At the Supreme Court Sitting as the High Court of Justice

HCJ 564/22

Before:	**Honorable Justice G. Karra** **Honorable Justice D. Mintz** **Honorable Justice S. Shohat**
The Petitioners:	**1. _____ Jaradat** **2. Anonymous** **3. Anonymous** **4. Anonymous** **5. Anonymous** **6. HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger**
	v.
The Respondents:	1. **Commander of IDF Forces in the West Bank** 2. **Legal Advisor for the Judea and Samaria Area**
Session Date:	Petition for *Order Nisi* 28 Shvat 5782 (January 30, 2022)
Representing the Petitioners:	Adv. Michal Pomerantz; Adv. Shira Palti
Representing the Respondents :	**Adv. Areen Safdi-Atila**

Judgment

Justice D. Mintz:

The petition at hand concerns a seizure and demolition order issued by Respondent 1 (hereinafter: the **Respondent**) for a residential apartment on the upper floor of a two-story building located in the village of Silat al-Harithiya (hereinafter: the **Apartment** and the **Building** respectively) which served as the residence of _____ Jaradat (hereinafter: the **Perpetrator**) who, according to the evidentiary material in Respondents' possession, committed on December 16, 2021, a terror attack in which the late Yehudah Dimentman of blessed memory (hereinafter: the **Deceased**) was killed and two additional Israeli citizens were injured.

Background

1. On December 16, 2021, a shooting attack was committed at an Israeli vehicle carrying four Israelis near Homesh in Samaria. As a result of the attack the Deceased was killed and two other Israeli citizens were injured. Investigations conducted by the security

bodies shortly after the attack led to a collection of evidence substantiating the involvement of several suspects in the execution of the killing, including the Perpetrator. On December 19, 2021, a few days after the attack, the suspects were arrested by the security forces. On January 6, 2022, the Respondent notified of his intention to seize and demolish the Building according to Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119** or the **Regulation**). The notice specified the reasons for the exercise of the power and the Petitioners were given the opportunity to file an appeal by January 11, 2022. The Respondent attached to his notice an engineering opinion for the execution of the demolition and an aerial photograph with a marking of the land and the Building designated for demolition.

2. On January 11, 2022 an appeal was submitted on behalf of the Petitioners in which, *inter alia*, arguments were raised with respect to the mere exercise of the power according to Regulation 119; absence of deterring purpose in the case at hand; the factual basis underlying the decision; the proportionality of the decision; the concern that damage shall be caused to the Building and adjacent buildings and more.

3. On January 2, 2022 Petitioners' objection was denied by a reasoned decision. Petitioners' principled arguments concerning the use of Regulation 119 were rejected. It was emphasized that the purpose of the demolition is solely deterrence. It was noted that the power was exercised in view of the Perpetrator's major and direct involvement in the execution of the attack and considering the fact that the Apartment was used exclusively by the Perpetrator and his immediate family. Given the engineering opinion, whereby a low level of damage was expected to the other parts of the Building, it was decided that Petitioners' arguments did not justify the limitation of the demolition. As the objection was rejected, a seizure and demolition order was issued.

Hence the petition at hand.

Petitioners' main arguments

4. Petitioners 1-5 are the Perpetrator's family members. Petitioner 1 is his wife and Petitioners 2-5 are the Perpetrator's children. Petitioner 6 is a not-for-profit association acting for the promotion of human rights. The Petitioners raised different arguments against Respondent's decision to seize and demolish the Apartment, including principled arguments concerning the use of Regulation 119 and specific arguments concerning the use of the Regulation in the case at hand. On the general level it was argued that the house demolition policy was contrary to the legal norms obligating the Respondents including international humanitarian law, and that the use of the Regulation violated various protected human rights, including the right to dignity, the right to dignified life, the right to property and the right to housing. It was also argued that in fact house demolition is used as a punitive measure. The Petitioners noted that they were aware of the fact that arguments of this sort have been rejected in the past by this court, but according to them the principled questions concerning Respondent's power should be re-visited. On the general level it was also argued that empirical data and clear evidence have not yet been presented to the effect that house demolition indeed served the declared deterring purpose underlying the use of the Regulation, and that until such data were presented, there was no room to approve the execution of the demolition which constituted vengeful punishment harming the innocent who did nothing wrong. It was

argued that the decision was disproportionate as it harmed the Perpetrator's family members, including his minor children, who were not aware of his deeds and could not have prevented them. In addition, a more proportionate option has not been examined, whereby only the Perpetrator's room shall be demolished.

