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

**HCJ 6745/15**

Before:

**Honorable Deputy President E. Rubinstein  
Honorable Justice Z. Zylbertal  
Honorable Justice M. Mazuz**

The Petitioners:

1. \_\_\_\_\_ **Abu Hashiyeh**
2. \_\_\_\_\_ **Abu Hashiyeh**

**v.**

The Respondent:

**Military Commander of the West Bank Area**

Petition for *Order Nisi*

Session date:

29 Heshvan 5776 (November 11, 2015)

Panel Secretary:

Elisaf Keller

Typist:

Galit Tobina

Representing the Petitioners:

Adv. Lea Tzemel

Representing the Respondent:

Adv. Yonatan Zion-Mozes; Adv. Yochi Genesin

## **Protocol**

**Honorable Deputy President E. Rubinstein:** We have obviously read the response. We were somewhat surprised that the answer focused, and it is legitimate, only on the issue of the passage of time between the murder of this petitioner and the decision but you failed to refer in the response, unless we missed something, to our question that was indeed in your response, but not now, to the issue of proportionality, whether this entire thing should be demolished. We read the previous response according to which sealing takes many hours.

**Adv. Mozes:** Also in the response, refers to paragraph 9 of the response, we pointed at the current security situation and its impact on the need to deter under the current circumstances. Namely, this also obviously has an effect on the demolition method. But as aforesaid here we have a combination of several considerations, concerning the ability to seal as well as concerning the partial demolition issue. Here the

position is that under the circumstances of the matter partial demolition shall not suffice and the lower floor should be completely demolished. As aforesaid, we do not demolish the entire building, it is not a demolition which causes damage to another apartment, but only the apartment of the perpetrator and his family members.

**Honorable Deputy President E. Rubinstein:** We saw that the government secretary signed paragraph 5 which has nothing to do with the government. It says that security is required and his signature is secured, is there a reason for this?

**Adv. Mozes:** In the framework of the decision political considerations are also taken into account and it was important to bring considerations that the political level also considers.

**Honorable Justice Z. Zylbertal:** In 4 it says that the intention to exercise the authority. Thereafter you say that in the other file it was also the same. What is the connection between July... it was before the incident.

**Adv. Mozes:** In this specific case the intention was formulated in July without any connection. The difficulty is to act within the Assa refugee camp.

**Honorable Justice M. Mazuz:** In my view there is a thick smoke screen. The picture drawn is it takes months to receive the responses of the political system, the military system on house demolition as a matter of routine and it is not what we know, it is not a new issue. Dozens, hundreds and more houses have already been demolished. I am not familiar with a procedure that requires eleven months as a matter of routine to demolish a house. The procedure drawn here is at least like the state budget.

**Adv. Genesis:** I have a feeling that the impression derived is not the right impression.

**Honorable Justice M. Mazuz:** Paragraph 5 describes very generally the decision making process and then paragraph 6 starts by saying that the process will terminate by July. It appears to have ostensibly been a routine procedure. There is no statement about something exceptional. It apparently seems that as a general rule it takes about eight months a decision making process of this kind. We see that such process takes one, two three days at the utmost.

**Adv. Genesis:** It is important to say that between 2004 to 2009 the entire activity was stayed. The stay of the activity was a decision which was made. It is a well known fact and there is nothing new in what I am saying here. In fact when there was a sequence of incidents unlike what happened between August and November unlike what happens now from the end of September until this date. Last year I took part in last year's wave. I therefore speak based on personal knowledge. With the exception of these two waves, generally, the decision to demolish or seal, using sanction according to 116 [*sic*] was specific if the incident was very dramatic. Then we had this small wave when we had two incidents in Merkaz Harav. In general, the rule of the political level was followed of circumstances combined with an extreme incident. Last year the wave commenced from August through November, last year's wave, putting aside the incident of the abduction of the youths. We had one in Passover and the abduction of the youths was in June and then the wave of ramming attacks began and the wave of incidents in Har Nof. In the beginning it was not a wave. In fact, there was a request, and this is also the connection to the government secretariat, in fact a decision was made that a work procedure is required, how we actually work to the extent there are incidents which require discretion, are we in such an extreme situation or special incident. The situation is that after an attack is investigated, whether the perpetrator was killed or whether he is held by the security forces, until a recommendation is made a certain period of time can certainly pass from the occurrence of the attack and until the Israel Security Agency (ISA) establishes its position and a decision is made. This is the procedure. It did not exist until last summer. Therefore, it can certainly take two months and it may take four months, depending on the investigation, the formulation of the investigation and the formulation of the evidentiary infrastructure. Even when the same administrative work is done, in the context of recommendation the

house of the perpetrator should be identified. Sometimes there are difficulties. They identify for us, I think it happened in a case heard by the President. Therefore the question, maybe the expression is unclear, operational difficulties, if I cannot enter into a certain village or into a certain refugee camp.

