At the Supreme Court Sitting as the High Court of Justice

HCJ 8150/15
HCJ 8154/15
HCJ 8156/15

Before:	**Honorable Justice I. Amit** **Honorable Justice Z. Zylbertal** **Honorable Justice M. Mazuz**
The Petitioners in HCJ 8150/15:	**1. _____ Abu Jamal** **2. HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
The Petitioners in HCJ 8154/15:	**1. _____ Alian** **2. HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
The Petitioners in HCJ 8156/15:	**1. _____ Adib and four family members** **2. _____ Hamed and ten family members** **3. HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
	v.
The Respondent in HCJ 8150/15 and in HCJ 8154/15:	**GOC Home Front Command**
The Respondent in HCJ 8156/15:	**Commander of the Military Forces in the West Bank**
	Petitions for *Order Nisi*
Session date:	**25 Kislev 5776 (December 7, 2015)**
Representing the Petitioners in HCJ 8150/15 and in HCJ 8154/15:	**Adv. Andre Rosenthal**
Representing the Petitioners in HCJ 8156/15:	**Adv. Labib Habib**
Representing the Respondents:	**Adv. Avinoam Segal-Elad and Adv. Roi Shweqa**

Judgment

Justice I. Amit

Three petitions which were filed against two seizure and demolition orders which were issued against the homes of two perpetrators by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**).

Factual Background

1. On October 13, 2015, Bahaa Alian (hereinafter: **Bahaa**) together with another, Bellal Omar Mohammed Abu Ghanem, boarded a bus (line 78) in Armon Hanatziv neighborhood, Jerusalem. The two locked the bus doors and started shooting and stabbing the passengers until they were shot by policemen who arrived to the scene. Bellal was wounded and Bahaa was killed. As a result of the attack three individuals were killed and four others were wounded, three of them were seriously wounded and the fourth was wounded in a medium-serious manner.

   On the same day, several minutes later, Alaa Abu Jamal (hereinafter: **'Alaa**), a "Bezeq" employee, drove the company car into a bus stop in Malkhei Yisrael Street in Jerusalem, hit one individual and then got out of the car with a butcher's knife, stabbed the person who was hit by the car and two other pedestrians, and was eventually shot and killed.

   Following said two attacks, seizure and demolition orders were issued against the apartments in which Bahaa and 'Alaa lived and hence the petitions before us.

The order in Bahaa's case (HCJ 8154/15; 8156/15)

2. Bahaa lived in an apartment on the second, middle floor, of a three story building in Jabel Mukaber neighborhood, Jerusalem (hereinafter: the **building** or the **Alian house**).

   Petitioner No. 1 in HCJ 8154/15 is Bahaa's father who lived in the same apartment in which Bahaa lived, the apartment being the subject matter of the seizure and demolition order, together with additional family members.

   Petitioners 1 and 2 in HCJ 8156/15 are also members of the Alian family and they live on the first and third floors of the building.

3. On November 10, 2015, the petitioners were notified of respondent's intention to seize and demolish the second floor of the building. On November 15, 2015, petitioners' counsels submitted their objections against the intention to use the authority according to Regulation 119 against Bahaa's apartment. On November 26, 2015, the objections were denied by the respondent and it was noted that the order would not be realized until November 30, 2015, at 14:00 (hereinafter: the **demolition order**).

On November 30, 2015, the two above petitions were filed and on the same day an interim injunction was given which prevented the execution of the demolition order. The state submitted its response on December 6, 2015 , and on December 7, 2015, a hearing in the two petitions was held before us.

The order in 'Alaa's case (HCJ 8150/15)

4. Petitioner No. 1 is 'Alaa's father. He lives with his family in a three story building owned by the family in Jabel Mukaber (hereinafter: the **Abu Jamal house**).

On October 22, 2015, the petitioners were notified of respondent's intention to seize and demolish a single story building located near the Abu Jamal house (hereinafter: the **separate building**). The family submitted an objection which was denied. Thereafter the family filed with this court a petition against the decision to demolish the separate building (HCJ 7219/15). On November 3, 2015, the respondent notified that he abolished the order against which said petition was filed and hence, the petition was deleted.

On that very same day the petitioner was given "an amended notice of the intention to seize and demolish the building in which lived 'Alaa Daud Ali Abu Jamal". The amended notice clarified that the respondent intended to seize and seal the **ground floor** of the Abu Jamal house. An objection on behalf of the petitioners was immediately submitted the next day, on November 4, 2015. The objection was denied on November 26, 2015, and a seizure and demolition order was issued against the first floor of the Jamal house.

On November 30, 2015, the above petition was filed and on the same day an interim injunction was issued which prevented the execution of the demolition order. The state submitted its response on December 6, 2015, and on December 7, 2015, a hearing of this petition was held before us.

The Arguments on the General Level in the Three Petitions

5. In the three petitions arguments were raised on the specific level and on the general level. In view of the fact that the arguments of all petitioners on the **general level** overlap, I shall discuss the main arguments jointly and concisely.

It was argued that initially the court regarded house demolition as a punitive sanction and that this was the genuine nature and purpose underlying Regulation 119, which was situated in the punitive measures part of the Defence Regulations. It was argued that there was no empiric basis for the argument that house demolition was an effective way to achieve a deterring effect and that the case of the perpetrator 'Alaa even proved that house demolition particularly encouraged the execution of attacks 'Alaa is the cousin of two perpetrators who carried out attacks. The house of one of these cousins was demolished on June 1, 2015, and the house of the other was demolished only about a week before the attack which was carried out by 'Alaa (these cases concerned the demolition of the houses of Jassen Abu Jamal and 'Udai Abu Jamal who took part in the execution of the murderous attack in the Har Nof synagogue on November 18, 2014, in which five individuals were killed (the subject matter of HCJ 8066/14 and 8070/14 **Abu Jamal v. GOC Home Front Command** (December 31, 2014)(hereinafter: **Abu Jamal case**)). It was argued that 'Alaa had personally witnessed the demolitions of his cousins' houses, and at least, witnessed the results of the demolitions. Nevertheless, 'Alaa, a "Bezeq" employee for several years and a father of three children, who must

have been well aware of price which would be paid by his family as a result of his deeds, was not deterred from carrying out the murderous attack.

It was also argued that house demolition constituted a collective punishment and it was a practice which ran contrary to international law; and that in fact it was a punitive sanction the utilization of which to deter others violated petitioners' dignity and was not proportionate.

