At the Supreme Court

HCJ 6745/15

Before:	**Honorable Vice President E. Rubinstein** **Honorable Justice Z. Zylbertal** **Honorable Justice M. Mazuz**
The Petitioners	**1.** [redacted] Abu Hashiyeh **2.** [redacted] Abu Hashiyeh
	v.
The Respondent	**Military Commander of the West Bank**
	Petition for Order Nisi
Session dates:	8 Cheshvan 5776 (October 21, 2015) 29 Cheshvan 5776 (November 11, 2015)
Counsel for the Applicants	Adv. Lea Tsemel
Counsel for the Respondents	Adv. Yochi Genessin, Adv. Yonatan Zion Moses

Judgement

Vice President E. Rubinstein

1. The Petition herein concerns the demolition order issued for a residential unit in New Askar Refugee Camp (hereinafter: **the unit**), which served as the residence of [redacted] Abu Hashiyeh (hereinafter: **Abu Hashiyeh**), who stabbed and killed the soldier Almog Shiloni in an attack perpetrated near the Hagana railway station in Tel Aviv on November 10, 2014. Abu Hashiyeh was charged with premediated murder for this attack on November 24, 2014. On October 8, 2015, some ten months after the attack, the Respondent made use of his power under Regulation 119 of the Defense (Emergency) Regulations 1945 (hereinafter: **Regulation 119** or **the Regulation**), and ordered the demolition of the unit. The Petitioners herein are the parents of Abu Hashiyeh, who live in the unit with five of their children. They request that we instruct the Respondent to refrain from using his power and demolishing the unit. The petition was filed on October 12, 2015; an interim

order staying the demolition was issued on the date of submission, an order nisi was issued on October 29, 2015, and therefore:

Background: Parties' arguments and the proceedings at bar

2. Petitioners' arguments can be divided into two aspects: first, *the aspect of power*, that is, whether the Respondent is entitled to use his power and order house demolitions generally, and specifically, in Area A, were the Petitioners live. The second aspect is *the aspect of proportionality and discretion*, that is, on the presumption that the Respondent does have the power to order the demolition of their unit, which Petitioners dispute, whether the measure is proportional under the circumstances.

3. In terms of powers, the Petitioners raise various arguments based mainly on international law. Their chief argument is that house demolitions are collective punishment and as such, prohibited under various international norms, including the Fourth Geneva Convention (1949) and the Hague Regulations (1917), and may amount to a war crime under the 1998 statute of the International Criminal Court (the Rome Statute). Specifically, Petitioners argue that the Respondent is not competent to order demolitions inside Area A, where the unit is located, because these are areas in which Israel has transferred powers pertaining to security to the Palestinian Authority, as part of the arrangements instituted in the Interim Agreement on the West Bank and the Gaza Strip of 1995 (Oslo B). Petitioners further argued that Abu Hashiyeh was not motivated by nationalistic sentiments and that this was purely a criminal incident, and as such, there is no room to use Regulation 119 in the matter. In this context, the statements Abu Hashiyeh gave during his interrogation indicate that he committed the attack because he had lost the desire to live and thought that if he stabbed a soldier he would be killed immediately, whether by the soldier himself or a bystander. Further thereto, the Petitioners argued that Abu Hashiyeh's father had quarreled with his son, and so, it was unreasonable to punish the Petitioners for the actions of the son for deterrence purposes.

4. In terms of discretion, the Petitioners argue that their unit should not be demolished for several reasons, and these are the main points they make:

   First, they do not own the unit. The unit is part of a building owned by the UN Relief and Works Agency (UNRWA), which was originally meant to provide shelter for Palestinian refugees who had arrived from Jaffa during the War of Independence in 1948. In this context, Petitioners argued that the Respondent should have at least sought the position of the UN, which owns the building, prior to using the drastic measure of demolishing the unit.

   Second, unreasonable delay. Given that eleven months had passed from the date of the attack until the demolition order was issued, Petitioners argued that the demolition was not meant as a real-time response to the attack, but as a response for recent incidents and the general rise in terrorist attacks. According to the argument, these latter considerations are extraneous, and for this reason too, the demolition must not be carried out.

   Third, the Respondent has failed to substantiate the argument of deterrence in the case at bar. Petitioners argued that, according to the rule produced by this Court in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (2014) (hereinafter: **HaMoked**), the Respondent must produce information demonstrating that house demolitions do in fact act as a deterrent, as alleged by the State over the years, and as alleged in the matter at hand as well. Since no such information was presented, the measure must not be used.

Fourth, in terms of the method chosen for the demolition, in this context, Petitioners argued that there is another unit above the unit in question and it was not clear how the top unit would remain undamaged. It was also argued that the Respondent had refused to provide the technical specifications of the demolition plan, thereby preventing the Petitioners from mounting an informed objection. I note that the decision of the military commander in the objection filed by the Petitioners indicates that the Petitioners had asked that a more proportionate measure be considered, such as demolishing one room and a bathroom that had been used by Abu Hashiyeh, rather than the entire bottom floor, occupied by the Petitioners. In the decision issued on October 9, 2015, this request was denied on the assertion that considerations of deterrence require the demolition of the entire residential unit.

5. In its preliminary response dated October 19, 2015, the State argued that the general arguments regarding powers must be dismissed, as they had been considered and dismissed by this Court in a number of judgments, including recently in **HaMoked**, and that they need not be revisited. With respect to the arguments pertaining to the Respondent's powers inside Area A, the Respondent argued that the unit in question was located in Area B, where, as is known, Israel retained security control. With respect to discretion in the specific case, the Respondent argued that the demolition of the unit is necessary in light of the recent spike in serious terrorist attacks – a succession of dozens of attacks beginning in early 2014, and particularly in recent months. The argument was that this created increased need for substantial deterrence, partly by using the exceptional measure of demolishing the homes of terrorists and their family members, which is resorted to only in particularly serious cases. As for the argument that the unit was owned by UNRWA, the Respondent argued this was factually erroneous, and presented information from the UNRWA website which stated that New Askar is not officially recognized as a refugee camp and that UNRWA has no buildings there (attached and marked R/4). In terms of the argument regarding unreasonable delay, the Respondent argued that the wave of terror which has increased in recent months increased the need for substantial deterrence, hence the Respondent's decision, among others, to order the demolition of the unit at this time. It was also noted that this was not a case in which years went by since the attack and that the demolition was ordered solely due to the state of security, but less than a year had elapsed between the attack and issuance of the order and as such, the duration was proportionate and did not amount to unreasonable delay. With respect to the evidence substantiating the stabbing and the motive, the Respondent argued that the available evidence, particularly Abu Hashiyeh's admission that he stabbed the soldier to death, meet the evidentiary requirements of administrative law for the purpose of demolishing the unit under the Regulation.

6. On the issue of the demolition method, the Respondent argued that the military commander had full discretion in the matter. The Respondent also provided an engineer expert opinion, signed by the head of the sabotage and fortifications unit in the engineering corps headquarters (marked R/5). The report includes a description of the building where the unit is located. The building has two sides, one has two stories and the other only a ground floor. According to the opinion, the ground floor of the two-story side is connected to the unit on the second floor of the other side of the building, serving as a single residential unit. The opinion noted that the demolition would affect the entire ground floor, without damaging the top floor "while safeguarding the principle of maximum mission completion with minimum collateral damage" (§5 of the opinion).

7. On October 10, 21, we held the first hearing in the petition. Given the time that elapsed between the date of the attack and the issuance of the demolition order, we asked that the state consider a more proportionate measure than demolishing the entire building, such as demolishing one room and the

bathroom, as suggested in the aforesaid objection, or sealing as an alternative or additional measure, or any other proportionate measure suggested by the State. On October 28, 2015, counsel for the State informed the Court that the Respondent declined the suggestion, for reasons of deterrence. With respect to the possibility of sealing, it was argued that this was not a viable option operationally due to the features of the area and the difficulty transporting the engineering equipment required for the sealing. On the next day, October 29, 2015, we issued the following Order Nisi:

> An Order Nisi as sought, and alternatively for the demolition of part of the unit, also considering that the family was issued notice close to eleven months after the murder.

The State was ordered to provide its response within a week, and the decision noted that "The State may of course submit its response earlier, if it so chooses, and a hearing shall be scheduled soon thereafter".

