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At the Supreme Court Sitting as the High Court of Justice

HCJ 1014/16

Before:

**Honorable Justice I. Amit
Honorable Justice Z. Zylbertal
Honorable Justice N. Sohlberg**

The Petitioners:

1. _____ **Skafi**
2. _____ **Skafi**
3. _____ **Skafi**
4. _____ **Skafi**
5. _____ **Skafi**
6. _____ **Skafi**
7. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

v.

The Respondent:

Commander of IDF Forces in the Judea and Samaria Area

Petition for *Order Nisi*

Session date:

6 Adar A 5776 (February 15, 2016)

Representing the Petitioners:

Adv. Lea Tsemel

Representing the Respondent:

Adv. Roi Shweiqa

Judgment

Justice N. Sohlberg:

1. Petition against a forfeiture and demolition order for a housing unit in Hebron issued by the military commander by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945.

Background

2. On November 4, 2015, _____ Samir Skafi drove his car toward the Halhul junction, where four border policemen, who were stationed at that place for security purposes, were standing at that time. When he was driving near the place in which the police officers were standing, he suddenly veered to the side of the road, toward them, and strongly hit a small mound of earth with his car. Several police officers managed to escape the car, but the late police officer Benjamin Yakubovich did not escape the car. Yakubovich who was hit by the car, was critically injured, and a few days later he died from his wounds in the hospital.
3. On December 31, 2015, following the attack, notice was sent by the military commander to the petitioners, the family members of the perpetrator, of "an intention to forfeit and demolish" the apartment which served as the residence of the perpetrator and the petitioners pursuant to Regulation 119. On January 5, 2016, the petitioners submitted an objection against the intention to forfeit and demolish the apartment, in which they raised several arguments and also requested to receive to their possession the investigation material which served as the basis for the decision "in order to remove the possibility that it was an accident rather than a terror attack" (paragraph 6 of the objection).
4. On February 2, 2016, shortly after midnight and before the response of the military commander to the objection was received, an IDF unit entered the apartment and according to the petitioners drilled holes in the apartment's walls in preparation for the execution of the demolition. On that day, petitioners' counsel sent a letter to the military commander in which his response to the incident was requested in view of the fact that his response to the objection had not yet been received. Later that day the response of the military commander to the objection was sent, in which the petitioners were notified of its denial. With respect to petitioners' request to receive the investigation material it was argued that the classification of the material did not enable the transfer thereof to the petitioners, but that a video clip which documented the incident and which was published on the internet indicated that it was an attack rather than an accident. With respect to the incident in which an IDF unit entered the apartment at night in order to drill holes it was argued that it was done in a bid to examine an additional demolition method, and that in any event **"The problematic nature of the matter was clarified to the authorized officials who were requested to ensure that such an event would not recur"** (paragraph 15 of the response). With respect to the execution method of the order it was stated that in view of the fact that the apartment was located on the third floor of a building in which additional families were living it had been decided to demolish the interior partitions of the apartment and seal it with foamed substance which would make it unusable. In view of the fact that the objection was denied, the response was sent to the petitioners along with a 'forfeiture and demolition order' with respect of which it was clarified that its realization would not commence before February 7, 2016, at 09:00. On February 7, 2016, the petition at bar was filed and on that day an interim injunction was issued by this court which prevented the execution of the demolition order.

Petitioners' main arguments

5. The petitioners raise several arguments on the **general** level: **firstly**, house demolition pursuant to Regulation 119 constitutes collective punishment and is contrary to the provisions of international humanitarian law; **secondly**, according to Israeli Palestinian Interim Agreement on the West Bank and the Gaza Strip, the military commander did not have authority to exercise the sanction of house demolition and forfeiture in Area A, in which the apartment is located; **thirdly**, it is highly doubtful whether demolition of perpetrators' homes does indeed deter potential perpetrators and the military should present **"an updated professional evaluation... concerning the benefit or the damage arising from the exercise of this sanction"** (Emphasis appears in the original). Moreover. According to the petitioners such deterrence is not required when the perpetrator was killed in the incident, and therefore it should be determined that **"when a person suspected of committing an attack was executed and killed without trial and without inquiry, additional deterring measure will not be allowed"** (Emphasis appears in the original).

