At the Supreme Court sitting as the High Court of Justice

HCJ 480/21

Before:	Honorable Justice I. Amit Honorable Justice D. Barak-Erez Honorable Justice .A Baron
The Petitioners:	1. Kabha 2. Kabha 3. Kabha 4. Kabha 5. Kabha 6. Kabha 7. HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger
	- v -
The Respondents:	1. Military Commander of the West Bank 2. Minister of Defense
	Petition for Order Nisi and Interim Injunction
Session date:	January 27, 2021.
Counsel for the Petitioners:	Adv. Nadia Daqqa; Adv. Maisa Abu Saleh
Counsel for The Respondents:	Adv. Areen Safadi Atilla

Judgment

Justice I. Amit

1. In the early afternoon of Sunday, December 20, 2020, Esther Horgan (hereinafter: the Deceased) went for a walk in Rihan Forest, near her home. A terrorist arrived at the site, captured the Deceased, held her, threw her to the ground and brutally murdered her. The terrorist fled the scene, and four days later, _____ Kabha was caught as a suspect in the crime (hereinafter: Kabha). Kabha was interrogated and confessed to having carried out the act for nationalistic reasons. Kabha said he murdered the Deceased after observing she was Jewish, as an act of revenge for the death of his friend who died of an illness while serving a prison sentence. Kabha had served three prison sentences in the past, between 2003 and 2019 and a total of eight years in prison for various terrorism offenses, including involvement in terrorist attacks using gunfire and in the production of explosive devices. The investigation of the heinous murder has been concluded. An indictment has not yet been served.

2. The petition herein is directed against a demolition order issued by Respondent 1 (hereinafter: the Respondent) with respect to two floors in the building in which Kabha resided in the village of Turah al-Gharbiyah (hereinafter: the building), pursuant to his powers under Regulation 119 of the Defence (Emergency) Regulations 1945 (hereinafter: Regulation 119). Petitioner 1, Kabha's father, lives with his wife, Petitioner 6, on the ground floor of the building. Petitioner 2, Kabha's wife, lives with him and their three children (Petitioners 3-5) on the second floor of the building. The third floor of the building, which is in fact built on a small part of the roof, contains a single room with a bathroom roughly 15 square meters in size. The demolition order refers to the second and third floors only.

3. On January 6, 2021, the Respondent notified counsel for the Petitioner of his intention to confiscate and demolish the second and third floors of the structure. The notice enclosed an engineering report. The Petitioners were given an opportunity to file an objection before January 11, 2021. An objection was filed and rejected on January 13, 2021. The rejection states that the order would not be executed before January 18, 2021. The date was pushed back to January 21, 2021, at the Petitioners' request. In the interim, the Petitioners contacted the Respondent and requested the investigation materials. Their request was rejected on the grounds that the investigation had not yet concluded. However, the Respondents state the Petitioners did receive redacted notes from the interrogation of Kabha's wife and brother.

   On January 21, 2021, the petition herein was filed and an Interim Injunction was issued on the same day, instructing a stay of the demolition pending a decision to the contrary (decision of my colleague, Justice Barak-Erez dated, January 21, 2021).

Parties' arguments in brief

4. In the petition, the Petitioners request an Interim Injunction ordering the Respondents to, "Desist from exercising the power granted under Regulation 119 [....] including confiscation, demolition or any other damage to the family home of the Petitioners and other homes." As an alternative, the Respondents were requested to suspend the exercise of said power until the matter of its exercise is heard by an extended panel of justices; to provide the Petitioners and the public with factual figures confirming their contention that their policy of house demolitions as a deterrent fulfills its purpose and refrain from issuing orders before the Respondent provides the details of the incident and investigation materials to a degree that enables the individuals set to be harmed by the order to exercise their right to access justice in the appropriate manner. The Petitioners also asked to extend the panel set to hear the petition according to Section 26 of the Court Law [Incorporated Version] - 1984.

