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At the Supreme Court Sitting as the High Court of Justice

HCJ 1629/16
HCJ 1631/16
HCJ 1638/16

Before:	**Honorable Justice I. Amit** **Honorable Justice N. Sohlberg** **Honorable Justice A. Baron**
The Petitioners in HCJ 1629/16:	1. **_____ 'Amar** 2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
The Petitioners in HCJ 1631/16:	1. **_____ 'Aliwa** 2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
The Petitioners in HCJ 1638/16:	1. **_____ Saih** 2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
	v.
The Respondent:	**Commander of IDF Forces in Judea and Samaria**
Petitions for *Orders Nisi* and Interim orders	
Session date:	4 Adar B 5776 (March 14, 2016)
Representing the Petitioners in HCJ 1629/16 and in HCJ 1638/16:	Adv. Habib Labib
Representing the Petitioners in HCJ 1631/16:	Adv. Andre Rosenthal
Representing the Respondent:	Adv. Yonatan Zion Mozes

Judgment

Justice N. Sohlberg:

1. Before us are three petitions directed against forfeiture and demolition orders for residential units which were issued by the military commander by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**), against apartments which served as the residence of accomplices to a shooting attack in which the late Eitam and Na'ama Henkin were killed.

Background

2. On October 1, 2015, three perpetrators carried out a murderous attack in the area of Beit Furiq junction. According to information provided by the respondent, the perpetrators carried out the shooting while driving from the car in which they were driving towards the car of the Henkin family, until it stopped. Then, two of the perpetrators approached the front doors of the car and shot from short range at the late Henkin spouses, while the third perpetrator was waiting in the car. Against the residential units of the these three perpetrators forfeiture and demolition orders were issued by virtue of Regulation 119, and a petition which challenged the lawfulness of these orders was dismissed (HCJ 7040/15 **Hamed v. Military Commander of the West Bank Area** (November 12, 2015)(hereinafter: **Hamed**)).

3. Additional perpetrators ostensibly took part in this murderous attack. The three cell members were recruited by the cell commander, Rajeb Ahmed Muhammad 'Aliwa; against whom the military commander also issued a forfeiture and demolition order and a petition which challenged said order was also dismissed by a majority opinion (HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (hereinafter: **'Aliwa**)). In addition, three additional perpetrators also ostensibly took part in said attack (hereinafter also: the **three perpetrators**), whose matter is considered in the framework of the petitions at bar.

4. Along with the arrest of the perpetrators' cell, Zid Ziad Jamil 'Amar (hereinafter: **'Amar**); Amjad Adal Muhamad 'Aliwa **(hereinafter: 'Aliwa);** and Basem Amin Muhamad Saih (hereinafter: **Saih**) were also arrested. As argued by the respondent in his response which is based on the indictment that was filed against 'Amar, on memoranda and on statements given by him, 'Amar was responsible for the 'opening of the route' in preparation of the attack. 'Amar drove, at the request of the cell, on the route leading to Beit Furiq checkpoint, to check the presence of the security forces in the area, and informed the cell members of his findings. In addition, 'Amar drove the three cell members after the execution of the attack and stored in his house one of the weapons which were used in the attack. With respect to 'Aliwa: as indicated by the indictment that was filed in his matter and as he indicated in his statement, 'Aliwa engaged in fund raising and in the acquisition of the weapons which were used by the cell members, and transferred the weapons to them. 'Aliwa admitted that he was involved in the planning of the attack from the outset and that he raised funds for the purpose of providing medical care to one of the cell members who was wounded in the course of the attack. With respect to Saih's involvement: as indicated by the indictment that was filed against him, by memoranda and by his own statement, Saih was the one who provided the funds which were used by 'Aliwa for the acquisition of the weapons that were used by the cell, and for the medical care that was provided to the wounded cell member. It was also argued that Saih was the one who approved the execution of the attack, after he had approved two previous shooting attacks, in which shots were fired at Israeli vehicles, which ended without casualties.

5. As aforesaid, due to the above described actions indictments were filed against the three with the Shomron military court which attributed to them, *inter alia*, a number of intentional causation of death offenses and an attempt to intentionally cause death, offenses parallel to premeditated murder and attempt to commit a premeditated murder under Israeli law.

