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At the Supreme Court
Sitting as the High Court of Justice

HCJ 4597/14

In the matter of:

1. Awawdeh, ID No. _____
2. 'Awwad, ID No. _____
3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
4. **Physicians for Human Rights – Israel**
5. **The Public Committee Against Torture in Israel**

all represented by counsel, Adv. Sigi Ben Ari (Lic. No. 37566) and/or Abir Joubran-Dakwar (Lic. No. 44346) and/or Daniel Shenhav (Lic. No. 41065) and/or Hava Matras-Irron (Lic. No. 35174) and/or Noa Diamond (Lic. No. 54665) and/or Benjaim Estejriba (Lic. No. 58088) and/or Tal Schneider (Lic. No. 62448) and/or Bilal Sbeihat (Lic. No. 49838) and/or Anat Gonen (Lic. No. 28359)

Of HaMoked Center for the Defence of the Individual, founded by Dr. Lotte Salzberger
4 Abu Obeida St., Jerusalem, 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **West Bank Military Commander**
represented by council from the State Attorney's Office
Ministry of Justice, Jerusalem

The Respondent

Petition for Order Nisi and Interim Injunction

A petition for an *order nisi* is hereby filed which is directed at the Respondent ordering him to appear and show cause why he should not refrain from the seizing and demolishing, or causing any other damage to the home of Petitioner 1 and the apartment occupied by Petitioner 2 and her five children, in the village of Idhna.

Urgent Motion for Interim Injunction

The Respondent has given notice of his intention to execute the seizure and demolition order on Monday, June 30, 2014, at 12:00 noon.

The Honorable Court is hereby urgently moved to issue an interim injunction instructing the Respondent and anyone operating on his behalf to refrain from causing any irreversible damage to the Petitioner's home, including to the apartment occupied by Petitioner 2 and her five children, pending the conclusion of proceedings in the petition herein.

The grounds for the petition:

1. The petition herein concerns the fate of the residence of two nuclear families, a structure built and exclusively owned by Petitioner 1. The two apartments in the building are occupied by the family of Petitioner 1 and the family of Petitioner 2. The cause for the demolition is an attack, the commission of which is attributed to the brother of Petitioner 1, who is also the husband of Petitioner 2 and who is in the custody of security forces. The demolition of the home, in full or in part, contravenes a fundamental moral principle whereby "Parents are not to be put to death for their children, nor children put to death for their parents; each will die for their own sin." ([2 Kings 14: 6 \(New International Version\)](#), in other words, the principle of personal responsibility, which forms the foundation of the entire legal system.

The facts

General background

2. On June 23, 2014, the authorities named Ziad 'Awwad, the brother of Petitioner 1, as the suspect in an attack carried out on April 14, 2014, in which one person was killed and several others were injured. On the same day, the media reported that security forces would demolish Ziad 'Awwad's home in the village of Idhna.
3. Some two months after the attack attributed to the brother of Petitioner 1, on June 12, 2014, three Israeli youths were abducted in the West Bank, likely in the vicinity of the city of Hebron. A large scale military operation for their location and release has been underway ever since.
4. As reported in the media, as early as on June 16, 2014, the Government of Israel instructed the Ministry of Justice to look into the possibility of using sanctions against Hamas members as a means to put pressure on the organization in the context of the abduction incident. Ordering the demolition of homes belonging to Hamas members was one of the possibilities under consideration.
5. On that day, HaMoked: Center for the Defence of the Individual contacted several officials, most notably the Attorney General, demanding that such measures be avoided since they contravene Israeli law and international humanitarian law.

A copy of HaMoked's letter dated June 16, 2014 is attached hereto and marked **P/1**.

6. On June 25, 2014, HaMoked received the response of the Attorney General's office, whereby "the matter has been and continues to be examined by this office".

A copy of the response of the Attorney General's office is attached hereto and marked **P/2**.

