At the Supreme Court Sitting as the High Court of Justice

HCJ 1336/16
HCJ 1337/16
HCJ 1721/16
HCJ 1777/16

Before: **Honorable Justice E. Hayut**
Honorable Justice U. Vogelman
Honorable Justice Z. Zylbertal

The Petitioners in HCJ 1336/16:

1. **Firas Mustafa Atrash**
2. **Fatma Atrah**
3. **Mustafa Firas Atrash**
4. **Ahlam Firas Atrash**
5. **Ansam Firas Atrash**
6. **Sdein Raba' Fira Atrash**
7. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

The Petitioners in HCJ 1337/16:

1. **Salah Muhammad Alian Abu Kaf**
2. **Amal Abu Kaf**
3. **Yihya Salah Abu Kaf**
4. **Hadil Salah Abu Kaf**
5. **'Alaa Salah Abu Kaf**
6. **Karim Salah Abu Kaf**
7. **Hala Salah Abu Kaf**
8. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

The Petitioners in HCJ 1721/16:

1. **Sara Ali Dwayat**
2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

The Petitioners in HCJ 1777/16

1. **Hanan Tawil**
2. **Abed al Rahman Tawil**
3. **Shahad Tawi**
4. **Ahad Tawil**

5. **Wa'ad Tawil**
6. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

v.

The Respondent:	**GOC Home Front Command**
Petition for *Order Nisi*	
Session date:	29 Adar A 5776 (March 9, 2016)
Representing the Petitioners in HCJ 1336/16; HCJ 1337/16 and HCJ 1777/16:	Adv. Lea Tsemel
Representing the Petitioners in HCJ 1721/16:	Adv. Andre Rosenthal
Representing the Respondent:	Adv. Yonatan Zion-Mozes

Judgment

Justice E. Hayut:

Pending before us are four petitions for the revocation of forfeiture and sealing orders (hereinafter:the **orders**) issued by the respondents on February 4, 2016, against four apartments which served as the residence of four young men, inhabitants of Sur Bahir, after on *Rosh Hashana* 5776 eve (September 13, 2015) the four threw stones, as alleged by the respondent, at vehicles on the "Asher Viner" road in Jerusalem, and caused the death of the late Alexander Levlovitch (hereinafter: the **deceased**).

Factual Background

1. On October 15, 2015, an indictment was filed with the Jerusalem District Court against Walid Mustafa Atrash (hereinafter: **Atrash**), born in 1997, Muhamad Salah Muhamad Abu Kaf (hereinafter: **Abu Kaf**), born in 1997, Abed Dwayat (hereinafter: **Dwayat**), born in 1996, and Muhamad Tawil (hereinafter: **Tawil**), born in October 1998 (minor) and against another involved, Ali Issa Ibrahim, born in December 1997 (minor) (hereinafter: **Ibrahim**, and the five collectively: the **defendants**). The indictment attributes to the defendants involvement in stone throwing and in the killing of the deceased. According to the allegations specified in the indictment, in the early hours of the morning of September 13, 2015, *Rosh Hashana* 5776 eve, clashes commenced between young Muslims who locked themselves in the al-Aqsa Mosque for the entire night and police forces which arrived to the scene to disperse the crowd and enable the ascent of Jews to Temple Mount. On the evening of that day, on or about 22:00, the defendants met in Abu Hamed neighborhood in Sur Bahir and decided to throw stones towards vehicles driven by Jews on the "Asher Viner" road, which connects between Hebron Road and Armon Hanaziv neighborhood in Jerusalem (hereinafter: the

road), as an act of retaliation and solidarity with the Temple Mount incidents. As planned, Dwayat – who was wrapped by Hamas flag, Abu Kaf, Tawil and Atrash walked from Sur Bahir to the road and Ibrahim stayed in the neighborhood as a lookout. Dwayat, it is so alleged, stood on the traffic island in between the lanes of the road, while the three others stood on the side of the road and all of them, jointly, threw stones towards six or seven vehicles which were driven by individuals whom they regarded as Jews and which were on their way from Hebron Road to Armon Hanaziv neighborhood. Some of the stones hit the vehicles and thereafter Abu Kaf, Tawil and Atrash handed over stones to Dwayat who as aforesaid, was standing on the traffic island, so that he will throw them at vehicles which were driving down the road in high speed. After several minutes of stone throwing Dwayat noticed a gray Mazda which was driven by the late Levlovitch. With him in the car were A and R who had *Rosh Hashana* dinner in the deceased's apartment in Har Homa, and he was driving them to their home in Armon Hanaziv neighborhood. At that stage Dwayat took, as alleged, a stone of about 10 cm which weighed one Kg. and threw it from a distance of about one meter towards the vehicle. The vehicle veered from the road to the right, hit an electric pole and thereafter a tree on the side of the road, where it stopped. As a result of the collision the deceased's chest was strongly hit by the wheel as a result of which a cardiac rupture was caused, the deceased's chest was crushed and he passed away. In addition, A was wounded in the left side of her chest, six of her ribs were broken and her left arm was broken as well. For the above doings the state attributes to the defendants the offense of manslaughter, eight offenses of stone throwing at vehicles and an offense of severe injury. The indictment further attributes to Dwayat and Abu Kaf additional offenses which are not relevant to the petitions at bar.