8. On November 9, 2015, the State submitted its response, enclosing the affidavit of the cabinet secretary. I note at this juncture, without prejudice to the cabinet secretary either personally or institutionally, that where the military commander is named respondent, the affidavit of response must be supplied by the military commander himself. Inasmuch as the matter contains a policy aspect, an additional affidavit may be enclosed, but as an addendum only and not as the main affidavit. The response noted that the decision to demolish the unit was made in July of 2015, prior to recent events, but notice thereof was delayed for three months due to operational issues related, among other matters, to the location of the unit in the New Askar refugee camp. It was further argued that this Court has previously refrained from intervening in decisions made by the Respondent to issue demolition orders in cases that involved long durations between the date of the attack and the date the order was delivered, and that the circumstances at hand give no cause to depart from these rulings. Among its authorities, the State cited HCJ 5839/15 **Sidr v. IDF Commander in the West Bank** (October 15, 2015) (hereinafter: **Sidr**), wherein nine and-a-half months had elapsed from the date of the attack and the delivery of the demolition notice. The Court chose not to intervene in the commander's decision in that matter. On this issue, it was argued that the difference between nine and-a-half months in **Sidr** and slightly less than eleven months in the case at hand does not justify intervention herein. As for the option of partial demolition, it was alleged that this could not achieve the desirable deterrent effect.

9. On November 11, 2015, we held a hearing on the objection to the Order Nisi. Counsel for the State clarified that the State opposes partial demolition or sealing as the severity of the attack required a full demolition since partial demolition would not suffice to deter potential attackers in future. In addition, a current report from the Israel Security Agency (ISA) substantiating the arguments concerning deterrence was presented *ex parte*. The report indicted the benefits of deterrence against the commission of terrorist attacks and provided examples. Counsel for the Petitioners stressed that the stabbing attack was not motivated by terrorism, and that Abu Hashiyeh simply wished to put an end to his own life. Abu Hashiyeh's statements to the police and minutes taken during his ISA interrogations were submitted. It was further argued that the Petitioners distanced themselves from Abu Hashiyeh prior to the attack and told him that they wished to have no contact with him, which cast doubt that demolishing the Petitioners' home would serve to deter Abu Hashiyeh and other potential terrorists from carrying out attacks, given that the conclusion would be that terrorist attacks would be answered with the demolition of the homes of those who do not care for the assailants.

Deliberation and decision

10. The purpose of Regulation 119 is deterrence not punishment. For this purpose, and this purpose alone, this Court has ruled, more than once, that the military commander must not be denied his power to order the demolition and sealing of terrorists' homes under the Regulation, despite the issues, which I do not discount, and the criticism based on the position of international law on this measure (**HaMoked**, a motion for a further hearing of this verdict was dismissed by President Naor (HCJFH 360/15 **HaMoked v. Minister of Defense** (November 12, 2015)). See also **Sidr**, §F; HCJ 7040/15 **Fadel Mustafa v. Military Commander of the West Bank**, §§25-26 of the opinion of the President (November 12, 2015) (hereinafter: **Mustafa**). As I noted in **HaMoked**:

> The Geneva Conventions of 1949 and the Hague Regulations of 1907 before them, were drafted and signed in an era much different from the one we live in. The terrorism facing world nations, and the State of Israel is certainly no different in that regard, presents them with uneasy challenges, since terror organizations do not abide by the provisions of one convention or another […] It is impossible to consider the issue at hand outside the context of the war on terror, which has only recently been referred to by Pope Francis as a "piecemeal World War III" (September 2014). It seems that the incidents described in the above individual petitions speak for themselves. Hence, the humanitarian provisions of the Fourth Geneva Convention which Israel has undertaken to uphold even if it has not recognized the legal application of the Convention […], should be interpreted in a manner that reflects their spirit and realizes their underlying objectives, but also enables the State of Israel, at the same time, to protect the security of its residents in the most basic manner.
> (**HaMoked**, §22; see also the opinion of Justice Solberg in **Mustafa**, para. 3).

11. With respect to the concrete argument regarding the Respondent's power to order the demolition or sealing of homes in Area A, pursuant to the Regulation: First, as stated by the State, inquiries made by the relevant officials in the Civil Administration has revealed that the unit is not located in Area A, but rather Area B, where the Respondent's powers to act are not in dispute. In any event, arguments regarding the military commander's lack of competence to demolish or seal a home pursuant to Regulation 119 in Area A have been considered and dismissed by this court (see: HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank**, §28 (2014); **Mustafa**, §§62-64). It was found that "The military commander has the option of acting in Area A, particularly when this is required for security reasons" (**Mustafa**, §64 of the opinion of the President).

12. Proceeding to the specific question regarding Abu Hashiyeh's motive. I shall begin by stating that I accept the premise that Regulation 119, and particularly the powers it grants the military commander to order the demolition of a dwelling, must be interpreted narrowly. Despite the fact that the Regulation seemingly applies also to "ordinary" criminal matters, including, as stipulated therein: "any offence […] involving violence or intimidation", it should be invoked for demolishing dwellings in exceptional cases, when the person in question acted in pursuit of terrorist objectives, or some other military-combat objective. The court has always noted the caution that must be exercised in using this regulation (HCJ 361/82 **Hamri v. Commander of the Judea and Samaria Area**, IsrSC 36(3) 439, 444 (1982) (hereinafter: **Hamri**); HCJ 5667/91 **Jabarin v. IDF Commander in the Judea and Samaria Area**, IsrSC 46(1) 858, 860 (1992); HCJ 5510/92

Turkman v. Minister of Defense, IsrSC 48(1) 217, 220 (1993), and all the more so subsequent to the enactment of Basic Law: Human Dignity and Liberty, when it was determined that the Regulation must be interpreted in accordance with the provisions of the Basic Law and the limitation clause (HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485, 488 (1996) (hereinafter: **Sharif**); HCJ 8084/02 **'Abasi v. GOC Home Front Command**, IsrSC 57(2) 55, 59 (2003); HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank**, §22 of the opinion of Justice Danziger (2014)).

13. We recall that the justification for using Regulation 119 is first and foremost an imperative military necessity; see Article 8(2)(a)(4) of the Rome Statute, which prohibits extensive destruction of property that is unjustified by military necessity, as well as the judgment of the International Criminal Tribunal for the former Yugoslavia, the ICTY, which determined that destroying homes is permitted only when absolutely necessary for military operations (**The Prosecutor v. Blaskic**, IT-95-14-T, §157 (2000); see also and compare Yoram Dinstein, **The Law of Belligerent Occupation** 93 (2009). As noted more than once in the past, we accept the concept that the term "imperative military necessity" must be interpreted in accordance with current global realities which include "systematic terrorist activities as part of a strategy or as part of an armed struggle" (E. Gross, **The Struggle of Democracy against Terrorism – Legal and Moral Aspects**, 227 (2004) (in Hebrew); see also **HaMoked**, §23; HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank**, §24 of the opinion of Justice Danziger (2014)). Yet there is a difference between terrorist attacks such as these and other criminal acts that do not amount to terrorism and, therefore, care should be taken that Regulation 119 is invoked for the demolition of a person's home only in exceptional circumstances, as part of the constant balance Israel must make between security considerations on the one hand and the protection of human rights and of its democratic identity on the other (see, on this issue, also my essay *Public Law during Crisis and War*, in my book **Paths of Governance and Justice –Public Law Issues in Israel**, (Hebrew), 15, 21 (2003)).

14. It is not necessary to determine that terrorism was the perpetrator's sole or primary motivation in order to find that the military commander had the authority to use his power to order the demolition or sealing of a house pursuant to Regulation 119. However, this may carry weight in terms of the military commander's discretion and assessment of the proportionate measure that fits the circumstances, for instance, sealing rather than demolishing, or partial rather than full demolition, all in keeping with the purpose of Regulation 119 "to give the military commander tools with which *effective deterrence* may be created" (**HaMoked**, §16, emphasis added, E.R.), while maintaining the principle of proportionality.

15. In the matter at hand, as stated, there is no dispute that Abu Hashiyeh stabbed the soldier, the late Almog Shiloni, to death. However, the Petitioners claim that his statements to the police and the ISA indicate that he was not motivated by terrorism, but rather by the desire to end his own life in some way, and that he believed that if he stabbed a soldier, he would die, whether at the hands of the soldier himself or at the hands of bystanders.

    First, I note that this is the fundamental dispute in the criminal case against Abu Hashiyeh at the Tel Aviv District Court (Serious CrimC 51040-11-14), and as such, the following remarks are made with due caution and to be sure, without making any determinations with respect to the criminal case.

    Second, I recall that administrative evidence indicating that the offense was committed by any of the occupants of the house is sufficient in order to find the Respondent competent to use Regulation

119, and there is no requirement for a criminal conviction (HCJ 6026/94 **Nazal v. IDF Commander in the Judea and Samaria Area**, IsrSC 48(5) 338, 343 (1994); **'Awawdeh**, §21; **Mustafa**, §38).

16. On the face of it, in his statements to the police, Abu Hashiyeh claimed that the main objective of causing the death of the soldier was, as claimed in the petition, to cause his own death, following a certain dispute with his parents (more details on this dispute will follow). So, for example, in his statement taken on November 10, 2014, the day of the attack, he said:

> I kept sitting and thinking to myself that I want to end my life and about how I wanted to die, and then I came up with the idea of killing a soldier, so I left and went looking for a soldier who would kill me. When I saw a soldier on the street, I showed him the knife so he would kill me, but he didn't do anything. When I saw he wasn't doing anything, I stabbed him…
> (s. 2, lines 53-57).

