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At the Supreme Court
Sitting as the High Court of Justice

HCJ 8154/15

In the matter of:

1. **_________ Alian, ID No. _________**
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**

Both represented by counsel, Adv. Andre Rosenthal, License No. 11864
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The Petitioners

v.

GOC Home Front Command
Represented by the State Attorney's Office

The Respondent

Petition for *Order Nisi* and Interim Order

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause, why he decided to seal and demolish the second floor I a three story building in Jabel Mukaber, Jerusalem, in which lived _____ Alian;

Alternatively, the respondent is requested to show cause why he should not seal the room of ____ Alian instead of having the entire floor demolished.

As an interim relief, the honorable court is requested to direct the respondent or anyone on his behalf to refrain from causing damage to the second floor of the home of the Alian family in any manner whatsoever.

A copy of the order is attached and marked **P/1**.

The grounds for the petition are as follows:

1. **A.** Petitioner No. 1 is the father of _____ Alian who ostensibly committed a shooting and stabbing attack in a bus on October 13, 2015. As a result of the attack' which was ostensibly committed together with another person, three people were killed and four additional people were wounded.

B. The apartment on the second floor consists of three bedrooms, a meeting room, a living room, kitchen and toilet. ______ Alian lived in a separate room the size of which is about 2m X 3m. In the apartment live, in addition to two parents and two young children, two additional families: _____, his brother L_____, his wife and daughter and _______, his brother L _____, his wife and son. In the apartment live altogether ten persons.

Petitioner 1's affidavit is attached and marked **P/2**.

2. Petitioner No. 2 is a human rights association which has taken upon itself, *inter alia*, to assist Palestinians, victims of cruelty or deprivation by state authorities, including by protecting their status and rights before the authorities, either in its own name as a public petitioner or as counsel for persons whose rights have been violated.

3. On November 11, 2015, notice of respondent's intention to seize and demolish the apartment of the Alian family was given to respondents' counsel.

4. On November 27, 2015, an objection against respondent's decision was submitted. In the objection the petitioners tried to convince the respondent that the continued use of Regulation 119 in fact embodied a continued denial of the reality in this region which guided the actions of the leaders of the Israeli settlement and continues to guide the actions of the leaders of the state until this very day. The worn-out and false slogan which encouraged the Jews to come here "land without people – to people without land" continues, until this day to direct the actions of the state like a compass, including the continued demolition of houses of innocent people, kin of perpetrators who committed severe and cruel attacks.

> "Denial is understood as an unconscious defence mechanism for coping with guilt, anxiety and other disturbing emotions aroused by reality. The psyche blocks off information that is literally unthinkable or unbearable. (Stanley Cohen, "States of Denial", Polity Press, 2001, @ p. 5. …
>
> In a just world, suffering is not random; innocent people do not get punished arbitrarily. They must have done something. They deserve to suffer because of what they did, must have done, support doing, or will do one day (if we don't act now). Even when there is no objective symmetry, each side may feel its very existence threatened. The self-righteous claim to victimhood was most famously stated by Golda Meir, queen of Israel kitsch, in her reproach of Arabs (Palestinians, she had said, did not exist) for 'making' nice Israeli boys do all those terrible things to them" (Cohen, @ p. 96)

The petitioners argue that the use of Regulation 119 is possible because the Israeli establishment cannot "see" the other, the Palestinian, as an equal human being. Regulation 119 may be used even if it runs contrary to fundamental principles of any kind – principles which are not relevant when a "non-Jew" is concerned – due to the special condition of the state. We would have wanted as a society, to respect the other, but reality defeats our wishes. It is a conscious decision of the respondent as well as of this honorable court.

A copy of the objection is attached and marked **P/3**.

5. On November 26, 2015, the objection was denied. A copy is attached and marked **P/4**.

6. An engineer on behalf of the petitioners visited the building and the apartment of the Alian family. Said opinion indicates that:

"6.1…

1. Supporting elements and/or structural elements in the apartment such as: pillars, supporting walls, ceiling parts etc. should not be demolished.

2. Any destruction of elements which are not supporting elements should be carried out very carefully and with light mechanical devices.

3. In view of the fact that according to Israeli Standard guidelines 412 the additional live load, beyond the fixed planning loads of a residential building is 150 Kg/square meter, and considering the quality of the construction of the apartment being the subject matter of the opinion, I am of the opinion that the floor of the apartment should not be loaded with debris in excess of about 100 Kg/square meter. Namely, the demolition debris should be removed while demolition is carried out to prevent static deficiencies in the building.

4. After the execution of the demolition precautions should be taken, including removal of debris, blocking the access to the apartment and/or adjacent areas which are above natural ground level and from which falls may occur."

   A copy of the opinion of the engineer from "Modon – Real Estate Planning and Assessment" company is attached and marked **P/5**.

