At the Supreme Court
Sitting as the High Court of Justice

HCJFH 5924/20

In the matter of:

1. Military Commander of the Judea and Samaria Area
2. Minister of Defense

Represented by the State Attorney's Office
Ministry of Justice, Jerusalem
Telephone: 073-3925305` Fax: 02-6467011

The Applicants

v.

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. _____ Abu Baher
12. HaMoked: Center for the Defence of the Individual

Represented by counsel, Adv. Nadia Daqqa (Lic. No. 66713) and/or Daniel Shenhar (Lic. No. 41065) et al.,
HaMoked: Center for the Defence of the Individual
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The Respondents

Respondents' Response

According to the decision of the Honorable President Hayut dated August 27, 2020, the respondents hereby respectfully file their response to the petition for further hearing in the judgment given on August 10, 2020 in HCJ 4853/20 (hereinafter: the **judgment**).

The respondents shall argue that the request for further hearing in the judgment – should be denied.

The institution of further hearing

1. The possibility to hold a further hearing in a judgment given by the Supreme Court is entrenched in Section 30(b) of the Courts Law [Consolidated Version], 5744-1984 (hereinafter: the **Courts Law**), stipulating that the President of the Supreme Court or another Justice appointed for that purpose may accept a request for further hearing if the rule established by the Supreme Court is contrary to previous rule, or if due to the importance, difficult nature or novelty of the rule, they are of the opinion, that a further hearing is justified.

2. In FH 3379/91 **Caspi v. State of Israel**, TakSC 91(3) 860 (1991), the Honorable Court interpreted the provisions of Section 30(b) of the Courts Law as follows:

> The language of the section makes it clear that it revolves around one axis only, the axis of the rule which was established. Namely, the rule which was established is either contrary to a previous rule of this court or is of importance, difficult nature or novelty.

3. In addition, judicial precedent of the Honorable Court has expressly distinguished between a further hearing and an appeal, stating as follows:

> … the further hearing is not another appeal as far as its main purpose is concerned, since it does nor revolve around the question of whether the court acted properly, but rather, the legal rule as such is examined (FH 6/82 **Yanai v. Director of the Execution Office**, IsrSC 36(3) 99, 101 (1982))

4. The satisfaction of one or more of the conditions listed in Section 30(b) of the Courts Law, does not necessarily result in a further hearing and the president of the court is vested with broad discretion in the matter. Judicial precedent has clarified more than once that the Honorable Court tends to hold further hearings only in rare and extremely exceptional cases.

> … however, a judicial novelty – even a judicial novelty having the characteristics specified in Section 30 of the Courts Law – does not justify a further hearing in each and every case. The reason for that being that the law has granted the justice considering the petition for further hearing broad discretion to examine **whether the case before them, according to its circumstances and characteristics, is one of those extremely exceptional and extremely rare cases in which a further hearing is held** (judgment of the Honorable Justice (retired) Cheshin in HCJFH 7802/04 **Milo v. Minister of Defense,** TakSC 2004(4) 719 (2004))(emphases added, N.D.)

5. It was further held by the Honorable Court as follows:

> As is known, a condition for holding a further hearing is that **substantial and significant novelty, importance or difficulty exist**; and even when these conditions are satisfied, the court still tends, as a matter of judicial policy, not to hold further hearings other than in rare cases (judgment of the Honorable Justice (as then titled) Mazza in CFH 4335/03 **Benbenisti v. The Official Receiver**, TakSC 2003(2) 1646 (2003))(emphases added, N.D.)

6. The determination whether case law was changed is not an easy one. Case law constantly develops by the implementation of abstract tests and standards on different specific circumstances, since each case is different from the other and there are no

identical cases. **Not any different implementation of standards established by case law or development of case law in a certain direction constitutes a new rule or veers from a previous rule** (see CFH 8045/06 **Housing and Construction Ministry v. Malibu Israel Ltd**., (reported in Nevo, May 21, 2007).

7. The Honorable Court has long examined the question of whether the fact that a certain panel made a certain decision on a legal issue in the context of a judgment, in and of itself justifies a further hearing. Relevant to this matter are the words of the Honorable Justice (as then titled) Strasberg Cohen in CFH 2485/95 **Apropim Housing and Entrepreneurship (1991) Ltd. v. State of Israel** (nor reported):

> It does not seem appropriate to me that a rule established by this court, by a majority of any panel, shall be changed only because a different panel could have resolved otherwise.

8. This means that the mere fact that another panel could have made a different decision in the framework of a certain rule does not constitute, in and of itself, grounds for a further hearing. The contrary is true. The re-examination of a rule, given the fact that the opinion of a random panel on a certain issue may differ from the opinion of another panel, may prejudice the finality of judgment and legal certainty principle.

9. Another question in this context is what are the scope and nature of the difficulty, importance or novelty of the rule justifying deviation from the finality of judgment principle and allocation of considerable judicial resources for the purpose of holding a further hearing.

