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At the Supreme Court

HCJFH 8988/15

Before:

Honorable President M. Naor

The Applicants::

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

v.

The Respondent:

GOC Home Front Command

Request for further hearing in the judgment of the Supreme Court in HCJ 8150/15 dated December 22, 2015, given by the honorable justices: **I. Amit, Z. Zylbertal and M. Mazuz**

Representing the Applicants:

Adv. Andre Rosenthal

Decision

The request herein concerns a request for further hearing in the judgment of the Supreme Court in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015), in which it was held by a majority opinion (Justices **I. Amit** and **Z. Zylbertal** against the dissenting opinion of Justice **M. Mazuz**) that there was no room for intervention in the forfeiture and demolition orders which were issued against perpetrators' homes.

Together with the request for further hearing the applicants also submitted a request to stay the execution of the demolitions of the houses until the proceedings in this request shall have been concluded.

Background

1. On October 13, 2015, Bhaa 'Alian (hereinafter: **Bahaa**) carried out together with another person a murderous attack in a bus (line 78) in Armon Hanatziv neighborhood, Jerusalem. On the very same day 'Alaa Abu Jamal (hereinafter: '**Alaa**) carried out another severe attack. The two were shot and killed in the attacks.

2. Following said two attacks, forfeiture and demolition orders were issued against the apartments in which Bahaa and 'Alaa lived. Three petitions were filed with this court against said forfeiture and demolitions orders.
3. Two petitions (HCJ 8154/15; HCJ 8156/15) were filed against the order which had been issued for Bahaa's apartment. Another petition (HCJ 8150/15) was filed against the order which had been issued for 'Alaa's home, to which the request for further hearing pertains. Petitioner 1 in said petition is 'Alaa's father (applicant 1 in the request at bar; hereinafter: the **father**). The father lived with his family in a three story building owned by the family in Jabel Mukaber neighborhood (hereinafter: the **Abu Jamal home**). On October 22, 2015, the applicants were notified of respondent's intention to forfeit and demolish a single story structure (hereinafter: the **separate structure**) adjacent to the Abu Jamal home. However, later on (on November 3, 2015), it was clarified that the respondent intended to forfeit and demolish the lower floor of the Abu Jamal home.

The judgment being the subject matter of the request for further hearing

4. The request for further hearing concerns the decision of the court in the petition which pertains to 'Alaa's apartment (HCJ 8150/15). We shall also focus on said petition only.
5. The court in a majority opinion (written by Justice **I. Amit** with the consent of Justice **Z. Zylbertal**, against the dissenting opinion of Justice **M. Mazuz**) held that the petition of 'Alaa's family members (HCJ 8150/15) should be dismissed. Petitioners' main argument there was that 'Alaa lived with his family in the **separate structure** whereas the floor designated for demolition in the Abu Jamal home was the apartment of his sister – Saffa. The court rejected said argument. Its conclusion was based on the entire administrative evidence which were in respondent's possession: a questioning of a neighbor which indicated that 'Alaa lived on the lower floor; privileged intelligence information which was submitted in the hearing; and photographs of several items which belonged to 'Alaa and were found in the apartment designated for demolition (family picture, a room with three beds equal to the number of 'Alaa's children, an excellence certificated from 'Bezeq' with which 'Alaa was employed and computer equipment of the company (new internet routers closed in a box), four pay slips and a health fund card of his son Khateb). The court noted that said items were photographed by the Israel Security Agency (ISA) coordinator after they had been removed from their original location, that this should have been avoided and that it would have been appropriate to photograph them where they were found. Nevertheless, it was held that they could be relied on without any preclusion. Against the above backdrop it was held that "the administrative evidence in respondent's possession indicates that 'Alaa and his family indeed lived on the first floor of the Jamal house" (*Ibid.*, paragraph 14 of the judgment of Justice **I. Amit**).
6. The court held further that the petitioners failed to present any positive evidence in support of their allegation that 'Alaa lived in the separate structure and that their "willingness" to "sacrifice" the separate structure should be understood against the backdrop of the fact that a demolition order by virtue of the planning and building laws was pending against said structure. The court noted that said fact could "... explain petitioners' interest to mislead the respondent with respect to 'Alaa's housing unit, and point at the separate building as the apartment in which he lived with his family" (*Ibid.*, paragraph 16 of the judgment of Justice **I. Amit**).
7. As opposed to the opinion of Justice Amit, Justice Mazuz was of the opinion that the factual-evidentiary infrastructure which was presented by the respondent in support of his position regarding the perpetrator's place of residence was not sufficiently substantiated, particularly in view of the fact that affidavits of three family members declared that the perpetrator and his family lived in the separate structure rather than in the apartment designated for demolition. In addition, Justice Mazuz noted that according to his position, the fact that an old planning demolition order (from 1997) which

