At the Supreme Court Sitting as the High Court of Justice

HCJ 1801/16
HCJ 1817/16

Before:	**Honorable Justice I. Amit** **Honorable Justice Z. Zylbertal** **Honorable Justice A. Baron**
The Petitioners in HCJ 1802/16:	1. **_____ Abu Ghosh** 2. **_____ Abu Ghosh** 3. **_____ Abu Ghosh** 4. **_____ Abu Ghosh** 5. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
The Petitioners in HCJ 1817/16:	1. **_____ Abu Ghosh** 2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
	v.
The Respondent in HCJ 1802/16 and in HCJ 1817/16:	**Commander of the IDF Forces in the West Bank**
	Petition for *Order Nisi*
Session date:	13 Adar B 5776 (March 23, 2016)
Representing the Petitioners in HCJ 1802/16:	Adv. Lea Tsemel Adv. Labib Habib
Representing the Petitioners in HCJ 1817/16:	
Representing the Respondent:	Adv. Avi Milikovski

Judgment

Justice I. Amit:

Two petitions which were filed against the forfeiture and demolition order that was issued against the apartment of the perpetrator Abu Gosh (hereinafter: the **perpetrator**) by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**).

1. On January 25, 2016, the perpetrator entered the Beit Horon settlement together with another perpetrator named Ibrahim 'Alan, and stabbed to death the late Shlomit Krigman. The two continued on their way throwing pipe-bombs in the settlement and stabbed and wounded another passerby. Thereafter the two were shot by security guards who arrived to the scene. The incident was widely publicized as the two perpetrators tried to enter the settlement's grocery store but were pushed back by the owner with a shopping cart, as was recorded by the security cameras on site.

2. The perpetrator, born in 1999, was seventeen years old at the time of the incident and lived with his family in an apartment on the second floor of a dwelling in Qalandiya refugee camp (hereinafter: the **apartment**). As indicated by the state's response, the apartment is about to be demolished manually by the demolition of the apartment's partitions and thereafter the apartment's space is about to be filled with barbed wire and double component polyurethane foam, so as to prevent damage to adjacent apartments.

   Hence, I shall start by saying that the petition of petitioners 1-4 in HCJ 1802/16, the owners of the apartments adjacent to the apartment, who argued that there was a concern that as a result of the demolition damage would be caused to their own apartments, should be dismissed *in limine*.

   We are therefore solely concerned with the petition of the family members of the perpetrator in HCJ 1817/16. As the petition indicates, the apartment serves as the residence of the perpetrator's parents and his six siblings.

3. The petitioners reiterate general arguments regarding house demolition, and in the hearing before us they also pointed at the young age of the perpetrator, who was a seventeen years old minor when the attack was committed. It was further argued that the fact that this case concerned the Qalandiya refugee camp, and that the land was owned by UNRWA should also be taken into consideration.

4. The petitioners raised before us again the general arguments regarding the mere use of Regulation 119. I do not intend to elaborate on these issues and I shall just say again that "It is not necessary to discuss all over again the general issue regarding the mere authority to issue forfeiture and demolition orders according to Regulation 119, whenever the court hears a petition which concerns Regulation 119 of the Defence Regulations" (HCJ 8150/15 **Abu Jamal v. GOC Home Front Command**, paragraph 6 and the references there (December 22, 2015)).

   Since then several additional judgments were given in which similar arguments on the general level have also been dismissed (HCJ 8567/15 and 8782/15 **Halabi v. Commander of IDF Forces in the West Bank** (December 28, 2015); HCJ 967/16 and 968/16 **Harub v. Commander of IDF Forces in the West Bank** (February 14, 2016); HCJ 1014/16 **Skafi v. Commander of IDF Forces in Judea and Samaria Area**, paragraph 11 (February 28, 2016); and HCJFH 1773/16 **Skafi v. Military Commander of the West Bank** (March 2, 2016); HCJ 7040/15 **Hamed v. Military Commander of the West Bank**, paragraph 17 and the references there (November 12, 2015). On the other hand, see the opinion of Justice **M. Mazuz** in HCJ 1125/16 **Hamed Mer'i v. Military Commander of the West Bank** (March 31, 2016)(hereinafter: **Mer'i**)

