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At the Supreme Court Sitting as the High Court of Justice

**HCJ 8154/15
HCJ 8156/15**

Before:

**Honorable Justice I. Amit
Honorable Justice Z. Zylbertal
Honorable Justice M. Mazuz**

The Petitioners in HCJ 8154/15:

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

The Petitioners in HCJ 8156/15

1. **Alian _____ and 4 family members**
2. **Alian _____ and 10 family members**
3. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

v.

The Respondent in HCJ 8154/15:

GOC Home Front Command

The Respondent in HCJ 8154/15:

Commander of IDF Forces in the West Bank

Petition for *Order Nisi*

Session date:

25 Kislev 5776 (December 7, 2015)

Panel Secretary:

Guy Rubinstein

Typist:

Neta Shapira

Representing the Petitioners in HCJ 8154/15:

Adv. Andre Rosenthal

Adv. Labib Habib

Representing the Petitioners in HCJ 8156/15:

Representing the Respondents in HCJ 8154/15 and in HCJ 8156/15:

Adv. Roi Shweiga; Adv. Avinoam Segal-Elad

Protocol

Honorable Justice I. Amit: With respect to the house of _____ Alian.

Adv. Rosenthal: I read the response of the state and the recent decisions of this court including the decisions of your honors.

Honorable Justice I. Amit: Maybe this time we can do without the general aspect, Regulation 119 etc. There are specific arguments concerning a specific apartment.

Adv. Rosenthal: I cannot refrain from arguing on the deterrence issue. It is actually more related to the other case but I shall start here.

Honorable Justice I. Amit: Counsel argued on the deterrence issue in the petition in writing.

Adv. Rosenthal: I would like to raise the issue which in fact was discussed by Justice Mazuz when this court repeatedly states that this court held in the past that the objective of Regulation 119 was to deter others. And they say that it was held time and time again. We checked the statements of the court from the outset, H CJ 434/79, where it is explicitly stated that Regulation 119 is an irregular punitive action rather than a deterring action. These statements are also repeated in 542/89, where it is stated that the Regulation is a punitive deterring measure. The punitive part cannot be disregarded. And it is hard for me as a jurist that the court can say that it does not matter that Regulation 119 was put under the caption of the punitive measures by the British legislator, which obviously knew what it was doing, and which could put it under the miscellaneous part had it wanted to. It is not there. It is in the part of the punitive measures. Therefore it is distorted by the court when it says that it is punitive but that its real objective is to deter. With respect to the deterring objective I know that a panel of the President received two weeks ago privileged material which substantiates.

Honorable Justice Z. Zylbertal: In another file Justice Mazuz and I also received privileged material.

Adv. Rosenthal: I assume that what you saw was privileged "evidence" regarding the deterring effect of said Regulation. And I ask, what the military did in 2005 when they recommended to stop the use, I assume because we did not see the data, neither that of the military nor the new data which the state submitted ex parte, how many perpetrators were affected by the mere fact that their home was demolished or a house in the neighborhood. And therefore I refer to the second file of Abu Jamal. One week after he witnessed two demolitions of homes of his family members. How can deterrence be argued full heartedly, when the perpetrator, a father of three, an outstanding Bezeq employee, who is not a member of a prohibited organization, takes his car, runs a person over, stabs a person and kills him? How can one say that deterrence is effective? And how can it be determined that there is basis to the argument of the state regarding deterrence without receiving data which I am positive they have in their possession, of how many perpetrators were affected by these actions? Reference is made to paragraph 8 of the petition, the words of Prof. Kremnitzer in 2004. Why don't they listen to a different voice? The use of Regulation 119 is a complete denial of state policy. The state of Israel is based on a UN resolution, there is nothing more international than that, how can it be said that international law does not apply here? That it is not a collective punishment? That all the conventions which were signed by us do not apply here? Why? Because Arabs are concerned? How can it be said that you, a father who did not know that his son intended to carry out an attack, we shall demolish your home? It is a retroactive legislation 11A. Deterrence is also found in the Penal Law, also deterrence of others, there is a special clause which refers to this issue, so how can a distinction be drawn when 119 is concerned? Rationally, I cannot understand it. Unless there is a total denial... before you.

With respect to the violation of fundamental principles, it cannot be severed. Paper endures this severance and you repeat and say different things, there is no in depth discussion of this issue. A decision is already embedded in the responses of the state. And then there are many pages of previous judgments, but show us the data! Everything is privileged. How can that be?

