At the Supreme Court in Jerusalem
Sitting as the High Court of Justice

HCJ 4715/03

In the matter of:

1. _____ Shuweiqi
2. _____ Shuweiqi
3. HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger (Reg. Assoc.)

all represented by attorneys L. Tsemel and/or P. Abu Ahmed and/or L. Habib
2 Abu Obeidah Street, Jerusalem 97200
Tel. 02-6273373; Fax 02-6289327

The Petitioners

v.

Commander of the IDF forces in the West Bank

Judea and Samaria Division Headquarters, M.P. 01149,
IDF
Tel. 02-9970200; Fax 02-9970436

The Respondent

Petition for Order Nisi and Temporary Injunction

A petition is hereby filed for an Order Nisi, directed at the Respondent and ordering him to give cause why he will not refrain from demolishing, or otherwise damaging, the Petitioners' house, and alternatively:

1. Why he will not present the Petitioners with a duly signed order, detailing the reasons therefore, before damaging the house.

2. Why he will not enable the Petitioners to voice their objections to him against damaging the house, before the house is damaged.

3. Why he will not grant the Petitioners, if he rejects their objections, another fixed period of time to approach this Honorable Court, before damaging the house.

The Petition for a Temporary Injunction

The Honorable Court is further moved to instruct the Respondent, in a Temporary Injunction, not to cause irreversible damage to the Petitioners' house, including the demolition thereof, until the hearing of this petition is concluded.

The grounds for the petition are as follows:

Introduction

1. a. This petition concerns the fate of a residential house in the City of Hebron, in which twenty-six persons reside.

   b. The Respondent's authority to exercise a sanction of confiscating, sealing or demolishing a house is found in the Defence (Emergency) Regulations, 1945. Extensive case law by this Honorable Court has defined the framework for the Respondent's discretion when exercising his authority, the proper proceeding for exercising the authority and the scope of judicial review. The Petitioners shall claim that in the case before us, the Respondent is acting in deviation from these precedents. In a hasty and stealthy act, without hearing the relevant persons, and without basing his decision on all of the facts, the Respondent might order a severe and grave act, which would leave many persons without shelter.

The Parties

2. Petitioner 1 is the mother of Petitioner 2, and the wife of _____ Shuweiqi, who has been arrested by Israel as specified below.

3. Petitioner 2 is the son of the detainee _____ Shuweiqi, 37 years old, married and the father of 5 children.

4. Petitioner 3 is a registered association, which has engaged for many years in the protection of human rights in the territories occupied by the IDF in the West Bank and in the Gaza Strip.

5. The Respondent, Commander of the IDF forces in the West Bank, holds the territories in which the house is located under belligerent occupation, and bears the duties and rights conferred upon him in this capacity by international law. The Respondent is also a "military commander" pursuant to the Defence (Emergency) Regulations, 1945. In this capacity, he has the authority to issue confiscation, sealing and demolition orders pursuant to Regulation 119 of the said Regulations.

The Facts

6. **Approximately ten days ago, Captain Yaron from the GSS [General Security Service] arrived close to the Petitioners' house, accompanied by about four army Jeeps. He met one of the residents of the house, the son _____, and told him, *inter alia*, that the house would be *demolished soon*, that he advised them to**

vacate it, and that he did not understand how it had not been demolished until then.

7. The family has no certain knowledge of the reason for the threat to demolish the house. All that is known is that the father of the family, _____ Shuweiqi, was arrested on 14 March 2003, and is standing trial at the Military Court in Bet El, although the precise charges against him are unknown to them. The father's arrest is probably related to the fact that his daughter's husband is wanted by Israel.

8. It is important to state, already at this point, that ***the security forces visited the family's house approximately three times over the last few months: first on 15 September 2002, on which occasion they searched the house for six hours; then on 19 February 2003, when they fired shots inside the house, threw bombs and ruined the contents of the house and the furniture, and ultimately, when they did not find what they were looking for, the GSS man Captain Hakim apologized for the "inconvenience"; and finally on 14 March 2003, at which time they broke the windows of the house, conducted a search which included beating one of the sons, and arrested the father***. This fact categorically precludes any possible claim of prior notice not being given due to the fear of the house "being booby-trapped". The fact is that on prior occasions the army knew how to reach the house alone, without fear, *and no claim should be raised regarding any impediment barring a right of hearing to be granted before the demolition is performed*.

