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At the Supreme Court Sitting as the High Court of Justice
Before the Honorable President

HCJFH 8988/15

In the matter of:

1. _____ **Abu Jamal**
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**

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

v.

GOC Hone Front Command

represented by the State Attorney's Office

The Respondent

Request for Further Hearing

The honorable court is hereby requested to order that a further hearing be held on two important issues which are contrary to the previous rule of this honorable court: the quality of the evidence required for the use of Regulation 119 of the Defence (Emergency) Regulations, 1945; and who has the burden to prove where the perpetrator resides.

This request is submitted following a judgment dated December 22, 2015, which was given in HCJ 8150/15 **Abu Jamal and HaMoked: Center for the Defence of the Individual v. GOC Home Front Command**. A certified copy of the judgment is attached hereto and marked **P/1**.

In said judgment it was held – by a majority opinion – that the administrative evidence which had been submitted for the review of the honorable court, including privileged information which had been submitted *ex parte*, was sufficient, despite the fact that it was not "clear, unequivocal and convincing" – as it should be – "**whenever the revocation of existing rights or the revocation of fundamental rights is discussed**" (HCJ 159/84 **Shahin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 39(1) 309, 327 (1985),

Furthermore, it was also held in said judgment, in addition to the quality of the required evidence that the burden of proof concerning the perpetrator's residence lied on the Applicants rather than on the respondent.

As an interim relief, and according to regulation 14 of the Further Hearing Procedure Regulations, 5744-1984, the honorable court is hereby requested to issue an order prohibiting the realization of the demolition order by the respondent or anyone on his behalf until the termination of the proceedings in this request. According to the judgment of this honorable court, the execution of the demolition order was stayed until December 30, 2015.

The grounds for the request are as follows:

The quality of the administrative evidence

1. Applicant No. 1 _____ Abu Jamal is the father of _____ Abu Jamal who carried out the attack in Jerusalem on October 13, 2015, in which one Israeli citizen was killed and two others were wounded.
2. Applicant No. 2, HaMoked: Center for the Defence of the Individual, 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 Applicant or as counsel for persons whose rights have been violated.
3. A. On October 13, 2015, the day of the attack, the security forces visited the house of Abu Jamal. The Abu Jamal family owns a three story building – divided into three apartments – and a separate structure adjacent to the three story building. A few meters separate between the two buildings. The Applicants argue that the perpetrator and his family resided in the separate structure.

According to the respondent, a nameless neighbor – whose identity is un-known and the documentation of his discussion with the security forces was not provided – pointed at the lower floor of the three story building as the dwelling of 'Alaa Abu Jamal (hereinafter: the **apartment**).

B. According to the respondent, the following items were found in the apartment:

Family pictures were found on the corridor wall including the picture of 'Alaa Abu Jamal;
Three beds in the kids' room;
Four pay slips of 'Alaa Abu Jamal;
Bezeq internet routers in the entrance closet, behind the entrance door to the apartment.

To prove respondent's allegations, the following photographs were attached:

- 1) A photograph of an excellence certificate in the name of 'Alaa Abu Jamal lying on a carpet on the floor of the apartment, and not, as argued by the respondent, on the corridor wall together with the other family pictures.
- 2) A health fund card in the name of Khateb Abu Jamal, a family member, which can also be seen in respondent's photograph lying on a carpet on the floor – and not in the third drawer of the kitchen cabinet of the apartment, as stated in the affidavit of _____ Abu Jamal, 'Alaa's sister who resides in the apartment. Her affidavit was submitted in the framework of HCJ 8150/15 and was marked as P/5.

- 3) Internet routers which were photographed on the carpet on the floor and not in the closet behind the entrance door.
- 4) The four pay slips which were not photographed in the original place in which they were found either.
4. On October 15, 2015 Applicant's son was interrogated – 'Alaa's brother – who pointed at the separate structure as the place which served as the residence of 'Alaa Abu Jamal. Said interrogation was not provided to the Applicants.
5. A. On October 19, 2015, respondent's representatives visited te separate structure. In this visit, as indicated by respondent's response in HCJ 7219/15 **Abu Jamal and HaMoked: Center for the Defence of the Individual v. GOC Home Front Command** – "... in the separate structure a photograph of the perpetrator was found hanging on the wall near the entrance to the structure, 2-3 beds were found in the bedroom and a box of electronic equipment was found in the living room. Other than the above, the structure was vacant of any equipment and furniture". No report or memorandum regarding the visit was provided. The arguments specified in said response were supported by an affidavit of "S" , an Israel Security Agency (ISA) division coordinator, who declared in paragraph 3 that:

"3. The facts specified in respondent's notice are known to me by virtue of my position and are true to the best of my knowledge and belief".

