At the Supreme Court Sitting as the High Court of Justice

HCJ 1631/16
HCJ 1638/16

Before:	**Honorable Justice Y. Danziger** **Honorable Justice Z. Zylbertal** **Honorable Justice A. Baron**
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 in both petitions:	**Commander of IDF Forces in the West Bank**
Objection to Orders Nisi	
Representing the Petitioners in HCJ 1631/16:	Adv. A. Rosenthal
Representing the Petitioners in HCJ 1638/16:	Adv. L. Habib
Representing the Respondent:	Adv. Y.Zion-Mozes

Judgment

Justice Y. Danziger:

1. This judgment is given following a decision dated April 20, 2016, in the context of which *orders nisi* were issued in the above captioned petitions (hereinafter: the **previous decision**). The facts relevant to this matter were specified in detail in the previous decision and I shall therefore only describe them again briefly.

Background

2. On October 1, 2015, the late Eitam and Naama Henkin were killed in a shooting attack which was carried out by three perpetrators. Against the residential units of the three perpetrators forfeiture and demolition orders were issued by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**). A petition which was filed against these orders was dismissed in HCJ 7040/15 **Hamed v. Military Commander of the West Bank Area** (November 12, 2015).

3. Thereafter the respondent decided to also issue forfeiture and demolition orders against homes of additional perpetrators who indirectly took part in the attack. Orders as aforesaid were issued against the home of the cell commander, which orders were approved after a petition which had been filed against them was dismissed in HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015). Similar orders were also issued against the homes of Zid Ziad Jamil 'Amar (hereinafter: **'Amar**); _____ Muhamad 'Aliwa (hereinafter: **'Aliwa**); and _____ Saih (hereinafter: **Saih**).

4. Against the orders which had been issued with respect to the homes of 'Amar, 'Aliwa and Saih three petitions were filed, respectively: HCJ 1629/16, HCJ 1631/16 and HCJ 1638/16. As aforesaid, on April 20, 2016, a decision was given in said petitions. The petition pertaining to 'Amar's case was dismissed by the majority opinion of Justices **I. Amit** and **N. Sohlberg**, against the dissenting opinion of Justice **A. Baron**. On the other hand, in the petitions pertaining to 'Aliwa and Saih, the members of the panel decided unanimously to issue *orders nisi*. The members of the panel were of the opinion that in said petitions the respondent should be ordered to provide additional details regarding the nature of the administrative evidence at his possession and the proportionality of the orders which had been issued. It was so stated in the conclusion of the decision of Justice **N. Sohlberg**:

> 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. …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.
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> 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 also raises a certain difficulty…
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> 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.

5. On June 16, 2016, and according to the above, the respondent filed a statement of response on his behalf. On September 14, 2016, a hearing was held before us in the objections to the *orders nisi* which had been issued.

The arguments of the parties

6. The respondent – represented by counsel, Advocate Yonatan Zion Mozes – specified in detail in the statement of response submitted by him as well as in the oral argument the nature of the administrative evidence which had been collected against 'Aliwa and Saih and his position regarding the proportionality of his decisions. In addition, the respondent gave an updated account of several developments which occurred since the previous decision had been given. In conclusion, the respondent is of the opinion that the two petitions should be dismissed and that the orders which were issued therein should be revoked. His reasons are as follows:

With respect to **'Aliwa** – the respondent updated that in the meantime, after the previous decision had been given, 'Aliwa was convicted at his admission in the indictment which had been filed against him in the criminal proceeding, in the offenses of intentional causation of death, attempts to intentionally cause death and attempts to commit abduction under aggravated circumstances. The indictment indicates that 'Aliwa acted, *inter alia*, for the acquisition of the weapons which were used by the cell members and also acted to raise funds for the purpose of financing the acts of the cell and for the purpose of providing medical care to one of its members after the attack. He was sentenced to an accumulation of two life sentences plus thirty years in prison. The respondent adds that the statement of the cell commander indicates that 'Aliwa was aware in the morning of the attack of the intention of the cell to carry it out, and even stated that to the extent it managed to abduct a person, he would be willing to assist to hide him. Under these circumstances, the respondent is of the opinion that there is no longer any doubt regarding 'Aliwa's major involvement in the attack in a manner which sufficiently justifies the exercise of the authority by virtue of Regulation 119. In addition, the respondent added that the sanction which was selected in 'Aliwa's case was demolition of the partitions of the apartment in which he and his family members lived and sealing the apartment with foamed substance. The respondent is of the opinion that this sanction is proportionate considering the severity of 'Aliwa's acts and the fact that the order is directed only against his residential unit. It should be noted that the respondent does indeed agree that he does not have in his possession evidence regarding 'Aliwa's family members' actual awareness of his activity, but according to him it does not prevent the use of Regulation 119 under the circumstances of the matter.