Exhaustion of Administrative Remedies:

9. On 21 May 2003, at 16:10 or thereabouts, oral and fax communications were made with the Office of the Legal Advisor to the Judea and Samaria Region. A copy of the fax is attached hereto as Exhibit A.

   The undersigned asked that prior notice be given of any intention to damage the house, in order to enable a lawful objection and an appeal to the court.

   On 25 May 2003, Mr. Timor Passo gave oral notice that as of now, there is no intention of damaging the house, and that when such intention is formed, the Respondent will act in accordance with the principles set forth in the case law. Mr. Passo agreed to allow the undersigned until 10:00 on 27 May 2003 to approach this Honorable Court.

The house:

10. The house which is the subject matter of this petition (hereinafter: the house) has three floors, a ground floor containing storerooms, and two floors with 5 residential

apartments. The area of each floor is approximately 300 [square] meters, and near the house there is land, on an area of approximately one half dunam, on which fruit trees are planted.

a. The ground floor is used for storerooms, in which chickens, goats and so forth are raised.

b. On the first floor there are three apartments, in one of which resides the son _____, 35 years old with a clean record, with his wife and four children. In this apartment there are two bedrooms, a living room, a kitchen and a restroom.

c. In the second resides the son _____, 28 years old with a clean record, with his wife and two children. In this apartment there is one bedroom, a living room, a kitchen and a restroom.

d. In the third apartment resides the son _____, 27 years old with a clean record, with his wife and daughter. In this apartment there is one bedroom, a living room, a kitchen and a restroom.

e. There are two apartments on the second floor. In one apartment resides the father of the family, A., who is 58 years old, married and the father of twelve children, with his wife, Petitioner 1, and their four children. He has been unemployed for three years and has a clean record.

f. In the second apartment resides Petitioner 2, who is 37 years old, with his wife and five children. He works as a construction worker, and has a clean record.

In total, the house shelters 26 people!

b. [*sic*] It should be noted that the expenses for the construction of the house were incurred as follows:

Initially, part of the first floor was built before the 1967 war. The family continued the construction in the 1990s and finished the construction of the house in 1995, with each son investing of his own money in building his apartment, and each one of the sons owning, in fact, his apartment.

Adjacent houses:

It is important to note that in close proximity to the house which is the subject matter of the petition, there are houses that are located approximately ten meters away from the house which is the subject matter of the petition.

11. Experience shows that the Respondent could demolish the house without any prior notice, as has happened in the past, and despite prior communications on the matter, and this petition is filed in view thereof. This fact gives rise to the fear that the Respondent intends to demolish also the Petitioner's house without giving prior notice and without affording the opportunity to object to the actual demolition and to the scope, nature and objective thereof.

The Legal Argumentation

The right to be heard

12. The right to be heard is one of the fundamental rules of natural justice. "Its origin and foundation are rooted in Jewish heritage from time immemorial, and the sages of Israel regarded it as the most ancient fundamental right in human culture" (the opinion of the Deputy Chief Justice M. Elon in HCJ 4112/90 *The Association for Civil Rights in Israel v. GOC Southern Command*, *Piskei Din* 44(4) 626, 637). It is well established in Israeli law that a person's property (as well as his status, reputation, etc.) may not be prejudiced without giving him the right to voice his claims. In its full scope, the right to be heard includes a notice to the effect that the authority is contemplating a decision that would prejudice such person; a specification of the authority's reasons and considerations; a presentation of the evidence underlying the authority's intention; and the granting of an opportunity to the injured person or his attorney to raise arguments in writing or orally, including presenting evidence and examining witnesses on their behalf.

13. The objective of a hearing is twofold: First, it is a primary principle of procedural fairness. A person's right to voice his claims before he is injured, even when he appears to be unable to shake the authority's considerations, derives from the recognition of his human dignity. Second, the hearing contributes to the quality of the administrative authority's decision. Through the hearing, the relevant person can draw the authority's attention to considerations and facts which it did not previously have before it. He may shed new light on the facts. The hearing is an important dam against unfounded or erroneous decisions.