**Honorable Justice M. Mazuz:** What counsel does here now is almost testimony. Instead of counsel already said and instead of what counsel is about to say, if there are difficulties in the identification of the perpetrator, in the identification of the house, this is the purpose of an order nisi to examine all the facts and ... it brought us to June.

**Adv. Genesin:** Your honor said that it was a matter of days and it is not a matter of days, it is certainly a matter of months.

**Honorable Justice Z. Zylbertal:** I speak only of this case. In this case we do not understand why six months were required.

**Honorable Justice M. Mazuz:** According to your version it also took eight months. You don't specify that according to the procedure it took three months or a week or two days for the ISA to establish the factual infrastructure of the events and it took time to identify the house which is the essence of the matter. The main argument in this case, beyond the other arguments, pertains to the passage of time, that in fact you apparently demolish the home of the petitioners now due to events which occurred much later. Therefore this is the essence of the case. On this main issue of the case you give such a general statement which has no specific information.

**Adv. Genesin:** We understood that this case was comparable in terms of circumstances and time to the Sidr case.

**Honorable Justice M. Mazuz:** You referred to the Sabih case in which time was significant and ostensibly an event which occurred later brought about a sort of quote unquote collective punishment. This means that you understood very well what you were requested to respond to.

**Adv. Genesin:** In Sabih, I am familiar with the case because I also appeared in this case. The case in Sabih is different from this case. Ostensibly there could be three categories. One category is that notice of intention was sent. The cases which were discussed in Sabih with respect of which judgment was given were different where notice of intention was sent and this is the difference. Therefore the court in my opinion... notice of intention is issued.. . I must admit that I don't remember whether the inhabitants of the house in that case submitted an objection or not.

**Honorable Justice M. Mazuz:** It only indicates whether it is more or less problematic, if you give notice and delay execution or if you don't issue notice and due to an incident which occurs almost a year later you remember that there was a person whose house has not been demolished... let us check him today. You say that here the decision was made before the other incidents.

**Adv. Genesin:** There is a difference between incidents that occurred in Jerusalem. All incidents which occurred last year in the chain of attacks.

**Honorable Justice M. Mazuz:** Who confirms by affidavit the main fact when the decision was made?

**Adv. Genesin:** It was in the main response, we obtained the signature of the Major General. Yossi Cohen is the head of Israel National Security Council (NSC). What we submitted on October 25, 2015, paragraph 8 (quotes).

**Honorable Deputy President E. Rubinstein:** We asked whether it was possible to do what they have ostensibly agreed to in the objection, namely the place in which the perpetrator himself lived? We also

asked about sealing. With respect to sealing you said that there was an operational need not to stay too long on scene.

**Adv. Genesis:** We have an engineering officer here.

**Honorable Justice M. Mazuz:** There is a procedure that sealing means that the house is filled with concrete? Is this the new procedure?

**Adv. Genesis:** It is not new.

**Honorable Deputy President E. Rubinstein:** The question concerns that part of the floor which we asked in the context of proportionality, in view of the passage of time. I understand that it is possible and I would like to receive the answer of the engineering officer, that it is technically possible but that you object based on deterrence reasons.

**Adv. Genesis:** The severity of the attack, the type of the attack are also considered. With respect to demolition, as far as we are concerned, a demolition of a toilette room is partial demolition. Partial demolition is not suitable under the circumstances of this attack. This is the position of the Major General and of the political level.

**Honorable Deputy President E. Rubinstein:** I asked without expressing an opinion whether there was a technical preclusion for the demolition of this part instead of the demolition of the entire floor.

**Adv. Genesis:** It has no significance. They come and demolish with hammers. The question is whether sealing can be used to demolish the house? The first time it is done in Areas A and B there is a demolition of the sealing, therefore the sealing must be equivalent to demolition, In other words, a sealing which neutralizes usage.

**Honorable Justice M. Mazuz:** We saw that houses are built within a few days with help. Other measures with which counsel is also familiar.

**Adv. Genesis:** When demolition is concerned which is a demolition of a room and a toilette room, beyond the fact that it is insignificant in terms of time because it is a matter of a few days and a few hours to rebuild the interior wall and install ceramics and a toilette seat, when it is impossible to detonate and put explosives when this cannot be done because it is a middle floor.

