At the Supreme Court Sitting as the High Court of Justice

HCJ 1630/16

Before:	**Honorable Justice U. Vogelman** **Honorable Justice N. Sohlberg** **Honorable Justice M. Mazuz**
The Petitioners:	1. **Masudi** 2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
	v.
The Respondent:	**Commander of IDF Forces**
Petition for *Order Nisi* and *Interim Order*	
Session date:	6 Adar 5776 (March 16, 2016)
Representing the Petitioners:	Adv. Andre Rosenthal
Representing the Respondent:	Adv. Roi Shweiqa

Judgment

Justice N. Sohlberg:

1. A petition against a forfeiture and demolition order for a residential unit in Hebron issued by the Commander of IDF Forces in the Judea and Samaria Area by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945.

Background

2. On December 7, 2015, Ihab Masudi arrived to the Cave of Machpela area with a knife in his bag. When he was near the Cave of Machpela, Masudi stabbed the late Genadi Kaufman, and critically wounded him. Three weeks later Kaufman died of his wounds.

3. On February 5, 2016, following the stabbing attack, notice was sent to the family members of the perpetrator, including his father, petitioner 1, on behalf of the respondent (hereinafter also: the **military commander**) of the latter's intention to forfeit and demolish the apartment on the first floor

of a building in Hebron, in which the perpetrator lived and which is owned by his father; and the above by virtue of Regulation 119.

4. On February 10, 2016, the petitioners submitted an objection on behalf of the perpetrator's family against the intention to forfeit and demolish the apartment. In the objection, several arguments were raised: Firstly, the respondent failed to specify how he intended to carry out the demolition which could cause the entire building to collapse; Secondly, "**Not a shred of evidence exists which ties the parents of Ihab Masudi and the other inhabitants of the building to the commitment of the alleged offenses**"; Thirdly, the mere use of Regulation 119 is immoral, does not reconcile with Jewish law, impinges on the property and dignity of innocent people, and is contrary to international law; Fourthly, the argument that the power to demolish under Regulation 119 is exercised for deterrence rather than for punitive purposes has no basis in view of the fact that the Regulation is located in a part captioned – 'Miscellaneous Penal Provisions' – and in view of the fact that the 'deterrence of others' principle is entrenched in the Penal Law as one of the objectives for which penalties are prescribed. The petitioners requested that the order for the demolition of the apartment be revoked and alternatively, that only one room therein be sealed. In alternative to the alternative the petitioners requested that the apartment be sealed in a manner which would not cause damage to the other apartments in the building.

5. On February 23, 2016, the respondent denied petitioners' objection and noted that "**the demolition of the apartment will be carried out manually, by the demolition of the apartment's partitions. To the extent possible, the interior space of the apartment will be filled with barbed wire (concertina wire) and foamed substance**". This method, it was so stated "**will prevent any incidental damage to uninvolved persons or third parties**." It was finally stated that "**the demolition would be monitored by an authorized engineer on behalf of the engineering corps**." The notice regarding the denial of the objection was sent together with a 'Forfeiture and Demolition Order' which stated that its realization would not commence before February 28, 2016. On February 28, 2016, the petition at bar was filed and on that very same day an interim injunction was given by this court which prevented the execution of the demolition order.

The main arguments of the parties

6. This petition is general in nature. In a nutshell, the petitioners request that we "**take a step towards a change of policy […] and restrain the use of force by the government**" in a bid to protect the rights of the Palestinian population. According to them, as far as house demolition by virtue of Regulation 119 is concerned, this court acts with "**exaggerated self-restraint**" only due to its "**reliance on the value of the precedent**" while section 20(b) of the Basic Law: Judiciary provides that the Supreme Court is not bound by its own rules and despite statements made by Justices of this court, including Justices **M. Zemora, M. Elon** and **A. Barak** regarding the importance attached to the freedom of determination of the justices of the Supreme Court and the fact that they are independent in the sense that the principle of the binding precedent does not apply to them.

7. The petitioners reiterate the arguments raised by them in the objection, including the argument that house demolition by virtue of Regulation 119 constitutes collective punishment which is contrary to the Jewish principle according to which every man shall pay for his own crimes and every man shall be put to death for his own sin, and which also runs contrary to the provisions of international humanitarian law; and the argument that it is not a deterring measure but rather a punitive measure. The petitioners argue further that despite the frequent use of Regulation 119 "**the attacks did not cease**" which raises doubts as to the effectiveness of this measure. Moreover. According to the petitioners "**even if there is no difficulty in justifying the cause, namely, reducing attacks – the measure is totally unlawful**." Finally, they argue that the use of said measure is motivated by "**necessities of revenge**".