A copy thereof is attached and marked **P/2**.

- B. The Applicants argue that no conclusion may be drawn from the fact that the separate structure was "vacant of any equipment and furniture", in view of the previous experience of the Abu Jamal family with demolition orders pursuant to Regulation 119; reference is made to two houses of family members of the Abu Jamal family which had been demolished (after judgments were given in their cases in HCJ 8066/14 and in HCJ 8070/14).
 - C. On October 22, 2015 the respondent notified of his intention to forfeit and demolish the separate structure.
 - D. After the objection which had been submitted in this matter was dismissed, on October 27, 2015, a petition was filed – HCJ 7219/15.
 - E. On November 3, 2015, one day before the day of the hearing, the respondent notified that the order had been revoked. The above specified photographs were attached to the notice. A collection of said photographs is attached hereto and marked **P/3**.
 - F. On the same day, November 3, 2015, the respondent notified of his intention to forfeit and demolish the first floor of the three story building, namely, the "apartment".
 - G. After the objection which had been submitted against the new order was dismissed, another petition was filed, HCJ 8150/15, which is the subject matter of this request.
6. In the hearing which was held in HCJ 8150/15, respondent's counsel submitted for the review of the honorable court privileged material, to complete the picture with respect to respondent's evidentiary infrastructure. Advocate Elad-Segal said in the hearing that "This is the house visit report from October 27th, and a report of the questioning of the brother". (page 6, line 17 of the protocol of the hearing).

The Honorable Justice Amit added: "We have here two intelligence items". (page 6, line 30 of the protocol).

7. The judgment in HCJ 8150/15 was given by a majority opinion.

A. The Honorable Justice Amit held as follows with respect to the quality of the evidence:

14. After we have heard the arguments of the parties and have reviewed the material before us including the privileged material which was presented to us, I am satisfied that the administrative evidence in respondent's possession indicates that 'Alaa and his family indeed lived on the first floor of the Jamal house. (page 7 of the printout of the judgment).

B. The Honorable Justice Zylbertal who joined the opinion of Justice Amit, held as follows:

With respect to the petition in HCJ 8150/15, I agree with my colleague Justice **Amit** that the administrative evidence, together with the entire relevant circumstances that the respondent was entitled to take into account, indicate that the perpetrator lived in the property against which the order was issued. Indeed, there is room for criticism, as was expressed by Justice **Mazuz** of the conduct of respondent's representatives with respect to the collection of the evidence. However, even if the evidence collected by the respondent is relatively poor, then, the other circumstances justified the decision which was made (the intention is mainly to the fact that a planning demolition order is pending against the "separate building" and to the fact that if the perpetrator's family had indeed lived in said building it should not have had any real difficulty to present proof to that effect and in so doing to refute the indications arising from the evidence in respondent's possession, but this was not done).

C. The Honorable Justice Mazuz held differently:

Having examined the material, I am of the opinion that the factual-evidentiary infrastructure which was presented by the respondent to substantiate his position concerning the place of residence of the perpetrator is not sufficiently based, particularly when confronted by affidavits of three family members who declare that the perpetrator ('Alaa) and his family lived in the single-story structure. Respondent's position concerning the place of residence of the perpetrator is mainly based on a collection of photographs taken by the representative of the security forces who arrived to the place on the day of the attack, which indicates that several personal and professional items of the perpetrator (a number of framed photographs of himself and his family, a certificate, several pay slips of the perpetrator and several boxes of communication routers) were found in the ground floor of the three story building. Said items were not photographed for some reason in their original places but rather when they were scattered on the floor. In addition, no affidavit was submitted by the representative of the security forces who conducted the visit and took the pictures.

Moreover. After said visit, which was conducted as aforesaid on the day of the attack, a seizure and demolition order was issued against the single-story structure. No convincing explanation was given to the change which occurred later on in respondent's position, and the evidence which was presented does

not provide a clear and convincing evidentiary infrastructure. The privileged information which was presented to us in this regard does not provide an actual evidentiary support for that matter either. It should be noted here that the fact – which apparently was given considerable weight by the respondent – that an old planning demolition order is pending against the single-story structure (from 1997), which has not been realized, may, perhaps, explain the fact that the family prefers the demolition of the single-story structure over the demolition of the ground floor of the big building, but is not relevant, in and of itself, to the factual issue in dispute, and obviously is not a legitimate consideration in respondent's considerations according to Regulation 119.

