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Very Urgent!

October 15, 2015

To:

Major General Roni Numa
GOC Central Command
Commander of the IDF Forces in the West Bank
By email: pniot-tzibur@mail.idf.il
And by fax: 02-5305741

Re: Very urgent appeal – the family home of Hamad, ID No. in the village of Silwad

I hereby turn to you on behalf of my above referenced client in an appeal against your intention to demolish the housing unit where she lived with her family, and this as follows:

1. On October 15, 2015, your notice was received at offices of the undersigned concerning an intention to seize and demolish the housing unit where lived Mrs. [] Hamad, ID No. with other family members, and this pursuant to Regulation 119 of the Defense (Emergency) Regulations, 1945 (hereinafter: “**Regulation 119**”).
2. According to the delivered notice, this measure has been taken against the actions of Mr. [M.S.], ID No. , who “acted to carry out a terror attack on July 26, 2015, during which he caused the death by shooting of Malachi Rosenfeld of blessed memory” (hereinafter: **Mr. [M.S.]**).
3. According to the notice, the decision may be objected to until October 17, 2015, and hence this appeal.
4. My client will argue that the decision to seize and demolish her housing unit is a wrongful decision, for the following reasons:

- a. House demolition, as a rule, is a prohibited action, which violates fundamental rights of innocent people, contrary to international humanitarian law;
 - b. The demolition of the family home will cause harm to innocent people, including children;
 - c. The decision to demolish my client's apartment is not proportionate, and this in view of the passage of time and the damage that will result to the neighboring apartments.
 - d. Alternatively, if it is decided to reject the above arguments, the instruction should be given to grant an extension for the purpose of obtaining an engineer expert opinion concerning the structure.
5. Furthermore, there are substantial doubts in this case as to Mr. [M.S.]’s involvement in the purported acts. According to the information in our possession, Mr. [M.S.] was not demanded or sought by the Government of Israel; he was arrested by the Palestinian Authority some four months ago, but until now he has not admitted to the acts attributed to him and has not been put on trial or convicted.
 6. In this situation, insofar as you have no sufficient evidentiary foundation regarding Mr. [M.S.]’s involvement, there is not room whatsoever to order the implementation of an irreversible action which causes real damage to the innocent. Additionally, insofar as such materials are in your possession, I will request to receive them, while retaining my client’s right to raise any relevant argument that might emerge from these documents.
 7. In view of all of the above, we request that you order the cancelation of said decision.

The main facts pertaining to the matter:

8. The seizure and demolition order issued by the military commander concerns the ground structure where my client, the mother of Mr. [M.S.], lives along with other family members, which is located in the village of Silwad, in the Neighborhood of Istiya, twelve km. north of the city of Ramallah. The house in question is registered in the name of the father of the family. Mr. [], who passed away some 15 years ago. The structure consists of five rooms, a kitchen and a bathroom. Below the house, there is basement with three additional bedrooms.
9. Until June 2015, in this structure, regularly resided Mrs. [], her 19 year old son [], and her son Mr. [M.S.] used sleep in the house three times a week. In the course of June 2015, Mr. [M.S.] was arrested by the Palestinian Authority and has since been in custody.
10. At the beginning of October 2015, IDF forces arrived at the family home. The military entered into the structure, photographed the house from the inside and took its measurements. On October 15, 2015 at 4 a.m., my clients received a notice from the military commander about the intention to seize and demolish their home. Hence this appeal.
11. The structure slated for demolition is the only apartment of my client and her 19-year-old son, and the two have no other alternatives. Should it be decided to demolish the structure despite the aforesaid, my client and her son will be left without a roof over their heads, this, while the suspect in question, Mr. [M.S.] did not live in the house on a regular basis prior to his arrest.