I quoted the decision of Justice Arbel from HCJ Adam. There too, the things said by Justice Arbel are acceptable to you, why does it work here too? Because it is 119? Because Arabs are concerned? Because it is British? It is a complete denial. I understand that there is distress on the part of the state that it does not succeed to put an end to this wave. I don't think that the state has ever put an end to terror in the state of Israel since its establishment. We continue to use the same solution, there is an attack – we will destroy. It repeats itself over and over again. It is again denial rather than the solution. In 2005 I have personally heard what the panel said. It said that it would not be allowed. Since when does the court in HCJs of house demolitions give the state 90 days to make calculations if not to tell the state that it does not approve? And here, a military committee is suddenly established and does, based on what? We don't have that either. I am convinced that the state has the data on both counts and I think that it would be appropriate to give the court the basis for these arguments so that it would be able to determine whether or not there is deterrence. I also quoted what the Military Advocate General said at the time when the recommendations of said committee were submitted.

There is no dispute that we are concerned with a severe attack, I am not going into this, I ask how can the family home be destroyed when there is no causal connection between the family and the attack other than kinship? We do not do it to Jewish perpetrators. I am not arguing here for discrimination because I do not support house demolition, period. But why isn't it being implemented? Things occurred, there were cases in which had the perpetrator who carried out the attack been an Arab his house would have undoubtedly been demolished.

Honorable Justice I. Amit: Does counsel have specific arguments concerning the demolition of this apartment?

Honorable Justice M. Mazuz: Is there specific information regarding the internal division of the second floor, who lives where?

Adv. Rosenthal: I will check it.

Honorable Justice M. Mazuz: In page 1 of the seizure and demolition order, a drawing of the floor is attached. But I did not notice the details.

Adv. Rosenthal: He lived in his own room, and he was not married. He carried out the attack together with another person, he was killed immediately and the other one was not and therefore my colleagues submitted the statement of the other one to implicate him. I do not have a dispute with them on this issue. In the past, this court, also in cases in which Regulation 119 was approved, a decision was made that its scope could be limited, and we obviously request to revoke the order, but alternatively that the court will be satisfied as the Deputy President proposed last week, that you will be satisfied with the sealing of his room.

Adv. Habib: I represent the first and third floors. I reiterate the grounds for the petition which was filed by my colleague Adv. Tsemel and join the arguments of my colleague regarding the unlawfulness of the order and its dis-proportionality since the expected damage or our concern of damage derives from the mere justification for the grant of the initial order. In the case at hand a decision was made to carry out the demolition manually, and this progress should be at least respected as we already know that in several cases of houses in Nablus which were demolished by detonation, there was a strong impression that the damage which was caused was not coincidental and that there was at least gross negligence in the execution of the demolition in view of the fact that damage was caused not only to the same structure as a result of the

execution of the order, but rather damage was caused to several neighboring buildings, serious damage, which means that it was not a small mistake. It should be noted that the disproportionate and inappropriate manner by which the demolition order is carried out, which causes the maximum area damage rather than the opposite, points at respondent's intentions and that he does not take seriously the fundamental rights not only of the nuclear family but also of the entire neighborhood, which may be injured as far as he is concerned, in excess of the order. If this may be done by detonation, then damage to buildings may also be caused by manual demolition. The respondent does not take seriously his obligation to minimize the damage. Once demolition is carried out, the temptation to make an explosion spectacle overshadows the need to restrain oneself and adhere to the undertakings given in court. For instance, in Qalandiya the destruction was not normal.

Honorable Justice I. Amit: Was there a situation where it was stated that it would be manual and it was executed by detonation?

Adv. Habib: No. I request to submit an opinion regarding the need to be careful also when the demolition is carried out manually.

Honorable Justice I. Amit: Why counsel did not file the petition?

Adv. Habib: I joined the petition, it was not ready. The order should have been reversed. We should know what they plan for us and then we bring an engineer on our behalf and he says what is and what is not appropriate. We are forced to do things in a reversed order because the plans are not disclosed. The general dispute still exists even if they do not detonate. If this impingement according to Regulation 119 is permitted, it should be at least be done by the book. They should give us the plan how they are going to demolish we shall transfer it to the engineer and maybe prevent the terrible things which happen. In Qalandiya for instance three building other the designated building were damaged. Hundreds of thousands of shekels are concerned and these things show not only that these people have the right to be compensated but also that the respondent does not internalize the fact that also when his granted permission to demolish said permit is given reluctantly and the expectation is that he will carry out the order very carefully.