The parties

7. Petitioner 1(hereinafter also: **the Petitioner**) is the brother of Ziad ‘Awwad, ID No. _____. He is married and has six children. The Petitioner, his wife, and five of their children reside in one of the apartments in the building that belongs to the Petitioner.
8. Petitioner 2 is the wife of Ziad ‘Awwad and the Petitioner’s sister-in-law. She and her five children reside in an apartment they lease in the building belonging to the Petitioner.
9. Petitioner 3 (hereinafter: **HaMoked**) is a non-profit organization that promotes human rights in the Occupied Palestinian Territories (OPT).
10. Petitioner 4 is an Israeli human rights organization that brings together members of the Israeli medical community who work through directly providing medical assistance, as well as through advocating for policy change, to promote human rights in general and the right to health in particular for all individuals in Israel and under its control.
11. Petitioner 5 is a human rights and social change organization that believes torture and ill-treatment, of any type and under any circumstances, are inconsistent with the values of democracy and the rule of law.
12. Respondent 1 is the Military Commander in the West Bank, on behalf of the State of Israel, which has held the West Bank under belligerent occupation for some 47 years. Respondent 1 issued an order for the seizure and demolition of the western part of the Petitioner’s home, pursuant to his powers under the **Defense (Emergency) Regulations – 1945**.

Exhaustion of remedies

13. On June 23, 2014, in the afternoon, the families of Petitioners 1 and 2 received the “Notice of intent to seize and demolish the structure where Ziad ‘Awwad, ID No. _____ resides”.
A copy of the notice, dated June 23, 2014 is attached hereto and marked **P/3**.
14. On June 25, 2014, the Petitioner filed an objection against the Respondent’s intent to seize and demolish his home, demanding he withdraw from any such intent. The demand was made given that the measure pursued by the Respondent, the seizure and demolition of a home **owned by the Petitioner** and serving as the residence of 13 individuals, is a cruel and inhuman measure that deliberately harms innocents, breaches international humanitarian law and fails to meet the tests of proportionality.
A copy of the objection dated June 25, 2014 is attached hereto and marked **P/4**.
15. The Respondent’s response to the objection was received on Friday, June 27, 2014, in the evening. The response indicated that the military commander had decided to accept the objection in part and “reduce the damage to the residential structure wherein the terrorist resided such that only the section of the building occupied by the terrorist and his nuclear family would be damaged, provided that the commander is satisfied that the demolition will not damage the other section of the structure, occupied by the family of the terrorist’s brother”.
A copy of the Respondent’s decision on the objection dated June 27, 2014 is attached hereto and marked **P/5**.

The families of Petitioners 1 and 2 and the building slated for demolition

16. The Petitioner's house, approximately 500 square-meters in size, is home to 13 individuals. It has two stories, with four storage units on the bottom floor and two apartments on the top floor. One apartment is occupied by the Petitioner's family – the Petitioner himself, his wife and their five children aged 5 to 20. The second apartment is occupied by Petitioner 2 and her five children, the youngest is four months old and the oldest is twenty (Ziad 'Awwad and his son ____ are currently held in detention).

17. Below is a list of the people living in the Petitioner's house:

In the Petitioner's apartment, not slated for demolition:

- a. The Petitioner, ____ 'Awawdeh, born in 1969, a carpenter;
- b. ____, the Petitioner's wife, a homemaker;
- c. ____, the Petitioner's son, born in 1993, second year accounting student at al-Khalil University;
- d. ____, the Petitioner's daughter, born in 1998, high school student;
- e. ____, the Petitioner's daughter, born in 2002, in school;
- f. ____, the Petitioner's son, born in 2004, in school;
- g. ____, the Petitioner's son, born in 2008, cared for by his mother in the home;

In the apartment of Petitioner 2, slated for demolition:

- a. Petitioner 2, the wife of the accused, Ziad 'Awwad, a homemaker;
- b. ____, the son of Petitioner 2, born in 1994, and suffering from moderate intellectual disability, cared for in the home;
- c. ____, the daughter of Petitioner 2, born in 1997, stays home;
- d. ____, the son of Petitioner 2, born in 1998, stays home;
- e. ____, the daughter of Petitioner 2, born in 2012, cared for in the home;
- f. ____, the son of Petitioner 2, born in 2014, cared for in the home.

18. **The demolition of the apartment occupied by Petitioner 2 and her five children would leave the family homeless and may cause damage to the apartment occupied by the Petitioner's family of seven.**

The law

19. The Respondent draws his power to employ the sanction of seizing, sealing or demolishing a house from Regulation 119 of the Defense (Emergency) Regulations – 1945 (hereinafter: Regulation 119). The Petitioners will argue that Regulation 119 contravenes the norms by which the military commander is bound and he must therefore refrain from using said Regulation.