5. It was also argued that in the case at hand the deterring purpose underlying the use of the Regulation did not exist, *inter alia*, in view of the fact that the notice of the intention to demolish the Building had been published in the media before notice to that effect was given to the Perpetrator's family, in a manner evidencing that it was a punitive reaction intended to "satisfy the desire for revenge of the public" and nothing more. In addition it was argued that the criminal legal proceedings pending against the Perpetrator have only commenced and a sufficient factual basis has not yet been established for the purpose of using the Regulation. The above, also given the fact that a restraining order prohibiting publication was issued with respect to the entire affair, as a result of which the Petitioners have no information of the suspicions attributed to the Perpetrator, and according to the partial publications in the media the Perpetrator was not directly involved in the carrying out of the attack. On the engineering level, it was argued that there is an actual concern that the demolition would cause damage to the first floor of the Building and to adjacent buildings. It also emerges from the engineering opinion on behalf of the Respondent that the ground floor of the Building may be harmed and the possibility of structural damage was not ruled out. Moreover, the engineering opinion which was attached by the Petitioners themselves pointed at an actual risk of damage to the first floor of the Building, to the Building's infrastructures and to adjacent buildings. Notwithstanding the above, the Respondent did not provide any explanations about the measures he intended to take to prevent such damages.

Respondents' main arguments

6. On the other hand, the Respondents are of the opinion that the petition should be dismissed. The principled arguments raised by the Petitioners are not new and were discussed and rejected in many judgments given by this court, including recently. In addition it was argued that the deterring effect of the power exercised according to Regulation 119 was recognized by this court in the past and is also valid and outstanding in the case at hand. It was emphasized that this is not an empirical-quantitative question but rather an assessment based on various means.

7. With respect to the exercise of the power in the case at hand, it was clarified that it satisfied the conditions of proportionality according to the standards established by this court in its judgments, particularly in view of the escalation in terror activities in recent years and the severity of the murderous attack in the case at hand. With respect to the argument that there was no room to exercise the power by virtue of Regulation 119 in the case at hand in view of the harm which shall be caused to the family members who had no knowledge of the attack and were not involved therein, it was noted that it has not infrequently been held that the absence of evidence about knowledge or involvement on behalf of the perpetrator's family members did not prevent, in and of itself, the exercise of the power by virtue of the Regulation. In addition, in the case at hand the absence of indications concerning the knowledge of the Perpetrator's family members was considered by the Respondent prior to making his decision, alongside additional details and the entire circumstances of the matter. It was emphasized that the Perpetrator

had a clear connection to the Apartment in which he lived together with his immediate family, and that the characteristics of the attack and its severe results required actual and effective deterrence which would not be achieved through less injurious means. It was also emphasized that the demolition was planned to take place only in the residential apartment in which the Perpetrator lived with his immediate family and not in the other parts of the Building, which were owned, as argued by the Petitioners themselves, by the Perpetrator and his siblings.

8. With respect to Petitioners' argument concerning the absence of a sufficient factual basis, it was clarified that following a review of the factual basis in the possession of the security forces, which included, *inter alia*, the Perpetrator's versions, testimonies of other participants and additional evidence, it was found that there was a sufficient administrative-evidentiary basis substantiating the determination that the Perpetrator played a major and direct role in the execution of the attack. As has already been held by this court, in view of the deterring purpose, the Respondent is required to exercise his power as soon as possible after the attack and should not wait until the criminal proceedings are exhausted.

9. The Respondent also totally rejects the argument whereby the fact that the notice of the intention to demolish the Apartment was published in the media before it was given to the Petitioners, shows that it is a "punitive" response. It was clarified that the demolition order was issued in view of the security circumstances and on the basis of the conclusion that it was an essential step which was required to deter potential perpetrators from committing other similar attacks.

10. With respect to the method of the demolition, it was clarified that the arguments raised in the engineering opinion which was attached by the Petitioners to their petition were reviewed by the professional engineering bodies and that they have concluded that the method of the demolition was not expected to cause the damage described in the opinion on behalf of the Petitioners. As detailed in the engineering opinion on behalf of the Respondent, there is an assessment that there is a possibility of damage to structural elements of the ground floor of the Building, but all required actions are being taken such that the explosion will be of a highly focused nature in a manner which would lead to a "low level and likelihood" of damage. In addition, it was found that the probability that damage would be caused to non-structural elements of the Building itself was of a "low level and likelihood". With respect to adjacent buildings, damage to structural elements was not expected and the probability that damage would be caused to non-structural items existed but was low. It was further clarified that according to the opinion, nearby infrastructure could be harmed and therefore an effort would be made to disassemble them before any action is taken in a manner preventing them from being harmed. In addition an effort shall be made to remove nearby glazing elements which are the elements most susceptible to damage.