With respect to **Saih** - the respondent specified that the indictment which was filed against Saih attributed to him the offenses of intentional causation of death, attempts to intentionally cause death and attempts to commit abduction under aggravated circumstances. Unlike 'Aliwa, Saih denied the charges brought against him, and currently the criminal proceeding against him is in the evidentiary stage. Anyway, the respondent is of the opinion that also with respect to Saih's activity there is sufficient administrative evidentiary infrastructure which enables the use of the authority by virtue of Regulation 119. Said infrastructure includes statements taken from Saih; memoranda written by the interrogators after his interrogations; and things which were said by 'Aliwa about him (although in this context the respondent agreed that a dispute existed as to whether it was an attempt to incriminate Saih, as explained in paragraph 28 of the previous decision). According to the

respondent, the collected infrastructure indicates that Saih acted to supply the funds which were used to acquire the weapons and to provide medical care to the cell member who was injured. In addition, said infrastructure indicates that Saih was aware of previous activity of the perpetrators' cell, and even "approved" the specific attack. In his statement of response the respondent added that after the previous decision had been given, he "reconsidered" Saih's case, following which he decided that the sanction against Saih's apartment would be taken by way of reversible-sealing, by welding iron boards to the openings of the apartment. The respondent is of the opinion that this sanction is proportionate and reconciles with the entire considerations, including the severity of Saih's acts and the fact that the order was directed only against his residential unit and not against other parts of the building. Finally, the respondent pointed out that the additional resident who was living in the apartment was Saih's wife, who, although there was no evidence regarding her actual awareness of the attack, was a Hamas activist who had been convicted in the past of having committed different security offenses and therefore her awareness of his acts could not be ruled out.

7. Petitioners' counsel in HCJ 1631/16 – Advocate Andre Rosenthal – argued in the hearing before us that respondent's arguments should be dismissed and that the order against him should be made absolute. According to him, nothing has changed since the previous decision had been given, in view of the fact that the administrative evidence which existed in 'Aliwa's case was the same evidence that existed from the outset. Particularly it was argued that 'Aliwa's conviction in the criminal proceeding could not change anything, because the conviction had no bearing on the main issue in the petition, namely, whether the evidence collected with respect to 'Aliwa, which indicated that he had ostensibly acted in the "second circle" of the attack, was sufficient for the purpose of using the authority by virtue of Regulation 119.

8. Petitioners' counsel in HCJ 1638/16 – Advocate Labib Habib – also argued in the hearing that the order in this petition should be made absolute. Advocate Habib emphasized that there was no reason to take such a dramatic administrative sanction while the criminal proceeding – which is the natural and proper proceeding in which the controversies and Saih's guilt should be clarified – is still pending and is only in its initial stages. Advocate Habib added that in any event the sanction which was chosen against Saih's apartment was not proportionate. It was argued, *inter alia*, that the fact that the sanction against the house would be taken by way of reversible-sealing was meaningless in view of the fact that the effective harm caused to Saih's wife, who was living in the apartment, would be similar to a situation of an irreversible sealing or demolition. It was further argued that respondent's argument concerning the former affiliation of Saih's wife with the Hamas organization was not relevant, since there was no dispute that she had no connection to the attack as a result of which the demolition orders were issued. In the alternative, Advocate Habib requested the court to order that only one room in the apartment would be sealed instead of a complete sealing thereof.