**Honorable Deputy President E. Rubinstein:** How many rooms are there in the floor which is designated for demolition?

**Adv. Tsemel:** Four rooms + a living room, kitchen, toilette and bathroom.

**Adv. Genesis:** about 140 Square meters.

**Adv. Tsemel:** My colleague forgets that the last part of Regulation 119 concerns remission. The last part stipulates that the authority that issued the demolition order can remit the demolition and the seizure and to the extent of his remission the property may be refurbished. In other words the conclusiveness ... the military commander, then the high commissioner may in accordance with the last part of Regulation 119. I sent it as a response in one of the petitions before another panel but no one denied it.

**Honorable Justice M. Mazuz:** This was common practice not only with respect of the high commissioner.

**Adv. Tsemel:** These things were valid at the time. I am very surprised of the things presented by my colleague... The incident, said murder, it occurred on November 10, 2014, and I admitted to the offense of murder when the death of the late soldier occurred while the offense was committed. The son actually

wanted to commit suicide, which is forbidden, totally forbidden by Islam and only if he is a Shahid, very relevant to these days, then it is permitted. On November 10<sup>th</sup>, the day of the incident, at noon time, my client stabbed the soldier and soldier dies from his wounds. On the same day he was himself wounded and was hospitalized in Ichilov. An ISA agent shows up. He was asked how he was feeling etc. and what was he doing... came to look for work and was told not to go back home because he was a disgrace to the family and involved it in trouble. Refers to paragraph 4. He purchased a knife in Jaffa and decides that he does no longer want to live. He decided that he wanted to die.

**Honorable Deputy President E. Rubinstein:** The purpose is to say that the family was not involved.

**Adv. Tsemel:** Not involved. But I am talking about a different thing now. In paragraph 7 he describes the stabbing incident. In paragraph 11 he says (quotes) it is important for the conviction. In paragraph 11.8 in page 4 to the same first admission which was taken from him in the hospital, page 4 (quotes).

The admission ends at 19:30 in the evening on the date of the incident November 10, 2014. When the ISA comes to interrogate him in the hospital it is initial information. This is the question.

I was somewhat surprised by my colleague's argument because in July 2015, it was not mentioned. It was considered and dismissed by the competent authority. Eventually the memorandum was in the possession of the decision makers. The father of the respondent [*sic*] and his brother were detained. Why? To examine their involvement. Perhaps it is the exception that ... should be justified.

I reiterate the petition. But I do want to refer to several issues.

The Efficiency of demolition. We have not discussed it enough other than the use to which I have referred. Is it a really suitable measure? In this file my colleagues submitted a kind of a confidential opinion to another panel although we had no agreement on this issue. Said opinion, I understand that already in 2008 a demand was made to examine whether this measure was overused? What is the benefit?

Honorable Justice Hayut says other than in extreme cases. What are these extreme cases. Everybody agrees that these things should be investigated. Honorable Justice Sohlberg also speaks of the gain, rather than of the damage. The data that we have do not indicate that there is an actual deterrence. We must at least be sure that it brings its gain. Maybe the other way around. My colleague says that she will submit if she receives an approval. I already wish to say that I understand from these general things that these are people who thought ahead of time and therefore turned quickly to the authorities. We have no doubt that this was not the intention of the policemen [*sic*] when they said that a real study was required as the one which was presented to said committee. Such a study cannot be made in cases in which fathers maybe came and said but there should be a scientific ability to examine the impact. If inmates committed severe and horrible attacks they may also be interviewed..."

According to the data in our possession, in the case of this specific person and in the case of his specific intentions, surely it is necessary to know what his family says, did they ask him? Does it support him? Honorable Justice Sohlberg says that we it is our obligation (quotes the words of Justice Sohlberg in HCJ 8091/14) in an additional HCJ 5839/15 the honorable justice also asked what was the position of the family. The entire family thinks that he is good for nothing. That he had no justification. Refers to quotes from his memoranda and quotes in the driest manner from his interrogations concerning his desire to die and nothing could not stop him as soon as he took action. Namely, his motive and the way he was treated by his family, both before and certainly after the attack. Why this case can be regarded as an exceptional case and *prima facie* he is indeed exceptional.

**Honorable Deputy President E. Rubinstein:** The response was submitted yesterday after the prescribed time. I have no complaints. People say that the court delays. The state did not meet the schedule twice.

**Adv. Genesis:** To obtain the approval of the government secretary is not very easy. When whole lines are typed it may be transferred to the other party. Yesterday a secretary sat and typed it. It is not customary.

