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At the Supreme Court
Sitting as the High Court of Justice

H CJ 8150/15

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., P.O. Box 19405, Jerusalem 91194
Tel: 02-6250458, Fax: 02-6221148

The Petitioners

v.

GOC Home Front Command
Represented by the State Attorney's Office

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 decided to seize and seal the housing unit of _____ Abu Jamal;

In addition the honorable court is hereby requested to order the respondent to disclose the sources based on which he decided where _____ Abu Jamal lived prior to October 13, 2015, the date of the attack;

Alternatively, the respondent is requested to show cause why he should not be satisfied with the sealing of _____ Abu Jamal's room instead of having the entire floor sealed, in view of the convoluted manner taken by him to revoke a previous order, the subject matter of H CJ 7219/15 as will be clarified below.

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 ground floor of the home of the Abu Jamal family in any manner whatsoever.

A copy of the seizure and sealing order is attached and marked **P/1**.

The grounds for the petition are as follows:

1. **A.** Petitioner No. 1 is the father of _____ Abu Jamal who carried out an attack in Jerusalem on October 13, 2015. As a result of the attack one Israeli citizen was killed and two citizens were wounded.

B. _____ Abu Jamal, married and father of three, worked as a technician in "Bezeq" and was a relative of Jassen Abu Jamal (whose home was the subject matter of HCJ 8066/14) and of Odei Abu Jamal (whose home was the subject matter of HCJ 8070/14).

The sealing-off of one of these two houses and the demolition of the other were approved by the honorable court. _____ Abu Jamal witnessed said demolitions; He was certainly aware of the ramifications and almost inevitable consequences of his actions – death and demolition of his family home.

C. Since shortly after his marriage _____ Abu Jamal lived in a single story structure which is adjacent to the three story family house.

Petitioner's affidavit is attached and marked **P/2**.

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.** As aforesaid, on October 13, 2015 the attack was carried out. According to respondent's response to the objection which was submitted in the case at hand, on the same date the security forces visited Abu Jamal's home. A neighbor whose identity is unknown and the documentation of whose conversation with the security agencies was not transferred, pointed at the ground floor of the three story building as the _____ Abu Jamal's place of residence. The inhabitants of the house were not present. The petitioners do not have any documentation – memoranda, photographs or videos – of this visit.

B. On October 15, 2015, as indicated by respondent's response to the objection, _____ Abu Jamal's brother was interrogated. A copy of said interrogation has not been transferred to the petitioners either.

C. On October 19, 2015, as indicated by respondent's response to the objection, the security forces visited the separate structure. As indicated by paragraph 3(d) of the response – "...in the separate structure a picture of the perpetrator was found on the wall near the entrance to the structure, 2-3 beds were found in the bedroom and a box with electronic equipment was found in the living room. Other than that, the structure was vacant of any equipment and furniture."

No documentation of said additional visit was transferred.

D. Notice of intention to seize and demolish the separate structure was given to the Abu Jamal family on October 22, 2015.

E. On October 24, 2015, Saturday, the objection on behalf of the petitioners was submitted.

F. On October 25, 2015, the respondent denied the objection.

G. On October 27, 2015, a petition was filed with this honorable court in HCJ 7219/15 against the seizure and demolition of the separate structure.

H. On that very same day an interim injunction was granted which prohibited to demolish the structure. In its decision the honorable court stipulated that the hearing in the petition would be held on November 5, 2015.

I. On November 3, 2015, respondent's counsel, Adv. Segal-Elad notified that the respondent revoked the order under Regulation 119 of the Defence (Emergency) Regulations, 1945, and requested an order for costs. Several photographs were attached to the notice. The date on which the photographs were taken was not mentioned. A copy of the collection of said photographs is attached and marked **P/3**. The petition was denied; No order for costs was given.

4. On November 3, 2015, "amending notice of the intention to seize and demolish the structure in which lived _____ Ali Abu Jamal" was delivered to petitioners' counsel. An extension was granted until November 5, 2015, 08:00 to submit an objection. On November 4, 2015, petitioners' objection was submitted against respondent's intention to seize and seal the ground floor of the three story building in Jabel Mukaber which belongs to the Abu Jamal family.

A. In the objection the petitioners argued that it would be difficult to argue in the case at hand that the declared purpose of Regulation 119 was to deter others, taking into consideration the fact that _____ Abu Jamal witnessed the demolition and sealing-off of the homes of his family members, months after the attack which was carried out by them. The attack in 2015 was carried out by _____ Abu Jamal only one week after he had watched the demolition of the home of his family member, Jassen Abu Jamal.