14. In HCJ 358/88 *The Association for Civil Rights in Israel v. GOC Central Command* (hereinafter: the Association for Civil Rights Judgment), this Honorable Court was required to apply the hearing to the Respondent's authorities pursuant to Regulation 119 of the Defence (Emergency) Regulations, 1945. The Court ruled that:

(A) **… except for matters involving military-operational needs […] it would be appropriate that an order issued under Regulation 119 should include a notice to the effect that the person to whom the order is directed may select a lawyer and address the Military Commander before implementation of the order, within a fixed time period set forth therein, and that, if he so desires, he will be given additional time after that, also fixed, to apply to this Court before the order will be implemented.**

(B) **Of course, the State may apply to this Court, in an appropriate case, and request that the hearing in a petition of this type be granted a right of preference.**

(C) **In urgent situations, the premises can be sealed on the spot, as distinguished from demolition, which is, as stated, irreversible, before the appeal or hearing of the Petition takes place. In the case of an on-the-spot sealing, as stated, notice is to be given to the affected party, clarifying that the right of objection or submitting a petition remains available.** [Translation: Supreme Court web site]

Thus the Court determined the balance between the security interest in the swift and deterring execution of orders pursuant to Regulation 119, and the necessity of holding a hearing in a case of what was described there as a harsh and severe means of punishment, one of the main characteristics of which is the irreversibility thereof.

Needless to note, this precedent has been implemented in practice by the Respondent in the exercise of his authority for twelve years, and also in severe states of emergency such as the period of the attacks of Spring 1996, the Respondent made sure to give the injured parties sufficient time to arrange for representation and to deliver objections, and thereafter to approach this Honorable Court. This procedure was once again cemented in this Honorable Court's judgment of 19 March 2002, in HCJ 2264/02 (and in another five petitions) *Mativ et al. v. The IDF Commander in the Gaza Strip* (not yet published). That case concerned the demolition of houses in

the Gaza Strip. At least one of the petitions (HCJ 2329/02) was a general petition, which did not concern the demolition of a particular house, but the general procedure for demolishing houses throughout the Gaza Strip. The State declared that

> **If a decision should be made to demolish a house, other than due to operational reasons, an advance notice, with reasons, will be given about the demolition, so as to enable the owners of such house to challenge the demolition decision before the Military Commander; and if the objection is dismissed, no action will be taken to demolish the house for 48 hours after the dismissal of the objection, so as to enable the owners of the house to file a petition with the High Court of Justice.**

This declaration was the grounds for the withdrawal of the said petitions.

15. Indeed, the right to be heard is not an absolute right, and there are urgent circumstances in which granting the right to a hearing is not realistic. Prof. I. Zamir, in his book *The Administrative Authority* (Jerusalem: Nevo, 1996, p. 806), cites as examples for such situations firefighters, who deem it necessary to break into a house in which a fire is raging, or into an adjacent house, or security forces who demand that a public hall be evacuated due to the fear that a bomb had been placed in it. The judgment in the *Association for Civil Rights* affair also qualifies the hearing duty when "there are military-operational circumstances, in which the conditions of time and place or the nature of the circumstances are inconsistent with judicial review; for example, when a military unit is engaged in an operational action, in which it must clear away an obstacle or overcome resistance or respond on the spot to an attack on army forces or on civilians which occurred at the time, or similar circumstances…" This exception was applied in HCJ 4112/90 *The Association for Civil Rights in Israel v. GOC Southern Command*, *Piskei Din* 44(4) 626). That case concerned the demolition of houses not for reasons of deterrence, but in order to enable military control of a street that was the scene of violent acts against civilians and soldiers, which culminated in a brutal murder. The urgent need for action to protect the lives of passersby prevailed, in that case, over the duty of properly complying with the right to be heard, particularly considering the fact that a certain right to be heard was granted to the local residents, including the possibility of raising their claims before representatives of the army and the legal advisors of the Military Commander who were present on the scene.

