At the Supreme Court in Jerusalem **HCJFH 360 /15**
Sitting as the High Court of Justice

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The Petitioners

v.

1. Minister of Defense
2. IDF Commander in the West Bank
represented by the State Attorneys' Office
Ministry of Justice, Jerusalem
Tel: 02-6466589; Fax: 02-6467011

The Respondents

Respondents' Response

1. According to the decision of the Honorable President Naor dated January 26, 2015, which was served on the State Attorney's Office on January 28, 2015, the respondents hereby respectfully submit their response to the petition requesting to hold a further hearing in the judgment which was given on December 31, 2014, in the petition in HCJ 8091/14 (hereinafter: the **judgment**).

2. The remedy which was requested by the petitioners in their petition in HCJ 8091/14 was a declarative judgment to the effect that "**the use of Regulation 119 of the Defense (Emergency) Regulations 1945, by way of confiscating and demolishing or sealing the homes of individuals suspected, accused or convicted of involvement in hostile activities against the State of Israel and/or its citizens is unlawful,** in that it breaches international humanitarian law, international human rights law and Israeli administrative and constitutional law." [emphasis in the original – the undersigned].

3. The respondents argued on this issue in their preliminary response to HCJ 8091/14 that the petition should be dismissed *in limine*, since there was no room to raise arguments on issues of principle in a theoretical public petition which was not based on a set of concrete factual circumstances; since there was no cause to revisit the legal issue of principle given the Honorable Court's jurisprudence over the years in individual petitions directed against the use of the power granted under Regulation 119 of the Defense (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**);

since arguments similar to those made in the petition herein were made by petitioners 1, 4 and 7 in the petition in HCJ 4597/14, which was dismissed several months earlier after it was ruled that: "**In fact, all arguments raised in this petition have already been discussed and decided by this court in previous judgments**."

The respondents also wish to refer the Honorable President Naor to paragraph 15 of their preliminary response to HCJ 8091/14, in which reference was made to the fact that petitioners' arguments with respect to international law, have already been raised, *albeit* more briefly, in the petition in HCJ 4597/14 as well as in the petitions in HCJ 5290/14 and HCJ 5295/14.

4. The petition in HCJ 8091/14 was dismissed on December 31, 2014, and the honorable court accepted the state's argument that the petition should be dismissed in view of the fact that similar arguments, including from the realm of international law, have already been raised and rejected by the honorable court in judgments given by it over the last few months.

On this issue see the explicit words of the Honorable Justice (as then titled) Rubinstein, in paragraph 16 of his opinion in the judgment:

> **However, it should already be noted that we decided not to reconsider issues which have already been resolved by this court, even if the grounds therefore do not satisfy the petitioners, in view of the fact that similar arguments were raised and rejected only a few months ago in HCJ 4597/14 'Awawdeh v. West Bank Military Commander (July 1, 2014 (hereinafter 'Awawdeh) and in HCJ 5290/14 Qawasmeh v. West Bank Military Commander (August 11, 2014)(hereinafter: Qawasmeh)**.

The Honorable Justice Hayut added and noted in her opinion in the judgment as follows:

> **I join the conclusion of my colleague Justice E. Rubinstein according to which the petition at hand should be denied. The main reason which lead me to this conclusion is the fact that the general issues which were raised by the petitioners in this petition were discussed and resolved by this court only recently in specific petitions. The first one – on July 1, 2014 concerning the demolition of the house of the person who was accused of having murdered the late Police Commander Baruch Mizrahi (HCJ 4597/14 'Awawdeh v. Military Commander of the West Bank Area (July 1, 2014)(hereinafter: 'Awawdeh) and the others - on August 11, 2014 concerning the demolition of the houses of the terrorists who abducted and murdered the youths Gil-Ad Shaer, Eyal Yifrach and Naftali Frenkel God bless their souls and of another person who was involved in said actions (HCJ5290/14 Qawasmeh v. Military Commander of the West Bank Area (August 11, 2014))(hereinafter: Qawasmeh). Indeed, this court is not bound by the judgments rendered by it, as stipulated in section 20(b) of the Basic Law: The Judiciary: "A rule laid down by the Supreme Court shall bind any court other than the Supreme Court." However, relevant to this matter are the words of Justice Silberg in FH 23/60 Balan v. The Executors of the Will of the Late Reimond Litvinski, IsSC 15(1) 71, 75 (1961), who referred to the previous version of the provision in section 33(b) of the Courts Law, 5717- 1957, and stated as follows:**

