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At the Supreme Court
Sitting as the High Court of Justice

HCJ 7528/08

In the matter of: 1. **Abu Dahim, Identity No._____**
 A resident of Jabel Mukhbar, Jerusalem
 2. **HaMoked: Center for the Defence of the Individual**
 founded by Dr. Lotte Saltzberger

 Represented by Andre Rosenthal and/or Mustapha
 Yehiye
 1 Ben Yehuda St., Jerusalem 94264
 Tel: 02-6250458; fax: 02-6221148

The Petitioners

- Versus -

GOCHOC Homefront Command

Represented by the State Attorneys
Ministry of Justice- Jerusalem

The Respondents

Petition for an Order Nisi and a Temporary Injunction

The honorable court is requested to order the respondent to appear and show cause why he does not deliver to the petitioners a copy of the findings of the Second Report – which investigated the appropriateness of implementing regulation 119 of the Defence (Emergency) Regulations 1945, a copy of the engineering plans which enable the respondent, as detailed in it, to demolish floor 2 and 3 of a four-storied building that belongs to petitioner 1, and a copy of the testimony sheet which links the son of the petitioner, the person responsible for the attack at the Merkaz Harav Yeshiva in Jerusalem that took place in March of this year, to an illegal organization, in order to fully realize its claimed right.

As **temporary relief** the honorable court is requested to issue an order prohibiting any action by the respondent or by someone acting on his behalf against the home of petitioner 1 until the termination of proceedings in this petition.

At the same time as this petition is being filed with the honorable court, a copy of it is being delivered to the Office of the State Attorney.

The grounds for the petition are as follows.

1. A. Petitioner number 1 (hereinafter: the petitioner) is the father of _____ Abu Dahim, who carried out the attack on 6 March, 2008 at the “Merkaz Harav” yeshiva in Jerusalem.
- B. The petitioner lives in a block of apartments that he owns in Jabel Mukhbar, on Almadras Street, opposite the Arab Alswahar School for Girls in Jerusalem. The block of flats has four floors. The petitioner’s affidavit is attached and marked **p/1**.
2. On 6 August, 2008 the respondent announced that he intends to confiscate and demolish the middle floors of the four storey building. A copy of the letter is attached and marked **p/2**.
3. A. As far back as 8 July, 2008 counsel for the petitioners applied to Adv. Shai Nitzan, the deputy attorney general with a request to receive the Second Report. A copy of this application is attached and marked **p/3**.
- B. Within the framework of the court proceedings in HCJ 7733/04 **Mahmud Ali Nasser and HaMoked: The Centre for the Defence of the Individual v. Commander of the IDF Forces in the West Bank**, which concerned the demolition of a house belonging to the perpetrator of a guerrilla attack, and after holding a meeting in this matter on 13 December, 2004, the hearing was postponed for a further 90 days, after a discussion had taken place between the court and the counsel for the respondent there.
- C. Coincidentally, or perhaps not coincidentally, after the aforementioned hearing a military commission was established which was charged with the task of examining the usefulness of Regulation 119. This was in fact the second commission. The findings of the commission were partially published in the media.

“It goes without say – as the commission has also established – that in no instance has it been proved that house demolitions have led to a cessation in terror attacks, or to any significant decrease in them, and perhaps the opposite has occurred. So that we find that it has not even been successful as a deterrent factor”.

“Over and above security considerations” by Amnon Shtrasnov *Haaretz* 21 February, 2005, a copy is attached and marked **p/4**.

We have learnt that the commission established that applying regulation 119 has had the opposite results. Instead of serving as a tool for deterring the public and thereby preventing the carrying out of a future incident within the framework of the Palestinian Israeli conflict, using this regulation has

increased the hatred, has deepened the lines of conflict and has led to the commission of additional revenge attacks.

- D. In the wake of the court's dicta during the hearing that took place on 13 December, 2004 in HCJ 7733/04 **Mahmud Ali Nasser and HaMoked: The Centre for the Defence of the Individual v. Commander of the IDF Forces in the West Bank** and in the wake of the findings of the second commission, the respondent announced there that he does not intend to make use of regulation 119.

