At the Supreme Court Sitting as the High Court of Justice

HCJ 4853/20

Before:	**Honorable Justice M. Mazuz** **Honorable Justice G. Karra** **Honorable Justice Y. Willner**
The Petitioners:	1. **_____ Abu Baher** 2. **_____ Abu Baher** 3. **_____ Abu Baher** 4. **_____ Abu Baher** 5. **_____ Abu Baher** 6. **_____ Abu Baher** 7. **_____ Abu Baher** 8. **_____ Abu Baher** 9. **_____ Abu Baher** 10. **_____ Abu Baher** 11. **HaMoked - Center for the Defence of the Individual**
	v.
The Respondents:	1. **Military Commander of the West Bank Area** 2. **Defense Minister**
	Petitions for *Order Nisi*
Session date:	29 Tamuz 5780 (July 21, 2020)
Representing the Petitioners:	Adv. Nadia Daqqa; Adv. Daniel Shenhar
Representing the Respondents :	Adv. Jonathan Berman

Judgment

Justice Y. Willner:

1. The petition at hand concerns a confiscation and demolition order issued by virtue of regulation 119 of the Defense (Emergency) Regulations, 1945, with respect to the residential apartment of _____ Abu Baher (hereinafter respectively: the **Order, Regulation 119,** the **Apartment** and the **Perpetrator**), who is accused of

having deliberately caused the death of Staff Sergeant Amit Ben Yigal of blessed memory (hereinafter: the **Deceased**).

Background

2. As described in the indictment filed against the perpetrator, on May 12, 2020, shortly before sunrise, security forces, including the Golani Brigade where the deceased served as a soldier, conducted an arrest operation in Yabed Village, in which, inter alia, one of the perpetrator's neighbors was arrested. On or about 04:30 the perpetrator heard shouts from his neighbor's house, and has consequently climbed to the roof of the building in which his apartment is located (hereinafter: the **Building**) and saw the security forces nearby. The perpetrator took from a wall located on the roof of the building, half a block weighing 9-11 kg (hereinafter: the **Block**), and when he heard voices from the road underneath the building – which he identified as voices of IDF soldiers, he threw the block from a height of about 13 meters, with the intention to cause death. The block had forcefully hit the head of the deceased, causing multiple fractures to his skull. His head was heavily bleeding and he immediately lost consciousness (hereinafter: the **Attack**). The deceased was rushed to receiving medical treatment and had thereafter died from his injuries. In view of the acts described above the perpetrator was accused, inter alia, of deliberately causing the death of the deceased.

3. To complete the picture it should be noted that the perpetrator resided in an apartment located on the third floor of the building together with petitioners 1-9 – his wife and eight children, and that the entire building is jointly owned by the perpetrator and his brothers – petitioners 10-11, also residing in the building with their families.

4. On June 25, 2020, following the above described attack, notice was given to the petitioners on behalf of respondent 1, the commander of IDF forces in the Judea and Samaria area (hereinafter: the **Military Commander**), of his intention to confiscate and demolish the apartment. The petitioners had been given the opportunity to submit an objection by June 30, 2020, at 11:00, and thereafter their request for extension was partially accepted and the objection's deadline was extended to July 1, 2020, at 16:00. The petitioners had submitted to the military commander an objection against the Notice of Intention given to them, and on July 5, 2020, their objection was denied in a response on behalf of legal advisor's office for the Judea and Samaria area, to which the order and opinion of the engineer, Major Y.P., whose content shall be described below, were attached. The response to petitioners' objection noted that the order would not be executed until July 8, 2020 at 18:00, and thereafter petitioners' request to extend the execution of the order for the purpose of filing this petition was approved and extension was granted until July 14, 2020. On July 14, 2020, the petition at hand had been filed, and on that day a temporary order was issued prohibiting the execution of the order until otherwise resolved.

5. It should be further noted that the opinion of Major Y.P., the structural engineer from the Combat Engineering Corp. (which had been prepared together with First Lieutenant Y. A. – structural engineer from Ben Gurion University, and approved by the head of the engineering desk, Colonel Doron Koler), which was attached as aforesaid to the response to petitioners' objection, noted that the apartment would be demolished by

way of "hot controlled detonation and/or demolition using heavy mechanical equipment". The opinion noted, inter alia, that there was a slim likelihood that the demolition would cause structural damage to the building, and that any such damage, if caused, would be low level damage. With respect to nonstructural damage it was noted that the demolition would certainly cause great damage to the elements of the roof which should therefore be disassembled; and that there was also a slim likelihood that elements such as windows and nearby block-partitions would be affected by the demolition, on a low and local level. It was also noted that there was a slim likelihood that nonstructural damage would be caused to nearby buildings; that any such damage, if caused, would be low level damage; that no structural damage to nearby buildings was expected; and that there was a slim likelihood that local damage would be caused to nearby electric infrastructures. In any event, it was noted that to the extent any actual concern arose that nearby infrastructures would be damaged as aforesaid, best efforts would be used to disassemble and disconnect them to prevent any such damage.