The Hearing

11. In the hearing before us the counsels of the parties reiterated their arguments. Petitioners' counsel attributed great importance to the fact that the notice of the intention to demolish had been published in the media on January 6, 2022, at 07:58, before notice to that effect was given to the family (at 09:06). It was argued that the above constituted clear proof

that the Regulation was not used for deterring purposes but in order to placate public opinion. It was also argued that it was an exceptional case which did not justify the exercise of the power according to the Regulation, given the heavy doubts concerning the degree of the Perpetrator's liability in the attack and the fact that as a result of the demolition the family members, including the four minor children of the Perpetrator, shall be left without a roof over their heads. It was also emphasized that there were differences of opinion among the Justices of this court with respect to the use of the Regulation and that the matter should be discussed by an expanded panel.

12. On the other hand, Respondents' counsel emphasized that the investigation was still privileged but that there were clear and convincing administrative evidence regarding the Perpetrator's major and direct involvement in the attack in a manner justifying the use of the Regulation. With respect to the publication of the notice concerning the intention to demolish the Building in the media, it was clarified in the hearing that a mistake did indeed occur when notice was published through IDF Spokesperson's Unit (at 08:51) a few minutes before notice was given to the family, but the notice was deleted and published again later (09:17). Either way, it has no bearing on the justification for the issue of the order.

13. During the hearing privileged material was submitted with Petitioners' consent which, according to the Respondents, substantiates the deterring purpose underlying the use of the Regulation. Interrogation material was also submitted which, according to the Respondents, substantiates the factual infrastructure concerning the involvement of the Perpetrator in the attack.

Deliberation and Decision

14. Having reviewed the petition, Respondents' response and the privileged material which was submitted, and having heard the oral arguments of the parties, I have reached the conclusion that the petition should be dismissed and I shall propose such to my colleagues.

15. At the outset I wish to point out that in the petition no new principled argument has been raised with respect to the implementation of the power established in Regulation 119, which has not already been discussed in the past. The arguments which were raised in the petition were thoroughly discussed by this court on many occasions and were rejected one by one, in numerous judgments (see for instance: HCJ 8091/14 **HaMoked Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014) (hereinafter: **Hamoked Judgment**); HCJ 8886/18 **Jabarin v. Military Commander for the West Bank Area**, paragraph 7 (January 10, 2019) (hereinafter: **Jabarin**); HCJ 6826/20 **Dweikat v. Commander of IDF Forces in Judea and Samaria Area** (October 25, 2020) (hereinafter: **Dweikat**)) and applications for further hearings in these petitions were denied on different occasions (see for instance: HCJFH 360/15 **HaMoked Center for the Defence of the Individual v.** Minister of Defense (November 12, 2015); HCJFH **Skafi v. Military Commander of the West Bank Area** (March 2, 2016); HCJFH **Jabarin v. Military Commander of the West Bank Area** (January 17, 2019); HCJFH 4605/21 **Shalbi v. Military Commander of the West Bank Area** (June 30, 2021)

(hereinafter: **HCJFH Shalbi**)). It was also reiterated by this court that there was no need to discuss these issues in each specific petition concerning a concrete use made by the Respondent of the power vested in him for the purpose of demolishing a specific house (HCJ 6420/19 **Al'azafreh v. The Military Commander of the West Bank Area,** paragraph 8 (November 12, 2019) (hereinafter: **Al'azafreh**); HCJ 6905/18 **Naji v. Military Commander of the West Bank Area**, paragraph 19 (December 2, 2018); HCJ 751/20 **Hanatche v. Military Commander of the West Bank Area**, paragraph 14 (February 20, 2020)(hereinafter: **Hanatche**); HCJ 1490/20 **Shibli v. Military Commander of the West Bank Area**, paragraph 14 (March 30, 2020); **HCJFH Shalbi**, paragraph 4)). Therefore, there is no need to re-examine the rulings which were established in that regard, and the discussion may concentrate on the issues pertaining to the concrete circumstances of the case at hand (**Jabarin,** paragraph 7; HCJ 2322/19 **Rafaiyeh v. The Military Commander of the West Bank Area,** paragraph 7 of the judgment of Justice **I. Amit** (April 11, 2019); HCJ 3872/21 **Shalbi v. Military Commander of the West Bank Area**, paragraph 14 (June 23, 2021)).