The following was indicated in the statement taken on November 13, 2014:

> Interrogator: "What was the purpose of the crime you committed on November 10, 2014"?
> Abu Hashiyeh: "I wanted to die".
> Interrogator: "Why"?
> Abu Hashiyeh: "Because I've given up on life".
> (s. 2)

And in a statement taken on November 17, 2014:

> Abu Hashiyeh: "After I stabbed him in the chest, I backed away from him so he would shoot me. He struck me with his weapon, so I took the weapon off him, stabbed him and backed away so he would shoot me".
> Interrogator: "Why did you want him to shoot you"?
> Abu Hashiyeh: "To die".
> (s. 3, lines 38-46).

However, additional interrogations conducted by ISA officials, and submitted to this court in the presence of both parties, indicate that there was an additional motivation, which is that his death would elevate him to martyrdom so that it would not have been in vain (minutes, November 10, 2014, §17; minutes, November 11, 2014, §11). Furthermore, I believe that it is safe to assume that a person whose sole purpose is to end his life and not harm others would have stopped at just pointing the knife at the other, making superficial wounds, not aiming for the upper body, or stabbing only once. It is no coincidence that under criminal law a person who has stabbed another person in sensitive areas in a manner that caused that other person's death is presumed to have intended the natural outcome of his actions, and, it follows, that he intended to cause the victim's death (CrimA 163/89 **S'adi v. State of Israel**, IsrSC 43(2), 495, §12 (1991); CrimA 6157/03 **Hoch v. State of Israel**, §14 (2005)). In the matter at hand, Abu Hashiyeh stabbed the soldier in the chest and abdomen, deep stabs that could have and unfortunately did lead to his death. It follows that even if I were to presume that the main objective of Abu Hashiyeh's actions was to cause his own death, a matter on which I certainly make no findings, it appears, at the level required of administrative evidence, that this objective was joined by another, which was to take the life of an IDF soldier simply because he is an IDF soldier, with the purpose of committing a terrorist attack. We cannot examine the act as if we were fools. As stated, suffice it that one of Abu Hashiyeh's

objectives was terrorism to determine that the military commander has the power to order the demolition of the Petitioners' home pursuant to Regulation 119. However, as I shall explain in detail below, there is a question as to whether the claims regarding suicidal tendencies and the conflict with the parents had some impact in terms of discretion and the proportionality of the measure chosen.

17. Thus, the power exists, and we must now consider the question of discretion in exercising the power in the specific case.

18. I shall begin with the issue of ownership of the unit. The Petitioners claim UNRWA, not they, is the owner of the unit. The State counters that the unit has no registered owners, and the UNRWA website states it has no facilities in the refugee camp where the unit is located. I see no need to determine the issue of ownership. True, as stated in **Mustafa**, in some cases where the family of the terrorist lives in the unit in question as tenants and the unit itself is owned by an external third party, this fact would suffice for a determination that the building should not be fully demolished (**Mustafa**, §§29, 46-48). However, I believe that this claim should be presented by the owners themselves, as they are the potential injured parties. The Petitioners themselves come to no harm as a result of the fact that they do not own the unit slated for demolition. Since in the matter at hand, the State found the unit to be registered as ownerless, and the party claiming ownership has not joined the proceedings, I see no room to consider the issue.

19. We now turn to the crux of the matter. The issue of house demolitions revolves around considerations of deterrence which are intertwined with considerations of proportionality. As I noted in **HaMoked**, given that house demolitions are a particularly grave measure, the security establishment must examine itself periodically and present this court with figures with respect to the efficacy of deterrence (**HaMoked**, §28, see also the opinion of Justice Hayut in the same matter and her remarks "Poet Yehuda Amichai has spoken in praise of doubt, which must always nag at the hearts of the righteous" (**HaMoked**, §6); see also **Mustafa**, §27). As stated, in accordance thereto, the Respondent presented this court with the opinion of security officials, *ex parte*. Needless to say, the weight carried by an opinion that is presented *ex parte* is largely limited, somewhat similarly to any other classified material that remains known to one party only. At the same time, as the President noted in **Mustafa** with respect to this or a similar opinion (§29), I am also of the opinion that it does sufficiently substantiate, to the extent required of administrative evidence, the *general* argument that house demolitions can potentially deter terrorists.

    However, as noted by the President in **Mustafa**, the argument of deterrence must be examined in accordance with the *particular* circumstances of the case. For instance, in **Mustafa**, the Court found in one of the petitions, that in the specific circumstances of that case, which concerned the demolition of the home of an "external" third party who was leasing the apartment to the petitioners on a short term basis, there was no room to allow the house demolition as it was doubtful that it would deter potential terrorists in future. In other words, there was no rational connection between the purpose and the means chosen and so the demolition of that particular house failed to meet the tests of proportionality (§§29, 46-48).

20. In the matter at hand, on the face of it, two major question surface with respect to deterrence:

    First, the question of delay – the fact that eleven months had passed from the time the attack was committed and the time the Respondent informed the Petitioners of his plan to demolish the home.

Second, the question of the main objective underlying Abu Hashiyeh's actions, particularly the nature of his relationship with his family. In other words, the question is whether it is possible to rule out that a significant objective of the attack perpetrated by the Petitioner [sic] was to end his own life, partly because of a conflict within the family, and killing the soldier was and additional objective, and the result of all this was naturally tragic.

21. With respect to the issue of delay. As this court has ruled, the exact timing of a demolition is generally trusted to the discretion of the security forces (HCJ 4747/15 **Abu Jamal v. GOC Home Front Command** (July 7, 2015); **Sidr** §G; **Mustafa** §50). Moreover, I generally agree with the position of the State whereby the recent increase in the number of terrorist attacks may impact the timing of a demolition, given the need for increased deterrence. According to the State, for these reasons, the Court has previously avoided intervening in demolition orders in similar cases of delay, including substantial delay. So for example, in **Sidr**, nine and-a-half months passed from the time of the attack until notice was served. See **Mustafa** for a review of similar cases "**Salem** [HCJ 1730/96 **Salem** [*sic*] **v. IDF Commander**, IsrSC 50(1) 353 (1996) – E.R.] (in which some four months had elapsed); **a-Sheikh** [HCJ 1056/89 **a-Sheikh v. Minister of Defense** (1990) – E.R.] (in which some five months had elapsed; HCJ 228/89 **al-Jamal v. Minister of Defense**, IsrSC 43(2) 66 (1989) (in which more than a year had elapsed from the time the attack was carried out and issuance of the order).

22. However, even before the constitutional era, this Court did note the fact that "the time that elapses between the action attributed to the suspects and the exercise of powers under Regulation 119 is, *per se*, a consideration worth weighing" (**Hamri**, President Barak, p. 444). Following from this, as I have just recently noted in **Sidr**, though discretion with respect to the timing of the demolition is entrusted to security forces: "the matter ought still to be subject to reasonableness, proportionality and common sense, and appearances also carry importance. It seems that inasmuch as there is an intention to demolish, notification should be given as soon as possible after the criminal act in question" (**Sidr**, §G, emphasis added; see also **Mustafa**, §50). In other words, the more time that elapses from the time of the attack, the likelier the appearance – and some say this appearance is in fact created – that the demolition is carried out for punitive purposes. Since this is not the purpose of Regulation 119, and to prevent said concern regarding appearances, it must be verified that the decision does in fact rest on considerations of efficacy and that these considerations do in fact justify use of the exceptional measure of house demolitions. To this end, I believe that an ideological "line", which could change according to the circumstances of each case, must be drawn following which the measure of full demolition should be avoided, and, where necessary, a more proportionate measure that is still able to achieve deterrence, under the circumstances, should be taken. In cases in which an extremely long time elapsed from the date of the attack, use of measures under Regulation 119 should perhaps be avoided altogether. I should like to avoid using the term "reliance", meaning that the affected persons in the terrorist's home develop an expectation that the home would not be demolished. However, out of confidence that this would achieve deterrence, balanced against considerations of proportionality, the passage of time should be taken into consideration to some extent. In our matter, it appears that in the circumstances of the case, the time that elapsed between the attack and the notice - some eleven months, though in my opinion, does not amount to an extreme delay that would obviate the possibility of using measures under the Regulation - coupled with the State's (albeit late) notice, accompanied by the affidavit stating that the decision to demolish the home was made (though no notice to that effect was delivered) in July 2015, require use of a more proportionate measure than the demolition of the entire home.