6. On the **specific** level the petitioners argue that it is doubtful whether the incident was a ramming attack and not a traffic accident. The necessary steps which should have been taken under the circumstances were not taken to rule out the possibility that it was an accident, including an interrogation of the perpetrator's family members and close friends; an examination by a traffic examiner of the circumstances of the accident; a medical examination of the deceased's body in an attempt to find out whether he had a stroke while he was driving, and such other interrogations and examinations. The petitioners argue that the classified material underlying the decision of the military commander cannot be trusted and that therefore the execution of the order should not be approved unless the investigation material is publicly disclosed. In addition, the petitioners stress that damage will be caused to the family should the order be approved, particularly to the perpetrator's father, who is not healthy.
7. Should the order be approved and due to the fact that the military commander notified that it would be executed by way of sealing, the petitioners argue that there is no need to demolish the interior partitions of the apartment. It is also argued that the provision included in the order according to which "**no structure shall be erected on the plot being the subject matter of this order**" is not lawful and that it should be clarified that the order applies solely to the apartment.

The main arguments of the military commander

8. In response to petitioners' arguments on the general level, the military commander argues that these arguments are not new and have already been broadly argued and discussed, and rejected in several recently given judgments. According to him, the decision to exercise the authority pursuant to Regulation 119 in the case at bar was made in view of the severity of the incident and its grave results, against the backdrop of the recent wave of terror attacks – which requires that deterrence actions be taken against potential perpetrators, and therefore there is no cause for interfering in his decision.
9. According to the military commander, petitioners' argument that there is a possibility that the incident was a traffic accident rather than an attack "**is frivolous and has no factual basis**". According to him he has clear administrative evidence that it was a terror attack: **firstly**, the video clip which documented the incident indicates that when the perpetrator arrived with his car to the point in which the policemen were standing, he veered from his path, accelerated the speed of the car and raced forward toward them; **secondly**, on the floor of the car, in front of the seat next to the driver's seat, an about 33 cm long switchblade was found (with an about 10 cm long blade); **thirdly**, according to the statements of the policemen who were on scene at the time of the attack the perpetrator accelerated the speed of the car and drove 'wildly' toward them, which indicates that it was a deliberate ramming.
10. With respect to the incident in which an IDF unit arrived to the apartment in order to drill holes in the internal partitions of the apartment, the military commander noted that in retrospect it became evident that the above actions were not carried out in petitioners' apartment. In any event, the military commander emphasized that following the incident the procedures were clarified to authorized officials so that similar incidents would not recur. As to petitioners' argument concerning the prohibition included in the order according to which "**no structure shall be erected on the plot being the subject matter of this order**", the military commander argues that said probation does not pertain to the entire plot but rather to the apartment only.

Discussion and Decision

11. "**It is not necessary to discuss all over again the general issue regarding the mere authority to issue seizure and demolition orders according to Regulation 119, whenever the court hears a petition which concerns Regulation 119 of the Defence Regulations.**" (HCJ 8150/15 Abu Jamal

v. GOC Home Front Command (December 12, 2015) paragraph 6 of the judgment of my colleague, Justice **I. Amit**). As noted by the military commander in his response, petitioners' arguments on the general level have been recently discussed in depth by this court in a number of judgments, and were rejected. This applies to the question of whether house demolition policy reconciles with international law (see, for instance, HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014) paras. 21-24 of the judgment of Justice (as then titled) **E. Rubinstein**); This applies to the effectiveness of the house demolition policy (see, for instance, HCJ 7040/15 **Hamed v. The Military Commander of the West Bank Area** (November 15, 2015) paras. 27-29); I also discussed this issue in the above HCJ 8091/14 (paras. 5-14). An updated opinion of the Israel Security Agency (ISA) has been recently submitted which indicates that "the measure of house demolition does essentially have a real deterring effect upon potential perpetrators who avoid such terror activities due to the concern of demolition" (the words of the Deputy President **E. Rubinstein** in HCJ 967/16 **Abed al-Basset Harub v. The Military Commander of the West Bank Area** (February 14, 2016); Likewise, the authority of the military commander to act in Area A has also been recently discussed and determined (see, for instance, HCJ 5290/14 **Qawasmeh v. The Military Commander of the West Bank Area** (August 11, 2014) para. 28). As is known, a request to hold a further hearing in the judgment which was given in the above HCJ 8091/14 was denied in a decision given by the President **M. Naor** in HCJFH 360/15 dated November 12, 2015. Recently, in the above HCJ 967/16 the deputy president **E. Rubinstein** mentioned the minority opinion of Justice **M. Mazuz** in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 12, 2015), and referred also to comments made by Justices **E. Hayut**, **U. Vogelman** and **Z. Zylbertal** in a number of judgments on this issue "**according to which once the court meticulously examined an issue which was submitted to it, its conclusion binds all, lest in lieu of a court of law we shall turn into a court of justices, and the meaning of the above is clear.**" In view of the above, there is no justification to revisit arguments on the general level in the context of this judgment, and they should be denied, with reference being made to the above authorities.