10. The applicant requesting a further hearing must show that the novelty, importance or difficult nature of the rule which was established are substantial and significant. Relevant to this issue are the words of the Honorable Justice Strasberg Cohen in Apropim:

> The importance, difficulty or novelty of the rule established by this court should be substantial and significant, including, for instance, that the judgment is tainted by a substantial error, it violates fundamental principle of the system or society's perception of justice, it brings about a result which cannot be tolerated, that significant changes have occurred in the reality or in the law which are not reflected in the rule. Obviously, the list is not closed; it only demonstrates the types of reasons elevating the issue to the level of importance, difficulty or novelty justifying a further hearing and possibly a change of the rule thereafter.

11. The authority vested with the Supreme Court should be regarded as a unique authority at the center of which stands the interest of the public to re-examine new case law, with petitioner's case being negligible compared to the general, in principle issue, such that it should not be regarded as an appeal and arguments having clear appellate characteristics should not be raised in this context. Therefore, a further hearing may not be regarded as another appeal (see for instance, FH 22/82 **Yoles House Ltd. v. Raviv Moshe & Co. Ltd**., IsrSC 43(1) 441, paragraph 15 of the judgment of the Honorable President Shamgar; CrimFH 4971/02 **Zaguri v. State of Israel**, IsrSC 58(4) 583, paragraph 11 of the judgment of the Honorable Justice Cheshin). Arguments having clear appellate characteristics should not be raised in the context of a further hearing (CFH 1641/06 **Vazana v. Clalit Health Fund**, Nevo, May 7, 2006). A further hearing should be regarded as "ab exceptional proceeding, rather than as a routine stage in which [decided] legal disputes are re-examined" (FH 9/88 **Strud v. Nathan**, judgment

of President Shamgar, Nevo, August 10, 1988; see also CFH 9200/05 **Fuaz v. Income Tax – Tiberius**, Nevo, November 2, 2005). The court should distinguish between re-valuation of a general legal rule which should indeed be done in the context of a further hearing, and an examination of the manner by which a certain rule was applied to specific factual situations, which should be done in the context of an appeal (CFH 2045/05 **Vegetable Growers Organization – Cooperative Association Ltd. v. State of Israel**, IsrSC 61(2) 1, paragraph 10 of the judgment of the Honorable Justice Procaccia).

12. According to this logic, the Honorable Court should distinguish between re-valuation of a general legal rule and re-examination of the manner by which a certain rule was applied to specific cases, which should be done in the context of an appeal.

13. Even if the applicants are of the opinion that the Supreme Court erred in its judgment, this fact alone **does not justify a further hearing unless an erroneous rule was established in a novel issue of a general, in principle, importance**.

14. The implementation of the above said leads to the conclusion that the judgment being the subject matter of the request for further hearing does not satisfy the conditions set forth in Section 30(b) of the Courts Law. The judgment does not veer from case law and does not justify a further hearing. It only implements the criteria which were established by existing case law. In this request the Honorable Court is requested to re-examine the manner by which case law was applied to a specific case, and it is for good reason that the request refrains from calling for re-evaluation of the general, in principle, aspect of the existing case law, assuming that another panel would have made a different decision, based on the same criteria. We shall now proceed to examine this substantial point in the case at hand.

The judgment in HCJ 4853/20 was given within the limits of current case law on the issue of punitive house demolition

15. In the judgment given by this Honorable Court in HCJ 4853/20 on August 10, 2020, it was held by the majority opinion of the Honorable Justices Mazua and Karra that the confiscation and demolition order which was discussed in the petition would be revoked, reserving the authority of the military commander to replace the order with an sealing order for the room in which the perpetrator had lived. The above, against the dissenting opinion of the Honorable Justice Willner, who was of the opinion that the petition should be denied.

16. The Honorable Justice Mazuz refers in the beginning of his judgment to his position concerning the lawfulness of the use of Regulation 119, a position which was stated in a succession of judgments given by him, to which he refers in the judgment. Despite the fact that according to him the exercise of the authority raises difficult legal issues, from the aspect of international humanitarian law and human rights law as well as from the aspects of Israeli constitutional and administrative law, which, in his opinion, have not been clarified to satisfaction, the Honorable Justice Mazuz decides not to veer from current case law, does not discuss the authority issue, and focuses on the level of discretion. The Honorable Justice Karra has also similarly pointed at the complexity of the implementation of Regulation 119, but limited the discussion in the remedy which was requested in the petition to the level of respondent's discretion as exercised by him in this specific case.

17. The starting point of the Honorable Justices Mazuz and Karra in their judgments is that the authority to implement Regulation 119 stands in force. Both of them strictly adhered to current case law, and the entire discussion revolved around the manner by

which the authority was exercised. In other words, the discussion focused on the proportionality level, refraining from examining the mere lawfulness of the use of Regulation 119.

18. The three Honorable Justices referred in the judgement, while examining the reasonableness and proportionality of the use of Regulation 119 in the specific case before them, to the involvement of the family members as a factor which bears on the manner by which the sanction by virtue of Regulation 119 is used. Accordingly, Justice Willner writes as follows:

> 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** (emphases added, N.D.)

19. At the same time, the Honorable Justice Mazuz emphasized the need to balance between the purposes underlying the exercise of the authority by virtue of Regulation 119 and the injury caused to family members who were not involved in the deed. In this context the Honorable Justice Mazuz referred to his words in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015):

> 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. (Emphases appear in the original).