The arraignment in the criminal proceeding has already been completed and in a nut sell it shall be noted that each one of the defendants denies to this extent or another the charges pressed against him.

2. Due to the severity of the actions and their results and due to the vital need to deter potential perpetrators the respondent decided, based on the recommendation of the Israel Security Agency (ISA) and with the consent of the State Attorney, the Attorney General and the political echelon, to exercise his authority pursuant to Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: the **Defence Regulations** or the **Regulations**) against the apartments which served as the residence of four of the defendants (with the exception of Ibrahim) and seal them. The designated sealing is about to be carried out by way of sealing the openings of the apartments by steel planks and iron bars which is a reversible sealing. The respondent notified the families of the four accused on February 4, 2016, of the decision and of the orders which were issued and after the objections which had been submitted by them were denied, the family members and HaMoked: Center for the Defence of the Individual filed the petitions at bar.

3. The petition in HCJ 1336/16 concerns the apartment which served as the residence of **Atrash** – a single story house in Sur Bahir neighborhood which consists of three bedrooms, a living room and a kitchen. The petition in HCJ 1337/16 concerns the apartment which served as the residence of **Abu Kaf**, located on the second floor of a two story building, also in Sur Bahir neighborhood. The apartment consists of three bedrooms, a living room and a kitchen. The petitioners in this petition are the parents of Abu Kaf and his siblings who all live in the apartment. The petition in HCJ 1721/16 concerns the apartment which served as the residence of **Dwayat**, located in a partly single story partly two story building. The apartment of the Dwayat family is located on the single story part of the building and consists of three bedrooms, a living room, a guest room and a kitchen. Petitioner 1 in said petition is Dwayat's mother. The apartment also serves as the residence of his sister who is not a petitioner. The petition in HCJ 1777/16 concerns the apartment which served as the residence of Tawil – single story building in Sur Bahir neighborhood which consists of two bedrooms, and a kitchen. The petitioners are Tawil's parents and siblings who live in the apartment.

HaMoked: Center for the Defence of the Individual joined, as aforesaid, as a petitioner to all of the above petitions and to complete the picture it should be noted that on January 19, 2016, the Minister of Interior decided to revoke the permanent residency status in Israel of three of the defendants – Dwayat, Atrash and Abu Kaf.

Summary of the parties' arguments

4. The petitioners raised similar arguments in all four petitions and I shall therefore discuss them jointly.

The petitioners argue that the respondent stretched the limits of his authority according to Regulation 119, inter alia, in view of the fact that the incident in which the deceased was killed did not belong to the category of attacks characterized by a premeditated intention to kill, in which it had been decided in the past to use Regulation 119. The petitioners emphasize in this context that the state attributed to the defendants the offense of manslaughter rather than the offense of murder, that an intention to kill cannot be attributed to a stone thrower and that in the absence of said mental element Regulation 119 should not be used. The petitioners argue further that the use of the Regulation in the case at bar was too broad and did not meet the proportionality tests. It was also argued that despite the fact that this court called to examine from time to time the effectiveness of the use of Regulation 119, it was not done and contrary to respondent's position, the petitioners are of the opinion that the use of the Regulation was neither effective nor deterring. The petitioners also note that they are well aware of the ruling of this court, including from recent time, which rejected the arguments concerning the unlawfulness of the use of Regulation 119, but that they refer in this context to different statements made by some justices of this court who expressed reservations about the ruling and they put their hopes in said reservations while calling to change the ruling. It was further argued that the orders which were issued discriminated against the petitioners as compared to family members of Jewish defendants who were accused of having committed the same offenses. Another argument which was raised by the petitioners was that once the Minister of Interior decided to revoke the permanent residency status of Dwayat, Atrash and Abu Kaf, there was no room for additional deterrence.

With respect to the criminal proceeding, the petitioners argue that the petitioners have different defense arguments including the argument that the deceased was very ill and that there was no certainty that the stone throwing caused the deceased to lose control over his car and that prior stone throwing took place. **Atrash's** family argues that he did not throw stones and that according to his statements he went to take photographs but when he heard Arabic voices from the cars which were hit he left the scene and went back home. Atrash heard of the accident, it was so alleged, from a great distance and from the village and he even thought that an Arab female driver was hit. **Abu Kaf's** family argues that he did not throw stones and that according to his statements he was indeed in the area but he did not stand near the road but rather on the mountainside. Additional arguments were made regarding difficult personal circumstances of the Abu Kaf family which would only be aggravated by the sealing of the apartment and which would severely harm the parents and the family members. **Tawil's** family notes that according to his statements he indeed threw stones, but that the defendant is a minor and in any event he did not throw the stone which hit the deceased's car. **Dwayat's** mother argues that she did not know of the intention of her son to throw stones on the day of the incident and that she did not encourage him to do it.