12. On the specific level the petitioners argue that the possibility that the ramming of the policemen was nothing but an undeliberate traffic accident was not seriously examined, and their position is that the administrative evidence which was presented by the military commander does not suffice to establish the determination that this case concerns a terror attack. As to the level of proof which is required for the purpose of having an order issued pursuant to Regulation 119, case law provides that "**In view of the fact that we are not concerned with a criminal proceeding, it suffices that the respondent is satisfied based on evidence presented to him that one of the inhabitants of the house committed any of the acts specified in Regulation 119 so that an order for its demolition may be issued; and in the words of Justice, as then titled, Barak: 'As is known, the military commander does not need a convicting judgment of a judicial instance and he himself is not a court of law. As far as he is concerned the question is whether a reasonable person would have considered the material which was presented to him as having sufficient evidentiary value' "**" (HCJ 7823/14 **Ghabis v. GOC Home Front Command** (December 31, 2014, para. 10).
13. After I have reviewed the evidence presented before us and the written arguments of petitioners' counsel which pertain to the material in the police file, I came to the conclusion that petitioners' arguments in that regard should be denied. The video clip which documents the incident speaks for itself; so does the knife which was found in the car, on the floor of the seat next to the driver's seat; the detailed statements of three border policemen about what happened on the scene of the attack, in which the perpetrator "**accelerated the speed of his car and raced toward us and I immediately shouted to the team attack**" (the words of the policeman Avatamo Gatamo); "**We heard a loud noise of an engine I looked and I saw that the car was driving wildly toward us**" (the words of the policeman Dan Uschenko); "**I heard a noise of a car wildly speeding up in our direction, and then I saw that the car hit a policeman named Benjamin Yakubovich**" (the words of the

policeman Ilan Kranofolsky); The above was coupled by a privileged, weighty evidence, which naturally may not be elaborated on. All of the above substantiate, on the required level of certainty, the conclusion that this case concerns a terror attack. Indeed, additional investigative steps could have been taken to substantiate and strengthen this conclusion (for instance, it seems that an examination of brake marks, technical flaws in the car etc. by a traffic examiner, could have been useful). However, this fact alone does not render the decision of the military commander defective. As aforesaid, **"the military commander does not need a convicting judgment of a judicial instance and he himself is not a court of law. As far as he is concerned the question is whether a reasonable person would have considered the material which was presented to him as having sufficient evidentiary value"** (the words of Justice (as then titled) A. Barak in HCJ 361/82 **Hassan Khalef Ali el Hamri v. Military Commander of the Judea and Samaria Area**, IsrSC 36(3) 439, 442 (1982)). Indeed, a reasonable person would have considered the material before the military commander in the case at bar as "having sufficient evidentiary value."

14. It is needless to reiterate the difficulties associated with the demolition of the interior partitions of the above referenced apartment and its sealing with foamed substance, acts which forthwith involve damage to innocent people. Nevertheless, if the above steps are not taken, as stated in the above HCJ 8091/14, how would deterrence against suicide attacks and other similar attacks, be achieved? These are obviously some of the rotten fruits of murderous terror which forces us to use this measure to promote deterrence, even if minimal, against horrendous acts such as the one committed by the perpetrator in the case at bar, a ramming attack in which the border policeman, the late Benjamin Yakubovich was killed. And note well: we are concerned with property damage rather than with bodily damage. The sealing of an apartment is on the scale, and it is grave; but on the other hand, it is balanced against the saving of lives.
15. Therefore, I am of the opinion that there is no justification to interfere in the decision of the military commander and I shall accordingly propose to my colleagues to dismiss the petition.