> **This provision does not turn the pages on which the previous judgments of the Supreme Court were written into *'blank pages*'… The Israeli legislator did not want to completely release the Supreme Court from the burden of the precedent as a result of which each one of its Justices – will act as it pleases… This is not the path that we must take! Should we take this path, over time this judicial institution, will turn from a 'Court of Law' into a 'house of Justices' the number of opinions of which will equal the number of its members.**

> **We should indeed always remember these important things. In the case at hand, the petitioners raise once again in their petition general issues concerning house demolition which have already been discussed and resolved in the 'Awawdeh and Qawasmeh cases, and they in fact request to revoke said judgments. I cannot agree to do that without turning this court of law into a "house of Justices", <u>especially in view of the fact that the above judgments were give, by five Justices of this court only a few months ago</u>. However, it should be honestly said that the issues raised in the petition are difficult and troubling and I will not deny the fact that taking the path of case law in this matter is not easy**. [emphases added – A.H.]

And the Honorable Justice Sohlberg noted further in the beginning of his opinion in the judgment, as follows:

> **I agree with the judgment of my colleague, Justice E. Rubinstein – little that holds much. Parenthetically I shall add a few comments.**

<u>Respondents' Position</u>

5. The respondents will argue that the petition for a further hearing in the judgment – should be dimissed.

<u>General</u>

6. The possibility to hold a further hearing in a judgment of the Supreme Court is entrenched in section 30(b) of the Courts Law [Consolidated Version], 5744-1984 (hereinafter: the **Courts Law**) which provides as follows:

> **In the event that the Supreme Court did not make a decision as specified in sub paragraph (a) above, any litigant may request to hold a further hearing as aforesaid; The president of the Supreme Court, or any other justice or justices designated for this purpose, may accept the request if the ruling of the Supreme Court conflicts with a previous ruling given by the Supreme Court, or if due to the importance, difficulty or novelty of the ruling which was given on the issue, they are of the opinion, that a further hearing should be held**.

7. In its interpretation of the provisions of the above section 30(b), the honorable court stipulated as follows:

> **… the language of the section clearly indicates that it revolves around one axis, the axis of the ruling which was given. Namely, the ruling which was given either conflicts with a previous ruling of this court, or is marked by importance, difficulty or novelty (FH 3379/91 Caspi v. State of Israel, TakSC 91(3) 860 (1991))**.

8. In addition it was held that the procedure of a further hearing is not a procedure of an additional appeal:

> … **the further hearing is not an additional appeal as far as its main purpose is concerned, as it does not examine whether the court acted properly, but rather the judicial ruling is examined as such (FH 6/82 Yanai v. Head of Execution Office, IsrSC 36(3) 99, 101 (1982)).**

9. Moreover. A "ruling" which meets the conditions set forth in section 30(b) of the Courts Law does not necessarily result in a further hearing, as there is no obligation to accept a petition for a further hearing. The decision whether or not a further hearing shall be held is subject to the broad discretion of the Justice who was designated to decide in the petition, and case law clarifies that the honorable court tends to hold further hearings only in rare and extremely extraordinary cases.

> … **however, a judicial novelty – and even a judicial novelty having the traits specified in section 30 of the Courts Law – does not justify in each and every case the holding of a further hearing. The reason for that being, that the law granted the justice who hears the petition for a further hearing broad discretion to examine whether the case before him, according to its circumstances and characteristics, belongs to such extremely extraordinary, and extremely rare cases, in which a further hearing will be held. (the decision of the Honorable Justice (as then titled) Cheshin in HCJFH 7802/04 Milo v. Minister of Defense, TakSC 2004(4) 719 (2004)).**
>
> **As is known, a further hearing will be held only if material and significant novelty, importance or difficulty is concerned; and even when such conditions are met, the court still tends, as a matter of judicial policy, to act scantily and hold further hearings only in rare cases (the decision of the Honorable Justice (as then titled) Mazza in FHC 4335/03 Benbenisti v. Official Receiver, TakSC 2003(2) 1646 (2003)).**

No "ruling" was established in the judgment in HCJ 8091/14 (according to the meaning attributed to this term in section 30(b) of the Courts Law)

10. The first reason which, according to the respondents, justifies the dismissal of the petition for a further hearing in the judgment is that no "ruling" was established therein, according to the meaning attributed to this term in section 30(b) of the Courts Law [Consolidated Version], 5744-1984 (hereinafter: the **Courts Law**).

