At the Supreme Court sitting as the High Court of Justice

HCJ 5839/15
HCJ 5844/15

Before: His Honorable Justice Vice President E. Rubinstein
His Honorable Justice U. Fogelman
His Honorable Justice Y. Amit

The Petitioners in HCJ 5839/15:
1. __ Sidar
2. ___Tamimi
3. __ al Atrash
4. __ Tamimi
5. __ Akribi
6. __ Tahah
7. __ al Atrash
8. __ Tahah
9. HaMoked – Center for the Defense of the Individual founded by Dr. Lota Salzberger

Petitioners in HCJ 5844/15:
1. Jane Doe
2. Jane Doe
3. John Doe
4. HaMoked – Center for the Defense of the Individual founded by Dr. Lota Salzberger

V E R S U S

Respondent in HCJ 5839/15: IDF Commander of the West Bank
Respondents in HCJ 5844/15:
1. Military Commander in the West Bank Region
2. The Attorney General for Judea and Samaria

Petition for granting of *order nisi*

Date of hearing: 14 October 2015

Representing the Petitioners in HCJ 5839/15:	Atty. Andre Rosenthal
Representing the Petitioners in HCJ 5844/15:	Atty. Michal Pomerantz
Representing the Respondents:	Atty. Avi Milikovsky, Atty. Aner Helman

Judgement

Vice President of the Court E. Rubinstein:

A. These two petitions concern a destruction order on the apartment of the terrorist Maher al-Hashalmun, who on 11-Oct-2014 at the Alon Shevut intersection bus station murdered a young woman Dalia Lamcus, peace be upon her, and attempted to kill two others, who were injured; in military court on 26-Mar-2015 he was sentenced to two consecutive life terms and to damages totaling over 4 million NIS. On 19-Aug-2015 the terrorist's family (the Petitioner in HCJ 5844/14) was given notice of intent to seize and demolish their apartment under Article 119 of the Defense (Emergency) Regulations, 1945. A short period of notice had been given and an extension was requested – and on 24-Aug-2015 oppositions were in fact filed by the family and by the Petitioners in HCJ 5839/15, who are the terrorist's neighbors – which were rejected on 25-Aug-2015. After the demolition order was signed on 29-Aug-2015, the petitions were filed on 30-Aug-2015 – and an interim injunction and later an interlocutory decree were issued by Justice Barak-Erez (30-Aug-2015 and 10-Sep-2015, respectively).

B. The petitions cited both general arguments about the legality of employing Article 119 and the effectiveness of such deterrents, and specific arguments regarding the late notice – some nine months after the commission of the crime – and the possibility that the demolition would also damage the apartments of innocent neighbors.

C. The Respondents' reply, accompanied by an affidavit from the Central Region Military Commander, stated that the authority to demolish had already been decided in principle in HCJ 8031/14 HaMoked – Center for the Defense of the Individual v. Minister of Defense ruling (31-Dec-2014), and that the authorities are granted discretion as to the timing of the demolition under HCJ 4747/15 Abu Jamal v. Home Front Commander (7-Jul-2015). As for the safety of the demolition, an IDF source wrote in a 8-Sep-2015 letter that the demolition would be conducted manually, electronically and mechanically without damaging the building and without the use of explosions (as was clarified during the hearing); that the demolition was not expected to cause damage to the neighboring apartments or to the building itself; that in spite of the threatening operational setting the location had been mapped in an attempt at precision so as to prevent collateral damage; and that "the demolition will be carried out under the supervision of a structural engineer from the fortifications branch who will be present at the site so as to ensure the demolition is carried out in accordance with the aforementioned." In anticipation of the hearing the Petitioners in HCJ 5839/15 asked to file a draft ruling in which another house

demolition (regarding HCJ 8066/14) caused various forms of damage to – among other things – a neighboring apartment.

D. Among other issues raised during the hearing before the court the question was raised as to the disposition of the law in case, despite these efforts, damage is done to the neighbors' apartments, for example, if such harm is in fact done – whether or not there would then be eligibility of compensation for damages; the question was raised (according to the Respondents due to possible acts of war [during the demolition?]).