6. Due to their involvement in the terror attack against the late Henkin spouses, the respondent issued forfeiture and demolition orders by virtue of Regulation 119 against the dwellings which served as their residence. Notice of the intention to do so was given to their families on February 4, 2016; On February 9, 2016 and February 10, 2016, the family members of the three submitted objections against the intention to forfeit and demolish the dwellings and on February 23, 2016, the objections were denied by the respondent. On February 28, 2016, the petitions at bar were filed.

7. With respect to the description of the apartments being the subject matter of the orders it should be noted that there are certain discrepancies between petitioners' description and respondent's description, although there is no dispute that the three apartments are located in multi-storey apartment buildings. With respect to the ownership of the apartments: the apartment which served as the residence of 'Amar is located in an apartment building the vast majority of which (including 'Amar's apartment) is owned by his father, and 'Amar rents the apartment from his father. 'Aliwa's apartment is located in an apartment building jointly owned by his two of his brothers, and he rents the apartment from them. Saih's apartment is owned by him (and as argued by the petitioners, is owned by his wife).

8. In the context of the demolition orders and as the families of the three perpetrators were informed, the apartments will be demolished manually by having the apartment's partitions demolished, and thereafter the apartment will be filled with barbed wire and double component polyurethane to ensure that the apartment is forfeited and to prevent the use thereof.

The petitioners and their arguments

9. The petitions at bar were filed by the family members of the three perpetrators who are connected to the apartments against which the orders had been issued. Petitioner 1 in HCJ 1629/16 is the father of 'Amar and as aforesaid the apartment in which the latter lived – is owned by him. Petitioner 1 in HCJ 1631/16 is the wife of 'Aliwa who resides in the relevant apartment with her children. Petitioner 1 in HCJ 1638/16 is the wife of Saih, and the apartment designated for demolition is the apartment which serves as the residence of the family (and as aforesaid, according to the petitioners, is owned by her). Petitioner 2 in all three petitions is HaMoked Center of the Defence of the Individual (**HaMoked**). The petitioners argue that the orders are flawed both on the specific level as well as on the general level; I shall commence with petitioners' specific arguments, each petition on its merits.

10. In HCJ 1629/16 concerning 'Amar's apartment, the petitioners argue firstly that 'Amar's hearing was flawed. The petitioners argue that the order was issued hastily, that the petitioners were not provided with the investigation material underlying the suspicions based on which the order was issued, and that the indictment was attached only when the notice regarding the denial of the objection and the issue of the demolition order was given. The notice of the intention to demolish the apartment stated only that 'Amar "**acted together with others in a bid to carry out a terror attack**", and failed to provide any details regarding 'Amar's alleged part in the activity. Consequently, the petitioners were denied of the ability to effectively object the order and their right to present arguments was violated. Secondly, it was argued that the authority established in Regulation 119 should not be used before the suspect was convicted of the actions attributed to him. Under these circumstances, in view of the fact that the suspicions have not yet been proven, an order for the demolition of the apartment should not be issued. The petitioners argue that only when it is impossible to prosecute the suspect or when such prosecution involves many difficulties, said authority may be used without the need to obtain a judicial decision. However, when a decision was made to press criminal charges against the suspects this avenue should be exhausted. The above applies even more forcefully to the case at bar, in which 'Amar's alleged involvement is negligible, and limited only to the allegation that he was requested to send a message to the members of the cell regarding the military presence in the area. It is highly probable that in the criminal proceeding it will be proved that said involvement amounts to aiding

and abetting only and that different defense arguments raised by the suspect will be accepted; therefore, no action should be taken before judgment is given in the criminal proceeding. Thirdly, it was argued that in view of the fact that the perpetrator was petitioner's son, and in view of the fact that he rented the apartment from his father and was not its owner, the execution of the orders did not satisfy the proportionality requirement.