Honorable Justice I. Amit: It has already been said by Justice Rubinstein that if indirect damages were caused everything is open.

Adv. Habib: It is a pre-planned procedure which is reviewed by the court. We argue for hours about the demolition method, they undertake and eventually they detonate as if there were no hearings. Therefore the remedy is not compensation when housing units are concerned. In a neighborhood in which there are young children – you do not tell people go and sue, but rather the respondent should be respectfully told not to execute such demolitions. Beyond the damage to property it is a violation of people's dignity and their right to exist. We wish to prevent it also when the demolition is manual. We argue in general against the mere execution of demolition and I think that if the respondent in on repeated occasions abuses the power vested in him by the law and causes damage beyond the mandate given to him, then we request not to enable him to execute the demolition in view of the fact that he does not act carefully.

After Recess

Adv. Shweika: I refer to Baha's case. The attack was carried out on October 13, 2015, in line 78 at Armon Hanaziv. Baha together with another perpetrator, we attached the indictment which has already been filed against the other one. From the description of the event, Baha was the dominant party because he purchased a handgun for twenty thousand Shekels on the eve of the attack, he encouraged to buy another knife which was used in the attack. When they entered the bus they split and in this attack three Israelis were killed and others were wounded. The attack occurred less than a month ago and Baha was killed in the attack.

Honorable Justice I. Amit: There is an argument of delay in the issue of the order of about a month.

Adv. Shweiq: My colleagues complained that not enough time is given to speak with them etc., and on the other hand delay.

Honorable Justice M. Mazuz: It is not their main argument.

Adv. Shweiq: The procedures were taken relatively quickly, with the intention to also enable the petitioners to submit an objection. The opinion presented by my colleague and which, in my opinion, was attached, my colleague transferred it to me and obviously it will also be transferred to engineering agencies which are responsible for the demolition in this case. As we noted here, we notified in advance that in the middle floor manual measures would be used with no impingement on structural elements of the structure. This case here is not related to detonations, there are no arguments here that there was any connection or involvement of the family in the attack itself. The deterring aspect, Adv. Rosenthal quoted judgments from the eighties; we quoted the Honorable President from less than a month ago on these specific issues.

Honorable Justice M. Mazuz: Do you attribute to the family involvement on any level?

Adv. Shweiq: No. There is some other information on the family but it is not related to this attack.

Honorable Justice M. Mazuz: Has it been considered to focus the response on the perpetrator's room? We are not concerned here with a perpetrator who is a married man and who lives in an apartment of his own, but rather with an ancillary tenant in his family home. In the past, in a considerable number of cases of this sort, the sanction was limited to the room of the perpetrator himself, either by sealing or by specific demolition. Has this been considered?

Adv. Shweiq: Certainly. We always consider the alternatives and therefore more severe options were ruled out. It derives from the scope of involvement in the attack. Here, the sanction of sealing, the respondent is of the opinion that it does not have the same deterring effect that a demolition of the entire apartment has, also due to the severity of the attack. The sealing of the entire apartment was also considered, but here this option was chosen, also in view of the location of the apartment in the building.

Honorable Justice M. Mazuz: With respect to the issue of the engineering opinion. You, in your response quoted from the words of the President in the Hamed judgment that indeed that was no obligation to transfer the opinion for their review but the door was open for them to submit an opinion on their own behalf which would be transferred to the representatives of the state. There is a presumption that you will review it with an open mind. The question is whether they will receive from you any response to the opinion. For instance, among other things, the issue of the removal of the debris is raised, since it may damage the foundations. Will you respond in writing to the opinion? They raise arguments the purpose of which is to prevent area damage. A careful consideration as I see it also means a certain response.

Adv. Shweiq: The demolition itself will be supervised and is always supervised by an engineer on scene. I have read the opinion again and these are the two points which were raised, the manual tools which will be used in any event, and the removal of the debris. I will check the second issue.

Adv. Rosenthal: With respect to the opinion which was submitted by my colleague I refer to the judgment in 7040/15 Hamed regarding the ... detonation. Quotes the President. Submits the photographs. Reference is made to page 5 so that you can see how the detonation affected the area. Thereafter there are photographs of the demolition itself, how it is impossible to rely on the engineer on scene to minimize the damage.