5. I shall therefore examine the specific arguments in the case at bar.

   The perpetrator was a seventeen years old minor, a detail which in the ordinary state of affairs, should have been taken into consideration by the military commander, among other things, while considering whether and how his authority under Regulation 119 should be exercised. However, in the case at bar, the fact that the perpetrator was a minor cannot assist the petitioners, rather, the contrary is true. Evidently, the perpetrator and his father were interrogated by the Israel Security Agency (ISA) and **were warned twice before the attack** as will be specified below.

On August 12, 2015, the perpetrator was summoned together with his father, the petitioner in HCJ 1802/16, for an interview during which and following extreme statements made by the perpetrator, the latter and his father were told that they were summoned for interrogation and questioning in view of the perpetrator's acts and conduct. It was made clear to the perpetrator's father that it was not without reason that his son was summoned for interrogation, that his family took after him, and that for this reason a security preclusion was pending against the father. By the end of the interview, their personal details were taken and they were released.

On October 27, 2015, the ISA contacted the perpetrator's father by telephone, and it was made clear to him that his son persisted in his bad conduct and that next time they would not contact him by telephone but would come over to his house.

Regretfully, the attack was carried out on January 25, 2016.

6. Hence, the ISA took the measure of a preliminary warning which was directed at the perpetrator and his family members, warning them that they were "watched closely" and that they should refrain from any extreme actions. Evidently, the notice and warning had no effect, the perpetrator's father failed to watch after his son, failed to warn him and failed to explain to him the severity of his actions, and therefore, the petitioners have no one to blame but themselves.

   In their response the petitioners argued, *inter alia*, that the above attested to the ISA's shortcoming and failure "to transfer the message and prevent the severe attack and the tragic end of petitioner's son" and that if the ISA had indeed suspected the perpetrator "a mechanism of surveillance or prevention could have been developed short of an actual detention". Said allegation is wisdom after the fact, and it may most probably be assumed that if before the attack the ISA had issued an administrative detention order against the perpetrator, the petitioners would have challenged it in a raging fury alleging that a minor was concerned and that the intelligence material did not substantiate a probable danger.

7. In **Mer'i**, my colleague, Justice **Baron**, expressed her opinion that Regulation 119 should not be used in the absence of the perpetrator's family involvement, and stated as follows (*Ibid*., paragraph 8):

> And it should be clarified – it does not mean that in the absence of direct and active involvement of the perpetrator's family members in the act of terror executed by him, there is no room to issue a demolition order. However, it is also difficult to agree with the current situation in which the perpetrator's family has **no ability** to avoid the demolition of its home in the event that one of its members decides on its own accord to carry out an attack. When severe terror attacks are concerned, the **knowledge** of one of the family members of the perpetrator's murderous intentions may possibly suffice – and in that regard even **implied** knowledge, "disregard", may suffice. In certain cases such knowledge may be imputed **circumstantially** – for instance from the nature of the relations between the perpetrator and his family members, considering the frequency thereof (whether he lives with them on a permanent or temporary basis), or the perpetrator's age (a minor as opposed to an individual who leads an independent life). In addition, in this context attention should be paid to "red flags" such as early statements made by the perpetrator on social networks, or meetings with individuals identified with terror organizations. The family's support of the terror attack may also be deduced from its conduct after the fact – for instance in the event it receives financial reward for the attack from an organization which supports terrorism, or in the event it expresses verbal or other support for the perpetrator's actions. It should be emphasized that nothing in the above said

> purports to establish hard and fast rules, and it is clear that each case should be considered on its merits against the backdrop of its entire circumstances (emphasis appears in the original – IA).