20. Based on the above said which is well established in case law of the Honorable Court from recent years, the Honorable Justice Mazuz held that the proportionality principle required in the case being the subject matter of the petition to mitigate the injury by replacing the demolition with partial sealing, which is one of the measures the use thereof was approved by the Honorable Court, in the framework of the exercise of the authority by virtue of Regulation 119, based on considerations of proportionality.

21. Unlike the position of the Honorable Justice Mazuz, the Honorable Justice Karra was of the opinion that under the circumstances of the case the proportionality principle required to revoke the confiscation and demolition order and to accept the petition. In any event he joined the comment of the Honorable Justice Mazuz retaining the authority of the military commander to replace the confiscation and demolition order with a sealing order for the room in which the perpetrator had lived, acknowledging the measure of sealing in the context of the authority vested in the military commander by virtue of Regulation 119, in view of the specific circumstances of this case and the fact that the residential home formed part of the circumstances of the incident.

22. The conclusion which was reached by the Honorable Justices Mazuz and Karra reconciles with the words of the Honorable Justice Willner cited above. The judgment adheres to current case law, acknowledges the authority of the military commander to apply sanction by virtue of Regulation 119, and wishes to mitigate the damage inflicted on the wife and her eight children, seven of whom are minors, due to the fact that they have done nothing wrong, by preventing the total demolition of the roof over their heads.

23. As was already argued above, a first and necessary reason for a further hearing is that a new rule was established according to Section 30(b) of the Courts Law. Not every statement made by the Supreme Court in a judgment constitutes a "rule" in the meaning of Section 30(b). Relevant to this issue are the words of the Deputy President (retired) Rivlin in HCJFH 10792/06 **Movement for Governmental Fairness v. Ombudsman of the Israeli Judiciary**, TakSC 2007(1) 4953 (2007), as follows:

> …we shall remind once again what has been held more than once, namely, that "for us to know whether statements made by the court amount to a rule, such rule must manifest itself in the judgment, and manifestation in this context means that the court had consciously and intentionally intended to establish a rule, and has expressed its said intention clearly and explicitly; this, and nothing less.

24. Accordingly, in the case at hand the Honorable Court did not wish to establish a "rule" in the judgment in HCJ 4853/20. The contrary is true – the majority Justices have expressly stated in the judgment that they did not wish to reopen for discussion the determinations made in case law throughout the years, whereby the military commander was vested with the authority to implement Regulation 119.

25. In other words, acknowledging the authority of the military commander and on the line commencing from demolition of an entire house, going through full or partial sealing and ending with abstention from demolition based on considerations of proportionality, the Justices application of existing case law based on the circumstances of the specific case before them, led to the result acknowledging the authority vested in the military commander to seal the room in which the perpetrator had lived. The implementation of the rule in the case at hand, which led the majority opinion to the conclusion that the respondent is vested with the authority to seal a room in the house instead of demolishing it is the issue with respect of which a further hearing is requested by the applicants, implementation which did not even lead to the most lenient of all possible results, namely, recognizing the fact that the authority exists while refraining from exercising it in the specific case. To respondents' regret, the judgment contains no revolutionary holding which justifies a further hearing – a long expected holding whereby the respondent is not vested with the authority to act pursuant to Regulation 119, since it stands in direct conflict with international humanitarian law, from which the respondent imbibes his authorities.

Review of case law as of the renewal of the frequent use of Regulation 119

26. A review of a host of judgments given by the Honorable Court since the judgment in HCJ 8091/14 **HaMoked Center for the Defence of the Individual v. Minister of Defence** (reported in Nevo, December 31, 2014) (hereinafter: **HaMoked**), following the renewal of respondent's frequent use of Regulation 119 points at the existence of a sharp dispute between the Justices concerning the lawfulness of the policy.

27. In the extensive rulings on this difficult issue, which is in conflict with previous rulings and fundamental principles regarding the use of a very extreme and draconian

administrative measure, many justices have raised weighty questions about the lawfulness of the policy.

28. Notwithstanding these sharp disputes, and notwithstanding the doubt expressed by some Justices of this Honorable Court as to the lawfulness of the policy, and in a bid to refrain from turning the court into a court of justices, it was agreed not to re-open for discussion the general, in principle, issue of the use of the authority by virtue of Regulation 119 (again, to the regret and protest of the petitioners in these petitions). However, one thing was consistently agreed upon by all said Justices: **the need to impose different legal limitations on the implementation of the authority**. In other words, the decisive question in all said judgments, without any exception, including the judgment being the subject matter of this request, is the question of proportionality.

29. According to case law, the policy is lawful and specific orders which were issued by virtue thereof are legal according to Israeli law, **in as much as they meet the proportionality test** (see the judgment in HaMoked).