Justice

Justice Z. Zylbertal

1. If my opinion is heard, we shall order that an *order nisi* be issued in this petition and therefore I cannot join the position of my colleague Justice **N. Sohlberg** according to which the petition should be dismissed.
2. The background and facts of the matter are specified in the judgment of Justice **Sohlberg** and there is no need to repeat these details. The same applies to the description of the parties' arguments. I also do not intend to refer again to the arguments on the general level of the issue of demolition (or sealing) orders issued pursuant to Regulation 119 of the Defence Regulations and my opinion on this issue has already been expressed in the past (HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015); hereinafter: **Abu Jamal**).

My opinion in the petition at bar is based on the specific details of the case at hand and more precisely – on my conclusion that the respondent did not have sufficient administrative evidence to exercise his authority.

3. Respondent's conclusion that this case concerns a deliberate attack is based on several details:

- a. Testimonies of border policemen (hereinafter: the **policemen**) about a car which arrived from the south toward Halhul junction north, and 'wildly' accelerated its speed while veering from its path toward the policemen.
- b. A video clip which documents (from a-far) the car driving up the road and which shows how the car heads on directly toward a group of people which was standing at the side of the road instead of turning right (eastward) with the road.
- c. A switchblade with an about 10 cm long blade which was found in the car.

Indeed, we are concerned with a collection of significant details which can, under certain circumstances, lead to a reasonable conclusion that this was a deliberate attack. However, in my opinion, we must examine not only the evidence that we "have", and under the circumstances of the case weight should also be given to the "lacking" evidence, that nothing prevented their completion (at least no explanation was given as to why said omission could not be completed). Before I point at the missing details, a few words on the nature of the administrative evidence which are required in the case at bar.

4. There is no dispute that in the case at bar the required level of proof is not as high as the level of proof which is required for conviction in criminal proceedings, and as far as the respondent is concerned "the question is whether a reasonable person would have considered the material which was presented to him as having sufficient evidentiary value" (HCJ 7823/14 **Ghabis v. GOC Home Front Command** (December 31, 2014)). However, in view of the extreme severity of the measure used according to Regulation 119 of the Defence Regulations and the severe violation of fundamental rights ancillary to the exercise of the power, the required evidentiary level is of "clear, conclusive and compelling evidence" (see a review of the issue in the context of demolition orders pursuant to Regulation 119 in paragraph 27 of the judgment of Justice **M. Mazuz in Abu Jamal**; see also: Itzhak Zamir **The Administrative Authority** 1135-1139 (second edition, 2011)). As aforesaid, "The greater the violation of a person's right, the higher the level of persuasion which is required, based on the evidence before the authority, to justify the decision" (HCJ 951/06 **Stein v. Police Commissioner Karadi**, paragraph 21 of the judgment of President **A. Barak** (April 30, 2006)). However, before we examine the administrative evidence which were used by the authority in the exercise of its power, in and of itself, we must examine whether the authority fulfilled the **evidence collection** obligation, in view of the fact that unlike a judicial authority, which as a general rule, does not collect the evidence which are used by it for the formulation of its decision, the administrative authority is also responsible for their collection which action must also be taken in a reasonable manner:

A basic rule in the doctrine of public administration is that a competent authority will not be permitted and authorized to make a decision before it establishes a proper infrastructure for the decision, an infrastructure premised on verified data which can properly serve as a reasonable basis for the decision.

(...)

Justice Zamir outlines the "procedure which leads to the formulation of a factual infrastructure which serves as a basis for the administrative decision", and as he taught us the procedure should meet four tests as follows: one, collecting data in a proper and reasonable manner; two, separating the wheat from the chaff and leaving on the table only the pertinent considerations; three, checking the reliability of the data; and

four, creating an infrastructure 'sufficiently solid to support its decision'" (HCJ 8569/96 **Federation of Working and Studying Youth v. Minister of Education, Culture and Sports**, IsrSC 52(1) 597, 620-621 (1998)).