Deliberation and Decision

9. According to the language of the *orders nisi* which were issued in the petitions, and according to the written and oral arguments of the parties, the decision will focus only on the nature of the administrative evidence against 'Aliwa and Saih and on the proportionality of the orders which were issued against them. In any event we do not intend to refer to other issues, including general issues of principle associated with respondent's authority to act according to Regulation 119 and the lawfulness of its use (see reference in that regard also in paragraph 17 of the previous decision).

10. The two relevant premises on which our decision will be based have also been specified some time ago in the context of our previous decision.

The first premise concerns the ***level of proof*** which is required for exercising the authority by virtue of Regulation 119, on the general level as well as on the specific level, and with respect of which it was held as follows:

> 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 the need 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 three 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 second premise concerns the question of whether the issue of the demolition orders is proportionate considering, *inter alia*, the **scope of involvement** of 'Aliwa and Saih in the attack. On this issue it was held as follows:

> …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.
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> [paragraph 23, ***Ibid***].

11. In view of the detailed discussion of the above issues in the context of the previous decision, I find no need to hold an additional general-legal deliberation on these issues in the context of this judgment, and the only thing which remains to be done is to apply the above to the **updated** facts and data in the cases of 'Aliwa and Saih. Nevertheless, before doing so, I found it necessary to make one short general comment regarding the connection between the scope and extent of involvement of the perpetrators in a terror attack and the use of the authority by virtue of Regulation 119. In the previous decision Justice **Sohlberg** noted that "**a terror attack is not exhausted in the killer who pulled the trigger**" (Ibid., 23). I also share this opinion. Indeed, when murderous terror attacks are

concerned such as the attack in which the Henkin spouses were killed, experience teaches that additional persons may be involved who, even if not actually "pulled the trigger", their part in carrying out the attack was significant. In this sense, the attempt to draw a dichotomous distinction between the "direct" and "indirect" perpetrators – such as the planners; the recruiters; the collaborators; or the suppliers of firearms and financing – has considerable difficulties. Sometimes precisely the acts of the "indirect" perpetrators are so significant and central to the extent that it is doubtful whether, were it not for them, the attack could have materialized. Hence, **the question which should be asked is not necessarily whether the perpetrator shot the victims of the attack personally, or whether he was physically present on scene at the time of the attack, but rather what was the effect of his acts on the realization of the attack, and whether it was sufficient to justify the use of the sanction by virtue of Regulation 119 against him** (all subject, obviously, to the examination of all other data the examination of which is required for the use of the authority). This question should be examined based on the circumstances of each and every case, as will be done in the case at bar.

12. '**Aliwa's case**: As aforesaid, since the previous decision had been given, 'Aliwa was convicted of offenses of intentional causation of death of the Henkin spouses, along with additional offenses. His conviction of said offenses simply means that 'Aliwa **himself** caused by his actions the realization of the killings. The judgment and verdict given in this matter by the military court speak for themselves. Particularly, the verdict refers to 'Aliwa's major and significant involvement in the execution of the attack, while, *inter alia*, it was written that 'Aliwa "**acted to establish a military cell, to raise funds for its activity and to acquire for it firearms**", and that the cell commander "**received from him an explicit approval to carry out the attack… including an approval in advance of a plan to execute an abduction in the course of said attack**". The military court even explicitly added that 'Aliwa had "**a key role [in] the cell**" concerning its organization before the attack which included "**arming and equipping, execution of observations, examination of possible locations for the attack, recruitment of members, appointment of proper position holders for the mission, their training and guidance**." (all as specified in paragraphs 28-29 of the verdict dated June 22, 2016).

