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**At the Supreme Court**  
**Sitting as the High Court of Justice**

**H CJ 6868/02**

- In the matter of:
1. \_\_\_\_\_ **Salah a-Din, ID No. \_\_\_\_\_**  
**Resident of Tulkarm**
  2. **HaMoked: Center for the Defence of the Individual,**  
**founded by Dr. Lotte Salzberger**

All represented by counsel, Adv. Andre Rosenthal  
and/or Mustafa Yihya  
Of HaMoked: Center for the Defence of the Individual,  
founded by Dr. Lotte Salzberger  
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**The Petitioners**

v.

**Commander of the Israeli Military Forces in the West Bank**

Represented by the State Attorney's Office

**The Respondent**

### **Petition for *Order Nisi* and Interim Order**

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause why he intends to demolish the house of Petitioner 1 (hereinafter: the **petitioner**).

A petition for an interim order is also filed which is directed at the respondent or any one on its behalf ordering him not to damage petitioner's house until the proceedings in this petition are concluded.

The honorable court is hereby requested to accept the petition without an affidavit and with a power of attorney which was sent by facsimile.

A copy of this petition is being transferred upon its filing to the state attorney's office.

**The grounds for the petition are as follows:**

1. The petitioner:

- A. The petitioner is the father of \_\_\_\_\_ Salah d-Din, ID No. \_\_\_\_\_, who apparently committed a terrorist attack in Baqa al sharqiya on November 8, 2001.
- B. The petitioner has been renting an apartment in Tulkarm, for about 21 years. The house which was owned by Mr. Malah, who passed away, was transferred to the possession of the deceased's (the lessor) children - who live on the third floor of said house. The petitioner and his family live on the first floor of this house – a three story building – which is registered in the name of the widow of the son of the owner – Malah. The petitioner and his family live on the ground floor as specified above. The family consists of five members as follows: petitioner's daughters: \_\_\_\_\_ and \_\_\_\_\_, his son \_\_\_\_\_ and his wife \_\_\_\_\_. The apartment consists of three rooms, a terrace, a living room, a bathroom and a kitchen.
- C. Vast news reports and the court's decision that no warning should be given of respondent's intention to demolish or damage his rented apartment in any other way, raised petitioner's concern.

The petitioner wishes to emphasize that the house is not owned by him, which fact justifies the grant of the requested relief.

- D. This information was received by Adv. Yihya today, August 7, 2002, by phone, since curfew was imposed today in Tulkarm.

2. Petitioner's concern is based on the following:

- A. On August 6, 2002, around 15:30, the respondent's advisory committee on the deportation of West Bank residents to the Gaza Strip decided to convene a meeting on August 7, 2002. Section 7 of the decision provides as follows:

We understood from the legal advisor [for the respondent A.R.] that the activity intended to stop the wave of terror is carried out under time pressure in an attempt to reduce the number of terrorist attacks and hence, to save human lives, including by house sealing and demolishing and many other actions and therefore we accept the request of the Area commander through his legal advisor to schedule the meeting for an earlier date.

A copy of said decision is attached and marked by the letter P1.

- B. On August 7, 2002, GOC Central Command Yithak Eitan was interviewed at "Galei Tzahal" which reported as follows:

GOC Central Command, Yitzhak Eitan, who leaves office tomorrow, tells Galei Tzahal that an extensive deportation of family members of suicide bombers and the demolition of their houses can greatly assist the fight against terror. "Damaging terrorists' houses is the right way. The larger its scope is, the greater are its chances to have a greater effect.

A copy of said report is attached and marked by the letter P2.

3. In H CJ 6696/02 **Amar v. Commander of IDF Forces in the West Bank**, (not yet reported) it was held as follows:

2. Upon the commencement of the hearing it was clarified that the petitions were limited to the issue of the right to be heard. For this purpose we

must therefore assume – an assumption which is yet to be reviewed – that the respondent has the authority to order that petitioners' houses be demolished.

The petitioners argue that the respondent does not have the authority to demolish the house of petitioner 1.

4. In CrimFH 7048/97 **Anonymous v. Minister of Defense** IsrSC 54 (1) 721, page 741 and thereafter, it was held by the honorable Justice Barak as follows:

The State, by means of the executive authority, detains a person who did not commit any offence, and who does not pose any danger, and whose only “sin” is being a “bargaining chip.” The violation of freedom and dignity is so profound and substantive, that it cannot be tolerated in a State aspiring to freedom and dignity, even if grounds of state security lead to the adoption of such measures. My colleague, Justice M. Cheshin has already pointed out that for the purpose of regulation 119 of the Defense (Emergency) Regulations, 1945 the basic principle is that *"the soul that sins it shall die... one should not punish without caution and one should strike the sinner himself alone"* (HCJ 2006/97 **Janimat v. GOC Central Command Uzi Dayan**, IsrSC 51(2) 651, 654. A similar approach should be taken with respect to an administrative detention.

