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At the Supreme Court
Sitting as the High Court of Justice

HCJ 1630/16

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
15 Salah a-Din St., P.O. Box 19405, Jerusalem 91194
Tel: 02-6250458, Fax: 02-6221148; Cellular: 050-5910847

The Petitioners

v.

Commander of IDF 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 the forfeiture and demolition order which was signed on February 23, 2016, and is directed against the apartment located on the first floor above the storage floor in a five story building in Hebron should not be revoked; Alternatively, the respondent is requested to show cause why he should not narrow down the scope of the order and be satisfied with a partial sealing;

As an interim relief, the honorable court is requested to direct the respondent or anyone on his behalf to refrain from causing damage to the apartment being the subject matter of this petition in any manner whatsoever until the termination of the proceedings in this petition.

The demolition order will enter into effect by the end of February 28, 2016. A copy of the order is attached and marked **P/1**.

The grounds for the petition are as follows:

1. Petitioner No. 1, Mr. _____ Masudi, is the father of _____ Masudi, who apparently committed, on December 7, 2015, a stabbing near the Cave of Machpela. As a result of the stabbing the person who was wounded passed away. Ihab Masudi was shot to death on or about the occurrence of the incident. The apartment in which Ihab lived with his parents consists of one bedroom, a living room, a family

room, two toilettes and a kitchen. Petitioner No. 1 knew nothing about the plans of his son _____ prior to the stabbing which occurred on December 7, 2015.

Petitioner No. 1's affidavit is attached and marked **P/2**.

2. Petitioner No. 2 is a human rights association which has taken upon itself, *inter alia*, to assist Palestinians, victims of cruelty or deprivation by state authorities, including by protecting their status and rights before the authorities, either in its own name as a public petitioner or as counsel for persons whose rights have been violated.
3. On February 5, 2016, notice of the intention to forfeit and demolish the apartment being the subject matter of this petition was received in the offices of the undersigned. A copy of the notice which does not bear a date is attached and marked **P/3**. Extension for the submission of an objection was granted until February 10, 2016, at 09:00.
4. On February 10, 2016, petitioners' objection was submitted. A copy of the objection is attached and marked **P/4**.

In the objection the petitioners requested that in the event that the objection was denied the details of the manner by which the respondent intended to execute the demolition including a detailed plan according to the details of the building and past experience.

5. On February 24, 2016, a response was received which denied the objection. In the same breath notice was given that the execution of the order would be stayed until February 28, 2016. A copy of the denial of the objection is attached and marked **P/5**.

The Arguments

6. The question at hand is whether it is the opinion of the honorable court that the demolition of apartments or homes of the family members of perpetrators – perpetrators who were killed or who stand trial – is judicial precedent which must be followed, and whether the argument regarding "deterrence of others" is strong enough to defeat the array of arguments against the use of house demolition.

Regulation 119 of the Defence (Emergency) Regulations, 1945, has already been used during the era of the British Mandate. The use of this regulation continued after the establishment of the state of Israel and has continued even more forcefully ever since the occupation of the territories in 1967. Hence, the state of Israel continues to use the regulation in a bitter attempt to eradicate violent resistance of the Palestinians – with the exception of a short period which commenced in 2005, when the then chief of staff, the current Minister of Defense, adopted the recommendations of a military committee which was established following the comments of this honorable court in a hearing which was held in H CJ 7733/04 **Nasser v. Commander of IDF Forces in the West Bank**. The use of the regulation did not stop – and the attacks did not stop either.

7. A. In H CJ 5839/15 **Sidr and 8 others v. Commander of IDF Forces in the West Bank** (reported in Nevo's website), the Honorable Justice Vogelman who expressed his opinion that in the absence of causal connection between the inhabitants of the house and the perpetrator's actions – in the case at hand the parents of ____ Masudi – Regulation 119 should not be used due to disproportionality, and that house demolition could not be regarded as a "mere" damage to property, has nevertheless decided to toe the line and follow the judgments of this court in paragraph 6 of his opinion, as follows:

Therefore, although I would suggest reconsidering case law in a bid to fully explore the issues which arise under domestic law as well as under international law, so long as this precedent stands, I bow my head before the opinion of the Court.

- B. In H CJ 8150/15 **Abu Jamal v. GOC Home Front Command** (reported in Nevo's website), the Honorable Justice Zylbertal also decides not to veer from case law and says:

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.