5. On the other hand the respondent argues that the underlying premise was and still is that a potential perpetrator who knows that his family members may be harmed as a result of his actions may be

deterred from committing an attack. The respondent further emphasizes that he is aware of the severity of the sanction under Regulation 119, and that also when reversible actions are concerned, like those in the cases at bar, the military commander is directed to exercise his authority only in severe cases which by their nature the "regular" punitive or deterring systems do not provide sufficient and appropriate deterrence for perpetrators. It was also argued that the Regulation is used in direct relation to the nature and scope of the attacks, and that due to the recent escalation in terror attacks the Regulation was used more often. The respondent requests to deny petitioners' arguments that the Regulation should not be used in stone throwing cases and argues that offenses "involving violence", in the words of Regulation 119, are attributed to the defendants, and therefore there is no flaw in the use thereof in the cases at bar. As to the argument that the deceased's death was not caused as a result of the stone throwing, the respondent argues that said argument was refuted by the pathological report of the National Center of Forensic Medicine, and with respect to the proportionality the respondent argues that he did not take the measure of demolition but rather the reversible measure of sealing taking into consideration the entire circumstances, including the characteristics of the attack, its fatal consequences and the offenses of which the defendants were accused. The respondent rejects the argument that the use of Regulation has no deterring effect, and argues that he has in his possession an updated opinion from February 2016, according to which the use of the Regulation deters potential perpetrators. With respect to the discrimination argument the respondent argues that it has no basis and should be denied.

With respect to the arguments raised by petitioners' families regarding the involvement of their sons in the events attributed to them in the indictments, the respondent argues that he has in his possession open and privileged administrative evidence substantiating their said involvement and that said administrative evidence suffices for the exercise of his authority according to Regulation 119.

The hearing in the petition and the notices thereafter

6. In the hearing of the above captioned petitions the respondent agreed that the hearing in three of the above petitions (HCJ 1336/16, HCJ 1337/16 and HCJ 1777/16) relating to Atrash, Abu Kaf and Tawil, would be held as if *orders nisi* were given therein. It should also be noted that during the hearing privileged material regarding the defendants which does not constitute part of the evidence in the criminal proceedings was presented with petitioners' consent *ex parte*. In addition, the updated intelligence opinion from February 2016 regarding the effectiveness of the exercise of the authority according to Regulation 119 was presented *ex parte*.

When the hearing ended and in view of things which were raised therein, the respondent was requested to submit a complementary notice regarding acts of remission which were carried out with the approval of the Minister of Defense in cases of reversible sealings, like those planned in the cases at bar, and regarding restitution of land in cases in which the house was demolished. In his notice dated March 16, 2016, the respondent informed that a partial examination which was conducted indicated that on July 5, 2012 the Minister of Defense signed a partial remission order with respect to a building which served as the residence of the perpetrator Kasem Mughrabi who carried out in 2008 an attack in Zahal square in Jerusalem. Said order was issued following a comment of the court in HCJ 5696/09 **Mughrabi v. GOC Home Front Command** (February 15, 2012) and not in response to a request for remission of the family. In addition to the above orders the respondent located remission orders issued by the Minister of Defense from 1992 and a remission order from 2006 – both with respect to buildings which were sealed in 1968. In addition the respondent located two requests for remission which were denied (from 2008 and from 2015). Hence, altogether three remission orders issued by the Minister of Defense were located. The petitioners replied on March 21, 2016, to the above complementary notice and argued that the small number of cases in which remission was given proved the failure to exercise discretion and the failure to reconsider each and every case in which a housing unit was sealed.

7. To complete the picture it should be noted that on March 28, 2016, the petitioners filed a request for the expansion of the panel which heard the above captioned petitions and said request was denied by our decision dated March 29, 2016.