Deliberation and Decision on the General Level

6. It is not necessary to discuss all over again the general issue regarding the mere authority to issue seizure and demolition orders according to Regulation 119, whenever the court hears a petition which concerns Regulation 119 of the Defence Regulations. As was just recently noted by my colleague, Justice Zylbertal:

> As stated, this question has been deliberated repeatedly, and it appears that the possible use of this power by the officials entrusted with same (the military commander and the security officials counseling him) has been recognized in the case law in practice, despite the difficulties in terms of international law and constitutional principles that lie at the foundation of the legal system. In this state of affairs, in a bid to minimize the unavoidable harm caused by the use of this measure, the Court is required to examine the concrete cases brought before it… (HCJ 6745/15 **Haled Abu Hashiyeh v. Military Commander of the West Bank Area** (December 1, 2015)(hereinafter: **Abu Hashiyeh**)).

The issues and arguments which were raised by the petitioners had been deliberated in a host of judgments, some of which were given only recently, in which the arguments concerning deterrence had also been deliberated, and there is no use repeating them (see **Abu Jamal**; **Abu Hashiyeh**; HCJ 9353/08 **Abu Dheim v. GOC Home Front Command** (January 5, 2009); HCJ 4597/14 **'Awawdeh v. Military Commander of the West Bank** (July 1, 2014); HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area** (August 11, 2014); HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014); and HCJFH 360/15 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (November 12, 2015); HCJ 7823/14 **Ghabis v. GOC Home Front Command** (December 31, 2014); HCJ 7040/15 **Hamed v. Military Commander of the West Bank Area** (November 12, 2015)(hereinafter: **Hamed**); HCJ 8024/15 **Hijazi v. GOC Home Front Command** (June 15, 2015). But see the minority opinion of Justice Vogelman in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015)(hereinafter: **Sidr**); and the opinion of my colleague, Justice Mazuz in **Abu Hashiyeh** and in HCJ 7220/15 **Du'aa 'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015)).

Indeed, it cannot be denied that the hideous murder committed by 'Alaa is a clear example of non-deterrence and maybe even of an increased motivation to carry out attacks. However, the entire issue cannot be judged by a single case. Therefore, I find no reason to re-open the discussion regarding the effectiveness of the deterrence and it seems that this issue will continue to be brought up again before the courts and to engage the security authorities in the future as well (on the complexity of this issue see my words in **Sidr**, paragraphs 2-3).

7. However, as we turn to discuss the concrete-specific arguments raised by the petitioners, it is worth pointing at another angle which pertains to house demolition, also on the practical level and which is certainly taken into consideration by the decision makers – how much does it cost us?

By this I refer to the input invested by the security agencies in the execution of the demolitions and the potential complications which may derive there-from. At least in some cases the execution of the demolition order involves an actual military operation which requires the placement of security forces in several circles. Sometimes the demolition puts the security forces at risk, and at times, the execution of the order involves an additional circle of inured parties amongst the local population, which may, in and of itself, escalate the security situation. In addition, the execution of the demolition orders under time pressure and security constraints may cause damage to adjacent houses, as ostensibly indicated by photographs which were presented to us in the hearing regarding a demolition of an apartment by detonation in the Qalandiya camp. In addition to the proprietary damage caused to uninvolved individuals, with all ensuing consequences, it may also expose the state, under certain circumstances, to tort actions seeking compensation.

The above was said only as food for thought, and from here I shall turn to examine the specific arguments which were raised by the petitioners.

The specific arguments concerning Bahaa's apartment

8. It was argued that the respondent let an unreasonable period of time pass from the date of the attack on October 13, 2015, and until the date on which the notice of the intention to seize the apartment was sent on November 11, 2015, a period of about one month. Said delay, it was so argued, did not reconcile with the directive of the court in **Sidr** according to which "It seems that insofar as an intention to demolish exists, it must be communicated at the closest possible date to the criminal act in question (***Ibid***., paragraph G).

The petitioners in HCJ 8156/15 who live on the third and first floors argued that damage may be caused to their apartments and that past experience showed that a demolition of one floor in a building which consists of several floors may cause substantial damage to other apartments in the building. The respondent failed to attach a demolition plan and did not specify how he intended to secure the completeness of their apartments following the execution of the demolition order. Hence petitioners' request that the respondent provides them with a detailed demolition plan which would ensure that no damages are caused to the first and third floors.

9. I shall shortly say that I found no merit in the delay argument. The order was issued a little less than a month after the execution of the attack, after the data were gathered and the relevant considerations were weighed, and there is no reason whatsoever to regard this period as constituting a delay.

10. With respect to the demolition method, the respondent emphasized that following a check with the engineering officials, the demolition of the apartment "is planned to take place manually (by hammers, Kongo, rotary hammers, etc.) without causing damage to the structural parts of the building". It was also noted in the reply letter to petitioners' request that the demolition would be carried out manually "without damage to the foundation of the building while protecting the perimeter by mechanical and electrical measures only. The manual demolition is intended to significantly minimize the potential damage to the surrounding area as a result of the mere execution of the demolition…".

Hence, we are of the opinion that no infrastructure was established for the argument that the demolition would also cause damage to the first and third floors. As a general rule, the demolition method should be determined by the professional bodies (**Hamed**, paragraph 35). However, the

attention of the respondent is hereby drawn to the engineering opinion submitted by the petitioners which refers, *inter alia*, to the need to remove the debris to prevent the accumulation of weight on the floor.

11. In conclusion, I did not find that the discretion of the military commander was flawed when he decided to use Regulation 119 against the home of Bahaa.

The specific arguments concerning 'Alaa's apartment

12. It was mentioned above that the first demolition order was issued against the separate building adjacent to the Jamal house, and that thereafter the sealing order being the subject matter of our discussion was issued against the first floor of the Jamal house.

    The petitioners focused on the argument that the first floor in the Jamal house was not 'Alaa's apartment, but rather the apartment in which his sister _____ lived, while 'Alaa and his family allegedly lived in the separate building, being the subject matter of the demolition order which was abolished prior to the hearing of the first petition.

13. We shall tell the reader that on the date of the attack, October 13, 2015, the Israel Security Agency (ISA) coordinator visited the building and no argument was presented to him at that time that Alla' did not live on the first floor. The conclusion that it was 'Alaa's apartment derived from an interrogation of a neighbor who confirmed that it was 'Alaa's house, and from several articles which belong to 'Alaa and which were found in the first floor apartment. The articles were photographed by the ISA coordinator: a family picture of 'Alaa which was hanging on the corridor wall; a room with three beds conforming with the number of his children; a certificate of excellence from "Bezeq", Alla's employer; four pay slips; health fund card of his son Khatab; and computer equipment of "Bezeq" by which he was employed (new internet routers sealed in a box).