8. On the specific level the petitioners raise a single argument, namely, that the father of the perpetrator knew nothing of the plans of his son and did not give them his consent.

9. Finally, the petitioners express a concern that despite respondent's statement that precautions will be taken when the apartment is demolished, severe damages will be caused to the neighboring apartments or even to the entire building as happened, as they argue, in other cases. Therefore, as an alternative remedy to the acceptance of the petition in which the revocation of the forfeiture and demolition order was requested, and alternatively, the limitation of the scope of the order in a manner that only partial sealing is approved, the petitioners request that we order the respondent to transfer to them a copy of the demolition plan and allocate a reasonable period of time to the engineer on their behalf to examine the plan and express his objections thereto.

The main arguments of the military commander

10. According to the respondent the petition should be denied in the absence of a cause of our intervention. According to him, the general arguments raised by the petitioners regarding the use of Regulation 119 are not new and were discussed and denied in a host of judgments including from recent times. Therefore, there is no justification to discuss them again within the framework of the petition at bar.

11. In his response to the petition the respondent specifies the considerations which are taken into account before the power pursuant to Regulation 119 is exercised, including "**the severity of the actions of the perpetrator; the circumstances of time and place; the perpetrator's residence connection to the apartment; the size of the apartment; the effect of the exercise of the measure on other people; engineering considerations and such additional considerations**". The respondent argues that given the severity of the attack which was carried out by Masudi; and in view of the escalating security situation over the last few years which is manifested in the increased number of attacks in general and in the number of popular attacks in particular, and in the increased number of injured Israelis as a result of terror activity, the exercise of the power by virtue of Regulation 119 against the building which served as the residence of the perpetrator is necessary in the case at bar for the deterrence of potential perpetrators against the execution of attacks in general, and attacks similar to the attack executed by Masudi, in particular. Therefore, the respondent is of the opinion that there is no cause to intervene in his decision.

12. In response to petitioners' argument that petitioners' father was not aware of his son's intentions, the respondent refers to the rule established by this court according to which the fact that no assistance was given to the perpetrator by his family members as well as the fact that they were not aware of his intentions, are not relevant to the formulation of the authority pursuant to Regulation 119.

13. As to the concern expressed by the petitioners that damage would be caused to the entire building, the respondent reiterates his response to petitioners' objection and clarifies that "**the demolition of the apartment will be carried out manually […] and therefore no damage is expected to be caused to the neighboring apartments**", and that the demolition plan was established by professionals on his behalf and was examined by them.

14. Finally the respondent argues that petitioners' request to receive for their review a copy of the demolition plan and enable an engineer on their behalf to examine it and submit his objections thereto should be denied since "**it is a professional matter which should be handled by professionals**".

Deliberation and Decision

15. Indeed, as noted by the respondent in his response, petitioners' general arguments against the use of Regulation 119 were discussed and denied in a host of judgments, some of which were given only recently.

16. As to the purpose of house demolition pursuant to Regulation 119, it was clarified in the judgments of this court that it was a deterring rather than a punitive purpose (see for instance: HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense**, paragraph 17 of the judgment of the Deputy President E. Rubinstein and the references there (hereinafter: **HaMoked**) (December 31, 2014)).

17. As to the appropriateness of the house demolition policy under international law, this issue was discussed in **HaMoked**, where it was held that house demolition, in and of itself, should not be regarded as a measure which ran contrary to international law and that it was a question of proportionality. Particularly, it was clarified that the demolition of a house of a proved perpetrator, in which the damage was caused to the property of the inhabitants of the house and not to the property of others or to human life, did not amount to collective punishment which was prohibited under international law (*Ibid*., paragraphs 21-24 of the judgment of Justice (as then titled) **E. Rubinstein**; see also *Ibid*., paragraph 21 of my judgment).

18. The issue of the effectiveness of the measure was also discussed in recent judgments and the conclusion is that there are indications to the effect that the concern that injurious measures may be taken against the houses of perpetrators' families does indeed deter potential perpetrators (HCJ 7040/15 **Hamed v. Military Commander of the West Bank Area**, paragraph 29 of the judgment of the President **M. Naor** (November 12, 2015); HCJ 967/16 **Harub v. Commander of IDF Forces in the West Bank**, paragraph 8 of the judgment of the Deputy President **E. Rubinstein** (hereinafter: **Harub**) (February 14, 2016); **HaMoked**, paragraphs 5-14 of my judgment).

