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At the Supreme Court Sitting as the High Court of Justice

HCJ 5290/14

HCJ 5295/14

HCJ 5300/14

Before:	**Honorable Justice Y. Danziger** **Honorable Justice I. Amit** **Honorable Justice N. Sohlberg**
The Petitioners in HCJ 5290/14:	**1. _____ Qawasmeh** **2. _____ Qawasmeh**
The Petitioners in HCJ 5295/14	**1. _____ Abu 'Ayesha** **2. _____ Abu 'Ayesha** **3. _____ Abu 'Ayesha** **4. _____ Abu 'Ayesha** **5. _____ Abu 'Ayesha** **6. _____ Abu 'Ayesha** **7. HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
The Petitioners in HCJ 5300/14	**1. _____ Qawasmeh** **2. HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
	v.
The Respondent in HCJ 5290/14:	**Military Commander of the West Bank Area**
The Respondent in HCJ 5295/14:	**Military Commander of Judea and Samaria Area**
The Respondent in HCJ 5300/14:	**GOC Home Front Command**
Petition for *Order Nisi and Interim Order*	
Session date:	11 Av 5774 (August 7, 2014)
Representing the Petitioners in HCJ 5295/14:	Adv. Smadar Ben-Natan

Representing the Petitioners in HCJ 5290/14
and in HCJ 5300/14: Adv. Labib Habib

Representing the Respondents in all Peitions: Adv. Aner Helman; Adv. Avinoam Segal-Elad

Judgment

Justice Y. Danziger:

Before us are three petitions which concern the decision of the military commander of the Judea and Samaria area (hereinafter: the **respondent**) to exercise his authority according to regulation 119 of the Defence Regulations (Emergency), 1945 (hereinafter: the **Defence Regulations**), and issue an order for the seizure and demolition of petitioners' homes (the petitioners in HCJ 5295/14, the Abu 'Ayesha family and in HCJ 5300/14, the H_____ Qawasmeh family) or for the sealing thereof (the petitioners in HCJ 5290/14, the M_____ Qawasmeh family).

1. On June 12, 2014 terrorists abducted the youths Gil-ad Shaer, Eyal Iifrach and Naftali Frenkel, God bless their souls, and murdered them shortly after the abduction. The murderers buried the bodies of the youths in a hiding place, but they were located by the security forces 18 days later, on June 30, 2014.

   According to information obtained by the respondent, the youths were murdered and abducted by _____ Abu 'Ayesha (hereinafter: **Abu 'Ayesha**) and _____Qawasmeh (hereinafter: **M_____ Qawasmeh**) who actually executed the abduction and the murder, and _____ Qawasmaeh (hereinafter: **H_____ Qawasmeh**) who acted as the "headquarters" of the terrorist cell (hereinafter collectively: the **suspects**). Within the framework of his responsibilities, H_____ Qawasmeh obtained financing for the terrorist cell, acquired for it firearms, and also acquired a few months before the abduction, the land plot in which the youths' bodies were buried. H_____ Qawasmeh also took part in the burial of the bodies and arranged the hiding of Abu 'Ayesha and M_____ Qawasmeh from the security forces.

2. As of the date of this judgment, the security forces have not yet been able to capture Abu 'Ayesha and M_____ Qawasmeh. However, H_____ Qawasmeh was arrested and interrogated, and at this stage an indictment has not yet been filed against him. As indicated by respondent's response, H_____ Qawasmeh admitted in his interrogation that he had executed the acts attributed to him and tied Abu 'Ayesha and M_____ Qawasmeh to said deeds.

3. In response to the above described actions and in view of the need to deter others from the recurrence of similar actions, the respondent issued the orders being the subject matter of this petition, as described below.

Respondent's decision concerning the petitioners in HCJ 5290/14

4. M_____ Qawasmeh lived in Hebron in an apartment located on the ground floor of a three story building consisting of four apartments which was built by his father, petitioner 1 in HCJ 5290/14. Together with M_____ Qawasmeh also lives in the apartment his pregnant wife, petitioner 2 in this petition. On July 1, 2014 IDF forces broke into the apartment. Said break-in – which damaged the apartment – was made, as explained by the respondent, during operational activity in which IDF

forces searched for M_____ Qawasmeh based on the suspicion that he was hiding in the apartment in a "double wall", and was armed and dangerous.

5. On July 15, 2014 the respondent gave the petitioners in HCJ 5290/14 notice of his intention to seize and demolish the structure in which M_____ Qawasmeh lived. On July 16, 2014, petitioners' counsel at that time – Advocate Leah Tzemel – submitted to the respondent an objection against said decision and on July 20, 2014 and July 24, 2014 completions to the objection were submitted. On July 28, 2014 respondent's decision in the objections was given, in which he notified that he decided to accept the objections in part, in the sense that M_____ Qawasmeh's apartment on the ground floor of the house would be seized and sealed, and not demolished. The demolition was scheduled for a date not earlier than July 31, 2014 at 09:00. On July 30, 2014 the respondent updated that following petitioners' request and in view of the Eid al-Fitr holiday which was celebrated on the relevant dates, the demolition would be postponed by a few hours, and would be carried out not before July 31, 2014 at 18:00. Hence petitioners' petition in HCJ 5290/14.