It is true that ostensibly the conviction in the criminal proceeding only ratified, in retrospect, what had already been argued by the respondent in his preliminary response before the *order nisi* in the petition was issued. It should also be noted that as a general rule no dependence should exist between the different proceedings – the criminal one and the administrative one – for the purpose of making and examining respondent's decisions to issue orders by virtue of Regulation 119, in view of the timing in which the administrative decision should be made and the different evidentiary level between the two proceedings (see in this context, *inter alia*,: HCJ 1014/16 **Skafi v. Commander of IDF Forces in the Judea and Samaria Area**, paragraph 4 of the opinion of Justice **Z. Zylbertal** (February 28, 2016)). However, in the circumstances of the case at bar, in which the chain of events in the petition caused the judicial review over respondent's decision to be passed after 'Aliwa's conviction in the criminal proceeding, I do not think that this fact can be disregarded. And to be precise, not only had the conviction in the criminal proceeding reinforced respondent's arguments that he had in his possession good and strong administrative evidence regarding 'Aliwa's involvement in the attack, it also removed the fog and the doubt – if any – around the question of the part he played therein. Now, particularly in view of 'Aliwa's **admission** and the **specific offenses** of which he had been convicted, there is no longer any doubt that he was a "central player" in the activity of the perpetrators' cell. Moreover, now we are certain and confident that 'Aliwa's acts were established based on the high severity level – a level which enabled his conviction of the offense of an intentional causation of death in the criminal proceeding; and which in any event suffices also to enable the exercise of the authority by virtue of Regulation 119 in the administrative proceeding.

Based on the above determinations I do not think that there is room for judicial intervention in respondent's decision to exercise his authority by virtue of Regulation 119 in 'Aliwa's case. I shall emphasize once again that according to me the severity of 'Aliwa's acts and the extent of his involvement in the attack have a great and decisive weight under the circumstances of the matter, without disregarding additional data which also have a considerable weight, which have also been weighed (even if at a later stage, and only after the comments of this court in the previous decision), including the fact that 'Aliwa's family members were not aware of his activity or did not take part therein. In conclusion, should my opinion be heard, we shall direct to revoke the *order nisi* which had been issued in HCJ 1631/16 and to dismiss the petition in this proceeding.

13. **Saih's case**: In the context of paragraph 28 of the previous decision Justice **Sohlberg** held that: "**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**." Thereafter it was added and noted that the evidentiary infrastructure in Saih's matter also raised difficulty because it relied, in central parts thereof, on statements made by others who were involved in the case, mainly 'Aliwa, however, the motive for making these statements was in dispute, while according to Saih said involved persons tried to incriminate him and "frame him up" with acts he had not carried out, *inter alia*, in view of the fact that he was terminally ill and was dying. Justice **Sohlberg** noted that Saih's argument in that regard "**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**." (*Ibid.*)

The statement of response submitted by the respondent contained no new information or updated data which may provide an answer to the questions and queries which had been raised by the members of the panel in the context of the previous decision. In fact, the respondent relied on the same administrative evidence including Saih's statements and the memoranda which were written by the security agents after his interrogations. The respondent also reiterates the fact that an indictment was filed against Saih. This evidentiary infrastructure was also at the disposal of the Justices of the panel in the previous hearing. The members of the panel were of the unanimous opinion that it was doubtful whether such infrastructure could sufficiently meet the lawful requirement for clear, unequivocal and convincing administrative evidence – as required for the use of Regulation 119. Under these circumstances, when the evidentiary administrative infrastructure actually remained as it had been beforehand, I am of the opinion that the respondent was unable to convince why the *order nisi* should not be made absolute. The result is, and I shall so propose to my colleagues to decide that an absolute order shall be issued by us in HCJ 1638/16 for the same reasons based on which the *order nisi* was issued in said petition, which are also relevant at this time.

14. Before wrapping up it should be noted that I found no reason to discuss in length the passage of time from the date on which the attack occurred and until the exercise date of the demolition orders in 'Aliwa's case. Firstly, it should be noted that this issue did not stand in the center of the previous hearing which was held, and the *order nisi* which was issued in the petition also failed to put a spotlight on this issue. Secondly, although there is no doubt that the passage of time from the date of the attack until the date on which the demolition orders are issued and exercised is important for the purpose of the judicial criticism over respondent's decisions by virtue of Regulation 119, I do not think that it has a crucial importance under the circumstances of the case at bar, in which the delay was caused mainly due to the prolongation of the legal proceeding, for reasons which are not at

respondent's responsibility (see: HCJ 4747/15 **Abu Jamal v. GOC Home Front Command** (July 7, 2015)).