16. It should only be added that the fundamental assumption is that for the purpose of saving human lives, in certain situations there is no alternative but to use the power according to Regulation 119 for deterring purposes which was recognized as an appropriate purpose (see for instance: HCJ 4597/14 **Awawdeh v. Military Commander of the West Bank Area**, paragraph 19 (July 1, 2014) (hereinafter: **Awawdeh**); **Dweikat**, paragraph 23). Indeed, the Respondent is required to exercise his discretion with respect to the exercise of said power according to the principles of reasonableness and proportionality and take into consideration the entirety of circumstances of the concrete case (HCJ 752/20 **'Atawaneh v. Military Commander of the Judea and Samaria Area**, paragraph 15 (May 25, 2020) (hereinafter: **'Atawaneh**); HCJ 1624/16 **Hamed v. Military Commander of the West Bank Area**, paragraph 21 (June 14, 2016)). While exercising the power, the Respondent is required to consider, *inter alia*, the magnitude of the deterrence which may be produced by the demolition; the severity of the actions attributed to the perpetrator; the magnitude of the evidence against him; and the number of persons who may be harmed as a result of the exercise of the power and their characteristics (HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 22 (August 11, 2014) (hereinafter: **Qawasmeh**); HCJ 974/19 **Dahadha v. Military Commander of the West Bank**, paragraph 8 of the opinion of Justice (as then titled) **N. Hendel** (March 4, 2019) (hereinafter: **Dahadha**); HCJ 2356/19 **Barghuti v. Military Commander of the West Bank Area**, paragraph 12 (April 11, 2019)).

We shall now examine the exercise of the power by the Respondent on the specific level, in view of the arguments of the parties.

From the General to the Particular

17. Many arrows were directed by the Petitioners in their petition against Respondents' position that the demolition of the Building was required for the purpose of creating an effective deterrence. According to them, not only does the argument concerning the deterring effect of the Regulation lack merit, since no empirical data were presented to that effect, but also in the case at hand the "cat is out of the bag" in the sense that it became clear for all to see that the real purpose behind the seizure and demolition order is a punitive purpose rather than a deterring purpose. I cannot accept this argument.

First, the question of whether the Regulation can cause deterrence is a professional matter. As was specified by the Respondents, the professional bodies that they rely on, whose position was also brought to our attention as part of the privileged material which was submitted, are of the opinion that house demolition has a deterring effect on potential perpetrators. It has already been held in the past that this court does not have the necessary tools to examine whether the demolition of a perpetrator's home would have an effective deterrence effect, and the court does not step into the shoes of the Respondent, who is vested with discretion to determine whether the measure taken would yield an appropriate gain (**Awawdeh**, paragraph 20; **Qawasmeh**, paragraph 25). The fundamental assumption is that the factual basis presented by the Respondents, also with respect to the deterring potential, which is supported by the affidavits of the relevant bodies, is accurate and reliable (**Dweikat**, paragraph 24). I also accept Respondents' position that it is impossible to measure the effect that the demolition of a perpetrator's home in a specific case will have on future perpetrators by numerical data since it is a conclusion which is affected by weighing the entire gamut of the data (see also: HCJ 144/22 **Abu Skhidem v. GOC Home Front Command,** paragraph 12 (January 19, 2022)). In addition, I cannot accept the argument that the mere fact that notice of the intention to demolish the Building was publicized in the case at hand before notice to that effect was given to the Petitioners – for a few minutes, and according to the Respondents, by mistake – shows that it is a "punitive" measure which is intended to "placate public opinion". In this regard I have also failed to understand Petitioners' argument that the above pointed at the existence of hidden "motives" or "proved" the "punitive" purpose argument in a manner which completely undermined the above position of the professional bodies.