Regulation 119 contravenes the norms by which the military commander is bound

20. Above all, the military commander is obligated to respect international humanitarian law and the law of belligerent occupation included therein. The Respondent is a trustee of the OPT, not its sovereign. All powers in the OPT are vested in him pursuant to international law, which forms the sole normative foundation for the exercise of said powers ([HCJ 2150/07 Abu Safiya et al. v. Minister of Defense](#), unreported, December 29, 2009).
21. Regulation 119 contravenes two central provisions in the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter: Geneva Convention IV), which lays the foundation for the law of belligerent occupation in international law. Article 33 prohibits collective punishment and reprisals against protected persons and their property, and Article 53 of the convention prohibits the occupying power from destroying houses and property.
22. Regulation 119 also contravenes Article 50 of the Hague Regulations concerning the Laws and Customs of War on Land (1907) (hereinafter: the **Hague Regulations**), which prohibits the use of collective punishment, and Article 43 thereof which prohibits damage and destruction of property.
23. Second, the Respondent is also obligated to respect international human rights law, primarily the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as established in the advisory opinion of the International Court of Justice with respect to the separation wall. This Honorable Court has also examined actions taken by the military commander vis-à-vis these norms. ([HCJ 9132/07 Al Basyouni et al. v. Prime Minister](#), TakSC 2008(1) 1213; [HCJ 7957/04 Mara'abe v. Prime Minister of Israel](#), TakSC 2005(3) 3333, Para. 24; [HCJ 3239/02 Marab v IDF Commander](#), TakSC 2003(1) 937; [HCJ 3278/02 HaMoked: Center for the Defence of the Individual v. Military Commander in the West Bank](#), IsrSC 57(1), 385.)
24. Regulation 119 contravenes Article 17 of the International Covenant on Civil and Political Rights (the right not to be subjected to arbitrary or unlawful interference with one's home), Article 12 (the right to freely choose one's residence), Article 26 (equality before the law) and Article 7 (the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment). The Human Rights Committee, which oversees state party compliance with the covenant, has made a similar finding in its 2003 opinion regarding Israel.
25. Regulation 119 also contravenes some of the articles contained in the International Covenant on Economic, Social and Cultural Rights, primarily Article 11 (the right to an adequate standard of living, and adequate housing) and Article 10 (special protection for the family unit). The regulation also contravenes Articles 12, 13 and 17 of the Universal Declaration of Human Rights and may amount to a war crime under Article 8(2)(iv) of the Rome Statute of the International Criminal Court (Extensive destruction and appropriation of property, not justified by military necessity).

House demolition is a breach of the prohibition on collective punishment and a violation of fundamental rights

26. The prohibition on collective punishment is one of the fundamental concepts of the law:

Far be it from you to do such a thing – to kill the righteous with the wicked,
treating the righteous and the wicked alike. Far be it from you!
([Genesis 18:25 \(New International Version\)](#))

27. The prohibition on collective punishment has entered customary international law. Article 50 of the Hague Regulations sets forth:

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

28. And Article 33 of the Geneva Convention IV categorically sets forth:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

[...]

Reprisals against protected persons and their property are prohibited.

29. This matter has been expressed in the case law produced by this Honorable Court as follows:

My colleague, Justice M. Cheshin has already stated that with respect to Regulation 119 of the Defense (Emergency) Regulations – 1945, the basic concept is that “Each shall bear his own transgressions, and each shall die for his own sins... There is no punishment without warning, and only those who have offended shall be stricken.” ([HCJ 2006/97 Ghneimat v. GOC Central Command, Uzi Dayan](#), IsrSC 41(2) 651, p. 654).

30. It is noted that even if, as the Respondent maintains, the purpose of the demolition is deterrence, in actual fact, it harms innocents and therefore, when examined against the outcome, constitutes collective punishment.
31. The demolition violates the very core of human dignity. A person’s dignity is severely injured when she is thrown out of her home and remains without shelter, without a roof over her head. The severe affront to dignity stems also from the fact that a person’s home is not just a physical structure, but also a place to which a person has a deep emotional attachment, a place that contains her spiritual possessions and memories (see also, **The (II)Legitimacy of Demolishing Terrorists’ Homes – Judgment Comments following the Judgment in Hisham Abu Dheim v. GOC Home Front Command**, by Prof. Mordechai Kremnitzer, February 24, 2009, Israel Democracy Institute).