12. **In light of the above, you are requested to order the cancelation of the seizure and demolition order, this, for the reasons stated above and as follows.**

The prohibition on house demolition

13. The demolition of a family home constitutes a cruel and inhuman measure, which causes a severe trauma to the family and leaves it destitute, this, in violation of the right to property and the right to housing, leaving them in a state of displacement, without accommodation, and in complete dependence on those around.
14. The demolition constitutes deliberate harm to people who have not offended, and runs contrary to the foremost basic moral and legal principle whereby, **“The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall be put to death for his own sin”** (Kings 14:5-6, and see also the words of the Honorable Justice Cheshin in HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 654), and it is therefore entirely prohibited.
15. Moreover, it seems needless to expand on the harm house demolition causes to protected human rights. House demolition impinges on the right to dignity, on the right to dignified living and on the right to property. Given that the demolition of the house harms innocent family members whose actions did not give rise to the demolition, and who are unable, as it is, to influence the Respondent's decision, the demolition critically infringes on the autonomy of personal will and a person's mastery over his actions and his responsibility for the consequences of his actions (see and compare AP 10/94 **A v. Minister of Defense**, IsrSC 53(1) 97, 107).
16. House demolition is also contrary to international humanitarian law, which prohibits collective punishment and damage and destruction of private property (Arts. 33 and 53 of the Fourth Geneva Covenant, Art. 46 of the Hague Regulations).
17. Given the severe impingement of fundamental rights, and given the irreparable harm caused to the family members who committed no wrong, it was held that the seizure and demolition of a home for deterrence purposes pursuant to Regulation 119, shall only be done subject to a proper administrative procedure, that includes meticulous factual substantiation, the provision of a warning and a fair opportunity to argue against the decision, and more (see HCJ 9353/08 **Hisham Abu Dheim v. GOC Home Front Command** (published in Nevo, January 5, 2009)).
18. The exercise of the authority must also satisfy the proportionality tests, once the authorized person has rigorously examined and properly balanced all the relevant interests at stake (see HCJ 1730/96 **Salem v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 50(1) 353, 359). As will be argued below, the decision to demolish my client's family home cannot be deemed reasonable or proportionate under the circumstances of the case.

Harm to innocent people

19. As described in the factual part, in the home slated for demolition, there currently live my client and her 19-year-old son, and it is the only apartment available to them. Hence the demolition of the structure would inevitably lead to great and needless suffering of innocent individuals and to a critical violation of their human dignity. All the more so in

the case of a widow and a youth who will be left without any ability to maintain normal life, homeless and destitute.

20. In addition to the above, there is room to consider whether an engineer expert opinion finds that there is danger to the apartments adjacent to my client's home, in order to exclude a situation where the structure's demolition would lead to additional and extensive damage to innocent people who are not involved. As stated, the undersigned has not had sufficient time to obtain said opinion, and this reason alone justifies accepting the appeal until all required information is obtained.

The decision is disproportionate

21. Under the case law of the Supreme Court, in view of the grave infringement of basic rights, the exercise of the military commander's authority under Regulation 119 must be narrow, subject to the application of reasonable discretion and the proportionality tests. And thus the Supreme Court has ruled recently, in H CJ 4597/14 '**Awawdeh et al. v. The Military Commander of the West Bank Area** (published in Nevo, July 1, 2014)(hereinafter: '**Awawdeh**):

[...] in its interpretation of [Regulation 119], this court limited the implementation and application thereof and held that the military commander must exercise reasonable discretion while using his authority there-under and act proportionately... This ruling was reinforced by the enactment of Basic Law: Human Dignity and Liberty. This court held that although the 'validity of law' clause applied to the regulation, it should be interpreted in the spirit of the Basic Laws... There is no dispute that the exercise of the authority granted by Regulation 119 violates human rights. It violates the right to own property and the right to human dignity. Therefore, as held, the exercise of the authority must be proportionate.

22. In abovementioned H CJ 769/02, the Supreme Court emphasized that the premise for examining the decision's proportionality is the right of the innocent civilians:

However, even under the difficult conditions of combating terrorism, the differentiation between unlawful combatants and civilians must be ensured. That, regarding the issue at hand, is the meaning of the "targeting" in "targeted killing". This is the meaning of the proportionality requirement which my colleague President Barak deals with extensively.