11. The honorable court held that a **basic condition** for the holding of a further hearing in a judgment of the Supreme Court was that a certain "ruling" was established by said judgment. On this issue reference is made to the decision of the Honorable President Beinisch in HCJFH 9856/06 **MK Robert Ilatov v. The District Planning and Building Committee**, TakSC 2007(1) 3691 (2007), as follows:

> **… as no ruling was established in the judgment it does not satisfy the basic condition for the holding of a further hearing, as set forth in section 30(b) of the Courts Law (see, HCJFH 2197/06 Binyamini v. Director of the Veterinarian Services at the Ministry of Agriculture (not reported yet)).**

12. Furthermore, not every determination of the honorable court in its judgment amounts to the establishment of a "ruling", according to the meaning attributed to this term in section 30(b) of the Courts Law, which constitutes, as aforesaid, a basic and preliminary condition for the holding of a further hearing. On this issue reference is made to the decision of the Honorable Deputy President Rivlin in HCJFH 10792/06 **Movement for Governmental Fairness v. Ombudsman of the Israeli Judiciary**, TakSC 2007(1) 4953 (2007), as follows:

> **…we shall remind once again what has been held more than once, namely, that "for us to know whether statements made by the court amount to a ruling, such ruling must be apparent from the judgment, and in this context this means that the court had consciously and intentionally intended to establish a ruling, and has expressed its said intention clearly and explicitly; this, and nothing less than this**.(FHC 4804/02 Ravizada v. Goldman, TakSC 2002(3) 585 (2002)).

13. As specified above, not only that the honorable court did not intend to establish a "ruling" in the judgment in HCJ 8091/14 – rather, on the contrary, the honorable court explicitly stated in the judgment that there was no room to revisit decisions which were made a few months earlier in the judgments which were given in HCJ 4597/14 and in HCJ 5290/14 (decisions which were based on the consistent judgments of the honorable court concerning the powers of the military commander according to Regulation 119 of the Defense Regulations throughout the years).

14. The respondents will argue that therefore, no "ruling" was established in the judgment, in the meaning of this term in section 30(b) of the Courts Law; and that the three opinions in the judgment mainly refer to previous rulings which were given in connection with Regulation 119, and were *prima facie* given beyond what was required for the dismissal of the petition in HCJ 8091/14.

    The respondents will argue that the above alone is sufficient for the dismissal of the petition for a further hearing in the judgment.

Absence of a real chance to overturn the ruling concerning Regulation 119

15. The respondents will argue that even if their argument that no "ruling" was established in the judgment is not accepted, the petition for a further hearing in the judgment should be dismissed due to the scant chances that the consistent case law concerning Regulation 119 will be overturned in the further hearing, to the extent it is decided to hold it.

16. According to the consistent judgments which were given in petitions for further hearings, a further hearing will not be held in a judgment which was given by a panel of three justices where it seems that there is no real chance that the prevailing ruling will be overturned.

    On this issue, see for instance, the decision of the Honorable Justice (as then titled) Landau in FH 17/62 **Badaran v. State of Israel**, IsrSC 17 1191 (1963), as follows:

> **To the extent there is novelty, it is well enshrined in the language of the law and I don't see any reason to cause the Supreme Court to revisit a ruling, in the absence of at least a slim chance that it would be overturned**.

    See also the decision of the Honorable President Agranat in FH 4/65 **Saving and Loan Haifa Mutual Association Ltd. v. Geler**, IsrSC 19(2) 317 (1965), according to which:

> **I agree that the ruling which was established by the Supreme Court in its said judgment is important and new (or almost new – see…) and that said ruling will be "used as a sort of a precedent and test for other cases with which the courts will have to engage in the future." However, a petition for a further hearing is not sufficiently justified when the applicants have no chance of success to overturn said judgment, had the further hearing been held**.

