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At the Supreme Court Sitting as the High Court of Justice

HCJ 752/20

Before: **Honorable Justice U. Vogelman**
Honorable Justice A. Baron
Honorable Justice D. Mintz

The Petitioners:

1. _____ 'Atawaneh
2. _____ 'Atawaneh
3. **A.**
4. **A.**
5. **A.**
6. _____ 'Atawaneh
7. _____ 'Atawaneh
8. **HaMoked - Center for the Defence of the Individual**

v.

The Respondents:

1. **Military Commander of Judea and Samaria**
2. **Legal Advisor for Judea and Samaria**

Petition for *Order Nisi* and Interim Order

Session date: 29 Adar 5780 (March 25, 2020)

Representing the Petitioners: Adv. Nadia Daqqa; Adv. Daniel Shenhar

Representing the Respondents : Adv. Reuven Idleman

Judgment

Justice D. Mintz

The petition before us concerns a confiscation and demolition order issued by respondent 1 (hereinafter: the **respondent**) for the second floor of a building which served as the residence of _____ 'Atawaneh (hereinafter: the **perpetrator**), one of the members of the cell which had committed on August 7, 2019 a stabbing attack in which the late Dvir Sorek of blessed memory was murdered (hereinafter: the **deceased**).

Background

1. On October 3, 2019, an indictment was filed against the perpetrator attributing to him the offense of deliberate causation of death, in connection with his involvement and participation in a stabbing attack and a succession of ancillary offenses. The indictment describes how the perpetrator and the other cell members grouped together in a bid to carry out ramming, stabbing and kidnapping attacks against Israelis, on behalf of the Hamas organization. The perpetrator was even appointed to act as the cell's commander. He encouraged his friends to commit attacks, and took part in the decision to carry out the stabbing attack. After the attack, in cell members' meeting in which the knife, covered in the deceased's blood, had been presented, the perpetrator congratulated, together with other cell members, the member who had committed the attack, and even criticized them for certain "flaws" in the attack. In said meeting the members of cell decided to carry out another attack. It should be noted that after some cell members had been arrested, the perpetrator hid, at the request of some cell members, equipment and materials relating to the cell. Shortly before his arrest, the perpetrator had notified another person that he was a member of the cell responsible for the deceased's murder, requested him to hide for him materials relating to details of the cell members and instructed him to continue acting on behalf of the Hamas organization.
2. On January 9, 2020, notice was given to the petitioners, perpetrator's family member, of respondent's intention to confiscate and demolish the second floor in the building in which the perpetrator had lived, in Beit Kahil. The perpetrator's father, the owner of the entire building, lives on the first floor of the building together with his wife and son, and the perpetrator lived on the second floor of the building together with his wife and children. The notice noted that the petitioners could appeal the order, and appeal was indeed filed on January 14, 2020. On January 23, 2020 the appeal had been rejected and on the same day the confiscation and demolition order for the second floor of the building was issued.
3. To complete the picture it should be noted that confiscation and demolition orders were also issued on September 24, 2019 and October 15, 2019 by the respondent for the houses of the other cell members (____ ____ ____ Al'azafreh (hereinafter: ____); ____ ____ ____ Al'azafreh (hereinafter: ____); ____ ____ ____ Al'azafreh (hereinafter: ____); ____ ____ ____ Zahur (hereinafter: ____)). A petition which had been filed against these orders (HCJ 6420/19 **Al'azafreh v. The Military Commander of the West Bank Area** (November 12, 2019)(hereinafter: **Al'azafreh**)) was denied by a majority opinion on November 12, 2019 and the houses were actually demolished on November 27, 2019.

Hence the petition at hand.

The Arguments of the Parties

4. To begin with, the petitioners raised general, in principle arguments concerning Regulation 119 of the Defense (Emergency) Regulations, 1945 (hereinafter: the **Regulation**) which according to them is contrary to the rules of international humanitarian law and with respect to the need to have a general, in principle, discussion of the lawfulness of the Regulation's implementation. In addition, it was

argued that the decision to demolish the second floor of the building constituted an inappropriate attempt to expand the use of the Regulation beyond its limits, taking a severe and unprecedented step, since it concerned the demolition of an entire floor in a building which was owned by the perpetrator's father. In addition, according to the indictment, the perpetrator himself was on the outer circle, distanced from the center of attack. He did not take any active step in connection with the attack and the degree of his involvement in the attack, if any, was negligible. We are therefore concerned with an expansion of the demolition policy, which is itself flawed, brazenly veering from the principle of proportionality. In addition, according to the petitioners, the expansion of the demolition policy was also manifested by the issue of a fifth confiscation and demolition order in connection with the same incident, about two months after the four previous orders had been had been executed and about six months after the attack itself. Respondent's delay was not justified, given the fact that the indictment against the perpetrator had been filed on the same date that the inducements against the other cell member had been filed (whose houses have long been demolished) and in view of petitioners' expectation that the building in which the perpetrator lived would not be demolished as well, coupled with the fact that respondent has failed to point at an objective preclusion for exercising the authority causing said delay. The above circumstances reinforce the assumption that it is a punitive-vindictive measure constituting an extraneous consideration to the deterrence considerations underlying house demolitions. It was further argued that severe damage and suffering shall be inflicted on the perpetrator's minor children residing on the second floor of the building. In addition, the petitioners argued that their right to be heard was violated since respondent's decision had been provided to them expeditiously without having properly considered all relevant considerations, and that the respondent did not leave the petitioners enough time to prepare for the filing of the appeal.