E. After perusing the materials and hearing the parties, it seems to me we are unable to accept the petitions in accordance with the following:

F. First, we are unable to address anew the matter of principle discussed in HCJ 8091/14, and which was recently raised – as noted – in another recent hearing (HCJ 360/15 HaMoked – Center for the Defense of the Individual v. Minister of Defense).

G. Second, even if there is no place for intervention in this specific case regarding the timing of the notification of the Petitioners of the intention to demolish, and even if such timing as a rule is subject to the authorities' discretion (the aforementioned HCJ 4747/15), the matter ought still to be subject to reasonableness, proportionality and common sense; moreover the appearance of things carries importance as well. It seems that as soon as there exists the intent to demolish, notification should be given as soon as possible after the criminal act in question. Under the totality of the current case's circumstances intervention is not possible, as noted, and in any case this argument does not carry enough weight to sway the scales; but going forward our comments should be heeded, even though the exact timing of notification is fundamentally in the hands of the authorities.

H. Third, as to the demolition itself: we have taken note of the Respondents' declaration regarding both the character of the demolition action and its placement under the command of the engineer. We would like to emphasize this point and ask that every effort be made to fulfill all the components of what has been promised regarding the demolition, especially and particularly with regard to the apartments of the neighbors who are not involved in the grave affair [of the terror attack]; there is a need for serious attention on this matter.

I. Finally, insofar as the damage to the neighbors' apartments is greater – beyond the parameters described – from our perspective the possibility of compensation remains open, in accordance, that is, with the relevant circumstances, whether these concern the essential matter of demolition or the conditions under which it was carried out.

J. On these conditions we have decided not to accept the petitions. There is no order regarding expenses.

K. This being said:

My two colleagues have added various comments on a broader level. Upon reading the opinion of my colleague Justice Fogelman I should add that my colleague honestly portrays his skeptical opinion of the actual deterrent capacity of Article 119, while also respecting the implications of the Court's decision. We attempted to express all the considerations on either side of the matter in our HCJ 8091/14 ruling, so I will not discuss them at length here and shall remain concrete. The reader should refer to that ruling for all the issue's complexities and difficulties, and look specifically at paragraphs 16-18 of my opinion there as well as the opinions of my colleagues. As I noted in paragraph 16 there, "it may be more comfortable and easy to stand with the Petitioners rather than the Respondents"; yet our duty is to see the greater picture in the reality within which we live, including the legal reality. I should add that like my colleague Justice Fogelman, I too am aware – as is my fellow Justice Amit, of course – of the present horrors, under which we hope morning and evening that we won't wake up to hear or be informed at the end of the day, God forbid, that more families are mourning their dead and wounded, God be merciful. Yet the Petitioners were notified of the pending demolition in August 2015, preceding the current dark and frightening wave, so the decision being petitioned would seem not to be a consequence of it. My colleague Justice Amit raises questions on the larger picture, to which the fundamental answers – in my opinion – operationally lie on the basis of HCJ 8091/14, and the reader can complete the equation.

Vice President of the Court

Justice U. Fogelman

I have perused the opinion of my fellow Justice Vice President of the Court E. Rubinstein and I join the conclusions he reached regarding HCJ 5839/15 and as well as the content of paragraphs H and I of his opinion. My opinion regarding HCJ 5844/15 is different, and in hered I would like to make several comments on the general question of house demolitions.

1. Article 119 of the Defense (Emergency) Regulations, 1945 (hereafter: the Regulations) grants the Respondents the authority to seize, demolish and seal off the homes of those suspected of involvement in hostile terrorist activity in accordance with alternative actions which are named therein. The authority granted by these Regulations, which are a piece of British Mandate legislation, is employed both within the State of Israel and within Judea and Samaria. In Israel the Regulation is not subject to be struck down on constitutional grounds under the Basic Law: Human Dignity and Liberty since it is "law which pre-dated the Basic