    See further, for instance, the decision of the Honorable Deputy President Levin in HCJFH 7635/96 **The Bar Association v. Ghnam**, TakSC 97(2) 2 (1997), as follows:

> **… the importance or novelty of the ruling are an essential condition for the acceptance of a petition for a further hearing, but they are not sufficient condition. If one or both of said conditions were satisfied, I must also take into consideration the chances that the ruling will be overturned in the further hearing… in the absence of a real chance to overturn the ruling of HCJ 4330/93 and 196/94 should I accept the petition, this petition should be dismissed and it is hereby dismissed**.

    And see also the decision of the Honorable President Beinisch in HCJFH 7469/04 **Meimon-Cohen v. Attorney General** (reported in the Judicial Authority Website, September 28, 2004), as follows:

> **It should be added that the chance that said ruling will be overturned in the further hearing is negligible, and for this reason also the petition before me should be dismissed (see: HCJFH 7635/96 The Bar Association v. Farid Ghnam Advocate (not reported)).**

17. The respondents will argue that there is no room to accept the petition for a further hearing , as they are of the opinion that there is no real chance to overturn the case law concerning Regulation 119, based on these two:

    a. **Firstly**, the consistent and unequivocal judgments of the honorable court during the last four decades in connection with Regulation 119. On this issue reference

is made by the respondents to their Preliminary Response and all judgments specified in the judgment itself.

b. **Secondly**, seven of the fifteen current justices of the Supreme Court - the Honorable President Naor, the Honorable Deputy President Rubinstein, the Honorable Justice Hayut, the Honorable Justice Danziger, the Honorable Justice Amit, the Honorable Justice Sohlberg and the Honorable Justice Shoham – have already heard, over the last seven months, different petitions in which the arguments against the exercise of the power according to Regulation 119 were raised. All petitions were denied.

   About half of the justices of the honorable court have discussed this issue over the last months, a fact which significantly reduces the chance that the case law in connection with Regulation 119 will be overturned, should a further hearing be held.

It is difficult to justify a further hearing on a ruling which was decided by seven justices

18. Even if the honorable court rejects the state's argument that no "ruling" was established in the judgment, according to the meaning of this term in section 30(b) of the Courts Law, then, as aforesaid, over the last seven months seven justices of this honorable court, who sat in different panels, discussed arguments which were raised against Regulation119. All petitions were denied.

    As noted by the Honorable Justice Hayut in her opinion in the judgment in HCJ 8091/14, in the above quoted paragraph, five justices of this honorable court sat in two panels which rejected last summer the petition in HCJ 4597/14 and the petitions in HCJ 5290/14, HCJ 5295/14 and HCJ 5300/14. It is important to point out in this context that petitioners' arguments with respect to international law, have already been raised, *albeit* more briefly, in the petition in HCJ 4597/14 as well as in the petitions in HCJ 5290/14 and HCJ 5295/14.

    Indeed, we are concerned with judgments which were given by different panels, rather than with one judgment, which was given by an extended panel of five or seven justices, but it has already long ago been held that this fact has no bearing on the decision in a petition for a further hearing. See on this issue the decision of the Honorable President Olshan in FH 10/63 **Matalon v. Regional Rabbinical Court, Tel Aviv Jaffa**, IsrSC 17 1653 (1963), which seems to have been written in our own case, as follows:

> This is a petition for a further hearing in HCJ 129/63, in which judgment was given on July 14, 1963.
>
> On September 11, 1963, judgment was given by the High Court of Justice in another case, HCJ 95/63, which addressed the same issues, and the rulings which were established therein and in HCJ 129/63 are identical.
>
> The panel in HCJ 129/63: Justices Silberg, Cohen and Manny, whereas the panel in HCJ 95/63 was: Deputy President (Agranat) and Justices Landau, Cohen.
>
> Hence, that five justices have already discussed these two issues.