30. Although the lawfulness of the use of Regulation 119 is one of the most controversial issues, which throughout the entire judicial history of the state of Israel there has been no similar issue with respect of which so many requests for further hearings have been filed, and with respect of which so many Justices in so many judgments have called **for a general, in principal, re-examination of the issue, the dozens of cases which were adjudicated by the Honorable Court in recent years did not lead to a change in the rule recognizing the lawfulness of the policy**. Numerous requests for further hearings which were filed by the petitioners therein, were denied by the presidents of the Honorable Court, all stating that in neither one of the judgments a new rule was established, and that there should be no deviation from case law despite the harsh and disturbing implications of the use of Regulation 119 (HCJFH 360/15 **HaMoked Center for the Defence of the Individual v. Minister of Defense** (reported in Nevo, November 12, 2015); HCJFH 2916/16 **Dwayat v. GOC Home Front Command** (reported in Nevo, April 10, 2016); HCJFH2624/16 **Masudi v. Commander of IDF Forces in the West Bank** (reported in Nevo, March 31, 2016); HCJFH 1773/16 **Skafi v. Military Commander of the West Bank Area** (reported in Nevo, March 2, 2016); HCJFH 8988/15 **Abu Jamal v. GOC Home Front Command** (December 29, 2016); (reported in Nevo November 12, 2015); HCJFH 4657/16 **Da'is v. Military Commander of the West Bank Area** (June 9, 2016); HCJFH 9324/17 **Abu Alrub v. Commander of IDF Forces in the West Bank** (reported in Nevo, November 29, 2017); HCJFH 416/19 **Jabarin v. Military Commander for the West Bank Area** (January 17, 2019); HCJFH 1561/20 **Halami v. Military Commander of the West Bank Area** (March 1, 2020).

31. It should be noted that the institution of further hearing has an institutional aspect thereto which adds to the unique nature of the authority of the president of the Supreme Court by providing an "overview" of the actions and role of the Supreme Court and its judgments.

32. Without derogating from the importance and need to hold a further hearing in the general issues concerning the lawfulness of the house demolition policy by virtue of Regulation 119, it seems that the long succession of judgments given in the last five years, in which request for further hearing in the issue have been consistently denied, point at the desire of the Honorable Court to wait for the rule to change by gradual development and ordinary panels of three Justices. Relevant to this matter are the words of the Honorable Justice (as then titled) E. Hayut in **HaMoked**:

> It should be honestly said that the issues raised in the petition are difficult and troubling and I will not deny the fact that taking the path of case law in this matter is not easy.

33. To date, and notwithstanding the numerous requests to re-open the general, in principle, discussion concerning the use of Regulation 119, this Honorable Court did not regard this controversial issue as raising special questions which cannot wait for a gradual change of the rule.

34. In this case we are concerned with one of the judgments which were given within the framework of the established rule recognizing respondents' authority to use Regulation 119 for deterring purposes, applying tests which were established by judicial precedent throughout the years in the framework of a gradual development of the rule which was applied in specific petitions dealing with specific situations rather than with theoretical questions.

35. Notwithstanding the above, the result of the proceeding in HCJ 4853/20 which revoked the demolition order was received with great anger by certain parts of the population in Israel, raising a heavy concern that it was the underlying reason which led to the initiation of the proceeding at hand. It is for good reason that this request is filed "at the request of the Prime Minister", although he was not a party to the proceeding.

36. Said reaction of filing a request for further hearing in a judgment which was given in the framework of the established and long-standing rule, attests to applicants' disapproval of the Supreme Court's rule concerning the cautious and prudent use of Regulation 119, as stated by the Honorable Justice Karra in the judgment being the subject matter of the request at hand:

> 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**. (Paragraph 2 of the judgment of the Honorable Justice Karra)

37. In other words, this policy is perceived by the public at large as punitive policy despite the military commander's declared deterring considerations. This perception stems, inter alia, from the routine use thereof in recent years. It is for good reason that the limitation of the authority by case law, evokes the feeling of deviation from the rule in significant parts of the population in Israel, and the assumption is that said decision should be overturned because the rule is that the authority should be exercised by way of demolition in each and every case. Relevant to this issue are the words of the Honorable Justice Baron in HCJ 1125/16 **Mer'i v. Commander of IDF Forces in the West Bank** (March 31, 2016):

> Contrary to the impression of a significant part of the population, house demolitions are not an act of retribution or punishment against a certain family for a terrorist attack perpetrated by a son or daughter, **and this measure must not be used simply to appease public opinion** (Paragraph 2, **Mer'i**) (Emphases added, N.D.)

38. This state of affairs should be regarded by the Honorable Court as signaling yet another dangerous escalation in the use of Regulation 119, which is one of the most controversial measures in Israeli judgments, entailing scathing international criticism of

Israel. The insertion of positions external to the relevant bodies in the security system into proceedings of this sort may taint them by punitive and vindictive considerations, as stated by the Honorable Justice Barak-Erez in HCJ 7961/18 **Na'Aliweh v, Military Commander of the West Bank Area** (December 6, 2018) (hereinafter: **Na'Aliweh**), referring to the position of the bereaved family:

> As a matter of fact, their independent and confrontational position vis-a-vis the position of the security system may even cast a shadow of punitive purpose on the use of demolition orders, contrary to the declared position of the security bodies (paragraph 3)

See also HCJ 4597/14 **Awawdeh v. Military Commander of the West Bank**, paragraph 19 (July 1, 2014) (hereinafter: **Awawdeh**).

39. Injuring the innocent, their property and life is prohibited. This is the core of the rule of law. The violation of this principle, which must be resisted by legal instinct, and even more so by state authorities, delivers a harsh and dangerous message. Precisely in these difficult days a restraining message is needed, going back to the basic, just and moral principle whereby:

> **Far be it from you to do such a thing—to kill the righteous with the wicked, treating the righteous and the wicked alike. Far be it from you! Will not the Judge of all the earth do right? (**Genesis 18, 25**)**

40. These are precisely democracy's testing times. These are exactly the times for which the court has been designed to act as a restraining and balancing body.