Law" (Article 10 of this Law), but our rulings have recognized that – like all law which pre-dated this Basic Law – this is to be interpreted in accordance with the content of the Basic Law. Therefore it has been and remains necessary to employ the authority under this regulation in accordance with the test of proportionality (see for example HCJ 8091/14 HaMoked – Center for the Defense of the Individual v. Minister of Defense, paragraph 18 (31-Dec-2014) (hereafter: the HaMoked matter)). And what shall be proportional in relation to the use of this regulation? This Court has previously ruled that the decision to demolish a house, as opposed to sealing off a room or demolishing a portion of the house, does not necessarily indicate that the means chosen was not proportional; the Court also ruled that there is no requirement to show that those living in the house knew about the suspect's terrorist activity (see citations, ibid.). This was the ruling years ago, and this Court restated it recently (there are a number of references which are noted in Vice President E. Rubinstein's opinion, in the HaMoked matter, and in the State's Response here, and there is no need to repeat them).

2. On these grounds and these grounds only I would normally be inclined (though not in this case, as I shall explain) to take the view that implementation of the law as it stands is sufficient to lead to the conclusion reached in this case by my colleague Vice President E. Rubinstein, that is: to reject the Petition. For this reason – that were this not the customary judicial precedent, my own opinion would have brought me to the conclusion that the employment of the authority under Regulation 119 when no sufficient proof has been provided that the family of the suspect were involved in hostile activity – is not proportional. The lack of proportionality is due to the fact that the means chosen – house demolition – is not in the proper relation to the yield to be gained from it. 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 this benefit. What does it mean?

3. First, this deterrence which the Regulation at hand hopes to establish. Deterring terrorists from taking part in atrocities – and though we are in crazed days of a murderous terror wave, this is true in "normal" times as well – has a large benefit. In effect, if the demolition of a certain terrorist's house deters an unknown terrorist from harming human life, then we may say that the chosen means has granted the greatest benefit imaginable. Except that there may be room to wonder whether this deterrence is in fact achieved through the implementation of the authority granted to the Respondents under Regulation 119. It would seem that the military authorities did so; even though they believed that there was a connection between the demolition of terrorists' houses and deterrence, they noted that as a system there exists a tension between deterrence and "the price of demolition"; they even concluded that "the tool of demolition in the framework of a deterrent element has been eroded'" (see slides 17, 20 and 22 of the presentation given by the Committee under Major-General Ehud Shani which examined this subject in 2004 and 2005, which was the Addendum No. 1 in the HaMoked

matter petition). As a result the security authorities chose – a decision later amended – to cease house demolition activity for purposes of deterrence as a method in the area (while keeping it available in extreme cases) (see ibid., paragraph 6 of the opinion by Justice E. Hayot). This Court took this stand as well when it emphasized that even though it is impossible to prove "how many terror attacks were prevented, and how many lives were saved as a result of the deterrent actions of sealing and demolishing houses" (HCJ 2006/97 Janimat v. Central Region Commander, PD 51(2) 651, 655 (1997) (words of Justice Goldberg) (hereafter: Janimat affair)), still "it behooves the State authorities to examine the tool and its concomitant benefit from time to time […] [and] to provide […] statistics indicating the effectiveness of the method of house demolitions as a deterrent in such a manner as justifies the harm to those who are not suspects or defendants" (HaMoked matter, paragraph 27/Aa; and paragraph 6 of Justice E. Hayot's opinion).

4. The grave consequences of the action must be weighed opposite this benefit and the doubts raised about it. It is one thing to destroy the house of one who tried to annihilate us when he lives alone; it is another thing to destroy the building in which his family or other residents live who were not involved in his malicious plan, and whose house collapses through no fault of their own. Erstwhile Justice M. Cheshin described it well:

> **"If we demolish the bomber's apartment we will simultaneously destroy the home of this woman and her children. We will thereby punish this woman and her children even though they have done no wrong. We do not do such things 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 the free and democratic Jewish state. These values guided us on the path of justice during our people's glory days of old and our own times are no different: "They shall say no more, The fathers have eaten sour grapes, and the children's teeth are set on edge. But every one shall die for his own iniquity: every man that eats sour grapes, his teeth shall be set on edge" (Janimat Affair (Minority Opinion)).**

