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[seal]  
**The Courts**

**At the Jerusalem Magistrates Court**  
**Before: Honorable Justice Irit Cohen**

**Civ. 007798/047**  
**Date: June 21, 2009**

In the matter of:

1. Estate of \_\_\_\_\_ Odeh, deceased
2. \_\_\_\_\_ Odeh
3. \_\_\_\_\_ Odeh
4. \_\_\_\_\_ Odeh
5. \_\_\_\_\_ Odeh
6. \_\_\_\_\_ Odeh
7. \_\_\_\_\_ Odeh
8. \_\_\_\_\_ Odeh

represented by counsel, Adv. Leah Tzemel and/or  
L. Hleihel et al.

**The Plaintiffs**

v.

**State of Israel**

represented by Tel Aviv District Attorney – Civil

**The Defendant**

## **Judgment**

1. The Plaintiffs are the estate and heirs of \_\_\_\_\_ Odeh, deceased, who was killed by shells and shell shrapnel fired by IDF helicopters in the 'Askar Refugee Camp in the Nablus district (Plaintiff, para. 2 of affidavit). The Plaintiffs further claim that the Deceased was killed as a result of exclusive negligence and/or lack of care and/or recklessness on the part of the Defendant, *inter alia*, due to the fact that the shelling was carried out in contravention of the open fire regulations in circumstances in which there

was no danger to life and limb, in breach of the safety instructions relating to the use of shells and while refraining from using less extreme measures.

2. The Defendant argued that it must not be held liable as the action in question was a “wartime action”. In addition, the Defendant denied that the Deceased was killed by IDF shell fire.
3. The Plaintiff herself and her son, \_\_\_\_\_ Odeh, testified for the Plaintiffs.

The Plaintiffs also called Mr. Shalom Vaaknin, Claims Department Manager with the Ministry of Defense and Oren Tzabari of the central command.

The following witnesses testified for the Defendant: Colonel Ofek Buchris, who, at the relevant time, served as a battalion commander in the brigade that operated, *inter alia*, in the ‘Askar Refugee Camp during Operation “Defensive Shield”, Major H., who served as an officer in the brigade operating in the ‘Askar Refugee Camp and Mordechai Havakuk, Head of Air Force History and Information.

The Defendant filed a public servant statement by Ms. Michal Tzur, IDF Archive Director.

Parties sought to have Dr. al-Karini, the physician who treated the Deceased after he was injured, testify. However, following two sessions to which the witness was summoned but failed to appear, Parties forwent his testimony.

#### **The circumstances of the incident**

4. The Plaintiffs declared that on April 16, 2002, at 2:20 AM, or at some time near that time, the Deceased went up to the roof of the house in order to examine the water tanks (para. 6(a) of the Plaintiff’s affidavit; para. 8(a) of the affidavit of \_\_\_\_\_ Odeh). According to the Plaintiff’s affidavit, the Deceased went up to the roof after she pointed to him that there was no water coming from the tap (para. 6(a) of the Plaintiff’s affidavit).

A few minutes after the Deceased went to the roof, the sound of a helicopter hovering in the air was heard, as well as the sounds of shelling, a powerful explosion and the Deceased’s cry (Plaintiff, para. 6(b) of the affidavit; para. 8(b) of the affidavit of \_\_\_\_\_ Odeh).

The Deceased’s sons \_\_\_\_\_ and \_\_\_\_\_ went up to the roof to see what had happened (Plaintiff, para. 6(b) of the affidavit; para. 8(b) of the affidavit of \_\_\_\_\_ Odeh). The Plaintiff stated that she followed her sons (para. 6(c) of her affidavit).

5. The Plaintiffs’ testimonies that the Deceased was hit by shots fired from the helicopter are supported by logs T/1 and T/5. Log T/1 includes the following entry: **“Pursuant to a request by the Red Cross, the District Coordination Office coordinated the evacuation of a Palestinian who was severely injured in the ‘Askar area”**. Similar information appears in log T/5. The fact that there is no testimony of any other shooting carried out at the time supports the Plaintiffs’ testimony that the Deceased was killed as a result of the helicopter fire.

#### **Is this a wartime action?**

6. Section 5 of the Civil Wrongs (State Liability) Law 5712-1952 stipulates that the state is not liable for damages incurred as a result of a wartime action.

7. According to the Plaintiffs, the action in question was a planned operation by security forces for the purpose of arrests. Security forces encountered no unusual activity, faced no danger, suffered no harm and ultimately succeeded in apprehending a number of suspects. On this issue, counsel for the Plaintiffs referred to Operation Log T/2, which includes the following entry: **“06:50, IDF force, in a planned action, took positions around the camp, assault helicopter gun ---- was carried out at suspected Palestinians. Searches uncovered an explosive device”**.

According to counsel for the Plaintiffs, suspect arrests do not come under the terms of “wartime action”.

8. The testimonies reveal that the action in the “Askar” camp was part of Operation “Defensive Shield” (Col. Buchris, p. 23 of the transcripts). When asked what the purpose of the action was and whether it was a planned operation, Col. Ofek Buchris replied: **“Yes. We went through all the terrorist hubs and the purpose was to purge the terrorist hubs, locate terrorists and arrest them or harm them and to stop terrorist infrastructure and damage it”** (transcripts, p. 30). According to his affidavit, the ‘Askar camp action was part of an operation that had begun earlier for purging terrorist hubs housing terrorists who had launched massive attacks against soldiers on that day and on preceding days (para. 3 of the affidavit). The action was largely carried out through house to house warfare which posed a real danger to the soldiers at any given moment (Buchris, para. 3 of the affidavit).