5. For the sake of clarity, I shall attempt to organize the Petitioner's arguments into two planes, the theoretical and the practical. On the theoretical plane, the Petitioners seek to cast a wide net with respect to the legality of the Respondents' policy on the exercise of Regulation 119. The Petitioners argue that the motivation for invoking the power granted under the Regulation is revenge and punishment, and as such, its exercise is unlawful. Alternatively, even if the measure is employed for the purpose of deterrence, the policy is disproportionate and constitutes collective punishment, which defies the rules of both international law and Jewish law. It is further argued that house demolitions do not deter individuals from carrying out terrorist attacks, but rather spur them to do so; that the level of deterrence achieved thereby is unclear and that it runs counter to the principle of the child's best interest. The Petitioners cite remarks made by some justices of this Court in other matters, wherein they expressed the opinion that the use of Regulation 119 is due for a thorough and current examination.

   On the practical plane, the Petitioners argue that the order issued in the case herein lacks reasoning, that it was not issued as part of a proper administrative procedure, that the decision failed to take into consideration all the relevant factors and that it did not state that

the Respondent had considered more proportionate, less injurious measures - particularly given the fact that the Petitioners had no involvement in Kabha's actions. The Petitioners further argue that they had not been given an opportunity to examine the process by which evidence against Kabha was collected. On the issue of Kabha's residential ties to the building, the Petitioners argue no such ties exist with respect to the third floor. The method proposed for the demolition in the engineering report provided by the Respondent was also impugned on the grounds that it might cause substantial damage to nearby units, as had occurred in other cases in the past. In support of this argument, the Petitioners enclosed their own engineering expert report.

6. The Respondents, on the other hand, argue that the legality of using the power granted under Regulation 119 has been upheld in a slew of judgments delivered by this Court. The Respondents agree that deploying the measure of house demolitions pursuant to the Regulation is contingent on the time and place and that the Respondent must respond to the changing face of terrorism with suitable means and to the extent required. The Respondents confirm that at other times in the past in which the number of terrorist attacks decreased, use of the Regulation subsided, and it was rarely used for about a decade. However, in recent years, security conditions have significantly deteriorated, and since 2013, 1300 to 2400 terrorist attacks have been committed each year, with a sharp increase in the number of Israeli casualties in terrorist attacks originating from the Judea and Samaria Area and Jerusalem. The Respondents stress that the Regulation is used for the purpose of deterrence rather than collective punishment, and that, factually, the deterrence has a proven efficacy (over the course of the deliberations, the Respondents submitted for our review, ex parte, a current report which they maintain speaks to the efficient deterrence achieved thanks to the use of the power granted in the Regulation).

   With respect to the case herein, the Respondents argue that the decision to employ Regulation 119 was made given the circumstances and with attention to the severity of the murderous, cruel terrorist attack, as well as the fact that Kabha's confession is distinctly corroborated by external evidence. With relation to Kabha's residential ties to the structure, the Respondent argues that the questioning of family members has revealed that the second and third floors in the structure are owned by Kabha himself after he purchased them from his brother 15 years ago, and that Kabha himself has lived in the structure for 15 years, as is common knowledge. It was further argued that there was no dispute that Kabha lives on the second floor, and, that according to the inquiries, the room on the third floor is in his constant use. As for the measure chosen for the implementation of the demolition, the decision was made after a specific examination by an accredited engineer, with the object of avoiding damage to the remaining parts of the structure and other housing units in the vicinity and a determination that no damage is expected to nearby structures and that Petitioners' allegations regarding severe damage expected to the area around the portion slated for demolition have no basis. With respect to other cases in which a demolition has been carried out and damage did in fact occur, it was argued that the Petitioners' claims on this matter were made baselessly.

Deliberation and decision

7. Having reviewed the petition and the Respondents' response and having heard parties' oral arguments and examined the material submitted to us by the Respondents, I have reached the conclusion that there is no cause justifying intervention in the Respondent's decision. Therefore, the petition must be dismissed. I will provide a brief explanation.