5. I too join these logical words. I should add that the damage of house demolition for its part should not be seen as economic or property damage alone (compare to HaMoked affair, paragraph 26/Z of Vice President E. Rubinstein's opinion; paragraph 21 of Justice N. Solberg's opinion), though this damage too should not be underestimated, since for humans a house "is not just a roof over one's head but also a means of the physical and social placement […] of the private life and social relationships" (HCJ 7105/02 Ajuri v. IDF Forces in the West Bank, PD 56(6) 352, 365 (2002); Civil Appeal 8398/00 Katz v. Kibbutz Ein Tzurim, PD 56(6) 602, 623 (2002); see also HCJ 1661/05 Gaza Coast Regional Administration v. Israel Knesset, PD 59(2) 481, 561-3

(2005)). These things are intended, as noted, primarily for innocent family members against whom there are no claims of aiding the criminal action of the terrorist, when the military commander orders the demolition of the entire house (as opposed to demolition or sealing off of portions of it).

6. The result of weighing the two scales against each other – between the benefit and the harm to human rights which result from implementing the Regulation's content – is that, at least in the absence of involvement by members of the household, the drastic harm to the rights of the uninvolved pushes the scales and enhances the considerations against such action. Demolition of the home is therefore within authority, but the fault lies rather in the realm of discretion: in this situation the action is not proportional. All of this is in a nutshell, since it is not the precedent put out by this Court. Still, I would suggest that we re-evaluate the judicial precedent so as to lay all the cards on the table regarding issues in internal and international law, since as long as this precedent stands I bow my head before the opinion of this house. "Only thus can the house effect its leadership" (see Yoram Shahar "Unity and Generations in the Supreme Court – the Politics of the Precedent" *Legal Studies* 16/O 161, 161-162 (2000) [Hebrew]; see for detail on the question of deviation from current precedent Aharon Barak *Judge in a Democratic Society* 240-270 (2004) [Hebrew]). Indeed, "[…] Follwing the path of judicial precedent on this matter is not easy" (HaMoked matter, paragraph 1 of Justice E. Hayot's opinion), but deviating from the judicial precedent of this Court, which it has renewed on several panels recently – is not desirable, lest this court of justice become a court of Justices – a comment rightfully mentioned by Justice E. Hayot in the HaMoked matter which remains relevant and was made famous by Lord Eldon: "It is better that the law should be certain than that every judge should speculate upon improvements in it."

7. So far in general, and now to the case before us which differs in my eyes from the mainstream of the cases discussed in our ruling: the grave delay in the conduct of Respondent 1. Due to this, it is my opinion that this affair requires different treatment. I shall explain. The attack in regards to which the house demolition is requested, for all its disastrous consequences, was carried out on 10-Nov-2014. Only on 19-Aug-2015 – many months later – the terrorist's family was given notice of the Respondent's intent to seize and demolish the apartment where he had lived with his family. Many months passed therefore between the date on which the attack was carried out and the giving of notice of the intent to demolish the house. This passage of time raises the suspicion – so it is claimed – that separate security incidents occurring after the attack in question are behind the Respondents' decision to go ahead with the demolition. These incidents, though their gravity is indisputable, are external to the conduct of the terrorist. The result of this, the argument goes, is that the terrorist's family is not only to suffer from a crime it did not itself commit, but also for other crimes committed by individuals other than the terrorist who came from their home. Erstwhile Justice Dalia Dorner (in a Minority Opinion) noted this:

> **"One of the requirements, which have not been disputed until now, for the exercise of the authority, is the existence of a causal relation between the terrorist attack and the demolition. Although the demolition of a house is not a punitive measure in the full sense of the word but a deterring measure, the same should not be instituted except as a direct response to a terrorist attack which was performed by the terrorist who carried out the attack who resided in the house. In the case at bar, the Respondent 'froze' the demolition decision and turned it into a *quasi* 'conditional' sanction. The 'condition', so it turns out, was the performance of additional terrorist attacks, by terrorists who lived in other towns and belonged to other families. Pursuant to the performance of such further terrorist attacks, the Respondent seeks to demolish the petitioners' houses. In my opinion he is not entitled to do so, since the demolition authority should not be exercised pursuant to terrorist attacks which are not those which were performed by the terrorist who lived in the house" (HCJ 1730/96 Salah v. IDF Military Commander, PD 50(1) 353, 364 (1996)).**

8. In the case at bar the written response of the Respondent does not directly address the causes for such serious delay in enacting the demolition authority, and in any case it fails – in the current stage of the hearing – to void the claim that the authority was enacted due to other attacks which were not committed by the terrorist who lived in the house. On this basis, if my view were to be heard, we would order that an *order nisi* be issued on the petition for HCJ 5844/15 and reject the petition in HCJ 5839/15.