5. On the other hand, the respondents made it clear that the general, in principle, arguments raised concerning respondent's authority pursuant to the Regulation should be denied, as they have been denied by this court in the past. It is a deterring authority which is implemented only if the respondent concludes that the use thereof is required to deter potential perpetrators from committing additional attacks in the future, and for this purpose only. The respondents have also noted that the scope of the implementation of the authority during the years is in direct proportion to the scope and severity of the attacks.
6. With respect to petitioners' specific case, the respondents noted that there was no reason to intervene with respondent's decision to use his authority with respect to the second floor of the building in which the perpetrator has resided. According to the respondents, petitioners' arguments concerning perpetrator's involvement in the actual execution of the attack. The indictment which was filed against the perpetrator attributes to him complicity in carrying out the attack, and it is supported by versions given by the perpetrator himself in his interrogations, by versions of other involved parties and by external evidence substantiating his involvement with the cell and the dominant part played by him in making the decision to carry out the attack. The degree of perpetrator's involvement in carrying out the attack is no less than that of the other two cell members, ____ and ____, with respect of whom it had been

determined that their involvement in the execution of the attack justified the exercise of the authority by virtue of the Regulation in **Al'azafreh**. Additionally, there is no room for the argument concerning the violation of petitioners' right to be heard.

7. With respect to petitioners' argument regarding the delay which occurred in the exercise of the authority pursuant to the Regulation, the respondents clarified that the fact that the demolition order was issued about five and a half months after the attack and about three and a half months after the indictment, did not sever the connection between the murderous act and the demolition and did not amount to delay undermining respondent's decision. The above, in view of the fact that the decision to use the Regulation was made taking into consideration the required proportionality arising from the circumstances of each case, and only after exercise of respondent's authority pursuant to the Regulation had been examined by all relevant bodies. In this context the respondents noted that the perpetrator's involvement in the execution of the attack became evident in later stages of the investigation, as a result of which the indictment against him was filed only on October 3, 2019.
8. It should be noted that following a hearing held before us in the petition on February 10, 2020, the respondents were given, at their request, an opportunity to file a supplementary notice with respect to the issues which had been discussed in the hearing, focusing on the dates in the decision making process concerning all cell members. Notice filed on March 1, 2020, included a clarification concerning the gap between the date on which the order was issued in perpetrator's case and the dates on which similar orders had been issued with respect to the houses of the other cell members. As aforesaid, said gap arises, according to the respondents, from the fact that the degree of the perpetrator's involvement was discovered only in later stages of the investigation. This issue was discussed in greater detail in the supplementary notice.
9. Firstly it was clarified that two cell members, ____ and ____, were arrested a few days after the attack (August 10, 2019), and admitted in their interrogation that they had committed the attack. The recommendation to issue confiscation and demolition orders pursuant to the Regulation in their case has already been transferred to the state attorney's office and to respondent 2's office, the legal advisor for the Judea and Samaria Area (hereinafter: the **legal advisor for the Area**) on August 19, 2019, at which time the other cell members including the perpetrator, have not yet been arrested. Only following a development in the interrogation of the two, which raised suspicions for the involvement of additional parties in the attack, the other cell members – ____, ____ and the **perpetrator**, were arrested on August 20, 2019.

In view of ____ and ____'s admission in having been members of the cell and in their involvement in the execution of the attack (on August 21, 2019 and August 29, 2019, respectively), a recommendation was made to issue confiscation and demolition orders for them, which was transferred to the state attorney's office and to the office of the legal advisor for the Area in the beginning of September 2019: on September 2, 2019 in ____'s case and on September 8, 2019 in ____'s case. Hence, confiscation and demolition orders for the four – ____, ____, ____ and ____ – could have already been issued during the months of September-October 2019. And indeed, orders for

the houses of ____ and ____ were issued on September 24, 2019, and orders for the houses of ____ and ____ were issued on October 15, 2019.

However, while the four cell members have already expressly and clearly tied themselves to the planning and execution of the attack in the interrogation, as a result of which the recommendation of Israel Security Agency (ISA) to issue confiscation and demolition order for their homes has already been established in that stage, the perpetrator has initially denied full involvement in the attack, although he admitted that he had acted in the framework of the cell. The degree of his involvement was revealed only as the investigation progressed and gained momentum. Therefore, only by the end of September 2019 the full factual picture concerning the degree of his involvement in the attack had been clarified and established, and only on October 3, 2019, an indictment was filed against him. After the indictment had been filed, given the required seriousness and caution in exercising the authority, a final conclusion in perpetrator's case concerning the demolition of his apartment was only established at that time, and on November 5, 2019, the recommendation was transferred to the state attorney's office and to the office of the legal advisor for the Area. Shortly after the approval of all bodies had been given – the office of the legal advisor for the Area and the Attorney General, who requested that the issue be presented before the most senior political officials - notice was given to the petitioners on January 9, 2020 of the intention to confiscate and destroy the second floor of the building.

10. According to the respondents, the issue of a demolition order in perpetrator's case, five and a half months after the date of the attack, is not contaminated by delay, despite the time difference relative to the demolition orders which were issued to the homes of the other cell members, considering the fact that the degree of his involvement was clearly established as aforesaid only about two months after the attack.
11. Referring to respondents' supplementary notice, the petitioners argued that no satisfactory explanation has been given, justifying the delay in the issue of the demolition order in perpetrator's case compared to the other cell members, in view of the substantial time difference between perpetrator's case and the cases of the other cell members. The above applies, according to them, to each one of the periods – to the period which passed from the date on which the involvement of the cell members had been clarified until the date on which ISA's recommendation was transferred; as well as to the period which passed from the date on which ISA's recommendation had been transferred until the date on which the demolition order was issued. The respondents did not point at the existence of any objective preclusion for the exercise of the authority which caused said delay, and did not present any proper explanation for the failure to exercise it together with the four other cases or at least shortly thereafter.
12. To complete the picture it should be noted that after the hearing in the petition which took place on March 25, 2020, and after additional explanations had been given, ex parte, by representatives of security bodies, the respondents requested to file another supplementary notice informing of their position on the issues which had been discussed in the hearing. On May 14, 2020, a supplementary notice was filed stating

that the political echelon decided to insist on the execution of the confiscation and demolition order being the subject matter of the petition. In the response filed by the petitioners to the supplementary notice, the petitioners repeated their position according to which the respondent failed to give satisfactory explanation to the issue of the delay. It was inter alia argued that the delay did not arise only from the passage of a defined period of time, but that under the circumstances of the case it attested to the fact that the respondent decided, either "actively" or "passively", not to exercise his authority against the petitioners, while having exercised it against all other cell members. It therefore seems that the issue of the current order is based on considerations extraneous to deterrence considerations, leading to the conclusion that the order was issued without authority.