15. And one more comment before conclusion. It can be easily seen that our decision in 'Aliwa's case reconciles with the decisions which were made with respect to the commander of the perpetrators' cell and with respect to 'Amar. With respect to the commander of the attack it was held that respondent's decision to issue demolition orders against his residential unit was proportionate *inter alia* because "**the respondent has established proof that Rajeb was the commander of the cell which executed the attack and that he was ostensibly personally involved in the hideous killing, as a collaborator**" (HCJ 7220/15, paragraph 20). With respect to 'Amar it was held that respondent's decision in his matter was proportionate *inter alia* because his involvement in the attack was "**direct and immediate. 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**." (HCJ 1629/16, paragraph 24). Against this backdrop it should be re-emphasized that respondent's three decisions – regarding the cell commander, 'Amar and 'Aliwa – have indeed passed the test of judicial criticism despite the fact that neither one of the latter has physically executed the shooting in the attack, only because each one of the cases justified it due to its specific circumstances. In no event should the above judicial decisions be regarded as a change of course or as an establishment of a new rule.

16. In view of all of the above said I shall propose to my colleagues to revoke the *order nisi* and to dismiss the petition in HCJ 1631/16 (in **'Aliwa**'s case); and conversely, to issue an absolute order and to accept the petition in HCJ 1638/16 (in **Saih**'s case). I shall also propose to my colleagues not to issue an order for costs to any of the parties in both proceedings.

Justice

Justice Z. Zylbertal:

I concur.

Justice

Justice A. Baron:

I join my opinion to the opinion of my colleague Justice **Y. Danziger**, according to which the order in **Saih**'s case should be made absolute and the petition in his case should be accepted (HCJ 1638/16).

Had my opinion been heard, the order in **'Aliwa**'s case should have also been made absolute and the petition in his case should have been accepted (HCJ 1631/16). As noted by my colleague the question to be resolved by us at this stage of the hearing focuses on the **proportionality** of the demolition order which was issued by the respondent against the apartment in which 'Aliwa resided until his arrest. 'Aliwa's wife and their eight children currently reside in this apartment. I am also of the opinion that unlike the issue of the **authority**, the issue of the **proportionate** use of the measure of house demolition is subject to judicial criticism again in each petition, according to circumstances of the case. And indeed, the long standing rule specifies a host of considerations that the respondent should consider before issuing a demolition order against a residential unit – including the severity of the acts attributed to the perpetrator; the magnitude of the evidence against him; the scope of involvement of the other inhabitants of the apartment in his acts, if any; the scope of the contemplated harm which will be inflicted on the family members as a result of the demolition, etc. (see: the words of my colleague Justice **Danziger** in HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, in paragraph 22 (August 11, 2014)). Hence, and as I have already noted in the previous decision from April 20, 2016, the consideration of the severity of the acts attributed to the perpetrator does not stand alone while examining the proportionality of the demolition order. When the dwelling serves as the residential unit of innocent family members, who are not aware let alone involved in the act of terror (not directly, not indirectly and not impliedly), I am of the opinion that the demolition of the residential unit constitutes a disproportionate violation of constitutional human rights of the first degree.

And it should be clarified: 'Aliwa participated in a horrendous terror attack in which the late Henkin spouses were killed. Even if he did not pull the trigger personally, his hands are covered with blood; this fact is not and cannot be in dispute. 'Aliwa was convicted at his admission of his crimes and was sentenced to an accumulation of two life sentences plus thirty years in prison. While he is expected to spend his entire life under lock and key, the individuals residing in the apartment designated for demolition are eight minor children and their mother – with respect of whom no argument has been raised that they had any involvement or awareness of 'Aliwa's evil deeds. Under these circumstances, I am of the opinion that the demolition of the apartment is not proportionate.

Justice

Decided by a majority opinion as specified in the judgment of Justice **Y. Danziger**.

Given today, 24 Elul 5776 (September 27, 2016).

Justice Justice Justice