8. First, with respect to the issues of principle raised by the Petitioners, this is neither the time nor the place to "reopen" the debate on these matters. As I have had cause to remark on several recent occasions: "There is no need to revisit anew the questions of principle surrounding the authority to issue confiscation and demolition orders under Regulation 119 per se every time the Court deliberates on a petition concerning the Regulation," (HCJ 8150/15 **Abu Jamal v. GOC Home Front Command**, para. 6 (December 22, 2015); HCJ 2322/19, **Rifa'iya v. Military Commander of the West**, para. 7, (April 11, 2019)

(hereinafter: **Rifa'iya**). I have further stressed that "the aforesaid does nothing whatsoever to detract from the gravity of employing Regulation 119 and the impingement on the Petitioners' rights as a result thereof. However, case law remains valid, and the legal limitations imposed on the Respondent when employing the power are undisputed. In the circumstances, there is no need to review once again the list of rules formulated through jurisprudence on this matter, and the deliberation can focus on the arguments concerning the concrete circumstances of the case," (**Rifa'iya**, para. 7 and the authorities therein). It is not superfluous to note that a mere several months ago, a motion for a further hearing on the matter was rejected, with a clarification provided that case law with regards to the legality of using Regulation 119 has not been altered and remains valid (decision of President Hayut in HCJFH 5924/20 **Military Commander of the Judea and Samaria Area v. Abu Sohila** (October 8, 2020) (hereinafter: **Abu Sohila**)).

This is, therefore, the starting point for this deliberation, and there is, at any rate, no need to address, as part of this petition, the benefits and difficulties, legal or otherwise, connected to the use of this power per se, even if it is difficult to dispute that the issue is complex. However, I will add, with a measure of caution, that according to the material presented for our review by the Respondents, I believe there is support for their position with respect to the presence of effective deterrence achieved by the use of Regulation 119. In any event, given the aforesaid starting point, we turn to an individual discussion regarding the Respondent's use of the power in the circumstances of the case herein, in relation to parties' arguments.

9. The Petitioners claim they were not provided with the investigation materials substantiating the decision made by the Respondent and maintain that Regulation 119 powers should not be exercised before an indictment is filed against the suspect or before investigation materials can be provided.

   This argument must be dismissed. Case law has explicitly determined that there is no need to wait for an indictment to be served in order to exercise powers granted under Regulation 119, and that administrative evidence suffices for this purpose, though it must be "particularly compelling" (see, inter alia, HCJ 5942/17 **A. v. Military Commander**, paragraph 8 and the sources cited therein, (August 3, 2017) (hereinafter: **A.**)) In the case herein, a clear determination may be made that administrative evidence that passes the required evidentiary bar is available. Suffice it to note that the suspect has confessed to committing the act and cited the nationalistic motivation for it and that compelling external evidence confirms his confession [the nature of this evidence was presented to us as part of an opinion submitted on behalf of the Respondent. However, since the investigation is still underway, this is not the place to go into detail]. It also appears to be no accident that the Petitioners have chosen not to focus their petition on the question of whether or not the suspect committed the act, but on the contention that the investigative materials had not been provided to them.

10. With respect to the argument made by the Petitioners regarding the investigative materials, I shall add that, even if an indictment had been served against Kabha, it would not have given the Petitioners the right to receive the investigative materials (on the assumption that the Petitioners were not party to the criminal proceeding, and unlike the right of a defendant under Section 74 of the Criminal Procedure [Incorporated Version] - 1982). As I have noted in the matter of **Rifa'iya**, I accept the approach whereby a "Chinese Wall" of sorts should be erected between a criminal proceeding and an administrative proceeding undertaken pursuant to Regulation 119, even if there is room for some flexibility in the examination of the merits (ibid., paragraph 13, and note that in that case, the petition was filed after an indictment was served). Moreover, in the case herein, while an indictment has not yet been served, the response provided by the Respondents does indicate that the Petitioners were provided with redacted memos from the interrogation of the suspect's father and wife. It appears that in so doing, the Respondent has demonstrated some flexibility, as is proper. At any rate, the factual basis in this matter is sufficiently grounded and the inevitable conclusion is that it meets the required evidentiary bar for invoking Regulation 119.

