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At the Supreme Court

HCJ 8156/15

- In the matter of:**
1. [REDACTED] Alian ID No. [REDACTED] and 4 family members
 2. [REDACTED] Alian ID No. [REDACTED] and 10 family members
 3. HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger

Represented by counsel, Adv. Lea Tsemel
and/or Adv. Hava Matras-Iron and/or Adv. Sigi Ben Ari and/or
Adv. D. Shenhar and/or Adv. Noa Diamond and/or Adv.
Benjamin Agsteribbe and/or Adv. Bilal Sbihat
Of HaMoked: Center for the Defence of the Individual, founded
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2 Abu Obeida St., Jerusalem,
Tel: 02-6273373; Fax: 02-6289327

The Petitioners

v.

IDF Commander in the West Bank
Represented by the State Attorney's Office
Ministry of Justice, Jerusalem

The Respondent

Petition

The Honorable Court is hereby respectfully moved to summon the Respondent to appear and show cause why he should not avoid any direct or indirect damage to the residence of Petitioners 1 and 2 and issue an Order Absolute to avoid same.

For the sake of clarity we stress that the Respondent does not intend to cause damage to the Petitioners' residential units on the first and third floor of a building that belongs to the Alian family in Jabal al-Mukabber. On the contrary, the seizure and demolition order issued by the Respondent states that it **refers only to the second floor of that same building**, where, the Respondent claims, the late [REDACTED] Alian, who had perpetrated an attack against Israelis, had resided. This petition is filed due to Petitioners' concerns regarding indirect damage that might be caused to their property during the execution of said order.

As an interim remedy:

The court is requested to order the Respondent or anyone acting on his behalf:

- a. To refrain from causing any damage to the building that is the subject of the petition herein pending the exhaustion of proceedings herein.
- b. To order the Respondent to provide technical specifications of his demolition plan for the second floor, and allow leave to file an expert opinion with respect to these specifications and the risk involved – all prior to hearing the petition itself.

The grounds for the petition are as follows:

1. This petition is filed in addition to and simultaneously with another petition filed by the family of the late █████ Alian, the subject of the seizure and demolition order, through Counsel A. Rosenthal. The petition herein is based on and adds to all legal arguments made in the aforesaid petition.
2. **A description of the house:** The house is located in Jabal al-Mukabber. It is a three-story building on the village outskirts.
The first, ground floor is occupied by the family of Petitioner 1, with a total of five members.
The second floor is occupied by the family of the late █████ Alian, and is the subject of the demolition order.
The third floor has a unit occupied by the family of Petitioner 2, with a total of 11 members.
3. Immediately upon receipt of the order pertaining to the second floor, the Petitioners, the remaining owners of units in the building and the uncles of the late █████ Alian, filed their own objection.

In the objection sent in on November 15, the Petitioners stated that some negative experience has been gained recently, when an allegedly controlled demolition of one floor in a residential building caused serious damage to the remaining units in the building. This was the case in the Abu Jamal home, despite an undertaking given by Respondent and promises that the demolition would be controlled and responsible (HCJ 5839/16, 5844/15).

After the objection was sent in, some more negative experience was gained. It appeared that most of the demolitions that were meant to be controlled and were discussed in a joint petition under HCJ 7092/15 **Kusa v. Military Commander**, as well as other petitions, had cause extensive collateral damage, going beyond the unit that was slated for demolition itself and extending to neighboring units and even neighboring homes. The situation required the demolition of units and homes.

4. The manner in which the building will be damaged: Advance understanding of the manner in which the Respondent intends to demolish the second floor, should this intention come to fruition, is critically important.

In the objection sent by the Petitioners on November 12, 2015, the Respondent was requested to state how he was planning to execute the demolition and provide full specifications and an engineering plan for said demolition.

A copy of the communication is attached hereto and marked A.

And, indeed, in response, the Respondent stated on that same day that:

... The demolition of the unit in which the terrorist and his family resided is planned to be executed manually (using hammers, jackhammers, demolition hammers, etc.) without causing damage to the building's structural components.

A copy of the response is attached hereto and marked B.

4. [*sic*] Consequently, a detailed objection to the demolition plan and its outcomes was filed. The objection does express appreciation for the lessons learned by the Respondent from prior failures to uphold his pledge to avoid causing damage to the surrounding area, yet expressed concern that this would not be enough. The mode of operation chosen was not detailed enough to allow a professional evaluation of its potential outcomes. Though, again, the Respondent is not planning a demolition using explosives but rather mechanical and hand-held tools, the type of tools used is significant. If these are only light tools, operated slowly and allowing close monitoring of the outcomes and ongoing removal of debris to avoid an accumulation of debris in the structure, the damage may not be severe. However, the Respondent has not undertaken to use this method exclusively. He has not pledged to carry out the demolition in a manner that would allow the **restoration of the building to its prior state.**

Petitioners' objection dated November 15, 2015 is attached hereto and marked C.