Respondent's decision concerning the petitioners in HCJ 5290/14

6. Abu 'Ayesha lived in Hebron in the north-east apartment on the second floor in a house owned by his father, petitioner 6 in HCJ 5295/14. Together with Abu 'Ayesha also lived in the apartment his wife, petitioner 1, and his three young children, petitioners 2-4 in this petition. The apartment of Abu 'Ayesha and his family is one of five apartments in the building. Two apartments in which the brothers of Abu 'Ayesha and their families live are located on the second floor, next to Abu 'Ayesha's apartment. Two additional apartments are located on the first floor. The parents of Abu 'Ayesha and his sister live in one of the apartments on the first floor. The nuclear family of Abu 'Ayesha moved to the additional apartment on the first floor, after large parts of their apartment on the second floor had been detonated by IDF forces on June 30, 2014. The detonation was carried out, according to the respondent, during operational activity in which IDF forces searched for Abu 'Ayesha based on the suspicion that he was hiding in a "double wall" in the apartment, armed and dangerous.

7. On July 16, 2014 the respondent gave the petitioners in HCJ 5295/14 notice of his intention to seize and demolish the structure in which Abu 'Ayesha lived. In his notice the respondent noted that he intended to seize and demolish the west apartment on the first floor, which is the apartment into which Abu 'Ayesha's family moved after their original apartment had been detonated. On July 17, 2014, petitioners' counsel – Advocate Smadar Ben-Natan – submitted to the respondent an objection against said decision. In her objection petitioners' counsel argued, *inter alia*, that there was no justification to demolish the west apartment on the first floor, after petitioners' original apartment had already been destroyed by IDF forces. On July 28, 2014 respondent's decision in the objections was given, in which he notified that he decided to accept the objections in part, in the sense that the apartment which would be seized and demolished would be the family's original apartment, namely, the north east apartment on the second floor. On that date the respondent also gave the petitioners a "Seizure and Demolition Order" for the apartment and stipulated that the demolition would be carried out not before July 31, 2014 at 09:00.

On July 29, 2014 petitioners' counsel wrote to the respondent and requested to receive information concerning the manner by which the demolition would be carried out. She also demanded to receive, for her review, an opinion concerning the prevention of damage to adjacent apartments as a result of the demolition. Petitioners' counsel further requested to postpone the demolition until August 4, 2014, due to the "Eid al-Fitr holiday which was currently celebrated all over the Muslim world." On July 30, 2014 respondent's response was given, which neither specified the manner by which the demolition would be carried out, nor referred to the opinion as requested. However, "in

view of the holiday" the respondent postponed the demolition by a few hours, and stated that it would not be carried out before July 31, 2014 at 18:00. Hence petitioners' petition in HCJ 5295/14.

Respondent's decision concerning the petitioners in HCJ 5300/14

8. H_____ Qawasmeh lived in Hebron in a single detached family home together with his wife, petitioner 1 in HCJ 5300/14, and their six young children.

9. On July 16, 2014 the respondent gave petitioner 1 in HCJ 5300/14 notice of his intention to seize and demolish the house in which H_____ Qawasmeh lived. On July 17, 2014 petitioner 1's counsel – Advocate Labib Habib – submitted an objection against said decision and on July 28, 2014 respondent's decision which denied the objection was given. The demolition was scheduled for a date not earlier than July 31, 2014 at 09:00. On July 29, 2014 the respondent updated that following petitioners' request and in view of the Eid al-Fitr holiday which was celebrated on the relevant dates, the demolition would be postponed by a few hours, and would be carried out not before July 31, 2014 at 18:00. Hence petitioners' petition in HCJ 5300/14.

Petitioners' arguments

It is hereby noted that petitioners' arguments are presented in this part in the same order which they were presented in the hearing before us.

10. The petitioners in HCJ 5295/14 – by their counsel Advocate Smadar Ben-Natan – argue that the seizure and demolition of their home is contrary to the duties imposed on the State under belligerent occupation laws and international human rights laws. According to the petitioners, the demolition of the apartment constitutes prohibited collective punishment which violates the fundamental rights of innocent family members. The petitioners argue further that the demolition of their home is in contrary with the principles of internal Israeli administrative and constitutional law and violates, *inter alia*, the presumption of innocence of the suspects, who were neither indicted nor convicted. Furthermore, respondent's decision to demolish their homes is in contrary with the principle of the child's best interest, which is entrenched in the provisions of internal Israeli law and Israel's international undertakings. The petitioners argue further that respondent's decision is not proportionate. On this issue the petitioners argue, *inter alia*, that the demolition or sealing of the suspects' homes will not create the desired deterrence, but will only arouse and strengthen the circle of hatred. On this issue, the petitioners refer to the recommendations of the think tank headed by Major General Udi Shani of 2005 (hereinafter: the **recommendations of the Shani committee**), which recommended to limit the exercise of the authority of the military commander according to regulation 119.