11. I now turn to the Petitioners' argument regarding Kabha's residential ties to the building. On this matter, it is important to clarify that the Petitioners do not dispute that Kabha lived with his wife and children on the second floor of the building until his arrest (paragraphs 4 and 23 of the petition). The only question in that regard is, therefore, whether Kabha had residential ties to the third floor of the structure, which, as noted, consists of one room and a bathroom. With regards to this matter, the Petitioners claim there are no residential ties with respect to the third floor, and at most, there are "reduced" ties. In support of their argument, the Petitioners contend that Kabha remarried his former wife (in addition to his current marriage) two years ago, and in the first month of their second marriage, his former wife and her daughter lived in the room on the third floor for about a month (the Petitioners note that Kabha and his former wife have since separated once more). The Petitioners wish to draw from the above that the floor was not used by Kabha as a residence.

    This argument presented by the Petitioners cannot be accepted. The Respondents' response and the materials submitted for our review clearly indicate that Kabha spent time on the third floor and routinely hosted people in it. As for the fact that some two years ago, Kabha housed his new wife (and former wife) for about a month in the room on the third floor does not negate his own ties to that floor. In fact, the opposite seems true, meaning that Kabha treated the third floor as an owner would. This conclusion falls in line with the materials submitted on this matter and with the Respondents' contention that Kabha owns the second and third floors. Either way, the question whether Kabha owns the two floors is not a decisive question, since, as clarified in case law, given clear ties to a structure, "ascertaining the exact proprietary status is not necessary" (**A.**, paragraph 11 and the sources cited therein). The Respondent's determination that Kabha's residential ties to the second and third floors has been proven is, therefore, substantiated.

12. The Petitioners claim they had no involvement in Kabha's actions, nor had they been aware of his actions or in a position to prevent them, and that execution of the order is disproportionate on these grounds. This argument too does not provide cause to intervene in the Respondent's decision. While knowledge, involvement or support for the terrorist act by household members does constitute one of the considerations to be taken into account for purposes of a decision on whether and how to exercise Regulation 119 powers, case law has repeatedly stressed that this is not an imperative condition and that, "non-involvement does not preclude the implementation of the orders." (See, inter alia, HCJ 751/20, **Hanatshah v. Military Commander of the West Bank**, paragraph 21, (February 20, 2020); **A.**, paragraph 9 and the sources cited therein; HCJ 799/17, **Qunbar v. GOC Homefront Command**, paragraph 10 of the judgment of Justice Danziger and paragraph 4 of the judgment of Justice Sohlberg and the sources cited therein (February 23, 2017)). The matter has recently been explicitly clarified once more by President Hayut in her decision in **Abu Sohila**, and I shall quote directly:

> To remove doubt, it is clarified and emphasized in this context that the rule in the matter at hand has been and remains that while awareness and involvement by family members in the perpetrator's acts does carry weight in the range of considerations the commander must weigh prior to exercising his powers under Regulation 119 – it is in no way a consideration which tips the scale." (ibid., paragraph 7 [sic]).

    Hence, the Petitioners' argument that their lack of involvement in Kabha's actions renders the order issued by the Respondent disproportionate should not be accepted. Add to that the fact that in the case at hand, the Respondent has considered the proportionality of the injury and its effect on the Petitioners, and pursuant thereto, has limited the order's application to the second and third floors of the structure only, leaving out the ground floor, where Kabha's father and his wife reside. In the circumstances, though the harm to the family members residing on the second floor of the house and the proprietary interference caused by the demolition of the two floors should not be taken lightly, this is not sufficient

to render the order disproportionate and as such does not justify intervention in the Respondent's discretion.