8. A. Reference is made by the petitioners to section 20(b) of the Basic Law: Judiciary which provides as follows:

A rule laid down by the Supreme Court shall bind any court other than the Supreme Court.

- B. On this issue we wish to refer to the words of the Honorable Justice Elon in CrimApp 2251/90 **Haj Yihya v. State of Israel**, IsrSC 45(5) 221, 271-2, who firstly specifies the considerations which should be taken into account by a judge while deciding not to veer from case law, but adds the following:

Along these considerations, great importance is attached to the freedom of adjudication of the Justices of the Supreme Court and their independence in the sense that they are not bound by their own precedents. The need to maintain the intellectual freedom of the Justice so that current rulings may be changed when it is desirable and proper, is even more important in a society such as ours, which is still in the process of formulation, and in which there are sharp and seething controversies on fundamental issues in the areas of beliefs and opinions, political and social approaches, culture and ways of life, policy and economy.

- C. Reference is made by the petitioners to the words of the honorable court in its early days, in CA 376/46 **Rosenbaum v. Rosenbaum** (reported in Nevo's website):

32. In conclusion: clearly, I do not under-estimate the importance of the ruling-stability principle in court judgments. However as between truth and stability – truth takes precedence [across the letter A, page 254 in a printout from Nevo's website).

And furthermore, in page 254 across the letter F:

The concern of a mishap cannot cause me to follow case law when in my opinion it is erroneous.

9. The petitioners wish to refer to the book of Aharon Barak, "Judge in a Democratic Society", page 242, where he writes: "There is no sanctity in a precedent..."

10. A review of the judgments of the honorable court indicates that as far as house demolition is concerned a sad picture arises of exaggerated self-restraint, minimal intervention in the discretion of security agencies – activated by the political echelon which publicly declares of its intention to continue to demolish houses. The issue which should be decided in this case is whether the Justices of the panel are willing to continue to believe that house demolition policy not only proves itself in the sense that it significantly reduces attacks, but is also a case in which the cause justifies the means.

Petitioners' argument is that even if there is no difficulty in justifying the cause, namely, reducing attacks – the measure is totally unlawful.

11. The petitioners argue that the court refrains from intervening in the actions taken against parts of the population in the Occupied Palestinian Territories (OPT) for about 48 years based on racial profiling reasons. It was this honorable court which invalidated the almost sweeping use made by governmental authorities of interrogation "permits", namely, torture of Palestinian detainees suspects of "security offences" – a term so broad which encompasses not only real perpetrators but also persons who set in a coffee shop with a social activist of an organization which was declared unlawful, and the above - contrary to the adamant objection of state authorities, including the Israel Security Agency (ISA) of many years (and see: HCJ 5100/94 **Public Committee Against Torture in Israel v. State of Israel et al.**, (reported in Nevo's website).
12. The arguments against the continued use of Regulation 119 of the Defence (Emergency) Regulations, 1945, were all denied by this honorable court time and time again with the connecting thread between the judgments being reliance on the value of the precedent.

The petitioners refer to the words of the Honorable Justice Cheshin in HCJ 2006/97 **Janimat v. GOC Central Command** (reported in Nevo's website) and argue that his words, which form part of the jurisprudence of the state, are pushed to the corner when the rights of the *other* are concerned. And it was so stated in that case:

... the basic principle will stand still, it will not sway neither to the right nor to the left: every man shall pay for his own crimes and every man shall be put to death for his own sin... this basic principle goes down to the roots of the authority and does not merely pertain to the discretion of the authority and to the correlation ('proportionality', 'relativity') between the evil act and the sanction imposed by the authority.

The respondent has no evidence which can tie between the person who committed the stabbing and his parents, other than kinship. The petitioners ask why the above basic principle recedes when it comes to a population which is protected population according to standards of international law. The humanitarian parts of the Geneva Convention, 1949, are acceptable to the respondent. His position on this issue was presented in hearings which were held in petitions that were filed with the court in connection with the explosion of ambulances by the respondent and was expressed in the judgment which was given in HCJ 2936/02 **Physicians for Human Rights v. The Commander of the IDF Forces in the West Bank**

We see fit to emphasize that our combat forces are required to abide by the rules of humanitarian law regarding the care of the wounded, the ill, and bodies of the deceased. The fact that medical personnel have abused their position in hospitals and in ambulances has made it necessary for the IDF to act in order to prevent such activities but does not, in and of itself, justify sweeping breaches of humanitarian rules. Indeed, this is

also the position of the State. This stance is required, not only under the rules of international law on which the petitioners have based their arguments here, but also in light of the values of the State of Israel as a Jewish and democratic state.

