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**In the Supreme Court sitting as the High Court of Justice**

**H CJ 968/16**

1. \_\_\_\_\_ Khalil, ID. \_\_\_\_\_
2. **HaMoked: Center for the Defence of the Individual**  
Represented by counsel, Adv. Andre Rosenthal, lic. No. 11864  
of 15 Salah a-Din St.,  
POB 19405, Jerusalem 91194  
Tel: 6250458, Fax: 6221148

**The Petitioners**

**v.**

**IDF Commander in the West Bank**  
represented by the State Attorney's Office

**The Respondent**

### **Petition for Order Nisi and Interim Order**

The Honorable Court is hereby requested to summon the Respondent and order him to appear and show cause why he has decided to use Regulation 119 of the Defense (Emergency) Regulations 1945 and seize and demolish the home of \_\_\_\_\_ Khalil, who stands accused of murder and attempted murder before the Tel Aviv District Court. A copy of the Seizure and Demolition Order is attached hereto and marked **P/1**. A copy of the indictment is attached hereto and marked **P/2**.

The Honorable Court is also requested, before hearing the petition, to order the Respondent to immediately provide a copy of the notes taken during \_\_\_\_ Khalil's ISA interrogation. This request has been rejected by the Respondent in response to the objection, as detailed below.

**As an interim remedy**, the Honorable Court is moved to order the Respondent or anyone acting on his behalf to refrain from damaging the home of Petitioner 1 pending judgment in this pt.

#### **The arguments**

1. Petitioner 1, \_\_\_\_\_ Khalil's wife, lives in Dura, Hebron District, in a home the size of 150 m<sup>2</sup>. The home is composed of two bedrooms, a living room, a kitchen and a bathroom. The home also has a subterranean level with storage space and a water cistern. The home is currently occupied by Petitioner 1, her three sons and her two daughters.

Petitioner 1 was not involved in any way whatsoever in the acts attributed to her husband in the indictment, Annex P/2 herein. The affidavit of Petitioner 1 is attached hereto and marked **P/3**.

2. Petitioner 2 is a human rights organization whose mission is, inter alia, to help Palestinian residents who have fallen victim to abuse or discrimination by state authorities, including defending their status and rights in court, both as a public petitioner and as counsel to individuals whose rights have been violated.
3. On January 19, 2016, Respondent gave notice of his plan to seize and demolish the home. On January 24, 2016, an objection was filed. Counsel for the Petitioners asked for a copy of the notes taken by ISA interrogators during Khalil's interrogation, which are the basis for the indictment, as well as the evidentiary basis for issuance of the order pursuant to Regulation 119.

On February 1, 2016, the response of the Respondent was received, noting that the objection had been dismissed. The following remarks were made with respect to the request for the notes from Khalil's interrogation:

3... Since the terrorist was charged on December 13, 2015, all the relevant material with respect to the issue of his guilt has been transferred to his counsel. Your clients are naturally in touch with the terrorist's defense counsel and can receive all the materials you request.

The response seems to indicate that the Respondent is not in possession of the requested material. The Honorable Court is moved to order the Respondent to deliver copies of the notes forthwith.

The reason presented for the dismissal of the objection was that all arguments made therein had been made and rejected in the past and that Supreme Court jurisprudence sanctions use of Regulation 119. According to the response, legal action may be brought to this Honorable Court by February 4, 2016 at 5:00 PM.

Copies of the objection and its rejection are attached hereto and marked **P/4** and **P/5** respectively.

### **Petitioners' arguments**

4. This Honorable Court has repeatedly upheld use of Regulation 119 by the state ever since independence. Arguments against the lawfulness of the Defense (Emergency) Regulations 1945 themselves have been rejected.

It has been found that the fact that the Regulations themselves were repealed by Britain shortly before the British Mandate came to an end is immaterial. Additionally, it appears that the fact that Sec. 11a of the Governance and Justice Procedures Ordinance which reverses the aforesaid repealment of the Defense (Emergency) Regulations 1945 constitutes retroactive legislation and as such contradicts the legal principle that prohibits retroactive legislation is afforded no importance.

Had the temporary government serving in 1948 wished to revive the Defense (Emergency) Regulations 1945, the correct route for doing so would have been primary legislation, rather than relying on the pretext that this was "the law during the Mandate". It was more convenient to put the blame for continued use of Regulation 119 on Britain's shoulders.

Furthermore, the fact that Section 4(1) of the Defense (Emergency) Regulations 1945 contains a clear exclusion regarding the need to publish matters concerning use of the Regulations did not convince the Court of their revocation.