Discussion and Resolution

13. After I have reviewed the petition, the response, the supplementary notices which were filed and the replies thereto and after I have heard the oral arguments of the parties' representatives before us, I have reached the conclusion that the petition should be denied and I shall advise my colleagues to do the same.

14. I shall start by saying that petitioners' general arguments concerning respondent's mere implementation of the Regulation should be denied. Arguments of this sort have already been discussed and denied by this court in its the judgments many times (see for instance: HCJ 8091/14 **HaMoked Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014); Request for further hearing in said case which was denied – HCJFH 360/15 **HaMoked Center for the Defence of the Individual, founded by Dr. Lotte Salzberger v. Minister of Defense** (November 12, 2015); HCJ 6905/18 **Naji v. Military Commander of the West Bank Area** (December 2, 2018); and see recently: HCJ 2492/19 **Abu Leila v. GOC Central Command**, paragraph 8 (April 16, 2019) (hereinafter: **Abu Leila**); **Al'azafreh**, paragraph 8; HCJ 751/20 **Hanatche v. Military Commander of the West Bank Area**, paragraph 14 (February 20, 2020)(hereinafter: **Hanatche**); HCJ 1490/20 **Shibli v. Military Commander of the West Bank Area**, paragraph 14 (March 30, 2020) (hereinafter: **Shibli**)). Notwithstanding petitioners' arguments that the Regulation's implementation policy had been expanded, this case is not different from previous cases in a manner justifying a general, in principle, discussion of issues which had long been examined and resolved. The discussion shall therefore focus on petitioners' arguments concerning the manner by which the authority was exercised in the case at hand.

In addition, before discussing petitioners' major arguments, I decided to reject the arguments regarding the issue procedure of the confiscation and demolition order for the building and the ostensible violation of petitioners' right to be heard, in view of the fact that there is no dispute that as part of the hearing notice of the intention to issue a confiscation and demolition order for the building was sent to the petitioners in which it was made clear to them that they had the option to appeal the decision. The petitioners had indeed acted accordingly and filed an appeal which was denied by a reasoned decision. Under these circumstances, the argument that petitioners' right to be heard was violated cannot be accepted.

15. To the crux of the matter. Indeed, the respondent should use the power vested in him by virtue of the Regulation, according to principles of reasonableness and proportionality and consider the entire circumstances of the case (HCJ 1624/16 **Hamed v. Military Commander of the West Bank Area**, paragraph 21 (June 14, 2016); Abu Leila, paragraph 10). While exercising the authority, the respondent should take into consideration, among other relevant considerations, the severity of the deeds attributed to the perpetrator, the magnitude of the evidence against him and the characteristics of the persons who may be harmed as a result of the exercise of the authority (**Al'azafreh**, paragraph 9). It has also been held in the past that the demolition of a building owned by the perpetrator is different from a similar measure taken against a house owned by a third party who has no family ties or other connection to the perpetrator or his family (HCJ 7040/15 **Hamed v. Military Commander of the West Bank Area**, paragraphs 46-48 (November 12, 2015)(hereinafter: **Hamed**)).

16. In the case at hand, considering the conditions established by judicial precedent, the entire material shows that respondent's decision was based on all relevant considerations which were taken into account in view of the special circumstances of the incident and the fact that it was a cruel and difficult attack in which the deceased, a young man, lost his life. Accordingly, an indictment was filed against the perpetrator attributing to him the offense of **complicity** in terror attack. This indictment is based on the perpetrator's version as well as on the versions of his accomplices, and on additional evidence. We are therefore concerned with sufficient evidentiary infrastructure for the issue of an order (see **Al'azafreh**, paragraph 10, **Shibli**, paragraph 22). Under the circumstances, the severity of the actions attributed to the perpetrator is self-evident. In addition, the respondent acted proportionately and reasonably in limiting the confiscation and demolition order only to the second floor of the building, in which the perpetrator had lived with his immediate family. It should also be noted that the need to deter also stands when we are concerned with a residential building in which minor children reside, and a decision that the respondent exceeded his discretion cannot be made based on this reason alone (HCJ 2828/16 **Abu Zeid v. Commander of Military Forces in the West Bank**, paragraph 7 (July 7, 2016); **Al'azafreh**, paragraph 13). Naturally, when a residential building is concerned, minor children often reside there too, and in suitable cases, as well as in the case at hand, preferring deterrence considerations over violation of the rights of the residents of the house, also stands when minor children are concerned (HCJ 8786/17 **Abu Alrob v. Commander of IDF Forces in the West Bank**, paragraph 33 (November 26, 2017)).

17. And with respect to petitioners' major arguments, which according to them tip the scales in their favor: the first argument is that the building is owned by the perpetrator's father, while its residents had no knowledge of the perpetrator's involvement. However this argument does not assist the petitioners. A "residential connection" is required, rather than perpetrator's ownership of the building. When we are concerned with a residential floor that served as the permanent residence of the perpetrator (which is not in dispute in this case) which is not owned by an unrelated third party but rather by an immediate family member, the residential connection is clear (HCJ 886/18 **Jabarin v. The Military Commander of the West Bank Area**,

paragraph 9 (January 10, 2019); **Hanatche**, paragraph 20). Moreover, according to judicial precedent accepted approach, awareness or involvement of the residents of the house is not a necessary condition for the implementation of the Regulation (see for instance: HCJ 4177/18 **Kabhaa v. Military Commander of the West Bank Area**, paragraph 14 (June 7, 2018)). And anyway, the demolition is aimed only against the apartment in which the perpetrator had lived and not against the first floor in the building in which his father and mother live.