The Arguments

7. The petitioners argue that the decision to act against the home of the Alian family is swayed by extraneous considerations.

   a. The attack was carried out on October 13, 2015.

   b. On November 11, 2015, one day after a series of attacks or attempted attacks which were carried out in Jerusalem by children under the age of thirteen, the respondent decided to give notice of his intention to seize and demolish the second floor in a three story building.

   c. The court held that action should be taken shortly after the date on which the offense was committed and the perpetrator was identified. In the case at hand there was no problem in the identification of the perpetrator in view of the fact that he died on scene.

   d. A waiting period of about a month does not reconcile with the words of the court in HCJ 5839/15 **Sidr and 8 others v. Commander of IDF Forces in the West Bank** (reported in Nevo) where it was held as follows:

      > It seems that to the extent there is an intention to demolish, it should be given as soon as possible after the occurrence of the offense at hand.

      Respondent's response to the objection did not make any reference to this argument.

   e. Respondent's decision derives from the renewal of the attacks on October 13, 2015, rather than from the attack itself.

Deterrence

8. The respondent argued throughout the years that the purpose of Regulation 119 was to deter the public. A person, a Palestinian, who wishes to execute an attack, knows that should he carry out his intention the chances that he would die are almost certain, and that if a severe attack is carried out,

the home of his family would be harmed – either seized and demolished or sealed. This purpose has only recently been reaffirmed by the honorable court in HCJ 7040/15 **Hamed v. The Military Commander of the West Bank**, after the court reviewed, *ex parte*, privileged material which had been submitted by the state to substantiate its argument.

The petitioners argue that in order to substantiate an educated decision regarding the gain of Regulation 119 in view of the incessant wave of violence which engulfs the state from its establishment, empirical data should be presented which compare between cases in which attacks were allegedly prevented, and cases in which their execution was rather encouraged.

Reference is made to the words of Prof. Mordechai Kremnitzer in meeting No. 342 of the Constitution, Law and Justice Committee of the 16th Knesset (December 6, 2004), in page 6:

> It would be appropriate to check one more thing, and without this datum we do not have a real benefit balance, we have a bluff. I propose to check how many people took the road of terror as a result of the fact that they were victims of such actions or witnessed such actions. In view of the fact that benefit is not examined only according to the test of what it did to a specific person who may have decided not to take action, but you must also see what motivation it implanted in other people, what forces were obtained by terror as a result of such actions, which are unjust and inhumane.

9. The only attempt of which the petitioners are aware, to refer to the benefit which arises from the use of Regulation 119, was made by the Israeli Defense Forces (IDF). The coincidence which occurred at the hearing of HCJ 773/04 **Nasser v. Commander of IDF Forces in the West Bank** (reported in Nevo website) and the recommendations of the committee headed by Major-General Udi Shani, which examined the lawfulness and legitimacy of the house demolition policy, caused the cessation of the use of Regulation 119 for three years, from 2005 through 2008. The former Military Advocate General, Major-General *(retired)* Avichai Mandelblit presented before the Constitution, Law and Justice Committee the change of policy as follows:

> The decision which was made, and it is indeed a dramatic decision, does not pertain only to periods of tranquility despite the fact that it was also made against the backdrop of the tranquility, I don't deny that, it also pertains to periods that if… hostilities are renewed it will also remain in force at that time. According to the decision there will be no more demolitions for deterrence purposes, of the kind of the demolitions…".

As aforesaid, the state has already decided in 2008, with the approval of the Supreme Court, to return to the circle of horror and demolish houses (see: HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**, reported in Nevo website).

Violation of basic principles

10. **A**. The petitioners argue that the use of Regulation 119 of the Defence (Emergency) Regulations (hereinafter: the **Defence Regulations, 1945**) is patently unreasonable and the intervention of this honorable court is required.

We are aware of the long standing judgments which held that notwithstanding the revocation of the Defence Regulations, 1945, by Great Britain before it left Palestine-Israel, such revocation was not valid. Amendment 11A to the Law and Administration Ordinance, 5708-1948, which was made for "the removal of doubts with respect to section 11 of the Law and Administration Ordinance, 5708-1948", official gazette No. 2, May 21, 1948, Addendum A, page 1, defined the term "hidden law".

The petitioners *[sic]* argue that said amendment has a retroactive effect; which is contrary to basic principles of the rule of law. The "Palestine (Defence) Order in Council, 1937" was revoked.

Had the Knesset wanted to revive the Defence Regulations, 1945, it should have done so explicitly.

B. In HCJ 703/15 **Darwish v. Home Front Command**, the court adopted respondent's argument and held:

> 12. The state's response concerning the Mandatory Revocation Order is acceptable to us; it is clearly a hidden law which therefore has no effect; even if certain things were not published in the Mandatory official gazette due to the security situation which existed towards the end of the British Mandate, the reasonable interpretation is that there was no intention to revoke a significant law in this manner, but rather various technical notices.

The petitioners argue that a careful study of Regulation 4(1) of the Defence Regulations, 1945, leads to the conclusion that "any document purporting to be an instrument (whether legislative or executive)…" cannot refer to "various technical notices". The interpretation of Regulation 4(1) refers also to the revocation or another act of the "legislator".

Regulation4(s) stipulates: "It shall not be necessary to publish any emergency document in the Gazette."