The petition at hand

6. In their petition the petitioners raise different general arguments concerning the lawfulness of the exercise of the military commander's power to confiscate and demolish buildings by virtue of Regulation 119, and concerning the proportionality of said regulation and its effectiveness for the purpose of deterring future attacks.

The petitioners also argue that the procedure by which the order was issued in the case at hand was flawed. In that regard it was argued that the petitioners have not yet received the entire investigation material underlying the decision to issue the order; that the time frames given by the respondents to the petitioners to file an objection against the decision to confiscate and demolish the apartment and to file the petition at hand were too limited; and that the response to petitioners' objection and the order which had been issued with respect to the apartment, were not sufficiently reasoned.

In addition, it was argued that the existing evidentiary infrastructure against the perpetrator was insufficient for the purpose of implementing Regulation 119 in the case at hand, since it did not support the allegation that the former meant to injure the soldiers or was aware of the possibility that his actions would lead to a lethal result. It was further argued that the order was disproportionate in view of the fact that the perpetrator's family members had no involvement whatsoever in the acts attributed to him and have not supported these acts, in retrospect. The petitioners also argue that the family at hand is a family with many children, seven of whom are minors, in a difficult socio-economic condition, which shall be left homeless if the apartment is demolished. It was argued that the damage inflicted by the demolition of the apartment to the perpetrator's family was intensified due to the arrest of the perpetrator – the family's main bread winner, and due to the corona virus outbreak, affecting the family's ability to earn a living and receive help from others.

The petitioners argue further that the respondents should have informed them of the demolition method alongside the notice of the intention to confiscate and demolish the apartment, to enable them to properly object thereto. It was also argued that the possibility that the demolition would cause structural damage to the building had not been ruled out, not even in the opinion of the engineer on respondents' behalf.

Arguments regarding different flaws and defects in the opinion of the engineer on respondents' behalf were also raised, and it was argued that in several cases in which houses had been demolished by the respondents according to Regulation 119, they have veered from the demolition methods presented to this court and caused the buildings severe damages. The petitioners have also attached to the petition at hand an opinion on behalf of the engineer, Mr. Nasser Abu Lil, specifying different damages which could be caused to the building, to its additional apartments and its surrounding area, as a result of the demolition of the apartment using the means that the respondents intend using.

7. The respondents argue that the petition should be denied. According to them, the general arguments raised by the petitioners concerning the implementation of Regulation 119 should not be discussed in view of the fact that these arguments have already long been discussed and denied by this court. To the crux of the matter, it was argued that the offense that the perpetrator was accused of was parallel, under defense legislation, to the offense of murder, and that the evidentiary infrastructure which led to filing an indictment against the perpetrator, including his admission in having committed the deeds, shows that he was aware of the fact that throwing the block could cause a soldier's death, and therefore he should be deemed to have intended to cause death, and at least, to have foreseen this result. It was also argued, inter alia, that the fact that the perpetrator's family members were not involved in the acts attributed to him did not prevent the demolition of the apartment; and that the implementation of Regulation 119 in the case at hand was justified despite the harm inflicted by it on the perpetrator's minor children.

It was also argued that the decision regarding the demolition method was made based on the professional discretion of Major Y.P. and the military commander, in a bid to prevent damage to the other parts of the building, its surrounding area and its additional apartments. The respondents have also attached to their response a supplemental opinion in which Major Y.P. referred to the potential damages which had been mentioned in the opinion of Mr. Abu Lil, and clarified that the method which would be used to demolish the apartment was proved to be effective in previous cases limiting the peripheral damage caused by the demolition to the necessary minimum.

Discussion and Resolution

8. After having reviewed the petition and the preliminary response, and after having heard the arguments of the parties in the hearing held before us on July 21, 2020, I came to the conclusion that the petition should be denied, and I shall suggest to my colleagues to do the same – based on the following reasons.

