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לביב ג. חביב, עו"ד

ענאן מ. עודה, עו"ד

Jerusalem, October 17, 2015

To:

Commander of Military Forces in the West Bank
Via Public Liaison Office
Central Command

By e-mail and fax

Dear Sir,

Re: Objection with respect to the home of _____ Haj Hamed, ID No.

On behalf of members of the family of the individual named above, whom I represent on behalf of HaMoked: Center for the Defence of the Individual, I hereby file an objection to the intent to seize and destroy the family home of the above named individual:

1. The family of the individual in reference has received notice of your intent to seize and demolish the house wherein _____ Haj Hamed lived in Nablus, pursuant to Regulation 119 of the Defense (Emergency) Regulations – 1945, on the grounds that the above named individual “had taken action to commit a terrorist attack on October 1, 2015, in which he caused the death of the late Mr. and Mrs. Henkin, by gunfire”.

Flawed, void notice

2. We wish to note at the opening of this objection that the notice you have provided is not clear. The Arabic section of the notice notes that the intent is to demolish the bottom floor, while the Hebrew section of the notice notes that the intent is to demolish the first and second floors. This contradiction on a substantive issue that renders the notice void. It negates my clients' right to plead their case and impedes my clients' right to mount a defense against the intent to demolish the home. Therefore, the notice must be revoked owing to the substantive flaw therein. For the sake of caution alone, below we present arguments in support of the objection to the intent to demolish the home, wherein, subsequent to making your intentions clear, you are required to provide me with additional time to make supplementary arguments with respect to the location of the home.
3. **We wish to note, at this early stage, that said home must come to no harm while proceedings regarding the intent to demolish and seal it are underway. Moreover, we hereby give notice of our intent to challenge the intention to seize and demolish said home before the Supreme Court. We must be given a reasonable amount of time to prepare and file the petition, without any harm done to the home in the interim.**
4. The time provided for filing an objection, which mostly fell on the weekend, was insufficient for collecting information and documents, visiting the home if necessary and preparing an objection. **On this matter, we ask that you postpone your decision on the objection in order to allow us to conduct a thorough investigation and collect documents.**
5. **Should my objection be rejected, I hereby give notice that we intend to file a petition to the Supreme Court. To this end, I request to be given enough time, several business days at least. I truly hope that there will be no need to file a petition with the High Court of Justice simply in order to get reasonable time to file the main petition.**

Missing information:

6. Additionally, we wish to inquire at this early stage, how you intend to execute the demolition and the reason for choosing this method, whether the possibility of collateral damage has been taken into account and whether there is any intent to compensate nearby houses in case they are damaged as a result of an ostentatious demolition.
7. Along with this objection, we request to be provided with a detailed account of the actions attributed to the suspect, his alleged role in the offense committed and the investigative material that supports the allegations. We reserve the right to make arguments with respect to this matter subsequent to receiving said material.
8. The building in question has four stories, with a separate unit on each floor. The building is owned by the mother Hyam, and the remaining occupants lease their units. It is not clear which floor is slated to be harmed. As stated, you are requested to clarify this issue and allow for supplementary arguments.

Collective punishment:

9. There can be no doubt that the demolition of the family home is a calculated measure of collective punishment and harm to innocents. It is all the more so given that the individual in reference is a tenant rather than the owner of the building.
10. As such, the demolition constitutes a breach of international humanitarian law which prohibits collective punishment (Art. 33 of the Fourth Geneva Convention) and the prohibition against damage to and destruction of private property under Art. 46 of the Hague Regulations and Art. 53 of the Fourth Geneva Convention. The demolition of the home also constitutes a severe violation of the family's dignity and their right to an adequate standard of living and to housing.
11. Your alleged objective at the time the decision to demolish the home does not alter the nature of this measure or its impact on the family.
12. It is no coincidence that the power to demolish family homes is found in the Emergency Regulations, regulations that have long since been obsolete, passed into law in 1945, in the previous century, during mandatory rule, near the end of the World War II. This power belongs in a different era, a bygone era. It is time that this relic also passes from this world, just as most of the other Emergency Regulations have been revoked.
13. Jewish law also unequivocally forbids harming innocents:

Far be it from you to do such a thing—to kill the righteous with the wicked, treating the righteous and the wicked alike. Far be it from you! Will not the Judge of all the earth do right?"
(Genesis 18:25)

Even if the language of Regulation 119 allows such a thing, to harm innocents just for the sake of putting fear into the hearts of others, the military commander must interpret the power the regulation grants and use it in the spirit of this dictum. This matter was addressed in the jurisprudence of this Honorable Court, by Honorable Justice M. Cheshin:

We have known and repeated this fundamental principle since our very beginnings: each shall bear his own transgressions and each shall die for his own sins. As the prophet said: "The one who sins is the one who will die. The child will not share the guilt of the parent, nor will the parent share the guilt of the child. The righteousness of the righteous will be credited to them, and the wickedness of the wicked will be charged against them" (Ezekiel 18:20). There shall be no punishment without warning and none but the offender shall be smitten. This is Jewish law and so it is written: "Parents are not to be put to death for their children, nor children put to death for their parents; each will die for their own sin" (2 Kings 14:6).

