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At the Supreme Court
Sitting as the High Court of Justice

HCJ 7219/15

In the matter of:

1. _____ **Abu Jamal, ID No. _____**
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**
Both represented by counsel, Adv. Andre Rosenthal, License No. 11864
15 Salah a-Din St., Jerusalem
Tel: 02-6250458, Fax: 02-6221148; cellular: 050-5910847

The Petitioners

v.

GOC Home Front Command
Represented by the State Attorney's Office
Ministry of Justice, Jerusalem

The Respondent

Petition for Order Nisi and Interim Order

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause, why he should not revoke the seizure and demolition order which was issued against the home in which lived the perpetrator _____ Abu Jamal, who committed a ramming and stabbing attack in Jerusalem on October 13, 2015;

As an interim relief, the honorable court is requested to direct the respondent or anyone on his behalf to refrain from causing damage to the house being the subject matter of this petition in any manner whatsoever until judgment is given.

In addition, the honorable court is requested, in the event that an *order nisi* is not granted and the petition is denied, to direct the respondent to give the inhabitants of the house - the perpetrator's wife and three children – forty eight hours for the purpose of removing their personal belongings there-from.

Fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers; a person shall be put to death for his own wrongdoing.' So we are taught in the Book of Deuteronomy (24;16[b])

The Honorable Justice Cheshin in HCJ 2722/92 **Alamarin v. Military Commander of IDF Forces in the Gaza Strip**, paragraph 7 of the judgment (reported in Nevo website).

The grounds for the petition are as follows:

1. Petitioner No. 1 is the wife of the perpetrator _____ Abu Jamal, who committed a ramming and stabbing attack in Jerusalem on October 13, 2015. She lives with her three children in a one story house in Jabal Mukabber neighborhood. The house consists of one bedroom, a hall which is used as a living room, a dining room and a sleeping area which was used by the perpetrator, a bathroom and a kitchen.

Petitioner 1's affidavit is attached and marked **P1**.

2. Petitioner No. 2 is a human rights association which has taken upon itself, *inter alia*, to assist Palestinians, victims of cruelty or deprivation by state authorities, including by protecting their status and rights before the authorities, either in its own name as a public petitioner or as counsel for persons whose rights have been violated.

3. **A.** On October 22, 2015, respondent's notice of his intention to seize and demolish the house was given. A 48 hour extension was given for the submission of an objection, should the inhabitants of the house wish to do so. The submission date of the objection was scheduled for Saturday, October 24, 2015, at 13:00.

A copy of the notice is attached and marked **P2**. (The quality of the photograph corresponds to the original, A.R.).

B. On Saturday, October 24, 2015, the objection was submitted. Among other things it was noted that:

5. In the matter of _____ Abu Jamal, who decided to commit the attack on October 13, 2015, he undoubtedly knew that his chances of staying alive after the attack were zero to none and that in addition, his wife and three children will have to depend on the mercy of family members since their home would be most probably demolished. As you know, the homes family members of the perpetrator were demolished on October 6, 2015 and he himself witnessed the demolition. There is no doubt that in the case at hand, the argument that house demolition prevents the next attack cannot be heard.

A copy of the objection is attached and marked **P3**.

C. On October 25, 2015, on or about 19:00, respondent's response to the objection was given. Along with the denial of the objection, notice was given that the respondent intended to carry out the seizure and demolition on October 27, 2015, at 12:00. The petitioners protest against respondent's attitude to the legal proceeding: the objection submission date was scheduled by him for 13:00 o'clock, Saturday, and less than 48 hours were given by him to the petitioners to decide whether they wanted to file a petition, to prepare the petition and file it with this honorable court.

A copy of the response is attached and marked **P4**.

The Legal Argument

4. **A.** The petitioners argue that the use of Regulation 119 of the Defence (Emergency) Regulations (hereinafter: the Defence Regulations, 1945) is patently unreasonable and the intervention of this honorable court is required. We are aware of the long standing judgments which held that notwithstanding the revocation of the Defence Regulations, 1945, by Great Britain before it left Palestine-Israel, such revocation was not valid. Amendment No. 4, which added section 11A to the Law and Administration Ordinance, 5708-1948, for "the removal of doubts with respect to section 11 of the Law and Administration Ordinance, 5708-1948", official gazette No. 2, May 21, 1948, Addendum A, page 1, defined the term "hidden law". The petitioners argue that said amendment has a retroactive effect; which is contrary to basic principles of the rule of law. The "Palestine (Defence) Order in Council, 1937" was revoked.

Had the Knesset wanted to revive the Defence Regulations, 1945, it should have done so explicitly.