    The petitioners continue to argue that the detonation of their apartment on June 30, 2014, a few hours after the bodies of the youths were found, was motivated by feelings of rage and revenge on the part of the military forces. The petitioners argue that the apartment was detonated in a manner which does not reconcile with the rules of administrative law and in brazen violation of their procedural rights. Said demolition did not result from any "military-operational need" and cannot be deemed as an ancillary damage of an "operational break-in" in view of the fact that the entire apartment was detonated. In the hearing before us the petitioners argued further that respondent's decision to demolish the "remainder" of the apartment after its previous detonation was not proportionate. The petitioners explained that to the extent that the demolition of the apartment had any deterring effect, this effect has already been almost fully achieved when the apartment was detonated on June 30, 2014. Any additional demolition of the apartment would injure the petitioners and would not serve the deterring purpose of regulation 119. The petitioners argued further that the activities of the military forces after the abduction, including "Shuvu Achim"

(Return Brothers) Operation, have significantly contributed to deterrence in the Area in a manner which rendered the demolition of the apartment redundant. The petitioners also argue that respondent's decision violates their rights in a manner which does not satisfy any one of three sub-tests of proportionality.

The petitioners argue further that the respondent has not properly examined the damage which may be caused to other structures adjacent to the apartment as a result of the demolition. The petitioners refer on this issue to the engineering opinion on their behalf, according to which the demolition of the apartment is expected to cause damage to the adjacent apartments. The petitioners noted that in HCJ 4597/14 **'Awawdeh v. Military Commander of the West Bank Area** (July 1, 2014) (hereinafter: **'Awawdeh**) the respondent undertook to examine petitioners' engineering opinion "with an open heart and mind". According to the petitioners, such an opinion was indeed submitted to the respondent and, despite its contents the responded decided not to change his position and carried out the demolition as planned. However, the petitioners argue that after the apartment in the **'Awawdeh** case was demolished, an engineer on their behalf inspected the house and found that the demolition caused considerable damage to adjacent apartments. In view of the above, the petitioners request, as an alternative relief, that the respondent provides them, prior to the demolition, an acceptable opinion according to which the demolition of their apartment would not cause damage to other units in the building, and that the respondent undertakes to compensate the injured parties if and to extent any damage is caused, as aforesaid.

11. The petitioners in HCJ 5290/14 – by their counsel Advocate Labib Habib – join the main arguments of the petitioners in HCJ 5295/14 concerning the lawfulness of the demolition under international law and Israeli administrative and constitutional law. The petitioners argue further that the relevant rules of international law also apply to the respondent by virtue of the State's undertakings under the Israeli Palestinian Interim Agreement on the West Bank and Gaza Strip dated September 28, 1995 (hereinafter: the **Interim Agreement**). The petitioners argue that according to the Interim Agreement the respondent is not authorized to exercise his authority against their home, in view of the fact that it is located in an area which is defined as "Area A". The petitioners argue that in this area, according to the Interim Agreement, the powers in matters of internal safety and public order were transferred from Israel to the Palestinian Council. Indeed, Israel was granted limited leeway to deviate from this "task assignment" in the event of "encounters", namely – an immediate military reaction to activity which poses threat to life or property. However, even when encounters are concerned, Israel must hand over the handling thereof to the Council "as soon as possible", and in any event the sealing of a house cannot be regarded as an action in the context of an encounter. In the hearing before us the petitioners argued further, that even if their argument concerning the authority was rejected, the respondent was still obligated to take into consideration the fact that the apartment was located in Area A as an "additional consideration" against the exercise of the authority.

The petitioners also argue that the respondent exercises his authority according to regulation 119 of the Defence Regulation in a discriminating manner, *inter alia*, in view of the fact that he did not issue an order for the demolition of the homes of the suspects in the murder of the teenager Mohammed Abu Khdeir, despite the fact that said suspects admitted and despite the fact that one of them lives in Area C. In the hearing before us the petitioners pointed at acts of violence and incitement against Arabs which were recently carried out by Jews, and argued that in view of these actions it was difficult to point at a relevant difference between parts of the Jewish society and parts of the Arab society as far as the need to deter was concerned.

12. The petitioners in HCJ 5300/14 – by their counsel Advocate Labib Habib – reiterate the main arguments of the petitioners in HCJ 5290/14 and in HCJ 5295/14 concerning the lawfulness of the demolition according to the provisions of international law and Israeli administrative and

constitutional law. The petitioners remind that the demolition order in their matter was issued after H_____ Qawasmeh's arrest, but before he was indicted and convicted. Therefore, according to them, the demolition should be postponed until the proceedings against H_____ Qawasmeh are terminated. The petitioners request that the demolition shall be postponed, at least, until H_____ Qawasmeh is indicted and the interrogation material is transferred to his attorneys. According to them, the interrogation material may shed light on the strength of the administrative evidence in respondent's possession and enable their counsels to properly prepare and establish orderly arguments concerning said administrative evidence. The petitioners also argue that the Defence Regulations, including regulation 119, are outdated, to such an extent which justifies to not exercise them. The petitioners emphasize the injury which will be caused to innocent people – petitioner 1 and her six children – as a result of the demolition. The petitioners also argue that H_____ Qawasmeh's alleged involvement in the abduction and murder is less than that of Abu 'Ayesha and M_____ Qawasmeh. However, notwithstanding the above, the respondent chose to impose on him a sanction considerably harsher than the sanction which was imposed on the other suspects – the demolition of his entire home. According to him, the suspects should have been "graded" and accordingly, the authority under regulation 119 of the Defence Regulations should be exercised towards him in a less offensive manner as compared to the manner by which said regulation shall be exercised towards the other suspects. In the hearing before us the petitioners argued further that it was not appropriate to exercise respondent's authority by the detonation of the apartment, and even if their general arguments are rejected, the demolition should still be carried out in a "civilian" manner, using engineering measures rather than explosives. According to them, this demolition method will reduce the unnecessary harm which will be caused to the family.