16. In our case, neither is the exception in the judgment in the *Association for Civil Rights* affair applicable, nor are the circumstances of HCJ 4112/90 present. The demolition of the house is aimed at effecting general deterrence. It was not designed to meet an urgent military-operational need, or prevent the use of a house which would pose an immediate danger to the lives of passersby. The urgency is no different than that which existed in demolitions of houses such as those discussed in the *Association for Civil Rights* affair, or that were performed over the last 12 years in accordance with the procedure determined therein.

17. ***The Respondent cannot draw support from HCJ 6696/02. This is, in no way, a case of operational action or of a military act of war. There is no obstacle to giving notice and warning***.

Moreover, nowadays, when **the IDF is the only effective authority and exerts full control over the area, no claim will be heard to the effect that a one-time entry to the area could cause damage if it is known in advance.** Nor will the claim, that has already been raised, that if the demolition will be expected, there is a fear that the houses will be booby-trapped, be heard. Nowadays, it is no secret that the Respondent damages all saboteurs' houses, and if such fear would have been justified, we would have found several dozen booby-trapped houses awaiting the demolishers, which is not the case, nor is there any precedent for the aforesaid. ***The fact is that Captain Yaron came to the family members and notified them of the intention to damage the house, without any fear for his well-being!***

Absence of an order

18. Alongside the lack of a hearing, the intention of demolishing the house is tainted by another defect, which concerns the fundamental principles of proper administration. The Petitioners were given no order – either verbal or in writing – specifying the Respondent's decision regarding their house. In the absence of an order, the Petitioners do not know whether an order was issued to damage the house pursuant to the Defence Regulations, the extent of the damage determined and which instructions accompanied the principal order, if any. It is doubtful whether the Respondent even issued such a methodical order, to guide the soldiers carrying out the task. In such a state of affairs, "one will neither know, nor be able to know, what is permitted and what is not, and therefore he cannot be required to be law-abiding and not to commit an unlawful act" (as ruled by this Honorable Court in a similar context in the early years of the State – HCJ 220/51 *Asslan et al. v. The Military Governor of the Galilee*,

Piskei Din 5, 1480, 1487). In addition, issuing the order in writing provides further assurance that the decision has been weighed

19. The duty of publishing the order so that it comes to the attention of the relevant persons is fixed in Article 6 of the Proclamation on the Administration of Rule and Justice (West Bank Region) (No. 2), 5727-1967:

> **A proclamation, order or notice on my behalf *will be published* in any way I deem fit** (emphasis added, Y.W.).

The Military Commander may not issue orders clandestinely, but is required to publish the same. Even though, according to Article 1 of the Order Regarding Defence Regulations (Judea and Samaria) (No. 378), 5730-1970, "any order may be issued orally", even then "the authority issuing the order will cause the notice on its taking effect to be given as early as possible and in such manner as it shall deem fit".

This Honorable Court has emphasized that "the rules of proper administration prescribe that even though orders may be issued orally, when the urgency passes and if justified, an order should be given in writing" (HCJ 469/83 *National United Bus Company et al. v. The Minister of Defence et al., Takdin Elyon* 92 (2) 1477).

Defects in the establishment of the factual foundation

20. In a grave decision such as this, of the demolition of a house, it is essential for the Respondent to rely on true facts, which are founded upon the proper gathering and review of information (HCJ 802/89 *Nasman v. The IDF Commander in the Region, Piskei Din* 44 (2) 601). On what factual information the Respondent is basing his intention the Petitioners do not know, since they were given no written order with reasons. However, the Respondent's ability to establish a factual foundation which would enable him to weigh the considerations which he is required by case law to weigh is doubtful, due to the absence of military presence in the area of the house; and in the lack of a hearing, the Respondent has before him no data on the structure of the house, on the potential danger to nearby buildings, or on the number, identity and special circumstances of the inhabitants of the house.

21. In addition, since it is presumable that the cause for damaging the house is the arrest of members of the family as aforesaid, the Petitioners shall claim that ***the use of this sanction should not be allowed while the detained father has not yet been convicted***. The use of this sanction at this stage is unlawful, and the Petitioners shall claim that the Respondent should wait until the detainees are convicted of the charges against them. Any earlier infliction of damage would, in fact, be passing judgment on the

suspects before they are tried, and would constitute a flagrant interference by the Respondent in the judicial discretion.