Deliberation and decision

8. The petitioners raise again, as aforesaid, general legal arguments based on Israeli law and international law to substantiate their position which denounces the authority of the military commander to use Regulation 119 for the issue of forfeiture and demolition or sealing orders, emphasizing that this Regulation is contrary to the norms by which the military commander is bound and that he should not use it. These arguments were discussed and denied by this court which approved the use of Regulation 119 by the military commander for the issue of forfeiture and demolition or sealing orders, after a long period (between the years 2005 – 2014) during which said Regulation was not used in the Judea and Samaria area (see: HCJ 4597/14 **'Awawdeh v. Military Commander for the West Bank Area** (July 1, 2014); HCJ 5290/14 **Qawasmeh v. Military Commander for the West Bank Area** (August 11, 2014) and in which the use of the Regulation within the territory of Israel was limited (see, for instance, HCJ 9353/05 **Abu Dheim v. GOC Home Front Command** (January 5, 2009)). A public petition which was filed by human rights organizations and which raised the general arguments regarding the authority of the Minister of Defense and the commander of the military forces in the West Bank to use Regulation 119, was also denied (HCJ 8091/14 **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Minister of Defense** (December 31, 2014)(hereinafter: the **public petition**) and a request for a further hearing in the public petition – was denied (see: HCJFH 360/15, November 12, 2015). Since then additional petitions which concerned forfeiture and demolition or sealing orders issued pursuant to Regulation 119 were denied (see, for instance, HCJ 1938/16 **Abu Alrub v. Commander of IDF Forces in the West Bank** (March 24, 2016) (hereinafter: **Abu Alrub**); HCJ 1630/16 **Zakariyeh v. Commander of IDF Forces** (March 23, 2016) (hereinafter: **Zakariyeh**); HCJ 1014/16 **Skafi v. Commander of IDF Forces in the Judea and Samaria Area** (February 28, 2016) (hereinafter: **Skafi**); HCJFH 1773/16 **Skafi v. Military Commander of the West Bank Area** (March 2, 2016); HCJ 967/16 **Harub v. Commander of Military Forces in the West Bank** (February 14, 2016) (hereinafter: **Harub**); HCJ 8567/16 **Halabi V. Commander of IDF Forces in the West Bank** (December 28, 2015) (hereinafter: **Halabi**)).

The petitioners argue that since the judgment in the public petition was given a number of justices of this court expressed doubts about the use of the Regulation and these statement are used by the petitioners to anchor their argument that case law should be veered from and that a rule should be established stating that the use of the Regulation is not lawful. Indeed, a number of justices of this court expressed doubts about the use of Regulation 119 for the issue of forfeiture and demolition or sealing orders, and in the public petition I have also stated that "taking the path of case law in this matter is not easy" (*Ibid.*, paragraph 1 of my opinion). But, like myself the vast majority of the other justices who expressed doubts were also of the opinion that they were bound by the recently established rule which approved the use of Regulation 119 for as long as it has not been changed. And as was rightfully emphasized, such change should be made by an expanded panel rather than by a panel of three (see **Zakariyeh**, paragraph 3 of the opinion of my colleague Justice **U. Vogelman**; paragraph 5 of the opinion of Justice **M. Mazuz**, *Ibid*.; and paragraph 6 of the opinion of Justice b in **Abu Alrub**; As to the great difficulty which this issue raises see also the words of the President in HCJFH 360/15, in paragraph 6; see also HCJFH 2624/16 **Zakariyeh v. Commander of IDF Forces in the West Bank** (March 31, 2016) where the possibility to expand the panel on this issue in the appropriate petition was not ruled out).

9. However, for as long as case law stands, the underlying premise of the discussion in the petitions at bar is that the respondent has the authority to use Regulation 119 and the examination of the exercise of the authority within the framework of the petitions at bar will therefore focus on aspects which relate to the application of the authority and the manner by which the respondent has exercised his discretion in the specific cases. The respondent does not dispute the fact that the authority vested in him according to Regulation 119 should be exercised with a measuring cup, meticulously, proportionately and for deterrence purposes in severe case which justify it (see paragraph 16 of the judgment of the Deputy President in the public petition; HCJ 8084/02 **Abbasi v. GOC Home Front Command**, IsrSC 57(2) 55, 59 (2003)). To meet these criteria the following considerations should, *inter alia*, be taken into account:

> 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**, paragraph 22 of the judgment of Justice Danziger; see also: HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, (1992); **Salem v. Major General Ilan Biran, Commander of IDF Forces**, IsrSC 50(1) 353, 359 (hereinafter: **Salem**); The public petition, paragraph 18 of the opinion of the Deputy President).

10. Have the required criteria been met in the case at bar with respect to the orders that were issues against each one of the apartments being the subject matter of the above captioned petitions?

I shall start by saying that as far as Dwayat's apartment is concerned I concluded that the criteria were indeed met and therefore the petition in connection therewith should be denied. On the other hand, with respect to the petitions concerning the residential units of Atrash, Abu Kaf and Tawil, I concluded that in the petitions which concern said apartments the *order nisi* should be made absolute, all for the reasons specified below.

11. The evidentiary level which is required according to case law for the use of Regulation 119 is "satisfactory" administrative evidence that one of the inhabitant of the house committed actions of the sort specified in Regulation 119 and as stated by the court "the military commander does not need a convicting judgment of a judicial instance, and he himself is not a court of law. As far as he is concerned the question is whether a reasonable person would have regarded the material in his possession as having sufficient evidentiary value" (HCJ 361/82 **Hamri v. Commander of the Judea and Samaria Area**, IsrSC 36(3) 439, 442 (1982); HCJ 7823/14 **Ghabis v. GOC Home Front Command**, paragraph 10 (December 31, 2014) and also recently **Skafi**, paragraph 12).