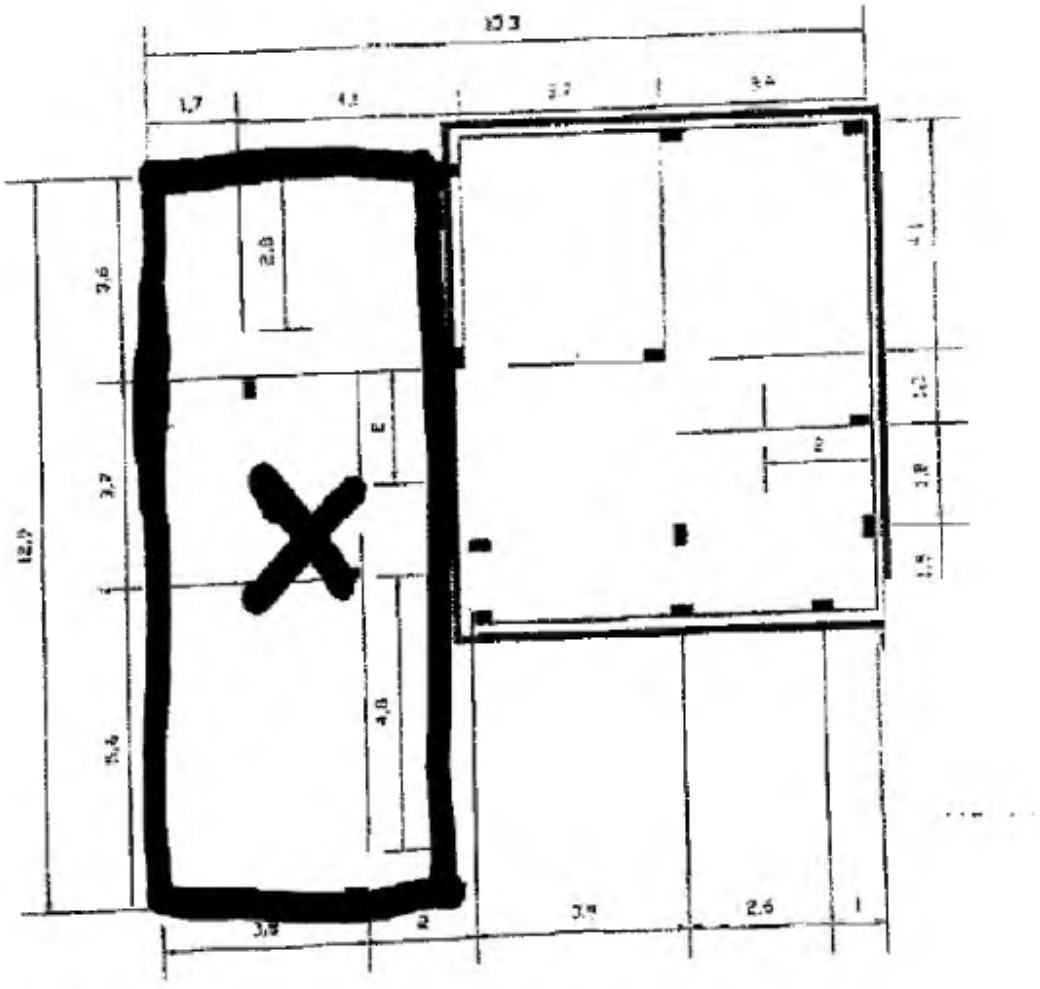
23. With respect to the question of the main objective for the terrorist's actions, whether it was terrorism, some other objective or both, and the relationship between the terrorist and his family members who live in the house slated for demolitions – some might ask – why is this distinction required? The moral defect cries to the heavens whether the main objective was to carry out a terrorist attack or suicide by means of a terrorist attack. The life lost, the soldier's life, is lost forever. The legal answer to this is, as noted above, that punishment is not the purpose of Regulation 119, and thus, considerations of retaliation and congruence are irrelevant on the legal aspect in the matter at hand, despite the emotional baggage attached. Punishment will come through criminal law, and the Court may well rule that a double objective, inasmuch as such existed, is irrelevant and that the action constitutes premediated murder either way and carries the same punishment – all, as stated, without making any determinations with respect to the pending criminal trial. However, when considerations of deterrence are at issue, is there no importance to the question of why the terrorist acted as he did? As stated, the object of demolishing the family home is to deter potential terrorists and the question is how much deterrence will be generated in the case of a person who has decided to end his life for reasons that are not exclusively related to terrorism, especially when there is a family feud in the background. In addition, as noted previously, in terms of the discretion entrusted with the military commander in such matters, the issue of whether and to what degree the occupants of the home were involved in the act of terrorism must be considered (HCJ 2722/92 **Alamarin v. IDF Commander in Gaza Strip** [1992-4] IsrLR 1; **Qawasmeh**, §22 of the opinion of Justice Danziger; **HaMoked**, §17). In our matter, it appears that members of the household were not involved in the acts, given that Abu Hashiyeh's statements to the police indicate a strained relationship between him and his family. The following is indicated from his statement to the police collected on November 10, 2015 [*sic*], the day of the attack:

> My parents called [that morning, before the attack – E.R.] and my father spoke to me and yelled at me on the phone. He said: "I hope you die". "Go away and don't come back", and "May God take you away". After I finished talking to my father, my mother picked up the phone and told me not to come home without finding work. When the call ended, I went and bought a knife at the flea market… I kept sitting and thinking to myself that I want to end my life …
> (s. 2, lines 39-53).

Thus, I believe that the possibility that Abu Hashiyeh had two goals, terrorism and self-harm, and it appears from his statements that the conflict with his family played a role in this, along with the fact that it has neither been argued nor proved that his family supported the depraved act, in addition, as stated, to the delay in delivering notice of the demolition to the family – all lead to the conclusion that demolishing the family home in its entirety is not a proportionate measure and that a more proportionate measure should be taken. Note, this is not a determination that any dual objective whatsoever would require use of a lesser measure than full demolition. For instance, where a person commits a terrorist attack largely for financial gain, and the money is to be used by the family living in the house the military commander seeks to demolish – in such circumstances it cannot be said that the dual objective should serve to preclude the option of full demolition. Each case must be examined individually, considering the circumstances.

24. We proceed to the question of what measure is to be taken in the case at hand. Parties have clarified that the size of the unit is 140 square meters and that it has four rooms, a living room and a kitchen. As stated, on October 29, 2015, we issued an Order Nisi ordering the State to address the possibility of a partial demolition. The State responded that such would not suffice to achieve the deterrent

effect required in the circumstances. However, in response to questions posed by the bench during the hearing, counsel for the State stated that there were no operational impediments to doing so. As stated, in the objection filed by the Petitioners prior to seeking remedy from this Court, they suggested the sealing of one room and a bathroom that had been allegedly used by the terrorist. The State elected not to address the possibility of partial demolition on its merits, despite the fact that the Order Nisi was explicit on this issue. The State made no arguments with respect to any or all parts of the home. In accordance thereto, given the circumstances of the case and given the delay and the aforesaid, I believe that a full demolition would be disproportionate and that we must allow only a partial demolition of the home. In these circumstances, the part of the ground floor that has no additional story above will be demolished. The part of the ground floor overtop of which lies a second floor will not be demolished. In other words: in keeping with the engineer expert opinion submitted to the Court, the demolition will take place in the section marked with an X below:



Inasmuch as the demolition leaves an open gap in the center of the unit, without an outer wall (unless the partial demolition can be accomplished without doing so), the Petitioners will be allowed to make repairs without such leading to an additional demolition. This could perhaps result in reduced risk for collateral damage to the second floor – without making any determinations on this matter. I shall recall in this context that in **Mustafa** (§§56-59, and before that in **Sidr**), the

Court ruled that inasmuch as such collateral damage does occur, the State will have to repair it or compensate the injured parties accordingly.

25. I suggest, therefore, to accept the petition in part, as stated and described in §24, and make a decree absolute ordering that only the part of the ground floor that does not have an additional story above shall be demolished. I suggest not making a costs order.

Postscript

26. Having read the opinions of my colleagues, Justices Mazuz and Zylbertal, I shall allow myself to make some additional comments. According to my colleague Justice Mazuz, the substantial delay in the Respondent's decision and issuance of the seizure and demolition order leads to the conclusion that he acted *ultra vires* when issuing same, and therefore, we must render the Order Nisi absolute and revoke the seizure and demolition order altogether. Thus, according to my colleague Justice Mazuz, the issue lies in the realm of authority, and, given the lack thereof, we pass over the examination of the proportionality and reasonableness of issuing the demolition order. As I noted in my own opinion, I agree with the position that given the clear ramifications of demolishing the homes of persons who did not take part in terrorist or criminal activity themselves, Regulation 119 must be employed with caution. It follows that despite the broad language used in the Regulation, it cannot be interpreted as granting the military commander limitless authority to demolish a home any time "any offence […] involving violence or intimidation" is committed, but rather, it should be invoked only in cases in which the person in question acted in pursuit of terrorist objectives, or some other military-combat objective, according to the circumstances of each case. My colleague Justice Zylbertal, though he does not concur with our colleague Justice Mazuz on the issue of authority, does believe that the delay justifies accepting the petition.