    The petitioners argued that the articles were photographed while they were lying on the carpet or on the floor, but were taken out of the closet or were off the wall. It was argued that the conclusion that 'Alaa lived there could not be drawn from said articles because he used to scatter his belongings around. It was argued that in view of the fact that 'Alaa was a "Bezeq" employee for more than eight years four pay slips could attest to nothing; that in the closet in which "Bezeq" articles were found different pieces of equipment were also found and not only equipment which belonged to 'Alaa; that the health fund card of 'Alaa's young son was found in the kitchen because a day before the attack his aunt, who lived on the first floor, took him to the health fund, and to witness, no other health fund cards were found.

14. After we have heard the arguments of the parties and have reviewed the material before us including the privileged material which was presented to us, I am satisfied that the administrative evidence in respondent's possession indicates that 'Alaa and his family indeed lived on the first floor of the Jamal house.

    I am willing to accept respondent's explanation that when the ISA coordinator arrived on October 13, 2015, to identify and locate 'Alaa's apartment, he did not think that any dispute would arise around the question of where 'Alaa had lived. However, it would be appropriate, in my opinion, that the relevant exhibits be photographed where they are located, on the wall or in the closet, before they are taken out or moved for having them photographed.

15. *Vis-à-vis* the evidence specified above, the petitioners did not offer any positive evidence attesting to the fact that 'Alaa had actually lived in the separate building. As indicated from the material and from respondent's explanations, the first demolition order was issued against the separate building due to the fact that 'Alaa's brother who was interrogated on October 15, 2015, argued that 'Alaa lived

in the separate building. The information was transferred to the Home Front Command personnel who arrived to the scene on October 19, 2015, for the purpose of conducting the required examinations in a bid to examine the possibility of demolition. The latter assumed, without hesitation, that the separate building which they were referred to by the family members of the petitioners was concerned. At that time pictures were hanging in the separate building and 2-3 beds were found, and in the living room a box with electronic equipment was found. Other than that the building was vacant of any equipment and furniture. When this was informed, the ISA coordinator returned to the apartment on October 27, 2015, and examined things once again. He found that the pictures which were hanging on the wall of the first floor apartment were transferred to the separate building. In addition to the examination and findings of the ISA coordinator, two sources informed that 'Alaa was the one who was living with his wife and children in the first floor apartment.

16. The willingness of 'Alaa's family members to "sacrifice" the separate building should be understood against the backdrop of the following facts. A demolition order is pending against the separate building by virtue of the planning and construction laws according to a judgment which was given back in 1997 which prohibited the use of the building that was described in the indictment as a "40 square meters garage".

    Having failed to execute the demolition order an indictment was filed against 'Alaa's father in 2011, and on June 25, 2013, a verdict was given against him according to which penalty and suspended sentence were imposed on him and it was held that the demolition order against the structure would be postponed and enter into force on May 26, 2014.

    All of the above explain petitioners' interest to mislead the respondent with respect to 'Alaa's housing unit, and point at the separate building as the apartment in which he lived with his family.

17. In conclusion, I did not find that the discretion of the military commander was flawed when he decided to use Regulation 119 against the home of 'Alaa either.

18. Hence, I see no reason to intervene in the discretion of the military commander and I shall therefore recommend to my colleagues to deny the petitions.

Justice

<u>Jutice M. Mazuz</u>:

1. I am unable to join the opinion of my colleague Justice **I. Amit** according to which the petitions in HCJ 8150/15 and in HCJ 8154/15 should be denied. If my opinion is heard we shall issue in these two petitions *orders nisi*. On the other hand, I am also of the opinion that the petition in HCJ 8156/15 should be denied. The following is a detailed explanation of the grounds for my opinion.

2. Preliminary notice: The petitioners in the three petitions also raised, along specific arguments, a host of general arguments against the lawfulness of the seizure and demolition orders. These arguments were concisely presented and denied by my colleague Justice **Amit** on the grounds that these arguments have already been discussed and denied in a host of judgments of this court including judgments which were given recently. In my opinion, a minority opinion, in HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015) I pointed at the many

difficulties, on the level of international public law and on the level of Israeli constitutional and administrative law which arise from the exercise of the power according to Regulation 119 of the Defence (Emergency) Regulations 1945 (hereinafter: the **Defence Regulations** and **Regulation 119**). I have also stressed the need to revisit the different aspects involved in the use of the Regulation which have not been thoroughly examined in the past, particularly in view of the fact that international humanitarian law and human rights laws of international law as well Israeli constitutional law underwent significant changes over the years. I refer to my opinion there and I do not intend to reiterate here the details thereof. However, it should be clarified that my discussion of the **specific** arguments and issues in the petitions at bar may not be regarded as an abandonment of my position on the **general** aspects concerning the exercise of the power according to Regulation 119.

A. The petition in HCJ 8154/15

3. As aforesaid I do not share the opinion of my colleague, Justice **Amit** that this petition should be denied. As described by my colleague, Bahaa Alian (hereinafter: **Bahaa**) carried out, together with another (Bellal Abu Ghanem), a severe attack in Armon Hanatziv neighborhood in Jerusalem in which three individuals were killed and four others were wounded. Bahaa was shot and killed on the scene by the security forces, where Bellal was wounded, captured and indicted in Jerusalem district court for the offenses of murder, attempted murder and additional offenses (CrimTC 19668-11-15). Following Bahaa's actions the respondent issued a seizure and demolition order according to Regulation 119 against the entire second floor of a three story residential building in Jabel Mukaber neighborhood in East Jerusalem. This floor consists of a housing unit of five rooms of about 150 square meters, in which live Bahaa's parents with their minor children and his two elder brothers with their families. Bahaa, who was single, lived in one of the rooms of the apartment.

4. The petition at bar was filed by Bahaa's father. In his petition and in the arguments of his legal counsel before us general-principle arguments were raised against the use of Regulation 119 as mentioned above. In addition, it was argued, **in the alternative**, that in view of the fact that Bahaa lived in one room of the apartment only, it was not appropriate to demolish the entire floor which was occupied by his father and other family members, who were innocent and had no connection whatsoever to the attack which was carried out by Bahaa, and that the sealing-off of Bahaa's room should suffice.