A review of the evidence presented to me shows that in the case at bar there is administrative evidence in the required level and quantity regarding all four defendants. However, and as far as the severity of the actions is concerned the evidence shows that there is a clear difference between Dwayat and the other three. In his police statement dated September 24, 2015, Tawil said:

> I forgot who said let's go and throw stones on Jewish cars and we put veils while we descended through the wadi, Abed Dwayat covered his head with his shirt and he stood in the middle of the road and Muhamad Abu Kaf

> stood in a higher spot [sic] and I don't remember whether he put a veil or not and I also stood in a higher spot and Walid [Atrash] stood near Muhamad and I don't remember whether his face was veiled or not and it was around 10 or 1 1at night. Abed [Dwayat] stood in the middle of the road and threw stones at the passing cars and we threw stones on the floor to him and the distance between us and Abed Dwayat was about five meters and several cars passed and he threw stones at them and hit the cars but they drove on. Thereafter a Mazda arrived from the upper part of the road and when it was driving down the street towards the traffic circle Abed Dwayat threw stones at the car at the driver's side of the car and he started to say that the stone hit him in the face and run away…" (RS/3 in HCJ 1721/16, page 55 lines 20-29).

Similar things regarding the chain of events that day were described by Abu Kaf in his interrogation (see the interrogations of Abu Kaf, RS/3 in HCJ 1336/16, including, inter alia, his interrogation dated October 7, 2015 in page 53 in which he noted that he threw stones and handed over stones to Dwayat so that the latter would throw them at cars). Atrash did not admit to stone trowing (see Atrash's interrogations, RS/2 in HCJ 1336/16) and noted that he stood with Abu Kaf and took photos of the occurrences with his cellular phone but in his interrogation by security agents Atrash said, after he has initially denied his involvement in the event, that he threw some stones and then stopped doing it (RS/4 in HCJ 1336/16). Dwayat's interrogation ostensibly indicates that he admitted in that he threw the fatal stone at the deceased's car and that he was the instigator and initiator of the entire event:

> … while we were sitting I told them [the other defendants – E.H.] let's go and hit the settlers' cars. In the beginning they refused and then I told them let's go and they agreed… the last car was a small Mazda which drove down the road in high speed and I held the stone which I took from the street. From where I was standing when the car came closer I saw the people in the car and I was about one or two meters away from the car and I threw the stone which I was holding at the car, at the driver's window and the glass of the car broke a little and I and my friends ran away to the village… (interrogation dated September 26, 2015, in page 39).

And in another interrogation he stated that:

> Q – You threw the stone at the Jew who died, do you remember where the stone hit?
>
> A – I remember that it hit the corner of the front window on the driver's side, and then I told Amir Atawil [*sic*] that the stone hit his face but I was not sure and then when I saw the news I knew that the cause of death was cardiac arrest but I saw the broken glass as I said in the first interrogation. (Interrogation dated October 7, 2015, in page 43).

The petitioners raised in their arguments the possibility that the deceased did not pass away as a result of the stone which hit him but as a result of a heart condition, and argued that this issue should be clarified in the framework of the criminal proceeding and therefore Regulation 119 should not be used until said issue was clarified. In response, the respondent presented the opinion of Dr. Gips from the National Center of Forensic Medicine according to which the deceased's death was caused as a result of a self-inflicted accident after stones were thrown at his car, and at this stage this evidence suffices to satisfy the required burden of administrative proof. This should be coupled with the privileged material that was presented by the respondent *ex parte* which obviously cannot be

elaborated on, and which also strengthens the administrative evidence presented that ties the defendants to the acts attributed to them in the indictment.

Is the use of Regulation 119 in the case at bar proportionate?

12. A similar case in which Regulation 119 was used was discussed in HCJ 126/83 **Abu 'Alan v. Minister of Defense**, IsrSC 37(2) 169 (1983) (hereinafter: **Abu 'Alan**). In that case the respondent issued forfeiture and sealing orders against the homes of four suspects who admitted of group stone throwing at the car of the late Ester O'hana when she was driving down the Beer Sheva–Hebron road and was killed by a stone which hit her in the head. The investigation of the incident revealed that the suspects were members of an organized cell the goal of which was to incite, provoke and throw stones at Israeli cars. In **Abu 'Alan**, unlike the case at bar, all four suspects against whose homes the orders were issued admitted that "they personally threw stones at cars which passed down the road, and that one of these cars was the above referenced Renault [O'hana's car]" (*Ibid*., page 170). Consequently the military commander decided, as aforesaid, to forfeit and seal the homes of the four. While denying the petition which was filed by their family members against the sealing of their homes, this court held as follows:

> The measure taken by the military commander is not the most drastic measure of house demolition but rather an intermediate measure of sealing, which is reversible. It seems to us that under these circumstances a proper correlation exists between the severity of the action attributed to the suspects and the severity of the means taken by the military commander. We are aware of the fact that said intermediate measure is not a light measure by any means, and that it may cause suffering to the suspect's family members to whom no offense under the regulations was attributed. Indeed, the sanction set forth in Regulation 119 is not intended to punish; rather, its purpose is to deter those persons who violate public order, whose conduct causes grave and lethal harm to other persons, who are also innocent. It the obligation of the military commander and his right to maintain public law and order in the Area and to protect any person who uses public roads, Jews and Arabs. In view of the recently escalating stone throwing phenomenon, it was incumbent on the military commander to take measures to overcome it and to maintain public order. The acts taken, in fact, fall within the array of measures which he was authorized to use and his discretion was exercised based on reasonable and pertinent considerations. (*Ibid*., page 172-173).