9. Firstly, I am of the opinion that the general arguments of the petitioners concerning the lawfulness of the implementation of Regulation 119 should be denied, since said arguments have already been examined and denied in many judgments of this court. Therefore, there is no need to revisit said general arguments whenever a petition is filed in connection with the implementation of Regulation 119 in this specific case or another (see for instance: HCJ 6905/18 **Naji v. Military Commander of the West Bank Area**, paragraph 19 (December 2, 2018) and the references there; HCJ 751/20 **Hanatcha v. Military Commander of the West Bank Area**, paragraph 14 (February

20, 2020) and the references there; HCJ 1490/20 **Shibli v. Military Commander of the West Bank Area**, paragraph 14 (March 30, 2020) and the references there).

Indeed, different approaches concerning the lawfulness of Regulation 119 and its proportionality were expressed by the Justices of this court, but, so long as case law has not been changed, we must act accordingly and beware of undermining its foundations, as stated by the Deputy President **A. Rubinstein** "lest in lieu of a court of law we shall turn into a court of justices" (See: HCJ 967/16 **Harub v. Commander of Military Forces in the West Bank**, paragraph 7 (February 14, 2016)). The above, inter alia, due to the systemic and public importance in maintaining the stability of case law, facilitating the planning of efficient conduct and preventing violation of equality between litigants in cases adjudicated by different panels (See: *Ibid*., paragraph 19; and also compare: LCA 8744/18 **State of Israel v. A**, paragraph 11 of my opinion (May 12, 2019)).

10. Beyond need, it should be noted that the waves of terror that have befallen Israel in recent years require effective deterrence against additional attacks in the future. Against this backdrop, implementing the power vested with the military commander by virtue of Regulation 119 for deterrence purposes as aforesaid is an inevitable necessity, despite the obvious difficulty embedded in causing harm to property of family members who were not involved in the unlawful acts of their relative – the perpetrator. In that regard I wrote in **Naji** as follows:

> Indeed it is true that protecting human and civil rights is one of the fundamental obligations of a democratic state. However, even more fundamentally, democracy must protect the existence of a political and security infrastructure enabling its citizens to enjoy their above rights. Hence the importance of protecting state security, even at the cost of violating human and civil rights… Moreover, it should be clarified that the use of injurious measures which are required to protect state security, does not constitute 'inevitable impingement' of democracy, but rather, it forms an integral part of the democratic system which occasionally needs to protect its continued existence" (See: *Ibid.*, paragraphs 21-23).

11. At the same time, the implementation of Regulation 119 requires constant examination of updated and relevant data concerning its deterring effect, actually arising therefrom, in preventing attacks (See: HCJ 8886/18 **Jabarin v. Military Commander of the West Bank Area,** paragraph 8 (January 10, 2019); HCJ 1633/16 **A v. Military Commander of the West Bank Area**, paragraph 27 (May 31, 2016)). Accordingly, in a hearing held before us on July 21, 2020, we have reviewed, with petitioners' consent and ex-parte, a classified opinion on behalf of the respondents. Naturally, we cannot elaborate on the content of said opinion, but it should be noted that the data presented therein are convincing and substantiate the contributory effect of Regulation 119 on deterring potential perpetrators from carrying out their malicious intentions.

The Issuance of the Order

12. And to the circumstances of the case at hand. I shall start by saying that I found no merit in petitioners' argument concerning defects in the procedure by which the order was issued, inter alia, in view of the fact that I was convinced that the military commander gave the petitioners sufficient time to file an objection against his decision to confiscate and demolish the apartment and to file the petition at hand, and has even accepted two extension requests filed by the petitioners in that respect. Moreover, it should be noted that the perpetrator had been indicted, and it is assumed that together with the indictment the perpetrator was provided with all relevant investigation material pertaining to his case. Furthermore, according to the petition, perpetrator's counsel has forwarded to the petitioners some of the investigation materials in his matter (See paragraph 137 of the petition), and therefore the arguments that the failure to transfer all investigation material to the petitioners resulted in the violation of their right to due process, should be denied.

The perpetrator's connection to apartment and the building

13. I shall now proceed to examine the order on its merits. It has been held more than once that the implementation of the power vested with the military commander by virtue of Regulation 119 requires a certain connection, even a residential connection, to the building which is about to be demolished (See: **Shibli**, paragraph 17). In the case at hand, in fact, the petitioners do not dispute the connection between the perpetrator and the apartment, since it is owned by him, was used by him as his place of residence and their family members still reside therein. Moreover, the perpetrator caused the deceased's death using a block taken from the **roof of the building**, which was thrown from **said roof** at the soldiers who were walking underneath the building (See and compare: **Naji**, paragraph 30). I am therefore of the opinion that in the case at hand a clear connection exists between the apartment and the perpetrator and his criminal acts – a connection providing a sound basis to the order which was issued for the apartment.