5. In the response submitted on respondent's behalf to the petition no argument was raised as to any involvement of the part of the petitioner (Bahaa's father), or of any other family members in the attack. In the hearing which was held before us I asked the state's counsel whether any involvement of any kind and nature whatsoever was attributed to the family in Bahha's actions, and he responded in the negative. I continued to ask whether under these circumstances the possibility to use the sanction against the perpetrator's room only had been considered? And the answer was that said alternative was ruled out in view of the severity of the attack and since "said alternative did not have the same deterring effect".

6. My colleague Justice **Amit** holds. Shortly, that he found no flaw in the discretion of the military commander while using the Regulation against Bahaa's house (paragraph 11).

   Unlike my colleague, I am of the opinion that this case raises a difficult question regarding the reasonableness and proportionality of the order pursuant to Regulation 119, which directs to demolish the entire home of the extended family; despite the fact that the apartment is not owned by the perpetrator who is an un-married family member that lived in one of the rooms in the house of his parents and siblings who have families of their own, and despite the fact that the family members, the owners of the apartment, were not involved in the actions of the perpetrator who was killed in the attack, and who are not guilty of his deeds. This difficulty is, as aforesaid, beyond the principle-

general questions concerning the mere lawfulness of the use of Regulation 119, and I would like to particularly refer to this difficulty herein below.

7. The conscious and deliberate infliction of harm on innocent people, and even more so, a severe violation of their constitutional rights, only for other potential perpetrators "**to see and beware**", is an inconceivable conduct in any other context. The consideration of **deterring others** is indeed recognized as one of the punitive principles in criminal law but it is applied only against a **convicted perpetrator** rather than against an innocent third party (section 40G of the Penal Law, 5737-1977). This difficulty ("collective punishment") underlies, *inter alia*, the question of the lawfulness and constitutionality of the mere use of Regulation 119. However, even according to the approach that the possibility to use Regulation 119 should not be denied altogether, the fundamental principles of our judicial system, as well as universal moral principles require that the exercise of said power be prohibited, or at least, extremely limited, where it causes harm to innocent people.

8. This court has repeatedly stated – including very recently – that Regulation 119 of the Defence Regulations is indeed governed by the validity of laws clause of the Basic Law: Human Dignity and Liberty. However, "the military commander must make prudent and limited use of said authority, according to principles of reasonableness and proportionality… the above ruling was reinforced following the enactment of the Basic Law: Human Dignity and Liberty, in light of which the Regulation should be interpreted (see HCJ 7040/15 **Hamed v. The Military Commander for the West Bank Area**, paragraph 23 (November 12, 2015), hereinafter: **Hamed**; and see also HCJ 8084/02 **Abbasi v. GOC Home Front Command**, IsrSC 57(2) 55, 59 (2003); HCJ 4597/14 **'Awawdeh v. The Military Commander for the West Bank Area**, paragraph 17 (July 1, 2014); HCJ 5290/14 **Qawasmeh v. The Military Commander for the West Bank Area**, paragraph 22 (August 11, 2014), hereinafter: **Qawasmeh**; HCJ 6745/15 **Abu Hashiyeh v. The Military Commander for the West Bank Area**, paragraph L (December 1, 2015)).

   The exercise of the power under Regulation 119 should be examined in view of the impact of the Basic Law: Human Dignity and Liberty, mainly from the aspects of proportionality, namely – a rational connection between the measure taken and the achievement of the purpose; the least possible violation of protected human rights (human dignity and proprietary rights) in a bid to achieve the purpose; and an appropriate relation between the purpose and the measure taken (HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485 (1996); HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**, paragraph 5 (January 5, 2009); **Hamed**, *Ibid*.)

   Based on these principles – which seem to be acceptable to all and which were reiterated over and over again in the judgments of this court – the issue at bar should be therefore examined.

9. It should be firstly noted that the issue of causing harm to innocent people has been discussed more than once in the judgments of the court in the context of the exercise of Regulation 119. The court has frequently reiterated that the harm caused to innocent family members should be taken into consideration and that the purpose for which the power is exercised should be balanced against the harm caused to the family members (HCJ 987/89 **Kahawaji v. Commander of IDF Forces in the Gaza Strip Area**, IsrSC 44(2) 227 (1990); HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip Area**, IsrSC 46(3) 693 (1992), hereinafter: **Alamarin**; HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014), hereinafter **HaMoked**). It was held that weight should be given to the fact that this concerned a "severe violation of the fundamental rights of the uninvolved inhabitants of said houses" on the grounds that "the demolition or sealing of a house in which lives a person who has not sinned is contrary to the right to own property, the right to dignity and even the right to housing which is derived there-from". It was also noted that such impingement "cannot be reconciled with concepts of justice and basic moral principles, including the principle according to which "The son shall not share the guilt of the father,

nor will the father share the guilt of the son." (**Qawasmeh**, paragraph 21). In certain cases it was emphasized that only in "special cases" the sanction of demolition could be justified due to the harm caused to the uninvolved inhabitants of the house (HCJ 361/82 **Hamri v. Commander of Judea and Samaria Area**, IsrSC 36(3) 439 (1982), hereinafter: **Hamri**; HCJ 5510/92 **Turkman v. Minister of Defense**, IsrSC 48(1) 217 (1993), hereinafter: **Turkman**).

10. And indeed, in the beginning it seemed that the exercise of the power was tied by the court with the existence of a connection which exceeded a connection of ownership or residence to the house against which the sanction was directed, and a connection between the house and the **actions** of the perpetrators was required. Accordingly, the two first judgments on this issue (HCJ 434/79 **Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34(1) 464 (1979) and HCJ 22/81 **Hamed v. Commander of the Judea and Samaria Area**, IsrSC 35(3) 223 (1981)), also concerned, in addition to the terror activity of the inhabitant of the house, possession of firearm in the house, and in the first case, in addition, hiding a fugitive perpetrator in the house. It was also noted that in these two cases the military commander was satisfied with the sealing-off of the perpetrator's room.

    However, later on said requirement was abandoned and even the consideration of harm caused to innocent inhabitants of the house remained, in most cases, in the realms of rhetoric only, with no operative conclusion drawn there-from as to the revocation of the demolition order or its replacement by sealing, while decisive weight was given to the severity of the action (**HaMoked**, Ibid., paragraph 18 (paragraph R)). However, there were also cases in which said consideration was operatively realized (see for instance **Turkman** where the court revoked a demolition order which was issued by the military commander and replaced it by a partial sealing due to the harm caused to innocent family members, and also in HCJ 8024/14 **Hijazi v. GOC Home Front Command** (*order nisi* dated December 31, 2014, and judgment dated June 5, 2015) where the respondent replaced a demolition order against the house by a sealing order which was issued only against the room in which the perpetrator lived in view of the court's comments and an *order nisi* which was issued in that case).