18. Another central argument of the Petitioners as aforesaid is that there was no room to exercise the power according to the Regulation in the case at hand in the absence of a sufficient factual basis in view of the stage of the criminal proceedings which are pending against the Perpetrator and given the fact that no information was given to the Petitioners about the evidence which exists with respect to the Perpetrator's involvement in the attack. However, it is a well-grounded principle that the exercise of the power to seize and demolish is not contingent on the conviction of the perpetrator in the criminal proceeding, and the Respondent may rely on evidence satisfying the administrative evidence test (**Qawasmeh**, paragraph 27; **Dweikat**, paragraph 56; HCJ 2828/16 **Abu Ziad v. Commander of the Military Forces in the West Bank**, paragraph 6 (July 7, 2016) (hereinafter: **Abu Ziad**); **Dahadha,** paragraph 9). However, for the purpose of exercising the power clear, unequivocal and convincing administrative evidence are required (HCJ 5376/16 **Abu Hdeir v. Minister of Defense**, paragraph 34 (July 4, 2017)). In the case at hand, having reviewed the evidentiary basis against the Perpetrator which was submitted for our review, and with respect of which obviously no details can be divulged since the investigation of the matter has not yet been concluded, it can be clearly and unequivocally determined that the materials can establish (certainly at the required administrative level) major, direct and clear involvement of the Perpetrator in the attack. It should also be noted, with respect to Petitioners' argument concerning the fact that investigation materials were not provided to them, that even if an indictment was filed against the Perpetrator it would not have given the Petitioners the right to receive the investigation materials in the framework of the proceedings at hand (unlike a defendant's

right according to section 74 of the Criminal Procedure [Consolidated Version] Law, 5742-1982; and see: HCJ 480/21 **Kabha v. Military Commander of the West Bank Area**, paragraph 10 (February 3, 2021) (hereinafter: **Kabha**)).

19. And with respect to the residential connection between the Perpetrator and the Apartment. The Petitioners do not dispute the fact that such a connection exists, and their argument in this regard focuses on the harm which is expected to the family members living together with the Perpetrator. Here too I did not find any merit in Petitioners' argument that in the case at hand there are unique circumstances justifying interference with Respondent's discretion. Frequently, when residential homes are concerned, the demolition of a Perpetrator's home may lead to harsh and severe consequences for his family members who naturally include, more than once, minors. President **A. Barak** noted in this regard in the past as follows:

> "We are aware of the fact that the demolition of the building harms the housing of the first petitioner and her children. This is not the purpose of the demolition order. It is not punitive. Its purpose is to deter. However, its consequences to the family members are severe. The Respondent is of the opinion that it is imperative, in order to prevent additional harm to the lives of innocent people. He is of the opinion that pressure of the families may deter the perpetrators. There is no assurance that this measure is indeed effective, but in the framework of the few measures left to the state to defend against "living bombs" this measure should not be disregarded" (HCJ 2006/97 **Ghanimat v. GOC Central Command – Uzi Dayan**, IsrSC 51(2) 651, 653-654 (1997)).

The above, including all of aspects thereof, are also true today.

20. Therefore, the mere harm caused to the Perpetrator's family members does not make the demolition of the building unlawful or disproportionate. The need to deter also stands when minors reside in the house, and it does not lead to the determination that the Respondent exceeded the bounds of his discretion (see for instance: **Abu Ziad**, paragraph 7; **Dweikat**, paragraph 43). In suitable cases, while weighing the circumstances, and the same applies to the case at hand, preferring deterrence considerations over the violation of the rights of the residents of the house is appropriate even when minors are concerned (HCJ 8786/17 **Abu Alrob v. Commander of IDF Forces in the West Bank**, paragraph 33 (November 26, 2017); **'Atawaneh**, paragraph 16).

21. As aforesaid, the Petitioners in their arguments emphasized the fact that the family members were not involved in the attack and were not aware of the perpetrator's actions. However, this too does not tip the scales (see for instance: **Hanatche,** paragraph 21; HCJFH 5924/20 **Military Commander of the Judea and Samaria Area v. Abu Suhileh**, paragraph 7 (October 8, 2020); HCJ 799/17 **Qanbar v. GOC Home Front Command**, paragraph 10 (February 23, 2017)). The Respondents emphasized that the expected harm to the family members, to whom no knowledge of the Perpetrator's involvement in the attack was attributed, was considered and taken into account in view of all of the relevant data. In this regard weight was *inter alia* given to the fact that it was a pre-planned and cruel attack; the Perpetrator's direct involvement in the attack which was committed for ideological motives; the direct residential connection between the

Perpetrator and the Apartment (which in fact, as aforesaid, is not in dispute). In addition, I was not convinced that there is room to limit the seizure and demolition order only to the room of the Perpetrator, given the fact that he has a clear residential connection to the entire Apartment (see also: **Hanatche,** paragraph 24). Indeed, the deterring purpose underlying the Regulation may cause - material - harm also to the innocent (**HaMoked Judgment**, paragraph 4 of the opinion of Justice **N. Sohlberg**). However, given the entirety of data which were available to the Respondent while the decision concerning the exercise of the power was made, it cannot be said that we are concerned with a flawed result which *prima facie* requires judicial interference. In addition, it should also be noted that the Respondent considered the proportionality of the harm and has consequently limited it to the second floor of the Building and did not apply it to the other parts of the Building which belong, according to the Petitioners themselves, to the Perpetrator and his siblings. Under the above circumstances, Respondent's decision does not warrant judicial interference.