8. The Applicants argue that the evidence in respondent's possession specified above is poor and cannot be equivocally interpreted. Respondent's argument that when the ISA coordinator visited the house on October 13, 2015, the identification of the house did not come up is unacceptable in view of the fact that according to his arguments he was assisted by a "neighbor" who pointed at the apartment and not at the separate structure. This means that the ISA coordinator did not know for sure where 'Alaa Abu Jamal resided. The fact that an order was issued which was later revoked proves it.

Photographs of the items which are seen scattered on the carpet of the house's floor rather than in the place in which they were located as argued by the respondent – cannot constitute clear, unequivocal or convincing evidence.

Said flaw may not be cured by the argument regarding the judicial demolition order which was issued against the separate structure due to a breach of the planning and construction law. Said order has been pending, as aforesaid, for many years, like many other orders in East Jerusalem.

... the required weight of evidence based on which a decision is made reflects to large extent the nature of the right or interest which may be violated as a result of the administrative decision and the severity of the harm which will be caused as a result of the decision.

(Itzhak Zamir, "The Administrative Authority", Volume B, Nevo Publishers, 1996, page 755).

9. The requirement that clear, unequivocal and convincing evidence be presented is an established case law. In HCJ 159/84 **Shahin v. Commander of IDF Forces in the Gaza Strip Area** (reported in the Nevo website) the President of the honorable court, Honorable Justice Shamgar held with respect to the quality of the evidence required for the revocation of existing rights or for the revocation of fundamental rights, as follows:

In HCJ 56/76 Berman v. The Minister of Police et al., IsrSC 31(2) 587, page 692, the revocation of existing rights was discussed and it was stated therein that for the purpose of making its decision the authority must have before it convincing and credible evidence which do not leave room for a doubt. I find said standard acceptable whenever the revocation of existing rights or the revocation of fundamental rights is discussed, similar to the acceptable rule which applies to such matters in the United States (see: Woodby v. Immigration Service 276 U.S. (1966) 385 in which the court discussed evidence that was before the administrative authority prior to the issue of a deportation order). I am of the opinion that the evidence which is required to

convince a statutory authority that it would be justified to issue a deportation order, as a general rule, should be clear, unequivocal and convincing.

10. Reference is made to Itzhak Zamir, "The Administrative Authority", Volume B, Nevo Publishers, 1996, page 753.

... the administrative authority may rely for the purpose of making a specific decision on any evidence that a reasonable person would have relied on for the purpose of making such decision. Evidence to which a reasonable person would not have attributed any weight – in other words, evidence of zero weight – should also be disregarded by the administrative authority.

11. In EA 2/84 **Neiman v. Chairman of the 11th Knesset Election Committee**, IsrSC 39(2) 225, 249-250, it was held as follows:

With respect to the revocation of existing rights and all the more so with respect to the revocation of fundamental rights, evidence which may be interpreted one way or another will not suffice... I am of the opinion that the evidence which is required to convince a statutory authority that the revocation of a fundamental right is justified must be clear, unequivocal and convincing... the greater the right the greater is the intensity and strength of the evidence underlying the decision to limit the right.

12. In HCJ 3638/99 **Blumental v. Rehovot Municipality**, IsrSC 54(4) 220 it was held that:

Any administrative decision must be based on verified factual infrastructure. In the absence of appropriate factual infrastructure the authority cannot consider and weigh the entire interests which are brought into play in the situation...

13. In HCJ 802/89 **Nasman v. Commander of IDF Forces in the Gaza Strip Area** (reported in Nevo website), an order which was issued according to Regulation 119 was abolished after the honorable court realized that the decision "was based – at least partially – on incorrect facts" (page 606).

14. In fact, the respondent has photographs of items lying on the floor's carpet. An indication given by a "neighbor". Two intelligence items which were submitted in the hearing. An affidavit of the ISA coordinator from which we learn that he personally did not see the family pictures including the excellence certificate hanging on the corridor's wall; nor did he see the children's bedroom or the electronic equipment either – or else he would have made a direct declaration to that effect, unhesitatingly and based on his personal knowledge rather than "to the best of his knowledge". On the other hand three affidavits were submitted by the Applicants: of the father, wife and sister of 'Alaa Abu Jamal, and the interrogation of his brother.

15. As was held by the Honorable Justice Mazuz in HCJ 8150/15 in page 20 of the judgment:

It must be remembered that this is a very extreme sanction of seizure and demolition of a residential unit, which concerns a severe violation of constitutional rights (the right to own property and the right to dignity), and

case law provides that when a violation of this kind is concerned, the required evidentiary level is of "**clear, unequivocal and convincing evidence**".

