At the Supreme Court
Sitting as the High Court of Justice

HCJ 8084/02
HCJ 8085/02
HCJ 8086/02
HCJ 8087/02

Before: The Honorable President A. Barak
The Honorable Justice D. Beinisch
The Honorable Justice A. Procaccia

The Petitioners in HCJ 8084/02:
1. _____ Abbasi
2. _____ Abbasi
3. HaMoked: Center for the Defence of the Individual

The Petitioners in HCJ 8085/02:
1. _____ Udah
2. _____ Udah
3. HaMoked: Center for the Defence of the Individual

The Petitioners in HCJ 8086/02:
1. _____ Qasim
2. _____ Qasim
3. HaMoked: Center for the Defence of the Individual

The Petitioners in HCJ 8087/02:
1. _____ Abbasi
2. _____ Abbasi
3. HaMoked: Center for the Defence of the Individual

v.

The Respondent: GOC Home Front Command

Petitions for Order Nisi

Date of session: 17 Heshvan 5763 (23 December 2002)

On behalf of the Petitioners: Att. Lea Tsemel; Att. Labiv Haviv

On behalf of the Respondent: Att. Yokhi Gnessin

Judgment

The President A. Barak:

Background

1. The Petitioners are terrorists and their family members. They are residents of Israel. They reside in East Jerusalem. The terrorist-Petitioners are responsible for a suicide bombing, for other serious terror attacks and for attempts to commit such terror attacks. *Inter alia*, they are responsible for the suicide bombing at Moment Café in Jerusalem; for the terror attack at the Mount Scopus campus of the Hebrew University; for the terror attack at a Rishon Le-Ziyyon club; for the explosion of a gasoline tanker in Rishon Le-Ziyyon; for an attempted terror attack at the Pi Gelilot site by attaching explosives to a gasoline tanker; etc. As a result of their actions, thirty five people were killed, and more than two hundred others were injured. After the terrorist-Petitioners were arrested, the GOC Home Front Command (hereinafter: the Respondent) gave notice (on 5 September 2002) of his intention of issuing orders to confiscate the houses in which they resided, by virtue of Regulation 119 of the Defense (Emergency) Regulations – 1945 (hereinafter: the Defense (Emergency) Regulations). In the notices sent by the Respondent, it was stated that the house of the Petitioners in HCJ 8084/02 was designated for demolition, whereas the houses of the other Petitioners (in HCJ 8085/02, HCJ 8086/02 and HCJ 8087/02) were designated for sealing. The Petitioners filed (on 9 September 2002) their objections against the intention of demolishing and sealing their houses. The Respondent dismissed the objections and issued (on 18 September 2002) demolition and sealing orders against the Petitioners' houses. Meanwhile, an indictment was filed (on 12 September 2002) with the Jerusalem District Court (CrimApp 5071/02), charging the terrorist-Petitioners with many offenses, including murder, attempted murder, membership in a terror organization, aiding the enemy in a war, etc. Against this background – and before the case at the District Court was decided – the petitions before us were filed. Their goal is to prevent the demolition and sealing of the Petitioners' houses.

2. This Court issued (on 23 September 2002) a Temporary Injunction ordering the Respondent to "refrain from confiscating, sealing or demolishing the apartments which are the subject matter of the petitions". After we heard the parties' arguments (on 23 October 2002), the District Court convicted (on 5 November 2002) the terrorist-Petitioners of the offenses with which they were charged. It did so after they admitted the facts of the indictment. According to the Respondent's notice (of 7

November 2002), Petitioner 1 in HCJ 8086/02 was convicted, *inter alia*, of thirty five acts of murder and of 211 attempted murders. Petitioner 1 in HCJ 8084/02 was convicted of twenty six acts of murder and of 129 attempted murders. Petitioner 1 in HCJ 8085/02 was convicted of nine acts of murder and of 82 attempted murders, whereas Petitioner 1 in HCJ 8087/02 was convicted of 78 offenses of attempted murder, aiding and abetting murder and aiding and abetting attempted murders.