Ever since the establishment of the State – certainly since the enactment of Basic Law: Human Dignity and Liberty we shall read into the provisions of Regulation 119 of the Defense Regulations – read into it and embed into it – values that are our own, the values of a Jewish, free and democratic state.

These values will lead us straight to our people's olden days, and our days are as those days: They shall say no more the fathers have eaten sour grapes and the children's teeth are set on edge.

HCJ 2006/97 Abu Farah Ghneimat et al. v. GOC Central Command, IsrSC 51(2) 651, 654-655.

Proportionality:

14. Without prejudice to the objection-in-principle to the demolition of the home, as stated in the objection herein, we request that inasmuch as a decision is made to take this measure, the least injurious option is chosen.
15. The principle of proportionality applies to the exercise of power under Regulation 119. This principle requires selecting the least injurious of the available options..

The demolition of the home will serve no purpose:

16. In any event, and even if this injurious, inhumane act, can be justified in the name of some benefit that will come of the demolition, an "ends justifies the means" scenario, here, the game is not worth the candle: **In 2005, the Minister of Defense accepted the recommendations of a Chief-of-Staff appointed committee to halt house demolitions as they had not been proven as an effective deterrent and as the harm they caused outweighed their benefit.**
17. There is no need for experts and committees to see that such harm, harm that leaves children and families homeless, can only exacerbate frustration, amplify feelings of despair and anger and fuel the cycle of hate among the affected population

Discrimination:

18. The family of Ami Popper, who killed innocent laborers, did not hasten to leave its home, as such a sanction never hung over its head. The Goldstein family, though residing in the OPT, never considered looking for alternate housing after its son massacred dozens of worshippers (and, on this issue, the matter of his **headstone**, was handled with surgical restraint). The cell of Jewish civilians who planned to hide explosives in an educational institution in Jerusalem, and conspired to carry out other attacks, required no special measures, other than being put on trial. The persons who burned the youth Muhammad Abu Khdeir never evacuated their home for fear it would be demolished. The individuals who burned the Dawabsheh family have not even been arrested.
19. The authorities have been known to use restraint with respect to the "deterrent measures" at their disposal even in grievous cases that cried out for deterrence, and avoid harming innocents. This path should be followed in the matter at hand as well.

20. The fact that the measure of house demolitions has never been used against Jewish families, either in Israel or in the OPT, amplifies the frustration, the sense that discrimination is at play and the feeling that this harm, directed at innocents, is reserved for Palestinians only.

The allegations against the detainee:

21. As far as the family is aware, ____ Haj Hamed has been under interrogation by the Israel Security Agency ever since his apprehension, and has been denied counsel. We have no information regarding the investigation, the interrogatee's version or any details regarding the alleged role he played in committing the offense. Your decision to take this measure against the family home is premature given that it was made even before the investigation had ended, let alone an indictment or a conviction.
22. Using the sanction at this stage, before the court rules on the guilt of the persons involved, before an indictment is served, before the investigation concludes, before the evidence against him is revealed - his role in affair, the circumstances under which the offense was committed, etc., is a breach of basic principles of justice, whereby a person is innocent until proven guilty.
23. Harming the house at this stage also constitutes a breach of the principle of the separation of powers and may send a message that the judicial proceedings in the detainee's case are for the sake of appearances only, and that his guilt has been determined even before the court has made its ruling.
24. What would the commander's position be if, after the harm to the house, it turns out that the court acquitted the detainee, or ruled that he played a minor role in the offense, which, in our legal system, is a distinct possibility?
25. Such an administrative measure can be left for later, pending the end of proceedings. For instance, HCJ 2/97 and 11/97, Najah Halaweh et al. v. GOC Home Front Command TakSC 97(3), 111, concerned harm to homes in **Jerusalem** only after the suspects had been convicted. As noted in the opening paragraphs of the judgment:

Following the conviction of the persons involved in terrorist attacks (emphasis added, L.H.), on December 29, 1996, the GOC Home Front Command (Respondent 1) issued orders for the seizure and sealing of dwellings wherein the Petitioners reside.