J U S T I C E

Justice Y. Amit:

1. The tool of house demolition is perceived, not without justification, as a problematic one which contravenes the commandment "Every man shall be put to death for his own crime" (Deuteronomy 24: 16), a statement anchored in the principles of liberty, justice, integrity and peace in Hebrew law and the heritage of Israel.

Yet we have recently discussed at length in HCJ 8091/14 various aspects related to house demolitions under Regulation 119 of the Defense (Emergency) Regulations, and an additional hearing is pending on the ruling. Therefore, and as my colleague Justice U. Fogelman noted, there is no room to reconsider the customary judicial precedent.

That being said, the comments of my colleague Justice U. Fogelman, elicit from me a number of comments and points for consideration, which follow.

2. The argument that employing house demolition as a deterrent turns the terrorist's family into a means, an object, and thus adds a violation of human dignity – should not be diminished. However, in light of the claim that house demolitions serve an interest of the highest order – defending the security and lives of residents of the State – it would seem that the controversy over house demolitions increasingly moves towards questions of the *efficacy* of the deterrence, that is, to the utilitarian element rather than the deontological.

On this matter my colleague noted that "in effect, if the demolition of a certain terrorist's house deters an unknown terrorist from harming human life, then we may say that the chosen means has granted the greatest benefit imaginable." Yet only several months ago a ruling was handed down by my colleague Justice D. Barak-Erez in Criminal Requests 2886/15 State of Israel v. Shareef Khaled Abu Saleh (3-May-2015). The ruling concerns the appeal of detention until conclusion of proceedings of a number of defendants indicted on charges of activities supporting the organization ISIS. My colleague quotes from the investigation materials there:

> **"…Indeed, Fadi and Muhammad disagreed with using violence within Israel. Yet Fadi explained this as something for which currently 'the time is not right,' and noted in his interrogation that he feared the results which could include long-term imprisonment *or demolition of his home*. Muhammad noted in his interrogation that 'a background of security [violations]' was something 'respectable' in his eyes. While he did reject the use of violence by himself, he supported violence carried out by others and generally supported war with Israel. Muhammad noted that the activity for which he was being interrogated was 'just talk', but added that 'talk' could also support Jihad" (ibid., paragraph 28, emphasis added – Y.A.)**

The deterrence question's complexity is sharpened in light of the words of the former Head Military Advocate General Avichai Mandelblitt, which were quoted in the expert opinion filed by the Petitioners:

> **"…The Committee headed by General Udi Shani…determined that it was very doubtful whether demolitions are effective, but when the Committee examined the subject in depth, and its findings were presented to the Chief of Staff, it transpired that in fact assessing the effectiveness was very difficult. Together with concrete examples, and there are such examples in which the effectiveness of such a step has been proved, *concrete examples of families who prevented their sons***

> ***from going out to conduct acts of suicide, and the ISA presented such examples. There are a few dozen cases like that*, but on the other hand prima facie evidence was brought to the effect that the subject of demolition of houses for the purposes of deterrence also created much more hatred, created increased motivation, created refugee collectivity. There are contrary indications and consequently on this subject it was difficult to reach an unambiguous conclusion. Moreover, when we tried to quantify it, quantifying the hidden aspects of effectiveness was not simple, was complicated…It was impossible to reach an unambiguous result in this matter. This is something very, very complicated. The importance of additional reasons entered the picture…subjects connected with international law and I say again…it is possible to make the argument justifying it…and as there is real doubt on the subject of the effectiveness of the demolition of houses, when we attempt to strike a balance there are arguments on both sides of the subject and that led to a decision, a significant and dramatic decision' (emphasis added: Y.A.).**