13. The same holds true for the Petitioners' arguments with respect to the method of demolition. As noted in the opening, the decision to go forward with the demolition was received based on an engineering report that stated no damage to nearby structures and surrounding area was expected and that at the most, there was a low chance of low-level damage to nearby structures, the surrounding area and the ground floor. The report further noted that based on past experience in previous cases with similar features, the specified method of demolition was carried out, "with a great deal of success without structural damage exceeding the geographical area of the demolition." It would not be superfluous to note that the engineering report enclosed with the petition was referred for a review by an engineer working for the Respondent, who addressed it in a detailed report. In any event, the rule is that the method of demolition is one of those professional matters regarding which the Respondent has particularly broad discretion and in the absence of exigent circumstances, this Court must not put itself in the Respondent's shoes who is presumed to exercise the required caution (HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank**, paragraph 31, (August 11, 2014); **A.**, paragraph 10).

14. Conclusion: The Respondent maintains that demolition of the second and third floors of the building is required in order to deter potential terrorists from carrying out similar attacks in future. The decision was made after consideration of all relevant factors and in keeping with standards laid out in jurisprudence. In the circumstances, despite the injury to the Petitioners, there is no cause to intervene in the Respondent's discretion and his decision to issue a demolition order for the second and third floors of the structure that is the subject of this petition, pursuant to his power under Regulation 119.

15. As a side note, though an important one:

    A. The demolition of terrorists' homes is a sensitive topic. The demolition of a terrorist's home is not a punitive measure, nor does it constitute vengeance in response to a terrorist attack. It is clear that Reuven is not punished for the actions of Shimon, even if Reuven is Shimon's father or son. An arch principle of Jewish ethics commands: "Each will die for their own sins" (Deuteronomy, 29:27 [sic]), and it is why, "The child will not bear the guilt of the parent, nor will the parent bear the guilt of the child" (Ezekiel, 18:20). The tool of demolishing a terrorist's home is employed solely as a deterrent, not as punishment. But even as such, deterrence is clearly no magic word that has the power to permit use of any measure. Deterrence would be more effective if the neighborhood that produced the terrorist is demolished, or if the structures where members of his extended family live are demolished, but no one conceives of using such a disproportionate tool. It follows that proportionality is the key phrase in light of which the house demolition tool should be examined.

    B. As clarified in case law, given the purpose of deterrence underlying Regulation 119, the Respondent must exercise his powers under said Regulation swiftly and immediately (see, e.g., HCJ 1629/16 **'Amer v. IDF Commander in the Judea and Samaria Area**, paragraph 20 and the sources therein (April 20, 2016)). Nevertheless, it is difficult to fathom that such an extreme, such a sensitive tool as a house demolition would take place without the terrorist's family being given the opportunity to put the demolition and confiscation order to the scrutiny of this court, which obviously necessitates delaying the order's execution until a decision is made on the merits of the petition. It was difficult to remain indifferent to the emotional statements and noble position of the Deceased's husband, who, when speaking before the Court, noted he did not agree with those who complain that this Court considers the matter instead of giving a "free hand."

    C. A plethora of utilitarian-moral-legal arguments are pitted against deterrence, which is the singular consideration justifying use of Regulation 119. In this state of affairs, the proportionality requirement gains importance, and it is expressed in the consideration

of the following factors: residential ties, the severity of the acts attributed to the suspect; the force of the administrative evidence against him; the level of involvement by family members (not as an exclusive consideration); the scope of the demolition or sealing with consideration for the number of individuals expected to be injured by the exercise of the power among other considerations, and more. And most notably, the authorities must constantly reconsider the effectiveness and exigence of deterrence:

> ... [A] house demolition under Regulation 119 will satisfy the proportionality test, if, as a general rule, it is indeed effective and realizes the purpose of deterrence [...] the principle of proportionality is incongruent with the presumption that choosing the drastic option of house demolition or even the sealing thereof always achieves the longed-for objective of deterrence, unless data are brought to substantiate said presumption in a manner which can be examined [...] the use of a tool the ramifications of which on a person's property are so grave, justifies a constant examination of the question whether it bears the expected fruit; [...] I am of the opinion that State agencies should examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to bring to this court in the future, if so required, and to the extent possible, data which point at the effectiveness of house demolition for deterrence purposes, to such an extent which justifies the damage caused to individuals who are neither suspects nor defendants." (HCJ 8091/14 HaMoked: Center for the Defence of the Individual v. Minister of Defense, paragraphs 24, 27 of the opinion of Justice (as was his title at the time) Rubinstein; see also paragraphs 6 of the judgment of Justice E. Hayut).

