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At the Supreme Court **HCJ 7076/15**
Sitting as the High Court of Justice

In the matter of:

1. **________ Haj Hamed, ID No. ________**
2. **_________Mashaqi, ID No. _______**
3. **_________Tzuwan, ID No. _______**
4. **_________ Bashir, ID No. ________**
5. **_________ Ganem, ID No. ________**
6. **_________ Ziat, ID No. ________**
7. **The cooperative Housing Company of Government Employees, Registration No. 355**
8. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA 580163517**

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The Petitioners

v.

1. **Miitary Commander of IDF Forces in the West Bank**
2. **Legal Advisor for the Judea and Samaria Area**

Represented by the State Attorney's Office
29 Salah a-Din Street, Jerusalem
Tel: 02-6466590; Fax: 02-6467011

The Respondents

Petitioners' Response to Respondents' Notice

According to the decision of the honorable court dated October 29, 2015, petitioners' counsel hereby respectfully submits her response to respondents' complementary notice, as follows:

1. The petitioners will argue that respondents' notice fails to sufficiently clarify the outstanding issues and to diminish the material concerns that their constitutional and proprietary rights as well as their right to dignity and housing be violated.

Lack of proportionality

A. On whom lies the burden to prove that respondents' action would not injure the petitioners?

2. The respondents gave notice of their intention to demolish by explosives the apartments being the subject matter of this petition, which constitute two complete middle floors in a four story building. Under these circumstances when violation of constitutional rights of the first degree is concerned, and as the petitioners have satisfied the burden of proof that the concern that damage would be caused to their homes and property was founded, the burden to prove that the contemplated demolition would not cause them damage lies on respondents' shoulders.

3. Relevant to this issue are the words of the Honorable Justice (emeritus) A. Barak in the constitutive judgment in CA 6821/93 **United Mizrahi Bank Ltd. v. Migdal Cooperative Village**, IsrSC 49(4) 221, 428, who held with respect to the satisfaction of the elements of the limitation clause in the Basic Law: Human Dignity and Liberty, and particularly with respect to the proportionality issue that "**In this matter it is customarily determined that in the second stage, the burden of proof is imposed on the party who claims that the impingement is constitutional.**" It should be emphasized that this heavy burden lies on the respondents based also on a substantive examination which takes into account the nature of the procedure, which everyone agrees is exceptional and extreme, the importance of the violated rights, the severity of the violation and the wide public interest in protecting the rule of law and democratic values (see HCJ 6427/02 **The Movement for Quality of Government in Israel v. The Knesset**, IsrSC 61(1), 619)).

4. However, despite the fact that this case concerns an offensive action which directly affects the lives of dozens of civilians who are not suspected of direct or indirect involvement in terror activity, including women, elderly people and children, who may find themselves exposed to the hazards of the approaching winter, the respondents inappropriately refrained from specifying in their response not even by a single detail the manner by which the contemplated demolition is about to be executed. This severe flaw is coupled by respondents' unreasonable refusal to disclose to the petitioners the engineering opinion on their behalf, although no practical reason was presented which could justify it and although the respondents decided, at their own initiative, to attach a similar opinion to their response in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (dated October 15, 2015; hereinafter: **Sidr**).

B. Lack of any detail which can show that the respondents intend to act proportionately

5. For the purpose of examining whether the respondents intend to act proportionately and examine less injurious alternatives, they should have explicitly specified which alternatives to the demolition were considered and the reasons for their dismissal. However, other than a laconic description of the alternatives which were outstanding (full demolition; demolition of internal walls and ceiling or sealing) no details were given by the respondents.

6. As argued by petitioners' counsel in the hearing before the honorable court, one cannot be satisfied with a general declaration according to which alternatives were examined, which at that time was supported by an assenting nod of the bench and is currently supported by a general and incomplete statement. This conduct runs contrary to respondents' obligation to examine petitioners' matter as required willingly and with an open heart and mind, and prevents the honorable court from exercising effective judicial criticism over respondent's decision.