The parties' arguments

3. The Petitioners claim that the demolition orders issued against them should not be executed. The essence of their claims pertained to the existence of the criminal procedure that was being conducted against the terrorist-Petitioners. They argued that so long as the criminal proceeding was pending, there was no room to order the demolition or sealing of the Petitioners' houses. In view of the terrorist-Petitioners' conviction in the criminal proceeding conducted against them, based on their confession, and in view of the agreement formulated between the Petitioners and the criminal prosecution regarding the penalties for which the prosecution will argue in the sentencing hearing (on 15 December 2002), there is no longer any need to address these arguments of the Petitioners, and we will not do so. We will present here the Petitioners' claims of a more general nature, and those raised in their complementary summations (of 17 November 2002).

4. The Petitioners claim that no use should be made of Regulation 119 insofar as it is aimed against residents of the State. They point out the severe injury to the basic rights of the terrorist-Petitioners' family members who reside in the houses designated for demolition and sealing, while they had no connection with their terrorist activity. They claim that in Jerusalem itself, there is no belligerent activity which justifies taking such a severe step, and that therefore taking the steps of demolition and sealing is not justified under the circumstances of the case. They claim that the severe penalties to which they are expected to be sentenced in the criminal proceeding are sufficient to gain the deterrence and punishment which the Respondent seeks to achieve by damaging the houses. Therefore, once the band - member Petitioners were punished in the criminal proceeding, adding the administrative sanction would result in the unnecessary penalization of their families. The Petitioners further claim that the acts of the Petitioner in HCJ 8084/02, whose house is the only one designated for demolition, are not the most severe compared to those of the other defendants, and therefore his house should not be demolished.

5. The Respondent rejects the Petitioners' arguments. He claims that his authority to demolish and seal the Petitioners' houses is well established in current law (Regulation 119 of the Defense Regulations (1945)), and that in the circumstances of this case there is full justification for taking these steps. He argues that the great severity of the terrorist-Petitioners' acts justifies exercising Regulation 119 of the Defense (Emergency) Regulations. He claims that this measure of demolishing and sealing houses is an absolute necessity in view of the severe terror attack from which Israel is recently suffering. As for taking the step vis-à-vis residents of Israel, the Respondent claims that such measure has already been taken in the past, and that in view of the rise in the involvement of Israeli residents in terror activity, there is justification for taking this step also within the territory of the State.

The normative framework

6. The Respondent's acts are fixed in Regulation 119 of the Defense (Emergency) Regulations. These regulations are a "law in force prior to the commencement of the Basic Law" (Article 10 of the Basic Law: Human Dignity and Liberty), and therefore the Basic Law cannot derogate from the validity thereof. The revocation or modification of the Regulations is therefore a matter for the legislator. However, the interpretation of the Regulations has to be performed against the background of the Basic Laws. Therefore, the authority conferred upon the Respondent in Regulation 119 has to be exercised proportionately (see FHHCJ 2161/96 *Sharif v. GOC Home Front Command*, *Piskei Din* 50(1) 485, 489; hereinafter – the *Sharif* Affair). Against this background, we shall turn to the Petitioners' claims.

7. The main argument of the terrorist-Petitioners which has to be addressed is that the penalties to which they were sentenced in the criminal proceeding (which include, with respect to most of them, many cumulative life sentences) fulfill the needs of penalization and deterrence, and that therefore there is no room to make use, in the circumstances of the case, of Regulation 119 of the Defense (Emergency) Regulations. We cannot accept this argument of the Petitioners. On the matter of penalization, this Court has repeatedly ruled that the use of Regulation 119 is designed for the purpose of deterrence and not penalization:

> **The authority conferred upon the Military Commander pursuant to Regulation 119 is not authority for collective punishment. The exercise thereof is not designed to punish the Petitioner's family. The authority is administrative, and its exercise is designed to deter, thus maintaining public**

order (HCJ 798/89 *Shukri v. The Minister of Defense* (not published; in Paragraph 3 of the Judgment)).