18. The second argument is that the perpetrator was in a distant circle, remote from the attack itself in a manner which does not justify the issue of a confiscation and demolition order for the building to which he has a connection. Indeed, there is no dispute that the perpetrator was not present on scene when the attack was committed and did not personally kill the deceased. However, different indirect bodies often stand behind the planning, equipping, guidance and preparations which precede the actual execution of the attack itself. Sometimes "precisely the acts of the "indirect" perpetrators are so significant and central to the extent that it is doubtful whether, were it not for them, the attack could have materialized." (HCJ 1631/16 **'Aliwa v. Commander of IDF Forces in the West Bank**, paragraph 11 (September 27, 2016)). In the case at hand, according to the facts described in the indictment, the perpetrator was one of the involved and dominant persons in the activity which took place behind the scenes and which was imperative for the execution of the attack. The perpetrator was one of the organizers and leaders of the cell the purpose of which was to attack Israeli Jews; he took an active and direct part in the cell's meetings; he encouraged his friends to carry out attacks; he supported the carrying out of the attack and even "reprimanded" the cell members who had actually committed the attack of "flaws" therein; he attended a meeting in which the cell members decided to carry out another attack; and hid in his possession all materials and equipment relating to the cell. Therefore, similar to my decision in **Al'azafreh** concerning the involvement of ____ and ____, in perpetrator's case too, the influence of his acts on the realization of the attack justify the exercise of the authority by virtue of the Regulation.
19. The third argument concerns the delay in the exercise of respondent's authority by virtue of the Regulation. Indeed, the deterring purpose of the Regulation dictates that although the scheduling of the demolition is subject to the discretion of the authorized bodies, the authority thereunder should be exercised as expeditiously as possible (see for instance: HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank**, paragraph 7 (October 15, 2015)(hereinafter: **Sidr**); HCJ 1629/16 **'Amar v. Commander of IDF Forces in Judea and Samaria**, paragraph 20 (April 20, 2016)). However, the period of time which shall be considered "reasonable" for the implementation of the Regulation cannot be established in advance and respondent's discretion shall be examined, in the case at hand too, considering the circumstances of each and every case (HCJ 5376/16 **Abu Hdeir v, Minister of Defense**, paragraph 38 (July 4, 2017)). In addition, one should take into consideration the fact that the decision to make a recommendation for the issue of a confiscation and demolition order is a complex decision, deriving from many factors which should be taken into account, including the magnitude of the evidence against the perpetrator. In the case at hand, we have clarified in great detail the circumstances which led to the delay in formulating the recommendation to demolish the second floor of the building, taking

into consideration the need to examine the full factual picture, given, inter alia, perpetrator's failure to admit, contrary to the other cell members, his involvement in the carrying out of the attack. It is a factor that clearly differentiates perpetrator's case from the case of the other cell members.

20. Moreover, according to respondents' notice, the recommendation to issue a demolition order was presented by the Attorney General, to the highest political officials, until their approval was obtained, and the explanations which were presented to us in this regard ex parte are acceptable to me. The entire picture shows that the decision to issue the order was preceded by a thorough examination and clarification process, which was very carefully administered, and which was the cause for the delay in issuing the order. In view of the above, under these circumstances, considering the duration of the delay – which does not exceed a few months – the delay argument cannot lead to the conclusion that respondent's decision exceeded reasonableness (Compare: **Sidr**, where the delay argument was denied although nine months have passed from the date of the attack; **Hamed**, where the delay argument was also denied after some four months have elapsed; H CJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank Area** (December 1, 2015), where the delay argument was accepted after a significant period of about 11 months has elapsed from the date of the attack; H CJ 628/18 **Kamil v. Military Commander of the West Bank Area**, paragraph 17 (February 28, 2018)). It is my opinion that the careful approach taken by all bodies in the case at hand should be endorsed, commencing from the discretion exercised by the respondent, through the legal advice which was given by the legal advisor of the Judea and Samaria Area and the Attorney General, and ending with the approval which was given by the senior political bodies. Certainly, the period of time which passed should not be interpreted as a decision to refrain from exercising the authority. I find it difficult to currently regard the delay which occurred in making the decision as a factor which should be held against the respondents.

In view of the entire considerations specified above, I did not find any cause to interfere with respondent's decision. Therefore, if my opinion is heard, the petition should be denied.

Justice

Justice A. Baron:

1. Dvir Sorek was a young and talented man who was murdered on August 7, 2019 in a stabbing attack – solely for being Jewish. The horrific murder was planned and carried out by a terror cell of the Hamas organization, which was established for the purpose of carrying out attacks against Jews (hereinafter: the **terror cell** or the **cell**). On October 3, 2019, an indictment was filed against five members of the terror cell, attributing to each one of them the offense of deliberate causation of death and ancillary offenses. Parallel to the criminal proceedings, the military commander issued in September 2019 orders for the demolition of the houses in which the

families of four out of the five perpetrators live (hereinafter: the **demolition orders**); and petitions which were filed against the demolition orders were denied by this court (by a majority opinion) on November 12, 2019 (HCJ 6420/19 **Al'azafreh v. The Military Commander of the West Bank Area**; hereinafter: **Al'azafreh**). On November 27, 2019 the four residential homes were demolished; and only more than a month later and about five months after the attack, the military commander issued a demolition order against the house in which the family of the fifth perpetrator lives – _____ 'Atawaneh (hereinafter: '**Atawaneh**). The validity of said demolition order, from January 2020, is at the center of the hearing before us (hereinafter: the **demolition order**).

