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In the Supreme Court sitting as the High Court of Justice

HCJ 7733/04

Before: The Honorable President A. Barak
The Honorable Vice-President M. Cheshin
The Honorable Justice E. Hayut

The Petitioners: 1. Mahmud 'Ali Nasser
2. HaMoked: Center for the Defence of the Individual, founded by
Lotte Salzberger

v e r s u s

The Respondent: Commander of IDF Forces in the West Bank

Petition for Order Nisi and Interlocutory Order

Date of the session: 1 Tevet (5765) (13 December 2004)

On behalf of the Petitioners: Attorney Andre Rosenthal

On behalf of the Respondent: Attorney Dani Horin

J U D G M E N T

President A. Barak

1. On 9 September 2003, a suicide bomber exploded in the Hillel Café in Jerusalem. The terrorist attack killed seven persons and injured many others. Immediately following the incident, security forces began an investigation, which revealed that the suicide terrorist was recruited by a person named Fuaz Mahmud 'Ali Nasser (hereafter – Nasser), who is the son of Petitioner 1 (hereafter – the petitioner). An indictment was filed against Nasser (on 14 March 2003) in the Military Court in Judea, charging him, inter alia, with the offense of intentionally causing death, attempt to intentionally cause death, membership and activity in an illegal association, and holding a position in the said association. Following the filing of the indictment, the respondent informed the petitioner (on 19 May 2004) of his intention to confiscate and demolish his house in the village of Dir-Qadim, in the Ramallah area, in that Nasser lived in the house prior to the attack. He was also informed that he could object to the

planned demolition order. The petitioner objected to the said order, and his objection was accepted in part, in the sense that the planned demolition order would be restricted to the second floor of the petitioner's house, the floor on which Nasser lived, and not the entire structure. In accordance with the results of the objection, and pursuant to section 119 of the Emergency Defense Regulations, of 1945 (hereafter – the Defense Regulations), a demolition order was issued (on 29 July 2004). On 23 August 2004, the petitioners petitioned this court, requesting that we nullify the demolition order issued by the respondent. That same day, an interlocutory order was issued (Justice E. Hayut) ordering the respondent not to demolish the petitioner's house until another decision is given.

2. In their petition, the petitioners attacked the use of section 119 of the Defense Regulations. They argue that use of section 119 of the Defense Regulations is illegal because the regulations were repealed in their entirety by the British Mandatory government before it left the country. They also argued that use of section 119 contravenes the domestic law applying in the region, and that the purpose underlying demolition of houses pursuant to this regulation is punitive, and not deterrent. Finally, they argue that the use of section 119 should be reconsidered in light of enactment of the Basic Laws.

3. In his response to the petition (on 16 November 2004), the respondent requested that the petitioners' arguments be rejected. He contends there is no basis for the argument that the Defense Regulations are invalid, and that arguments of this kind had been made and rejected by this court. He noted the deterrent purpose lying at the foundation of use of section 119, which justifies exercise of the authority to demolish. This purpose, the respondent argues, is recognized in international law and in Israeli domestic law and deserves protection accordingly.

4. A supplemental response on behalf of the respondent (of 15 March 2005) states that it had recently been decided not to use the authority specified in section 119 of the Defense Regulations. This decision, it was stated, applies also to the petitioner's house. Should it be decided to change the aforesaid policy, this change will be made in accordance with the principles set forth in this court's judgments. Inter alia, the petitioner will be given the right to be heard, so long as doing so does not endanger IDF forces or cause security activity to be thwarted. In addition, if it is indeed decided in the future to renew the policy of demolishing houses, the respondent made a commitment that the petitioner would be able to make a request to him in advance of the action, if he fears further harm to his house. In this request, the petitioner may provide information that, in his opinion, might influence the respondent's decision. In initiated actions planned sufficiently in advance, no demolition action will be taken before the respondent considers this information. This statement conforms to the arrangement agreed on in another petition (see HCJ 6868/02, *Salah a-Din v. Commander of IDF Forces in the West Bank* (not reported)). The petitioners, in their reply (of 30 May 2005), stand by their arguments

regarding the invalidity of section 119 and request that we decide their fundamental arguments, even though the concrete relief that they request is now moot.

5. Following study of the material before me, I have concluded that the petition should be denied, without considering, in the framework of this petition, the many complex arguments raised by the petitioners. The reason is that, under the circumstances of the case, the petition has been resolved and should be denied. As the respondent pointed out, at this stage, there is no intention to demolish the petitioner's house. This decision results from a change in policy regarding use of authority under section 119 of the Defense Regulations. The aforesaid decision regarding the change in policy applies also to the petitioner's house. Furthermore, should it be decided to demolish his house, all his rights are reserved, including the right to be heard before the demolition and to return to this court. Also, denial of the complaint does not mean that any of the petitioner's legal arguments are rejected, and all his arguments are reserved should he decide to file an additional petition, based on a change in circumstances. In addition, it goes without saying that the fundamental question regarding demolition of houses in the area is being heard in a pending petition in this court (HCJ 4969/04, *Adalah – The Legal Center for Arab Minority Rights in Israel v. IDF Commander of the Southern Command*), and for this reason, too, it is unnecessary to deliberate on these questions in the present petition.

Therefore, the petition is denied. Automatically, the interlocutory order that was given is cancelled. Under the circumstances of the matter, no order for expenses is given.

The President

Vice-President M. Cheshin:

I concur.

The Vice-President

Justice E. Hayut:

I concur.

Justice

It is decided as stated in the judgment of the President A. Barak.

Given today, 13 Sivan 5765 (20 June 2005).

The President

Justice

Justice