

Disclaimer: The following is a non-binding translation of the original Hebrew document. It is provided by **HaMoked: Center for the Defence of the Individual** for information purposes only. The original Hebrew prevails in any case of discrepancy. While every effort has been made to ensure its accuracy, **HaMoked** is not liable for the proper and complete translation nor does it accept any liability for the use of, reliance on, or for any errors or misunderstandings that may derive from the English translation. **For queries about the translation please contact site@hamoked.org.il**

At the Supreme Court

HCJFH 2624/16

Before:

Honorable President M. Naor

The Applicants:

1. _____ **Masudi**
2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger-RA**

v.

The Respondent:

Commander of IDF Forces in the West Bank

Request for further hearing in the judgment of the Supreme Court in HCJ 1630/16 dated March 23, 2016, which was given by the Honorable Justices: U. Vogelman, N. Sohlberg and M. Mazuz

And request for stay of execution

Representing the Applicants:

Adv. Andre Rosenthal

Decision

Pending before me is a request for further hearing in the judgment of the Supreme Court in HCJ 1630/16 **Masudi v. Commander of IDF Forces in the West Bank** (March 23, 2016) in which a petition that was directed against the demolition of applicant 1's home was denied by a majority opinion (Justices N. Sohlberg and U. Vogelman against the dissenting opinion of Justice M. Mazuz).

Background

1. On December 7, 2015, Ihab Masudi (hereinafter: **Masudi**) stabbed and wounded the late Genadi Kaufman in the Cave of Machpela. Consequently, on February 5, 2016, notice was sent to Masudi's family members on behalf of the respondent of the latter's intention to demolish the apartment on the

first floor of a dwelling in Hebron which served as the residence of Masudi and which is owned by his father (applicant 1), by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945.

2. On February 10, 2016, the applicants (Masudi's father and HaMoked: Center for the Defence of the Individual) submitted an objection on behalf of Masudi's family against the intention to forfeit and demolish the apartment. The objection was denied on February 23, 2016. On February 28, 2016, a petition was filed against the demolition order and on that very same day an interim injunction was given by this court preventing the execution of the demolition.

The judgment being the subject matter of the request for further hearing

3. The petition was mainly directed against the lawfulness of the use of Regulation 119. Justice **Sohlberg** who wrote the main opinion held that there was no reason for deviating from the precedents of this court on the issue at bar, particularly in view of the fact that it has recently been discussed in a host of judgments. With respect 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 deeds, Justice **Sohlberg** held that arguments of this nature were discussed in the past by the Supreme Court in its judgments, and were denied. Moreover, the respondent argued that he had in his possession privileged information which indicated that individuals close to Masudi expressed support in his actions. However, in the hearing applicants' counsel refused to give his consent for the presentation of said privileged information *ex parte*. In any event, Justice **Sohlberg** held that the open material which was presented to the court sufficiently substantiated the decision of the military commander in the case at bar. For these reasons Justice **Sohlberg** was of the opinion that the petition should be denied.
4. Justice **Vogelman** did not see any alternative but to join the conclusion of Justice **Sohlberg**. Justice **Vogelman** noted that the different opinions which have been recently expressed in case law, strengthened him in his opinion that the lawfulness of the use of Regulation 119 should be re-visited. However, "in view of the many judgments which followed the rule... the rule should be re-visited by an expanded panel rather by a panel of three" (paragraph 3 of his opinion). Therefore, according to Justice **Vogelman**, for as long as case law has not changed, there is no cause for the intervention of this court "since the case at bar is no different than the main stream of the cases which were adjudicated by us" (*Ibid.*)
5. Justice **Mazuz** had a different opinion. According to him, the use of Regulation 119 evoked difficult legal questions which in his opinion have not yet been addressed by this court in its judgments in a sufficient and up-to-date manner. Justice **Mazuz** reminded that in a previous case (the subject matter of HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015)), he had broadly discussed the difficulties associated with the exercise of the sanction against innocent family members and expressed his opinion according to which it should not be exercised against uninvolved family members. In this context, Justice **Mazuz** noted that in the case at bar the respondent argued that individuals close to the perpetrator Masudi have indeed expressed support in his actions, but no argument was raised as to the any involvement or knowledge on the part of his father (applicant 1) – whose home is designated for demolition by the respondent. Justice **Mazuz** noted further that the petitioners refused to grant their consent for the court's review of the privileged information *ex parte* after the respondent refused to clarify whether the information in his possession pertained to the family members of the perpetrator or not. In view of the above, Justice **Mazuz** did not join the position of Justices **Sohlberg** and **Vogelman** who denied the petition. He however noted that he joined the call of Justice **Vogelman** for having the issues associated with the use of Regulation 119 revisited by an expanded panel. Hence, the petition was denied by a majority opinion as aforesaid.