Major H. stated that combat in the Nablus area, as in the Jenin area, during Operation Defensive Shield was real combat and its nature compelled the forces to enter almost every house in order to purge terrorist hubs, which fired from almost every single home (Major H., para. 4 of the affidavit).

Under cross examination, Major Buchris explained: **“This operation was not a sole operation. It was part of a series of operations which was part of Operation Defensive Shield, which was, in fact, a war”** (transcripts, p. 23).

9. The testimonies reveal that a number of units, all from the Golani Brigade, participated in the action in the ‘Askar refugee camp (Col. Buchris, transcripts, p. 30). Helicopters accompanied the units from the air during the action (Col. Buchris, transcripts, p. 30). The helicopters were called only when gunfire sources posing a real and present danger to the forces were identified with certainty (Buchris, para. 8 of the affidavit, Major H., para 5 of the affidavit). Shots were fired from the helicopters only toward streets and intersections where these gunfire sources were identified (para. 8 of the affidavit of Buchris).
10. The Plaintiffs’ testimonies also indicate the extent of the military operation. The Plaintiffs stated that at the time of the incident, security forces were present at the edge of the camp, some 500 meters from the house (Plaintiff, para. 7(c) of the affidavit; \_\_\_\_\_ Odeh, para. 9(g) of the affidavit) and that soldiers and tanks were present on the camp’s main street (para. 6(g) of the affidavit).

According to the Plaintiff’s affidavit, the helicopter continued to shell when she and her sons went up to the roof (para. 6(d) of the Plaintiff’s affidavit).

The Plaintiff denied that a curfew was imposed on the camp prior to the incident (transcripts, p. 11). The son, \_\_\_\_\_, also denied that there was a curfew (transcripts, p. 18). However, the testimony of Dr. al-Karini, the physician who treated the Deceased after he was injured, indicated that he did not agree to come to their home since he anticipated more casualties (transcripts, p. 18).

11. The evidence shows that this was a planned operation for the purpose of undercutting terrorist infrastructure, that it was part of Operation “Defensive Shield” and that ground troops and helicopters participated therein. This operation is a wartime action.

In ‘**Ajuri**, (HCJ 7015/02 **Ajuri v. IDF Commander**, [2002] IsrLR) Barak referred to “Defensive Shield” as follows:

In its struggle against terrorism, Israel has undertaken — by virtue of its right of self-defence — special military operations (Operation “Protective Wall” [Defensive Shield - translator] which began in March 2002 and Operation “Determined Path” which began in June 2002 and has not yet ended). The purpose of the operations was to destroy the Palestinian terrorism infrastructure and to prevent further terrorist attacks. In these operations, IDF forces entered many areas that were in the past under its control by virtue of belligerent occupation and which were transferred pursuant to agreements to the (full or partial) control of the Palestinian Authority. The army imposed curfews and closures on various areas. Weapons and explosives were rounded up. Suspects were arrested. Within the framework of these operations, many reserve forces were mobilized; heavy weapons, including tanks, armoured personnel carriers, assault helicopters and aeroplanes, were used.

In CC (Haifa District) 1081/04 **A. v. State of Israel** (reported in Maagarim, March 18, 2009), the Court held the following with respect to a targeted killing:

The action which is the subject of this claim is a planned operation carried out by the IDF in order to prevent terrorist attacks by the wanted person who was a senior member of a terrorist organization and had been engaged in terrorist activity in the past. The risk he posed and his intention to continue to engage in terrorism were, as stated, known to State security officials. The action was carried out by way of an air strike using aircrafts and missiles, measures that are commonly used during a war rather than during policing activities. The action was carried out in the context of an armed conflict in which the State was engaged, during a period of rampant terrorism against the country’s citizens and soldiers. The characteristics of this action come under the terms of “wartime action” as it existed prior to the amendment of the Law and certainly thereafter.

In CC (Kfar Sava) 5042/03 **Estate of the Deceased Yasin Murtaja et al. v. Ministry of Defense** (reported in Maagarim, September 28, 2008), the Court held that a planned military action designed to harm a terrorist which was carried out via air strike constituted a wartime action. In the same judgment, the Court held that there is no doubt that a bombing by an assault military aircraft is a military action undertaken by the military due to war.

In CC (Haifa, Magistrates) 5016/05 **Ihsan Matar Balbar et al. v. State of Israel** (reported in Maagarim, December 6, 2007), the Court held that the firing of missiles by air force planes is a clear wartime action which the legislature sought to make immune from legal action.

12. In light of the provision contained in Sec. 5 of the Civil Wrongs (State Liability) Law 5712-1952 and in light of the conclusion that the action in question constitutes a wartime action, the claim must be rejected.

13. The Plaintiffs shall pay the Defendant's legal fees and trial costs to a total sum of 15,000 shekels.
14. The Plaintiffs in this case have deposited a guarantee against the Defendant's costs.  
The deposited amount shall be transferred to the Defendant.

**Given today, 29 Sivan 5769 (21 June 2009) in Parties' absence.  
The secretariat shall provide parties' counsel with copies.**

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Irit Cohen, Justice