Respondent's arguments

13. The respondent – by his counsel Advocate Aner Helman – argues that there is no cause for this court's intervention in his decisions. The respondent notes that in recent years the security condition in Judea and Samaria has significantly deteriorated, as was broadly described in **'Awawdeh**. The respondent argues further that since the 'Awawdeh judgment was given, the security condition has deteriorated further, a deterioration which is manifested by "a sharp increase in severe terror attacks, in which Israeli citizens were killed or in which firearms were used, as well as attempts to carry out severe terror attacks." The respondent argues that he has in his possession clear administrative evidence which indicates "in a level almost reaching certainty" that the three suspects took part in the abduction and murder of the youths. This evidence includes H_____ Qawasmeh's admission and additional evidence. The respondent argues that the exercise of his authority according to regulation 119 against petitioners' homes is required to deter potential perpetrators from carrying out acts similar to those executed by the suspects and to deter the family members of such potential perpetrators and encourage them to object to the activity of said potential perpetrator, their family member.

14. The respondent argues that petitioners' arguments concerning collective punishment, injury caused to innocent people and the principle of the child's best interest should not be discussed, in view of the fact that similar argument have already been discussed and rejected in a host of judgments. The respondent also rejects petitioners' arguments concerning the rules of international law, and reminds that similar arguments were rejected by this court in a host of judgments. The respondent also reminds that arguments similar to those raised by the petitioners concerning the presumption of innocence have already been discussed and rejected by this court and notes, again, that the strength of the administrative evidence against the suspects is quite significant. The respondent argues that his decisions are proportionate, *inter alia*, because he decided to exercise his authority only against petitioners' apartments and because it was decided to seal the apartment of M_____ Qawasmeh rather than to demolish it. The respondent notes that the ownership of the homes being

the subject of his decisions was taken into consideration, but reminds that the proprietary status of the suspects *vis-à-vis* their homes has no bearing on his authority according to regulation 119 of the Defence Regulations. The respondent further rejects petitioners' arguments concerning discriminating enforcement and refers on this issue to HCJ 6026/94 **Nazal v. Commander of IDF Forces in Judea and Samaria Area**, IsrSC 48(5) 338, 347-348 (1994) and to the words of Justice E. Levy in HCJ 10467/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1) 810, 815 (2003) (hereinafter: **Sharbati**).

15. The respondent rejects petitioners' arguments in HCJ 5290/14 concerning his authority and argues that there is no preclusion which prevents the exercise of his authority under regulation 119 of the Defence Regulations against houses located in Area A. The respondent explains that the Interim Agreement was incorporated into the internal law of the Judea and Samaria area through the Proclamation Regarding Implementation of the Interim Agreement (Judea and Samaria)(No. 7), 5756-1995 (hereinafter: the **Proclamation**). This Proclamation left in the hands of the respondent wide authorities regarding Area A, and stipulated, in section 6B thereof, that "The decision of the commander of IDF forces in the region that the powers and responsibilities remain with him will be decisive for this matter." The respondent explains that these provisions of the Proclamation take precedence over the provisions of the Interim Agreement, as held in HCJ 2717/96 **Waffa v. Minister of Defence**, IsrSC 50(2) 848, 853 (1996). Therefore, according to the respondent, the provisions of the Interim Agreement cannot prevent the military commander from exercising his authority under regulation 119 of the Defence Regulations in Area A.

16. The respondent rejects petitioners' arguments in HCJ 5295/14 concerning the detonation of their apartment prior to the demolition decision, and reiterates his position according to which the demolition of the apartment of the Abu 'Ayesha's family will not cause any damage to the other parts of the building. The respondent updates on this issue that he intends to demolish only the exterior walls of the apartment, without causing any damage to the roof and the supporting columns. Under these circumstances, respondent's position is that the engineering opinion which was attached by the petitioners is not relevant. Petitioners' arguments concerning the damage which was caused to the structure which was demolished following the **'Awawdeh** judgment are also not relevant in this case. The respondent argues that petitioners' alternative request, that he undertakes to compensate the injured parties should the demolition cause damage to adjacent apartments is theoretical, and should be heard, if at all, after the fact, and by the competent court having the subject matter jurisdiction on this issue.

17. The respondent argues that no distinction should be drawn between the acts attributed to H_____ Qawasmeh and the acts of Abu 'Ayesha and M_____ Qawasmeh. According to him, H_____ Qawasmeh's involvement in the acts is not negligible or marginal, and he is regarded by the respondent, like his peers, as a principal perpetrator of the abduction and the murder. The different decisions concerning the demolition or sealing of the homes of the three suspects are based on permitted distinctions, arising from respondent's duty to act proportionately while exercising his authority according to regulation 119 of the Defence Regulations. The respondent is of the opinion that the sealing of H_____ Qawasheh's home will not achieve the desired deterring purpose in this case.

18. The respondent offered in his response to the petitions to present, *ex parte* and *in camera*, privileged information which established, according to him, administrative evidentiary infrastructure which indicated that the suspects committed the acts attributed to them. However, in response to the question of the undersigned in the hearing before us, petitioners' counsels clarified that they did not insist that we review said privileged information.