It was so held with respect to the evidentiary infrastructure regarding another severe sanction according to the Defence Regulations, the sanction of deportation from the Area according to Regulation 112 (HCJ 159/84 **Shahin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 39(1) 309, 327 (1985), hereinafter: **Shahin; Nazaal**; HCJ 672/88 **Labadi v. Commander of IDF Forces in the West Bank**, IsrSC 43(2) 227, 237 (1989)). In the above **Shahin** President Shamgar stressed that this was the applicable test "**whenever the revocation of existing rights or the revocation of fundamental rights is discussed**" (*Ibid.*) And indeed, this test was applied by case law in connection with violations of fundamental rights, including rights which are not granted by virtue of the basic laws (see for instance: HCJ 680/88 **Meir Schnitzer v. Chief Military Censor**, IsrSC 42(4) 617 (1989) on the violation of the freedom of speech; HCJ 394/99 **Maximov v. Ministry of Interior**, IsrSC 58(1) 919 (2003) on the revocation of rights according to the Law of Return; HCJ 9822/08 **The Movement for Quality Government in Israel v. The Director of Elections** (November 27, 2008) on the disqualification of a candidate in elections; HCJ 1398/04 **Ben Horin v. Registrar of Associations** (January 19, 2006) on the violation of the freedom of association, and many others).

The decision of the honorable court that this evidence suffices deviates from a current rule and hence this request.

The burden

16. The judgment also deviates from case law on the issue of the burden.

- A. The Honorable Justice Amit does not hold that the evidence produced by the respondent is clear, unequivocal or convincing, and just says "... I am satisfied that..." (paragraph 14 of the judgment, page 7).
- B. The Honorable Justice Zylbertal, as cited above, holds that the evidence is indeed poor, but the fact that a demolition order by virtue of the planning and construction law is pending and Applicants' failure to bring evidence regarding the residence of 'Alaa Abu Jamal in the separate structure provide sufficient evidentiary infrastructure. Namely, the Applicants are the ones who should prove where 'Alaa Abu Jamal resided rather than the respondent who wishes to forfeit and demolish the house.

This is a deviation from current case law.

- C. The Honorable Justice Mazuz, while referring to this argument which was raised by the respondent, holds as follows:

26. In his response the respondent argued that the Applicants did not present positive evidence to support their argument that the perpetrator lived in the single-story structure. This is an awkward argument and it seems that the respondent turned things topsy-turvy, since the evidentiary burden to substantiate facts which justify the infliction of such a severe harm on the Applicant and his family, lies in its entirety **on the respondent**. (page 20 of the judgment).

17. The Applicants argue that the conclusion arising from the judgment is that the burden of proof lies on the Applicants rather than on the respondent, which constitutes a substantial deviation from current case law.

Conclusion

18. ... evidence must be given reasonable weight by the authority. It forms part of the administrative evidence test. (Zamir, *Ibid.*, page 753).

The Applicants argue that respondent' evidentiary material would not have been regarded by a reasonable person as having sufficient weight to substantiate a decision according to Regulation 119.

Indeed, the military commander does not need a convicting judgment of a judicial instance and he himself is not a court of law. As far as he is concerned the question is whether a reasonable person would have regarded the material available to him as having sufficient evidentiary weight. (HCJ 361/82 **Hamri v. Commander of Judea and Samaria Area**, IsrSC 36(3) 439, 442 (1982); see also: HCJ 802/89 **Nasman v. Commander of IDF Forces in the Gaza Strip Area**, IsrSC 461, 464 (1989); HCJ 897/89 **Jaber v. GOC Central Command**, IsrSC 41(2) 522, 524-525 (1987)(hereinafter: **Jaber**); Mughrabi, paragraph 14 of the judgment of my colleague Justice H. Melcer; HCJ 7823/14 **Ghabis v. GOC Home Front Command**, paragraphs 10-12 of the judgment of Justice E. Rubinstein (December 31, 2014)).

The evidence in this case is contradictory and poor. The honorable court is requested to accept the request – to stay the execution of the demolition order and hold a further hearing on the issue of the required quality of the evidence when the respondent wishes to exercise his power according to Regulation 119 of the Defence (Emergency) Regulations, 1945, and on who carries the burden to prove the issue of the perpetrator's residence.

Jerusalem, December 26, 2015

(Signature)

Andre Rosenthal, Advocate
Counsel to the Applicants