41. Hence, it seems that in view of the consistent decision of the Honorable Court to refrain from a further hearing before an expanded panel in the general and in principle issue, acceptance of the request at hand which focuses on a very specific issue with respect of which there was no deviation from case law, shall necessarily lead to the conclusion that house demolition is inevitable under any circumstances, a conclusion which brazenly deviates from the consistent rule established by the Honorable Court whereby Regulation 119 should be used cautiously and prudently, as reflected in the judgments of all Justices of the court who have examined this issue, without any exception. The above applies in general, and specifically to the issue in dispute in the context of the implementation of the proportionality tests in the case at hand, as shall be discussed below.

Involvement of family members as reflected in judicial precedent

42. Throughout the years, judicial precedent has recognized respondent's authority to use Regulation 119. However, at the same time, it emphasized that the military commander should not use his said authority disproportionately, in a manner amounting to collective punishment (see HCJ 698/85 **Dajalas v. Commander of IDF Forces**, IsrSC 40(2) 42 (1986), page 44) and HCJ 4597/14 **'Awawdeh v. Military Commander of the West Bank Area**, paragraph 16 (July 1, 2014)).

43. According to this approach, the Honorable Court has specified, more than once, the criteria limiting the authority of the military commander while exercising this draconian sanction:

> the severity of the acts that are attributed to the suspect; **the number and characteristics of the persons who may be harmed as a result of the exercise of the authority; the strength of the evidence and**

> **degree of involvement, if any, of the other inhabitants of the house**. The military commander is also required to examine whether the authority may be exercised only against that part of the house in which the suspect lived; whether the demolition may be executed without jeopardizing adjacent buildings and whether it is sufficient to seal the house or parts thereof as a less injurious means as compared to demolition (HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 22 of the judgment of the Honorable Justice Danziger (August 11, 2014)(Emphases added, N.D.).

44. In view of the above, it seems that it has long been recognized by the Honorable Court that the number of the family members who may be harmed, their characteristics and degree of involvement are weighty considerations in making a decision concerning the exercise of the authority by virtue of Regulation 119 and for the purpose of determining the scope of the authority. The importance of these considerations, and particularly in response to the argument of collective punishment, was also stressed by the Honorable President Hayut in **HaMoked**:

> … one of the considerations which the military commander should take into account in connection with house demolitions is the scope of involvement of the other inhabitants of the house in the hostile activity of the terrorist (see: 'Awawdeh, paragraph 18 of the judgment of the Deputy President, M. Naor; Qawasmeh, paragraph 22 of the judgment of Justice Y. Danziger). The Deputy President however, noted further in this context that "the absence of evidence concerning awareness or involvement of the family members does not prevent, in and of itself, the exercise of the power, but this factor may influence the scope of respondent's order, as aforesaid." **In my opinion, said consideration, although it is not the only consideration, should carry a significant weight in making the decision concerning the demolition of the structure and its scope, and it seems that it was emphasized more than once in the past by this court that said consideration should be given such weigh**t (HaMoked, paragraph 4 of the judgment of the President the Honorable Justice Hayut) (Emphases added, N.D.).

45. Not only that the involvement of family members carries a substantial weight in making a decision concerning the manner by which the authority should be exercised, but rather, it is also the rule in this specific issue. Even according to the approach whereby the exercise of the authority by virtue of Regulation 119 should not be denied, the deliberate and conscious injury of innocent people raises weighty questions and requires, according to the fundamental principles of Israeli law and universal moral principles, to prohibit the exercise of the authority, or to at least limit it.

46. In a number of judgments given by the Honorable Court, the court has repeatedly stated that the harm caused to innocent family members should be taken into account, and that the purpose of exercising the authority should be balanced against the harm caused to the family members. Accordingly, for instance in HCJ 5510/92 **Turkeman v. Minister of Defense**, IsrSC 48(1) 217 (1993), the consideration of the innocence of the family members was put into practice. In said judgment the court directed that the demolition order be revoked and replaced with a partial sealing order due to the harm which would be caused to innocent family members.

47. In recent years this issue was also examined by the court in HCJ 8024/14 **Hijazi v. GOC Home Front Command** (June 5, 2015). In said matter the GOC Home Front

Command replaced the demolition order for the house with a sealing order for the room in which the perpetrator had lived in view of the court's comments and an *order nisi* which was issued in said proceeding on December 31, 2014, regarding the innocence of his family members.