19. Along with their petition, the petitioners requested that an interim order be issued which would prohibit the respondent from taking any irreversible action against petitioners' homes. On July 31, 2014 this court (Justice Z. Zilbertal) accepted the request and directed the respondent to refrain from taking any action to demolish or seal petitioners' homes, until resolved otherwise.

Discussion and Decision

20. The underlying premise of our discussion is that indeed, administrative evidence in an adequate level of certainty exists which indicates that the suspects have ostensibly committed the acts attributed to them. This conclusion arises from the presumption of administrative validity enjoyed by the respondent, a presumption which the petitioners did not try to refute. As noted by Justice I. Zamir in HCJ 1227/98 **Malevsky v. The Minister of the Interior,** IsrSC 52(4) 690, 711 (1998), a petitioner who notifies that he does not wish the court to review the privileged information which served as the factual infrastructure for the decision of the administrative authority, actually states that he does not intend to refute the presumption according to which the authority acted properly based on sufficient factual infrastructure. Justice Zamir states as follows:

> If the petitioner does not agree that the court reviews, in his absence, the privileged information which served as the basis for the decision of the authority, the presumption of validity will usually apply to said decision. The presumption is that the administrative authority made a valid decision, and the burden to prove otherwise lies on the party who wishes to refute said presumption… if the presumption of validity applies to the case at hand, it should be said, in the absence of any refuting evidence, that the Minister of the Interior was indeed presented with information according to which the petitioner committed criminal offenses. [*ibid*, page 711].

The above is particularly relevant to the case at hand, in which the petitioners notified that they did not wish that we review respondent's evidence. Moreover, in the hearing before us the petitioners did not argue against the evidentiary infrastructure underlying respondent's decision and did not dispute his conclusion according to which the suspects committed the acts attributed to them. Under these circumstances and in the absence of evidence to the contrary, respondent's declaration concerning the sufficiency and weight of the administrative evidence upon which his decision was based may be accepted.

21. The purpose of the authority vested with the military commander according to regulation 119 of the Defence Regulations is to deter potential terrorists from committing terror attacks and take human lives, a purpose which may not be overstated [see, for instance: HCJ 1730/96 **Salem v. Commander of IDF Forces in Judea and Samaria Area**, IsrSC 50(1) 353, 358-359 (1996) (hereinafter: **Salem**); 'Awawdeh, paragraph 19; HCJ 6996/02 **Za'arub v. Commander of IDF Forces in the Gaza Strip**, IsrSC 56(6) 407, 409-410 (2002) (hereinafter: **Za'arub**)]. However, along this proper purpose, there is no dispute that the exercise of the authority under regulation 119 by way of seizure and demolition or sealing of residential homes severely violates the fundamental rights of the uninvolved inhabitants of said houses. Indeed, the demolition or sealing of a house in which lives a person who has not sinned is in contrary with the right to own property, the right to dignity and even the right to housing which is derived there-from [concerning the right to housing, compare: LCA 5368/01 **Yehuda v. Tshuva**, IsrSC 58(1) 214, 220-221 (2003); LCA 4905/98 **Gamzo v. Yeshayhu**, IsrSC 55(3) 360, 375 (2001)]. As noted many times in the judgments of this court, such demolition and sealing cannot be reconciled with concepts of justice and basic moral principles, including the principle according to which "The son shall not share the guilt of the father, nor will the father share the guilt of the son." [Ezekiel, 18, 20; see also: **Salem**, page 365].

The above violations become much more severe when, as a result of the exercise of the authority, children are left without a roof over their heads. In such an event, the petitioners note, the exercise of the authority is in contrary with the principle of the child's best interest, a principle which runs like a golden thread through a host of legal arrangements, local and international, all of which are designed to protect the rights of those who need, due to their age, special protection.

22. In order to decrease, to the maximum extent possible, the injury caused to innocent parties as a result of the exercise of said regulation 119, a host of directives and criteria were established by this court, in its judgments, which were designed to limit and restrict the authorities vested with the military commander under the regulation. The main principle underlying these directives is that the authority under regulation 119 should be exercised proportionately, in a manner which complies with, to the maximum extent possible, with the spirit of the Basic Law: Human Dignity and Liberty ['**Awawdeh**, paragraph 17; HCJ 8084/02 **Abassi v. GOC Home Front Command,** IsrSC 57(2) 55, 59 (2003); **Sharbati,** page 814]. In this context it was held that in exercising his authority, the military commander must take into consideration the severity of the acts that are attributed to the suspect; the number and characteristics of the persons who may be harmed as a result of the exercise of the authority; the strength of the evidence and the scope of involvement, if any, of the other inhabitants of the house. The military commander is also required to examine whether the authority may be exercised only against that part of the house in which the suspect lived; whether the demolition may be executed without jeopardizing adjacent buildings and whether it is sufficient to seal the house or parts thereof as a less injurious means as compared to demolition [see: Salem, pages 359-360; HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693, 699-700 (1992); '**Awawdeh**, paragraph 18].

23. It was also held that the military commander may use regulation 119 only when the deterring purpose of the regulation is served. In this context it was held that in the absence of a weighty deterring purpose the military commander may not exercise his authority to punish terrorists or as a means for collective punishment of uninvolved parties. Indeed, as aforesaid, in practice, the exercise of the authority may cause injury to uninvolved parties. However, it is not the purpose of the regulation and it cannot be the purpose of the exercise of the authority conferred there-under [see, for instance: '**Awawdeh**, paragraph 19; **Abassi,** page 60].