The honorable court is requested to take a similar approach with respect to house demolition.

5. According to applicable international law, Article 46 of the Hague Convention of 1907 Respecting the Laws and Customs of War on Land (hereinafter the **Hague Convention**) prohibits confiscation of private property.

Article 46 of the Hague Convention specifically provides as follows:

Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property can not be confiscated.

Article 23 of the Hague Convention, entitled "Hostilities" provides in sub-article (g) as follows:

In addition to the prohibition provided by special Conventions, it is especially forbidden –

...

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

The petitioners refer to the words of Prof. Dinstein, "Laws of War", Shoken and Tel Aviv University Press, 1983, page 229, who writes as follows:

The first rule concerning protection of property in an occupied territory is that the occupying power must not destroy any property – real or personal – private or public (including property belonging to the enemy state), unless such destruction is imperatively demanded by operational military needs. The general principle of the laws of war in this respect was established in Article 23(g) of the Hague Convention, and Article 53 of the Fourth Geneva

Convention specifically applies it to occupied territories. Under Article 53 it is prohibited, for instance, to destroy the house of a protected person in an occupied territory only because the owner or the tenant is suspected of having assisted hostile terrorist activity. Indeed, the prohibition refers to destruction of property as such, and a distinction should be drawn between the demolition of a house and the sealing thereof (a technique which prevents the use of the house, but enables to preserve it and to possibly use it again after a while).

And in page 155 it is stated as follows:

Article 23(g) of the Hague regulations generally prohibits to destroy enemy property of any kind (private or public), unless the destruction is imperatively demanded by operational military needs. Needless to note that any act of war involves the destruction of property and the loss of human lives; any bombardment and attack – and especially urban warfare – causes massive destruction. The regulations wish to emphasize, that enemy property should not be indiscriminately and arbitrarily destroyed. However, enemy property (with the exception of protected properties such as cultural assets) is not immune of destruction if such is demanded by the necessities of war. The operational military need may exist in different circumstances, such as in an attack (for instance, when enemy forces hiding in a structure should be hit), defense (for instance, when fortifications should be erected), long distance exchange of fire and movement of military forces.

In fact Prof. Dinstein only reinforces petitioners' argument that the use of Article 23(g) of the Hague Convention is limited to an "operational military need" which is defined, *inter alia*, as an attack, defense, exchange of fire etc. It has not been argued that these houses were used for the purpose of carrying out an attack, that they were required to protect IDF forces (otherwise they would not have been demolished) or that fire was exchanged from them. In fact, according to Prof. Dinstein, Article 23(g) of the Hague Convention does not allow house demolition as requested by the respondent.

Prof. Kretzmer refers in his book to this issue and this honorable court is requested to adopt this approach. And it is so stated in "The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories" State University of New York Press, 2002, page 147, last part:

Article 53 of Geneva Convention prohibits destruction of real or personal property of the state or individuals "except where such destruction is rendered absolutely necessary by military operations". While he was attorney-general of the State of Israel, Meir Shamgar argued that demolition of houses fits the exception relating to military operations because it is a form of 'effective military reaction' that is necessary as a deterrent. This argument is not convincing. Article 53 refers to destruction rendered necessary by *military operations*. A distinction must be drawn between military operations and punitive action by the military aimed at maintaining *security*. Shamgar based his interpretation on the ICRC Commentary on Geneva Convention IV that refers to "imperative military requirements", but this must be read in the context of the Convention itself which makes a clear distinction between *military operations*, requirements or considerations and requirements or considerations of *security*. THE ICRC has clarified that the term "military operations" must be restricted to "movements, maneuvers, and other action taken by the armed forces *with a view to fighting*" and does not extend to action taken as a punishment. Furthermore, in order to fit the exception, the destruction must be

rendered *absolutely necessary* by military operations. The military may be able to argue that house demolition is effective as a general deterrent (though many would doubt this), but it would be stretching credulity beyond reasonable limits to argue that such demolitions are rendered absolutely necessary.

Both the Hague Regulations and Geneva Convention IV prohibit collective punishment. Article 50 of the Geneva Convention expressly prohibits imposition of punishments on a protected person for an offense he or she has not personally committed.

The petitioners argue that under international law, an enemy's property may be destroyed in the course of military action – and not as a punitive sanction against the act of another person – when the only connection between the offender and the people dwelling in the house is blood relationship.