48. Moreover. The Honorable Court has expressed a consistent position and held more than once that the home of the immediate family should not be totally demolished, in the absence of argument concerning involvement or assistance on their behalf (HCJ 5359/91 **Hizran v. Commander of IDF Forces in the West Bank**, IsrSC 46(2) 150 (1992); HCJ 2722/92 **Al'amarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693 (1992) (hereinafter: **Al'amarin**); HCJ 6026/94 **Nazal v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 48(5) 338 (1994) (hereinafter: **Nazal**); HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51 (2) 651 (1997) (hereinafter: **Janimat**)). Accordingly, for instance, it was held by the Honorable Justice (retired) Cheshin, as follows:

> Legislation that originated during the British Mandate — including the Defence (Emergency) Regulations — was given one construction during the Mandate period and another construction after the State was founded, for the values of the State of Israel — a Jewish, free and democratic State — are utterly different from the fundamental values that the mandatory power imposed in Israel. Our fundamental values — even in our times — are the fundamental values of a State that is governed by law, is democratic and cherishes freedom and justice, and it is these values that provide the spirit in constructing this and other legislation… This has been so since the founding of the State, and certainly after the enactment of the Basic Law: Human Dignity and Liberty, which is based on the values of the State of Israel as a Jewish and democratic State. These values are general human values…
>
> 'In those days people shall no longer say: fathers ate unripe fruit and their sons' teeth shall be blunted, but a person shall die because of his own sin; any person who eats unripe fruit shall have his teeth blunted' (Jeremiah 31, 28-29).
>
> No longer do fathers eat unripe fruit and their sons' teeth are blunted, and no longer do sons eat unripe fruit and their fathers' teeth are blunted, but a man shall be put to death for his own sin. (Al'amarin, paragraphs 6-7).

49. And in **Nazal**:

> … The basic principle stands, without a hair's breadth deviation there-from; a man shall be put to death for his own sin… The basic principle with which we are concerned goes to the root of the power and does not pertain only to the discretion of the authority and to the issue of compatibility ('proportionality, 'relativity') between the evil deed and the sanction imposed by the authority.
>
> … I find it difficult to agree to the stipulation that the respondent is vested with the power to demolish the entire house being the subject matter of this case, despite that fact that the assassin did not own it and did not reside in the entire house. The assassin's room is

> designated for demolition, and the authority was entitled to destroy it had it wanted to; his room alone rather than the home of others.

50. And in **Janimat**:

> If we destroy the perpetrator's apartment, we shall destroy at the same time – by the same strokes – the apartment of this woman and these children. We shall there-by punish this woman and these children although they have not sinned. This is not done here. Since the establishment of the State - certainly since the Basic Law: Human Dignity and Liberty – when we have read regulation 119 of the Defense Regulations, we have read it and vested it with our values, the values of a free, democratic Jewish state. These values directly lead us to the ancient times of our people, and be our times no different than former times: they shall say no more the fathers have eaten sour grapes and the children's teeth are set on edge. Every man who eats sour grapes, his teeth will be set on edge.

51. Recently, the Honorable Justice Vogelman expressed a similar position in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015):

> … and these words primarily relate, as stated, to the innocent family members, with respect of whom no argument was made that they were in any way involved in the criminal deed of the perpetrator, where the military commander orders the demolition of the entire house (as opposed to its partial demolition or sealing).
>
> The result of balancing the scales one against the other – the benefit against violation of human rights ancillary to the realization of the purpose of the Regulation – is that, at least in the absence of involvement on behalf of the household members, the drastic harm to the rights of the uninvolved tips the scales and outweighs the opposing considerations. The demolition of the home is therefore with authority, but the flaw lies on the level of discretion: under such circumstances the act is disproportionate (paragraph 5-6).

52. In a later case, the Honorable Justice Mazuz discussed the issue in greater detail in the framework of HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015)(**Abu Jamal**). Referring to respondent's obligation, while exercising the authority, to examine the degree of involvement of the family members living in the house, if any, the Honorable Justice Mazuz stressed that it was a fundamental consideration in making the decision to exercise the authority and how it should be implemented. And these are his words:

> 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.(paragraph 14)(emphases appear in the original).

53. Moreover. The Honorable Justice Mazuz explained that said approach reconciled with deterring considerations which, according to the applicants in the proceeding at hand, underlie the policy:

> In my opinion this approach reconciles with deterring considerations. A deterring purpose assumes the existence of a rational connection between the prohibited act and the sanction. Said purpose does not reconcile with the infliction of harm on innocent people. Using the sanction only against family members who were involved in the terror activity, and on the other hand, leaving uninvolved family members unharmed, may create an incentive for the family members to act toward preventing attacks when they become aware of such intention, in a bid to avoid the expected sanction. On the other hand, using the sanction against those who are not involved as well, does not create an incentive for the family members to act for the prevention of the terror activity in view of the fact that the sanction would be taken against them in any event, even if they act for the prevention thereof (without success).

54. Similarly, the Hobnorable Justice Baron referred in HCJ 1125/16 **Mer'i v. Commander of IDF Forces in the West Bank** (March 31, 2016), to the undesirable implications embedded in the use of said sanction against innocent family members. It should be noted that in that case the Honorable Court decided to revoke the demolition order and even denied the possibility to replace it with a sealing order:

> As a general rule, using the power to demolish homes based on the severity of the acts attributed to the terrorist alone, without giving any weight to the degree of involvement by family members in said acts, I believe, fails to meet the test of proportionality in the narrow sense in circumstances where the deterring power of demolition is, at the least, not unequivocal. It should be noted, **that the jurisprudence of this Court has highlighted the importance to be attached to the family's knowledge of or involvement in the murderous plans of its offspring with respect to examining the proportionality of the decision to demolish the family's home** (Paragraph 6) (Emphases added, N.D.).