A copy of the judgment is attached and is marked **p/5**.

- E. In its reply to counsel's application, Adv. Nitzan declared that since this involved a military report the correct address was the army. On 4 August, 2008 counsel for the petitioners applied to the legal advisor of the commander in charge, Sergeant Major Yehoshua Gortler with the request to receive a copy of the Second Report.

A copy of this application is attached and marked **p/6**.

- F. On 21 August, 2008 counsel for the petitioners resubmitted the request to Sergeant Major Yehoshua Gortler to receive a copy of the Second Report.

A copy of the additional application is attached and marked **p/7**.

- 4. On 13 August 2008 a letter of objection was filed with the respondent against the implementation of Regulation 119. In section 2 of the letter of objection we requested to receive a copy of any evidence that linked the son of the petitioner to an illegal organization; we also requested to allow us to relate to this evidence, if such exists, before a decision is made to make use of regulation 119. And thus the following is written there:

"We are unaware of any link, in the event that such exists, between the perpetrator of the attack and illegal organizations. In the event that evidence of such link in fact exists, and such evidence is not classified, we request to receive it and to allow us to relate to this evidence"

- 5. On 26 August 2008 the respondent dismissed the objection. In paragraph 4 of the rejection letter the following was noted down with respect to the Report of the Second Commission:

"At the outset it must be noted that the important team headed by General Shani (in all probability it was this one to which you intended to refer when you mentioned the "military commission" that was alluded to in the letter of objection) who examined the home demolition policy for deterrent purposes, never determined that home demolitions as stated do not deter".

There is no reference at all to this application.

A copy of the respondent's reply, including the confiscation and demolition order is attached and marked **p/8**.

6. On 27 August, 2008, as a result of the rejection of the letter of objection, and in light of the fact that an extension was granted until 2 September 2008 in order to apply to the honorable court against the implementation of Regulation 119, counsel for the petitioners applied to the legal adviser of the Homef-ront Command with an additional request to receive a copy of the findings of the Second Commission. We also requested to receive a copy of the work plans to implement the destruction because it was not clear to us nor was it clear to the expert with whom we sought advice how it would be possible to destroy the middle floors of a four storey building and to claim further that it would still be possible to make safe use of the first and fourth floor. Eventually we reapplied to receive a copy of the evidence that links the son of the petitioner to an illegal organization.

A copy of this application is attached and marked **p/9**.

7. On 1 September 2008 after innumerable telephone conversations, we were informed that there was no intention to hand over any kind of evidence, there was no intention to hand over to us the plans for carrying out of the demolitions and with respect to the second commission, we would be receiving a reply.

A copy of the reply is attached and marked **p/10**.

8. A. In HCJ 4914/94 **Jacob Turner v. State Comptroller et al.**, *Piskei Din* 49(3), 771 the following was held by the honorable Justice Goldbar:

“The only legal question that arises in this petition is whether it was incumbent upon the State Comptroller to deliver to the petitioner the evidentiary material before it has given its opinion and whether this claimed right was denied from the petitioner when it did not do so”.

There it was decided by the majority, that by not handing over the evidence to the petitioner, the claimed right was harmed and the petition was accepted.

- B. In HCJ 10271/02 **Abraham Fried et al. v. Israel Police – Jerusalem District et al.**, *Takdin Elyon* 2006(3) 1128 the following was held:

“50. The required balance between human rights and public interests, and the internal balance between them, is not fixed and uniform for every type of case. The balance test that will be implemented for every case needs to comport with the quality and importance of the competing principles, and the measure of protection that we seek to grant every principle (see: HCJ 2481/93 **Dayan v. Commissioner Yehuda Wilk, Commander of Jerusalem District**, *Piskei Din* 48(2) 456, 474-475; HCJ 448/85 **Dahar v. Minister of the Interior**, *Piskei Din* 40(2) 701, 708; A. Barak *Purposive Interpretation in Law* (volume two – *Legislative Interpretation*, 5753) 688).