22. Finally, with respect to Petitioners' arguments on the engineering level. The decision to demolish was made on the basis of a specific engineering opinion. With respect to the first floor of the Building it was noted in the opinion that damage was possible as a result of the activity itself, but it was however stated that maximum effort will be meticulously taken at the engineering planning and execution stage to cause the harm to be of a very limited nature causing "low likelihood of low-level damage". It was also emphasized that based on past experience in previous cases with similar features, it has been proved that demolition by a similar method was carried out, “without structural damage exceeding the geographical area of the demolition.” In addition, it emerges from the opinion that no damage to adjacent buildings was expected and that at the most, there was a low chance of low-level damage. In addition, with respect to the damage which was expected to nearby infrastructure, it was stated that an effort would be made to disassemble the infrastructure which may be harmed and to accordingly prevent the damage which may be caused to them. In addition, the engineering opinion which was attached by the Petitioners to their petition was transferred to the professional bodies on behalf of the Respondent for their examination, and it was found that the damage described in said opinion was not expected to occur. Accordingly, the Petitioners did not establish any grounds for interference also from this aspect, also in view of the fact that the method of demolition is one of those professional matters regarding which the Respondent has particularly broad discretion and he is presumed to exercise the required caution (**Qawasmeh**, paragraph 31; **Kabha**, paragraph 13).

In conclusion, the Respondent is of the opinion that the demolition of the Apartment is required to deter potential perpetrators from committing similar attacks in the future. The decision was made after all relevant considerations were considered, and shows no cause for interference by this court. If my opinion is heard the petition shall be dismissed and the temporary order which was issued on January 23, 2022 shall expire on February 10, 2022 at 12:00.

J U S T I C E

Justice S. Shohat:

I concur.

J U S T I C E

Justice G. Karra:

1. I have reviewed the opinion of my colleague, Justice **D. Mintz**. I cannot join his opinion.

2. Firstly, as I have already noted in the past, the exercise of the power of the military commander for the purpose of house demolition by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119** or the **Regulation**), raises difficulties under domestic law and international law. Said difficulties have not yet been clarified and thoroughly discussed in the judgements of this court. As noted by my colleague, Justice **M. Mazuz**:

> This court has recently rejected attempts to re-visit these issues and to thoroughly examine them […] The main reason which was given was that said issues have already been discussed and decided in previous judgments. However, a careful review shows that the discussion of these issues in previous judgments was not exhausting, and moreover, we are mostly concerned with judgments from the eighties and nineties of the previous century, before the constitutional era in Israeli law, while during the period which has passed since then the legal norms of international law also underwent considerable changes" (HCJ 7220/15 '**Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015 (hereinafter: '**Aliwa**) paragraph 4 of the judgment of Justice **M. Mazuz**).

These questions should be re-visited by an expanded panel of Justices.

Statements to that effect were made by me, inter alia, in HCJ 6905/18 **Naji v. Military Commander of the West Bank Area** (December 2, 2018) (hereinafter: **Naji**); HCJ 8886/18 Jabarin v. **Military Commander of the West Bank Area** (January 10, 2019); HCJ 4853/20 **Abu Baher v. Military Commander of the West Bank Area** (August 10, 2020); and only recently in HCJ 144/22 **Abu Skhidem v. GOC Home Front Cmmand** (January 19, 2022) (hereinafter: **Abu Skhidem**).

3. However, notwithstanding the fact that the ruling which applies to the mere authority to exercise the Regulation in cases such as the case at hand has not changed, the manner by which the power is exercised by the military commander, its reasonableness and proportionality are not immune from judicial scrutiny, since, as is known:

> "The scope of Regulation 119 of the Defence Regulations, as drafted, is very broad […]the military commander must make prudent and limited use of said authority, according to principles of reasonableness and proportionality […] The above ruling was reinforced following the enactment of the Basic Law: Human Dignity and Liberty, in light of which the Regulation should be interpreted (HCJ 7040/15 **Hamed v. Military Commander of the West Bank Area**, paragraph 23 of the judgment of President **M. Naor** (November 12, 2015)).