11. Similar arguments were also raised in HCJ 1638/16 regarding the apartment of Saih. It was argued that the hearing was flawed in view of the fact that the respondent failed to disclose to the petitioners the investigation material underlying the suspicion based on which the order was issued, and that the only thing which was said in that regard was that he cooperated with others in a bid to carry out an attack. It was also argued that the suspicions against him have not yet been proven since the criminal trial has not yet ended. Not only that, but according to the petitioners there is a substantial doubt as to Saih's culpability and consequently it is unknown whether he may be convicted as an accomplice to the murder. They argue that Saih has several solid defense arguments, that we are concerned with a complex criminal file the results of which are unknown. It was argued that Saih had indeed given 'Aliwa a shotgun, but was not aware of its intended purpose, and that he denied having prior knowledge and any additional involvement in said attack. In addition, it was argued that Saih's incrimination was substantially based on 'Aliwa's statement concerning his involvement; however, Saih provides an explanation for said incriminating statement against him. According to him 'Aliwa told him that should he be arrested he would put the entire blame on Saih in view of the fact that Saih was terminally ill and was about to die anyway. It was also argued that Saih's admission of guilt was made following physical and mental pressure which was exerted on him and subject to the exploitation of his medical condition and the fact that he was terminally ill. It was further argued that the demolition of the apartment while petitioner 1, Saih's wife, was the owner of the apartment, and while Saih was suffering a terminal illness, did not satisfy the proportionality tests.

12. In HCJ 1631/16 regarding 'Aliwa's apartment, it was mainly argued that the forfeiture and demolition thereof did not satisfy the proportionality tests due to 'Aliwa's negligible involvement in the attack. As argued in the petition, a meticulous perusal of the indictment and evidentiary material indicates that 'Aliwa was not responsible for the attack but rather turned to his superiors to obtain approvals for the execution thereof. Although it may be said that he took part in the attack he was not within its inner circle in view of the fact that he had to turn to two of his superiors to receive their approval. Under these circumstances, the exercise of the sanction pursuant to Regulation 119 did not satisfy the proportionality tests. In addition, it was argued that the petitioners requested the respondent to provide them with a copy of the demolition plan, should their objection be denied, but the respondent stated that the demolition of the apartment would be carried out manually only, that the partitions of the apartment would be demolished and that it would be filled with barbed wire and double component polyurethane; According to the petitioners who rely on a precedent from the past, respondent's undertaking to take precautions while demolitions were carried out in multi-storey buildings could not be relied on and therefore the petitioners request in the petition at bar to order the respondent to provide them with a copy of the demolition plan and allocate to an engineer on their behalf reasonable time to examine the plan and express his objections, if any.

13. In addition to the specific arguments, the petitions raise general arguments against the use of the authority established in Regulation 119. It was argued that this Regulation was contrary to the norms by which the military commander was bound under international law, that it violated the prohibition against collective punishment and that the use thereof constituted a disproportionate violation of fundamental rights. In addition it was argued that the respondent disregarded his obligation to examine from time to time the effectiveness of the sanction and the rational connection between the sanction and the sought for result – deterring perpetrators from executing attacks. It was also argued

that the authority entrenched in the Regulation was exercised in a discriminatory manner due to the fact that it was not used against Jewish perpetrators who had committed similar actions.

Respondent's Arguments

14. The respondent is of the opinion that the petitions should be denied since he has exercised the authority established in Regulation 119 lawfully. In his opinion, according to case law, the purpose of the authority is to deter, and it is exercised by balancing between the severity of the attack and the need to deter potential perpetrators, on the one hand, and the scope of the steps taken and of the harm expected to be caused to the perpetrator's family, on the other. The case at bar concerns a particularly severe attack and the exercise of the authority is therefore justified, despite the ancillary damage to the families of the perpetrators.