Regarding the implementation of the proportionality requirement, the appropriate point of departure emphasizes the right of innocent civilians who are not lawbreakers. **The State of Israel has a duty to respect the lives of the civilians of the opposite side.** It must protect the lives of its own citizens, while respecting the lives of the civilians who are not under its effective control. **When the rights of the innocent civilians are before our eyes, it becomes easier for us to recognize the importance of the restrictions placed upon the conduct of the armed conflict.**

This duty is also part of the additional normative system which applies to the armed conflict. It is part of the moral code of the state and the supreme principle of protecting human dignity. (p. 61 [in Hebrew], emphases added)

23. Indeed, in a regime which respects fundamental rights and protects human dignity, Regulation 119 is not implemented unless it is the last resort. To witness, Regulation 119 is not exercised in Israel against the families of Jewish security inmates, despite the escalation in violence against Arab Israeli citizens and politically-motivated hate crimes we are now witnessing. Parenthetically, it should be noted that there is substantial concern that the distinctions found in the Regulation's differentiated implementation in similar cases, amount to discrimination.
24. In the present case, there is no rational connection between the means and the alleged objective, namely, deterring potential perpetrators and protecting the security of the Area. In view of the critical harm to the rights of my client and her son, a high level of proof is required concerning the efficacy of such a harsh measure. However, in addition to the fact that there is no evidence that house demolition does indeed serve its professed objective, the security establishment itself has concluded in the past that the policy of demolishing the homes of assailants' families had not proved to be a deterring policy. Consequently, in 2005, the Minister of Defense adopted the recommendations of the Shani review team, and decided to stop the use of the authority vested by Regulation 119, this because the deterrence had not proved effective and the demolitions' harm exceeded their benefit.
25. We wish to recall that in the judgment of the Honorable Vice President Rubinstein in HCJ 8091/14 HaMoked: Center for the Defence of the Individual v. Minister of Defense (dated December 31, 2014), it was held concerning house demolitions in circumstances similar to the present case, that, **“state agencies should examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to present before this court, as needed in future and to the extent possible, data which point to the effectiveness of house demolition as deterrence, to such a degree which justifies the harm to those who are neither suspects nor accused...”**.
26. In view of the above, conducting such research should have been done immediately rather than continuing implementing the house demolition policy that is unfounded on proper empirical examination of its consequences. You are therefore required to refrain from demolishing my client's family home or any other home, before such research is conducted as was held by the Supreme Court and its results presented.
27. Given the immense and irreparable damage which would befall my client, her son and the rest of the family as a result of the new circumstances, it is insufficient that such a cruel measure “may” realize objectives of deterrence against the perpetration of additional acts of violence. The damage is certain and severe, and justifying it requires a benefit of much higher level of certainty.
28. In this specific case, the demolition of the apartment cannot be regarded as a proportionate measure also because, thus far, Mr. [M.S.]'s involvement in the purported acts has not been sufficiently determined. As noted above, Mr. [M.S.] has never been sought by Israel, and he is held in detention by the Palestinian Authority. In such circumstances, imposing a draconian punishment which leads to irreparable damage to innocent people, is resoundingly disproportionate and contrary to basic commonsense and sound legal reasoning. Using this measure in the present circumstances, underscores the fact that this is nothing but a vindictive act of punishment and an overreaction involving harm to innocent people, which cannot be considered proportionate by any scale.

