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In the Supreme Court sitting as the High Court of Justice

HCJ 4969/04

Before: The Honorable President A. Barak
The Honorable Vice-President M. Cheshin
The Honorable Justice D. Beinisch

The Petitioners: 1. Adalah – The Legal Center for Arab Minority Rights in Israel
2. The Palestinian Center for Human Rights – Gaza
3. Al Haq – Ramallah
4. Mahmud Alsh'ar et al.

v e r s u s

The Respondents: 1. IDF OC Southern Command, Dan Harel
2. IDF OC Central Command, Moshe Kaplinsky
3. IDF Chief of Staff, Moshe Ya'alon
4. The Minister of Defense, Shaul Mofaz
5. The Prime Minister, Ariel Sharon

Petition for Order Nisi and interlocutory order

Date of the session: 7 Sivan 5768 (14 June 2005)

On behalf of the Appellants: Attorney Marwan Dalal

On behalf of the Respondents: Attorney Aner Helmann

J U D G M E N T

The President A. Barak:

1. The petition before us (which was filed on 27 May 2004) involves the demand of the petitioners, human rights organizations and Palestinian residents, to order the respondents to refrain from demolishing houses in the area of Judea, Samaria, and the Gaza Strip because of military necessity. The petitioners contend that, since the outbreak of the armed conflict between

the Palestinians and Israel in September 2000, the respondents have demolished thousands of civilian structures and residential dwellings of Palestinians residents, the demolitions being carried out in reliance on the “military necessity” exception specified in article 53 of the Fourth Geneva Convention of 1949 and in article 23(g) of the Hague Regulations of 1907. According to the petitioners, military necessity alone is insufficient to grant the respondents power to demolish houses of protected persons. They argue that destruction of houses is permitted only in cases in which “immediate and imperative military necessity” as interpreted in international public law exists. According to their reasoning, the respondents are not permitted to act under the exception so long as the structure is used for civilian purposes and has not become an active military object in which hostilities are being conducted. The petitioners are of the opinion that the respondents’ actions relating to demolition of houses is carried out extensively and disproportionately, without ensuring that the said exception and its conditions are met. In this context, the petitioners request that the respondents issue explicit directives and orders regarding the “military necessity” exception that comport with the provisions of international humanitarian law.

2. In their response, the respondents request that the petition be dismissed summarily and on its merits. They argue that the petition is general and ignores the security circumstances prevailing in the area, which are equivalent to a situation of actual hostilities. The relief that the respondents [mistake in the original should be petitioners] seek, cessation of all acts of demolition, at a time that military actions are frequently taking place, is general relief that this court does not customarily grant. For example, the respondents contend that the petitioners do not distinguish between areas in which military actions are being waged and do not distinguish between unplanned destruction resulting from the constraints of the hostilities and planned demolition of a structure used for activity against the IDF. The respondents further contend that it is not the function of this court to determine what means of combat should be used in the arena of the hostilities. As for the substance of the petition, the respondents declared that, in its actions in the area, the IDF seeks to minimize the damage caused to civilian structures. Moreover, IDF orders prohibit intentional harm to civilian houses, unless imperative military necessity so requires, and then subject to the principle of proportionality. The respondents reject the petitioners’ contentions regarding indiscriminate and disproportionate demolition of houses. They point to the harsh combat prevailing in the area, which requires that different means be used to cope with it, one of the means being demolition of houses when necessary for combat

purposes. The respondents stated that the demolition of houses is carried out by ground forces, with the persons inside the houses being given the opportunity to leave the house.

3. The petition was heard on 26 October 2004. Because of the broad sweep of the petition, the sides agreed, at our recommendation, that the petitioners would reduce their petition to a number of specific typical situations of demolition of houses on which they wish to focus. Therefore, in a statement (of 10 January 2005), the petitioners divided the demolition of houses into three typical situations as they view it: demolition of houses in a populated area in Rafah in May 2004 for the purpose of locating tunnels; demolition of houses in the partition area in southern Rafah, in the area bordering Egypt ("the Philadelphi corridor") in April-May 2004; demolition of houses by means of heavy equipment in the Jenin refugee camp in April 2002.

4. In the response on behalf of the respondents (of 20 March 2005), they announced that, in accordance with the statement made by the prime minister at the Sharm el-Sheikh conference, whereby "Israel will stop its military activity against the Palestinians in every place" (statement of 8 February 2005), and in light of the present period of calm, the respondents have refrained as a rule from house-demolition actions. In the continued hearing that we held (on 14 June 2005), the respondents repeated their declaration. They added that the essential element of the petition focuses on houses located in the Gaza Strip, and, in any event, there have not been additional demolitions in this area because of the approaching implementation of the "disengagement plan." With respect to houses that were demolished in Judea and Samaria, the respondent's contend that these were houses that were demolished in the special circumstances of Operation "Defensive Shield," which took place more than three years ago. According to the respondents, in light of their statement regarding the cessation of the demolitions, and in light of the "disengagement plan," which will make the subject of house demolitions in the Gaza Strip academic, it is not proper to hear the petition and it should be denied. Notwithstanding these comments, the petitioners insist on pursuing their petition, and request that we decide with respect to their fundamental claims.

5. We have concluded that, in light of the statement of the respondents with regard to the intention to cease the demolition of houses, it is not proper at this time to hear the petition on its merits. Decision on the fundamental claims made by the petitioners is not necessary at the present time. Indeed, in light of the new situation in the field as declared by the respondents, the petition becomes academic, and is moot (see and compare, HCJ 6055/95, *Tzemach v. Minister of*

Defense, P. D. 53 (5) 241, 250; HCJ 10026/04, *Poalim A. B. A. – Underwriting and Securities Issues Ltd. v. Supervisor of Restrictive Practices* (not reported)). It appears that cessation of house demolitions in the area is part of the respondents' overall policy. For this reason, too, we denied another petition (HCJ 7733/04, *Nasser v. Commander of IDF Forces in the West Bank* (not reported)), in light of the announcement of the respondent there that the military commander decided to refrain from using his power under section 119 of the Emergency Defense Regulations of 1945, and did not intend to demolish houses (that were not incidental to military activity) for the purpose of deterring potential terrorists. But it is understood that denial of the petition here does not deny any of the petitioners' claims, and they reserve all their claims should they decide to file another petition, if the respondents' policy declared before us in the framework of this petition should change.

The petition is denied. No order for expenses.

The President

The Vice-President M. Cheshin:

I concur.

The Vice-President

Justice D. Beinisch:

I concur.

Justice

Decided as stated in the judgment of the President A. Barak.

Given today, 6 Tammuz 5765 (13 July 2005).

The President

The Vice-President

Justice