Lack of factual foundation concerning the suspect

22. The decision to demolish a house infringes the constitutional property rights of the owners of the house and the inhabitants' rights to shelter and dignity. As such, it should rely on clear, unequivocal and convincing evidence.

See: EA 2/84 *Neiman v. Chairman of the Central Elections Committee for the Tenth Knesset*, *Piskei Din* 39 (2) 225, 250.

And with regard to authorities pursuant to the Defence (Emergency) Regulations, 1945:

HCJ 159/84 *Shahin v. Commander of the IDF forces in the Gaza Region*, *Piskei Din* 39 (1) 309, 327 (deportation order against an infiltrator);

HCJ 672/87 *Atamlla et al. v. GOC Northern Command*, *Piskei Din* 42 (4) 708, 710 (restriction order pursuant to Regulation 110);

HCJ 5973/92 *The Association for Civil Rights in Israel et al. v. The Minister of Defence et al., Piskei Din* 47 (1) 267, 282 (deportation orders pursuant to Regulation 112).

And, indeed, the Respondent has relied in the past on particularly strong evidence. Thus, for instance, in HCJ 6026/94 *Nazaal et al. v. Commander of the IDF forces in Judea and Samaria, Piskei Din* 48 (5) 338, (hereinafter: the *Nazaal* affair), the identity of a suicide bomber was determined by the cumulative weight of publications on behalf of the Hamas movement, police alerts and a comparison between tissue taken from the remains of the bomber's body and blood taken from his parents (p. 343 of the judgment). A similar accumulation of evidence led the Court to determine, in HCJ 1730/96 *Sabih et al. v. Commander of the IDF forces in Judea and Samaria et al., Piskei Din* 50 (1) 353, (hereinafter: the *Sabih* affair), that "there is no reasonable doubt as to the terrorist's identity", and that "we are satisfied that the evidence held by the Respondent justified his certain conclusion" (p. 360-361 of the judgment).

In our case, and as far as the family is aware, no direct involvement in violent saboteur activity is attributed to the detained father of the family. The Petitioners shall claim that the severity of the suspicions should be taken into account and shall claim that in their case, the severity of the suspicions does not justify demolishing an entire apartment building, and the rendering of a large number of families homeless.

23. The binding precedent is that the Respondent is required to check whether the suspect's residence may be viewed as a residential unit separate from the rest of the building, and whether it may be demolished without harming the other parts of the building. If this is not possible, sealing that unit should be considered. (The *Sabih* affair, p. 360, and see also HCJ 5510/92 *Turkeman v. GOC Central Command*, *Piskei Din* 48 (1) 217, in which the Court, in the opinion of Justice (as was his title then) Barak, ruled that the damage should be limited to the suspect's residential unit only, and since partial demolition of the structure is not possible, the less drastic measure of partial sealing of the building should suffice).

This case concerns an apartment building with 5 separate and independent apartments, in which distinct nuclear families reside, and no permission should be given to damage the entire house, which damage should be focused, if at all, on the apartment of the suspect due to whose activity damage is sought to be inflicted on the house.

The Honorable Justice Cheshin's position, whereby the Respondent has no right at all to order an injury to residential units other than the residential unit attributable to the terror suspect, is also known.

See: HCJ 4772/91 *Hizran v. Commander of the IDF forces in Judea and Samaria*, *Piskei Din* 46 (2) 150; HCJ 2722/92 *Alamarin v. Commander of the IDF forces in the Gaza Strip*, *Piskei Din* 46 (3) 963 (where Justice Cheshin clarifies that the matter touches on the fundamentals of the authority, as it should be construed in the spirit of Israel's basic principles), and see the *Nazaal* Affair.

Danger to neighboring buildings!!!