The exercise of power

32. Though house demolitions contravene international humanitarian law and violate fundamental rights, this Honorable Court has found that Regulation 119 may legitimately be used for deterrence, when the measure is required in order to prevent further harm to innocents ([HCJ 2418/97 Abu Farah v. Military Commander](#), IsrSC 51(1) 226; HCJ 6996/02 [Zo'arub v. Military Commander in Gaza](#), IsrSC 56(6), 407 and others).
33. However, case law has delimited the Respondent’s discretion when exercising his power to seize and demolish homes under Regulation 119:

[...] the above does not mean that the military commanders, who have the authority, are not required to use reasonable discretion and a sense of proportion in each case, nor that this court is not able or bound to intervene in the decision of the military authority, whenever the latter intends to exercise its authority in a way and manner that are unthinkable.

([HCJ 2722/92 al-'Amrin v. IDF Commander in the Gaza Strip](#), [1992-4] IsrLR 1, para. 7) (hereinafter: **al-'Amrin**)

34. Thus, the Respondent must carefully examine the specific circumstances of each case: the expected harm to the family, the assailant's ties to the house, the severity of the attack, the size of the house and the effect the sanctions in question would have on other individuals, whether any of the victims of the demolition have any connection to the attacker's actions, whether it is possible not to damage the entire structure, etc. (see HCJ 6299/97 **Yasin v. Military Commander**, reported in Nevo, and **al-'Amrin**).
35. The Petitioners argue that in the matter at hand, the Respondent is not acting within the parameters set forth in case law, and has ordered a serious, grave measure that would leave at least six people without a roof over their heads, without giving the required careful consideration to the circumstances of the case.
36. Even if, as stated by the Respondent in his response to the objection, this Honorable Court has sanctioned house demolitions in circumstances that partly resemble the matter at hand, each case must still be examined on its own merits and discretion must be based on the cumulative circumstances and facts in their entirety. The examination should not center on whether or not each factor individually gives rise to the exercise of powers under Regulation 119, as the Respondent does, but rather, on whether all circumstances in the case at hand cumulatively undermine the foundation of the military commander's decision.
37. With respect to the factual foundation – a serious decision to demolish a home, which, if implemented, creates an irreversible situation, must be based on accurate facts, on the collection and meticulous examination of information. In the judgment given in HCJ 802/89 **Nasman v. IDF Commander in the Area**, the court dismissed the military commander's decision to demolish a home, and returned the matter for further consideration in light of inaccurate facts and arguments:

There is no need to elaborate on the fact that a decision made by a public authority must be anchored in facts and figures that are appropriately collected and considered before serving as the factual foundation for the decision (see, on this issue, HCJ 297/82 [1], pp. 48-49). Once part of this foundation is found to be baseless, the Respondent's decision should be struck down so that he may reconsider his position in light of the true facts of the case.

... Recall that the case in question involves the demolition and sealing of a structure where others reside, an action that would bring harm to individuals who have not sinned. Indeed, as has been ruled on more than one occasion, this Court does not intervene in decisions made by the military commander under Regulation 119 of the Defense (Emergency) Regulations 1945, when such decision meets the test of reasonableness. However, due to the harsh results of this action, I believe that there is room, in each case, to carefully examine whether the decision is appropriately anchored in the relevant facts and whether the Respondent appropriately used his discretion (*Ibid.*, IsrSC 44(2) 601).

The expected damage to the Petitioner's apartment and home

38. In the decision on the objection, the Respondent notes that he would "seize and demolish only the section of the structure occupied by the terrorist and his nuclear family ... provided that he is

satisfied that the demolition would not damage the other section of the structure, occupied by the family of the terrorist's brother".