2. The premise is that the military commander is vested with the authority by virtue of regulation 119 of the Defense (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**) to issue an order for the demolition of the residential home of a perpetrator even if innocent family members who did not take part in the terror activity also reside therein. However, as is known, "authority is one thing and discretion is another" (see the words of my colleague Justice **U. Vogelman** in HCJ 1490/20 **Shibli v. The Military Commander of the West Bank Area** (March 30, 2020), hereinafter: **Shibli**) – and therefore the proportionality and reasonableness of the use of the house demolition measure is examined on its merits in each petition according to the circumstances of the matter. The demolition of residential homes of perpetrators is intended to serve the most important interest of protecting the security of the citizens of Israel; however, this measure embeds a severe violation of fundamental rights of innocent family members, often including minors, and constitutes a collective punishment in a manner "which contravenes the commandment "Every man shall be put to death for his own sin" (Deuteronomy 24: 16), a commandment entrenched in the principles of liberty, justice, honesty and peace of Hebrew law and the heritage of Israel". (Justice **Y. Amit**, HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015); hereinafter: **Sidr**). In view of the above it has already been clarified by judicial precedent that the measure of house demolition may be used solely for deterrence purposes "for all to see and beware", rather than as an additional tool to punish the perpetrator and certainly not to appease public opinion. Furthermore, judicial precedent from many years ago has clarified that the military commander must carefully exercise the authority vested in him to issue demolition orders and only in special and extraordinary cases: "It is well known that the measure embedded in Regulation 119 is an extreme and severe measure and that it shall be used only after strict examination and consideration and only in special circumstances" (HCJ 361/82 **Hamari v. Commander of Judea and Samaria Area**, IsrSC 36(3) 439, 443 (1982))(and see also: HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank Area**, the words of the Deputy President **A. Rubinstein** in paragraph 12 (December 1, 2015) (hereinafter: **Abu Hashiyeh**)); These words, which were said before the enactment of the Basic Law: Human Dignity and Liberty, have greater validity after the enactment of said basic law.
3. I have expressed my opinion more than once that the deterring power embedded in the measure of house demolition is vague and doubtful, and that said doubt bears on the proportionality of the exercise of the authority. In this context, I am of the opinion

that the demolition of the residential home of innocent family members solely on the basis of the severity of the deeds attributed to the perpetrator, without giving weight to the degree of knowledge or involvement of his family members in his deeds, does not meet, as a general rule, the proportionality test (see for instance: **Al'azafreh; Shibli**; and in greater detail see my words in H CJ 1125/16 **Mer'i v. Commander of Military Forces in the West Bank** (March 31, 2016)). In the case at hand, 'Atawaneh's wife and their three minor children (two, eight and sixteen years old) reside in the house designated for demolition. The respondents do not argue that the family members were involved in any way in 'Atawaneh's deeds, or that any of them knew of his intention to kill Jews, or that they have supported the murderous act in retrospect; and only for this reason I believe that the demolition order is disproportionate and should be revoked.

Moreover. In the case at hand there is another reason which, in my opinion, requires the revocation of the demolition order – namely, the delay which occurred in the issue of the order by the military commander. Said delay does not merely arise from the passage of time as of the date of the murderous attack until the date of the demolition order (five months), but also from the fact that the order was issued only after the houses of four out of the five cell members which committed the attack had long been demolished. These circumstances significantly reduce the deterring power of the demolition order and give it a punitive nature. I shall now focus on this issue.

4. "The **timing** of the execution of a demolition order is generally left to the discretion of the respondent (the military commander – A.B) according to time and place data" (emphasis in the original – A.B) (H CJ 4747/15 **Abu Jamal v. GOC Home Front Command** (July 7, 2015)). However, it is clear that in order to achieve the entire deterring effect embedded in house demolition, the sanction of demolition should be applied shortly after the attack. It should be noted in this context that acknowledging the importance of said proximity of time, the military commander allots to the families of the perpetrators a few single days to submit an objection against the demolition order; and when a petition is filed with this court against a decision in the objection, the petition is heard as soon as possible. The aspect of time is therefore extremely important for the purpose of achieving effective deterrence, which is as aforesaid the entire purpose of house demolition:

"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....** 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" (emphasis added – A.B.)(**Abu Hashiyeh**, paragraph 9 to the opinion of Justice **Z. Zylbertal**)

Hence, the greater the time gap between the attack and the demolition of the perpetrator's home, the lesser the deterring effect embodied in the demolition of the house – and in the absence of a deterring effect, the unavoidable impression is that the demolition of the house is used only as a punitive measure. The above was also clarified by the Deputy President **A. Rubinstein** in **Abu Hashiyeh**:

"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 (See: **Abu Hashiyeh**, paragraph 21 of the judgment of the Deputy President **A. Rubinstein** (in a minority opinion but not on this issue)).

5. In **Abu Hashiyeh** the court held (by a majority opinion) that the demolition order for the residential home of a perpetrator's family should be revoked, since it was issued by the military commander some 11 months after the perpetrator had committed the murderous attack. It was held there that under said circumstances the demolition of the house would not lead to the desired deterring result, and therefore and in view of the violation of the rights and dignity of the innocent family members, the exercise of the demolition authority was unreasonable and inappropriate.

In the case at hand, "only" five months passed from the murder of the late Dvir Sorek of blessed memory and until the issue of the demolition order for the house in which 'Atawaneh's family lives; however, other than the passage of time, there are additional circumstances in the case at hand which intensify the severance of the "conscious connection" between the attack and the sanction therefore – and in that I refer to that the demolition order was issued only after the house demolition sanction has already been exercised against four of five members of the terror cell which committed the attack (about a month later). Given these circumstances combined, it is doubtful whether the population which is to be deterred shall make the connection between the price paid by 'Atawaneh's family and the devastating attack; This is what separates the case at hand from other cases in which the argument of delay in the issue of a demolition order has been discussed and denied (see, for instance, **Sidr**).