The expert opinion's compilers chose to emphasize the later portions of the above comment, while I chose to emphasize the opening remarks which suggest that dozens of terrorist attacks were prevented. It should be noted that as these lines are being written the Israeli public is experiencing primarily knife attacks. Without of course belittling these actions, the bloody days of the Second Intifada when each suicide attack killed dozens, should be kept in mind. Thus, I ask my colleague, did not deterrence achieve the greatest possible benefit by saving dozens of people? And in balancing between property damage – even if an individual's home is more than property in the regular sense – and the possibility of harm to human lives, is not the second to be preferred? And in "translation" to constitutional language, does the State's use of administrative authority to carry out an order to demolish a house under Regulation 119 cause proportional harm to the rights of the house's owners to *property and to dignity*, considering the possibility that deterrence may defend the right to *life* of residents of Israel?

3. And if we are dealing with deterrence, it is interesting to note that in various realms of the law the initial assumption is of the human as a rational being guided by cost-benefit considerations. In effect, the economic approach to the law is based on this assumption (which has its detractors in other disciplines). It seems to me that the "rationality assumption", under which we may assume that a potential terrorist will take into account the suffering his family is liable to be subjected to from the demolition of their house, is neglected in the framework of the discussion on Article 119 of the Defense Regulations in favor of the assumption that a potential terrorist is full of motivation to carry out an attack and indifferent to the totality of the results

which will result from his actions. And is the terrorist's nuclear and extended family, too, necessarily indifferent to cost-benefit considerations?

4. Is the demolition/sealing off of a house/apartment/room under a specific order in effect collective/group punishment under both the simple meaning of the word and in light of the content and historical background standing at the base of the prohibition against collective punishment? Is there no middle ground between individual punishment and responsibility on the one hand and collective punishment and responsibility on the other? Shouldn't the destruction of a single house be distinguished from a large-scale demolition? Does not the classification of the destruction of a single home – on the basis of a specific order, conducted carefully to prevent damage to adjacent houses/apartments/rooms, and after granting the right of hearing and possibility to remove items from the house ahead of time – as collective punishment broaden, and thus cheapen, the concept of collective punishment? And generally, does every punishment of an individual for the crimes of another constitute collective punishment? Is there importance to the stance that house demolition is not a tool of *punishment* but rather of forward-looking *deterrence* vis-à-vis an unknown potential terrorist? On the other hand, can we ignore the fact that the actual effects harm the residents of the terrorist's house *directly* and not *indirectly*?

5. Consideration of direct or indirect involvement of the terrorist's family members, and the degree to which the limits of this consideration can be expanded.

Should the family of a terrorist indeed be seen as a completely innocent third party, a completely foreign party, like the family whose home is destroyed in a bombing because of mistaken identification of a target? Morally speaking, is there any importance to the behavior of the terrorist's family? Shall we distinguish between behavior-knowledge-support and encouragement of the family before the attack and the family's behavior after the attack? Is there any relevance to the fact that a terrorist's family praises their son as a martyr for his participation in the attack, and distributes candy as a marker of happiness and generally "dances on the blood" spilled by him? On the other hand, should not the possibility be considered that the family's joy is a matter forced upon it by the surrounding society and is not actually identification with the act of terror?

6. I do not believe that there is room to expand on these points, the answers to which appear – whether explicitly or generally – in the precedents regarding Regulation 119, which has been surveyed in detail by my colleague Justice E. Rubinstein in the aforementioned HCJ 8091/14. The policy of demolishing terrorist's houses has to date been enacted in a measured fashion, pursuant to careful measures to prevent damage to neighboring houses, as indicated by the comment of my colleague Justice E. Rubinstein in paragraph H of his opinion above. So long as this policy is used in measure and on the basis of pure security concerns, I do not think it

right to reconsider the well-rooted precedent on the issue, for which all the matters of principle regarding house demolitions have already been decided.

Therefore, in conclusion I join my colleague Vice President E. Rubinstein.

J U S T I C E

Ruled in favor of the opinion of Vice President, Justice E. Rubinstein.

Hand down today, 15 October 2015.

Vice President of the Court J U S T I C E J U S T I C E