26. It appears that this power may be exercised without the need for a judicial decision and at this stage only in cases in which it is impossible, or very difficult to bring the offender to justice. However, once a suspect is apprehended, the criminal process must be exhausted and no parallel measures should be taken against the suspect.
27. It is better to take the high road and wait until a judgment is given, or, at least, until an indictment is served, in the absence of serious issues that compel a departure from this principle.

28. Even according to the rulings of the Honorable Court, it has been ruled that taking administrative measures prior to a judicial decision is rare and exceptional under general legal rules. HCJ 518/78 Daniel Avrhami v. Minister of Transportation et al., IsrSC 32(3) 675, concerned the power of an administrative authority to revoke a driver's license prior to a conviction. The court examined the language of the regulation and ruled as follows:

The judgments on which Ms. Naor relied do not support her arguments. Indeed, it has been ruled, more than once, and recently in the aforesaid HCJ 338/77, wherein the bench, by a majority of three to two, delivered a judgment that an administrative authority may use its punitive powers even without a criminal conviction being entered beforehand. However, all the cases in which this was the ruling concerned statutory provisions that did not state, as Regulation 264 states, that the condition for using the power is evidence available to the authority that the person had 'committed an offense'. Therefore, these judgments have no bearing on the matter at hand. On the other hand, the judgment given in FH 13/58 (Tel Aviv Jaffa Municipality vs. Yosef Lubin, IsrSC 13 118, 125; IsrLab 38 6) (the matter of Tel Aviv Municipality v. Lubin) does lend some support to the argument made by the Petitioner. It is true that this judgment cannot serve as a direct authority in the issue at hand, as it did not concern the revocation of a license by the issuing authority, but rather harm to a person's property by way of seizing same, but the arguments for the majority ruling given in that case, are relevant to the case at hand as well. In that case, it was ruled that the enforcer may not confiscate pork meat without a judicial process, despite the fact that the empowering section of the law does not mention a legal proceeding as a condition for confiscation. The majority opinion in FH 13/58 which was primarily articulated in the judgment issued by Justice Landau, centered on the fact that allowing an administrative confiscation prior to an offense is an exception in terms of general legal principles.

The above quoted FH 13/58, Tel Aviv Yafo Municipality v. Yosef Lubin, IsrSC (13) 118, 125, concerned the administrative confiscation of property prior to a judicial decision. It was ruled that the administrative power must not be exercised, when it comes to harm to property, prior to a judicial decision, despite the fact that the relevant section of the law does not make confiscation conditional upon a judicial proceeding:

And now, think just how exceptional the interpretation seeking to allow administrative confiscation prior to an offense is in terms of general principles. This was explained in the majority opinion in the first hearing, and I need not but summarize it: this interpretation allows for confiscating property without prior judicial review, either by a court or some other judicial instance, and certainly not by the local authority or the enforcer, since, as the President notes... the relevant law does not give local authorities the power to interrogate people or force them to answer its questions or the questions of its enforcers. However, the interpretation does

subject the power to confiscate to facts that are not at all simple, in terms of the holder's mental state... the surrounding circumstances, the determination that the goods are in fact pork meat or a pork based food (and the sausage proves these evidentiary difficulties). All this is augmented by the fact that the by-law seeks to give enforcers the power to decide all this, without requiring any training for this role. Given all this, with all due respect, I join the remarks of the President that "This is an extremely rare case in legislation and one that is very difficult to accept in terms of legal thought.

29. The two conditions, that separately justified delaying use of administrative powers pending a judicial decision in the cases above are present in our case as well. First, the case at hand also concerns harm to property and proprietary rights, not just in the suspect's case, but also in the case of his family members. Second, the language of Regulation 119 and an internal comparison of its content also supports this outcome. As stated:

... or any structure or land... whose occupants were revealed to have breached or attempted to breach these regulations, a breach involving violence or terrorization or an offense adjudicated by the military court.

30. In conclusion, your notice must be revoked due to the fact that it conceals more than it reveals, that there is no effective defense against it given that it does not clarify which home is slated for demolition, the first, the second or the third. Alternatively, this action is a disproportionate, prohibited breach of international law, which constitutes collective punishment. The benefit to be gained by this action has not been proven and its harm outweighs its benefits. It is a discriminatory sanction reserved for Palestinians only. The suspect has not yet been convicted. He and his family cannot be punished before an indictment is served against him and before he is convicted.

31. In light of all the aforesaid, we request that you do not seize and demolish the home.

Sincerely,

Labib Habib, Adv.