24. Hence, the fact that the exercise of the authority according to regulation 119 violates the rights of innocent parties does not prevent the military commander from exercising the authority vested in him under said regulation. However, in order to justify the exercise of the authority according to regulation 119 the military commander must show that there is a substantial military need to deter, that the exercise of the authority will indeed create, in practice, the desired deterrence, and that the authority will be exercised in a proportionate manner.

25. In the cases at hand, the respondent evaluated that there was a substantial and urgent need to deter the residents of the Area under his command from committing murderous terror attacks, and particularly from committing abduction and murder attacks, as attributed to the suspects. The respondent also evaluated that the exercise of his authority by the demolition of the homes of Abu 'Ayesha and H_____ Qawasmeh and the sealing of the home of M_____ Qawsmeh, would promote said deterrence. These evaluations are situated at the heart of respondent's expertise, and this court will not tend to interfere therewith other than in extraordinary cases and when weighty reasons are presented [see, for instance: '**Awawdeh**, paragraph 20; **Sharbati**, page 814; HCJ 6288/03 **Sa'adeh v. GOC Home Front Command**, IsrSC 58(2) 289, 292 (2003)]. And indeed, in the case at hand, respondent's evaluation is based on data concerning the deteriorating security condition in the Judea and Samaria Area and concerning the sharp increase in the number of terror attacks and attempted terror attacks which originate from this Area. This reality lead the respondent and the political echelon to change their previous policy, which was adopted following the conclusions of

the Shani Committee of 2005, within the framework of which the exercise of the authority of the military commander according to regulation 119 was reduced. In fact, ever since 2005 the military commander exercised his authority according to the regulation three times in 2008-2009 against the homes of terrorists in the Jerusalem area [see the overview in '**Awawdeh**, paragraphs 5 and 25], and once again in July 2014 against the home of a terrorist in Judea and Samaria. And indeed, in evaluating the relevance of the changes in the operational circumstances in the area under his command, the extent of the need to create deterrence and the effectiveness of the sanction according to regulation 119 in the creation of such deterrence, the respondent exercised his authority properly, and petitioners' arguments do not point at any reason which may justify intervention with said decision. In fact, exactly the same arguments as those raised by the petitioners before us, have already been discussed and rejected by this court only about a month ago in '**Awawdeh**, in which the court stated as follows in the words of the Deputy President, M. Naor:

> There is no room to intervene with respondent's decision who has concluded that at this time actual deterrence was required, and that the demolition of the terrorist's house would result in such deterrence. As held by us in our case law "the court is not inclined to intervene with the security agencies' evaluation concerning the effectiveness of using the measure of demolishing houses or sealing them as a means to deter others" … Furthermore, as was noted in our case law more than once, it is impossible to conduct a scientific research which would **prove** how many terror attacks were prevented and how many human lives were saved as a result of taking the measure of house demolition… The conclusions arising from the severity of the recent events in Judea and Samaria are a clear matter for the respondent to attend to. ['**Awawdeh**, paragraph 24].

26. Petitioners' arguments concerning the proportionality of respondent's decision are not acceptable as well. There is no dispute that respondent's decisions would severely injure uninvolved parties, including young children, which is regretful. However, it seems that the respondent chose to exercise his authority in a proportionate manner and acted to reduce, to the maximum extent possible, the injury caused to uninvolved parties. Thus, with respect to the apartment of M_____ Qawasmeh, the respondent accepted the objection of the petitioners in HCJ 5290/14, retracted his intention to demolish the apartment and ordered to seal the apartment, a less offensive measure, at least towards structures adjacent to this apartment which could have been damaged as a result of the demolition. Also with respect to the apartment of Abu 'Ayesha the respondent accepted the objection of the petitioners in HCJ 5295/14 and ordered to demolish the apartment on the second floor in lieu of the apartment on the first floor in which the family currently lives. The respondent also ordered to carry out the demolition in a limited manner, which is intended to reduce the damage to the other parts of the building. Said decisions attest to the proportionality of the decision and to a proper balancing between the need to deter and the duty to protect, to the maximum extent possible, uninvolved parties. In this context, petitioners' argument in HCJ 5295/14 according to which the demolition of the apartment on the second floor is not proportionate in view of the fact that the demolition of a "destroyed" apartment will not create substantial deterrence beyond the deterrence which has already been obtained when the apartment was initially destroyed, should be rejected. Although this is an attractive argument, I cannot accept it. As aforesaid, the evaluation of the scope of the deterrence embedded in this demolition or another is a matter for the respondent to attend to, and no fault was found in respondent's evaluation according to which a substantial deterring effect is embedded in the demolition of the Abu 'Ayesha's apartment. It should also be noted that petitioners' above argument in HCJ 5295/14 may become a double edged sword. To the

same extent that, as argued, the demolition of a "destroyed" apartment will not make a significant residual contribution to deterrence, such a demolition will not cause significant residual injury to the petitioners, who have already suffered most of the injury when the first demolition was carried out.