…

> In view of the fact that as aforesaid, five justices have already discussed these issues, I do not find any justification to allow a further hearing. …

19. Drawing from the above decision of the Honorable President Olshan in FH 10/63, as to the decision of whether or not a further hearing should be held in a judgment, it makes no difference whether the ruling was established by seven justices who set in different panels of three or by one extended panel of seven justices.

The words of the Honorable President Beinisch in HCJFH 10030/06 **Movement for Quality Government in Israel v. Prime Minister of Israel** (reported in the Judicial Authority Website, January 10, 2007) are relevant to the dismissal of the petition for a further hearing in the judgment which was given in HCJ 8091/14:

> **5. The petition for a further hearing should be dismissed. I reached this conclusion in the case at bar, even without having to decide on petitioner's detailed arguments concerning the importance, novelty and difficulty embedded in the ruling which was given: in view of the fact that the judgment, being the subject matter of the petition, was given by an extended panel of seven justices of this court.**
>
> **6. … since the Nachmani judgment was given, this court has repeated several times the ruling that a further hearing in a judgment which was given by a panel of five justices will be held only in extremely extraordinary cases… .**
>
> **7. The above words which referred to the holding of a further hearing in a judgment of the Supreme Court, which was given by an extended panel of five justices, apply even more forcefully to a judgment which was given by a panel of seven justices. Even if, in view of the ruling which was established in Nachmani, the power to hold a further hearing in a judgment which was given by a panel of seven justices, theoretically exists, it is hard to think of a case in which such power shall indeed be exercised and the court will be willing to hold a further hearing in judgment which was given by a panel of seven. The purpose of the further hearing is to enable, in extraordinary cases, the reconsideration of special, new or difficult rulings which were established by a narrow panel of the Supreme Court, by a more extended panel, so that the ruling which will be eventually established, will reflect the opinion of the vast majority of the Supreme Court justices (see: Nachmani, pages 606-607, Etinger, page 15). When, in the first place, an extended panel of the Supreme Court discusses a certain issue, and certainly when the extended panel consists of seven justices, it has already been discussed by the vast majority of the Supreme Court justices. Under these circumstances the need to revisit the same issue is**

> **significantly reduced, if not nullified altogether. The exercise of the power to extend a panel of the Supreme court under such circumstances violates the purpose of the special procedure of a further hearing, and it veers from the principles of the method according to which judgments of the Supreme Court are not given by a plenum of the justices, but rather by different panels, and at the utmost, by a panel which represents the majority of the court's justices. [emphasis added –A.H.]**.

20. The respondents will argue, based on the decisions of the Honorable President Olshan in the above FH 10/63 and of the Honorable President Beinisch in the above HCJFH 10030/06 that the fact that seven different justices of this honorable court have rejected, over the last few months, petitions in which arguments were raised against the exercise of the power under Regulation 119, including according to international law, justifies the dismissal of the petition for a further hearing in the judgment.

<u>There is no room to hold a further hearing in a judgment which was given in theoretical petition which is not based on a specific case</u>

21. Beyond need, and for cautionary purposes only, the respondents will reiterate their argument which was raised in their Preliminary Response in HCJ 8091/14, according to which the petition in HCJ 8091/14 should have been summarily dismissed, due to the fact that it was completely theoretical, as it did not concern any specific decision to exercise the power granted under Regulation 119. The respondents will refer again to the words of the Honorable President Barak in HCJ 7957/04 **Mara'abe v. Prime Minister of Israel** (reported in the Judicial Authority Website, September 15, 2005)), according to which "**Once again, the simple truth is proven: the facts lie at the foundation of the law, and the law arises from the facts (*ex facto jus oritur*).**" (*Ibid*., para. 61).

22. Indeed, the honorable court dismissed the petition in HCJ 8091/14 on the grounds that the issue has already been decided recently, rather than on the grounds that the petition at bar was a public and theoretical petition, but the respondents will argue that in any event a further hearing should not be held in a judgment which was given in a public and theoretical petition.

<u>In Conclusion</u>

23. The respondents will argue that the petition for a further hearing in the judgment - should be dismissed.

Today, Shvat 23, 5775
February 12, 2015

(signed)
Aner Helman, Advocate
Deputy Director of HCJ Department
At the State Attorney's Office