The proportionality of the order

14. According to case law, alongside the general power vested with the military commander to issue confiscation and demolition orders to perpetrators' houses by virtue of Regulation 119, said power should be exercised by the military commander proportionately. In doing so, the military commander should weigh the severity of the actions attributed to the perpetrator; the magnitude of the evidentiary infrastructure against him; and the involvement of the other tenants of the building in the acts committed by their family member – the perpetrator. In addition, it should be examined whether there are less injurious means facilitating the realization of the deterring purpose embedded in Regulation 119 (See: HCJ 6420/19 **Al-Atzafra v. Military Commander of the West Bank Area**, paragraph 9 (November 12, 2019); **Naji**, paragraph 27; **Hanatcha**, paragraph 17, **Shibli,** paragraph 20).

15. The application of the above standards to the case at hand leads to the conclusion that the order which was issued for the apartment is proportionate and that there is no room to interfere with the discretion of the military commander with respect to its issuance. Hence, the severity of the perpetrator's actions is not in dispute and there is no need to discuss it any further. A review of the indictment filed against the perpetrator shows that he threw a heavy block from great height toward the road underneath the building,

after he had heard voices from the road which he had identified as voices of IDF soldiers. The block which had been thrown caused the death of the deceased, a young man – a tragic result that speaks for itself.

Needless to point at the disturbing resemblance between the action of the perpetrator and the attack discussed in **Naji** – where the court denied a petition against a demolition order which was issued for a building owned by the family of a perpetrator who had thrown an 18 kg block at the head of staff sergeant Ronen Lubarsky of blessed memory, in the course of security forces' activity in Al-Am'ari refugee camp in Ramallah. I am of the opinion that the recurrence of such actions directed against IDF soldiers in the course of security activities which are carried out in populated areas in Judea and Samaria – mandates effective and substantial deterrence, which shall hopefully prevent potential perpetrators from repeatedly "imitating" them.

16. With respect to the evidentiary infrastructure existing against the perpetrator, it has been held more than once by this court that the use of Regulation 119 may be based on administrative evidence and that there is no need to file an indictment for that purpose. The above applies even more forcefully to the case at hand, where an indictment had been filed against the perpetrator charging him with the offense of deliberate causation of death – an offense which, as aforesaid, is parallel to the offense of murder according to the Israeli penal law. The fact that an indictment was filed against the perpetrator attests to the existence of considerable evidentiary infrastructure establishing reasonable grounds for his conviction in a deliberate causation of death, and it is therefore clear that said infrastructure can sufficiently justify the issuance of the order (See: HCJ 2322/19, paragraph 9 (April 11, 2019); **Hanatche**, paragraph 19).

17. Moreover, the respondents do not argue that the family members of the perpetrator were involved in this way or another in the act attributed to him, and as aforesaid, it is clear that the harm caused as a result of the realization of the demolition order to family members who did nothing wrong, raises a significant difficulty. The above, particularly with respect to the minor children of the perpetrator, and also in view of the arguments raised in the petition concerning the difficult economic condition of the family. However, it has long been held that the deterring purpose of Regulation 119 stands and justifies the implementation of the Regulation, even where all other tenants residing in the building which is about to be demolished were not involved in the attack (See: HCJ 2356/19 **Barguti v. Military Commander of the West Bank Area**, paragraph 15 (April 11, 2019); **Hanatche**, paragraph 21) and notwithstanding the potential harm to minor tenants as a result of the demolition (See: **Al-Atzafra,** paragraph 13).

18. Finally, I am of the opinion that petitioners' arguments concerning the demolition method should be denied. A review of the opinion of Major Y.P shows that respondents' bodies have thoroughly examined the existing possibilities for the demolition of the apartment, with the assistance of professional bodies who were of the opinion that the demolition of the apartment in the manner described in the opinion would not cause significant damage to the other parts of the building and to adjacent buildings, and even undertook that the demolition would be carried out in a controlled manner with an effort to cause the least peripheral damage possible. It is incumbent upon the respondent to indeed act to minimize said damages and in any event I saw no

reason to interfere with the opinion of Major Y.P. and prefer the opinion of Mr. Abu Lil over it.