6. In a supplementary notice dated March 1, 2020 the respondents referred to the delay in the issue of the demolition order in the case at hand. According to them, the fact that said order was issued only in January 2020 while the demolition orders for the homes of the four other members of the terror cell had been issued earlier already in September 2019, stemmed from the fact that 'Atawaneh, as opposed to the other perpetrators, has initially denied his involvement in the carrying out of the attack –

and under these circumstances his involvement in the murder was established at a later stage compared to the other cell members who have immediately admitted the acts attributed to them. It was argued that the proceeding for the issue of a demolition order in 'Atawaneh's case has therefore commenced only on or about an indictment was filed against all cell members – while with respect to the other four the proceeding for the issue of demolition orders had already commenced shortly after the attack. With respect to the period which passed from the date on which the part played by 'Atawaneh in the murder has already been clarified (the indictment filing date, at the latest, October 3, 2019) until the date on the demolition order for his home was issued (three months later) – it was argued by the respondents that the Attorney General thought that in view of the circumstances of the case the approval of the "highest political echelon" was required for the demolition of the house, and that only after said consultation it would be possible to issue the order.

It should be emphasized at this point that I do not think that there was any flaw in respondents' conduct in connection with the proceedings and approvals which were required for the issue of the demolition order as specified above. As noted by my colleague Justice **D. Mintz**, the caution exercised in this context by all involved bodies – including the legal advisor of the Judea and Samaria area, the Attorney General and the senior political echelon should be endorsed. However, even if the explanations given by the respondents are sensible, they do not justify the issue of the demolition order **on the date on which it was issued**. Namely – before exercising the authority vested in him by virtue of Regulation 119 the military commander should have re-examined the arising deterring picture – and among other things to take into account the change of circumstances which was created by the passage of time and since the initial decision in that regard had been made. As clarified above, in the case at hand the passage of time substantially reduces the deterring power of the demolition order – particularly in view of the fact that during said period, and more than six months ago, the houses of the other members of the terror cell had been demolished. Even if the issue of the demolition order was delayed for justified reason, in the absence of sufficient deterring effect, the order is flawed by unreasonableness and hence is disproportionate, and should not have been issued.

7. In conclusion, 'Atawaneh is one of the cell members who murdered the late Dvir Sorek of blessed memory and for this he should be fully and severely punished. However, the demolition order at the case at hand is directed against the residential home of 'Atawaneh's wife and three minor children, who are innocent and have shown no involvement in the attack – not from the beginning and not in retrospect. For this reason there is already a substantial concern that the demolition order is used as a mere punitive sanction, and this is not the purpose of the house demolition authority which was vested in the military commander by virtue of Regulation 119. This concern intensifies in view of the time that had passed from the attack until the date on which the demolition order was issued (five months), particularly while during said period and some time ago the houses of all other members of the terror cell that 'Atawaneh was a member of, have been demolished. The passage of time severs the "conscious connection" between the murder and the sanction therefore, such that already on the date on which the demolition order was issued its deterring power was doubtful: and in the absence of deterring effect the demolition order appears to be

carried out solely for punitive purpose, and as such it is unreasonable and disproportionate. Hence, if my opinion is heard and since with the parties' consent the hearing was held as if *order nisi* had been granted, the order shall become absolute and we shall direct that the demolition order be revoked.

Justice

Justice U. Vogelman

1. In the dispute between my colleagues, I join the conclusion proposed by my colleague Justice **A. Baron**, although the way I reach said conclusion is different.

In the petition at hand the petitioners request that we revoke a confiscation and demolition order which was issued on January 23, 2020 for the second floor of a building in which ____ 'Atawaneh (hereinafter: '**Atawaneh**) had lived – due to his alleged involvement – in a stabbing attack in which the late Dvir Sorek of blessed memory was murdered (hereinafter: the **confiscation and demolition order** or the **order**).

In a hearing held before us on February 10, 2020 the respondents agreed that we would hear the petition as if *order nisi* had been granted. I shall already say that in my opinion, the delay which occurred in the issue of the confiscation and demolition order by the respondents justifies its revocation.

2. At the outset it should be noted that in their petition the petitioners request once again that we re-visit the general, in principle, issues evoked by the house demolition policy and the exercise of the authority according to Regulation 119 of the Defense (Emergency) Regulations, 1945. In this context, I shall reiterate what I have said several times in the past:

"I have expressed my opinion on the prevailing rule concerning house demolition by virtue of Regulation 119 of the Defense Regulation and the general difficulties associated therewith more than once [...] As I have noted in these cases, although I am of the opinion that said rule should be re-visited and all aspects thereof be fully discussed, it is binding until it is changed, to the extent it is changed, by an expanded panel" (HJC 628/18 **Kamil v. Commander of IDF Forces in the West Bank**, paragraph 13 (February 28, 2018) (**Kamil**); see also HCJ 1490/20 **Shibli v. Military Commander of the West Bank Area**, paragraph 1 of my opinion (March 30, 2020)(hereinafter: **Shibli**); HCJ 2356/19 **Barghuti v. Military Commander of the West Bank** (April 11, 2019); HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank**, paragraphs 1-6 of my opinion (October 15, 2015) (hereinafter: **Sidr**)).