11. A more decisive and consistent position on this issue was taken by Justice M. Cheshin in several judgments – in which he held a minority opinion – according to which the inevitable conclusion arising from the values of the state of Israel as a Jewish and democratic state, as well as the Basic Law: Human Dignity and Liberty, is that respondent's power is limited only to **that part of the house which was used by the perpetrator**. He accordingly held that the entire home of the perpetrator's nuclear family should not be demolished in cases in which he lived with his parents and siblings or with his wife and children and no argument was raised that they have assisted him in his actions. Similarly, one should not demolish that part of a building in which other member families of the perpetrator's cluster of families live, whether they live in separate housing units or whether several families live in one building and share the kitchen and other parts of the building as is customary in their community (HCJ 4772, 5359/91 **Hizran v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 46(2) 150 (1992); **Alamarin**; HCJ 6026/94 **Nazaal v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 48(5) 338 (1994) hereinafter: **Nazaal**; HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651 (1997), hereinafter: **Janimat**). The following are some of the scathing things which were written by him on this issue:

> Legislation that originated during the British Mandate — including the Defence (Emergency) Regulations — was given one construction during the Mandate period and another construction after the State was founded, for the values of the State of Israel — a Jewish, free and democratic State — are utterly different from the fundamental values that the mandatory power imposed in Israel. Our fundamental values — even in our times — are the fundamental values of a State that is governed by law, is democratic and cherishes freedom and justice, and it is these values that provide the spirit in constructing this and other legislation…

> This has been so since the founding of the State, and certainly after the enactment of the Basic Law: Human Dignity and Liberty, which is based on the values of the State of Israel as a Jewish and democratic State. These values are general human values…
>
> 'In those days people shall no longer say: fathers ate unripe fruit and their sons' teeth shall be blunted, but a person shall die because of his own sin; any person who eats unripe fruit shall have his teeth blunted' (Jeremiah 31, 28-29 [8]).
>
> No longer do fathers eat unripe fruit and their sons' teeth are blunted, and no longer do sons eat unripe fruit and their fathers' teeth are blunted, but a man shall be put to death for his own sin. (**Alamarin**, paragraphs 6-7).

And elsewhere:

> The basic principle will stands, without a hair's breadth deviation there-from; a man shall be put to death for his own sin… The basic principle with which we are concerned goes to the root of the power and does not pertain only to the discretion of the authority and to the issue of compatibility ('proportionality, 'relativity') between the evil deed and the sanction imposed by the authority.
>
> I find it difficult to agree to the stipulation that the respondent is vested with the power to demolish the entire house being the subject matter of this case, despite that fact that the assassin did not own it and did not reside in the entire house. The assassin's room is designated for demolition, and the authority was entitled to destroy it had it wanted to. His room alone rather than the home of others" (**Nazaal**).

And finally:

> If we destroy the perpetrator's apartment, we shall destroy at the same time – by the same strokes – the apartment of this woman and these children. We shall there-by punish this woman and these children although they have not sinned. This is not done here. Since the establishment of the State - certainly since the Basic Law: Human Dignity and Liberty – when we have read regulation 119 of the Defense Regulations, we have read it and vested it with our values, the values of a free, democratic Jewish state. These values directly lead us to the ancient times of our people, and be our times no different than former times: they shall say no more the fathers have eaten sour grapes and the children's teeth are set on edge. Every man who eats sour grapes, his teeth will be set on edge (**Janimat**).

The above position of Justice **Cheshin** has been recently joined by Justice **U. Vogelman**, also in a minority opinion (HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015) hereinafter: **Sidr**, who noted, *inter alia*, as follows:

> And these words primarily relate, as stated, to the innocent family members, about whom it was not claimed that they were in any way involved in the criminal action of the assailant, in cases where the military commander orders the demolition of the entire house (as opposed to its partial demolition or sealing).
>
> The result of balancing the scales one against the other – the benefit against the human rights violation attendant to the realization the Regulation's aim – is that, at least in the absence of involvement by the household members, the drastic

> harm to the rights of the uninvolved tips the scales and outweighs the opposite considerations. The demolition of the home is therefore done with authority, but the flaw lies in the level of discretion: in such a case, the action is unbalanced. And all this in a nutshell, since is not the precedent set forth by this Court. Therefore, although I would suggest to re-consider the judicial precedent so as to explore the full breadth of issue regarding both domestic law and international law, so long as this precedent stands, I bow my head before the opinion of the Court. (*Ibid*., paragraphs 5-6)).

12. The sensible and scathing words cited above constitute, as far as I am concerned, fundamental principles and I therefore join the position expressed therein.

13. I am of the opinion that the power according to Regulation 119 should be exercised in view of the fundamental principles which derive from the mere fact that the state of Israel is a **Jewish state** ("a man shall be put to death for his own sin") and a **democratic state** (compare: HCJ 73/53 **"Kol Ha'am" v. Minister of the Interior**, IsrSC 7, 871 (1953)), and in view of **the principles of our constitutional law**, mainly from the aspects of **proportionality**, as well as in view of **universal values**. I am of the opinion that all these principles inevitably lead to the conclusion that the sanction under Regulation 119 may not be taken against uninvolved family members, regardless of the severity of the event and the deterring purpose underlying the use of the power. Needless to point out that apparently the biblical principle according to which "a man shall be put to death for his own sin" constitutes the ideological basis of the prohibition against collective punishment in international law.

    In my opinion, a sanction which directs itself to harm innocent people, cannot be upheld, whether we define the flaw as a violation of right, act in excess of authority, unreasonableness or dis-proportionality (compare: the words of Justice **Cheshin** in **Nazaal** cited above; the words of Justice **Vogelman** in **Sidr** above, and also D. Kretzmer "HCJ criticism of the demolition and sealing-off of houses in the territories" **Klinghofer Book on Public Law** (I. Zamir editor, 5753), 305, 353-355).

    The rule which guides this court in its judgments is that in the interpretation of laws such interpretation which promotes fundamental rights must be sought (CA 524/88 **Pri Ha'emek v. Sdeh Yaakov**, IsrSC 45(2) 529' 561 (1991); HCJ 693/91 **Efrat v. Commissioner of Population Registry**, IsrSC 47(1) 749' 763 (1993); Aharon Barak **Interpretation in Law – Interpretation of Statutes,** Second Volume)(1993), 553). This principle also requires that a very narrow approach be taken with respect to the exercise of the power according to Regulation 119, since said power involves a severe violation of a host of fundamental rights (violation of the right to own property, violation of human dignity and a violation of a host of rights which derive from human dignity), while also harming innocent people , and frequently harming **them alone**, such as in cases in which the perpetrator is no longer alive or has been incarcerated for many years.