29. And indeed, in case law it has been determined that the more severe and irreversible are the consequences of a decision, the more rigorously must the court examine the authority's actions. Further, that the greater the anticipated harm's impact to a basic right, so must the evidence held by the authority be more compelling and convincing (see EA 2/84 **Neiman vs. Chairman of the Central Elections Committee for the Eleventh Knesset**, PD 39(2) 225, 251; CA 8398/00 **Katz v. Kibbutz Ein-Tzurim**, IsrSC 56(6) 602, 616; HCJ 3648/97 **Stamka v. Minister of Interior**, IsrSC 53(2) 740, 777)

30. In HCJ 987/94 **Euronet Golden Lines (1992) Ltd. v. Minister of Communications**, IsrSC 48(5) 412, in par. 11(d), it was held in this matter that:

The degree of reasonability requires that the weight of the data before the authority be more substantial the more the administrative decision is complex or harmful. A particularly severe violation of a fundamental right must be based on particularly reliable and convincing data.

31. It was similarly held in HCJ 680/88 **Schnitzer v. The Chief Military Censor**, IsrSC 42(4) 617:

If the administrative discretion is liable to prejudice human rights, persuasive and credible evidence are required, which leave no doubt.

32. In view of the above, if you do not have a sufficient evidentiary foundation, at least at the administrative level, which supports the suspicions raised by you against Mr. [M.S.], the demolition of his relatives' home must be avoided. If such a foundation exists, I will ask to receive the relevant materials and, as said above, she reserves her right to bring forth any argument that may come up from these materials, which pertains to the matter at hand.

33. Thus also, the lengthy passage of time between the purported acts and until your decision to demolish my client's family apartment, namely more than three whole months, may indicate the absence of rational connection between the means and the purported objective and demonstrates the nature of "urgency" of the matter, with regards to deterrence.

34. As stated, the Respondents justify the policy of house demolition on the fact that they hold it to be an effective deterrence measure. However, this justification also depends on the Respondents' swiftness in employing the sanction against the assailant and his family. It is beyond dispute that the passage of time has direct impact on the connection, which is anyhow doubtful, between the demolition and the deterrence, so that the longer the passage of time, thus ever more weaker do the rationales underpinning this connection become (see Amichai Cohen and Tal Mimran in their article "**Cost without Benefit of the house demolition policy: following H CJ 4597/14 Muhammad Hassan Khalil 'Awawdeh v. Military Commander of the West Bank Area**", Hamishpat Online: Insight into Recent Judgments, 31 5, (2014).

35. In matter at hand, the lengthy passage of time between the date of the event and the exercise of the sanction weakens the purported deterrence link between the two events, and therefore, it is also the deterrence consideration that does not justify the demolition of this house.

36. Finally, we wish to emphasize that injury inflicted on innocent people and also collective punishment, have additional and broader negative results. Use of these tools increase hostility and hatred and strengthens the sensation that Israel attaches no value to the safety and wellbeing of the residents of the OPT, even if they are innocent and uninvolved in any hostile activity. Such an extensive and indiscriminate harm, as opposed to localized harm to the culpable and those deserving punishment, may infuse despair and willingness to sacrifice, rather than fear and worry. Thus, the indiscriminate destruction you plan may contribute to the feeling among the suspect's close and distant circles that they have nothing to lose in any case, and thus undermine the security interests of Israel and encourage additional injurious acts. It seems that the goal of this measure is not to deter but rather to cater to the public opinion in Israel clamoring for revenge.

In Conclusion

37. House demolition is a cruel and irreversible measure, the effectiveness of which is doubtful, as was acknowledged also by the Minister of Defense who therefore abandoned this policy in the West Bank some years ago. Under the circumstances of this case, employing such an injurious measure cannot be regarded as proportionate, particularly given the circumstances of my client and her family.
38. Therefore, **we request that you retract your decision to demolish my client's apartment.**
39. So long as proceedings over the demolition of my client's apartment are pending, no action should be taken which may cause any damage to their home. In addition, if it is resolved to deny this appeal, my client intends to file an urgent petition to the Supreme Court. For this purpose, we request a reasonable period of time (more than one workday – which is the unreasonable period of time that was given for submitting this present appeal), during which time, no action shall be taken which may cause damage to the structure.

Respectfully,

Michal Pomeranz, Advocate