27. Contrary to the position of my colleague Justice Mazuz, I do not believe that the significant delay – and there is no dispute among the panel that this was a significant delay – serves to lead to the conclusion that the Respondent acted *ultra vires*, but rather, that the question revolves around reasonableness and proportionality. Additionally, contrary to the position of my colleague Justice Zylbertal, I believe that the discomfort caused by the delay may be expressed more moderately. As noted above, the objective of Regulation 119 is to achieve effective deterrence. In terms of authority, inasmuch as the matter concerns terrorism, the military commander has the authority to order the demolition or sealing of a home when one of its dwellers acted in pursuit of terrorist objectives, in order to achieve effective deterrence. In terms of reasonableness and discretion, the military commander must balance, among other things, between the need for deterrence and the harm to individual rights, and to this end, consider, among other matters, the time that elapsed between the terror attack and the requested demolition date. When, as in our matter, a significant amount of time has elapsed, the commander must search for a more proportionate solution than full demolition. However, when the matter involves taking a life, I do not believe that the decision made by the authority should be wholly rejected. Proportionality serves both parties – through the partial demolition of the home. As recalled, the Petitioners themselves were prepared to accept the demolition of the room and the bathroom used by the terrorist (see §4 above). Note, as I stated in my opinion, there may be cases in which the time gap between the incident and the demolition is so extreme, that use of Regulation 119 would no longer be possible at all. However, it is my opinion that this is not the case in the matter at hand, and it seems to me that the solution of partial demolition strikes an appropriate balance between the time that elapsed from the attack to issuance of the demolition order, and the occupants' expectations, and the contribution partial demolition of the home would make to achieving deterrence – as discussed above.

Justice M. Mazuz

1. I cannot join the position of my colleague Vice President E. Rubinstein and the outcome he proposes. I believe the Order Nisi must be rendered absolute and the seizure and demolition order issued by the Respondent must be revoked.

2. The petition at bar, like other recent and less recent petitions, raises a number of general arguments on issues of principle related to the validity and use of Regulation 119 of the Defense (Emergency) Regulations 1945 (hereinafter: **Regulation 119** or the **Regulation**). One of the arguments made in this context was that Regulation 119 defies various international legal norms, including those prohibiting collective punishment, damage to property and other breaches of international human rights law. Petitioners also made arguments related to constitutional principles within Israeli law, including arguments regarding discrimination, questions pertaining to the efficacy and reasonableness of the sanction and more. These are serious arguments which merit a thorough examination (see my remarks in HCJ 7220/15 **'Aliwa v. IDF Commander in the West Bank** (December 1, 2015)).

   However, my opposing position in the matter herein is not the outcome of taking a position on said general questions of principle with respect to the validity and use of Regulation 119, but rather stem from the specific circumstances of the matter under review and the main issue that arose in this petition and due to which the Order Nisi was issued, namely the issuance of a seizure and demolition order long after the attack and unrelated to the circumstances thereof.

3. My colleague proposes, as detailed in his opinion, to accept the petition in part and restrict the seizure and demolition issued by the Respondent to the part of the ground floor that does not have a second floor above. I accept my colleague's position that the Respondent's decision merits intervention, but I believe that in the circumstances of the matter, *reducing* the scope of the demolition order is insufficient. My reasons are briefly presented below.

4. The Regulation 119(1) clause relevant to the matter at hand stipulates:

> 119. — (1) A Military Commander may by order direct the forfeiture to the Government of Israel of […] any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact of the commission of, any offence against the Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure…

5. The authority granted by Regulation 119 is discretionary. Thus, once an incident that evokes the powers granted to the military commander under Regulation 119 occurs, the military commander must use his discretion and decide whether or not to exercise this power, and if so, in what manner. The authority is not unlimited in terms of time. Once cause arises to exercise the power, the military commander must decide whether to do so "with due dispatch… as required by circumstances" (Section 11, Interpretation Law 5741-1981).

Where the military commander has decided *not* to exercise the powers granted to him by Regulation 119 in response to an incident that would substantiate the possibility of exercising said power, or, where the commander *has not decided* to make use thereof – the time allotted for doing so *has expired*, and the military commander may not use the power after a significant amount of time has elapsed from the time of the attack, with no connection to the temporal or geographical circumstances of the attack. The exercise of the power must have some causal connection to the legal cause that allows for it to be exercised. In other words, the order must be issued due to an attack committed by a family member living in the home named in the order rather than subsequent incidents that are not related to the incident in question.

This requirement is a direct result of the rational condition within the constitutional principle of proportionality (Aharon Barak, Proportionality in Law, 373 (2010) [in Hebrew], and case law requires that Regulation 119 should be used with caution and interpreted within the context of Basic Law: Human Dignity and Liberty and its limitation clause (§12 of the opinion of my colleague the Vice President; HCJ 8084/02 **'Abasi v. GOC Home Front Command**, IsrSC 57(2) 55, 59 (2003); HCJ 4597/15 **'Awawdeh v. Military Commander of the West Bank**, §17 (July 1, 2014); HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank**, §22 (August 1, 2014)).

6. From the very beginnings of judicial review over use of powers granted by Regulation 119, it has been ruled that such use will only be made in special circumstances.

> It is well known that the measure encapsulated in the provisions of Regulation 119 is grave and extreme and that use thereof shall be made only after thorough consideration and examination and only in special circumstances. (HCJ 434/79 [3]
>
> HCJ 361/82 **Hamri v. Commander of the Judea and Samaria Area**, IsrSC 36(3) 439, 443 (1982).

This Court has repeated this position more than once (see, for instance, HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485, 489. My colleague the Vice President has also addressed the "the caution that must be exercised in using this regulation" (§12).

7. Indeed, over the years, Israel has employed a policy of abstention from or limited and exceptional use of the power granted under Regulation 119 for long periods of time. So, from 2005 to 2014, Israel followed a policy of abstention from use of the powers granted by Regulation 119, following the recommendations of a committee headed by Maj. Gen. Ehud Shani, which were adopted by the Chief of Staff and the Minister of Defense (see notice submitted to this Court with respect to this decision in HCJ 7733/04 **Nasser v. Commander of IDF Forces in the West Bank** (June 20, 2005) (hereinafter: **Nasser**). We note that this policy was formulated partly as a result of the criticism voiced by this Court with respect to the use of Regulation 119 during the hearing in **Nasser**. These comments followed on others made in earlier hearings, with the Court noting that the issue raises difficulties in terms of international law and that there may be room to change current practices (hearing date December 13, 2004). Powers granted by Regulation 119 were effectively not used between 1998 and 2001 as well, and between 1993 and 1997, their use was limited.

8. In light of the aforesaid, and given that the power is discretionary and that it is not routinely used, the aforesaid carries more weight, since, refraining from using the power *soon* after an incident constitutes a decision not to use the power. As such, the military commander may not turn back time and decide to use the sanction after a significant period of time had elapsed from the original incident, particularly under new, unrelated circumstances. The duty to act with due dispatch is a

foundational principle of good governance. It follows from the duty every public employee has to act fairly. A breach of this duty may, under certain circumstances, preclude use of a power, whether due to expiration of the time allotted for use thereof, or whether due to waiver and estoppel (cf.: Itzhak Zamir, **Administrative Authority**, Vol. B., 1098, 1109-1111 (2011, 2nd Edition) (in Hebrew); Dafna Barak-Erez, **Administrative Law**, Vol. A., 410 (2010) (in Hebrew)).

Non-exercise of the power also creates *legitimate, reasonable expectation* on the part of the relatives of a person who committed an offense that the fact that the Respondent did not decide to use the power granted to him under Regulation 119 with respect to their home soon after the incident is a sign that he has decided to refrain from doing so. It should be recalled that in the vast majority of the cases in which Regulation 119 is used, the relatives of the person who committed the offense are not alleged to be involved in the incident, and as such, their legitimate expectations should be taken into account (Dafna Barak Erez, *The Reliance Defense in Administrative Law*, **Iyunei Mishpat**, 27, 209 (2003) (in Hebrew).

9. Note, the restriction on the use of the power does not stem simply from the fact that a predetermined period of time had elapsed, but rather, that the passage of time is an *indication* that a decision has been made, whether actively or passively, not to use the power granted under the Regulation in reference to the relevant incident. Where it has been decided not to exercise the power, or to exercise it in a certain way (abstaining from using the Regulation), the Respondent may not make a different decision once a significant amount of time has elapsed from the incident and without relation thereto. The cause for using the power crystalizes at the time of the incident and the identification of those involved. Events that are temporally and geographically removed from the original incident cannot justify revisiting the decision made therein.