14. In my opinion, considering the severe violation of the rights of those who did not sin, the inevitable conclusion which arises is that in cases in which no evidence exists regarding connection and involvement of the family members in the criminal act, the order should not be directed against them, and accordingly one should consider to refrain from exercising the sanction or at least limit it to the perpetrator's part in the house alone. Where data exist which attest to the fact that the family members were connected or involved in the deed, the scope of such involvement should be examined as well as other circumstances, as specified below, and appropriate and proportionate weight should be given to them in a decision as to whether the sanction should be taken.

15. Proper exercise of discretion as to whether the sanction under Regulation 119 should be exercised, while proper weight is given to the connection between the perpetrator and the building against which the sanction is directed and to the proportionality of the sanction, requires an examination of a host

of relevant circumstances – which pertain to the perpetrator, his family members and the building against which the sanction is sought to be taken – the main principles of which are as follows:

A. Was the house actually used for the terror activity of the perpetrator, such as shooting from the house, storage of firearm, or usage of the house for the purpose of meeting with his terrorism accomplices (compare: **Sahweil** and **Hamed** mentioned above); or whether it was used by the perpetrator as his residence only?

B. What is the connection between the perpetrator and the building – is the house owned by the perpetrator or is he only an "ancillary tenant" in a property which belongs to his parents or family members, or does he only rent the apartment which belongs to another? (Compare recently **Hamed** which limited the possibility to act against a house in which the perpetrator had the status of a mere lessee).

C. How and to what extent did the perpetrator use the house – did he live there on a permanent basis or only visited it and slept there occasionally? Which parts of the building were used by him alone, and which parts did he use together with his nuclear family or extended family?

D. Were the inhabitants of the house involved in the activities of the perpetrator (whether or not he is a family member), and if the answer is positive – what is the type and scope of such involvement – only awareness of his mere involvement in terror activity, awareness of the specific action being the subject matter of the order, support or actual assistance to terror activity?

E. What happened to the perpetrator – was he killed during the attack, arrested and incarcerated for many years, or maybe escaped?

16. A prudent examination of these circumstances and passing them through the melting pot of the proportionality test will lead to the conclusion of whether there is a basis and justification under the relevant circumstances to exercise the sanction according to Regulation 119, and if the answer is positive, under what terms and conditions: seizure only, sealing (partial or full), or demolition (partial or full). The perpetrator's connection to the house and the involvement of the family members in his actions, as specified above, are fundamental components in making a decision regarding the mere exercise of the sanction, its type and scope. I am of the opinion that interpretation in the spirit of the Basic Law and the fundamental values of our legal system as aforesaid in a bid to refrain from causing a severe harm to those who did not sin, leads to the inevitable conclusion that where there is no evidence of connection and involvement of the family members in the criminal act the order should not be aimed at causing them harm, but rather one should examine whether it may be directed only against the perpetrator's part in the house, or whether the exercise of any sanction against the house may be avoided. **A sanction which is, in and of itself, aimed at causing harm to innocent people cannot be justified, in my opinion, under any circumstances**.

17. I do not intend to discuss in this context the issue of the deterring purpose, which raises complicated questions of fact and law. It should only be noted that I do not think that my above position contradicts the deterring purpose which is discussed by the court in its judgments. In my opinion, the above approach precisely reconciles with considerations of deterrence. A deterring purpose assumes that a rational connection exists between the prohibited action and the sanction. Said purpose does not reconcile with the infliction of harm on innocent people. Focusing the sanction only against family members who were involved in the terror activity, and on the other hand, leaving uninvolved family members unharmed, may create an incentive for the family members to act for the prevention of attacks when they become aware of such intention, in a bid to avoid the expected sanction. On the

other hand, taking the sanction against those who are not involved as well, does not create an incentive for the family members to act for the prevention of the terror activity in view of the fact that the sanction would be taken against them in any event, even if they act for the prevention thereof (without success).

The other circumstance which were specified above, such as the use of the building for terror activity or the rights of the perpetrator in the housing unit and the scope of his presence and use thereof, also strive to focus the deterrence on a pertinent prevention of terror activity while limiting and restricting the harm caused to innocent people. Based on these entire circumstances, the question of whether the sanction should be imposed shall be examined and if the answer is positive – which kind of sanction (seizure, sealing or demolition) and with respect to which part of the building, according to the specific circumstances and mainly according to their accumulation.

And from the general to the particular

18. In the case at bar an order was issued for the demolition of the entire second floor in a three story building, which occupies the home of the perpetrator's parents in which also live, as specified above, his elder brothers with their families. As mentioned in the beginning, the respondent does not attribute to the family members any involvement in the actions of the perpetrator, by knowledge or assistance. The perpetrator was shot and killed by the policemen in the attach and therefore, in fact, the established sanction is defiantly directed against the innocent family member and **against them alone**, and is also directed at the demolition of the entire floor in which three families live, while the perpetrator was not married and lived only in one room.

    It should also be noted in this regard that in the past, during a long period of time, a policy was applied according to which the military commander refrained from using Regulation 119 in cases in which the perpetrator was killed. Said policy eroded in the period in which horrible suicide attacks took place in the mid-nineties (see **Nazaal**), and it seems that since then the above policy was forgotten, including its underlying considerations.

19. As I have already noted, respondent's counsel notified in the hearing that the alternative of sealing the perpetrator's room alone was considered but rejected on the grounds that it had a weaker deterring effect as compared to the demolition of the entire apartment. Under the circumstance at bar said reasoning cannot be accepted. There is no dispute that the severe security situation takes a painful tall almost on a daily basis and requires a determined and effective response. However, using the sanction of a complete demolition of the home of individuals who did nothing wrong while seriously violating their most fundamental rights does not reconcile, as aforesaid, with basic Jewish and universal moral principles and with the principles of our legal system, and we should not give it a hand.

    Under these circumstances, if my opinion is heard, we shall issue an order nisi, ordering the respondent to show cause why he should not refrain from the demolition of petitioner's home, and alternatively – why he should not be satisfied with the sealing-off of the perpetrator's room alone.

B. The petition in HCJ 8156/15

20. The petitioners in this petition, as recalled, are the first and third floors' neighbors, living above and underneath the second floor against which a demolition order was issued which is the subject matter of the petition in HCJ 8154/15 discussed above, The petitioners wish to prevent damage to their homes as a result of the demolition of the second floor. No involvement in the attack is attributed to these petitioners.