19. As to petitioners' argument that even if the purpose was appropriate it did not justify the means, I do not think so. Indeed, as noted by Justice **I. Turkel** "The idea that the perpetrator's family members are to bear his sin is morally burdensome […] But the prospect that a house's demolition or sealing shall prevent future bloodshed compels us to harden the heart and have mercy on the living, who may be victims of perpetrators' horror doings, more than it is appropriate to spare the inhabitants of the house. There is no other way." (HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289, 294 (2003)). See also: **Hamed**, paragraph 24 of the judgment of President **M. Naor** and the references there). As I have recently emphasized, we are concerned with proprietary damage rather than with bodily harm. The sealing of an apartment is on the scales, and it is hard; but on the other hand, on the other pan of the scales, the saving of lives is weighed (HCJ 1014/16 **Skafi v. Commander of IDF Forces in Judea and Samaria**, paragraph 14 (February 28, 2016)).

20. In fact, the petition indicates that the petitioners realize that they have a major hurdle to clear while raising again arguments which have been recently denied, but they wish to convince us that we should veer from the applicable rule in this matter. We cannot accept this argument. As is known, "**The Supreme Court does not easily veer from its own precedents. New rules are created against the backdrop of new circumstances and in general they are not commonplace in our judicial work. A new rule is established when the court is convinced that the previous rule was erroneous or that it was no longer valid due to the change of times. The need to create a new rule occurs when it is necessary to adapt the law to the reality, be it social, practical or legal reality. Only then the rule is likely to change and thus develop the law**" (LCA 8925/04 **Solel Boneh Building and Infrastructure Ltd. v. Estate of Alhamid**, judgment of Justice (as then titled) **D. Beinisch** (February 27, 2006)). The above applies even more forcefully to a rule which has just recently been affirmed after the circumstances of time and place were examined. The lawfulness of the house demolition measure, its effectiveness and the justification of its use, all these issues were discussed

in a large number of judgments, including many from recent times. The petitioners did not point at any change of circumstances which justifies a deviation from case law (**Harub**, paragraph 7 of the judgment of Deputy President E. Rubinstein and the references there (February 14, 2016)).

21. As to petitioners' argument that the father of the family was not aware of the intention of his son to carry out an attack and therefore should not be punished for his actions, this argument has also been discussed in the past by this court in its judgments and was rejected. Indeed, "**Deterrence considerations sometimes require the deterrence of potential perpetrators who must understand that their actions might also harm the well-being of their relatives, also when there is no evidence that the family members were aware of the perpetrator's doings**". (HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**, paragraph 7 of the judgment (as then titled) **M. Naor** and the references there (January 5, 2009)). However, it was held that the awareness or involvement of the perpetrator's relatives may affect the scope of the demolition order (HCJ 4597/14 **'Awawdeh v. Military Commander of the West Bank Area**, paragraph 18 (hereinafter: **'Awawdeh**) (July 1, 2014)).

22. The respondent argued that he had in his possession privileged information which indicated that parties close to the perpetrator expressed support in his actions. In the hearing before us, petitioners' counsel did not agree that the privileged information be presented *ex parte*. Therefore, we were unable to examine the quality and nature of said material. However, I believe that the open material which was presented to us sufficiently substantiates the decision of the military commander, considering the scope of the expected harm, the presumption of administrative regularity according to which respondent's decision to demolish the apartment was duly made and is valid, and the privileged information which supports his arguments on the evidentiary level (HCJ 1227/98 **Malevski v. Minister of Interior**, IsrSC 52(4) 690, 711 (1998); AAA 5237/05 **Ministry of Interior v. Carlson**, paragraph 9 (April 25, 2006); LHCJA 1621/06 **Shibli v. Israel Prison Service**, paragraph C.4 (May 4, 2006); HCJ 5696/09 **Mughrabi v. GOC Home Front Command**, paragraph 3 of the judgment of the President (as then titled) **D. Beinisch** (February 15, 2012)).