4. The confidential information presented to us does indeed substantiate to a great extent the argument that the suspect, the home of whose family the military commander wishes to demolish, is the perpetrator who killed the late Yehuda Dimentman of blessed memory and injured two additional Israeli citizens on December 15, 2021, despite the fact that at this stage the investigation has not yet been officially concluded and an indictment has not yet been filed against the perpetrator.

5. As known, before the demolition of a perpetrator's home according to Regulation 119, the military commander is required to specifically consider a host of considerations in each and every case. These considerations include, *inter alia*, the severity of the acts attributed to the perpetrator; the harm caused by the demolition to the tenants of the Building; the degree of the tenants' involvement in the acts of the perpetrator; and the existence of means causing less harm to the Building which is about to be demolished and its neighboring buildings (see, for instance: **Naji,** paragraph 27 of the judgement of Justice **Y. Willner**).

6. The Petitioners, the wife and four minor children of the perpetrator, reside in the Palestinian village of Silat al-Harithiya. The Apartment that the military commander wishes to demolish (hereinafter: the **Apartment**) is located on the second floor of a two-story building, which serves as the residence of additional family members of the perpetrator. The Petitioners did not know, and there is no allegation that they knew that the perpetrator was planning to commit the attack. No evidence was presented to the effect that they could have known that the perpetrator intended to commit the attack, that they could have prevented it or that the attack was in any way connected to the Apartment. There is also no allegation that they have assisted the perpetrator in retrospect, after the attack.

   On the evening of December 20, 2021, after the perpetrator's arrest, measurements of the Apartment were taken by the IDF. On January 6, 2022, the military commander gave notice of the intention to demolish the Apartment. It should be noted that the notice was firstly given to the media by a press release, and only later that morning to the Petitioners, who reside in the Apartment.

7. Under these circumstances, whereby the perpetrator's family members had no knowledge of his intention to commit the attack and did not identify with it after the fact, and in the absence of any connection between the attack and the Apartment – the imposition of the sanction constitutes unreasonable and disproportionate collective punishment devoid of any legal basis. As I have noted in **Abu Skhidem**:

> "When none of the perpetrator's family members had any knowledge of his intentions before the action or any involvement therein, and did not identify with his actions after the fact, the sanction of demolishing the only residential unit of the family members is therefore unreasonable and disproportionate collective punishment having no moral or legal justification and is devoid of any deterring effect. Relevant to this matter are the words of Justice (as then titled) **M. Cheshin** in HCJ 2006/97 **Ghanimat v. COC Central Command** (March 30, 1997): 'The first petitioner before us is the wife of the suicide-murderer and mother of his four minor children. The wife and children live in the same apartment in which the suicide- murderer lived, but no one argues that they collaborated with his contemplated actions – which he carried out – the killing of innocent human beings. No one argues that they even knew of the contemplated action. If we demolish the perpetrator's home, we demolish at the same time – and with the same hammer blows – the apartment of the wife and the children. In doing so we shall punish the wife and the children although they have not sinned. This is not done here. Since the establishment of the state – and certainly since the Basic Law: Human Dignity and Liberty we read into the provisions of Regulation 119 of the Defense Regulations, we read into it and entrench in it values which are our values, values of a Jewish, free and democratic state. Values which lead us directly to ancient times and now as then: they shall no longer say fathers have eaten unripe grapes and the teeth of the children shall be set on edge. But whoever eats unripe grapes his teeth shall be set on edge'."

8. In the case at hand, as aforesaid no evidence was presented indicating that the perpetrator's family – including his four children aged 4 – 10 – were involved in the attack, or had any knowledge thereof. In fact, Respondents' response focuses in its entirety, on the severity of the deeds attributed to the perpetrator.

Obviously, there is no dispute that horrendous deeds are attributed to the perpetrator, the severity of which cannot be overstated. The perpetrator was located and arrested after the murder – and criminal charges are about to be filed against him. Subject to his conviction, to the extent it is proven beyond any reasonable doubt that he committed the acts attributed to him, he will be punished for his deeds. However, the need to punish the perpetrator, does not justify neglecting the distinction between cases in which the family members took part or were responsible in one way or another for the perpetrator's deeds, and cases – like the case at hand – in which the family members were not at all aware of his intentions (see: '**Aliwa**, paragraph 13 of the judgment of Justice **M. Mazuz**).