21. This court has stressed more than once the obligation of the military commander to take all necessary measures, according to the circumstances of the matter, while carrying out a demolition order, to prevent damage which may be caused to neighboring buildings (HCJ 2209/90 **Shwahin v. Commander of IDF Forces in the West Bank Area**, IsrSC 44(3) 875, 879 (1990); HCJ 6932/94 **Alrub v. Military Commander of the Judea and Samaria Area** (February 19, 1995); HCJ 8124/04 **Aljaberi v. Commander of IDF Forces in the West Bank** (October 12, 2014); **Sidr,** paragraphs H-I of the judgment of the Deputy President Justice **E. Rubinstein**).

22. In the case at bar a declaration was given on behalf of the respondent according to which the demolition would be carried out manually and would be supervised by an engineer so as to prevent damage to petitioners' homes. Willingness was also expressed to examine the engineering opinion on behalf of the petitioners which refers, *inter alia*, to the need to remove the debris to prevent damage to petitioners' apartments. In view of the above I am satisfied that the matter of these petitioners received an adequate response. To the extent that damage is nevertheless caused, they will be entitled to file suit for their damages (**Sidr**, *Ibid*.) Subject to the above, this petition should be denied.

C. The petition in HCJ 8150/15

23. As aforesaid, I do not share the opinion of my colleague, Justice **Amit** and his conclusion that the petition should be denied. I am of the opinion that we should issue an *order nisi* in this petition in a bid to thoroughly examine the controversy in this matter.

24. The controversy in this petition focuses on the **identification** of the apartment in which lived the perpetrator 'Alaa Abu Jamal (hereinafter: **'Alaa**). As recalled, the attack took place on October 13, 2015, and on October 22, 2015, the respondent notified of his intention to seize and demolish a single story structure in which lived the perpetrator with his wife and children. A petition was filed against the demolition order (HCJ 7219/15), however, on November 3, 2015, on the eve of the hearing which was scheduled in the petition, notice was given by the respondent that order was revoked on the grounds that he realized that the perpetrator did not live in the single-story structure against which the order was issued but rather on the ground floor of the three story building adjacent to said structure. The petitioner, the perpetrator's father, filed the petition at bar against the demolition order, while along general arguments against the lawfulness of the order the petition argued that 'Alaa and his family lived in the single-story structure against which the original demolition order was issued rather than in the three story family building. It is worth noting that both structures belong to the Abu Jamal family.

25. Having examined the material, I am of the opinion that the factual-evidentiary infrastructure which was presented by the respondent to substantiate his position concerning the place of residence of the perpetrator is not sufficiently based, particularly when confronted by affidavits of three family members who declare that the perpetrator ('Alaa) and his family lived in the single-story structure. Respondent's position concerning the place of residence of the perpetrator is mainly based on a collection of photographs taken by the representative of the security forces who arrived to the place on the day of the attack, which indicates that several personal and professional items of the perpetrator (a number of framed photographs of himself and his family, a certificate, several pay slips of the perpetrator and several boxes of communication routers) were found in the ground flour of the three story building. Said items were not photographed for some reason in their original places but rather when they were scattered on the floor. In addition, no affidavit was submitted by the representative of the security forces who conducted the visit and took the pictures.

Moreover. After said visit, which was conducted as aforesaid on the day of the attack, a seizure and demolition order was issued against the single-story structure. No convincing explanation was given

to the change which occurred later on in respondent's position, and the evidence which was presented does not provide a clear and convincing evidentiary infrastructure. The privileged information which was presented to us in this regard does not provide an actual evidentiary support for that matter either. It should be noted here that the fact – which apparently was given considerable weight by the respondent – that an old planning demolition order is pending against the single-story structure (from 1997), which has not been realized, may, perhaps, explain the fact that the family prefers the demolition of the single-story structure over the demolition of the ground floor of the big building, but is not relevant, in and of itself, to the factual issue in dispute, and obviously is not a legitimate consideration in respondent's considerations according to Regulation 119.

26. In his response the respondent argued that the petitioners did not present positive evidence to support their argument that the perpetrator lived in the single-story structure. This is an awkward argument and it seems that the respondent turned things topsy-turvy, since the evidentiary burden to substantiate facts which justify the infliction of such a severe harm on the petitioner and his family, lies in its entirety **on the respondent**.

27. It must be remembered that this is a very extreme sanction of seizure and demolition of a residential unit, which concerns a severe violation of constitutional rights (the right to own property and the right to dignity), and case law provides that when a violation of this kind is concerned, the required evidentiary level is of "**clear, unequivocal and convincing evidence**".

    It was so held with respect to the evidentiary infrastructure regarding another severe sanction according to the Defence Regulations, the sanction of deportation from the Area according to Regulation 112 (HCJ 159/84 **Shahin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 39(1) 309, 327 (1985), hereinafter: **Shahin**; **Nazaal**; HCJ 672/88 **Labadi v. Commander of IDF Forces in the West Bank**, IsrSC 43(2) 227, 237 (1989)). In the above **Shahin** President Shamgar stressed that this was the applicable test "**whenever the revocation of existing rights or the revocation of fundamental rights is discussed**" (*Ibid*.) And indeed, this test was applied by case law in connection with violations of fundamental rights, including rights which are not granted by virtue of the basic laws (see for instance: HCJ 680/88 **Meir Schnitzer v. Chief Military Censor**, IsrSC 42(4) 617 (1989) on the violation of the freedom of speech; HCJ 394/99 **Maximov v. Ministry of Interior**, IsrSC 58(1) 919 (2003) on the revocation of rights according to the Law of Return; HCJ 9822/08 **The Movement for Quality Government in Israel v. The Director of Elections** (November 27, 2008) on the disqualification of a candidate in elections; HCJ 1398/04 **Ben Horin v. Registrar of Associations** (January 19, 2006) on the violation of the freedom of association, and many others).

28. In the case at bar, it seems that the respondent does not purport to claim that he presented to us "**clear, unequivocal and convincing evidence**" regarding the perpetrator's residence. Under these circumstances, if my opinion is heard, we shall issue an order nisi in this petition for a thorough examination of the factual dispute regarding the residence. Obviously, once the question of the perpetrator's residence is clarified, the justification of the order itself should be examined, *inter alia*, according to the criteria specified by me above in connection with the petition in HCJ 8154/15.