7. It should be further noted that respondents' attempt to mix in this case engineering considerations together with operational considerations and considerations of deterrence should not be accepted. The only impression which arises from a review of respondents' notice is that these additional considerations, which are extraneous to the engineering issue and are not within the realm of expertise of the deponent (Engineering Commander in the Central Command), were brought for the purpose of shifting the discussion and avoiding the need to present the engineering alternatives. Thus, even following respondents' notice one cannot understand which specific alternatives were considered, why engineering-wise isn't it possible to seal the house, were the ramifications on petitioners' apartments examined and what were the conclusions in that matter, why was the measure of explosives chosen and why shouldn't manual or mechanical demolition be used etc. And it should be emphasized tat in Sudr the respondent undertook that the demolition "will be executed manually, by the demolition of non-structural elements only and by mechanical measures" and to the extent the demolition is approved there is no justification to execute it differently in petitioners' case.

8. Under these circumstances the petitioners request the honorable court again to direct the respondents to present to the court and to the parties the engineering opinion which was prepared on their behalf, including a comprehensive review on their behalf of the specific alternatives which were allegedly examined. On this issue see also the comments of the Honorable Justices M. Mazuz and N. Hendel in the hearing which was held yesterday in HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (hereinafter: **'Aliwa**) according to which the petitioners needed the engineering opinion and that it should be given to them (page 11 of the Protocol of the hearing).

<u>The Compensation Issue</u>

9. In the hearing the respondents refrained from assuming an obligation to compensate the petitioners for damage which would be caused to their homes as a result of the demolition. Thereafter, in their complementary notice the respondents presented a position which devoid their obligation to compensate the petitioners of any meaning, and which practically is not different than an "act of war" defense according to section 5 of the Civil Wrongs Law (Liability of the State), 5712-1952 (hereinafter: the **Civil Wrongs Law**). What is it all about?

10. Firstly, one should not accept respondents' argument that to the extent any compensation is given it would be given "*ex gratia*", in a manner which shows that according to them compensation given to the petitioners for damage caused to them is an act done out of grace.

11. Secondly, only direct damages are concerned, when the difference between such damages and indirect damages is thin and unclear. Thus, for instance, it is unclear whether a flood caused as a result of negligent demolition constitutes according to the respondents a direct damage, or not.

12. Thirdly, the respondents condition compensation on the absence of "riots, disruptions and any other resistance encountered by the force on scene". These are threshold conditions over which the petitioners have no control, while the respondents are responsible for maintaining order and are prepared to handle the breach thereof as part of their routine, and therefore it is inappropriate to deny the petitioners compensation on such grounds.

13. Fourthly, the respondents condition compensation on the satisfaction of the provisions of section 5B of the Civil Wrongs Law, namely, a person who is an activist or a member of a terror organization or acted as an agent or on behalf of such an organization. It is clear that the petitioners have nothing to do with such actions. However, this issue is subject to broad and flexible interpretation which raises a substantial doubt as to respondents' willingness to compensate any one.

14. Not parenthetically the petitioners will argue that in circumstances in which the respondents cannot guarantee that no damage will be caused to their homes and property as a result of the demolition, they should completely refrain from its execution and particularly from its execution by dangerous explosives. To the extent the respondents decide not to refrain from carrying out the demolition under such circumstances, it must be made sure that the petitioners are fully compensated for their damages, without having to satisfy impossible conditions which would add insult to injury and will, in fact, block their way to the courts.

The place of residence of ____ Haj Hamed

15. Beyond the fact that the petitioners will argue that less offensive measures should be taken such as sealing, in view of the scope of the damage expected to be caused to their homes they will also argue that at the utmost, measures should be taken against one apartment only within the building.

16. The petitioners have already objected in the hearing to the submission of the mapping report which was attached to respondents' notice. A thorough review of said document shows that it was prepared in a negligent manner which cannot lay down an adequate evidentiary infrastructure regarding the place of residence of ____ Haj Hamed, and for making such a crucial decision as the decision at hand.

17. It is a laconic report which fails to include many substantial details that appear in the complementary notice. Thus, for instance, while the report merely states that "some furniture is already in the building and is covered with nylon" respondents' notices provides that "some of the furniture has already been put in this apartment including sofas which apparently have already been used for sleeping purposes therein, and a table-tennis table, and the apartment is already connected to the power grid…". Hence, the response noted that ____ Haj Hamed used to sleep in this apartment occasionally, while the report made no mention of that.