15. With respect to the specific arguments raised by the petitioners it was argued that according to case law they should be dismissed. **Firstly**, it is not necessary that the perpetrator's family members were aware of or assisted the perpetrator to carry out the attack in order to exercise the authority established in Regulation 119; **Secondly**, according to case law evidence of the criminal degree is not required for the exercise of the authority and for this purpose administrative evidence suffices. The respondent is of the opinion that in the case at bar there is sufficient administrative evidence, including the admissions of the three perpetrators, for the exercise of said authority. Indictments were filed against the three which constitute significant administrative evidence that the administrative authority may rely on. **Thirdly**, with respect to the arguments regarding the hearing it was argued that the respondent was of the opinion that the authority under Regulation 119 should be exercised as soon as possible after the attack so as to achieve maximum deterrence. Therefore, the duration of time allocated to the petitioners for the purpose of submitting an objection against respondent's intention derived from the need to exercise the authority without delay, and the scope of the evidentiary material disclosed to them was also subordinated to additional considerations, such as the stage of the investigation and general security considerations. **Fourthly**, with respect to the degree of involvement of the three perpetrators in the attack it was argued that some of them were significant – opening the route for the execution of the attack, raising funds and acquiring firearms, communicating with very senior office holders in Hamas organization to obtain prior approval for the attack, and assisting the cell members after the fact. Said activity constituted a significant part of the attack and the exercise of the authority established in Regulation 119 against those who carried it out was proportionate. **Fifthly,** with respect to the argument that 'Amar's apartment was rented it was argued that this case did not concern rental from a third party, but rather a landlord who was a family member of the perpetrator. Under these circumstances, the fact that the apartment was rented should not be attributed much weight since rental of this sort had no effect on the realization of the deterring purpose. **Sixthly**, with respect to the arguments concerning the possible damage that may be caused to the other apartments in the building as a result of the demolition of 'Aliwa's apartment, the respondent clarifies that the demolition method was chosen in view of the engineering characteristics of the building; this case concerns a professional-engineering decision which should not be intervened by the court.

16. With respect to the general arguments that were raised in the petitions regarding the compatability of Regulation 119 with international law and with the Israeli constitutional and administrative law, and regarding its ability to obtain effective deterrence and regarding inappropriate discrimination, the respondent argued that these arguments have just been recently discussed and rejected by this court; and that there was no room to revisit these issues in the context of the petitions at bar.

Deliberation and Decision

17. The petitions at bar raise some difficult questions regarding the specific implementation of the authority established in Regulation 119, which I shall discuss below; this however does not apply to the **general** issues that were raised in the petitions which, as argued by the respondent, were thoroughly examined by this court on several occasions only recently, and therefore there is no room to revisit them. I have recently stated in this regard as follows:

> **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); Tis 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... 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… 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. (**HCJ **1014/16 Skafi v. Commander of IDF Forces in the Judea and Samaria Area,** paragraph 11 (February 28 2016) (hereinafter: **Skafi**).

It should be added that these deliberations did not concern only the scope of the authority pursuant to Regulation 119 but also the exceptional nature of said authority. For my part I stated in the general judgment which was given on this issue that "**Indeed, the injury inflicted on a family member – who committed no sin – and who lost the roof over his head, contrary to fundamental principles, is burdensome**" (HCJ 8091/14 **HaMoked Center for the Defence of the Individual v. Minister of Defense**, paragraph 2 of my opinion (December 31, 2014)(hereinafter: **HaMoked**)); and in another matter it was stated that "**Indeed, the demolition or sealing of a house in which lives a person who has not sinned is contrary to the right to own property, the right to dignity and even the right to housing which is derived there-from**" (HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 21 of the judgment of Justice **Y. Danziger** (August 11, 2014) (hereinafter: **Qawasmeh**)). However, at the same time this court pointed at the exceptional and painful circumstances in which we live, as a result of which there is no alternative but to use the authority in order to deter potential perpetrators, since its objective is – eventually – to save human lives (see for instance **HaMoked,** paragraph 4 of my opinion).

18. And now – I shall discuss the specific arguments which were raised by the petitioners regarding the exercise of the authority established in Regulation 119 in the case at hand. These arguments mainly concern the scope of the right to a hearing which was given to the petitioners; the exercise of the authority against a person in whose matter criminal proceedings are still pending; and the proportionality of its use against accomplices to hostile activity in different circles of participation. I shall discuss these issues in an orderly manner.