As for myself, I am prepared, in the case herein as well, to accept the assessment of the security officials - who have professional discretion based on the figures and information in their possession - that the house demolition tool is effective and critical and can prevent future terrorist attacks. I am also prepared to assume that this is not collective punishment in the usual sense of the term. However, given the "cons," use of the house demolition measure must be informed, scarce and employed in the appropriate cases given the overall security situation. The officials making the decisions are presumed to strike a balance between the various interests and considerations in each and every case and base their decisions on professional, material considerations.

16. The bottom line is that I shall propose to my colleagues to dismiss the petition and order that the temporary order issued on January 21, 2021, shall expire on February 10, 2021 at 12:00 P.M. in order to give the Petitioners time to prepare and evacuate.

Justice

Justice D. Barak Erez:

1. Once again, we are asked to consider a petition against the demolition of a terrorist's home. The sorrow over the despicable murder again intermixes with the troubling questions arising from the harsh act of house demolitions.

2. Prior to addressing the merits, and following on the remarks of my colleague Justice I. Amit on this matter, I would like to begin with a comment regarding the judicial procedure with respect to the demolition order pursuant to Regulation 119 of the Defense (Emergency) Regulations 1945. When the military commander decides to issue a demolition order, those affected are given the opportunity to appeal the decision and in the time allocated for submission of said appeal, the decision is suspended. Thereafter, if the appeal is denied, those impacted are given a brief extension, usually several additional days, to file a petition with this Court. Naturally, the petition is submitted close to the filing deadline in order to best prepare it. The practical implication of this is that the filing of the petition requires a further short delay in the execution of the order to enable a court discussion of the matter without a fait accompli transpiring in the meantime. Counsel for the Respondents clearly acknowledged this and it is seemingly beyond dispute. Nevertheless, the Petitioners have no formal guarantee that the order will not be executed; therefore, they normally ask the court to issue an order staying execution of the order. Accordingly, it is customary judicial practice to issue a temporary order postponing the execution of the order until the petition is heard. However, since the Respondents themselves agreed that despite the urgency they imputed to the implementation of the demolition order, it should not have been carried out immediately, they should have clarified that as long as a petition were to be filed before the deadline, the demolition would not be carried out (without prejudice to Respondents' right to ask for a speedy hearing, as was in fact done.) Such conduct would have obviated the need to issue unnecessary judicial orders and would have displayed the respect the branches of government are expected to have for one another.

3. And now to the merits. As I have done in similar cases, while limiting my consideration of the petition to the context of case law, or what I have called in the past "an internal examination" (see HCJ 1938/16 **Alrov v Commander of IDF Forces in the West Bank** (March 24, 2016)), I could support the decision reached by my colleague, Justice Amit. However, I wish to clarify that, unlike my colleague, I see no difficulty in continuing to raise arguments of principle regarding the nature of the measure taken in accordance with Regulation 119, both in terms of deterrence and in terms of its consequences for those not involved in the murder. I say this because, as I have noted previously, I believe there is good reason for the matter to be addressed by an expanded panel of this court (See, for example: HCJ 2356/19 **Barghouti v Military Commander of the West Bank** (April 11, 2019)).

4. At any rate, when case law serves as the starting point for assessing the decisions taken in the case before us, I believe that we have no cause to intervene in the discretion exercised given that this was a measure taken in the wake of a particularly brutal murder clearly stemming from a nationalist motive. The decision to demolish part of the house was taken close to the event itself without delay. It was limited from the outset in that it did not apply to the entire building but only to that part which the terrorist himself was using.

Justice

Justice A. Baron:

1. I join the position of my colleagues, whereby there is no room for intervention in the discretion of the military commander with respect the demolition of the third floor of the house where Kabha (hereinafter: Kabha or the terrorist) – who, by his own admission, murdered Esther Horgan with horrifying cruelty – resided. Nevertheless, were my opinion to be accepted, we would issue an order nisi instructing the military commander to refrain from executing the demolition order with respect to the **second floor** of the house. The reason for this, in brief, is that the third floor served the terrorist exclusively, while the second floor served additional members of the family, his wife and his three minor children, who are unquestionably innocent and have had no involvement in the terrorist act either beforehand or after the fact.