19. In view of all of the above, I am of the opinion that the severity of the act attributed to the perpetrator, with its harsh and lethal results, as well as the perpetrator's clear connection to the apartment, the use of the building to commit the attack and the evidentiary infrastructure against the perpetrator – all show that the order which was issued for the apartment is proportionate and necessary to deter against additional attacks such as the attack before us.

20. Finally, it should be noted that in the framework of the hearing in the petition, the deceased's parents described to us the huge pain and emptiness with which the family was left after the loss of their beloved son – Amit of blessed memory. It is heartbreaking to hear these things. Our sincere condolences are sent to the deceased's parents, sisters and all his friends and beloved ones.

21. In conclusion: I shall suggest to my colleagues to deny the petition at hand.

Justice

Justice M. Mazuz:

1. After I have reviewed the opinion of my colleague Justice Y. Willner, I cannot join her position and conclusion that the petition should be denied. My colleague described the factual background and arguments of the parties and there is no need for me to repeat them. I shall therefore proceed immediately to discuss the petition on its merits.

2. Firstly, I shall reiterate my position which I have expressed in all judgments on this issue adjudicated by me, that the exercise of the power according to Regulation 119 of the Defense (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**) raises a host of complex and difficult legal issues, from the aspect of the international public law – the international humanitarian law (laws of belligerent conflict) and international human rights law – as well as from the aspects of Israeli constitutional law and administrative law, which, in my opinion, have not yet been clarified in the judgments of this court in a sufficient and up-to-date manner, raising question marks as to the validity and current scope of Regulation 119.

   There is no need to describe again my position in detail, and reference made to my opinions in the following cases shall suffice: HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015); HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015), hereinafter: **Abu Jamal**; HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank Area** (December 1, 2015), hereinafter: **Abu Hashiyeh**; HCJ 1630/16 **Zakariyeh v. Commander of IDF Forces** (March 23, 2016, hereinafter: **Zakariyeh**; HCJ 1125/16 **Mer'i v. Commander of IDF Forces in the West Bank** (March 31, 2016), hereinafter: **Mer'i**; HCJ 8161/17 **Aljamal v. Commander of IDF Forces in Judea and Samaria** (November 7, 2017),

hereinafter: Aljamal; and HCJ 8786/17 **Alrub v. Commander of IDF Forces** (November 26, 2017), hereinafter: **Alrub**.

3. Anyway, power is one thing and discretion is another. According to accepted case law, the power to act by virtue of Regulation 119 stands. However, the military commander must still exercise this power carefully, with a level of restraint, reasonably and proportionately. Throughout the entire years this court held that the exercise of the power according to Regulation 119 requires a very cautious and limiting approach, particularly after the enactment of the Basic Laws, in view of the fact that the implementation of said powers involves severe violation of a succession of fundamental rights, including harm to property, harm to human dignity and a succession of rights deriving from human dignity. This court has already emphasized in one of the first judgments on this issue that:

> "It is well known that the measure embedded in Regulation 119 is a severe and harsh measure and that it shall be used only after strict consideration and examination and only in special circumstances…" (HCJ 361/82 **Hamri v. Commander of Judea and Samaria Area**, IsrSC 36 (3) 439, 443 (1982)).

And more recently:

> "… the military commander should use this power carefully and in a limited manner according to the principles of reasonableness and proportionality… the above were reinforced by the enactment of the Basic Law: Human Dignity and Liberty, in view of which the Regulation should be interpreted" (HCJ 7040/15 **Hamad v. Military Commander of the West Bank Area**, paragraph 23 (November 12, 2015)).

Also see: HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485, 489; HCJ 8084/02 **Abassi v. GOC Home Front Command**, IsrSC 57(2) 55, 59 (2003); HCJ 4597/14 **'Awawdeh. v. Military Commander of the West Bank Area**, paragraph 17 (July 1, 2014); HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 22 (August 11, 2014), hereinafter: **Qawasmeh**; **Abu Hashiyeh**, paragraph 12 of the opinion of the Deputy President and paragraph 5 of my opinion; and **Abu Jamal**, paragraph 8 of my opinion; **Mer'i**, paragraph 8 of the opinion of the President).

My colleague, Justice Willner has recently noted in Naji (HCJ 6905/18 **Naji v. The Military Commander** (December 2, 2018) that:

> "… it was held that although the 'preservation of laws' provision applies to this regulation (see: section 10 of the Basic Law: Human Dignity and Liberty), it should be exercised in light of the provisions of the Basic Laws and in a reasonable and proportionate manner. In addition, an open list of consideration, has been developed in judicial precedent, that should be considered by the military commander before using the power granted under Regulation 119, including: the

> severity of the actions attributed to the perpetrator and the magnitude of the evidence against him; the harm caused by the demolition to the tenants of the building; the degree of involvement of the tenants in the actions of the perpetrator; and the existence of means causing less harm to the building which is about to be demolished and its neighboring buildings…" (*Ibid*., paragraph 27).

