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At the Supreme Court Sitting as the High Court of Justice

HCJ 8066/14
HCJ 8070/14

Before:

Honorable Justice E. Rubinstein
Honorable Justice E. Hayut
Honorable Justice N. Sohlberg

The Petitioners:

1. Abu Jamal
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
3. **Addameer – Prisoner Support and Human Rights Association**

v.

The Respondent:

GOC Home Front Command

Petition for *Order Nisi* and Interim Order

Session date:

11 Kislev 5775 (December 3, 2014)

Panel secretary:

Matan Barzilai

Typist:

Sigalit Doster

Representing the Petitioners:

Adv. Muhammad Mahmud; Adv. Andre Rosenthal

Representing the Respondent:

Adv. Yochi Genesin, Adv. Avinoam Segal Elad

Protocol

Honorable Justice E. Rubinstein: Please start talking about the two files, this file and file No. 8070/14.

Representing the Petitioners Adv. Rosenthal: Firstly, a procedural matter if I may. This morning we tried to submit to the court an opinion of an engineer on our behalf regarding the two structures and in addition we made an internet search to find out whether there was a basis to the argument, the sharp increase in terror attacks as compared to 2005 and I attach it. I received their consent this morning. Submits a copy to the court. The opinion speaks for itself. I will get to it. We argue that in fact the decision to demolish the houses in this case... stems from the current political situation... In fact we are not talking of punishment or potential perpetrators. On this issue I would like to say one thing. In 2008,

after three years of suspension, Regulation 119 was used and her honorable Justice also set in the panel of 7731 A 4 if I am not mistaken, but we will get to it, where a petition was filed against the sealing of three stories located in the same village, Jabel Mukaber, at the entrance to the village. That case concerned a terror attack at Merkaz Harav and this case also concerns a terror attack which took place in a synagogue, and in that case also the court did not interfere with the exercise of Regulation 119 and the house was completely sealed with the exception of two small rooms, but the thing is that it was sealed with concrete in a very conspicuous manner.

The terrorists lived in the same village. To come and say that they did not know that the result of the terror attack, beyond their death... the possibility that the state will destroy the house and that the family will pay the price was known to them. Therefore the question which should be asked is how can the respondent come after a few years ... and claim with full certainty that it works. There are no data in that regard... a person who intends to commit a terror attack and knows that he is going to die, does not think about what's going to happen next, otherwise he would not have done it. Had he been thinking about what would happen next he would have found another way. His protest is a political protest because of a political stalemate and it cannot be disregarded. The situation in East Jerusalem after 40 years of occupation by the State keeps deteriorating and deteriorating. It is a horrible situation.

In response to questions of the Honorable Justice E. Rubinstein: I don't know how many files there are but the situation is horrible. However, the situation here is better than the situation in Syria. In Syria I would not have been able to argue like this.

The Honorable Justice E. Rubinstein: Protest has many ways, but to enter a synagogue and kill so many people.

Advocate Rosenthal: It is not a question of justification. What I argue here is that the judicial assumption which runs like a golden thread throughout the years is that it deters someone, but there is no evidence to that effect. It is a wishful thinking. I would like to refer to what you did in 2005 when we were in court with six files. In one file set the honorable Justice and the former Deputy President, and the court explicitly told the state attorney that it was no longer willing to enable it, and unfortunately, the protocol of the hearing which we tried to receive disappeared from the system although according to the system it exists... in this hearing the court presented to the state attorney all arguments that we have raised throughout the years, myself and my colleagues, for years we argue that we are concerned with collective punishment and that the Regulation is punitive rather than deterring and that it runs contrary to morality, contrary to international law, that it puts the State in a wrong position. The court raised all these arguments before the state attorney and then, when the hearing ended, it was adjourned for 90 days. When does the court adjourn a house demolition file according to Regulation 119 for 90 days? The State got the hint, they did not want a judgment. A few days later a military committee was appointed to examine Regulation 119, whether it served its purpose or not, and the conclusions of this committee, you are familiar with them. The committee recommended... namely, the result did reconcile with what the State wanted. [The conclusion was] that hatred remained, that it created the possibility that the other family members would wish to revenge the demolition of their home. The current Minister of Defence who was at that time the Chief of Staff canceled the recommendations of the committee, the orders were canceled 6 files... I request and I have now submitted a document which I took off the internet, from the site of the Israel Security Agency, which specifies the number of terror attacks and I see that in 2005, when the court interferes and says that it will no longer agree to the use of Regulation 119 for different reasons... I have a judgment which does not specify the reasons but just says that in view of the fact that the State agreed not to demolish there is no longer a dispute before us. Therefore I requested judgments from a few panels and I received judgments in the absence of legal controversy and I have nothing to say about it, again, back in 2005 there were terror attacks. According to the respondents... and the State's notice I think that by the end of 2013-2014 there were 1900 terror attacks.

The Honorable Justice E. Hayut: The number that Counsel gives is not relevant.

Advocate Rosenthal: I brought the number not for comparison purposes, it is not my intention and my purpose. The purpose is one and only. [To show] that when there were terror attacks... maybe not as murderous as this one but there were plenty of terror attacks in 2005. The thing is that notwithstanding the above and despite the number of terror attacks in 2005 the court did interfere. The court has the power to interfere. It did it with respect to Regulation 119 and commented that it should be proportionate, that an examination should be conducted, that balancing ... should be made.

The Honorable Justice E. Rubinstein: ... and now... we have this case, after the court made the balancing and after we had the ... committee, meanwhile... I would have been very happy to be in your place and make these arguments, but we are not dealing with theories but rather with reality. The question is whether or not we are in a situation which justifies, also according to the committee and recent case law, in such cases in which you represent the families of these murderers, the execution of such demolition or not.