19. The scope of the right for a hearing in the context of the exercise of the authority according to Regulation 119 was recently discussed in **Hamed**. In said case it was held that the respondent should establish clear procedures regarding the timeframe for the submission of objections against the intention to exercise the authority, and it was held that "**as a general rule, the authorities should transfer to the interested parties the content of the documents underlying their decision**" (*Ibid*., paragraph 34). On the general level I accept respondent's position according to which the scope of said obligation depends on the circumstances of the matter since "**circumstance may arise in which it will not be possible due to reasons associated with state security or other reasons**" (*Ibid*). On the specific level it might have been appropriate to specify the main suspicions against the three perpetrators so as to give the hearing a real meaning, instead of making a general statement regarding their involvement in the attack. However, in view of the fact that the petitioners are currently aware of said suspicions and in view of the fact that they have presented their arguments on this matter before us in the hearings of the petitions at bar, it may be said that said flaw was rectified. It should be noted that as a general rule it is unacceptable that the administrative authority deprives a person of his right to have a hearing based on the assumption that in the framework of a judicial proceeding which will be conducted – if any – the flaw will any be rectified (and compare Daphne Bark –Erez **Administrative Law** Volume B 814-814 *[sic]*(2010)). Therefore it is important to emphasize the words of President **M. Naor** in **Hamed**, according to which the respondent is obligated, as a general rule "**to include in the notice of the intention to seize and demolish a detailed account, be it even a minimal one, of the evidentiary material against the suspect who lives in the house designated for demolition**" (*Ibid*., paragraph 34).

20. Another issue which is raised in the petitions at bar pertains to the required level of proof for the exercise of authority according to Regulation 119. The established rule is that for the exercise of said authority solid administrative evidence suffices and there is no need to rely on criminal evidence – even if criminal proceeding is pending against the perpetrator (**Skafi**, paragraph 12; HCJ 7823/14 **Ghabis v. GOC Home Front Command**, paragraph 10 and the references there (December 31, 2014)). It should be added that the deterring purpose of Regulation 119 provides that the authority established therein should be exercised immediately and expeditiously. This court even accepted in the past a petition which challenged forfeiture and demolition orders that were issued after a significant delay, emphasizing that the exercise of the above authority in this manner was unreasonable or exceeded power (HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank Area**, the majority opinion of Justices **Mazuz** and **Zylbertal** (December 1, 2015)). In that matter Justice **Zylbertal** pointed out that a delayed exercise of the authority prejudiced its underlying deterring purpose:

> **Public deterrence is not particularly effective where the connection between the act and the sanction is unclear. The expression "for all others to see", which lies at the heart of deterrence, is based on the concept that the public that is to be deterred would realize that the offense exacts a heavy price and the real fear of this price would prevent others from taking similar actions in future. Clearly, when the demand to pay the price is delayed, the deterrent effect slowly dissipates, and the more time elapses, the less likely it is to achieve the requisite deterrence, and the**

> **more the demolition turns into an act of punishment or pure vengeance rather than an act of deterrence**.

Indeed, if the results of the criminal proceeding had to be awaited for, the deterring purpose would have been totally worn down and the authority nullified. For this reason, *inter alia*, it was held that administrative evidence sufficed for the exercise of the authority. However, there is no dispute that the sanction established in Regulation 119 is a severe sanction which seriously violates fundamental rights of the perpetrator and mainly the rights of his family members. Therefore the administrative evidence must be particularly strong "**clear, unequivocal and convincing**" (**Skafi**, paragraph 4 of the opinion of Justice **Zylbertal**). The tension between to exercise the authority expeditiously on the one hand, and the need to substantiate it on solid evidentiary grounds on the other, may raise difficulties when the perpetrator raises substantial arguments, of merit, regarding his innocence in the criminal proceeding. In the case at bar I was convinced that the respondent has administrative evidence regarding the **mere involvement** of the three perpetrators in the attack. Indictments were filed against the here and the latter have also given different statements concerning their involvement in the attack; as is known, significant weight is given thereto in the assessment of the administrative evidence. (HCJ 4597/14 **'Awawdeh v. Military Commander of the West Bank Area**, paragraph 25 (July 1, 2014)). The **scope of the involvement and the degree of the responsibility of the three for the execution of the attack**, will be discussed below.

21. A difficult question is whether what was argued against the perpetrators suffices for the exercise of the sanction established in Regulation 119. It was ruled more than once that in view of the severity of the sanction of the demolition of a residential unit, which in the vast majority of cases also harms family members who were not directly involved in the hostile activity, it should be used in a moderately and carefully: "**The military commander must make prudent and limited use of said authority, according to principles of reasonableness and proportionality**" (**Hamed**, paragraph 23). The violation of the proprietary rights of the inhabitants of the house was justified when it was used for a deterring purpose, but said deterrence is proportionate "when the acts attributed to a suspect are particularly severe" (*Ibid*., paragraph 24; HCJ 8066/14 **Abu Jamal v. GOC Home Front Command**, paragraph 9 (December 31, 2014)). The case at bar does not concern the individuals who committed the hideous murderous act but rather the encircling support for its execution: raising funds, giving instructions, provision of firearms, etc. In addition, the petitioners argue that the perpetrators' part in the preparations for the attack and its execution is more limited than the part attributed to them by the respondent. Hence, can the execution of these actions justify respondent's use of Regulation 119 in the case at bar?