23. With respect to petitioners' request to receive for their review a copy of the demolition plan and enable an engineer on their behalf to review it and submit his objections, I am of the opinion that the request should be denied. The respondent described in his response to the objection and in his reply to the petition the anticipated demolition method and noted that it would be carried out annually in a manner which is not expected to cause damage to the neighboring apartments. Therefore, and in view of the broad discretion vested in the respondent as to the demolition method (see for instance: HCJ 5290/14 **Qawasmeh v. Military Commander for the West Bank Area**, paragraph 31 of the judgment of Justice **Y. Danziger** (August 11, 2014)), I see no reason to accept the request. However, to the extent the petitioners choose to submit to the respondent an engineering opinion on their behalf they may do so within three days. (Compare: *Ibid*; **'Awawdeh**, paragraph 27 (July 1, 2014)).

24. Therefore, I am of the opinion that there is no reason to intervene in the decision of the military commander and I shall therefore suggest to my colleagues to deny the petition. The interim order will expire within one week so as to enable the petitioners to submit an engineering opinion as aforesaid (within three days) and to make the necessary arrangements for the demolition.

25. Having read the opinion of my colleague, Justice **M. Mazuz**, regarding a host of questions which "have not yet been addressed in a sufficient and up-to-date manner by this court in its judgments" (paragraph 3) It should be noted that I respect his opinion but find it hard to accept his tone which disregards a thorough and weighty discussion of the difficult questions raised by the issue at bar in a host of recent judgments.

Justice U. Vogelman:

Under the circumstances which will be described below, I see no alternative but to join the conclusion of my colleague, Justice **N. Sohlberg**.

1. Over a considerable number of years the respondent did not exercise the power vested in him under Regulation 119 of the Defence (Emergency) Regulations, 1945, to forfeit, demolish and seal the houses of suspects of involvement in hostile activity against the state of Israel. As he resumed doing so general arguments against the exercise of the power were argued before this court. Some of the issues associated therewith were discussed and decided by a panel of three in HaMoked (HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014) (hereinafter: **HaMoked**); see also the various authorities there). In said case petitioners' argument that the use of Regulation 119 in that manner and for such purposes was unlawful as it ran contrary to international law and Israeli constitutional and administrative law was denied. A request for a further hearing of said judgment was denied (HCJFH 360/15 **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Minister of Defense** (November 12, 2015)).

2. In **Sidr** (HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015) (hereinafter: **Sidr**)) I expressed my opinion the that "were it not the applicable case law, my own opinion would have brought me to the conclusion that the employment of the authority under Regulation 119 when no sufficient proof has been provided that the family of the suspect was involved in hostile activity – is not proportionate" (paragraph 2 of my opinion. In said case on its merits I suggested – in a minority opinion – that an *order nisi* be issued; in view of particular circumstances which do not apply to this case). In addition, and despite my position that for as long as the rule has not been changed it should be followed, I added that I thought it would be advisable to revisit said rule in a bid to fully examine all issues which may arise under the local law as well as all issues which may arise under international law (paragraph 6 of my opinion). Ever since the **Sidr** judgment was given additional voices were heard regarding the use of Regulation 119 for house demolition purposes, in different versions and emphases (see for instance the opinion of Justice **M. Mazuz** in HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015), and paragraph 13 of his opinion in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015) ("In my opinion, a sanction which is aimed at harming the innocents, cannot stand"). See also paragraph 2 of the opinion of Justice **Z. Zylbertal**, *Ibid*. ("The reasons of Justice **Mazuz** are weighty reasons which are based on fundamental constitutional principles as well as on basic reasons of justice and fairness. Had said issues been brought to this court for the first time, it is possible that I would have joined the main principles of his positions"); see also paragraphs 1-2 of the opinion of Justice **D. Barak-Erez** in HCJ 8567/15 **Halabi v. Commander of IDF Forces in the West Bank** (December 28, 2015) ("We have no alternative at this time but to respect the current judgments of this court, and to refrain from the practice of applying different law according to the panel of the Justices […] Indeed, ostensibly, there is merit to the argument that the use of power which concerns house demolition raises a difficulty from the aspect of the proportionality requirement […] However, according to the principles of conduct which are binding on this court as an institution and despite the difficulty associated therewith, I join the recommendation of my colleague, the Deputy President **E. Rubinstein** to dismiss the petition at bar"). See also the opinion of Justice **Z. Zylbertal**, *Ibid*. Prior to **Sidr**, see paragraph 1 of the opinion of Justice **E. Hayut** in **HaMoked** ("The issues raised in the petition are difficult and troubling and I will not deny the fact that taking the path of case law in this matter is not easy"). For criticism of the denial of petitions against house demolition by virtue of Regulation 119 due to the concern that a "court of law" would

become a "court of justices" see Michael Sfard "HCJ's curse: on personal responsibility for collective punishment – following HCJ 7220/15 'Aliwa v. Commander of IDF Forces in the West Bank" **Din Online** 51 (2016)).