Thus, where an objective impediment stood in the way of exercising the power shortly after the incident, such as late discovery of the identity of the perpetrator, or a similar objective impediment, the abstention from using the power shortly after the incident does not preclude its subsequent use when conditions allow, and no legitimate expectation of such is created, as aforesaid. So, for instance, in HCJ 1056/89 **a-Sheikh v. Minister of Defense** (March 27, 1990) (hereinafter: **a-Sheikh**), the Court rejected an argument regarding several months of delay, after it was convinced that the delay had occurred partly as a result of hearing proceedings and the need to verify various details, including where one of the assailants resided.

10. The case at hand concerns a lethal stabbing attack that took place on November 10, 2014. The terrorist was injured and apprehended. He was interrogated on the same day. The interrogation included an exhaustive examination regarding his residence – where he lived, who lived in his home with him, the structure of the home and its rooms and whether he had used all rooms in the house (§§8-11 of the minutes dated November 10, 2014).

This indicates that the possibility of exercising powers under Regulation 119 with respect to the home in which the assailant lived was considered on the day of the attack itself. It should also be noted that four months earlier, the government decided to renew the policy of employing Regulation 119 after nearly a decade long moratorium, as noted. It follows that use of powers granted under Regulation 119 with respect to the house where the assailant lived, the home where the Petitioners (the assailant's parents) live with four of their other children, was on the agenda, but no decision was made to issue a seizure and demolition order with respect to the house.

11. And so, only some eleven months later, on October 8, 2015, the Respondent issued a seizure and demolition order for the house. A review of the response to the petition submitted by the

Respondent indicates that the reason for the current decision to use the sanction against the house was "a significant change in circumstances", which is reflected in an escalation in terrorist activity and requires action to deter additional terrorists (§§34, 37 and 45). Thus, the Respondent's response seems to indicate that the late decision to take action against the Petitioners' home was the result of security incidents that occurred around the time the *order was issued* (October 2015) and are unrelated to the incident that is the subject of the order, whereas shortly after the incident, in November 2014, the Respondent did not choose to exercise his power with respect to the house.

We note that the Statement of Response dated November 9, 2015, which was provided after the Court issued the Order Nisi, made an attempt, which in my view was strained and unconvincing, to provide a slightly different explanation. It was argued that the decision had in fact been made back in July 2015 (still nine months after the incident) and that notice was given to the Petitioners only three months later, in October 2015, "for operational reasons… partly with attention to the area in which the building which is the subject of this petition is located – the 'Askar Refugee Camp" (§6). If find it difficult to consider these vague statements as an explanation, even a weak one, for the eleven-month delay in issuing the order. I note that in another case discussed at the same time, the subject of HCJ 7220/15, notice of the intent to seize and demolish the house was issued within *19 days* of the incident.

12. As noted above, in my view, in these circumstances, the Respondent was not permitted to exercise his power with respect to the Petitioners' home. The power to employ a sanction pursuant to Regulation 119 is restricted to *a time close to the time of the incident* (subject to objective impediments) and *in relation to the incident* and the temporal and geographical elements of the incident that gave legal cause to using the power. The military commander may not decide to use a sanction pursuant to Regulation 119 due to an incident or incidents that are subsequent to the incident due to which the order was issued and have no connection to the incident which is the subject of the order or to the assailant and his family.

13. My colleague, the Vice President, has expressed his opinion in a previous judgment with respect to the need for a temporal connection between the incident and the use of a sanction pursuant to Regulation 119 for said incident, remarking that: "It seems that inasmuch as there is an intention to demolish, notification should be given as soon as possible after the criminal act in question" (HCJ 5839/15 **Sidr v. IDF Commander in the West Bank**, §G (October 15, 2015) (hereinafter: **Sidr**). He repeated this position in his opinion in the case at hand as well (§22). In the matter at hand, this important normative instruction was only partially reflected in the outcome in that my colleague suggests that the demolition of the entire home would not be proportionate given the delay, and that partial demolition should be accepted.

My colleague considers issuing an order with a significant delay from the time of the incident as simply a question of *reasonableness*. I believe, as stated, that the flaw in issuing the order in these circumstances goes to the root of *authority* (see final clause in the quote included in §16 below), and therefore, I believe that reducing the scope of the order cannot correct this flaw.

14. With respect to the matter of issuing the order long after the incident, the State argued in its response that such arguments have been considered and dismissed by this Court (HCJ 4747/15 **Abu Jamal v. GOC Home Front Command** (July 7, 2015) (hereinafter: **Abu Jamal**). I do not consider this evidence. In that matter, the Court issued a brief judgment, containing several lines only, in which it rejected the claim that a seven-month delay in *executing* an order issued shortly after the incident did not amount to a flaw justifying revocation of the order, partly because "The delay in the execution of the demolition order was partly the result of the legal proceeding undertaken by the

Petitioner himself" and "the *timing* of its execution is generally at the discretion of the Respondent according to the particulars of time and place" (emphasis in original).

15. This is the place to address the distinction between a significant delay in *issuing* the order, as in the matter at hand, and a delay in *executing* an order lawfully issued in a timely fashion, as in the matter in **Abu Jamal**. While issuing an order long after the incident which is the subject of thereof and unrelated to its circumstances is tainted by a flaw that goes to the root of *authority*, as detailed above, where an order was issued in a timely fashion and the delay affected only execution thereof, the question then is a question of *reasonableness*, to be examined vis-à-vis the constraints and considerations that caused the delay in executing the order (and this also impacts the issue of legitimate expectations), although, an unreasonable delay may, in some circumstances, amount to an "abandonment" of the sanction.

16. The State also relied on the judgment in HCJ 1730/96 **Sabih v. IDF Commander**, IsrSC 50(1) 353 (1996) (hereinafter: **Sabih**). Arguments regarding a delay in the *execution* of demolition orders were considered in this matter as well. The argument raised therein was that "Once the Respondent decided not to execute demolition orders against the structures in which the terrorists who are the subject of these petitions resided […] it would be unjust to 'unfreeze' these orders and execute the same at this time" (**Sabih**, p. 362). Justice G. Bach, in the majority opinion, believed that though the argument was "worthy of consideration", it must be rejected as the delay in the execution of the orders was the result of objections filed by the families (**Sabih**, p. 363). Justice D. Dorner, in a dissenting opinion, thought the petitions should be accepted as the authority may only be used in direct response to an attack committed by an assailant who had resided in the home, whereas at the time, the Respondent was seeking to use the powers with respect to "additional terrorist attacks" that were not perpetrated by the assailant who had lived in the home (**Sabih**, p. 364). While Justice Cheshin concurred with Justice G. Bach's dismissal of the petitions, he did clarify that:

> The freezing of the demolition orders when they were frozen and the unfreezing thereof when they were unfrozen, both the freezing and the unfreezing were, in my opinion, lawful and within the boundaries of reasonableness. I would have ruled otherwise had I believed that the military commander waived- explicitly or implicitly – the issuance of demolition orders, namely: had we found out that after earlier terrorist attacks the military commander waived the issuance of demolition orders, and that the recent terrorist attacks led him to recant the waivers he had made. Had it been so, I would have then said that the decision on unfreezing demolition orders which were frozen – or a decision on issuing demolition orders - is an unlawful decision, a decision which does not support itself on proper discretion, a decision which is tantamount to a decision made ultra vires.
>
> (**Sabih**, p. 365, emphasis added, M.M.)

17. Finally, the State also referenced the aforesaid matter of **Sidr** in its arguments. In that matter, similarly to the matter herein, though the delay in issuing the order was shorter (some nine months), the Court, in a majority opinion authored by my colleague the Vice President, did not accept the allegation that the order was flawed due to the delay, while making a normative assertion, to which I have alluded above, that: "inasmuch as there is an intention to demolish, notification should be given as soon as possible after the criminal act in question" (§G). On the other hand, in a dissenting opinion, Justice Vogelman considered the "serious delay" in issuing the order a flaw that

undermines the discretion of the military commander, relying on the remarks made by Justice D. Dorner in the aforementioned **Sabih**, whereby such undermines the required causal connection between the attack and the demolition (§7 of the opinion of Justice Vogelman).

18. Thus, along with the required distinction between a substantive delay in the *issuance* of the order and a delay in its *execution* (a distinction that was not discussed in previous jurisprudence), the Court has recognized serious delays in issuing an order pursuant to Regulation 119 as a major difficulty, and has made the general ruling that the order should be issued "as soon as possible" after the incident. However, with respect to the *resulting flaw*, jurisprudence contains different opinions, as detailed above. My view is, as stated, that in circumstances such as these, as detailed above, the lawfulness of the order is compromised and in any event, the derivative outcome is, generally, the revocation of the order, with the exception of cases in which the decision was delayed due to material, objective constraints.