The petitioners argue that the demolition of petitioner No. 1's home violates the humanitarian rules of the Geneva Convention and therefore, according to the standards of the state itself, the demolition is unlawful.

13. The petitioners find it hard to understand how the court can repeatedly hold that the legal term "deterrence of others" – a term which appears in section 40G of the Penal Law, 5737-1977, as one of the considerations which should be taken into account by the judge while determining the proper sentencing range – can serve as the purpose for the use of Regulation 119 against innocent people. The only possible explanation is found in racial profiling as noted above and in the Israeli Society's denial of the *other* – the Palestinian.
14. The golden thread which connects between past and present judgments concerning the use of Regulation 119 is the court's denial of the *other*, the Palestinian, who lives under the rule of the state in conditions which we do not intend to describe in detail in this petition. In the case at hand the *other* is the person who lost his son who had committed an act without the father's knowledge or consent, and who, in addition, is about to have his home demolished. This is the spirit of the times (*Zeitgeist*) since the establishment of the state.
15. The government of Israel reiterates its declared position that it intends to demolish the homes of perpetrators and this court repeatedly approves it over and over.
16. The apartment of petitioner 1 is located in a five story building above a storage floor; the two upper floors in the building are under construction in the skeleton stage and are not occupied.

The building is made of stone and concrete; the storage floor and ground floor were built in the beginning of the eighties; the other floors were added over the years.

The apartment of petitioner 1 is located on the first floor in the west part of the building. The size of the apartment is about 105 meters. A complete storage floor is located underneath petitioner 1's apartment. The apartment of his brother Omar is located beside petitioner 1's apartment and above said floor the brothers Jum'ah and Iyad live.

17. The petitioners requested that in the event that the objection is rejected a copy of the demolition plan be provided to them. Instead they were notified that "the demolition of the apartment will be carried out manually, by the demolition of the apartment's partitions." It was further stated that the internal space of the apartment would be filled with "barbed wire" and "foamed double component Polyurethane."

Respondent's declarations that precautions would be taken in the demolition of apartments in high rises were given in several petitions in the past. However, despite of respondent's declarations, in the case of the Amar family home in the Qalandiya refugees camp, following the demolition of the upper floor in a three story building, the entire building was determined to be dangerous due to the damages caused by the demolition to the lower floors and it was demolished in its entirety by the Palestinian Authority (See: H CJ 7081/15 **Amar v. Commander of IDF Forces in the West Bank**, reported in Nevo website).

Should the petition be denied the honorable court is requested to order the respondent to provide the petitioners with a copy of the demolition plan and give an engineer on their behalf a reasonable period of time to examine the plan and convey his objections, if any.

Past experience shows that regardless of declarations made before this honorable court, damages are sometimes caused to neighboring apartments and even to adjacent buildings. A copy of a photograph of the building being the subject matter of this petition is attached and marked **P/6**.

18. The petitioners request the honorable court to take a step toward a change of policy, similar to what was done in its judgment against the use of torture, and to restrain the exercise of power by the government.

The petitioners argue that the use of Regulation 119 against Palestinian population – within 1967 borders and in the West Bank – is possible due to the continued denial by Israeli society of the *other*, namely, the Palestinians. The "necessities of the times" in the words of the Honorable Justice Elon in the above **Yihya** are "necessities of revenge". By failing to intervene in the actions taken by state authorities against said population, the court disrupts the balance and does not protect the fundamental rights of the *other*. The court adopted the position that respondent's acts should not be intervened in view of the fact that the political echelon had determined that the proper governmental reaction to attacks was the demolition of the houses of the perpetrators' families, and is not willing to avail itself to any other position. The petitioners request the honorable court to reconsider the acts taken by the only democracy in the middle east, the state which purports to be a "light unto the nations", which is guided by ancient principles of justice, and to issue the requested order and after hearing the arguments of the parties, make it absolute.

Jerusalem, today, February 25, 2016.

(Signature)

Andre Rosenthal, Advocate
Counsel to the petitioners