4. One of the main issues which has been repeatedly raised and examined in the judgements of this court throughout the years while examining the reasonableness and proportionality of the exercise of the power according to Regulation 119, pertained to the **involvement of the family members**, the tenants of the house, in the acts of the family member-the perpetrator, and the effects of the exercise of the power according to Regulation 119 on these family members. In this context the argument of "collective punishment" has often been raised, as well as the great difficulty of harming innocent family members. The need to examine the involvement of the family members, on the one hand, and the harm inflicted on them, on the other, is essential for substantiating the mere justification for the exercise of the power according to Regulation 119, as well as for determining the scope and severity of the sanction which may be used – sealing or demolition, partial or full (see for instance: HCJ 698/85 **Dajlas v. Commander of IDF Forces**, IsrSC 40(2) 42 (1986); HCJ 987/89 **Kahawaji v. Commander of IDF Forces**, IsrSC 44(2) 227 (1990); HCJ 5510/92 **Turkeman v. Minister of Defense**, IsrSC 48(1) 217 (1993); **Qawasmeh**; HCJ 8091/14 **Hamoked Center for the Defense of the Individual v. Minister of Defense** (December 31, 2014); and HCJFH 360/15 **Hamoked Center for the Defence of the Individual v. Minister of Defense** (November 12, 2015). And see also my words in **Mer'i**, paragraph 22, and in **Alrub**, paragraph 6).

5. The petitioners in the case at hand are as aforesaid the perpetrator's wife and eight children, seven of them minors, living in the apartment against which the confiscation and demolition order was issued (hereinafter: the **House**). The respondent do not attribute to the wife and children any involvement whatsoever in the criminal deeds of the head of the family – neither adding and abetting, nor knowledge of his intention to commit the deed or even supporting his deeds in retrospect. The perpetrator himself was caught and stands trial, and is expected to serve long incarceration sentences, if convicted. Hence, harming the house primarily harms his wife and children living in the house, whose demolition shall leave them without a roof over their heads. It was further argued in the petition that this was a poor family.

6. The above circumstances raise the difficulty – probably the hardest and sharpest difficulty in the implementation of Regulation 119 – the difficulty of harming innocent family members, that no involvement in or support of the perpetrator's deeds is attributed to them. On this issue it has often been held that the harm inflicted on innocent family members should be taken into consideration and that the objectives for which the power according to Regulation 119 is exercised should be balanced against the harm inflicted as a result thereof on family members who were not involved in the deeds of the perpetrator. Things to that effect were stated by me several times in the past, including, inter alia, as I noted in **Abu Jamal**:

> "7. The conscious and deliberate infliction of harm on innocent people, and even more so, a severe violation of their constitutional rights, only for other potential perpetrators "to see and beware", is an inconceivable conduct in any other context...
>
> 9. …the issue of causing harm to innocent people has been discussed more than once in the judgments of the court in the context of the exercise of Regulation 119. The court has frequently reiterated that the harm caused to innocent family members should be taken into consideration and that the purpose for which the power is exercised should be balanced against the harm caused to the family members (HCJ 987/89 **Kahawaji v. Commander of IDF Forces in the Gaza Strip Area**, IsrSC 44(2) 227 (1990); HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip Area**, IsrSC 46(3) 693 (1992), hereinafter: **Alamarin**; HCJ 8091/14 **Hamoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014), hereinafter **Hamoked**)…
>
> 14. In my opinion, considering the severe violation of the rights of those who did not sin, the inevitable conclusion which arises is that in cases in which no evidence exists regarding connection and involvement of the family members in the criminal act, the order should not be directed against them, and accordingly one should consider to refrain from exercising the sanction or at least limit it to the perpetrator's part in the house alone…"

(And also see things written by me on this issue in **Zakariyeh**, paragraph 4; **Mer'i** paragraphs 10 and 24; **Aljamal**, paragraphs 5-6; and **Alrub**, paragraphs 9-11).