Hence, it must be ascertained not only that the evidence in the authority's possession creates "a solid infrastructure" to support the decision, but also that the evidence collection procedure was conducted "properly and in a reasonable manner". If it becomes evident that additional data could have been collected, which could have potentially shed a different light on the case and it was not done and no explanation was given for such failure, it should also be taken into account that had the additional data been obtained, the power would not have been exercised or would have been exercised in a different manner. To a certain extent it is similar to the well-known rule according to which a litigant is held not to withhold evidence which may assist him, and had he failed to do so and did not explain why – it may be held against him and assume that the evidence is to his detriment.

5. The possibility that a driver will lose control over his car, either as a result of human or physical failure or as a result of a technical malfunction in the car, and consequently an accident will occur, is not far and unreasonable. Incidents of this sort happen occasionally and cause accidents, some of which have serious results. Indeed, in view of current events the possibility that this case concerns a deliberate attack is ostensibly more plausible than the possibility that an accident is concerned, taking into consideration the data of the scene and the identities of the persons who were injured and the person who hit them. However, precisely in view of such possible "bias" in the analysis of the administrative evidence, which derives from the information that the authority has with respect to **other** cases, it was appropriate to at least **try to obtain** additional evidence so as to have a full and complete picture to the maximum extent possible which is not affected by presumptions and desired assumptions. In this context one should take into consideration the possibility that the policemen experienced the incident, as far as they were concerned, as a deliberate attack, being an incident which they expected and of which they were fearful, and in this sense one should be reluctant from drawing conclusions which are mainly based on their testimonies, without implying that these testimonies are not truthful (rather, they reflect a subjective understanding of the incident which derives, *inter alia*, from current events and public atmosphere).

The above mentioned video clip and other evidence which were in respondent's possession (including the privileged evidence which was presented to us for our review) do not rule out the possibility that it was not a deliberate attack but rather an accident. In that regard it should be noted that the car hit the policemen and caused the unfortunate death of one of them, the late Benjamin Yakubovich, while it should have taken a relatively sharp turn to the right (eastward) and instead continued driving generally to the north and in so doing, hit the force which was standing on the outer side of the curve of the road. In other words – it is neither a deviation nor conduct which by its nature indicates of a deliberate intent to hit the policemen; and at least – it cannot be determined without an opinion of a traffic examiner. Such an opinion could have (possibly) shed light on the driver's conduct prior to the ramming incident. In the current circumstances, the **absence** of an opinion and the **absence** of a reasonable explanation for the failure to obtain such an opinion constitute, as such, a consideration which should be taken into account among all other considerations. In that sense, it seems that the administrative evidence would have carried greater weight had such an opinion been prepared and stated that no conclusion could be drawn about the conduct prior to the ramming. The absence of an opinion of a traffic examiner leaves an open possibility that a deliberate ramming could have been ruled out had such an opinion been prepared.

The above also applies to an opinion regarding the condition of the car, as well as to a pathologist opinion which will try to find out whether the driver suffered, prior to the accident, some sort of physical occurrence which could explain the loss of control over the car. Here too, no explanation

was given for the absence of these opinions, and here too, **their mere absence** (along the absence of any explanation for this state of affairs) carries evidentiary weight.

Beyond the above evidentiary deficiencies, the absence of background information regarding the driver's past, the purpose of his trip (to the extent such purpose existed other than the execution of a terror attack. In the petition it was argued that the driver was on his way to an important meeting: had this allegation been verified, it should have been taken into account among all other considerations), his seniority and experience as a driver (on this issue it was also argued in the petition that he was an unexperienced driver), data pertaining to the rental of the car by the driver etc. – is evident. Similarly, the person who was questioned by the policemen prior to the incident was not interrogated: how did he see the occurrences etc.

Hence, in a host of issues, the evidentiary infrastructure could have ostensibly been "thickened". In the case at bar, in view of the fact that the respondent did not have direct evidence that the incident was a deliberate attack and in view of the fact that this conclusion was drawn from an array of circumstantial evidence, it was at least necessary to obtain additional evidence to refute or substantiate the conclusion, particularly when the conclusion that this case involves a deliberate attack has very severe consequences to the driver's family.