B. In H CJ 703/15 **Darwish v. Home Front Command**, the court adopted respondent's argument and held:

12. The state's response concerning the Mandatory Revocation Order is acceptable to us; it is clearly a hidden law which therefore has no effect; even if certain things were not published in the Mandatory official gazette due to the security situation which existed towards the end of the British Mandate, the reasonable interpretation is that there was no intention to revoke a significant law in this manner, but rather various technical notices.

The petitioners argue that a careful study of Regulation 4(1) of the Defence Regulations, 1945, leads to the conclusion that "any document purporting to be an instrument (whether legislative or executive)..." cannot refer to "various technical notices". The interpretation of Regulation 4(1) refers also to the revocation or another act of the "legislator".

Regulation 4(s) stipulates: "It shall not be necessary to publish any emergency document in the Gazette."

C. In conclusion: a revocation took place and the revocation was not published in the official gazette at that time. The addition of section 11A of the Law and Administration Ordinance, 5708-1948, in Amendment No. 4, had a retroactive effect and is thus contrary to principles of the rule of law.

In addition, even according to the Defence Regulations, 1945, themselves, Regulation 4 relinquishes publication of anything which is related to the Regulations themselves.

5. The petitioners argue that the ruling of the honorable court according to which the objective of Regulation 119 is to "deter others", is contrary to basic principles of applicable Israeli law and to the rule of law.
 - A. A special section was dedicated by the Penal Law, 5737-1977, to the term "deterrence of others" in section 40G thereof. The section enables the court, while sentencing an offender who was convicted of an offence, to add the "deterrence of others" element and consider it together with other sentencing guidelines. In other words, the "deterrence of others" element may be used only after the court convicted the accused and found him guilty.

Petitioner 1, the perpetrator's wife and his children are not guilty.

- B. Reference is made to CrimApp 99/14 **State of Israel v. Melisron Ltd.** where it was held – with respect to the meaning of the term "deterrence of others", as follows:

108 However, on the hand, I think that the district court did not give enough weight to such deterrence considerations, while it has not taken into account the need to deter others (paragraph 22 of the judgment); the court is required to take a harder line due to the deterrence of others beyond the range, but section 40G of the Penal Law concerns a more severe sentencing within the established range. As I have noted in a similar context:

As far as I am concerned, whoever thinks that deterrence of others, possibly as distinct from the deterrence of the individual, is effective, as a general rule, in the 'classic' offenses of murder, robbery and rape, assault and such other similar offenses (see CrimApp 7534/11 **Mizrahi v. State of Israel** [reported in Nevo] (2013) paragraph C to my opinion), may think that it has a chance in economic offenses, and in any event in 'white color' offenses. A person who plans – or should we say 'concocts' – offenses, and hears that he may be sentenced to prison, may think twice... as aforesaid, it seems that in the case at hand a deterring penalty was designed to deter not only the appellant himself from a forward looking perspective, but rather, and not less importantly, others, and mainly – as pointed out by the district court – those who hold senior positions in corporations, so that they shall not betray the trust put in them. Precisely basically normative people who plan their actions may include in such 'planning' the risk of having criminal charges pressed against them (**Dankner**, paragraphs 38-39).

- C. In the case at hand, as noted above, the seizure and demolition of the homes of the perpetrator's relatives, which were carried out in his presence on October 6, 2015, did not deter him.

6. Reference is made to the minority opinion of the Honorable Justice Vogelman in H CJ 5839/15 **Sidr v. Military Commander of IDF Forces in the West Bank**, in paragraph 2 of his judgment:

... my own opinion would have lead me to the conclusion that the exercise of the authority under Regulation 119 when no sufficient proof has been provided that the family of the suspect was involved in hostile activity – is disproportionate. The lack of proportionality is due to the fact that there is no proper relation between the measure chosen – house demolition – and the gain achieved there-from. In other words: even if we assume that the demolition of the house is effective in realizing what has been identified as the goal of this regulation – deterrence – the consequences of the action are not comparable to the gain embedded therein.

7. Reference is made to the words of this honorable court in H CJ 5100/94 **Public Committee Against Torture in Israel v. State of Israel et al.**, (reported in Nevo):

39. This decision opens with a description of the difficult reality in which Israel finds itself security wise. We shall conclude this judgment by re-addressing that harsh reality. We are aware that this decision does not ease

dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand, since the preservation of the Rule of Law and the recognition of an individual's liberty constitute important components of its security concept. By the end of the day, they strengthen its spirit and its strength and enable it to overcome its difficulties.

8. Therefore, in view of all of the above, the honorable court is requested to issue the requested orders and after hearing the arguments of the parties, make them absolute.

Jerusalem, today, October 25, 2015.

(signature)

Andre Rosenthal, Advocate
Counsel to the petitioners