In the above circumstances, when the perpetrator's father had been warn twice prior to the execution of the atrocious killing, we are concerned with more than disregard, and at least, a very high level of disregard. I believe that my colleague will also agree that in the case at bar the use of Regulation 119 satisfies the proportionality test and there is no need to further elaborate on this issue.

8. With respect to the argument which was raised by the petitioners by the way in the hearing that the building in which the apartment was located was erected on land owned by UNRWA, the state's response indicates that also according to UNRWA this was not the case, and this argument has no validity in the case at bar.

9. In conclusion, we did not find any flaw in the discretion exercised by the military commander regarding the use of Regulation 119, and the petitions should be dismissed.

Justice

Justice Z. Zylbertal:

I concur.

Justice

Justice A. Baron:

I agree with the conclusion reached by my colleague Justice I. Amit according to which the petitions at bar should be dismissed.

With respect to HCJ 1802/16 – the petitioners were unable to show that a real concern existed that the demolition of the perpetrator's home would also cause any damage to their apartments, and the above constitutes sufficient grounds for the dismissal of the petition.

And now to HCJ 1817/16. This court in its judgments has long ago recognized the authority of the military commander to use Regulation 119 of the Defence (Emergency) Regulations, 1945, for the issue of forfeiture, sealing and demolition orders against perpetrators' homes; and for as long as this rule is in force, it should not be veered from. In HCJ 112/16 **Mer'i v. Commander of Military Forces in the West Bank** (March 31, 2016)(hereinafter: **Mer'i**) I noted that contrary to the **mere** authority to issue house demolition orders – the **proportionality of the use** made by the military commander of the authority vested in him is subject to judicial scrutiny in each petition *per se* and according to the circumstances of the matter (paragraph 7). In this context I clarified further that in view of the doubts surrounding the deterring power of house demolition as an effective measure against potential perpetrators, a situation in which a decision to demolish a perpetrator's home is made by the military commander based solely on the severity of the deeds attributed to the perpetrator, was unacceptable. House demolition carries with it a severe violation of

fundamental constitutional rights of the **individuals residing in the perpetrator's home**, including human dignity and the right to own property, and therefore the military commander must consider, *inter alia*, the degree of the family members' involvement, if any, in the deeds attributed to the perpetrator (paragraph 6). In this context Justice **M. Mazuz** added that it seemed that there was a reasonable basis to assume that precisely the approach which opposed the demolition of homes of family members who were not involved in the terror activity, could promote the deterring purpose in the most optimal manner:

> A deterring purpose assumes that a rational connection exists between the prohibited action and the sanction. Said purpose does not reconcile with the infliction of harm on innocent people. Using the sanction only against family members who were involved in the terror activity, and on the other hand, leaving uninvolved family members unharmed, may create an incentive for the family members to act for the prevention of attacks when they become aware of such intention, in a bid to avoid the expected sanction. On the other hand, taking the sanction against those who are not involved as well, does not create an incentive for the family members to act for the prevention of the terror activity in view of the fact that the sanction would be taken against them in any event, even if they act for the prevention thereof (without success). (HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015), paragraph 17; **Mer'i**, paragraph 26).

However, unlike **Mer'i** – in the case at bar the respondent presented intelligence information which indicated unequivocally that the father of the family was aware, in real time, of the danger posed by his son, who was seventeen years old at the time of the attack. Moreover, the information which was presented indicates that the father did not pay any attention to the ISA's repeated attempts to cause the father to take action which would prevent his son from participating in terror activity. Under these unique circumstances, it seems that there was no flaw in respondent's discretion to issue a demolition and forfeiture order against the home of the petitioners in HCJ 1817/16. And it should be clarified – the fact that the conclusion in the petition at bar is different from the conclusion in **Mer'i** precisely substantiates the importance of the examination of the degree of involvement of the perpetrator's family members, before a decision to demolish their home is made; and also emphasizes the need to examine the proportionality of the decision to demolish in each case on its merits.

Justice

Decided as specified in the judgment of Justice I. Amit.

Given today, 4 Nisan 5776 (April 12, 2016).

Justice Justice Justice