has not been realized was pending against the separate structure, could explain the fact that the family preferred its demolition, but was 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" (*Ibid.*, paragraph 25). Justice Mazuz noted that the respondent argued in his response that the applicants did not present positive evidence in support of their allegation that the perpetrator lived in the separate structure. According to Justice Mazuz "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 petitioner and his family, lies in its entirety **on the respondent**" (*Ibid.*, paragraph 26). In addition Justice Mazuz held that when an extreme sanction of forfeiture and demolition of a housing unit was concerned, which involved a severe violation of constitutional rights, case law provided that when a violation of this kind was concerned, the required evidentiary level was of "**clear, unequivocal and convincing evidence**". It was so held with respect to the evidentiary infrastructure which was required for another severe sanction according to the Defence Regulations - the sanction of deportation from the Area according to Regulation 112. In the case at bar, Justice Mazuz held that it seemed that even the respondent himself did not purport to claim that he presented before the court evidence which satisfied the above level. Under these circumstances, Justice Mazuz was of the opinion that it would be justified to issue an *order nisi* in the petition for a thorough examination of the factual dispute regarding the housing unit.

8. As aforesaid, Justice **Z. Zylbertal** joined the position of Justice **I. Amit** that the petition should be dismissed. Justice Zylbertal was of the opinion that the administrative evidence coupled with the entire relevant circumstances that the respondent was entitled to take into consideration, indicated that the perpetrator lived in the asset against which the order had been issued. Justice Zylbertal noted further that even if relatively poor evidence was gathered by the respondent, then all other circumstances – the fact that a planning demolition order was pending against the separate structure and the assumption that if the perpetrator's family had indeed lived in the structure it should not have had any difficulty presenting proof, thus refuting respondent's evidence – facilitated the decision.
9. Therefore, the petition was dismissed by a majority opinion. The applicants did not accept said result and submitted a request for further hearing. Together with the request for further hearing a stay of execution request was submitted as aforesaid. Yesterday I ordered that a response be given to the stay of execution request. However, after a thorough perusal of the request and of the judgment being the subject matter of the request, I came to the conclusion that the request should be dismissed without response, and hence there is no need to stay the execution of the demolitions.

The request for further hearing

10. As aforesaid, the request for further hearing is directed only at the decision of this court in HCJ 8150/15, which concerns the order that was issued against 'Alaa's home. The applicants argue that the respondent presented poor evidence which did not satisfy case law requirement for clear, unequivocal and convincing evidence. Hence, the majority opinion – which relied on the above evidence – ran contrary to previous rulings of this court. In addition the applicants argued that according to the majority opinion in said judgment the burden to prove where the perpetrator lived was imposed on his family members rather than on the respondent. The applicants argue that said result did not reconcile with applicable case law as well.

Decision

11. After I reviewed applicants' arguments and the judgment being the subject matter of the request, I came to the conclusion as aforesaid that the request for further hearing should be dismissed.

12. In the judgment being the subject matter of the request no explicit and clear rule was determined in the issues complained of by the applicants. The Justices who gave the majority opinion did not establish ironclad rules regarding the evidentiary level which is required for the exercise of the power according to regulation 119, and therefore it cannot be determined that a rule was established on this issue. Furthermore, a new rule should *prima facie* arise from the judgment, and this is not so in the case at bar. The above is also relevant with respect to the burden of proof. As specified above, the majority opinion was based on the administrative evidence presented by the respondent and on additional circumstances, whereas applicants' failure to present positive evidence on their behalf was only used to support the incriminating conclusion. Under these circumstances, applicants' argument according to which the judgment being the subject matter of the request "turned over" the acceptable burdens of proof – is far reaching. Eventually, we are concerned with a specific decision in factual matters which does not justify the holding of an exceptional and rare proceeding such as a further hearing.
13. Therefore, the request for further hearing cannot be accepted and is hereby dismissed. Hence, the request for stay of execution is also dismissed. No order for costs is issued.

Given today 17 Tevet 5776 (December 29, 2015).

The President