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At the Supreme Court

HCJFH 2624/16

In the matter of:

1. _____ Masudi, ID No. _____
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**
Represented by counsel, Adv. Andre Rosenthal, License No. 11864
And/or Adv. Muchael Sfard whose address for service of process is at
15 Salah-a-din Street, P.O. Box 19405, Jerusalem 91194
Telephone: 6250458, Facsimile: 6221148 Cellular: 050-5910847

The Applicants

v.

Commander of IDF Forces in the West Bank
Represented by the State Attorney's Office

The Respondent

Request for Further Hearing and Request for an Interim Order

The honorable court is hereby requested to order that a further hearing be held in H CJ 1630/16 **Masudi and HaMoked: Center for the Defence of the Individual**. The judgment which was given by the Honorable Justices Vogelmann, Mazuz and Sohlberg denied petitioners' request for an *order nisi* against respondent's decision to use Regulation 119 of the Defence (Emergency) Regulations, 1945, for the forfeiture and demolition of petitioner's apartment. The judgment was given on March 23, 2016, and petitioner No. 1 was given one week to get organized, until **March 30, 2016**.

The subject matter of the requested further hearing is **the lawfulness of the use of Regulation 119 of the Defence (Emergency) Regulations, 1945, by way of forfeiture and demolition or sealing of the homes of individuals suspected, accused or convicted of involvement in hostile activity against the State of Israel and/or its nationals, and mainly the relation between the authority established by the Regulation and the prohibition established by international humanitarian law, human rights law and Israeli law against collective punishment and destruction of property of protected persons.**

The honorable court is hereby requested to issue an interim order prohibiting the realization of the demolition order by the respondent or anyone on his behalf against petitioner's apartment located on the first floor in a five story building above a storage floor in Hebron until a final decision is given.

The grounds for the request are as follows:

1. A. In the judgment being the subject matter of this request, the presiding Justice, the Honorable Justice Vogelmann held as follows:

3. The different opinions expressed in case law, particularly after **Sidr**, strengthen me in my position that the weighty questions associated with the exercise of the power by virtue of Regulation 119 should be re-visited. In my opinion, in view of the many judgments which followed the rule (by different panels), the rule should be re-visited by an expanded panel rather by a panel of three. However, for as long as case law stands, which is the situation at this time, I see no alternative in this case but to hold that there is no cause for our intervention according to the rule in its current form, since the case at bar is no different than the main stream of the cases which were adjudicated by us (Compare to **Sidr**, paragraph 7 of my opinion).

- B. The Honorable Justice Mazuz held:

In view of my above positions I am unable to join the position of my colleagues who denied the petition. However, I obviously join my colleague Justice Vogelmann in his call for having the issues associated with the use of Regulation 119 revisited by an expanded panel (paragraph 3 of his opinion).

2. This honorable court held in HCJFH 360/15 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** as follows:

Three justices of this Court saw no room for revisiting matters that have been laid to rest, even if briefly and even if not to Petitioners' satisfaction (last part of paragraph 5).

In the above case two of the three justices of the panel were of the opinion that a hearing before an expanded panel was required.

3. A. Furthermore. One day after its release, while the judgment being the subject matter of this request was still hot off the press, it was held by the Honorable Justice Joubbran in HCJ 1938/16 **Abu Alrub and HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Commander of IDF Forces in the West Bank** as follows:

I must admit and cannot deny the fact that I am not comfortable with the use of the authority established in Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**), for the issue of forfeiture and demolition orders against the homes of perpetrators (hereinafter: the **authority**), while all other inhabitants of these houses were not involved in terror activity. I share the reservations from the exercise of said authority by the respondent which were expressed, *inter alia*, by Justice **M. Mazuz** in his opinion (minority opinion) in HCJ 7220/15 '**Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015) and by Justice **U. Vogelmann** in his opinion (minority opinion) in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015). The exercise of the authority raises difficulties under local law and international law, which in my opinion have not yet been thoroughly addressed by the court in its judgments, particularly in view of the increasing use of this authority, against the backdrop of the severe security situation and the rising wave of terror.

The Honorable Joubran added:

6. Shortly after the above opinion was written, the judgment in HCJ 1630/16 **Zakariye v. Commander of IDF Forces** (March 23, 2016) was given and published. In paragraph 3 of his opinion Justice **U. Vogelman** called for a reconsideration of the questions associated with the exercise of the authority by virtue of Regulation 119 by an expanded panel. This call was joined in that case by Justice **M. Mazuz** (paragraph 5 of his opinion) and I also join it for the reasons specified in paragraph 2 above.

B. The Honorable Justice Barak-Erez held:

In view of the fact that the position of the court on this issue has only been recently re-visited I consider it to be binding upon me at this time. However, as I have already noted, it would be appropriate that "this court will continue to examine the compatibility of case law to the changing circumstances and the lessons learnt from the cases in which demolition orders were executed as aforesaid" (*Ibid.*, paragraph 2 of my opinion). In fact, my colleague, the Deputy President also holds the same opinion.