What does this concern? Each and every demolition carried out under the first clause of Regulation 119 of the Defense (Emergency) Regulations 1945 must ensure the possibility of realizing the final clause of the same regulation. The British Mandate's Regulation 119 does more than allow seizure and demolition as repeatedly quoted in the responses of the Respondents, but **it also allows remission and revival.**

Remission arrives further in the Regulation:

[W]hen any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything on growing on the land. **Where any house, structure or land has been forfeited by order of a Military Commander as above, the Minister of Defense [High Commissioner] may at any time by order remit the forfeiture in whole or in part and thereupon, to the extent of such remission, the ownership of the house, structure or land and all interests or easements in or over the house, structure or land, shall revert in the persons who would have been entitled to the same if the order of forfeiture had not been made and all charges on the house, structure or land shall revive for the benefit of the persons who would have been entitled thereto if the order or forfeiture had not been made.**

The military commander, the same military commander who has powers to seize and demolish, also has powers to remit the seizure and demolition! What is to be remitted in the future, and what hope for remission lies in shattered supporting beams, collapsing ceilings and piles of bricks and broken furniture? The manner in which the demolition is carried out must ensure true, feasible remission.

5. On November 26, 2015, counsel for the Petitioners received notice that the Respondent had rejected their objection and decided to execute the seizure and demolition order it issued. It gave Petitioners very little time to take legal action.

The notice is attached hereto and marked D.

6. The Petitioners have a vested right to be informed about the manner in which the Respondent plans to damage part of the house in which they live, where he plans to use each proposed tool and whether they can expect to be harmed as a result of the demolition. They are also entitled to provide their own expert opinion with respect to the chosen demolition plan.

The Court is requested to uphold the Petitioners' rights and compel the Respondent to provide the full specifications of the proposed demolition and allow the Petitioners to raise informed objections, while presenting a counter expert opinion, all, as requested, prior to hearing the petition.

6. [*sic*] As stated, this petition adjoins and supports all arguments raised in the main petition. We add, briefly, that while undertaking causing damage to a house in the OPT in a situation of occupation, the military commander is obligated to obey the rules of international humanitarian law. Whereas such damage is sought in an area that has been annexed to Israel, the Respondent is obligated to follow humanitarian norms, some of which have been incorporated into the basic laws, whereby, a person should be punished for an action he or she committed, and will retain the right to a residence.
7. The Respondent is subject and obligated to international human rights norms, particularly, the UN Convention on Civil and Political Rights and the UN Convention on Economic Social and Cultural Rights. The same has been held in the advisory opinion of the International Court of Justice with respect to the separation wall. These norms have also guided this Honorable Court when considering the actions of the military commander (HCJ Al-Bassiouni v. Prime Minister, TakSC 2008(1), HCJ 7957/04 **Mara'abe v. Prime Minister of Israel**, TakSC 2005(3) 3333, para. 24; HCJ 3239/02 **Marab IDF Commander in the West Bank**, TakSC 2003(1) 937, HCJ 3278/02 **HaMoked: Center for the Defence of the Individual v. Commander of the IDF Forces in the West Bank**, IsrSC 57(1) 385).
8. Use of Regulation 119 also contravenes Article 17 of the International Convention on Civil and Political Rights which stipulate every person's right to be free of arbitrary or unlawful interference with their home, Article 12 which protects the right to freely choose one's residence, Article 26 which enshrines the right to equality before the law and Article 7 which protects the right not to be subjected to cruel, inhuman or degrading treatment or punishment. The UN Human Rights Committee, which oversees the implementation of the Convention by various UN members, said in its 2003 concluding observations that use of the Regulation constituted a breach of the Convention.
9. The Regulation also contravenes several articles of the Convention on Economic Social and Cultural Rights, for instance, Article 11 (protecting the right to an adequate standard of living and housing), Article 10 (protecting the family unit), Articles 12,13; as well as Article 17 of the Universal Declaration of Human Rights. There is concern that use of Regulation 119 of the Defence (Emergency) Regulations could amount to a war crime under Article 8(2)(IV) of the Rome Statute of the International Criminal Court.

The fulfillment of accepted international norms of human rights and rule of law and their application in the location of the home that is the subject of this petition should be examined from this **double perspective**.

The efficacy and reasonableness of the sanction

23. [*sic*] It is well known that the Respondent **ceased** use of this sanction of collective punishment through house demolitions following an opinion issued by a military committee, the Shani

Committee, which examined the history of demolitions and concluded that said sanction produced no real benefit and could even possibly have the adverse effect of broadening terrorist activity.