Indeed, since the use of Regulation 119 was renewed in recent years for the forfeiture and demolition or sealing of perpetrators' homes, this measure had thus far been used in cases of attacks in which according to the administrative evidence firearms or cold weapons were used including cars for ramming purposes, **with an intent to kill**. However, unfortunately, the things which were written in **Abu 'Alan** and which pertain to the stone throwing incident in which the late Ester O'hana was killed, are true and correct now as they were at that time, although about 30 years passed from the occurrence of said incident. In view of the clear administrative evidence that was presented to us in the case at bar regarding the direct connection between the throwing of the fatal stone by Dwayat and the death of the deceased, and in view of the fact that said administrative evidence (which I shall discuss below) indicates that Dwayat was the provocateur and initiator of the entire incident, I do not see any reason to intervene in respondent's discretion who exercised the authority vested in him according to Regulation 119, as far as Dwayat is concerned, all of the above according to the currently applicable case law and although the state does not attribute to him the offense of murder, namely, a premeditated intention to take a person's life.

After I wrote my opinion I reviewed the opinion of my colleague Justice **Vogelman**, and with respect to its content I would like to note that the Basic Law: Human Dignity and Liberty does indeed bring hope to any human being "as such", but it seems that there is no dispute that human rights, including those specifically mentioned in the Basic law, have always guided this court. The **Abu 'Alan** judgment had indeed been given about nine years before the Basic Law: Human Dignity and Liberty was enacted, but it seems that one can find in the words of Justice (as then titled) Barak in **Abu 'Alan** – although written prior to its enactment – reference to issues of proportionality including an examination of the proper relation between the severity of the action attributed to the suspects and the severity of the measures taken. In addition it refers to the suffering of the suspects' family members to whom no offense was attributed and to the fact that the measure taken in that case – like in the case at bar – was not the most drastic measure of house demolition but rather an intermediate measure of sealing.

13. The administrative evidence indicates that Dwayat had a clear intention to injure Jews who were driving down that road and a mental element of awareness of a possible fatal consequence. Case law referred more than once, and sometimes with a critical tone, to the wide range of manslaughter offenses as a result of which this offense includes a host of killing incidents which are very different from one another. President (*emeritus*) **A. Grunis** discussed this issue in CrimFH 404/13 **A v. State of Israel** (April 15, 2015) and stated as follows:

> The broad scope of the manslaughter offense derives also from the broad manner of its drafting by the legislator, but perhaps, and maybe primarily, from the broad manner of its construction by the courts over the years. I referred to said issue above when I discussed the factual element of the offense, but it is also applicable to the mental element of the offense and even to the legal causal connection. The broad interpretation of the manslaughter offense and its application to cases which are very different from one another, caused it to encompass circumstances whose moral flaw is totally different. This situation may prejudice the moral message of the offense. Indeed, a distinction between different prohibited acts may be drawn by the severity of the penalties imposed on the commitment of the offense. However, on occasions said distinction is not fully clear to the public. As aforesaid, different parties who are responsible for the criminal law in the state of Israel are aware of the difficulty embedded in the overly broad application of the offense of manslaughter and in the killing offenses report a proposition was made to break up the manslaughter offense as currently defined in the law, into several sub-offenses. And note well, until the legislator re-establishes the limits of manslaughter, if and to the extent it so does, I am of the opinion that we should be twice as much as careful when we determine which cases fall within the scope of the offense (Ibid., paragraph 41)

In the case at bar, given the administrative evidence regarding Dwayat as described above, it can be said – with the required caution arising from the fact that a criminal proceeding in which judgment has not yet been given is concerned - that Dwayat's physical actions and his conduct in terms of the mental element, are situated on the edge of the range of manslaughter offenses almost embarking on the offense of murder. When a person stands on a traffic island in the middle of a main road and throws from "zero range" a large stone towards the driver's window of a car travelling in high speed "we can assume, in the absence of evidence to the contrary, that he was also aware of the fatal consequence" (CrimApp 8827/01 **Shtreizant v. State of Israel**, IsrSC 57(5) 506, 524 (2003)) and that he was at least indifferent to such consequence (**A**, paragraph 17; CrimApp **Foriadin v. State of**

Israel, paragraph 7 (January 19, 2006)). I am therefore of the opinion that we should not intervene in respondent's discretion who decided to use Regulation 119 in Dwayat's case, particularly in view of the fact that the measure which was used takes into account the difference between the case at bar in which Dwayat was accused of manslaughter and a perpetrator who embarked on an attack with a premeditated intention to kill, namely, that in the case at bar the respondent decided to take the measure of reversible sealing which is a more lenient measure in the array of measures which may be used according to Regulation 119 (demolition and irreversible sealing).