39. The Respondent declares that he has decided to reduce the damage by demolishing only the western section of the structure, but that he has not yet been satisfied that destroying one part of the building would not damage the other part of the Petitioner's home. And still, before an examination to his satisfaction, the Respondent has issued the seizure and demolition order. In so doing, he failed to fulfil his obligation to rely on clear, accurate and unequivocal facts prior to issuing an order for such an extreme and irreversible measure.
40. The question arises: When, if ever, will the Respondent be satisfied that it is possible to destroy only one part of the structure without damaging the other? Will this occur after the demolition has already begun? And if so, what would become of the house if it emerges that it is impossible to destroy only its western part? There is no indication that the Respondent has a plan of action for ensuring that the demolition of the western part of the house will not damage the eastern part.

Ownership of the house by Petitioner 1

41. As stated in the opening paragraphs, the land on which the structure was built was originally owned by the Petitioner's father, and then transferred to him. Over several years, beginning in 1995 and ending in 2003, Petitioner 1 built his house. The house is registered with the tax authorities and the Idhna municipality under his name, as are the water and electricity bills for the house.

A copy of the Palestinian Finance Ministry, Property Tax Department, record of the Petitioner's title to the land and the structure is attached hereto and marked **P/7**.

A copy of confirmation from the Idhna municipality of the Petitioner's title to the land and the structure is attached hereto and marked **P/8**.

Copies of documents from the Idhna municipality confirming the registration of the utility bills in the Petitioner's name are attached hereto and marked **P/9a-b**.

42. The Petitioner's family moved into the house after construction was completed, followed by the Petitioner 2 and her children (Ziad 'Awwad was incarcerated in Israel at the time). After Ziad 'Awwad's release from prison in 2011, the brothers signed a contract on May 15, 2012, according to local custom and in order to prevent a possible family feud in the future, clarifying that Ziad 'Awwad had transferred all rights in the apartment in which he resides to Petitioner 1. Thereafter, on May 20, 2012, the brothers signed a lease agreement whereby Petitioner 1 would lease to Ziad 'Awwad the second floor apartment in which his family resides, in return for 800 Jordanian dinars per year.

A copy of the sale agreement between Petitioner 1 and his brother is attached hereto and marked **P/10**.

A copy of the lease agreement between Petitioner 1 and his brother is attached hereto and marked **P/11**.

43. In this context we note that despite the Respondent's intention to cause partial damage to the Petitioner's home – destroying the western side thereof, which includes the second floor apartment where Petitioner 2 and her family resides, and the storage units on the ground floor, under the apartment of Petitioner 2 – the damage to the Petitioner's property is still quite considerable. This is so even based on – the entirely unfounded – assumption that the apartment occupied by Petitioner 1 would not be damaged at all.

44. Moreover, Petitioner 1 owns a water reservoir with a 50-cubic-meter capacity that is located near the home. This reservoir may become damaged during the demolition, flood the entire house and cause severe damage. There is no indication that the Respondent considered the damage that might be caused to the water reservoir, and with it, to the entire house.
45. It is further noted that Ziad ‘Awwad used the money he received in return for waving his rights to the apartment in the Petitioner’s home to purchase another home in the same neighborhood. He has been renovating the house since the purchase, and his family was planning to move into it in the beginning of the month of Ramadan. This house has recently been damaged by the military.

Damaging the accused’s housing unit exclusively

46. According to case law, the Respondent must inquire whether the suspect’s housing unit can be considered as separate from the rest of the structure, and whether it can be demolished without damaging the remaining parts of the structure. If this is not possible, the option of sealing off the unit must be explored ([**HCJ 1730/96 Sabih v. Commander of IDF Forces in the Judea and Samaria Area et al.**](#), IsrSC 50(1) 353 (hereinafter: **Sabih**, p. 360); and in HCJ 5510/92 **Turqman v. GOC Central Command**, the Court, in the opinion of Justice Barak (as was his title then), found that only the suspect’s dwelling should be targeted, and since partial demolition of the structure was not possible, the less drastic measure of partially sealing the structure must be employed).

It appears to me that demolishing the entire structure would constitute a disproportionate measure – and thus unreasonable – in terms of the balance between the murderous conduct of Muhammad Turqman and the suffering that would be caused to the family of the eldest brother. In these circumstances, it appears that the reasonable course would be the one mandating only a partial demolition. As we have seen, this course is not possible. Under these circumstances, it is the less drastic measure – which is still quite serious – of partial sealing that must be taken. (HCJ 5510/92 **Turqman v. Minister of Defense et al.** IsrSC 48(1) 217, 220, hereinafter: **Turqman**).