3. Authority is one thing and discretion is another. Even where authority exists, in view of the severe consequences arising from the implementation of Regulation 119, the exercise by the military of commander of the discretion vested in him should be thoroughly examined according the criteria established by administrative law, including the requirements of reasonableness and proportionality (see, from recent time, **Shibli**, paragraph 20; also see **Kamil**, paragraph 15; HCJ 1624/16 **Hamed v. Military Commander of the West Bank Area**, paragraph 21 (June 14, 2016)). The proportionality of the decision should be examined considering the specific circumstances of each case, taking into account, inter alia, among other factors, the severity of the actions attributed to the suspect; the number and characteristics of those expected to be affected by the exercise of the authority; the magnitude of the evidence against the suspect; and the degree of involvement, if any, of the other inhabitants of the house. The military commander is also required to examine whether it would suffice to exercise the authority with respect to that part of the house in which the suspect lived; whether the demolition may be carried out without causing damage to adjacent houses and also whether the sealing of the house or parts thereof would suffice as a less injurious measure (HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 22 (August 11, 2014); also see: **Shibli**, paragraph 20; HCJ 6420/19 **Al'azafareh v. Military Commander of the West Bank Area**, paragraph 9 (November 12, 2019); HCJ 8161/17 **Al-Jamal v. Commander of IDF Forces in Judea and Samaria**, paragraph 5 (November 7, 2017)).
4. Another factor that the military commander should take into consideration among all other data considered by him is the passage of time between the attributed deed and the exercise of the authority according to Regulation 119 (HCJ 8031/16 **Zein ('Awad) v. Military Commander of the West Bank Area**, paragraph 7 (November 1, 2016); HCJ 1631/16 **'Aliwa v. Commander of IDF Forces in the West Bank**, paragraph 14 (September 27, 2016); HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank Area**, paragraph 22 (December 1, 2015) (hereinafter: **Abu Hashiyeh**); HCJ 361/82 **Hamari v. Commander of Judea and Samaria Area**, IsrSC 36(3) 439, 444 (1982)). The above, as a result of the obligation imposed on the administrative authority to act at the appropriate speed (Section 11 of the Interpretation Law, 5741-1981; **Abu-Hashiyeh**, paragraph 4 of the opinion of Justice **Z. Zylbertal**; also see Itzhak Zamir **The Administrative Authority**, Volume B 1097-1105 (2011)(hereinafter: **Zamir**)). The "appropriate speed" for the exercise of the authority is relative and derives from the public and personal interests affected by the manner by which the authority is exercised (**Abu Hashiyeh**, paragraph 5; HCJ 1999/07 **MK Galon v. The commission of inquiry into the events of military engagement in Lebanon 2006**, IsrSC 62(2) 123, 160 (2007)). With respect to the exercise of the authority by virtue of Regulation 119 it has already be held that "inasmuch as there is an intention to demolish, notification should be given as soon as possible after the criminal act in question" (**Abu Hashiyeh**, paragraph 22; **Sidr**, paragraph 7; HCJ 7040/15 **Hamed v. Military Commander on the West Bank Area**, paragraph 50 (November 12, 2015)). In this context the authority should engage in balancing since alongside the obligation to act expeditiously, the decision

should be based on "solid evidentiary grounds" (HCJ 1629/16 '**Amar v. Commander of IDF Forces in Judea and Samaria Area**, paragraph 20 (April 20, 2016) (hereinafter: '**Amar**); and generally see **Zamir**, pages 1109-1110). In this context, I agree with Justice **Mazuz** in **Abu Hashiyeh** who noted that "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 (*Ibid.*, paragraph 9).

5. In **Abu Hashiyeh** Justice **Z. Zylbertal** pointed at the interests affected by a delayed exercise of the authority (see also: HCJ 5376/16 **Abu Hdeir v. Minister of Defense**, paragraph 36 (July 4, 2017)). The first interest is the personal interest of the inhabitants residing in the home of the person accused of committing the acts specified in Regulation 119. The confiscation and demolition orders have a dramatic effect on their lives, and for as long as no decision is made in their matter, they are left in the dark, without knowing whether and when they shall be served with a demolition order for their home. The second interest is the public interest in having a clear connection between the act of violence which evoked the authority and the exercise thereof (**Abu Hashiyeh**, paragraphs 6-8 of the opinion of Justice **Z. Zylbertal**). The interest to deter the public at large from committing acts of violence is also affected by the passage of time, since "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 (*Ibid.*, paragraph 9; for cases in which the delay in exercising the authority may evoke the concern that events external to perpetrator's deeds are the underlying reason for the demolition order, *Ibid.*; **Sidr**, paragraph 7 of my opinion).
6. The harm inflicted on said interests as a result of the delay in making the decision also bears, in my opinion, on its proportionality. In **Sidr** I have pointed at the difficulty in the existing rule, with respect to the balancing between the deterring purpose and the drastic violation of the rights of the uninvolved inhabitants of the house. Although I decided to follow the path of the existing rule I added that delay would require a different approach since the specific balancing between the considerations may yield a different result. In such cases the purpose of deterrence is affected since – as was held in **Abu Hashiyeh** – deterring the public at large is not particularly effective where the connection between the deed and the sanction is vague (see also: '**Amar**, paragraph 20). In addition, the expectation level of the affected family that in its case the authority shall not be exercised rises, particularly in view of the fact that the authority has already been exercised against the homes of other perpetrators who took part in the same attack. Needless to say that similar to other context in administrative law, delay is not measured in firm time periods but is rather a functional term measured against the particular circumstances of each and every case.
7. From the general to the particular. According to respondents' supplementary notice dated March 1, 2020 (the **supplementary notice**), 'Atawaneh's involvement in the attack unraveled as the investigation progressed and only "by the end of September

2019 the full factual picture became clear and was substantiated, including with respect to the degree of his ['Atawaneh – U.V.] involvement" (paragraph 10 of the supplementary notice). The indictment against 'Atawaneh was filed a few days after the investigation had terminated, on October 3, 2019. In this context, the relevant date for the examination of the duration of time in which the decision to demolish was made in the case at hand commences, at the latest, on the date on which the indictment had been filed, for two reasons. Firstly, only on that date the respondents had a factual picture concerning the degree of 'Atawaneh's involvement in the attack (and it should be noted that in fact, as the respondents themselves state, the picture has already been clarified by the end of September 2019, but I shall assume, in the case at hand and in view of the close proximity between the dates, that the relevant date is the date on which the indictment was filed). Secondly, on that date it became clear to the petitioners – his family members – openly and unequivocally that 'Atawaneh was accused of involvement in the attack, and consequently, that respondent 1 may use the authority vested in him by virtue of Regulation 119 and issue a confiscation and demolition order against the second floor of the building in which the petitioners reside.