19. Conclusion: I believe that there is a substantive flaw in the issuance of the order in the circumstances at hand. Should my opinion be heard, the petition shall be accepted and the Order Nisi issued by the Court on October 29, 2015, shall be rendered absolute in the sense that the seizure and demolition order issued by the Respondent for the Petitioners' home on October 8, 2015, will be revoked.

Justice

Justice Z. Zylbertal

1. The case at hand raises once more the intractable issue of the demolition of terrorists' homes, the various aspects of which have been considered by this Court, in particular on several occasions recently. The matter is complicated. Along with the difficult legal questions it raises, its other attending aspects cannot be ignored. It appears that no ruling in such cases can be fully, unequivocally "correct", "right" or "moral". The question of the manner in which the powers enshrined in Regulation 119 of the Defense (Emergency) Regulations 1945 (hereinafter: **Regulation 119**) lies at the crux of this deliberation in full force. 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. This is the case too in the matter at hand, whose facts have been detailed in the opinion of the Vice President.

2. My colleagues, Vice President E. Rubinstein and Justice M. Mazuz disagree: The position of the Vice President is that the significant delay in notifying the family residing in the home, coupled with the "dual objective" that motivated the assailant Abu Hashiyeh to commit the murder attributed to him, lead to the conclusion that the full demolition of the home would not be proportionate. Hence, the Vice President proposes to accept the petition in part, allowing for the demolition of half of the ground floor of the unit, rather than the entire floor. Justice Mazuz holds a different position, whereby, the time that elapsed from the stabbing incident until notification was given to the family constitutes an indication that a decision has been made – even if only implicitly, by abstaining from a decision – not to use the powers granted by Regulation 119 with respect to Abu Hashiyeh's actions. Once a decision was made not to use the power, or to use it in a certain

fashion, the Respondent may not make a different decision after a significant amount of time had elapsed from the act that evoked the powers and based on circumstances that are unrelated to said act. In other words, Justice Mazuz maintains that at the time the seizure and demolition order was issued against the home, the time available for using the power granted under Regulation 119 had passed. According to Justice Mazuz, the power had "expired" once the Respondent refrained from exercising it soon after the incident, and therefore, the petition must be accepted such that the seizure and demolition order issued by the Respondent for the Petitioners' home on October 8, 2015 will be revoked.

3. I shall name a conclusion prior to the deliberation, and state that in the disagreement between my two colleagues, I am closer to the approach taken by my colleague Justice Mazuz, and had I too maintain that in the concrete circumstances of the matter at hand, the petition must be accepted and the seizure and demolition order issued by the Respondent for the Petitioners' home should be revoked. However, I do not agree that the Respondent no longer had the power to take action pursuant to Regulation 119 at the time the order was issued. Additionally, I am of the view that there is no need to rest the decision on "lack of authority" or "expiration of authority". My position is that what justifies accepting the petition herein is the great delay in issuing the demolition order, which undermined the *manner* in which the authority was exercised, though the Respondent still had said authority (as is known, a flaw in the manner in which a power is used is sometimes seen as an ultra vires act, such that my opinion and that of my colleague Justice Mazuz are not so distant).

The duty to act with due dispatch

4. The duty of the authority to exercise its powers with due dispatch is a foundational principle of good governance. It is enshrined in Section 11 of the Interpretation Law 5741-1981, which stipulates: "Any authorization or duty to take a certain action, where no time for doing so is prescribed shall mean authorization or duty to take said action with due dispatch". This is an administrative obligation which stems from the principle of reasonableness, a fundamental principle of administrative law (HCJ 10296/02 **The Association of Teachers in Secondary Schools, Seminars and Colleges v. Minister of Education, Culture and Sports**, IsrSC 59(3) 224, 237 (2004)).

5. To rule that the Respondent acted reasonably and in accordance with his duty to act "with due dispatch", we must examine what constitutes "due dispatch" in the matter at hand. In other words, what is the "appropriate" time during which the Respondent must pursue the powers granted to him under Regulation 119? As is known, the relevant tests are not "technical". The Court does not have a table listing deadlines for use of each existing administrative power. Therefore, when we undertake to determine what is "appropriate" and "reasonable" when exercising powers pursuant to Regulation 119, we must weigh the private and public interests that are affected by the exercising of the power, and mostly, whether and to what extent the great delay in exercising the power may harm any of these. Justice A. Procaccia addressed this in a different matter:

> The duty to act with due dispatch incumbent upon a public authority is simply the duty to act reasonably (HCJ 7198/93 **Mitral v. Minister of Industry and Commerce**, IsrSC 48(2) 844, 853… "Reasonable time" is a relative concept. It is designed to delineate the proper time during which the authority has a duty to take a certain action, according to the overall circumstances of the matter, and given the overall considerations and conflicting interests at play. *The requirement of "reasonable time" for an action by a public authority derives, on one hand, from practical*

> *constraints that may interfere with the authority's preparations for taking the action, and on the other, the weight and importance attached to taking said action quickly, whether in terms of the public's interest, or private interests. When the matter concerns human rights or a major public interest… the concept of "reasonable time" for taking an action is imbued with special meaning.* The meaning of "reasonable time" for taking an action is always a question of the particular circumstances that made said action necessary. To define the term, all of the competing interests must be calibrated in order to reach the appropriate balance.
>
> HCJ 1999/07 **MK Gal-On v. Government Commission of Inquiry into the 2006 Lebanon War**, IsrSC 62(2) 123, §8 of the opinion of Justice A. Procaccia (2007), emphasis added, Z.Z).

Failure to meet the duty to act with due dispatch, and the generation of an "administrative delay" may preclude the continued use of a power that was invoked late, or lead to a revocation of the administrative act. At times, delay, taken as an evidentiary factor, may point to abandonment of the cause for which the power was invoked, and at times, the delay itself would give rise to cause to revoke the administrative act given the flaw tainting the power in view of the delay. In the latter situation, a court ruling is required in order to resolve the question of the relative weight carried by the interests involved.

> The substantive aspect relating to administrative delay requires a court ruling on the issue of the relative weight carried by the interests involved. *To this end, the court conducts a harm analysis, that is, a balancing of the harm caused by the administrative act to the private interest affected by it against the harm to the public interest the administrative act is meant to serve.*
>
> Itzhak Zamir, **Administrative Authority**, 1109-1110 (Vol. B. 2nd Edition, 2011) (in Hebrew) (emphases added, Z.Z.)

As recalled, in the matter at hand, some eleven months had elapsed from the date on which the murderous attack was carried out until the day on which notification regarding the seizure and demolition order was delivered to the assailant's family. I believe that in these circumstances, it is possible to highlight two main interests that are harmed as a result of the delay in exercising the power granted under Regulation 119 (in the absence of objective reasons for said delay) – one is a private interest and the other a public interest.

The private interest

6. The *private* interest that is harmed as a result of issuing the seizure and demolition order and delivering it to the occupants of the home significantly long after the grievous actions of the assailant is the harm to their reasonable and legitimate expectation. My colleague Justice Mazuz addressed this issue, and I too am of the opinion that in exercising a power that has such a dramatic impact on the lives of the petitioners (and others in their situation), a decision should be reached and executed as quickly as possible given the circumstances. Inasmuch as a decision is delayed without a reasonable explanation, relatives of persons who committed the acts enumerated in Regulation 119 are kept in the dark, not knowing their future fate, and the fate of their home. Leaving the Petitioners in this predicament for many months, liable to receive a demolition order any day, is akin to prolonged "delayed justice" without a foreseeable end. All this, when the

"justice" in question itself raises difficult moral dilemmas even according to those who support using it, and when the Petitioners themselves took no part in the actions of their terrorist relative.

7. I note that in my view, in this context, a distinction must be drawn between delaying the exercise of *mandatory* powers and delaying the exercise of *discretionary* powers. So, for instance, in a recent ruling, it has been found that where a municipal authority did not collect a debt accrued for unpaid municipal taxes over many years, there was no objective basis to develop a legitimate expectation for or reliance on an exemption from said debt. It was stated clearly that every citizen and resident, and certainly any business owner, is presumed to be aware that a property used as a residence or a business is subject to municipal taxes, and thus, the fact that a municipal authority did not collect taxes with respect to a certain property does not give rise to a defensible interest of reliance that may trump the public interest in upholding the law (see: AAA 89/13 **City of Ramat Gan v. Harel** (February 24, 2015), §6 of the opinion of Justice Dafna Barak-Erez and §§5-6 of the opinion of Justice M. Mazuz). Remarks in the same vain were expressed in another matter concerning serious planning violations against which enforcement action was taken after a significant delay on the part of the authority. In that matter it was ruled:

> A delay in using enforcement measures does not, on its own, give rise to estoppel vis-à-vis the enforcing authority, other than in extreme and exceptional cases. An authority that is legally required to take action, particularly an authority charged with enforcing the law, cannot be released from its duty due to the fact that it did not employ measures to fulfill the duty in a timely fashion. In any event, in circumstances of illegality, particularly when the illegality is patently clear, the abstention of an authority from acting does not substantiate a private interest against it.
>
> LCrimA 1520/01 **Shneitzer v. District Planning and Building Committee**, IsrSC 56(3) 595, 604 (2002).