47. As stated, the Respondent has not yet been satisfied that destroying one part of the structure would not damage the other part of the Petitioner’s home, and therefore, he must not execute the order.
48. The position of Honorable Justice Cheshin, that the Respondent may not order damage to be caused to residential units in addition to the unit that may be attributed to the suspected terrorist, is also well known.

See HCJ 4772/91 **Hizran v. IDF Commander in the Judea and Samaria Area**, IsrSC 46(2) 150; **al-‘Amrin**, (where Justice Cheshin clarifies that the matter concerns the very root of the authority, as it should be interpreted in the spirit of Israel’s fundamental principles); and HCJ 6026/94 **Nazal v. IDF Commander in the Judea and Samaria Area** (IsrSC 48(5) 338, hereinafter: **Nazal**).

49. In this context, it is noted that the Respondent intends to demolish the storage units located on the ground floor of the western section of the house, under the apartment occupied by Petitioner 2. Contrary to the implication contained in the order, that these storage units form part of the residential unit of Petitioner 2, they are not part thereof and are not leased to the family.

50. Therefore, no damage must be caused to the storage units located on the ground floor, beneath the apartment of Petitioner 2, which belong to Petitioner 1 and do not constitute part of the residential unit of Petitioner 2 and her family.

Danger to nearby structures

51. The Respondent must consider whether the circumstances point to any danger that nearby structures might be damaged, relying on reliable, professional sources.
52. There is no indication that the Respondent has properly weighed the danger to other homes near the Petitioner's home. The execution of the order may cause damage to neighboring houses: the 'Awwad home, seven people residing, located five meters away from the home of the Petitioner (marked 2 on the map); the home of Abu Taysir Amiza, two adults residing, located six meters away (marked 6 on the map); the home of Muhammad Amiza, four people residing, located seven meters away (marked 7 on the map). Any damage caused to these homes by the execution of the order would be a prohibited, *ultra vires* act.

A copy of the Respondent's aerial photograph of the area where the house is located, with neighboring homes marked, is attached hereto and marked **P/12**.

The Petitioner and his family have no connection to the brother's actions

53. The Petitioner and his family have no connection to actions intended to harm security. The Petitioner was detained once, many years ago, in 1987, and released within several days with no indictment served against him. He worked in Israel until 2000, and is not currently barred from entering Israel. He is in possession of a magnetic card and receives permits to enter Israel from time to time.

A copy of the magnetic card is attached hereto and marked **P/13**.

54. Petitioner 2 fully denies the allegation made by the Respondent in his response to the objection that she had knowledge of her husband's possession and use of weapons. Petitioner 2 cares for her five children, two of whom are infants, and is not involved in her husband's affairs in any way.
55. While case law sets forth that the sanction may be taken against members of the suspect's family even if they had no knowledge of or involvement in his actions, as stated above, the Respondent must still consider the factual situation of each and every case. This is *a-fortiori* the case where the Petitioner has a spotless record, unlike the Abu Dheim family, whom, the Respondent alleged sympathized with its member who had committed the attack and with the Hamas movement, and had been aware of the son's plan to commit the attack ([HCJ 9353/08 Abu Dheim v. GOC Homefront Command](#), reported in Nevo, (hereinafter: **Abu Dheim**).

The suspect has not been convicted

56. As stated, an indictment has been served against the Petitioner's brother. The suspect is denying the allegations against him. It would have been appropriate to wait for the verdict in the suspect's matter, and then reconsider the demolition of the house. The haste with which the Respondent pursues the demolition at this particular point in time is unclear.