8. From the date on which the indictment had been filed and until the date on which the petitioners received the notice of respondent 1's decision to exercise his authority according to Regulation 119 three months have elapsed. The above period may be divided – in the case at hand – into two parts: the period from the indictments' filing date until the date on which the recommendation of Israel Security Agency (ISA) was transferred to the State Attorney's Office and respondent 2's bureau (hereinafter: the **first period**; about a month from October 3, 2019 through November 5, 2019); and the period which passed from the date on which ISA's recommendation had been transferred until the date on which the notice of the intention to demolish the second floor was transferred to the petitioners (hereinafter: the **second period**; about two months - from November 5, 2019 through January 9, 2020). With respect to the first period, the respondents did not present sufficient reasons for its continuation for about a month. In the hearing before us on March 25, 2020 respondents' representative clarified that other than the fact that it was a holiday season, he did not have an additional explanation for the continuation of this stage in the decision to demolish the floor. And it should be noted in this context that with respect to the other cell members the recommendation of the ISA was transferred in much shorter time periods: see paragraphs 6 and 8 of the supplementary notice). With respect to the second period, the respondents described the processing procedure for the issue of the confiscation and demolition order from the date on which ISA's recommendation had been received and clarified that in said period the Attorney General wanted to bring the issue before the highest political echelon before making a decision (on this issue we have received explanations ex parte, with petitioners' consent, from representatives of the securities bodies; see also paragraph 18 of the supplementary notice).
9. I am of the opinion that the delay (for which no pertinent justification was presented) in the first period, alongside the examination of the entire period, in which the petitioners were shrouded in uncertainty as to what would become of their home, lead to the conclusion that the exercise of the demolition authority in the case at hand was

flawed, in a manner justifying the revocation of the confiscation and demolition order. The above is said considering also the period which has elapsed from the issue of the confiscation and demolition orders for the homes of the four other perpetrators to whom involvement in the attack is attributed until the issue of the order in the case at hand, amounting to several months. From the perspective of the deterring purpose, the measures taken in the above cases which realized immediately the deterring purpose in connection with the discovery of their involvement in the attack – should be given weight in the circumstance of the case at hand. This last datum intensifies the violation of the family members' expectation interest, against the period in which no measures were taken against them despite the discovery of 'Atawaneh's involvement, in the framework of which – the sanction has already been used against other involved parties. All of the above – as was held in **Abu Hashiyeh** – "when the 'law' itself raises difficult moral dilemmas even according to those who support using it" (*Ibid.*, paragraph 6 of the opinion of Justice **Z. Zylbertal**).

10. In view of the above I am of the opinion that also on the level of public interest, the belated exercise of the authority against the house of the 'Atawaneh's family obfuscates the connection between the criminal acts attributed to him and the sanction imposed in connection therewith (on this issue see the words of my colleague Justice A. Baron in paragraph 5 of her opinion). As aforesaid, there is no arithmetic formula for calculating the exact period of time after which the magnitude of the delay would lead to the revocation of the decision, and as noted by me, each case should be examined according to its circumstances. The special characteristics of the delay under the described circumstances, indicated as aforesaid, that interests described above are affected: the delay affects the deterring justification underlying the exercise of the authority by virtue of Regulation 119; it weakens the connection between the criminal act and the exercise of the authority; and mainly, it increases petitioners' expectation that the passage of time from the date on which an indictment had been filed against 'Atawaneh without a demolition order indicates that a decision was made to refrain from exercising the authority by virtue of Regulation 119. Hence, the balance between the alleged benefit of the exercise of the authority by virtue of Regulation 119 and the injury inflicted on the petitioners was violated. The result of this violation of balance is that the confiscation and demolition order in the case at hand (which as aforesaid is aimed at the demolition of the entire second floor in which 'Atawaneh's wife and children reside) is disproportionate.
11. I did not disregard the fact that a period of three months passed from the filing of the indictment until the notice of the intention to exercise the authority. In comparison to previous cases in our judgments, it is a borderline period. Had the military commander decided to limit the confiscation order and issue it, ab initio, against one room to which the perpetrator had a special connection and which could have been sealed, as was done for instance in **Kamil** (in which a similar period of time was concerned), it may have opened the door for the determination that the decision was within the realm of reasonableness. However, in the case at hand a distinction could not be drawn between the part in which his wife and children lived (and the comparison that the respondents tried to make between this case and **Shibli** is irrelevant given the fact that in said case, as was noted by petitioners' representative (who also represented the petitioners in **Shibli**) a delay argument was not raised and

in any event the issue was neither examined nor resolved in the judgment). Under these circumstances, the demolition of the entire floor, given all circumstances which were described in detail above, is in my opinion disproportionate.

12. In view of the above, I am also of the opinion that the petition should be accepted and that the confiscation and demolition order dated January 23, 2020 which was issued by respondent 1 for the second floor of the building in which 'Atawaneh had lived - revoked.

Justice

Decided by the majority opinion of Justices U. Vogelman and A. Baron against the dissenting opinion of Justice D. Mintz to accept the petition and direct to revoke the confiscation and demolition order dated January 23, 2020 which was issued by respondent 1 for the second floor of the building in which ____ 'Atawaneh had lived in Beit Kahil.

Given today, Sivan 2, 5780 (May 25, 2020).

Justice

Justice

Justice