22. To respond to this question we must consider the list of criteria established by case law "**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, to the maximum extent possible, with the spirit of the Basic Law: Human Dignity and Liberty**" (**Qawasmeh**, paragraph 22). In this context it was ruled by Justice **Y. Danziger** 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 (**Qawasmeh**, *Ibid*.).

Our case is premised on the fact that the respondent chose the less injurious measure from the array of measures available to him – sealing with foamed material. On the other hand, it must be taken into account that no arguments were made regarding the involvement of the other inhabitants of the house. Eventually, in the case at bar the question of proportionality will be determined based on the severity of the actions attributed to the suspects and on the strength of the evidence in their matter.

23. Before I specifically discuss the matter of the three perpetrators, it should be noted that a terror attack is not exhausted in the killer who pulled the trigger; the execution of such an attack requires preparation by the perpetrators in many aspects, some of which were, as it was proved, under the responsibility of the three perpetrators in the case at bar. Needless to point out that also against the 'commander of the cell' which carried out the murderous attack an order was issued according to Regulation 119, and a petition in his case was dismissed – although he was not present in the execution of the attack itself ('**Aliwa**; and it is needless to point out that Justice **N. Hendel** points out there that the acceptance of the petition, while the homes of the perpetrators which in fact carried out the attack were demolished "**is inconceivable – particularly in view of the central role he played in the attack**"). When **punishment** is concerned, in certain aspects the activity of the encirclement which accompanies the terror attack is not less severe than the killing itself, and in certain cases it is even more severe – being a systemic and infrastructural activity which facilitates the execution of specific terror attacks. On many occasions, which concerned the authorities of the military commander in this matter as well as the criminal and civil law directed against 'civilian' accomplices to terror, this court pointed at the close relations between the economic and organizational aspect of terror, and its military-murderous aspect. In the criminal context it was stated that:

> **The civil activity of the organization is intended to assist the military activity and provide it with basis and infrastructure […] therefore, the civil function cannot be isolated from the military function of the activity of the organization and any distinction and separation between them is artificial and erroneous. The civil function nurtures the military purpose, and the military purpose provides the cause and purpose for the financial civil activity and for the provision of the required financing for the activities of the organization**" (CrimApp 6552/05 **Abidat v. State of Israel**, paragraph 11 (August 17, 2005)).

Similarly, it was noted on the civil aspect, with respect to the Financing Terror Prohibition Law, 5765-2005:

> **This court in its judgments stressed more than once the danger involved in the provision of funds which are intended to finance the activities of terror organizations that threaten the state of Israel. Terror activity is made possible not only by preparations and training for operational activity, but rather, not less importantly, also by organizational activity aimed at the realization of the operational purpose by way of obtaining financing which will feed the activity of the organization. The civil function of the activity of the terror organization cannot be, in fact, distinguished from its military function and any distinction and separation between them is fundamentally erroneous)** HCJ 1169/09 **Legal Forum for Eretz Israel – RA v. Prime Minister**, paragraph 11 (June 15, 2009); **For similar statements regarding the authorities of the military commander by virtue of the Defence (Emergency) Regulations see** HCJ

10244/06 **Elajuly Co. for Money Change v. Minister of Defense (February 9, 2011)).**

Hence, in general, I cannot say that for the purpose of deterrence, the authority of the military commander to deter potential perpetrators from carrying out their evil plan by using Regulation 119 cannot be used also for deterring the individuals who finance, assist, recruit, provide firearms etc. However, the distance from the center of execution of the murderous act itself must be applied with extreme caution, on the level of the factual infrastructure as well as on the level of proportionality; so we do not find ourselves using an extreme and destructive sanction, an act which runs contrary to fundamental principles that hard times compel the respondent to take – against individuals whose involvement in the act of terror is not unequivocal and clear, or which is negligible in the sense that deterrence against it by the drastic measure of forfeiture and demolition of a residential unit is not proportionate. Expanding the use of Regulation 119 also against individuals who are situated in circles farther from the inner circle, is not a negligible thing and it requires a thorough examination of the matter.