5. Arguments regarding the difficulties raised by use of the “deterrence” argument have been rejected despite the fact that, under Israeli law, this term is an element of the punishment imposed on individuals who have been convicted (Sec. 40g of the Penal Code 5736-1970). These arguments have been rejected in view of Respondent’s claim – currently supported by “figures” submitted to the Court *ex parte* – that lives may perhaps be saved thanks to the demolition of the Khalil family home, despite the facts on the ground: the fact that though the Regulation has been used since the establishment of the State of Israel and the fact that security, nonetheless, remains precarious – have thus far failed to move the Honorable Court to give the needed signal to end this vicious cycle.
6. Arguments that use of Regulation 119 raises difficulty as it is a punitive measure, given that it appears in a section of the Defense (Emergency) Regulations 1945 entitled Miscellaneous Penal Provisions, have also been rejected. Despite this fact, it has been repeatedly ruled that the purpose of Regulation 119 is “deterrence”, achieved by a means other than a sentence, as decreed by the legislature, as noted above.
7. Arguments regarding difficulty raised by causing damage to the property of a person who has no connection to the act itself, other than marriage, in the case of Petitioner 1 and a blood relation in the case of the five children – a difficulty that grows harder when the State has not a shred of evidence tying the family members to the commission of the acts which are the subject of the indictment (Appendix P/2).
8. Arguments regarding difficulties raised by use of Regulation 119 given the prohibition set in international law have also been rejected, based on an assertion that international law does not apply, that international customary law does not prohibit use of Regulation 119 and that the Geneva Conventions of 1949 are treaty law, which lacks corresponding Israeli legislation. It must be noted that the State of Israel has often declared that it respects the humanitarian provisions of international law. The following has been recorded in H CJ 2936/02 **Physicians for Human Rights v. IDF Commander in the West Bank**:

However, respondents asserted, the IDF sees itself as bound to its obligations under humanitarian law, not only because this is their duty under international law, but also due to moral and even utilitarian considerations. Combat forces had been instructed to operate according to humanitarian law, and the IDF has dedicated personnel and resources to provide humanitarian aid was reaching combat areas.

This approach must be applied in the case at hand. It is difficult to accept the contention that the demolition of the Khalil home is required due to “imperative military needs”, as stated in the order itself (Appendix P/1).

The Petitioners are further perplexed by the fact that Israel claims, on the one hand, that the provisions of international law do not apply in the matter, yet, acknowledges that the basis for the legal legitimacy for its very existence lies in the UN resolution made on November 29, 1947.

9. In 2005, following the remarks of this Honorable Court in H CJ 7733/04, **Nasser v. IDF Commander in the West Bank**, the Respondent reached the conclusion that there was no benefit to using Regulation

119, and the following remarks were made in the Knesset Constitution Law and Justice Committee, by the Attorney General himself, with respect to the decision to no longer use Regulation 119:

The decision that was made is certainly dramatic. It does not pertain only to times of relative calm, though it was made partly in the context of the current calm, I will not deny it. It also pertains to a time when, heaven forbid, hostilities resume. It will stand then too. The decision is that there are no more demolitions for the purpose of deterrence...

The Court ruled that the State had the right to change its position, which it has: see, HCJ 9353/08 **Abu Dheim v. GOC Home Front Command** (published by Nevo).

11. [sic] The case at hand does not present any of the circumstances that have thus far mitigated a demolition order or, in rare occasions, moved the court to revoke such an order. The house which is the subject of the petition does not belong to a stranger, the family did not move there only this year, the suspected assailant is not single and did not live in a single room separately from the rest of the family, nor is there concern for harm to neighboring homes as the house stands alone. And yet, we still maintain that the home of a mother and five children who have done nothing and are suspected of nothing should not be destroyed.
12. The Honorable Court has persistently refused to order the Respondent to do what is obvious to any reasonable person. Clinging to the letter of the law, it allowed the demolition of family homes under Regulation 119.

Use of Regulation 119 of the Defense (Emergency) Regulations 1945, is diametrically opposed to universal norms of justice. It is an affront to ancient legal rules. It contradicts Jewish law, whereby a father cannot be blamed for the actions of his son simply because he is the father.

The wife - Petitioner 1 – and the five children cannot be held responsible for the actions of the husband and father – it is unjust that they should be left homeless because of his actions.

13. In light of all the above, the Honorable Court is respectfully requested to issue the orders sought herein and upon hearing parties' arguments render them absolute

Jerusalem, February 3, 2016.

[signed]

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Andre Rosenthal, Adv.  
Counsel for the Petitioners