55. In conclusion, the involvement of family members in the deed is a weighty question for the purposes of examining the proportionality of the decision. The Honorable Court, in its judgments throughout the years, has emphasized the importance of this factor while discussing the argument of collective punishment, contrary to applicants' argument that "the decision in the judgment revoking the demolition order issued for the perpetrator's home due to the harm which shall be inflicted on the perpetrator's family in circumstances in which no involvement is attributed to the family members, despite the existing deterring purpose, **does not reconcile with the spirit of previous judgments of the honorable court**. Therefore, according to the state, it is a rule which "is contrary to previous rules of the Supreme Court" (Section 30(b) of the Courts Law)".

56. The judgment being the subject matter of the request did not deprive the military commander of his authority, but has rather retained said authority for the purpose of replacing [the demolition order] with a partial sealing order, based on a long-standing case law recognizing family's involvement as a fundamental factor in the examination of the exercise of the authority and the manner of its exercise, in a manner which also reconciles with the purpose of deterrence.

57. Beyond need. It seems that as a general rule there is no basis for applicants' argument regarding a significant limitation of express powers, to the point of their actual deprivation, in any event in which innocent family members are involved, as specified

in paragraph 5 of the Request. On September 10, 2020, the applicant issued notice of intention to demolish the home of the Dwaykat family in Rujeib village, Nablus district, in view of the ostensible involvement of the father of the family in an attack in Petach Tikva on August 26, 2020. In said case, no arguments have yet been raised regarding any knowledge or involvement of family members, which did not prevent the issue of the notice by virtue of Regulation 119. Therefore, it seems that the judgment did not "befog" the exercise of the authority in such cases as argued by the applicants.

58. For these reasons the respondents are of the opinion that there is no room for re-opening the issue for discussion by an expanded panel according to Section 30(b) of the Courts Law.

Accepting the Request for Further Hearing requires discussion of the lawfulness of the use of Regulation 119

59. The history of the use of Regulation 119 had its ups and downs. In certain years the use of Regulation 119 was stopped and abandoned in others, all of the above based on the understanding that it is an extreme measure which raises difficulties on the constitutional level.

60. Accordingly, for instance, and in the framework of HCJ 7733/04 **Nasser v. Commander of IDF Forces in the West Bank** (June 30, 2005), the military commander notified of the adoption of the conclusion reached by the committee headed by Major General Udi Shani, whereby house demolition for deterrence purposes should be stopped and used only in extreme cases. Following said notice, the petition was deleted and the demolition order which had been issued was revoked.

61. From the above we learn that the Honorable Court recognized the importance of the consistent monitoring of the lawful use of the authority by virtue of Regulation 119, and that deviation from the policy, given change in circumstances, is not only expected, but also required. Relevant to the above are the words of the Honorable Justice (as then titled) Hayut in **HaMoked**:

> The last wave of terror which commenced with the abduction and murder of the three youths God bless their souls and continued in frequent killings and massacres of innocent civilians, passersby and worshipers in a synagogue, also marked an extreme change of circumstances, characterized by terrorists from East Jerusalem, which required a renewed used of this means**. However, these 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.**(Paragraph 6) (Emphases added, N.D.)

62. To the extent the Honorable Court is of the opinion that the discussion should be re-opened before an expanded panel, the Honorable Court is requested, **in the alternative**, to direct that a hearing be held in the issue on the general and in principle level, in response to voices among many honorable justices asking to revisit the lawfulness of the use of Regulation 119, in view of the difficulties raised by it under international law and local law, which have not been thoroughly discussed and clarified by the court in its judgments.

63. It should be noted that in the petition filed in HCJ 4853/20 by the respondents in the proceeding at hand, a request to expand the panel was filed which has not been

addressed in the framework of the proceeding. The general issue with respect of which the expansion of the panel was requested is the question of the lawfulness of the use of Regulation 119 and house demolition policy applied by the applicants by virtue thereof, on the grounds of uncertain deterring need toward potential third parties.

64. Changes that have recently occurred in the international arena led to a situation whereby the International Criminal Court examines whether it has jurisdiction to adjudicate actions which would be filed against Israeli citizens due to Israel's policy in the territories and its actions therein.

65. Hence, the day on which the International Criminal Court shall resolve the above issue is nearing. Should the International Criminal Court hold that it is indeed vested with jurisdiction to adjudicate these issues, the house demolition policy applied by Israel on the basis of Regulation 119 shall be one of the main issues with respect of which actions shall be filed with the court.

66. In view of these developments, and since the only justification for the house demolition policy and its implementation until now, according to this Honorable Court, is a 75 old Regulation and rule which was established by the Honorable Court more than forty years ago, it seems that not only has the time ripened to hold a hearing by an expanded panel in the **general legal issues** arising from the exercise of the alleged authority, but that an actual immediate need has been created to thoroughly examine the issue and clarify it once and for all. Respondents' arguments are reinforced by the fact that for many years there is sharp legal dispute between scholars with respect to the lawfulness of the use of the Regulation as such, while most scholars agree that its use is not lawful, and in a significant number of cases heard by the Honorable Court minority opinions were given which clarified that the time had come to re-open the rule for discussion. The respondents are of the opinion that it is the right of the state's agents and citizens as well as of the respondents to know at the highest possible degree of certainty, whether the exercise of the authority – establishing a house demolition policy, its implementation on the basis of Regulation 119 for deterrence purposes and the validation thereof – may amount to a war crime, and whether and to what extent does in expose any person to personal criminal liability.