Advocate Rosenthal: The demolition of the family home is never justified, since their only connection is kinship. These are Jewish values, this is the land of the Jewish people that the father is [not] responsible for the acts of the sons when he knew nothing about it, he did not help him. There are even declarations in these files that these families were shocked from these deeds. Is it justified to punish them?

The Honorable Justice N. Sohlberg: Regulation 119 is not concerned with punishment but rather with deterrence. Security agencies expressed their opinion that said deterrence contributes to the prevention of terror attacks. Assuming that deterrence is achieved, what is your legal position concerning the use of Regulation 119?

Advocate Rosenthal: How do we know that it indeed deters. When did the terror attacks stop?

The Honorable Justice N. Sohlberg: I ask you for your position, assuming that deterrence, prevention or reduction of additional bloody attacks is achieved, is it the justified, in your opinion, to use Regulation 119?

Advocate Rosenthal: There is no justification. A family home should not be demolished unless there is evidence that the family knew or helped. It should not be used, the narrative that it has a deterring purpose rather than a punitive purpose... it is clear that its purpose is to punish, and who is punished? People who did not know. Isn't it enough that they lost a relative or a family member, putting aside what he did and looking at it from a humane perspective, in addition they should lose the roof over their heads... you heard most of the things. What bothers me is the use of time and place. Has nothing changed over the years, there are ups and downs, but how can we enable. There is an argument that we are concerned with primary legislation, but with all due respect it is a denial again because it is not the primary legislation that we know. It was not approved by the Knesset. It is British. It was introduced in 1945... and then in 48-49 the new state of Israel decided that in view of the fact that the cancelation of said Regulation did not appear in the official gazette... it was not canceled, but in fact, the British canceled all of these regulations before the left Palestine.

Advocate Avinoam Segal: ... The arguments raised in this petition were broadly discussed in 2005. In fact, my colleague disregards the fact that petitions were filed also in 2008-2009 and also recently in the Qawasmeh judgment. There are judgments in which the honorable court in fact repeatedly denies all of the above legal arguments. With respect to the terror attack itself, there is no need to say too much. It is the most shocking terror attack which occurred in a neighborhood in Jerusalem. According to security agencies and the professional bodies which are responsible for the safety and security of the State of Israel, there appears to be deterrence and it is a significant and effective measure... the court reiterated it

in a number of judgments and it cannot be proved in numbers how many terror attacks were prevented, because when a terror attack is prevented it is not carried out and cannot be counted, but there is an opinion and position of the security forces and currently it is the acceptable position. Therefore... it is used only in extreme circumstances. It is important to say. Since 2005 there was no dispute in the committee about the deterring effect of the measure. The question concerned the frequency in which such measure should be used and indeed the rule is that it will be used in an extreme change of circumstances. In fact, from 2005 it was used twice. In 2008 during very severe terror attacks in the heart of Jerusalem, eventually two houses were demolished, and recently. The two files concern the murder and abduction of the two youths and the honorable court discussed everything in detail in the previous judgment, and I refer to Judea and Samaria a few months ago before the present wave in Jerusalem and the court held that change of circumstances occurred which enabled the State to use house demolition orders and I think that it is needless to say that the events which occurred since then, namely, since the court's decision in the Ma'ayeh case... justify the measure. There is no doubt that it is a severe measure, but it is justified because of the deterrence and therefore we are of the opinion that there is no room for the court's intervention. The professional bodies are of the opinion that deterrence is materially required. We request the honorable court to decide in these petitions while, to our regret, we are constantly exposed to terror attacks including the murder which occurred in Gush Etzion just yesterday or the day before yesterday. Therefore we request the court not to accept the petition. There are testimonies from people on scene that this measure deters people and is taken into account when they consider whether they should enter the circle of terror... This is also supported by sources and information in the possession of the security service.

Advocate Rosenthal: No affidavit of any official was submitted here. The position which is presented is the position of the army... Why was that committee established, and this is what I was trying to explain. The committee was established not because the army wanted to check itself. The committee was established because the honorable court did not want to intervene for all of the above reasons other than the international reasons. Until when will the court stand aloof and say, we do not want to intervene here, we do not feel comfortable. The family is punished here and everybody knows it. It is not something I merely say.

The Honorable Justice E. Rubinstein: There are 3 petitioners. Doesn't Counsel agree that there is an effort for proportionately assuming that it is legally substantiated?

Advocate Rosenthal: How can I agree that there are signs of proportionality... It's similar to the torture files. How long did it take the court to understand, to rule against tortures. It took them from 1994. How Long? They did not understand? They procrastinated. How many petitions were filed? Hundreds of petitions and I signed them and all the Justices read them, and it was delayed and delayed... In the press and all over the world the only thing we read, Israel punishes the families again, Israel uses the Regulations again. Until When? This is a Jewish state, these are the values that we pass-on, that we demolish the homes of innocent families to show that there may be deterrence. Even an affidavit I do not have. I have no basis for the argument of deterrence. It is a wishful thinking. This is not the solution. The solution is found elsewhere and you know it, we know it and they also know it.

Advocate Segal: Nobody can know and ... it is a professional position ... to ascertain that no more terror attacks occur.

Typist: Sigalit D.

Advocate Rosenthal: I firstly request that you read the opinion that we filed concerning the injury which will be cause to the surrounding area of the houses if you approve the use of the Regulation.

The Honorable Justice Sohlberg: Does Counsel request 48 hours?

Advocate Rosenthal: Yes. I request that you cancel the Regulation.