7. There is no doubt that the deed attributed to the perpetrator is a severe and despicable offense. In addition, in the case at hand there is a clear connection between the perpetrator's deed and the house against which the sanction according to Regulation 119 is directed, since the attack was committed from the roof of the house. On the other hand, we are not concerned with a petition of the perpetrator himself concerning the harm caused to him. The perpetrator stands trial, and if convicted is expected to serve a long incarceration sentence. The sanction being the subject matter of the offense harms mainly the family members, his wife and eight children, seven of whom are minors, and hence the difficulty. Under these circumstances:

> It was held that weight should be given to the fact that this concerned a "severe violation of the fundamental rights of the uninvolved inhabitants of said houses" on the grounds that "the demolition or sealing of a house in which lives a person who has not sinned is contrary to the right to own property, the right to dignity and even the right to housing which is derived there-from". It was also noted that such impingement "cannot be reconciled with concepts of justice and basic moral principles, including the principle according to which "The son shall not share the guilt of the father, nor will the father

> share the guilt of the son." (**Qawasmeh,** paragraph 21). In certain cases it was emphasized that only in "special cases" the sanction of demolition could be justified due to the harm caused to the uninvolved inhabitants of the house… (**Abu Jamal**, paragraph 9).

And appropriate for this matter are the wordsof Justice M. Cheshin in HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651 (1997):

> "If we demolish the perpetrator's apartment we will simultaneously demolish the home of this woman and her children. We will thereby punish this woman and her children although they have done no wrong. We do not do such things here. Since the establishment of the state – certainly since the Basic Law: Human Dignity and Liberty – when we shall read into Regulation 119 of the Defense Regulations, we shall read into it and vest it with our values, the values of a free and democratic Jewish state. These values shall guide us directly to ancient times of our people, and our own times no different than those days. They shall say no more, the fathers have eaten sour grapes, and the children's teeth are set on edge. But every one shall die for his own iniquity: every man that eats sour grapes, his teeth shall be set on edge." (*Ibid*. Page 655, minority opinion)

And see the words of Justice U. Vogelman, also in minority opinion, in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015):

> "… These things are mainly directed, as noted, at innocent family members against whom there are no claims of aiding the criminal action of the terrorist, when the military commander orders the demolition of the entire house (as opposed to demolition or sealing off of portions of it).
>
> The result of balancing the scales one against the other – the benefit against the harm to human rights associated with the implementation of the purpose of the Regulation – is that, at least in the absence of involvement by members of the household, the drastic harm to the rights of the uninvolved tips the scales and defeats the considerations to the contrary. The demolition of the home is therefore within authority, but the fault lies rather in the realm of discretion: in this situation the action is not proportionate (*Ibid*. paragraphs 5-6).

8. Therefore, although we are concerned with circumstances that **in as much as they relate to the perpetrator**, there is an ostensible justification to apply the severe sanction of demolition according to Regulation 119, it is still impossible to ignore the harsh harm caused to his innocent **family members** – that no involvement in the attack is attributed to them. Under these circumstances I am of the opinion that in the case at hand the principle of proportionality requires mitigating the harm, by replacing the demolition with **partial sealing** of the house.

It should be noted that more than once in the past this court directed, or the respondents themselves sought the sanction of full or partial sealing, in lieu of demolition, for different considerations concerning the proportionality of the harm. Accordingly, for instance, in **Turkman** mentioned above, the court revoked a demolition order which had been issued by the military commander and replaced it with partial sealing due to the harm inflicted on innocent family members. This was also the case in HCJ 8024/14 **Hijazi v. GOC Home Front Command** (June 5, 2015) from more recent times, where, following an *order nisi* issued by the court, inter alia due to the harm inflicted on family members who were not allegedly involved, notice was given by the respondent that after additional consideration "**it was decided to take in the case at hand a more proportionate step, and direct that only the room in which the perpetrator had resided be sealed, without harming the other parts of the apartment and the building**."

9. Therefore, if my opinion is heard, we shall make the *order nisi* absolute in the sense that the confiscation and demolition order issued by respondent 1 for the house being the subject matter of the petition – is revoked, retaining the power of respondent 1 to replace it with an order to seal the room in which the perpetrator resided.

Justice

Justice G. Karra

1. I read the opinion of my colleague Justice Y. Willner and I cannot join it. In HCJ 6905/18 **Naji v. Military Commander of the West Bank Area** (December 2, 2018) and in HCJ 8886/18 **Jabarin v. The Military Commander** (January 10, 2019) I have expressed my opinion that the exercise of the power of the military commander to demolish houses by virtue of Regulation 119 of the Defense (Emergency) Regulations 1945 (hereinafter: Regulation 119 or the Regulation) raises difficulties in the realm of local law and international law which have not been thoroughly clarified and discussed in our judgments and that these questions should be revisited by an expanded panel of this court. I also noted that an increased use of Regulation 119 shall intensify the need to re-examine the rule.