Respondent's decision to demolish the home of H_____ Qawasmeh in its entirety, rather than to demolish parts of the house or seal it, is also not disproportionate. As noted by the respondent, the acts attributed to H_____ Qawasmeh are extremely severe and are situated, ostensibly, at the heart of the terror activity which is attributed to the suspects. Under these circumstances, respondent's position according to which there is a substantial need to deter potential perpetrators from carrying out similar acts to those which were committed by H_____ Qawasmeh, poses no difficulty. There is also no fault in respondent's position according to which the demolition of H_____ Qawasmeh's home will promote the creation of such deterrence. Petitioners' argument in HCJ 5300/14 concerning the need to create a "hierarchy" between the sanction imposed against the apartment of H_____ Qawasmeh and the sanction imposed against the apartments of the other suspects, should also be rejected. Respondent's decision concerning Abu 'Ayesha and M_____ Qawasmeh is based on the engineering characteristics of their residential apartments and on the fact that they were living in apartments, rather than in a house, like H_____ Qawasmeh. Said decision is not based on any kind of severity hierarchy and the conclusion, according to which the acts attributed to H_____ Qawasmeh justify, in and of themselves, respondent's decision in this matter, is sufficient to reject petitioners' above arguments.

27. The petitioners in HCJ 5300/14 argued that respondent's decision should be postponed until the conclusion of H_____ Qawsmeh's interrogation, in view of the fact that only after an indictment is filed against him and only after the interrogation material is transferred to his attorneys, the strength of the evidence against him may be evaluated. This argument must be rejected. Firstly, the rule is that the existence of administrative evidence is sufficient to justify the exercise of the authority according to regulation 119 of the Defence Regulations, and there is no need to wait for the filing of an indictment or for a conviction. Relevant to this matter are the words of Deputy President M. Naor in **'Awawadeh**:

> The petitioners argued that it was advisable to wait for the conclusion of 'Awwad's trial, and only if convicted – the demolition of his house should be considered. However, as specified above, it has already been held in our case law, that the authority pursuant to regulation 119, may be exercised based on administrative evidence attesting to the fact that a terrorist was living in the house the demolition of which was sought… I described above the administrative evidence against 'Awwad, including the detailed statements of his son and the indictment which was filed against him. Against this backdrop, I am of the opinion that there is no room to intervene with respondent's decision to issue an order for the demolition of 'Awwad's home, which relied on said administrative evidence. [*ibid*, paragraph 25].

An additional reason to reject petitioners' argument is that the petitioners chose not to dispute before us the strength of the administrative evidenced on which the respondent relied or to try to refute the presumption of administrative validity in this matter. Under these circumstances, there is no real practical reason to wait for the transfer of the interrogation material to H_____ Qawasmeh's attorneys.

28. I also found no merit in petitioners' arguments in HCJ 5290/14 concerning respondent's authority to act in Area A. Petitioners' arguments on this issue do not reconcile with the fact that respondent's

authority is regulated by the law which applies in to the Area and is controlled directly by the Interim Agreement. As noted by the respondent, the provisions of the Proclamation grant the respondent very broad discretion in the interpretation and application of the provisions of the Interim Agreement, and they do not prevent the respondent from acting in Area A when such activity is required to safeguard security. Furthermore, petitioners' interpretation of the Interim Agreement disregards the provisions of Article XII(1) of said agreement, which provides as follows:

> Israel shall continue to carry the responsibility for defense against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defense against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility.

As explained by the author Yoel Zinger in his article "The Israeli-Palestinian Interim Agreement concerning self governmental arrangements in the West Bank and the Gaza Strip – some Legal Aspects" *Mishpatim* 27 605 (1996), said provision grants Israel very broad authority to take any step which may be required to fulfill its responsibility to safeguard security. Zinger explains:

> This is a sweeping stipulation. It means that in order to protect against external threats, the overall security of Israelis and the Israeli settlements, Israel can take steps anywhere in the West Bank and in the Gaza Strip (including locations in which the territorial jurisdiction was transferred to the hands of the Palestinian Council). Furthermore, Israel reserves for this purpose all necessary powers, without any restriction whatsoever (including powers which have already been transferred to the Palestinian Council). In addition, the agreement does not provide under which circumstances Israel may take such steps, and the conclusion is that Israel alone shall make the decision in that regard. [*ibid*, page 622].

Hence, respondent's authority to apply regulation 119 of the Defence Regulations reconciles with the law which applies in the Area as well as with the provisions of the Interim Agreement. It should be further noted that I accept respondent's position according to which the acceptance of petitioners' interpretation of the Interim Agreement and the law which applies in the Area will grant broad "immunity" from the application of regulation 119 to any potential terrorist who resides in Area A, a result which does not reconcile with the deterring purpose of regulation 119. Therefore, I do not think that in exercising his authority according to regulation 119, the respondent should take into consideration, as distinct from the deterring issue, the geographic location of the house which is intended for demolition.

29. I also found no merit in petitioners' argument in HCJ 5295/14, according to which the proceeding taken by the respondent had administrative flaws, mostly pertaining to the first demolition of their home on June 30, 2014 without any order or warning. The respondent explained that the activity of the IDF forces in the apartment of said petitioners, as the activity of the forces in the apartment of M_____ Qawasmeh, was the outcome of operational needs and such explanations are acceptable, particularly in view of the fact that in the hearing before us the petitioners chose not to dispute respondent's explanations on this issue.