Justice

Justice Z. Zylbertal

1. I join the opinion of my colleague Justice **I. Amit** according to which the petitions at bar should be denied (the denial of the petition in HCJ 8156/15 was also agreed to by my colleague Justice **M. Mazuz**).

2. I am aware of the general position of Justice Mazuz regarding the lawfulness of the seizure and demolition orders according to Regulation 119 of the Defence (Emergency) Regulations 1945, as expressed in his judgment in HCJ 7220/15 '**Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015); as well as of his general position on the dis-proportionality and unreasonableness of the order discussed by us in HCJ 8154/15 which is directed against the home of the extended family which was not owned by the perpetrator, who lived as a bachelor in one of its many rooms, as said position was specified by him in detail in this judgment.

   The reasons of Justice **Mazuz** are weighty reasons which are based on fundamental constitutional principles as well as on basic reasons of justice and fairness. Had said issues been brought to this court for the first time, it is possible that I would have joined the main principles of his positions. However, the above issues were discussed by the Supreme Court in its judgments over and over again, including very recently, and the positions of my colleague were not accepted (on the denial of petitions in cases in which an order was issued for the demolition of a residential unit of the extended family of the perpetrator see: HCJ 7040/15 **Hamed v. The Military Commander of the West Bank Area** (November 12, 2015); HCJ 7823/14 **Ghabis v. GOC Home Front Command** (December 31, 2014); HCJ 5696/09 **Mughrabi v. Major-General Yair Golan, GOC Southern Command** (February 15, 2012) and HCJ 9353/08 **Abu Dheim v. GOC Home Front Command** (January 5, 2009)).

3. In the judgment given by Justice **E. Hayut** in the general petition which was submitted in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defence** (December 31, 2014), the main principles which reflect my own position were said, according to which, as a general rule, previous decisions of this court should not be veered from, particularly in view of the fact that these decisions were given just recently and especially in view of the fact that we are concerned with decisions that have reached time and time again the same conclusion. Known are the words of Justice **Zilberg** in FH 23/60 **Blen v. Executors of the Will of the Deceased Reimond Litwinski**, IsrSC 16(1) 71, 75 (1961) according to which:

   > The Israeli legislator did not want the Supreme Court to be completely free from the binding authority of precedents and – consequently – that each one of its justices will act at his own accord… Far be it from us! Should we follow this route, then, in time, this judicial institution will turn from a 'court of law' into a 'court of justices', whose number of opinions will equal the number of its members.

   The above words apply even more forcefully when the issue with which we are concerned is an issue of great importance which has been just recently brought, time and time again, before the Supreme Court, and the latter expressed its opinion in that regard. Under these circumstance the possibility that the end-result of the petition would be haphazardly determined according to the specific panel which would be assigned to hear it is not adequate, and it would be appropriate that at least in general issues the position of the Supreme Court, as an institution, will be known by the other state authorities as well as the public at large. All of the above, so long as the general position has not been changed in one of the acceptable ways, such as by way of a further hearing or by an expanded panel. And note well – only recently a request for a further hearing in the above issues was denied (HCJFH 360/15 **HaMoked: Center for the Defence of the Individual v. Minister of Defence** (November 12, 2015).

In another case, which was heard only a short while ago, Justice **U. Vogelman** also stressed the need to "bow my head before the opinion of the Court" so long as the precedent is in force (HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015), paragraph 6 of his judgment).

Indeed, the Supreme Court is not bound by its own precedents as stipulated in section 20(b) of the Basic Law: The Judiciary. However, a deviation from a rule must be made very carefully, after passage of time from the date on which such rule was made, usually by an expanded panel, when the reasons for the revocation of the previous rule defeat the reasons which support the continued existence of the current law, such as the need to maintain stability, certainty, consistency and continuity. On this issue it was held that:

> … deviation from precedent destabilizes the normative system and prejudices it. The public and the government relied on the existing law and made their plans accordingly. A deviation from the precedent violated the principle of reliance and the need to maintain validity and certainty… deviation from precedent violates consistency which is based on justice, fairness and equality. It prejudices the continuity of the system.
>
> (Justice A. Barak in LCA 1278/92 **Bouskila v. Tzemach**, IsrSC 46(5) 159, 172 (1992)).

Prof. Y. Shahar in his article "**Solidarity and Generational Sequencing in the Israeli Supreme Court – The Politics of Precedents**", *Mehkarei Mishpat (Bar Ilan University Law Review)* , Vol. 16, 161 (5761-2001) expressed his opinion according to which:

> …a necessary (but not sufficient) authoritative tool in the hands of the Supreme Court is its solidarity, namely, its ability to establish an effective institutional position and protect it by discipline and self restraint. In other words, the Supreme Court relies on its commitment to its precedents.
>
> …
>
> … this is the only way by which the court can formulate one opinion. This is the only way by which all Israeli Justices will learn to bow their heads before the opinion of the court. This is the only way by which all execution bodies, elected and appointed, will know to bow their heads before the opinion of the court. This is the only way by which the court will maintain its leadership.
>
> (The above words were consensually included in Prof. A. Barak's book **Judge in a Democratic Society** 247 (2004)).

4. Indeed, I am also of the opinion that the current rule in the issues at bar raises difficult questions. It would be appropriate to examine it. However, in circumstances in which different panels of this court reiterated, specifically in the last few weeks, in view of the current difficult and turbulent events, the above rule, I do not think it would advisable to deviate from said rule in the context of the proceedings at bar.

5. With respect to the petition in HCJ 8150/15, I agree with my colleague Justice **Amit** that the administrative evidence, together with the entire relevant circumstances that the respondent was entitled to take into account, indicate that the perpetrator lived in the property against which the order was issued. Indeed, there is room for criticism, as was expressed by Justice **Mazuz** of the conduct of respondent's representatives with respect to the collection of the evidence. However, even if the

evidence collected by the respondent is relatively poor, then, the other circumstances justified the decision which was made (the intention is mainly to the fact that a planning demolition order is pending against the "separate building" and to the fact that if the perpetrator's family had indeed lived in said building it should not have had any real difficulty to present proof to that effect and in so doing to refute the indications arising from the evidence in respondent's possession, but this was not done).

6. As aforesaid, I agree with Justice **Amit** that the petition should be denied.

Justice

Decided as stated in the majority opinion of Justices **I. Amit** and **Z. Zylbertal**, against the dissenting opinion of Justice **M. Mazuz**, to deny the petitions,

The execution of the orders will be postponed to December 30, 2015 (inclusive), to enable the petitioners to prepare for the execution thereof.

Given today, 10 Tevet 5776 (December 22, 2015).

Justice Justice Justice