House demolition is contrary to international humanitarian law and we find the respondent accepting this principle elsewhere as set forth in his statement in H CJ 2936/02 **Physicians for Human Rights v. The Commander of IDF Forces in the West Bank** (not yet reported), page 2 of the judgment's transcript:

However, the State explained that the IDF saw itself as bound by the rules of humanitarian law not only because these rules were binding under international law, but also because they are required by morality itself and even due to utilitarian reasons.

6. It was so held by the honorable Justice Cheshin in H CJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 654-655:

This is a basic principle which our people have always recognized and reiterated: every man must pay for his own crimes. And in the words of the prophet: "The soul that sins, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him." (Ezekiel 18:20). One should punish only cautiously, and one should strike the sinner himself alone. This is the Jewish way as prescribed in the Law of Moses: "The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall be put to death for his own sin." (II Kings 14:6)

Since the establishment of the State - certainly since the Basic Law: Human Dignity and Liberty – when we have read regulation 119 of the Defense Regulations, we have read it and vested it with our values, the values of a free, democratic Jewish state. These values directly lead us to the ancient times of our people, and be our times no different than former times: they shall say no more the fathers have eaten sour grapes and the children's teeth are set on edge. Every man who eats sour grapes, his teeth will be set on edge.

7. The petitioners argue that the demolition of their house – regardless of whether it is carried out pursuant to the provisions of regulation 119 of the Defense (Emergency) Regulations or according to the provisions of international law as interpreted by the respondent – is a punitive action towards the family members, which departs from a basic principle of the State of Israel concerning the personal responsibility of the offender. And it is so stated by Prof. Kretzmer, in page 151, in this regard:

Even if one adopts a narrow definition of the term collective punishment, according to which demolishing the family home of a young person who committed a serious act of violence is not included, there can be little doubt that such a demolition is a departure from the principle of individual responsibility. This, in itself, would seem to imply a significant departure from accepted principles of penal law. As previously stated, it is also incompatible with international law.

Article 33 of the Fourth Geneva Convention provides as follows:

No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

The petitioners argue that even if in the past this honorable court has rejected such arguments, in view of recent years' developments in international law, a renewed examination of these arguments is warranted.

The Court has never considered on their merits the substantive arguments against house demolitions that rest on the prohibitions on confiscation and destruction of property.

Prof. Kretzmer, *ibid*, page 153.

The petitioners refer to the words of the honorable President Barak in HCJ 4219/01 **Gosin v. Commander of Military Forces in the Gaza Strip** (not yet published):

The military commander too must act in accordance with the law, and the court is the competent authority to interpret the law.

8. The petitioners argue further that since this is a punitive action, a house demolition is prohibited under Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Treaties 1039, which became binding upon Israel on November 2, 1991. Article 16 provides as follows:

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

The honorable court has already ruled in HCJ 434/79 **Sahwil v. IDF Commander in Judea and Samaria**, TakSC, as follows:

3. ... in addition it should be remembered that said regulation 119 refers to an extraordinary punitive measure...

The petitioners argue that this is a punitive sanction. This sanction is cruel, inhuman and degrading contrary to the above Article 16.

9. In HCJ 1759/94 **Sreuzberg v. Minister of Defence**, IsrSC 56(1) 625 in page 628 it was held as follows:

This is the response to the petition, to the extent it refers, in general, to the imposition of curfew "every once in a while" or to the imposition of other limitations on "the freedom of movement, occupation, profession and trade" of the local population. In the event such limitations are imposed the competent authority must weigh the security need in exercising the power afforded to it against the harm inflicted upon the local population, it must refrain from imposing limitations for punitive purposes and abstain from taking excessively extreme and injurious measures under the circumstances. This is the standard by which its decision to impose any kind of limitation at a certain time and place, should be considered.

The petitioners argue that this is the test which applies to movement limitations, and that this test should be applied in a narrower and more stringent manner to a demolition of a house of a person whose culpability has not been established – other than being related to the terrorist.

10. The petitioners argue that the demolition of their house is a collective punishment the purpose of which is punishment. This is an administrative decision the consequences of which are irreversible: before the respondent takes such a draconian measure the petitioners and others like them should be afforded the opportunity to submit a verbal and/or written appeal; if the appeal is rejected the right to turn to the court should be granted. The petitioners and others like them should be granted the right to be heard before the demolition is carried out.
11. In view of the above, the honorable court is hereby requested to accept this petition, grant the requested orders and make them absolute.

Jerusalem, August 7, 2002

[ signed ]

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Andre Rosenthal, Advocate  
Counsel to Petitioners