The tests of proportionality

57. Proportionality and balance are supreme principles, reigning over the breadth of the Respondent's discretion. So it is in general, and so it is with respect to the exercise of this exceptional power to harm innocents for no fault of their own:

Exercising powers under Regulation 119 of the Defense Regulations must be the outcome of a series of balances: between the gravity of the act committed by the terrorist and the gravity of the sanction pursued; between the harm caused to the terrorist's family and the benefit derived from deterring other potential terrorists; between the right of the terrorist's family members to their property and the protection of public safety. Such balance, as part of the known constitutional tests of proportionality, requires that the deterring measure rationally lead to the attainment of the appropriate purpose; that the measure cause the least possible harm to the protected right in pursuit of the appropriate purpose; and that the selected measure meet the third sub-test of pertinent relativity, that is, that there be an appropriate balance between the benefit derived from the act and the fulfillment of the purpose underlying it and the harm likely to be caused to the constitutional right as a result thereof ("proportionality" in the narrow sense). (See: Aharon Bark, **Proportionality in Law** 471 (2010); cf. CrimApp 8823/07 **A. v. State of Israel**, para. 26 of the opinion of my Colleague, Vice-President E. Rivlin [reported in Nevo], February 11, 2010)). In this context, one must also be satisfied that the same purpose cannot be achieved by using a measure that is less drastic than demolishing or sealing the home (See: **Abu Dheim; Sharif** (HCJ 5696/09 **Mughrabi v. GOC Home Front command**, hereinafter: **Mughrabi**, Para. 12).

58. In view of the above, the Petitioners argue that the seizure and demolition of the Petitioner's house for the purpose of deterrence fails to meet the tests of proportionality. It does not meet the test of rational connection between the measure taken and the purpose sought, and, we note beyond requirement, also fails to meet both the test of the least injurious measure, and the harm versus benefit test (proportionality in the narrow sense).
59. With regards to the issue of rational connection between the measure taken and the purpose sought, i.e., between the demolition of the home and deterrence: a high order of proof is required with regards to the efficacy of such a severe and injurious measure. And yet, not only is there no evidence that house demolitions do in fact serve the official purpose of deterring potential terrorists and promoting security in the Area, but security authorities themselves have reached the conclusion that the long pursued military policy of demolishing homes where relatives of alleged terrorists reside had failed to prove itself as a deterrence.
60. A "rethinking team", headed by Major General Shani and appointed by the chief of staff in 2004, examined, among other things, the issue of using house demolitions under Regulation 119 for the purpose of deterrence. The team's conclusions and recommendations were presented to the general staff forum via computer presentation in early 2005.

The Shani Committee presentation is attached hereto and marked **P/14**.

61. The computer presentation included the following sentences: "The measures are lawful, but may not pass the test of legitimacy"; "in a country that hails liberal, democratic values, house demolitions are seen as collective punishment, which is incongruent with the principle of human dignity and respect for private property". The committee also stated that "deterrence must be just one of the considerations". The team's recommendation, as stated in the presentation, was to **halt the demolition of terrorists' homes for the purpose of deterrence**. The concluding remark was that: "the IDF [...] cannot tread the line of legality, let alone, the line of legitimacy".

62. The presentation indicates that deterrence had not proven effective and that the harm caused by the demolitions exceeds their benefit. The Defense Minister at the time accepted the committee's recommendation to halt house demolitions, despite the fact that attacks were still, unfortunately, being perpetrated in the country (see [HCJ 7733/04 Nasser v. Commander of Military Forces in the West Bank](#) (reported in Nevo); [HCJ 4969/04 Adalah v. GOC Southern Command](#), reported in Nevo).
63. Indeed, in 2009, after five years in which no homes were demolished under Regulation 119, the Supreme Court approved the partial demolition of the homes of Jerusalem residents who had committed attacks in the city (**Abu Dheim**, [HCJ 124/09 Dwayat v. Minister of Defence](#), hereinafter: **Dwayat**). However, in **Abu Dheim**, the state explained that it had departed from its decision because the case was exceptionally grave, and because circumstances had changed: a wave of attacks perpetrated by East Jerusalem residents that began in 2008, wherein, unlike previously, East Jerusalem residents perpetrate the attacks themselves rather than aid OPT residents (**Abu Dheim**, Para. 10; **Dwayat**, Para. 3). The Court ruled that an authority may change its policy when the circumstances change.
64. In contrast, demolishing the home of Petitioner 2 constitutes a return to the policy that preceded the decision to desist from demolishing the OPT family homes of individuals involved in attacks, as doing so had not been proven effective.
65. The Respondent gives no explanation as to why and how he decided to renew house demolitions in the OPT at this particular point in time, against the 2005 recommendation and decision and how the attack attributed to Ziad 'Awwad is different from other attacks perpetrated by OPT residents since 2005.
66. The decision to stop house demolitions and the unexplained departure from it raise grave concerns that the purpose here is not deterrence, but rather that the decision is driven by extraneous considerations. These concerns grow graver given the abduction of three Israeli youths in the West Bank this month, the subsequent military operation and Israel's reported intention to demolish the homes of Hamas members. Thus, the decision to demolish the Awawdeh home for the purpose of deterrence, in response to an attack Ziad 'Awwad is accused of having perpetrated prior to the abduction raises concerns that the purpose of the demolition is in fact to **punish or take revenge on Hamas**, which the Government of Israel holds responsible for the abduction. Considerations of revenge are clearly prohibited. They have no place in a law abiding country and do not fall within the permissible considerations in the context of the Regulation.
67. Demolishing the western part of the Petitioner's home also fails to meet the other two proportionality tests. The test of the least injurious measure and the test of proportionality in the narrow sense. It is clear that the military commander is able to use less injurious measures in order to achieve deterrence (such as fining the family, or other sanctions), rather than a most extreme, injurious and irreversible measure. It is also clear, in light of all of the above, that the injury caused by the demolition – a serious violation of the dignity of innocents, leaving six individuals, including minors, without a roof over their heads – far exceeds its benefit which amounts to supposition and conjecture.