To emphasize, this authority is exercised only against the houses of the terrorists themselves, in which they resided and from which they sometimes left to commit the terror acts of which they were convicted. True, the outcome of this act of deterrence also hurts the terrorist's family, but this is not the purpose of the Regulation (HCJ 698/85 *Dejales v. Commander of the IDF forces in Judea and Samaria*, *Piskei Din* 40(2) 42, 44; HCJ 2006/97 *Ghanimat v. GOC Central Command*, *Piskei Din* 51(2) 651, 653-654; hereinafter – the *Ghanimat* Affair). Indeed, the claim that the Petitioners are expected to be sufficiently punished in the criminal proceeding, does not preclude exercising Regulation 119 of the Defense (Emergency) Regulations in order to achieve the deterrence goals thereof. Nor can I accept the Petitioners' claim that the prison sentences given to them are sufficient to fulfill the needs of deterrence. The deterrence of terrorists who are frequently prepared to sacrifice their lives to achieve their goals is a complex matter (HCJ 1730/96 *Sabih v. Commander of the IDF forces*, *Piskei Din* 50(1) 353, 361; the *Ghanimat* Affair, at p. 653-654). Often, the criminal penalties which the terrorists are expected to face in the criminal proceeding are insufficient for deterring them. The Respondent has expressed his position that this move of demolishing houses in which terrorists reside has a deterrent effect on terror (Paragraph 48 of the Respondent's Answer of 16 October 2002). We do not deem, in the circumstances of the case, to intervene in this position.

8. Also the Petitioners' other arguments should be dismissed. The Respondent has exercised his discretion lawfully. He took into account the great severity of the acts of the terrorist-Petitioners (HCJ 2722/92 *Alamarin v. IDF Commander in the Gaza Strip*, *Piskei Din* 46(3) 693, 700), and in view of this severity decided to resort to the severe measure of exercising Regulation 119 of the Defense Regulations. True, the houses are located inside the territory of Israel, but it has already been ruled that such houses too are subject to the authority of demolition by virtue of the Defense Regulations (the *Sharif* Affair, p. 489). As in the *Sharif* Affair, in this case too the Petitioners have failed to establish their claim that the demolition policy is implemented in a discriminatory manner, considering the severity of the acts attributed to the terrorist-Petitioners (*Id*., p. 489).

9. The Petitioners are right to claim that the Respondent is required to act with proportionateness. Under the circumstances of the case – and in view of the great severity of the terrorist-Petitioners' acts, the Respondent's action is proportionate. In HCJ 8085/02 it was decided to seal the second floor of the building in which the

Petitioner and his family resided, and not to harm the first floor on which another family lives. So it was done also in HCJ 8086/02 (where it was decided to seal the first floor and not harm the second and third floors) and in HCJ 8087/02 (where it was decided to seal the first floor and not harm the other floors). It was decided to demolish the house of the Petitioner in HCJ 8084/02 since it is a one-story house in which the Petitioner lived with his family. The Respondent agreed to diminish the force of the blast in view of the fear of damaging nearby houses. The Petitioners' claim whereby, considering the reduced degree of involvement by the terrorist-Petitioner (in HCJ 8084/02) in the band's activity, there is no room to demolish his house, should be dismissed, because the Respondent's refraining from demolishing the other Petitioners' houses results, as we have seen, from considerations which are inapplicable to the said Petitioner's case. The Petitioner's actions are severe enough to justify the step that is taken against him.

10. The Petitioners claimed, based on a professional opinion which they submitted to us, that sealing the houses would cause damage to the residents of the other parts of the houses, and could even cause them to collapse. The Petitioners further claim that demolishing the house of the Petitioner in HCJ 8084/02 could still cause damage to surrounding houses. We have perused the opinion, and the Respondent too has it before him. The Respondent has undertaken "to take the steps necessary to avoid causing damage to buildings to which the orders do not apply, and to this end, the Respondent has decided that the execution of the orders be performed under engineering supervision in the field" (Paragraph 4 of the Respondent's notice of 21 November 2002). The Respondent is presumed to peruse the opinion of the Petitioners' expert before exercising Regulation 119 of the Defense Regulations. Against this background, the Respondent's undertaking is sufficient to dismiss the Petitioners' claims on this matter.

The Petitions are denied.

The President

Justice D. Beinisch:

I agree.

Judge

Justice A. Procaccia:

I agree.

Judge

Decided as stated in the opinion of the court filed by President A. Barak.

Issued today, 2 Shevat 5763, (5 January 2003).

The President Judge Judge