However, in both aforementioned cases, the administrative authority in question delayed taking action it was *obligated* to take (law enforcement), rather than action that albeit in its purview, is discretionary, as in the matter at hand. This distinction carries a great deal of importance which pertains to the legitimacy of the reliance and expectation developed by the individual who depends on the exercise of the administrative power. In cases in which there is no doubt that the authority must use its power, it would naturally be quite difficult to justify an expectation on the part of the individual that the power not be exercised even after a significant delay. However, in cases such as the matter herein, in which the authority *may* use its power, but often chooses not to do so for various reasons, it is clear that once a significant amount of time elapses during which the authority does not take action pursuant to its power, the individual develops a legitimate expectation that this means that a decision has been made not to use the power at all. The longer the time gap, the stronger the expectation and the reliance on the status quo. It is all the more so when the power in question is so injurious to the relevant parties - to the point of changing their entire lives and undermining the foundations on which they are built.

This is the case in the matter at hand. As is known, the Respondent does not invoke the powers granted to him under Regulation 119 in every case in which he is legally permitted to do so. The Respondent considers each case on its merits, weighing many different considerations before deciding whether or not to use the powers (HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank** (August 11, 2014) §22 of the opinion of Justice Danziger). When no decision was made with respect to the Petitioners' home over many months, the expectation (and hope) that

having used discretion and considered all the parameters, the Respondent had chosen not to use his Regulation 119 powers in the case at hand, grew. I believe that this is a legitimate expectation and that there is an increased duty to act "with due dispatch" in cases in which the authority has *discretionary* powers (as distinct from powers the authority is *obligated* to exercise), since in these cases, the odds that the powers would eventually be exercised are greatly diminished.

This concludes the discussion of the *private* interest harmed by a delay in exercising the powers granted by Regulation 119.

The public interest

8. The *public* interest that is harmed by the great delay from the time the act of violence that gave rise to the powers took place and the actual use of the powers under Regulation 119 is the obfuscation of the justification for use of said powers. So, for example, in the case at hand, the seizure and demolition order was delivered to the Petitioners only after the current surge in terrorism began, and the Respondent himself clarified in the response to the Petition that the current security situation led to the decision to issue the order. Though the Respondent somewhat retreated from the manner in which he initially presented the situation, later arguing that the decision to issue the order was made back in July 2015, the impression drawn may be different. The time that elapsed between Abu Hashiyeh's depraved act and the demolition of his family home makes for a weak connection between the two, as far as the public interest in concerned. When the demolition order is issued in the midst of a chaotic time marked by a new wave of terrorism, the connection may be lost altogether. In other words, demolishing the Petitioners' home almost a year after the murderous stabbing, at a time when unfortunately stabbing attacks occur on an almost daily basis throughout the country, may appear to be a decision that stems solely from the dire security situation and would not have been made otherwise. I am not asserting that this is indeed the case and that the Respondent was motivated by these considerations alone. However, as stated, I believe that public perception of the demolition and "appearances" do carry importance and that these issues must be considered, particularly when the sole justification for exercising powers under Regulation 119 is deterrence – a matter which, as is known, is highly dependent on the impact the demolition has on the position of the relevant public.

The purpose of deterrence

9. I have pointed to the private and public interests that may be seriously harmed were the Respondent to exercise his power to demolish the Petitioners' home long after Abu Hashiyeh carried out his actions. At this point, it is also appropriate to address the public interest that might come to harm should the demolition not be executed at this point. As noted more than once in judgments on this issued, the public interest meant to be served by the demolition is deterring the public from committing similar acts of violence. However, as I noted above, public deterrence is not particularly effective where the connection between the act and the sanction is unclear. The expression "for all others to see", which lies at the heart of deterrence, is based on the concept that the public that is to be deterred would realize that the offense exacts a heavy price and the real fear of this price would prevent others from taking similar actions in future. Clearly, when the demand to pay the price is delayed, the deterrent effect slowly dissipates, and the more time elapses, the less likely it is to achieve the requisite deterrence, and the more the demolition turns into an act of punishment or pure vengeance rather than an act of deterrence. Indeed, with time, and usually in the context of an increase in attacks, the need for deterrence suddenly peaks, at which point, the entity holding the power seeks to exact the price for an offense committed long ago. However, at this stage, many no longer remember that an offense had been committed and who the offender is, and have difficulty

relating the price exacted to the offense. In other words, using the sanction at this point may lack context for many members of the public sought to be deterred, particularly when carried out in a situation of many terrorist attacks and many acts taken in response thereto.

10. In view of the aforesaid, I fear that Respondent's use of the power almost a year after Abu Hashiyeh's murderous acts would, in any case, fail to achieve the desired, legitimate, deterrent effect. As such, and mainly due to the interests that would be harmed should the home be demolished after a significant delay, my position is that exercising the power at this stage would be unreasonable and improper.

The case at hand vis-à-vis current jurisprudence on house demolitions

11. This conclusion is congruent with existing jurisprudence on the issue, which often emphasized that notice of the decision to demolish a terrorist's family home should be delivered as soon as possible after the criminal act in question (HCJ 5839/15 **Sidr v. IDF Commander in the West Bank**, (October 15, 2015) §G; hereinafter: **Sidr**). In another recent ruling in a different matter, wherein the petitioners also claimed that exercise of the power had been delayed (the demolition order was delivered to the family three and-a-half months after the attack), President M. Naor stressed that "the demolition decision was made *as a direct response to the commission of the terrorist attack*… given the dire security situation and the need for deterrence. I see no wrong in this" (HCJ 7040/15 **Hamad v. Military Commander in the West Bank** (November 12, 2015) §50 (hereinafter: **Hamad**). The circumstances in the matter at hand are different. It is difficult to refer to the issuance of the order in this case as a direct response to the commission of the terrorist attack, when said attack was carried out almost a year ago. Moreover, in the case considered by the President, it was emphasized that the assailant was indicted about six weeks after the attack, and the family was served with a demolition order some two months later. In the matter at hand, Abu Hashiyeh was indicted just two weeks after the attack, but, as stated, the order was delivered to the family some ten and-a-half months thereafter. Given the aforesaid, it is clear that there is a great difference between the time periods relevant to the two cases, and that the dismissal of the arguments regarding delay in **Hamad** do not reflect on the issue at hand.

12. I also believe that the circumstances in **Sidr** are different from the circumstances of the matter at hand in a manner that may impact the outcome. In **Sidr**, where a demolition order was issued about nine months after the attack, Justice U. Vogelman was of the opinion that an Order Nisi should be granted in one of the petitions, in order to examine the arguments regarding delay made by the petitioners and clarify whether Regulation 119 powers were invoked in relation to terrorist attacks that were not committed by the terrorist living in the house. Justice Vogelman remained in the minority in that case, but the Vice President responded to his position, noting that: "The August 2015 notice to the Petitioners with respect to the demolition preceded the current bleak wave [of attacks] and therefore it is difficult to view the decision which is the subject of the petition as a result thereof". In our matter, on the other hand, there is no dispute that Abu Hashiyeh's family was served with the order during, not prior to, the current wave of terrorism. As stated, this is also indicated in the response to the petition submitted by the Respondents on October 19, 2015. In view of the Vice President's comments in **Sidr**, a position which was also expressed in his opinion in the matter at hand, whereby the petition should be accepted in part, it appears that the circumstances in the matter at hand are different, and, in my view, justify accepting the petition for all the aforesaid reasons.

13. In conclusion – my position is that the petition should be accepted and the order rendered absolute. In terms of the outcome, I concur with my colleague Justice Mazuz. However, the reasoning that led me to this outcome followed a different path than that taken by my colleague, and I believe that the basis for revoking the order is unreasonableness in the manner in which the power was used, rather than lack power per se, all as detailed above.

Justice

As stated, it has been unanimously decided that the time that elapsed from the time the terrorist attack was committed until the seizure and demolition order was issued by the Respondent, some eleven months, precludes the execution of the order verbatim. Operatively, the decision, following the majority opinion of Justice Z. Zylbertal and Justice M. Mazuz, against the dissenting opinion of Vice President E. Rubinstein, is to render the Order Nisi absolute and revoke the seizure and demolition order issued by the Respondent. The minority opinion supported an Order Absolute ordering a partial demolition.

Issued today, 19 Kislev, 5776 (December 1, 2015).

Vice President Justice Justice