24. And note well: it should be reiterated and emphasized that in my opinion there is no preclusion which prevents the use of Regulation 119 also beyond the circle of the direct perpetrators. This was done in the matter of Rajeb, who played a central role in the attack, being the one who recruited the assailants, planned the attack and provided firearms to the assailants (majority opinion in **'Aliwa**). In the case at bar I was convinced that the involvement of 'Amar in the attack was direct and immediate involvement. The indictment attributes to him actual assistance in the carrying out of the attack; both beforehand and afterwards. 'Amar stayed with the members of the cell when they received the firearms, he was sent to 'open the route', he signaled to the members of the cell that no security forces were present on the traffic route and thereafter he drove the perpetrators and handled one of the firearms which were used in the attack. The indictment is based inter alia, on statements given by 'Amar. In the petition concerning his apartment (HCJ 1629/16) no actual arguments were made regarding the scope of his involvement in the attack, other than the argument that it concerned "a very marginal part, which could be definitely considered as aiding and abetting only" and that "the suspect raises different arguments in his defense". These general arguments do not derogate, in my opinion, from the actual alleged involvement of 'Amar in the execution of the attack, which is properly backed-up by administrative evidence.

25. In this context I accept respondent's position regarding the additional specific arguments raised by the petitioners in connection with the rental of 'Amar's apartment. As is known, it has been recently held that the fact that the asset was rented constituted a relevant consideration which should be taken into account by the military commander, and in the appropriate cases – he should refrain, for this reason, from exercising his said authority. However, in the case at bar we are concerned with an "inter-family" rental, rather than in the violation of the proprietary rights of an unrelated individual. Under these circumstances, the mere fact that the apartment was rented does not prevent the military commander from exercising his authority and its exercise in this context does not veer, in my opinion, from the proportionality requirement, considering the planned manner of demolition and 'Amar's scope of involvement in the attack at hand (for further discussion see **Hamed**, paragraphs 44-48).

26. In conclusion, the petition should be dismissed as far as 'Amar matter is concerned (HCJ 1629/16) considering the entire circumstances of the matter – the severity of the murderous attack, and the substantiated scope of 'Amar's involvement. All of the above bring to the conclusion that respondent's decision and the exercise of his discretion do not veer from the boundaries of proportionality and are not tainted by unreasonableness.

27. As to 'Aliwa's involvement (HCJ 1631/16) the indictment attributes to him, in the framework of his membership in the Hamas organization, the fund raising and the acquisition of the firearms for the

cell which carried out the shooting attack, and contacting Saih and another person for the purpose of receiving an approval for the attack. In addition, 'Aliwa is accused of raising a certain amount of money for treating one of the cell members who was injured in the attack. The indictment is based, *inter alia*, on the statements of 'Aliwa himself. *Prima facie*, and without establishing a hard and fast rule, it seems that 'Aliwa acted in the "second circle" of the perpetrators of the attack, and his role in the attack was smaller than that of 'Amar's, not to mention the main perpetrators and the head of the cell.

28. Similarly with respect to Saih's involvement in the attack (HCJ 1638/16): as alleged in the indictment Saih has been a Hamas activist since 2004 or thereabouts. As to his involvement in the shooting attack it was argued that Saih was the one who approved the attack, who transferred funds to 'Aliwa for the acquisition of firearms and weapons and transferred to him money for the financing of the medical treatment of the perpetrator who was injured in the shooting attack. The administrative evidence in Saih's matter raises a certain difficulty. A review of Saih's statements and memoranda of his interrogation indicates that as a general rule the latter did not cooperate in his ISA (Israel Security Agency) and police interrogations, and even in the stages in which he admitted that he was involved, it was only in a limited and partial manner, while arguing that he indeed transferred monies and firearms, without going into any details and without any knowledge of their purpose. Saih's alleged incrimination is based, so it seems, mainly on statements made by the other individuals involved in the matter, and particularly 'Aliwa (who received, as alleged, monies from Saih). The argument which was raised in the petition according to which Saih was incriminated by the other individuals involved in the attack due to the fact that was terminally ill and was about to pass away in any event, also appears in the paraphrases of the privileged material of said interrogees, which were attached to respondent's position, and it should be clarified in the framework of the criminal trial together with his other arguments.