24. The danger to neighboring buildings, or to parts of the building that are not designated for demolition, is at the very least a consideration which the Respondent should weigh. See on this matter, the *Sabih* affair, p. 360, and see also HCJ 5510/92 *Turkeman v. GOC Central Command*, *Piskei Din* 48 (1) 217, in which the Court, in the opinion of Justice (as was his title then) Barak, ruled that damage should be limited to the suspect's residential unit only, and since partial demolition of the structure is not possible, the less drastic measure of partial sealing of the building should suffice. The Respondent did not properly weigh the danger to nearby buildings. His intention, probably, is to order merely the demolition of the house, but the significance of executing the order is to damage also the houses of the neighbors, which the Respondent neither sought, nor is authorized, to order.

In this case, as described above, there are structures that are located approximately 10 meters away from the house which is the subject matter of the petition, and damaging the house which is the subject matter of the petition may damage them too!

Proportionateness

25. Reasonableness and proportionateness are superior principles, which govern the breadth of the Respondent's discretion. Thus it is in general, and particularly so in the exercise of such irregular authority to injure innocent people through no fault of their own.

> **It is well known that the measure embedded in the provisions of Regulation 119, is sharp and severe, and should be used only after strict consideration and examination and only under special circumstances… Furthermore, Regulation 119 itself provides for various degrees of means according to severity, starting with confiscation only, through confiscation accompanied by partial and full sealing, to the demolition of the building. It is only natural that the severity of the means used by the Military Commander be related to the severity of the act that was committed by the inhabitant, and that only in special cases will the measure of demolition of the building be taken.**
>
> The opinion of the Honorable Justice Barak (as was his title then) in HCJ 361/82 *Chamri v. The Regional Commander of Judea and Samaria*, *Piskei Din* 36 (3) 439, 443.

In another case, the Court reviewed an order to demolish a house that was inhabited by a man who was convicted of cold-blooded murder. After determining that the authority should be exercised in accordance with the principles of relativity and proportionateness, the Court ruled, in the opinion of Justice (as was his title then) Barak:

> **It appears to me that demolishing the entire building would constitute a measure that is "disproportionate" – hence also unreasonable – between the murderous behavior of Muhammad Turkeman and the suffering that will be inflicted on the elder brother's family. Under these circumstances, it appears that the**

> **reasonable route was that which provided for partial demolition only. As we have seen, this route is impossible. Under these circumstances, the less drastic measure – which too is very severe – of partial sealing, should be employed.**
>
> (HCJ 5510/92 *Turkeman v. The Minister of Defence et al., Piskei Din* 48 (1) 217, 220).

And see also in the detailed opinion of Chief Justice Barak in HCJFH 2161/96 *Sharif v. Home Guard Commander*, *Piskei Din* 50 (4) 485, 490.

These statements are particularly pertinent to our case, in which no hearing was held and no essential examinations were conducted on the possible damage from the demolition of the building. Any doubt as to the scope of the terror suspect's activities, any doubt as to the scope of the injury to the inhabitants of the house and their neighbors, should operate in favor of the Petitioners. It is important to note that the father of the family has not yet been convicted, and that the activation of the sanction, if at all, should be deferred until his case is decided. Once the Respondent chose to act in conditions of uncertainty and without adequate factual basis, he must adopt a margin of caution, lest he disproportionately infringe the constitutional rights of the inhabitants of the house. The Respondent's desire to exhaust his authority should yield to the concern that under the conditions of uncertainty in which he is operating, he might disproportionately injure the property and dignity of innocent people.

26. In view of the urgency of the circumstances and the impossibility of meeting with the Petitioners, this petition is supported by the affidavit of the undersigned, who has maintained telephone contact with Petitioner 2.

27. In conclusion, one cannot ignore the political aspect attending the Respondent's actions, and it should be hoped that his genuine intentions, and [those of] the echelons on whose behalf he is acting, to bring about calmness and tranquility to the land, will also be expressed in restraint in the use of this draconian, cruel and loathsome sanction of the demolition of houses which, at least according to the Petitioners, achieves the very opposite goal and adds fuel to the fire.

On all of the foregoing grounds, the Honorable Court is moved to issue an Order Nisi and a Temporary Injunction as requested at the outset of the petition, and, after hearing the Respondent's answer, render them absolute.

Jerusalem, Today 26 May 2003,

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Labiv Habib, Att.

Counsel for the Petitioners