6. I am not oblivious of an important and weighty item which is the knife that was found in the car. Ostensibly, this indicates of the terrorist purposes of the driver. However, in view of the fact that the car was rented and was not in the exclusive control of the driver (it was not even examined how long it was in his possession, a detail which seemingly could have been easily obtained), the least that should have been done was to examine whether the knife had the driver's finger prints on it. And again – in my view, the knife would have had greater evidentiary weight had a finger prints examination been conducted which concluded that they could no finger prints could be produced from the knife. The **absence** of an examination obligated the respondent to consider the possibility that finger prints could have been found on the knife which did not include the finger prints of the driver.
7. According to the above, in my view a reasonable evidence collection procedure has not been implemented and therefore it is possible that the respondent had before him only partial data, while the missing data could have, had they been collected, changed the conclusion which was reached. It is needless to note that the scope of evidence collection requirement changes from one case to the other, and if, for instance, any document was found which attested directly at the driver's intention to carry out an attack, there would have been no need to deepen the investigation. However, under the circumstances of the case at bar I am of the opinion that despite the fact that the respondent has in his possession evidence which carry substantial weight, the absence of an effort for the collection of additional data which could have ostensibly been obtained (no argument to the opposite was made by the respondent), affects the evidentiary weight of the "existing" evidence. And note well – as has already been mentioned, not in every case in which an administrative authority is exercised the same scope of evidence collection effort is required. However, this case involves harm of an extreme severity and it would be appropriate that a decision in that regard would be made only after the evidence collection effort was exhausted.

Justice

Justice I. Amit

1. The evidentiary level which is required for the exercise of the administrative authority is not the level which is required for criminal conviction. However, we are not concerned with an ordinary administrative authority which involves the revocation of a person's license and such other similar action, and I agree with my colleague, Justice **Zylbertal**, that in view of the severity of the measure under Regulation 119 the required evidentiary level is very high.

In my opinion, the evidence in the case at bar meets the required level.

2. We have before us an objective evidence which speaks for itself (the video clip which shows how the car veers and races into a group of soldiers which stands at the side of the road) and policemen's testimonies which indicate that we are not concerned with a sudden deviation, either as a result of a cardiac failure or a stroke which was suddenly suffered by Samir Skafi at his young age, or due to a sudden malfunction of the brakes or wheel system. Not without reason had the policemen noticed the car which was racing at them. It came about as a result of the sound of the accelerating engine of the car which was racing toward them, and in the words of one of the policemen "**and then we heard a loud noise of an engine**", which enabled the policemen to escape injury at the last minute, other than the late policeman Yakubovich who did not manage to do so.
3. There is no doubt that more could and should have been done, be it only to thwart the allegation that an innocent traffic accident is concerned, and first and foremost, an examination of a traffic examiner and examination of the car. In the hearing before us it was argued that there were no brake signs. It is regretful that this was not manifested in the evidence collected on scene. With respect to the pathologic examination of the body, as proposed by my colleague, I am not at all convinced that an autopsy is required to rule out a cardiac failure or a stroke, particularly in circumstances as clear as the circumstances at hand and in view of the sensitivity of the matter since an autopsy may be followed by complaints and claims on other levels.
4. In criminal cases, in which the required level of proof is higher than the administrative evidentiary level, we frequently hear arguments about investigation deficiencies. But the rule on this issue is known, and it has been held by the court in many cases that investigation deficiencies, although held against the prosecution, would not necessarily lead to the acquittal of the defendant and an examination should be conducted as to whether the omission was so severe that it raised the concern that defendant's defense was undermined in a manner which made it difficult for him to deal with the evidence which "was" produced. The same applies to the case at hand. Although more could have been done, the investigation deficiencies do not tip the scale toward the possibility that this case concerns an innocent traffic accident.
5. I watched the video clip which speaks for itself over and over again. The video clip coupled by the testimonies of the policemen, the fact that the knife was found in the car and the support or "something in addition" in the form of the privileged evidence – have all completely satisfied me that the incident being the subject matter of our discussion is far from being an undeliberate traffic accident.

Therefore, I join the opinion of my colleague, Justice **Sohlberg**, that this petition should be dismissed.

Justice

Decided as specified in the judgment of Justice **Noam Sohlberg**.

Given today, 19 Adar A 5776 (February 28, 2016).

Justice

Justice

Justice