**Adv. Tsemel:** The material is known and clear. I do not need to learn the material. Said arguments were made based on the material. Based on these quotes your honors can see his state of mind when he committed the attack, and the family, we see that the father used to work in Israel for years and we punish the family for no fault of its own. We must not forget. There is a price to the fact that he has not yet been sentenced. There is a price that the respondents request a sanction before a sentence was given. We are in a place of full innocence. It should be given the entire weight.

This family should not be punished.

I refer to discrimination. Everything appears in writing. I am afraid that the delay which we have already discussed does not relate to the offense itself but rather to the situation in general and it is a mistake which should not be repeated. We did not solve the problem and we cannot ignore the fact that things were discussed. The entire family is from a village near Jaffa, which today is Tel Aviv. They received the land from UNRWA. On the land they built the house and the uncle and the entire family lives together in the same house. The commander did not speak with UNRWA. Nobody asked UNRWA. There was an effort to settle these refugees. Now what? They will have to leave again? The son is the black sheep of the family. I suggested, he had a room, he lived there with his brother, so his brother will suffer. You cannot demolish the house of this family again. We succeeded to receive an answer from the senior engineer. The answer is in RS/5. The scientific manner in which things are referred to, there is no answer why the wall should not be demolished manually. The answer is we want detonation. Now, a general comment. The head of combat engineering department notes that the engineering mapping, in fact the activity is conducted in a hostile area (quotes). All belongings must be removed from the house. The first open statement before us refers not only to the house in a refugee camp of the lowest standards, it shows the stupidity of the decision to demolish by detonation, We learnt in other petitions that houses were significantly demolished precisely in Jerusalem which under full Israeli control, there is no need to enter a refugee camp, you control the territory and can do everything, take your time, put the small charge, in Jerusalem the demolition is unbearable because the house collapsed.

**Adv. Genesis:** The house did not collapse. It stands. Counsel raises things which are unrelated to this case.

**Adv. Tsemel:** It is not the case but it is the case itself (quotes). To date the demolition has not been executed. A refugee camp, it is hard to enter hard to control etc. Why am I saying that? Because along the anticipated damage referred to, there is a new version of the state attorney's office in other files, in which they were specifically asked by the other panels what do you say if environmental damage is caused to the neighbors.

**Adv. Mozes:** These things are not part of the petition.

**Honorable Deputy President E. Rubinstein:** Ms. Tsemel shall finish.

**Adv. Tsemel:** What was their answer? that if the demolition is executed while order is disturbed, we are not responsible for the consequences. In the refugee camp according to the aerial photograph, the house is in the midst of the refugee camp. These things are expected and therefore the environmental damage should be compensated for. I am in contact with the prisoner's father and I know that he like many others does not understand what is going to happen to his house. The natural inclination of most people is my house is about to be demolished. Court or no court, the role of the court is unclear. I must take everything out, the pipes, there were cases in which they took the pipes of the house and the tiles. I stopped this specific father and told him don't touch the house, trust the court, there are legal proceedings, it is not arbitrary and I want to keep my word.

**Adv. Mozes:** Firstly, with respect to deterrence. The issue of deterrence came up before two different panels in the context of reporting in HCJ 7720 and in the HCJ before the president where an opinion in this regard was submitted and here we have an updated opinion in this regard.

**Honorable Deputy President E. Rubinstein:** I shall accept it, so that I don't feel deprived.

**Adv. Mozes:** With respect to the nature of the attack and with respect to the intention of the perpetrator to execute the attack there is additional administrative evidence. Things are well established.

My colleague argues that one should wait until the criminal procedure is terminated. Firstly, it is an administrative decision. Secondly, if we wait until the termination of the criminal proceeding it will obviously take much more time since in the criminal proceeding frequently extensions are requested by my colleague here who represents the perpetrator in the criminal proceeding too.

As to the compensation issue. My colleague represents here this family and not other families. In other petitions in which these arguments are made we gave an answer, we gave an undertaking and said that to the extent there are additional cases, things are examined as is the case in Abu Jamal which is not like the case at hand. It is a civil proceeding pending before the Magistrate court in Jerusalem. In Akri in the refugee camp in Shoafat, indeed in the context of the eleven cases before the honorable president, it is an order which indeed has not yet been executed. There were order disturbances and to date the order was not executed due to operational reasons.

**Adv. Genesin:** They entered to execute the order. When they entered once again to execute the order it ended up with one person dead and three others wounded.

**Adv. Mozes:** As to the sealing the problem is not only structural. The alleys are very narrow. There is a walking distance of about 150 meters in order to reach this building and it is impossible to bring the engineering equipment over there. A response was given to my colleague in the context of our preliminary response. As was noted this is Area A and not Area B. It is not an UNRWA recognized area.

**Deferred for review and judgment.**

Typist: Galit