14. This is not the case with respect to the use of Regulation 119 in the cases of Atrash, Abu Kaf and Tawil. The administrative evidence and the indictment indicate that collaborative manslaughter is attributed to the three due to their presence in the event, the stones which they threw at other passing cars and the transfer of stones to Dwayat. However, there is no dispute that the throwing of the fatal stone is attributed only to Dwayat who stood, as aforesaid, on the traffic island and threw it from a very short range while the others stood farther away. Even if the three may be regarded as members of the inner circle of the manslaughter offense, and I do not express an opinion on this issue, the above specified administrative evidence and the indictment indicate that their part in the incident was much smaller than Dwayat's. In this respect the case at bar differs from the **Abu 'Alan** case where the entire group of suspects bombarded the car of the late Ester O'hana with stones with no ability to single out from the group the suspect who threw the fatal stone which hit and killed her.

    Therefore, it seems to me that the analogy drawn by the respondent between Dwayat and Atrash, Abu Kaf and Tawil with complete disregard of the clear difference between them with respect to their respective parts in the event, does not reconcile with the proportionality by which the respondent is bound while exercising any of the measures available to him under Regulation 119. It seems to me that in the case at bar – although a reversible sealing is concerned – it was not appropriate to take this measure against the three due to difference which exists between them and Dwayat as far as their involvement in the event is concerned and due to the comprehensive balancing which should be made in this context, given the harm caused to the families of the three and their property.

15. Before I conclude it should be noted that the petitioners in the petitions in the matters of Dwayat, Atrash and Abu Kaf argued further that in view of the decision of the Minister of Interior to revoke the permanent residency status of the three, there was no room for the exercise of another deterring measure and that this should suffice. As it became evident that with respect to the status revocation separate proceedings are pending, we found that there was no room to express an opinion on that issue in the context of the petition at bar.

Conclusion

16. Theerfore, I shall suggest to my colleagues to dismiss the petition in HCJ 1721/16 in the matter of Dwayat and accept the petitions in HCJ 1336/16, HCJ 1337/16 and HCJ 1777/16 in the matters of Atrash, Abu Kaf and Tawil, in which the *order nisi* will be made absolute and the forfeiture and sealing orders which were issued against the residential units being the subject matter of these three petitions will be revoked. Finally, I shall suggest to my colleagues not to issue an order for costs.

Justice

Justice Z. Zylbertal:

I concur.

Justice

Justice U. Vogelman:

A, who had no "intention to kill" stands trial in a criminal proceeding for having been involved in hostile activity which caused a person's death, and administrative evidence exists to that effect which substantiates the allegations made against him. It was not found that his family members were involved in the alleged hostile activity. Under these circumstances will the sealing of the apartment which served as his residence and as the residence of his family members in Sur Bahir neighborhood in East Jerusalem – be proportionate? In my opinion the answer to this question is negative. For this reason I join the result of my colleague, Justice E. Hayut, who suggested to make the order nisi absolute in the petitions in HCJ 1336/16, 1337/16 and 1777/16 – but I do not share her position that the petition in HCJ 1721/16 should be dismissed. In view of the fact that in said petition there was no consent that the hearing would be held as if an order nisi was issued, had my opinion been heard, we would have issued an *order nisi* in said petition as well.

1. Pending before us again are petitions which pertain to the exercise of the authority pursuant to Regulation 119 of the Defence (Emergency) Regulations, 1945, and now we are concerned with forfeiture and sealing. Once again the petitioners request to bring up for discussion the difficult questions of principle which arise as a result of the exercise of the authority vested in the military commander under this regulation. Recent case law responded to the general arguments against the exercise of said authority (HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014)), and although my opinion was and continues to be that it should be revisited by an expanded panel – my position, as recently reiterated, is that since this is the rule, and since this court has recently affirmed it by different panels, there is no alternative but to make decisions within its limits for as long as it has not been changed (see my opinion in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015) (hereinafter: **Sidr**) and in HCJ 1630/16 **Zakariyeh v. Commander of IDF Forces** (March 23, 2016) and the authorities there).