2. As is known, the military commander's power to order house demolitions is meant to serve Israel's national security and the security of its residents, and as a deterrent against acts of terrorism. In that regard, in some cases, house demolitions are an unavoidable necessity. On the other hand, house demolitions cannot serve as reprisal against or punishment of innocent family members. Collective punishment is prohibited under international law and violates fundamental human rights, particularly the rights to dignity and to property. And to quote the salient words of Justice M. Cheshin:

> Should we demolish the apartment of the terrorist, we shall be demolishing at the same time, and with the same blows, the apartment of his wife and children. With this act, we punish the wife and children even though they have committed no sin. This is not our way. 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 the free and democratic Jewish state. These values guided us on the path of justice during our people's glory days of old and our own times are no different. "They shall say no more. The Fathers have eaten sour grapes and the children's teeth are set on edge. But every man that eats sour grapes, his teeth shall be set on edge."
> HCJ 2006/97 **Abu Ghneimat v. OC Central Command**, IsrSC 51 (2) 651, 655 (1997)).

I agree with my colleague, Justice I. Amit that deterrence is not a "magic word" with the power to justify use of house demolitions without due discretion; and that proportionality is the primary standard which should be used to consider the use of this tool. However, here is where we go our separate ways. Unlike my colleague, I believe the question of the effectiveness of the deterrence produced by house demolitions raises, at the very least, substantive doubt:

> In general, the question of the effectiveness of the deterrence produced by house demolitions is a matter for the judgment of the security forces. However, as I have pointed out on more than one occasion in the past, in the case before us, the confidential opinion presented to us by the Respondents does not remove the serious question mark that hovers over the deterrent power involved in this measure. One thing is certain, and that is the inherent difficulty in quantifying the degree to which house demolitions have an opposite effect – increasing acts of violence and hatred against Jews." (HCJ 6420/19 **al-Asafra v. Military Commander of the West Bank** (November 12, 2019)).

Even after studying the updated opinion presented to us in the proceedings in this matter, I did not find a basis for a positive finding that the use of Regulation 119 does, in fact, achieve substantial deterrence against terrorist acts and perhaps even the opposite. At the very least, it indicates that the question is an open one and the answer is far from unambiguous. This situation has, in my view, direct implications for the question of proportionality in the practice of house demolitions in concrete cases, especially when we come to consider whether there is a proper balance between the deterrent benefit arising from the demolition of a terrorist's home and the violation of his family members' fundamental rights. As I have stated, "the demolition of a house in which the terrorist's family lives solely because of the gravity of the acts attributed to the terrorist, without giving consideration to the degree of their involvement in his acts does not stand the test of proportionality. (See for example: HCJ 752/20 **Atawneh v. Military Commander of**

Judea and Samaria, para. 3 (May 25, 2020); and to expand on this see HCJ 1125/16 **Mer'i v. Military Commander of the West Bank** (March 31, 2016)).

3. Horgan was murdered with unfathomable violence and brutality for no other reason than she was Jewish. Words cannot convey the extent of the loss and sorrow and the heart goes out to the family. The terrorist should be dealt with to the full force of the law; however, the measure of house demolitions is meant to be preventive, not punitive. When we come to examine the proportionality of the demolition order issued with respect to the house in this case, it must give proper expression and weight to the horrific act and order the demolition of the third floor which, it was made clear, was used by the terrorist. At the same time, I believe the decision to demolish the second floor of the house is tainted with disproportionality – since the terrorist's wife and three children live there. And, as we have said, there is no disputing that they were not involved and did not know about the horrific acts, nor did they express support for them after the fact.

Justice

It has been decided by majority rule as stated in the judgment of Justice I. Amit.

Given today, February 3, 2021.

Justice Justice Justice