unfortunately, the events speak for themselves, loud and clear, and the attacks take place in the very heart of Jerusalem. With respect to the engineering aspect, we received the engineering opinion this morning. I gave my colleague the same answer I gave in previous cases that the engineering opinion would be examined and to the extent possible damage to the structures would be minimized.

Honorable Justice E. Rubinstein:

Your colleague suggests maybe to seal rather than demolish.

Adv. Segal:

Part of the ground floor structure... it was decided to partly demolish and partly seal. Namely, the part on which the upper floor is built will be sealed and the other part will be demolished in a manner that would not damage the upper floor. Maybe in the opinion submitted by my colleague today, he does not say that it cannot be done, he just offers conclusions. If prior bracing is required prior bracing will be made. On this level it cannot be argued that demolition cannot be carried out.

Honorable Justice Y. Danziger:

The truth is that there are not many judgments. Since the judgment of our late colleague Justice Levy in Sharbati in 2003 the argument was not properly examined and the question is whether, since then and until this present time, things occurred which strengthen the arguments of your colleague or whether as you argue, nothing changed and the discrimination argument should be totally denied.

Adv. Segal:

I believe that violent conduct of any kind should be condemned. There is currently no change in our position which was presented before the honorable court concerning the discrimination argument or the intention to exercise the authority also against Jews who are involved, in this way or another, in terror. It should also be noted, and it pertains to the argument which has been previously raised, that we witness many incidents of stones and Molotov cocktails throwing, and no demolition order was issued in connection with any such incident. Sabotage attacks against mosques or any kind of 'price tag' action cannot be compared to this current tide of terror. Change of circumstances is always a cause to re-examine things but the position which was presented is our position.

Adv. Genesis:

What my colleague is trying to do is to draw a distinction between the residents of Jerusalem and the residents of the Area and to legitimize a political murder. ... it is an outrageous argument. Only two weeks ago an attempt of a Hamas cell to hit the car of Minister Liberman was exposed. Thus... injury based on political views is a terror attack. Precisely in view of the single terrorist phenomenon amongst East Jerusalem residents, precisely in view of the escalation in Jerusalem...we are talking here of a phenomenon of change of means which are "civil means", the single terrorist, due to the freedom of movement, therefore in the context of deterrence, when we must cope with this phenomenon of escalation in recent months, this is an effective measure.

Honorable Justice E. Rubinstein:

Counsel heard, assuming that it is going to take place, there is willingness to examine the engineering arguments etc.

Adv. Habib:

... If the apartment is partly sealed why shouldn't it be sealed in its entirety? With respect to the attempted political murder I will not reiterate what I said, I already answered that. Had the name Montezes Hijazi been replaced with Avi, Avi shot another person due to his political positions, the State would not have requested to demolish his home, because his deeds constitute a political action rather than an act of terror in the classic sense of the word.

It is regrettable that under these circumstances demolition rather than sealing is intended.

With respect to the next file, it concerns a house which was built in a poor and neglected neighborhood against which this military measure of house demolition is about to be exercised by the detonation of an apartment located on the third floor of an unsound building, having a joint wall with another building and with additional buildings only 2 meters apart. I suggest to think about the huge operation which will be required to re-build the houses and improve the quality of life of the residents...

I think that from the opinion the court can get the impression from the photographs that we attached that this building will probably collapse within the next few years. It is a three story house which has no foundations, and according to the opinion a demolition would destabilize the entire structure and cause it to collapse sooner or later. This is from the engineering perspective. I reiterate everything I said and all my arguments in the petition. I will not repeat what I said. I will shortly refer to a few points.

In this case the structure is not owned by the nuclear family. The family, in this case, the father of the family rented this apartment from his brother. I have already argued that a distinction should be drawn between the residents of Jerusalem [and the residents of the Area] and I raised the question what kind of protection did said residency give the residents of Jerusalem. I think that in view of this distance, in view of the fact that the apartment was neither owned by the terrorist himself nor by his nuclear family, but rather by his brother, at least demolition should be avoided. Had he rented an apartment in Pisgat Zeev or in the French Hill I do not think that the building would have been demolished. I think that in this case at least demolition should be avoided. I don't think that the house would have been demolished had he rented an apartment in Pisgat Zeev or in the French Hill. This is my guess but it is only an incidental comment. Here too the State argued that the brother Mansur, petitioner 2, the State brought things which were published by in the internet in his name and claimed that he was calling hundreds to follow the footsteps of his brother. It is important for me to say the following: the truth, it is important for me to say these things... the State would not have spared the house regardless of whether he did or did not say anything. The State would have demolished the house in any event. No matter what the brother says or thinks or does.