C. In conclusion: a revocation took place and the revocation was not published in the official gazette at that time. The addition of section 11A of the Law and Administration Ordinance, 5708-1948, in Amendment No. 4, had a retroactive effect and is thus contrary to principles of the rule of law.

In addition, even according to the Defence Regulations, 1945, themselves, Regulation 4 relinquishes publication of anything which is related to the Regulations themselves.

11. The petitioners argue that the ruling of the honorable court according to which the objective of Regulation 119 is to "deter others", is contrary to basic principles of applicable Israeli law and to the rule of law.

   A. A special section was dedicated by the Penal Law, 5737-1977, to the term "deterrence of others" in section 40G thereof. The section enables the court, while sentencing an offender who was convicted of an offence, to add the "deterrence of others" element and consider it together with other sentencing guidelines. In other words, the "deterrence of others" element may be used only after the court convicted the accused and found him guilty.

   The family of ______ Alian is not guilty.

   B. Reference is made to CrimApp 99/14 **State of Israel v. Melisron Ltd**. where it was held – with respect to the meaning of the term "deterrence of others", as follows:

   > 108 However, on the hand, I think that the district court did not give enough weight to such deterrence considerations, while it has not taken into account the need to deter others (paragraph 22 of the judgment); the court is required to take a harder line due to the deterrence of others beyond the range, but section 40G of the Penal Law concerns a more severe sentencing within the established range. As I have noted in a similar context:

> As far as I am concerned, whoever thinks that deterrence of others, possibly as distinct from the deterrence of the individual, is effective, as a general rule, in the 'classic' offenses of murder, robbery and rape, assault and such other similar offenses (see CrimApp 7534/11 **Mizrahi v. State of Israel** [reported in Nevo] (2013) paragraph C to my opinion), may think that it has a chance in economic offenses, and in any event in 'white color' offenses. A person who plans – or should we say 'concocts' – offenses, and hears that he may be sentenced to prison, may think twice… as aforesaid, it seems that in the case at hand a deterring penalty was designed to deter not only the appellant himself from a forward looking perspective, but rather, and not less importantly, others, and mainly – as pointed out by the district court – those who hold senior positions in corporations, so that they shall not betray the trust put in them. Precisely basically normative people who plan their actions may include in such 'planning' the risk of having criminal charges pressed against them (**Dankner**, paragraphs 38-39).

C. Reference is made to the words of this honorable court in HCJ 7146/12 Serge Adam v. The Knesset (reported in Nevo) in the judgment of Justice Arbel:

> 85. …There can indeed be no dispute that the purpose of blocking the phenomenon of infiltration is an important and appropriate purpose, given the difficulties this phenomenon raises. However, the significance of this purpose in the context of the amendment of the law is deterrence. Namely, the mere placement of the infiltrators in detention deters potential infiltrators from coming to Israel since they realize that they, too, will be placed in custody, and as put in the colorful language of the Deputy President M. Cheshin, “we must not be misled by the polite language; we have all realized that the silk glove contains a fist” (Stamka, 769).
>
> 86. The difficulty in the purpose of deterrence is clear. A person is placed in detention not because he personally presents any danger, but in order to deter others. The person is regarded not as a goal but as a means. This treatment undoubtedly inflicts an additional impingement on his human dignity. “Human dignity regards the human as a goal rather than a means for securing the goals of others” (Barak, Constitutional Interpretation, 421). “Humans always stand as a purpose and value by themselves. They should not be regarded merely as a means or as a negotiable commodity – however noble the goal” (Kav LaOved I, 399). I have also noted that “a person is not to be treated merely as a means for securing ancillary and external purposes, since it constitutes an impingement on his dignity,” as illuminated in the teaching of the philosopher Immanuel Kant (Human Rights Division, paragraph 3 of my judgment).

12. Reference is made to the minority opinion of the Honorable Justice Vogelman in HCJ 5839/15 **Sidr v. Military Commander of IDF Forces in the West Bank**, in paragraph 2 of his judgment:

> … my own opinion would have lead me to the conclusion that the exercise of the authority under Regulation 119 when no sufficient proof has been provided that the family of the suspect was involved in hostile activity – is

> disproportionate. The lack of proportionality is due to the fact that there is no proper relation between the measure chosen – house demolition – and the gain achieved there-from. In other words: even if we assume that the demolition of the house is effective in realizing what has been identified as the goal of this regulation – deterrence – the consequences of the action are not comparable to the gain embedded therein.

13. Reference is made to the words of this honorable court in HCJ 5100/94 **Public Committee Against Torture in Israel v. State of Israel et al**., (reported in Nevo):

> 39. This decision opens with a description of the difficult reality in which Israel finds itself security wise. We shall conclude this judgment by re-addressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand, since the preservation of the Rule of Law and the recognition of an individual's liberty constitute important components of its security concept. By the end of the day, they strengthen its spirit and its strength and enable it to overcome its difficulties.

14. Therefore, in view of all of the above, the honorable court is requested to issue the requested orders and after hearing the arguments of the parties, make them absolute.

Jerusalem, today, November 29, 2015.

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Andre Rosenthal, Advocate
Counsel to the petitioners