67. The state's official position is that the use of such a cruel measure of house demolition and eradication of any memory and experience related to the demolished buildings from the lives of individuals and families in a systematic manner whenever an attack with fatal consequences is carried out, is necessary for deterring purposes.

68. However, while there is no dispute nor can there be any dispute as to the depth and certainty of the harm caused to uninvolved family members, the other side of the equation – namely, the reasonableness and lawfulness of the policy by virtue of which demolition orders are issued – has not been thoroughly discussed and clarified by the court at least four decades, and in fact, has never been thoroughly examined. In addition, it has never been proved - and therefore it has never been unequivocally held – that there is an absolute certainty or high degree of certainty that a systematic harm inflicted on so many people and demolition of houses and destruction of lives of so many who have done nothing wrong, achieves its purpose. In addition, the question of whether it is possible that the application of house demolition policy shall God forbid lead to exactly the opposite result of the desired ostensible deterrence alleged as a matter of routine.

69. Based on this policy thousands of houses of Palestinians have been demolished over the years. Each demolition of a house is a tragic event for its residents. Each demolition leaves innocent and humiliated children, elderly people, women and men in the street.

In the framework of this policy respondents 1-11 are used by the applicants as a tool to convey messages to potential third parties and are the next candidates to be so humiliated. All of the above, having their dignity trampled on and their most fundamental rights violated.

70. It has been stated more than once in specific petitions heard by this Honorable Court, that this policy sewed hatred and rage in the hearts of thousands of Palestinians who were forced to witness the destruction of the homes built by their ancestors, and in certain cases the demolition was even identified as the direct motive for the carrying out of attacks (see Abu Jamal and Na'Aliweh).

71. According to the respondents, at this stage and in the current state of affairs, the continued validation of the house demolition policy applied by the state of Israel by virtue of a 75 years old Regulation and based on a legal rule which was established more than 40 years ago, against the backdrop of the changes described above, justifies and even requires a thorough review and clarification of this complex issue including all levels and aspects thereof, by an expanded panel.

72. In the case of respondents 1-11 there is no novelty, other than the fact that we are concerned with eleven individuals who did nothing wrong that the applicants wish to use as an instrument and to deliberately cause a devastating injury to their property and dignity, with all ensuing consequences. Precisely for this reason, this is an appropriate case to revisit the lawfulness of the use of the Regulation and re-open it for discussion by an expanded panel of this Honorable Court.

73. The request for further hearing as filed, that wishes to limit the expanded discussion to the question of absence of awareness and non-involvement of family members in the deed in the context of the exercise of the authority according to Regulation 119, not only disregards the difficulties surrounding the lawfulness of the exercise of the authority, but also tries to neutralize one of the fundamental elements which should be examined in exercising the authority, namely, the involvement of the family members; an element which was given, as demonstrated above, a significant weight in long-standing judgments, in response to the severe argument of collective punishment.

74. Precisely this development, the request for a further hearing which has been initiated, for the first time, by the state, and respondents' extensive use of Regulation 119 – as was also stated in the judgment of the Honorable Justice Karra – in any event in which a person is killed, without examining the circumstances of each and every case as has been held by this Honorable Court more than once (for instance, the manner by which the death was caused, were the family members involved in the deed, the family's economic condition, etc.), increase the need to hold a hearing before an expanded panel regarding the entire issue without any exception.

75. Ever since the house demolition policy has been reinstated, the respondents issued demolition orders in every case in which a person had been killed, without examining the circumstances of the specific case as required by law, intensifying the argument that the considerations underlying the use of Regulation 119 are punitive and vindictive considerations.

76. Accordingly, for instance, in the case at hand, we are concerned with petitioners with respect of whom no argument of involvement, awareness or support in retrospect of the event being the subject matter of the order was raised, a poor family that the house in which it lives is very poor attesting to the family's low socio-economic status.

77. Following the above described changes, a full and comprehensive discussion of the issue is required and even inevitable, according to the respondents. Hence the request to expand the panel and to hold a general, in principal, discussion in the issue, which was filed in the context of the petition. Therefore, according to the respondents in this proceeding, if the Honorable Court decides to the schedule a further hearing in this case, the further hearing should concern all issues arising from the implementation of the policy by virtue of Regulation 119, and in no event should the discussion be limited to the manner by which the discretion is exercised in cases involving innocent family members who shall be injured as a result of the exercise of the authority, an issue which clearly should not be clarified in the framework of a further hearing, as explained above.

78. To the extent the request for a full and comprehensive further hearing in the issue is accepted, the respondents wish to reserve their right to attach an expert opinion on their behalf regarding the lawfulness of the policy according to international law.

Conclusion

79. The respondents shall argue that the request for further hearing in the judgment, as drafted by the applicants, should be denied.

80. Alternatively, the respondents shall argue, and to the extent that the Honorable Court schedules a further hearing in the case, that the hearing should concern all issues involved in the lawfulness of the use of Regulation 119 and should not be limited to the specific issue of the manner of the exercise of the authority in cases involving innocent family members.

Jerusalem, September 13, 2020

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