...

The right of private inspection, like the right of public inspection, is based on the principle of *bona fides*, namely on the fact that “information was gathered by the governmental authorities and is held by them in good faith for the citizens of the State and for its residents” (CAA 291/99 above; and see also AA 8282/02 above, 470-471). This right is also, as held in CAA 291/99 above “one of the most fundamental concepts of a democratic regime” which is “derived from the right of argumentation and from the administrative obligation to act transparently” (*ibid.* at 232). Nonetheless, since this involves a right that is intended to serve a private interest, the status and importance of such a right is invariably derived from the importance of the interest which it intends to realize.

...

In this spirit the court in HCJ 7805/00 above held:

“The scope and limit of the right of inspection, which is derived from the right of argumentation, are also dependent on the nature of the case and the surrounding circumstances as well as the extent of the foreseeable harm to the citizen from the decision of the administrative authority” (*ibid.* 600).

9. The petitioners claim that since the respondent decided that it is his desire to carry out the confiscation and demolition of parts of the house, it is their full right to receive the findings of the military commission which investigated the implementation of Regulation 119 less than three years ago. This is especially true in light of the fact that as a result of the findings from this commission the respondent changed its name, its commander of the IDF Forces in the West Bank, and its reasons and ceased to make use of this Regulation.

Since the respondent of late has stubbornly insisted on reverting to this policy and wishes to penalize the family relatives of the perpetrator of the attack because of his actions and because he was a tenant of the building, it is their right to receive the findings of this report to protect their possessions as they are protected in Basic Law: Human Dignity and Liberty. It is not at all clear why the respondent is unprepared to deliver the commission’s findings for examination by the petitioners.

10. The petitioners claim the right to examine the work plans which the respondent intends to implement against the house. The petitioners wish to file an opinion on their behalf. After being advised by an engineer, we were informed that it is not at all clear how it would be possible to live in those parts of the building that are not demolished, in the event that the respondent

does destroy the second and third floors. On the first and fourth floor there are three families with small children. The petitioners fear that carrying out the planned demolition will endanger the entire building and there will be a need to evacuate it and to demolish it since it will not be fit for human habitation. It is not at all clear why the respondent is unprepared to deliver these plans to the petitioners.

11. Petitioner 1 has no knowledge of any links of his son – who carried out the attack – to an illegal organization. The respondent has made use of Regulation 119 in the past, but he always had evidence linking the perpetrator of the attack to an illegal organization. The petitioners claim that it is insufficient to point to the fact that the perpetrator was an Arab, resident of Israel, and the victims were Jewish Yeshiva students. It is quite possible that this involves a resident of the state who lost his sanity; in the same way as Israeli residents of the Mosaic persuasion who carried out attacks that are no less loathsome lost theirs.
12. As was noted above, over the course of the last few years the respondent and the Commander of the IDF Forces in the West Bank have avoided making use of Regulation 119, despite the fact that during this period attacks against Israeli civilian targets took place and people were killed. In January 2007 three persons were killed in an attack in Eilat, in April 2006, 6 persons were killed and a further 68 injured in a suicide attack at the Central Bus Station in Tel Aviv. We do not intend to review all the serious incidents that the State suffered in the past years ever since the decision to cease making use of Regulation 119 was made and until it was decided to reinstate it, but it must be said that the petitioners are of the opinion that it was foreign considerations that led to this change in policy.
13. The petitioners claim that this policy does not conform to the values of a Jewish and democratic State that seeks to be a “light unto the Nations”. In order that the petitioners’ voices be heard and that their claims against making use of Regulation 119 be properly considered the honorable court is requested to grant the requested Order and to instruct the respondent to hand over to them the findings of the Second Report, the work plans for demolishing the two floors of the building and the evidence that links the son of the petitioner to an illegal organization – in the event that there is such a link.

Jerusalem, 2 September, 2008