B. In the objection the petitioners explained why certain items were found in the ground floor of the house, which according to the respondent, attested to the fact that _____ Abu Jamal lived over there rather than in the separate structure.

C. As specified in respondent's notice which was submitted in the framework of HCJ 7219/15 the circumstances were as follows:

1. When the military broke into the apartment of the sister Safaa – on the ground floor of the three story building – on October 13, 2015, the inhabitants of the house were not present. The excellence certificate of _____ Abu Jamal which was granted to him by "Bezeq" was hanging, together with the pictures of the family's children, including the children of _____ and his sister Safaa, on the corridor wall. The photograph which was attached to respondent's notice in HCJ 7219/15 was taken while the certificate was lying on the carpet on the floor, and was not hanging on any wall.

2. A bunk bed of Saffa's two daughters was found in the children's room in the apartment located on the ground floor.

3. About 4 pay slips in the name of _____ Abu Jamal were found in the apartment located on the ground floor. As indicated in the affidavit of his wife, Amal, her husband was not a particularly organized person and used to scatter his things around. Considering the fact that _____ Abu Jamal was a Bezeq employee for more than eight years and that only a few pay slips were found in the adjacent apartment of his sister rather than a stack of pay slips, and in view of the fact that his apartment – in the adjacent building – is small, the petitioners are of the opinion that the fact that 3 or 4 pay slips were found in that apartment does not constitute "proof", not even on the administrative level, that _____ Abu Jamal lived in the apartment.

4. In the entry closet to Safaa's apartment, on the ground floor, "Bezeq" equipment was found. Various pieces of equipment are still stored in the closet, including equipment which does

not belong to ____ Abu Jamal. _____'s apartment is small – a bedroom, living room, kitchen and bathroom. _____, like the other family members, used said entry closet.

5. The health fund card of _____'s eight years old son _____, Khatab, was found in the third drawer in Safaa's kitchen. Several days before October 13, 2015, the day of the attack, Khatab did not feel very well and had fever. His aunt, Safaa, took him to the health fund clinic; at that time the boy's mother, Amal, studied hairdressing in Al 'Eizariya, and therefore requested Safaa to take him to the clinic. It should be noted that it was the only health fund card of the members of ____ Abu Jamal's family which was found in Safaa's apartment.
 6. The petitioners argue that this evidence cannot sufficiently point, not even on the administrative level, at ____ Abu Jamal's place of residence, while the respondent wishes to use one of most extreme sanctions available to him. The balance of administrative evidence which is required in the case at hand – while balanced against the severe harm inflicted on the individual from the aspect of human rights, the right to own property and the right to dignity, as well as from the ethical, moral aspect, aspects of international law and the negative effects of encouragement to carry out revenge actions by Palestinians, must be such which does not leave room for a doubt as to the place of residence of the perpetrator.
 7. The facts specified above are supported by the affidavits of Amal Abu Jamal, the wife of _____ Abu Jamal and Safaa Abu Jamal, the sister of _____ Abu Jamal, which are attached and marked **P/4** and **P/5**.
5. The respondent, in his response to the objection of November 26, 2015, failed to respond to the above specified details and preferred to rely on "new information", as stated by him in paragraph 3(f). Said material was not transferred to the petitioners for their review and its sources were not specified, or, assuming that human sources are concerned, the relations between the source and the security agencies, its credibility or even an affidavit which verifies the allegations. A copy of the response is attached and marked **P/6**.
 6. According to the opinion of an engineer from "Modon – Real Estate Planning and Assessment" a copy of which is attached and marked **P/7** –

The execution of the sealing by the insertion of materials heavier than about 100 Kg/square meter, is expected to cause the ceiling of the floor underneath it to collapse and will consequently cause damage to the apartment below. In addition, consequently, a total collapse is expected which will damage the upper floor.

In other words, the sealing of the ground floor with cement will cause the entire building to collapse. Past experience shows that respondent's promises to refrain from causing damage to the entire building have no basis.

Deterrence

7. The respondent argued throughout the years that the purpose of Regulation 119 was to deter the public. A person, a Palestinian, who wishes to execute an attack, knows that should he carry out his intention the chances that he would die are almost certain, and that if a severe attack is carried out, the home of his family would be harmed – either seized and demolished or sealed. This purpose has only recently been reaffirmed by the honorable court in HCJ 7040/15 **Hamed v. The Military Commander of the West Bank**, after the court reviewed, *ex parte*, privileged material which had been submitted by the state to substantiate its argument.