The request for further hearing

6. In the request reconsideration of the lawfulness of the use of Regulation 119 is requested. In addition an interim order was requested preventing the respondent or any one of his behalf from carrying out the demolition order against the apartment of applicant 1. Firstly, the applicants emphasized that in the case at bar two of the three justices of the panel were of the opinion that a hearing by an expanded panel was required. In addition, the applicants relied in their request on the judgment in HCJ 1938/16 **Abu Alrub v. Commander of IDF Forces in the West Bank** (March 24, 2016), which was given one day after the judgment being the subject matter of the request at bar was given, in which two out of the three justices of the panel also discussed the difficulties associated with the use of Regulation 119. The applicants argue that the time is ripe for further review of the legal issues of principle associated with the use of Regulation 119. These are the grounds for their current request for further hearing.

Deliberation and decision

7. The request should be denied. It is not the appropriate case for considering further review of the issues of principle pertaining to the use of Regulation 119 before an expanded panel of this court. The judgment being the subject matter of the petition was given on March 23, 2016. It was held by a majority opinion that the interim order would expire within one week from the date of the judgment (namely, March 30, 2016), so as to enable the applicants to submit an engineering opinion and for making the necessary arrangements in anticipation of the coming demolition. The request for further hearing was submitted today (March 30, 2016), in the afternoon, on the expiration date of the interim order and virtually at the last minute, although the request could have been submitted earlier. The format of the request is problematic. The request was submitted without material reasons and without a real discussion of the legal issues underlying the use of Regulation 119. In fact, the vast majority of the request consists of complete citations of minority opinions and sole opinions from recently given judgments. Towards the end of the request, applicants' counsel noted that should the court accept the request for further hearing, he requested to submit written arguments which will consist of "a detailed discussion of the legal questions which arise in this matter". This format of request for further hearing does not reconcile with regulation 5 of the Further Hearing Procedure Regulations, 5744-1984, which provides that "the applicant will specify in the petition the arguments concerning the fact that the ruling is contrary to a previous ruling, or concerning the difficulty or innovation of the ruling which was given in the matter, each argument separately, and will specify the authorities used by him to substantiate his arguments." (See and compare CrimFH 1077/14 **Attorney General v. Malka** (March 16, 2014)).
8. Moreover, a review of the judgment being the subject matter of the request for further hearing indicates that it does not contain a detailed and in-depth discussion of the legal issues associated with the use of Regulation 119, and thus, it does not contain an express and detailed ruling (See and compare: HCJFH 360/15 **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Minister of Defense**, paragraph 4 (November 12, 2015)). Indeed, two out of the three justices of the panel commented that in their opinion a further review of the issue by an expanded panel was required. However, these comments, in and of themselves, do not establish a cause for further hearing.
9. The request at bar was submitted as aforesaid on the last day of the stay of execution period (although it could have been submitted earlier). Given the fact that the request fails to specify material reasons, I did not find reason to hold in these proceedings a further hearing on the general question regarding to the lawfulness of the use of Regulation 119. This is not the way to submit a request for further hearing. I do not express an opinion on whether in another case the court may consider holding a further hearing on any question which may pertain to the use of Regulation 119.

10. For these reasons I decide to deny the request for further hearing, and hence the request for stay of execution is also denied. No order for costs is issued.

Given today, 21 Adar B 5776 (March 31, 2016).

The President