18. Beyond the material flaws in the mapping report, the respondents cannot hold the stick at both ends and argue that regardless of the fact that there are clear indications that ___ Haj Hamed has already started to live on the second floor above the ground floor, any apartment in which he used to live in the past should be demolished. This is where the honorable court is required to implement proportionality considerations and limit the scope of the contemplated demolition so that at the utmost, measures are taken against one apartment only, namely, the apartment which ___ Haj Hamed moved into and which located farther from the apartment of petitioner 1's family.

On deterrence, punishment and the relation between them

19. A significant part of the issue at hand concerns the great tension which exists between the purpose of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**) as a punitive measure and the fact that it used by the respondent to deter others, while harming individuals against whom no accusation of any kind has been made.

20. In view of the fact that one of the remedies which were requested in this petition was that the respondents presented a study with factual data regarding the alleged effectiveness of house demolition as a deterring measure before they issue an order for the execution of the demolition and as a condition for the realization thereof – it is important to examine respondents' approach to the issue of punishment and deterrence, its consequences and ramifications.

21. And indeed, from the data presented by the respondents in paragraph 9 of their response arises a non-cohesive picture which does not reconcile with the arguments of the state regarding the creation of immediate deterrence. Thus, the data indicate that from July 2014 to date ten judgments were given on the issue of house demolition. However, **only half of the demolition orders which were approved by the court were realized shortly after the date of the judgment! Four additional houses were demolished within four to six months after the date of the judgment and one additional house has not yet been demolished, after the elapse of eleven months with the excuse of operational considerations the nature of which is unclear**. It should also be noted that the seizure and demolition orders themselves were sometimes issued shortly after the incidents and sometimes after the elapse of about ten months from the date of the incident.

22. Moreover. In the hearing which was held yesterday in **'Aliwa,** respondents' counsel emphasized that the use of Regulation 119 by the state was intended to impose on the family members an active obligation to dissuade a person from realizing his intentions, even when there was no indication that they were aware of such intentions! It is a slippery slope which must be used as a warning sign with respect to the house demolition policy, in a situation which requires the intervention of the honorable court, particularly in a case such as the case at hand in which not only family members are about to be injured but also dozens of neighbors including many minors (see, *ibid*., pages 8-9 of the protocol of the hearing).

23. It should be noted that in other contexts the honorable court pointed at the difficulty arising from arrangements which violate human rights for a general deterring purpose. Case law even emphasized that the difficulty embedded in the deterring purpose is intensified when it is the exclusive purpose of the statutory provision, as noted by the Honorable President M. Naor in HCJ 7385/13 **Eitan Israeli Immigration Policy v. Government of Israel** (reported in the Judicial Authority website, September 22, 2014, paragraph 2 of the judgment): "**General deterrence in and of itself is not a legitimate purpose.**" The honorable president even reiterated the above in a judgment which was given in HCJ 8655/14 **Dasta v. The Knesset** (reported in the Judicial Authority website, August 11, 2015, paragraph 35 of her judgment).

24. The respondents presented to the court *ex parte* data which according to them proved that house demolition indeed contributed to deterrence. Respondents' refusal to disclose to the petitioners the data upon which their evaluations in this matter are based is unclear, but it should already be said that while both the Honorable Justice E. Rubinstein and the Honorable Justice E. Hayut emphasized in HCJ 8091/14 **HaMoked; Center for the Defence of the Individual v. Minister of Defense** (reported in the Judicial Authority website, December 31, 2014) the importance of having supervision and study conducted regarding the effectiveness of the deterrence of

Regulation 119, respondents' counsel stated to the protocol of the hearing which was held on October 29, 2015 that **these were not studies** (*ibid*., page 7).