3. The different opinions expressed in case law, particularly after **Sidr**, strengthen me in my position that the weighty questions associated with the exercise of the power by virtue of Regulation 119 should be re-visited. In my opinion, in view of the many judgments which followed the rule (by different panels), the rule should be re-visited by an expanded panel rather by a panel of three. However, for as long as case law stands, which is the situation at this time, I see no alternative in this case but to hold that there is no cause for our intervention according to the rule in its current form, since the case at bar is no different than the main stream of the cases which were adjudicated by us (Compare to **Sidr**, paragraph 7 of my opinion).

Under these circumstances I join, as aforesaid, the conclusion reached by my colleague.

Justice

Justice M. Mazuz:

1. I cannot join the opinion of my colleagues that the petition should be denied.

2. In their written petition and in the oral arguments of their counsel before us the petitioners raised along specific arguments also general arguments against the lawfulness of the forfeiture and demolition order which was issued against the home of petitioner 1, on the level of international public law as well as on the level of Israeli constitutional and administrative law. These arguments were summarily presented and denied by my colleague Justice **N. Sohlberg** mainly on the grounds that these arguments have already been discussed and rejected more than once by this court in its judgments, including judgments from recent times. My opinion on these general issues is different. I have recently presented my position on several occasions and I do not find it necessary to reiterate or elaborate on these issues in the case at bar (see my position in HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015), hereinafter: **'Aliwa**; and in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015), hereinafter: **Abu Jamal** – in both cases in a minority opinion; and my position (in a majority opinion) in HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank Area** (December 1, 2015)).

3. In '**Aliwa** (paragraph 4) I pointed out that the use of Regulation 119 "raises a host of difficult legal questions which, in my opinion, have not yet been addressed in a sufficient and up-to-date manner by this court in its judgments".

4. In **Abu Jamal** I have broadly discussed the great difficulty involved in the exercise of the sanction pursuant to Regulation 119 against the homes of innocent family members, who were not allegedly involved, neither by knowledge nor by assistance to the perpetrator's actions, and I expressed my opinion against the exercise of the sanction towards uninvolved family members. The following are some excerpts from my words in that case:

> 7. The conscious and deliberate infliction of harm on innocent people, and even more so, a severe violation of their constitutional rights, only for other

> potential perpetrators "to see and beware", is an inconceivable conduct in any other context…
> 13. I am of the opinion that the power according to Regulation 119 should be exercised in view of the fundamental principles which derive from the mere fact that the state of Israel is a **Jewish state** ("a man shall be put to death for his own sin") and a **democratic state** (compare: HCJ 73/53 "Kol Ha'am" v. Minister of the **Interior**, IsrSC 7, 871 (1953)), and in view of **the principles of our constitutional law**, mainly from the aspects of **proportionality**, as well as in view of **universal values**. I am of the opinion that all these principles **inevitably lead** to the conclusion that the sanction under Regulation 119 may not be taken against uninvolved family members, regardless of the severity of the event and the deterring purpose underlying the use of the power. Needless to point out that apparently the biblical principle according to which "a man shall be put to death for his own sin" constitutes the ideological basis of the prohibition against collective punishment in international law.
>
> In my opinion, a sanction which directs itself to harm innocent people, cannot be upheld, whether we define the flaw as a violation of right, act in excess of authority, unreasonableness or disproportionality…

It should be noted in this respect, in reference to paragraph 22 of the opinion of my colleague Justice **Sohlberg**, that in respondent's notice it was argued that "parties close to the perpetrator expressed support in his actions". No argument was raised of an alleged involvement or knowledge on the part of the perpetrator's father, whose house is designated for demolition by the respondent. It should also be noted that the petitioners did not agree that the privileged material be reviewed by us after the respondent refused to answer the question whether the information pertained to **family members** of the perpetrator and whether the information pertained to a point in time **prior** to the attack.

5. In view of my above positions I am unable to join the position of my colleagues who denied the petition. However, I obviously join my colleague Justice Vogelman in his call for having the issues associated with the use of Regulation 119 revisited by an expanded panel (paragraph 3 of his opinion).

Justice

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

Given today, 13 Adar B 5776 (March 23, 2016).

Justice Justice Justice