30. Indeed, it cannot be denied that acts of incitement and violence in Jewish society against Arabs have proliferated. It is regretful and one should act forcefully against such phenomena. However,

the comparison is not in place, in view of the fact that the measure of house demolition in the Area is not taken in cases of incitement and violence, but only in extreme cases of murder. I am not oblivious of the horrifying murder of the youth Mohammed Abu Khdeir, a case which rocked the foundations of our country and was condemned across the board. However, this is an extremely exceptional case. Therefore, I am of the opinion that there is no room for the artificial symmetry argued by the petitioners in support of their argument concerning discriminating enforcement.

Moreover, I do not think that petitioners' discrimination argument is acceptable. The burden to present adequate factual infrastructure which can refute the presumption of administrative validity, lies on the party who argues that discriminating or "selective" enforcement is applied. Even if the arguing party surmounted this hurdle, the authority can still show that the seemingly selective enforcement is, in fact, based on pertinent considerations. And as pointed out by Justice I. Zamir in HCJ 6396/96 **Zakin v. The Mayor of Beer Sheva**, IsrSC 53(3) 289 (1999), the burden to prove selective enforcement is particularly weighty. Justice Zamir states as follows:

> Indeed, an administrative authority seeking to enforce the law enjoys, like any administrative authority, the presumption of validity. The burden to refute this presumption lies on the party who raises against the decision of the authority the argument of selective enforcement, and therefore requests that the decision be revoked. It stands to reason that only in rare cases said presumption will be refuted and selective enforcement substantiated. Firstly, it stands to reason that usually an administrative authority which has the power to enforce the law, will exercise the power based on pertinent considerations in view of the underlying purpose of the law. Secondly, even when there is a concern that selective enforcement was applied, usually it is difficult to prove that the administrative authority exercised its power to enforce the law based on an extraneous consideration or for the attainment of an inappropriate purpose. However, in the rare case, in which selective enforcement is proved, it should have legal ramifications [*ibid*, page 307].

In the case at hand, the respondent made a decision which is situated at the heart of his discretion. Petitioners' arguments cannot point, at this time, at discrimination or extraneous considerations which underlie respondent's decision. In view of the fact that regulation 119 has a deterring rather than a punitive purpose, the mere execution of hideous terror acts by Jews, such as the abduction and murder of the youth Mohammed Abu Khdeir, cannot justify, in and of itself, the application of the regulation against Jews, and there is nothing in respondent's decision alone, not to exercise the regulation against the suspects of this murder, which can point at the existence of selective enforcement.

31. As to petitioners' arguments in HCJ 5292/14 concerning the possible effect of the demolition on adjacent apartments, we made a note of the statement made by respondent's counsel according to which he would refrain from taking actions which might cause damage to adjacent properties. If they so wish, the petitioners in the three petitions can submit to the respondent engineering opinions on their behalf on this issue, and the respondent will examine these opinions with an open heart and mind before he executes the orders being the subject matter of the petition.

However, I found no merit in the alternative request of the petitioners in HCJ 5295/14 that we order the respondent to transfer for their review an engineering opinion concerning the demolition, and I am satisfied that the respondent will carry out his decisions, taking into proper consideration the engineering characteristics of petitioners' apartment. I also found no merit in petitioners' arguments in HCJ 5300/14 concerning the manner of execution of the demolition, a matter with respect of

which the respondent is vested with particularly broad discretion. In addition, I did not find that there was any room to discuss petitioners' request that the respondent would undertake to compensate the injured parties should the demolition cause damage to adjacent properties. This is a hypothetical argument which should be heard, if at all, only in the event such damages are caused as aforesaid, and by the competent instances. I am hopeful that this issue remains solely hypothetical.

32. In conclusion – I suggest to my colleagues to deny the three petitions without an order for costs. If my opinion is heard, the petitioners will submit for respondent's review, if they so wish, an engineering opinion as specified in paragraph 31 above until Wednesday August 13, 2014 at 13:00. After he reviews the opinions will be submitted, if submitted, the respondent will decide whether to leave his decision as is or to alter it. The respondent will not carry out any seizure and demolition or sealing actions in petitioners' homes until Thursday August 14, 2014, at 13:00.

Justice

Justice I. Amit

I concur.

Justice

Justice N. Sohlberg

I agree with the opinion of my colleague, Justice Y. Danziger.

Indeed, injuring a family member – who committed no sin – in a manner which will cause him to remain without a roof over his head, contrary to fundamental principles, is troublesome. But this should be well remembered, that also in criminal proceeding the purpose of which is punitive – as distinct from the deterring purpose herein – innocent family members are injured. The imprisonment of a person for a criminal offense committed by him, necessarily injures his spouse, children and other relatives, both physically and mentally. There is no need to elaborate on the deprivations arising from a person's incarceration, which are suffered by his family members.

It should be further noted: the deterring purpose underlying the seizure and demolition or sealing of a residential home necessarily entails the impingement of innocent people. Otherwise, how shall deterrence be achieved? The sour fruits of the murderous terror compel us deter in advance against a horrible act such as that which was carried out against the three youths, even at the cost of injuring the family members of Abu 'Ayesha and M_____ and H_____ Qawsmeh; and this injury, under the circumstances, does not exceed the proper extent, as shown by my colleague in his opinion.

Justice

Decided according to the judgment of Justice Y. Danziger.

Given today, 15 Av 5774 (August 11, 2014).

Justice Justice Justice