2. The multiple and repeated use of the Regulation by the military commander whenever an attack resulting in the loss of human life occurs – arguing that it is a deterring rather than a punitive measure expands the use of the Regulation as a matter of policy, and a sanction which should have been reserved for extreme situations and used rarely, is imposed frequently, let alone regularly. The continued application of this policy relying on security bodies' opinions that it is a deterring measure while refraining from a pertinent and thorough discussion of the general issues which are raised as a result of the use of this Regulation is severely regarded by me. The continued use of this measure inflicting severe harm on innocent people constitutes collective punishment imposed contrary to the fundamental rule whereby:

> "Every man must pay for his own crimes. In the words of the prophet:
> "The soul that sins it shall die. The son shall not bear the iniquity of

> the father, neither the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him,: (Ezekiel 18:20) One should punish only cautiously, and one should strike the sinner himself alone. This is the Jewish way as prescribed in the La of Moses: "The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall die for his own sin." (namely: shall be put to death) (Kings II 14:6) HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651 (hereinafter: **Janimat**).

3. With the passage of time and the increased use of the Regulation, I do not think that judicial scrutiny exercised over the use of the Regulation should forever be limited to the realm of administrative law, namely, the examination of the lawfulness of the decision-making process and the lawfulness of the discretion, "extreme cases should not make us forget the need, as my colleague pointed out, to re-examine from time to time and raise doubts and questions concerning the constitutional validity of the house demolition measure according to the limitation clause tests. .." (HCJ 8091/14 **Hamoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014), paragraph 6 of the judgment of my colleague Justice (as then titled) E. Hayut (December 341, 2014)).

   In the case at hand the petitioners are the family members of the perpetrator, his wife and eight children, including minors who were sleeping when their father woke up at 04:30 hearing voices and women screaming from the neighboring house, went up to the roof of his apartment on the third floor, took therefrom half a block and threw it at soldiers who engaged at that time in operational activity and consequently caused the death of an IDF soldier, staff sergeant Amit Ben Yigal of blessed memory. Neither one of the inhabitants of the house knew or was involved in the deeds of the perpetrator who did what he did and thereafter pretended to be sleeping in the children's room. I do not think that under these circumstances the wife and children of the perpetrator should be punished by demolishing the roof over their heads. Justice shall be served if the perpetrator is punished, but the results of his actions should not be borne by others who did no wrong.

4. Appropriate to the case at hand are the words of Justice Cheshin in Janimat which I adopt to the case at hand:

> "Petitioner 1 is the wife of the suicide-murderer and the mother of his four young children. The woman and her children reside in the same apartment in which the suicide-murder had lived , but nobody alleges that they were involved in the deed that he intended to carry out – and did carry out – the murder of innocent souls. Likewise, nobody alleges that they had any knowledge of the contemplated deed. If we demolish the perpetrator's apartment we will simultaneously demolish the home of this woman and her children. We will thereby punish this woman and her children although they have done no wrong. We do not do such things here. Since the establishment of the state – certainly since the Basic Law: Human Dignity and Liberty – when we shall read into

> Regulation 119 of the Defense Regulations, we shall read into it and vest it with our values, the values of a free and democratic Jewish state. These values shall guide us directly to ancient times of our people, and our own times no different than those days. They shall say no more, the fathers have eaten sour grapes, and the children's teeth are set on edge. But every one shall die for his own iniquity: every man that eats sour grapes, his teeth shall be set on edge." (emphasis added).

If my opinion is heard, the petition shall be accepted, an absolute order shall be issued revoking the confiscation and demolition order which was issued by respondent 1.

Nevertheless, in view of the special connection between the house being the subject matter of the demolition order and the attack, I join the comment of my colleague Justice M. Mazuz to retain the power of respondent 1 to replace the confiscation and demolition order with a sealing order for the room in the house in which the perpetrator was living.

Justice

Decided by the majority opinion of Justices M. Mazuz and G. Karra to make the *order nisi* absolute, such that the confiscation and demolition order discussed in the petition at hand be revoked, while retaining the power of respondent 1 to replace it with a sealing order for the room in which the perpetrator was living, the above contrary to the dissenting opinion of Justice Y. Willner who was of the opinion that the petition should be denied and that the demolition of the perpetrator's apartment should be approved.

Given today, 20 Av, 5780 (August 10, 2020).

Justice Justice Justice