Applicant No. 2 intends to submit a request for a further hearing in that case as well.

C. The Honorable Justice Barak-Erez referred to in the above citation to HCJ 8567/15 **Halabi v. Commander of IDF Forces in the West Bank** where she held as follows:

However, this matter cannot be already re-visited at this time, after this court has just recently affirmed the applicable rule. As noted by my colleague Justice **Z. Zylbertal** in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command**, paragraphs 2-4 (December 22, 2015)(hereinafter: **Abu Jamal**) and as has already been previously noted by my colleague Justice **U. Vogelman** in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015)(hereinafter: **Sidr**), we have no alternative at this time but to respect the current judgments of this court, and to refrain from the practice of applying different law according to the panel of the Justices.

As aforesaid, it stands to reason that in view of the complex questions evoked by the use of the measure of house demolition, even following a murderous terror attack which was carried out by one of its inhabitants – from the aspect of international law as well as from the aspect of Israeli constitutional law – this court will continue to examine the compatibility of case law to the changing circumstances and the lessons learnt from the cases in which demolition orders were executed as aforesaid. Indeed, ostensibly, there is merit to the argument that the use of power which concerns house demolition raises a difficulty from the aspect of the proportionality requirement (compare with the position of Justice **Vogelman** in **Sidr** and the position of Justice **Zylbertal** in **Abu Jamal**) – without derogating from the repugnance, condemnation and deep sorrow which arise as a result of the killings which lead to the hearing in this case and in other similar cases, and from the justified desire to deter in a bid to prevent similar additional doings. However, according to the principles of conduct which are binding on this court as an institution and despite the difficulty associated therewith, I join

the recommendation of my colleague, the Deputy President **E. Rubinstein** to dismiss the petition at bar.

4. In HCJ 8150/15 **Abu Jamal and HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. GOC Home Front Command** the Honorable Justice Zylbertal held as follows:

The reasons of Justice **Mazuz** are weighty reasons which are based on fundamental constitutional principles as well as on basic reasons of justice and fairness. Had said issues been brought to this court for the first time, it is possible that I would have joined the main principles of his positions.

5. As specified above, in three different petitions which challenged the use of Regulation 119, three different panels of this honorable court approved the realization of the forfeiture and demolition or sealing orders, while each and every panel had one Justice who held a minority opinion and another Justices who pointed out that the application raised difficulties but nevertheless approved the demolition only due to the fact that the rule had just recently been re-affirmed.
6. In HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** the Honorable Justice Hayut held in the last part of paragraph 1 as follows:

I cannot agree to do that without turning this court of law into a "house of Justices", especially in view of the fact that the above judgments were given by five Justices of this court only a few months ago. However, it should be honestly said that the issues raised in the petition are difficult and troubling and I will not deny the fact that taking the path of case law in this matter is not easy.

7. As specified above, six justices of this honorable court are of the opinion that they are bound by case law as far as their intervention in the use of Regulation 119 by the respondent or by the Ministry of Defense is concerned and they are uncomfortable with that. One justice holds an even more decisive opinion.
8. Despite the fact that only about six months ago a request for a further hearing on the same issue was denied (the above HCJFH 360/15), it appears that in view of the statements made by six justices of this honorable court which were cited above, the time is ripe to hold a hearing on the general legal questions which concern the lawfulness of the use of Regulation 119, by an expanded panel of justices of the honorable court. It should be noted that all of the above cited statements of the justices of this court, with the exception of the minority opinion of the Honorable Justice Vogelman in **Sidr**, were given **after** applicant 2's request for a further hearing was denied.

A copy of the request for a further hearing in HCJFH 360/15 (without its exhibits) is attached hereto and marked Exhibit 1.

A copy of the decision of the Honorable President in HCJFH 360/15 is attached hereto and marked Exhibit 2.

The applicants refer to the arguments made in the above HCJFH 360/15 and adopt all allegations specified therein and in particular, the allegations made therein regarding the importance and difficulty of the issue in which a further hearing is requested

9. The current rule regarding the use of Regulation 119 of the Defence (Emergency) Regulations, 1945, is difficult in the sense of section 30(b) of the Courts' Law [Consolidated Version], 5744-1984, and satisfies the condition established therein for further hearing purposes.
10. This honorable court which denied the request of applicant 2 for a further hearing (HCJFH 360/15) held, while making reference to the fact that there was no specific applicant that "... without setting things in stone, it appears that this petition, at the time at which it was filed, was not the optimal vehicle for Applicants' arguments...". (last part of paragraph 5).

In this request the apartment of petitioner 1, who resides in an apartment located on the first floor of a five story building, is designated for demolition commencing from March 30, 2016.

11. In view of the above, the honorable court is requested to accept this request.

Should the honorable court accept this request and order that a further hearing be held, the applicants request to file written arguments which will consist of a detailed discussion of the legal questions which arise in this matter.

Jerusalem, today, March 30, 2016

Andre Rosenthal, Advocate

(Signature)

Andre Rosenthal, Advocate
Counsel to the Applicants