It has already been held in a general petition against house demolition, H CJ 8091/14 **HaMoked Center for the Defence of the Individual v. Minister of Defense**, by Honorable Justice Rubinstein, in paragraph 27 of his judgment as follows:

I am of the opinion that the principle of proportionality cannot support the continued supposition that choosing the drastic option of demolishing, or even sealing homes achieves the anticipated objective of deterrence without more information to substantiate said presumption in a manner which can be examined [...]. [I]n my opinion, using a tool that has grave ramifications for a person's property, justifies constant examination of whether it bears the expected fruit. This is so especially in view of the fact that even IDF officials have raised arguments in that regard, and see for instance the presentation of Maj. Gen. Shani, which, on the one hand, stated that there was a consensus among intelligence agencies with respect to its effectiveness, while on the other, proclaimed, under the caption "Main Conclusions" that "the demolition tool within the context of the deterring element has been eroded" (slide No. 20). Therefore, I am of the opinion that State agencies should periodically examine this tool and its benefits, including by conducting research and monitoring on the issue, and that they bring to this court in the future, if so required, and to the extent possible, information pointing to the effectiveness of house demolitions for deterrence purposes to an extent justifying the injury caused to persons who are neither suspected nor accused.

We have been provided with no information to suggest such an examination has been carried out recently and that renewed use of this wrongful sanction is warranted.

In the same judgment, in paragraph 6 of the opinion of Justice Hayut:

And finally, I wish to note that I attach great importance to the comment of my colleague, Justice Rubinstein concerning the need to conduct, in future, periodic research and monitoring to the extent possible concerning the house demolition measure and its benefits (paragraph 28 of his opinion). In this context it is needless to point out that also in the past this issue was examined by the Shani committee, referred to by my colleague, which engaged in "rethinking the issue of house demolitions" and at the time (2005), reached the conclusion, which was adopted by security agencies, that the demolition of terrorists' homes for deterrence purposes as a method in the Judea and Samaria Area should be stopped and reserved for extreme cases (slide 30 of the Shani committee presentation, Exhibit 1 to the petition).

The Honorable Justice believed that the attack on Merkaz HaRav Yeshiva, the abduction and murder of three youths and the murder of worshippers at a synagogue did constitute extreme cases, but nevertheless ruled:

However, these extreme cases should not make us forget the need, as my colleague pointed out, to re-examine from time to time and raise doubts and questions concerning the constitutional validity of the house demolition measure according to the limitation clause tests. Poet Yehuda Amichai has spoken in praise of doubt, which must always nag at the hearts of the righteous.

10. [*sic*] It is precisely the swift changes in national security, and the new factors thrown into the conflict's ring, that require a professional reevaluation. The facts today are not the facts the Shani Committee considered. The current political map of the Arab World is not what it was then, Israel's political balance of powers at the time of the Shani Committee is not what it has been since the last election. The state of religion and mutual religious zealotry at the time of the Shani Committee did not have the effect it has today. The approach of the outside world to Israel's actions then, is not akin to the boycotts and the threat of boycott facing Israel today.

Before house demolitions return to routine use, as practiced in the past without success, it is necessary for the military to present a current **professional** evaluation, which has not been carried out for many years, with respect to the benefit or harm using this sanction brings.

Instead of respecting the recommendation made by Honorable Justice Rubinstein, the Supreme Court has recently been presented with **classified material** that allegedly proves that the demolition is a deterrent and therefore permitted and desirable. Counsel for the Petitioners therein consented to the presentation of the material, noting their discontent at the fact that they are unable to review the material, respond to it or refute it. The Respondent, who is attempting to rely on various citations from court rulings on this matter, would do well to respect the proposition of Honorable Justice Rubinstein in the general petition referenced above:

I am of the opinion that State agencies should periodically examine this tool and its benefits, including by conducting research and monitoring on the issue, and that they bring to this court in the future, if so required, and to the extent possible, information pointing to the effectiveness of house demolitions for deterrence purposes to an extent justifying the injury caused to persons who are neither suspected nor accused.

The time is now.

Affidavit verifying the facts is attached.

Due to the short time allotted by the Respondent for filing the petition, counsel for the Petitioners reserves the right to request to add further arguments to this petition should the need to do so arises at a later stage.

Given the above, the Honorable Court is requested to issue an Interim Injunction, an Order Nisi and an Order Absolute as requested and issue a costs order against the Respondent for costs incurred in this petition and legal fees.

[signed]

L. Tsemel, Adv.

HaMoked: Center for the Defence of the Individual
Counsel for the Petitioners