29. In view of the fact that the acts of 'Aliwa and Saih are situated in the second circle of the attack, I am of the opinion that their matter requires a further review. I shall therefore recommend to my colleagues to issue an *order nisi* in their matter (HCJ 1631/16 and HCJ 1638/16), in which the respondent will well clarify the nature of administrative evidence against them and the proportionality of the forfeiture and demolition order which was issued in their case, considering the weight given by the respondent to the entire considerations which he must take into account (referenced above, paragraph 22).

Justice

Justice I. Amit:

I concur.

Justice

Justice A. Baron:

As stated by my colleague Justice **N. Sohlberg**, our case in premised on the fact that the military commander is vested with the authority by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 to issue orders for the forfeiture, sealing or demolition of a suspect in hostile activity against the state of Israel (hereinafter shortly: **house demolition**). Indeed, voices are heard in current judgments according to which it would be appropriate to revisit, by an expanded panel, the case law which entrenched said authority (see, for instance, the words of Justice **U. Vogelman** in HCJ 1336/16 **Atrash v. GOC Home Front Command**, paragraph 1 (April 3, 2016); and the words of **S. Joubran** in HCJ 1938/16 **Alrub v. Commander of IDF Forces in the West Bank**, paragraph 6 (March 24, 2016)) – however, currently, the rule is in force. I have already expressed my opinion that contrary to the question of the **authority**, the question of the **proportionality** of the use of the house demolition measure is subject to judicial criticism, once again in each petition, according to the circumstances of the case (see: HCJ 1125/16 **Mer'i v. Commander of Military Forces in the West Bank** (March 31, 2016); hereinafter: **Mer'i**) – and the same applies to the petitions at bar.

With respect to the issue of proportionality – case law has long ago established a list of relevant considerations for the examination of the manner by which the authority to issue house demolition orders was exercised. I find it necessary in this context to reiterate the words of Justice **Y. Danziger**, which were also cited by my colleague:

> **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 (emphasis was added – A.B.) (HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 21 (August 11, 2014)).

Notwithstanding the above, Justice **Sohlberg** noted that "in the case at bar the question of proportionality will be determined based on the **severity of the actions** attributed to the suspects and on the **strength of the evidence** in their matter" (emphases were added – A.B.). Indeed – weighty considerations are concerned – which justify in and of themselves the issue of *orders nisi* in connection with the homes of 'Aliwa and Saih. However, these are not the only considerations. As I have already clarified in another case "in view of the doubts surrounding the deterring power of house demolition as an effective measure against potential perpetrators, a situation in which a decision to demolish a perpetrator's home is made by the military commander based solely on the severity of the deeds attributed to the perpetrator, was unacceptable. House demolition carries with it a severe violation of fundamental constitutional rights of the **individuals residing in the perpetrator's home**, including human dignity and the right to own property, and therefore the military commander must consider, *inter alia*, **the degree of the family members' involvement, if any, in the deeds attributed to the perpetrator**" (HCJ 1802/16 **Abu Ghosh v. Commander of IDF Forces in the West Bank** (April 12, 2016); and for further discussion see: **Mer'i** (paragraph 6)). In the petitions at bar it was not argued by the respondent that any of the family members of the suspects had any involvement or knowledge of the acts attributed to their family member. It therefore seems that this consideration, despite its importance, was completely disregarded by the respondent when he issued the orders against the homes of each one of the three suspects; and in that respect his exercise of the authority was flawed. Therefore, if my opinion was heard, we would have issued *orders nisi* in all three cases.

Justice

Decided as specified in the judgment of Justice **N. Sohlberg**, which was accepted by Justice **I. Amit**, contrary to the dissenting opinion of Justice **A. Baron**, to dismiss the petition in HCJ 1629/16; Decided as specified of the judgment of Justice **N. Sohlberg** which was accepted by Justice **I. Amit** and by Justice **A. Baron**, to issue *orders nisi* in HCJ 1631*[sic]* and in HCJ 1638/16. Response shall be submitted by May 17, 2016.

Given today, 12 Nisan 5776 (April 20, 2016).

Justice Justice Justice