2. The above applies to the rule which was recently established by this court; this is not the case with respect to a different rule which was established over 30 years ago – the rule which was established in HCJ 126/83 **Abu 'Alan v. Minister of Defense**, IsrSC 37(2) 169 (1983) (hereinafter: **Abu 'Alan**)). Said case concerned, as was also noted by my colleague, the matter of a group which threw stones at a car driven by the late Ester O'hana thus causing her death – "with no ability to single out from the group the suspect who threw the fatal stone which hit and killed her" (paragraph 14 of her opinion). This court did not find reason to intervene in the decision of the military commander to seal the homes in that case and found it proportionate (**Abu 'Alan**, page 172).

3. Based on the **Abu 'Alan** judgment my colleague decided to dismiss the petition in the case of Abed Dwayat (hereinafter: **Dwayat**)(HCJ 1721/16). As alleged in the indictment, Dwayat was the one who took and threw the stone which caused the late Alexander Levlovitch to lose control over his car and hit a tree – and in so doing caused his death. According to my colleague in the matter of the latter, the things which were written **there** "are true and correct now as they were at that time" (paragraph 12 of her opinion). On the other hand my colleague was of the opinion that we should accept the petitions of the families of the other suspects that the manslaughter offense which was attributed to

them in the indictment stemmed from their membership in a partnership due to their presence in the event. In that respect, according to my colleague, their matter differs from **Abu 'Alan** (paragraph 14 of her opinion).

4. As noted in the beginning, in my opinion *order nisi* should also be granted in Dwayat's petition. There is no doubt that the actions attributed to him in the indictment are allegedly more severe than those attributed to his partners. However, it should be remembered and emphasized that Dwayat was not accused of murder either, namely: it was not argued that he acted with a premeditated intention to take a person's life. It should also be emphasized that no argument was made that the family members of Dwayat were aware of the evil plan alleged in the indictment. Nevertheless, the military commander decided to issue an order for the sealing of Dwayat's apartment which also serves as the residence of his mother and sister. We are therefore requested to decide whether the use of Regulation 119 in circumstances in which the suspect of being involved in hostile activity did not act with an "intent to kill"; and in circumstances in which the family members were not involved in the hostile activity – is proportionate.

5. Indeed, in Abu 'Alan this court answered said question in the positive. As aforesaid, over 30 years passed since said judgment was given. Ever since the respondent resumed exercising the authority vested in him according to Regulation 119 (an authority which had not been exercised for a considerable number of years after the publication of the conclusions of the Shani committee; see in this context **Sidr**, paragraph 3 of my opinion) it was not argued that a request was made for the demolition or sealing of apartments of persons suspected of hostile activity which did not consist of an "intent to kill". It seems that this limitation which the respondent assumed upon himself is appropriate: the use of Regulation 119 is extreme by its nature and we have already pointed at the disproportionate harm caused by it to uninvolved family members. Therefore, even if case law affirms such use in the event of hostile activity which was carried out with an "intent kill" and which resulted in the taking of human life, it is difficult to accept a situation in which said authority is exercised in cases that do not consist of a premeditated intention to kill – the most severe offense in the book of laws.

6. Needless to elaborate on the vast changes which took place in Israeli law since the Abu 'Alan judgment was given. The basic laws, including the Basic Law: Human Dignity and Liberty, were enacted and brought with them hope to any human being "as such" (section 2 of the Basic Law: Human Dignity and Liberty), be it the prisoner or the infiltrator, the detainee or the family member of the suspect of hostile activity (see also HCJ 8425/13 **Eitan – Israeli Immigration Policy v. Government of Israel**, paragraphs 123-124 (September 22, 2014)). The demolition of a person's home – despite the possibility to change it, as well as the forfeiture and sealing thereof – severely violates the rights of his family members who did not sin (see **Sidr**, paragraph 5 of my opinion). In the past I expressed my position that in my opinion – which differs from the currently applied rule, the exercise of the authority by virtue of Regulation 119 when it was not proved that the suspect's family members were involved in the hostile activity – was not proportionate (**Sidr**, paragraph 2 of my opinion). As aforesaid, I shall not veer from case law for as long as it stands – but in the case at bar we took one step forward relative to the rule which was established in the current era in which the authority is exercised, which we should not get used to even though the rule still stands.

   Therefore, I would have suggested to my colleagues to issue an order nisi in HCJ 1721/16 as well. Had my opinion been heard, it could have been examined in this context whether the military commander could have been given permission to issue an order for a partial sealing which would be limited solely to Dwayat's room (see and compare: HCJ 6026/94 **Nazal v. Commander of IDF Forces in the Judea and Samaria Area**, the opinion of Justice (as then titled) **M. Cheshin** (November 17, 1994)(in a minority opinion); HCJ 4772/91 **Hizran v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 46(2) 150 (1992) (the opinion of Justice (as then titled) **M.**

Cheshin (in a minority opinion). Since my opinion was not accepted, I shall not decide on this issue in the case at bar. With respect to the other petitions, I join, as aforesaid the result of my colleague, Justice **E. Hayut**.

Justice

Decided as specified in the judgment of Justice E. Hayut.

Given today, 24 Adar B 5776 (April 3, 2016).

Justice Justice Justice