In fact, the mere decision to issue a demolition order against the perpetrator's home before the investigation of the matter has been officially concluded, raises in and of itself serious legal questions. The determination that a demolition order may be issued against a perpetrator's home before the time is ripe for filing an indictment against him for the same attack which ostensibly justifies the demolition of his home, is not obvious.

9. Moreover, the Respondents argue that the demolition of the Apartment shall create deterrence which shall prevent future acts of terror. With respect to this argument I can only repeat my position whereby I am not of the opinion that in the case at hand – like in many other cases in the past – the assumption that the demolition of the Apartment shall lead to deterrence has been properly substantiated.

My colleague, Justice **D. Mintz**, is of the opinion that there is merit to Respondents' position whereby the extent of influence that the demolition of a perpetrator's home has on future perpetrators cannot be necessarily estimated on the basis of numerical data, since it is "a conclusion which is affected by weighing the entire gamut of the data". However, after I have examined the opinion in the case at hand I do not think that the conclusion of the military commander whereby the demolition of the house was justified in view of the purpose of deterring future perpetrators was based on a sufficient "gamut of data".

As I have recently noted:

> In the case at hand, there is no dispute that the security officials of the state of Israel have considerable and highly appreciated expertise in fighting terror. But the fact that an IDF soldier or an ISA agent has extensive knowledge in fighting terror, and the ability to identify the risks posed by a perpetrator and act to neutralize them – does not necessarily turn them into experts who can identify potential "collective deterrence" of a civilian population by the measure of house demolition, for instance. At least, we were not **presented with any evidence substantiating the expertise of the author of the security opinion which was submitted to us in this regard, and we have no means enabling us to examine the level of its credibility, the data underlying it, the methodology justifying it and the like.**
>
> Expertise is not a negligible matter. Not every counter-terrorism expert is an expert regarding deterring a civilian population. **Expertise requires proof and should be substantiated**. An expert may testify only in the area of their expertise and only after their expertise in the area was properly proven. I am of the opinion, that **the time has come to re-visit the professional validity, credibility and weight of the security opinions submitted to us in cases such as the case at hand**. (**Abu Skhidem**, paragraph 10 of my judgment. Emphases were added).

I did not change my position in the case at hand. To justify the demolition of the home of innocent people for "deterring" purposes, proof should be brought that the demolition of the house shall indeed lead to deterrence. Using such an offensive sanction against someone with respect of whom there is no allegation that they have taken any part in the attack, cannot be totally based on a "gamut" of vague estimates. It should be based on solid and clear data which were gathered according to a clear and valid methodology. Such data were not presented in the case at hand. Therefore, no actual weight should be given to the security opinion and it cannot be said that the decision to demolish the

Apartment – which in fact is based only on the security opinion – was an informed decision.

Accordingly, the decision to demolish the Apartment was an uninformed decision and therefore, in my opinion, is unreasonable and disproportionate. The above is reinforced by the fact that according to the opinion, maintaining awareness – that committing an attack will have an economic, personal and familial toll – requires the consistent use of this measure.

10. Parenthetically, it should also be taken into account that due to a "mistake" of the military, the perpetrator's family improperly learnt of the intention to demolish the Apartment through the media, before they received an official notice in that regard. In the hearing before us, in view of the court's questions, Respondents' legal counsel admitted that the IDF spokesperson's unit gave notice to the media about the intention to demolish the Apartment at 08:51, before the notice was given to the perpetrator's family. According to the Respondents, the notice was "deleted" shortly thereafter and was re-published only at 09:17, ostensibly after notice in that regard had been given to the family. In fact, it emerges from the petition that the family learnt of the decision to issue the demolition order from the media.

    The Petitioners are of the opinion that the fact that the notice of the demolition had been published in the media before it was given to the Petitioners shows that its purpose is to punish rather than to deter. I for one am not indeed convinced that the above has no evidentiary value, as far as the purpose of the demolition is concerned.

11. In conclusion, under the circumstance of the case, since the use of the Regulation lacks reasonableness and proportionality, I am of the opinion that the demolition order should be voided.

J U S T I C E

Decided as stated in the judgment of Justice **D. Mintz,** who was joined by Justice **S. Shohat** against the dissenting opinion of Justice **G. Karra**.

Given today, Adar A 3, 5782 (February 4, 2022).

Justice Justice Justice