25. With all due prudence it should be said that it may be assumed that the material on which the respondent relies is based. At least partially, on memoranda from Israel Security Agency (ISA) interrogations in which interrogees expressed concern of having their homes demolished (see paragraph 2 of the judgment of the Honorable Justice I. Amit in **Sidr**). However, it should be emphasized that the evidentiary weight of these materials is low from the outset since they do not properly reflect what was said and are based on a situation in which the interrogees are subjected to severe stress and pressure. Materials of this kind were also reviewed by the Shani committee which stipulated that "**evidence was brought to the effect that house demolition for deterrence purposes also created more hatred, created higher motivation, created a collective of refugeeness.**" The honorable court is also requested to refer to this material very carefully and to examine it as a defense attorney would have done to the maximum extent possible, considering the fact that the hearing is held *ex parte*, and to direct the respondents to transfer to the petitioners the material which was presented or at least a paraphrase thereof together with an explanation of the manner by which the information was gathered and the conclusions established.

26. Additional question marks concerning the effectiveness of the use of Regulation 119 also arise these days from the direction of Mr. Shlomo Gazit in the context of a personal letter which he is about to publish in wide circulation on the internet the day after tomorrow. Mr. Gazit is a retired major-general, he headed Israel's military intelligence service and received the Ben-Gurion award for 2012. During his long military service he served, *inter alia*, as the Coordinator of Government Activities in the Territories and as the head of IDF regional military and security rule department. Currently he serves as a senior member of the staff of the Jaffe Center for Strategic Studies at the Tel Aviv University and as a research associate at the Center for International Affairs at the Harvard University, at the Woodrow Wilson Center in Washington and at the United States Institute of Peace in Washington. In an article entitled **"Demolition of perpetrators' homes – Does it Deter?"** Mr. Gazit clearly questions the effectiveness of house demolition, and after he specifies weighty factors which can undermine the alleged deterrence he concludes with the following seething words:

> **About forty years ago we examined the issue and decided that the damage in house demolition exceeded the gain arising there-from as far as we were concerned, and decided to refrain to the maximum extent possible from such a punitive measure.**
>
> **What has changed ever since?**

Attached is the article of Mr. Gazit and marked <u>Exhibit 1</u>.

27. To complete the picture and present the extensive use of the measure of house demolition by the respondent, it should be noted that data gathered by petitioner 8 indicate that as of the date of this response not less than 27 structures face the risk of demolition: six are the subject matter of the petitions which were heard on October 29, 2015; two are cases the hearing of which is pending in HCJ 6745/15 and HCJ 7220/15; two demolition orders which have been recently issued; one with respect of which judgment was given in HCJ 8025/14 and has not yet been demolished as aforesaid; and not less that sixteen others in which measurements were taken by the respondent but in with respect of which no seizure and demolition orders were issued.

Conclusion

28. The petitioners stress that inadequate representations were presented to the court with respect to respondents' considerations regarding the manner by which the order would be realized and proportionate alternatives which can minimize the damage to their homes and property. The above is reinforced by the impossible threshold conditions posed by the respondents for compensating the petitioners who are expected to be injured by the demolitions and the flawed infrastructure based on which a decision was made to demolish two stories in the building despite the absence of any lawful justification and the heavy damage which is expected to be consequently suffered by the petitioners.

29. In addition, the data disclosed by the respondent regarding the realization of the demolition orders and the increased use of this measure both in scope and by respondents' attempts to decrease the required standard for impinging on innocent people indicate that we are on the edge of a slippery slope which requires the intervention of the honorable court. The entire data show that the picture which was presented until now according to which the measure of house demolition was used rarely and for pure security considerations only does not conform with reality and that the tables have turned in a manner in which the exception became the rule, and the last word has not yet been said.

30. In view of the above, the honorable court is requested to issue an absolute order directing the respondents to refrain from the demolition of the apartments being the subject matter of this petition, and alternatively to obligate the respondents to compensate the petitioners for the entire damages which would be inflicted on them as a result of the demolition. The honorable court is further requested to direct the respondents to give the petitioners full and complete information regarding the contemplated demolition method, including the engineering plan, a detailed account of all alternatives which were considered and the reasons for their dismissal, and, in addition, to give the petitioners the data which allegedly points at the effectiveness of house demolition or at least a paraphrase which specifies the principle points of the information which may be revealed, the methods by which it was gathered and conclusions were established with respect to the above referenced matter.

November 5, 2015

(Signed)

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