The petitioners argue that in order to substantiate an educated decision regarding the gain of Regulation 119 in view of the incessant wave of violence which engulfs the state from its establishment, empirical data should be presented which compare between cases in which attacks were allegedly prevented, and cases in which their execution was rather encouraged.

Reference is made to the words of Prof. Mordechai Kremnitzer in meeting No. 342 of the Constitution, Law and Justice Committee of the 16th Knesset (December 6, 2004), in page 6:

It would be appropriate to check one more thing, and without this datum we do not have a real benefit balance, we have a bluff. I propose to check how many people took the road of terror as a result of the fact that they were victims of such actions or witnessed such actions. In view of the fact that benefit is not examined only according to the test of what it did to a specific person who may have decided not to take action, but you must also see what motivation it implanted in other people, what forces were obtained by terror as a result of such actions, which are unjust and inhumane.

In the case at hand of _____ Abu Jamal, it may be argued that the mere demolition of the homes of his family members encouraged him to take an action which does not reconcile with his image as an outstanding employee, married and father of three.

The respondent preferred not to respond to this argument in his response. Likewise, the respondent failed to respond to petitioners' request to receive the report of the family house visit of October 13, 2015, or any other documentation pertaining to said visit, which substantiates the the argument concerning _____ Abu Jamal's place of residence.

8. The only attempt of which the petitioners are aware, to refer to the benefit which arises from the use of Regulation 119, was made by the Israeli Defense Forces (IDF). The coincidence which occurred at the hearing of HCJ 773/04 **Nasser v. Commander of IDF Forces in the West Bank** (reported in Nevo website) and the recommendations of the committee headed by Major-General Udi Shani, which examined the lawfulness and legitimacy of the house demolition policy, caused the cessation of the use of Regulation 119 for three years, from 2005 through 2008. The former Military Advocate General, Major-General (*retired*) Avichai Mandelblit presented before the Constitution, Law and Justice Committee the change of policy as follows:

The decision which was made, and it is indeed a dramatic decision, does not pertain only to periods of tranquility despite the fact that it was also made against the backdrop of the tranquility, I don't deny that, it also pertains to periods that if... hostilities are renewed it will also remain in force at that time. According to the decision there will be no more demolitions for deterrence purposes, of the kind of the demolitions...".

As aforesaid, the state has already decided in 2008, with the approval of the Supreme Court, to return to the circle of horror and demolish houses (see: HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**, reported in Nevo website).

Violation of basic principles

9. 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 11A to the Law and Administration Ordinance, 5708-1948, which was made 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 [*sic*] 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.

10. 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 No. 1, _____ Abu Jamal's wife and 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. Reference is made to the words of this honorable court in H CJ 7146/12 **Serge Adam v. The Knesset** (reported in Nevo) in the judgment of Justice Arbel:

85. ...There can indeed be no dispute that the purpose of blocking the phenomenon of infiltration is an important and appropriate purpose, given the difficulties this phenomenon raises. However, the significance of this purpose in the context of the amendment of the law is deterrence. Namely, the mere placement of the infiltrators in detention deters potential infiltrators from coming to Israel since they realize that they, too, will be placed in custody, and as put in the colorful language of the Deputy President M. Cheshin, “we must not be misled by the polite language; we have all realized that the silk glove contains a fist” (Stamka, 769).

86. The difficulty in the purpose of deterrence is clear. A person is placed in detention not because he personally presents any danger, but in order to deter others. The person is regarded not as a goal but as a means. This treatment undoubtedly inflicts an additional impingement on his human dignity. “Human dignity regards the human as a goal rather than a means for securing the goals of others” (Barak, Constitutional Interpretation, 421). “Humans always stand as a purpose and value by themselves. They should not be regarded merely as a means or as a negotiable commodity – however noble the goal” (Kav LaOved I, 399). I have also noted that “a person is not to be treated merely as a means for securing ancillary and external purposes, since it constitutes an impingement on his dignity,” as illuminated in the teaching of the philosopher Immanuel Kant (Human Rights Division, paragraph 3 of my judgment).

11. 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.

12. 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.

13. 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, November 30, 2015.

Andre Rosenthal, Advocate
Counsel to the petitioners