Justice in trying times

68. These are trying times. These grave incidents increase the impetus to take action, and using lucid, orderly discretion often proves difficult. It is difficult to consider the rights of those seen as belonging to "the enemy". However, it is exactly in these conditions that discretion must be well guarded to keep it from straying:

It is our duty to preserve the legality of government also in difficult decisions. Even when the canons roar and the muses are silent, the law is alive and well, and it determines what is allowed and what is prohibited, what is legal and what is not.

(The remarks of President Barak in HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485, 491).

It is these trying times that put democracy to the ultimate test. It is for these trying times that the Courts have been designed as a restraining, balancing force.

69. And even if the language of Regulation 119 permits this action, this harming of innocents to serve as a lesson to others, we are obligated, and the Respondent is obligated to interpret and exercise this power in this spirit, and he must be wary of leaving a family without a roof over its head. Peace and security must be pursued by other means.

This has been presented in the case law produced by this court, by Honorable Justice Cheshin:

This is a basic principle which our people have always recognized and reiterated: every man must pay for his own crimes. In the words of the Prophets: “The soul that sins, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the inequity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him.” (Ezekiel 18:20)

There is no punishment without warning, and only those who have offended shall be stricken. This is Jewish law as prescribed by Moses:

“Parents are not to be put to death for their children, nor children put to death for their parents; each will die for their own sin.” (II Kings 14: 6)

[...]

Since the establishment of the state – certainly since 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 to 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 one shall die for his own iniquity: every man that eat sour grapes, his teeth shall be set on edge.” (Jeremiah 31:28-29)

(HCJ 2006/97 Abu Farah Ghneimat et al. v. GOC Central Command,

IsrSC 41(2) 651, p. 654-655; see also the opinion of Honorable Justice Cheshin in **Khizran, al-Amrin and Nazal**).

70. Considering the urgency, and the Ramadan holiday, the Petitioners have not been able to prepare and submit an engineer’s opinion on the viability of destroying part of the house without causing damage to its other part and to neighboring houses. **The Petitioners are currently preparing an expert opinion and ask for leave to submit it to the Honorable Court in the coming days.**
71. Given the urgency and the inability to meet with the Petitioner, this petition is supported by the affidavit of Adv. Abir Joubran-Dakwar, who has communicated with the Petitioners by telephone. For this reason too, the petition encloses powers of attorney given by Petitioners 1, 2, 4 and 5, which were received by fax following telephone coordination.

For all the reasons named above, the Honorable Court is hereby moved to issue an order nisi and an interim injunction as sought herein, and render them absolute after hearing the Respondent's response

Jerusalem, today, 29 June 2014.

Sigi Ben Ari, Adv.
Counsel for the Petitioners

Abir Joubran-Dakwar, Adv.
Counsel for the Petitioners