Honorable Justice Y. Danziger:

These things in the State's response refer to Counsel's argument that the innocent should not be injured and that fathers should not be punished for the sins of their sons.

Adv. Habib:

The purpose of this argument is to reduce the discomfort. These things were said by the brother immediately when he was told of his brother's death without any details, or clips or any information. It is understandable that in such moments when a person is very upset he speaks out of anger. The argument that he told others to follow his [brother's] footsteps is not true and his words he referred...

Honorable Justice Y. Danziger:

Didn't he say that his late brother was a Shahid?

Adv. Habib:

Had I known I would have brought our own transcript. The brother said things which impose liability on specific politicians who set fire in Jerusalem, and as far as he is concerned, are intended to harm his holy place.

Honorable Justice E. Rubinstein:

We should not mix everything together... this is nationalistic politics... Why should counsel insist on saying that he did not say what he did say?

Adv. Habib:

He lost his brother....

Typist: Galit

Adv. Habib:

He stated his position on the most sensitive issue in Jerusalem.... Indeed things were said in a rage but they are not what the state tries to make out of them. They impose liability for the volatile situation in Jerusalem and it is a political stance. For this he was detained and interrogated by the ISA for 20 days and

was released. He is here. The petitioners are still hopeful, and it encourages me argue out of hope, because the petitioners still hope that this can be prevented or eased-up and it attests to petitioner's character who is a law abiding citizen, who shows up and states that he opposes any injury to innocent people as his brother did and anywhere either by Jews or Arabs. I would also like to refer to the ownership of the apartment which was neither owned by the terrorist nor by his wife or children, and therefore the ownership issue requires some relaxation in the severity of the injury. If not to cancel [the demolition] at lease seal in a sensible manner which maybe, 10 years from now when peace erupts, may be opened. The brother owns the ceiling, and the ceiling of the apartment is the only place in which his brother Mansur can build his apartment. Therefore we request to at least prevent damage to the ceiling of the apartment. We request that the apartment be sealed and the ceiling left intact. We are of the opinion that in this case, in view of the damage and the risk posed to the adjacent buildings and to the entire structure which is so unsound, we request the court to be very precise on the demolition... is the apartment going to be detonated. I reiterate my general objection for the infliction of any injury on the family, and in conclusion I would like to say that maybe the time has come, in view of the fact that after every two or four years of calmness we experience an escalation, and so forth and so on, maybe the time has come to think of another way to stop the violence, not by pouring oil but rather by the implementation of a different approach of construction rather than destruction.

Adv. Segal-Elad:

I will not repeat things. With respect to rental as opposed to ownership, this issue has already been discussed by the court and the test is the residency connection to the building, and here there is no argument that he did not reside in the building. It derives from the fact that we are concerned with deterrence rather than with punishment, otherwise terrorists who rented apartments were protected and could not be deterred. Therefore this argument should be denied. As to the terrorist's family, as noted by Justice Danziger, we brought these things up only because arguments were raised concerning injury to innocent people. A few terrorists who carried out terror attacks grew up in this house. One of whom was arrested and released in the Shailt transaction. He is currently in Turkey and continues with Hamas activity. The other one is also a terrorist and it seems that the house served as a fertile soil for the production of terrorists. With respect to my colleague's comments about political incidents... it is outrageous. With respect to the opinion, this case concerns a simple demolition because it is the top floor of a structure which consists of a few floors. The demolition is executed in a controlled manner by putting small quantities of explosives in the walls themselves which do not form part of the frame of the building.

Adv. Habib:

I request two days from the date of the decision to enable the family to vacate its things and make the necessary preparations.

Adv. Segal Elad:

The need to deter is material and immediate according to security agencies and the Prime Minister and we have therefore requested that decision in this matter be given as soon as possible and we will provide one or two days for organization purposes.

Deferred for review.

Typist: Ziva