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At the Supreme Court
Sitting as the High Court of Justice

HCJFH _____

In the matter of:

1. Military Commander of the Judea and Samaria Area
2. Minister of Defense

Represented by the State Attorney's Office
Ministry of Justice, Jerusalem
Telephone: 073-3925305` Fax: 02-6467011

The Petitioners

v.

1. ____ Abu Baher
2. ____ Abu Baher
3-9. A (Minors)
10. ____ Abu Baher
11. ____ Abu Baher
12. HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA 580163517

Represented by counsel, Adv. Nadia Daqqa et al.,
4 Abu Obeida St. Jerusalem 97200
Tel: 02-6283555, Fax: 02-6276317

The Respondents

Petition for Further Hearing
Request to Schedule a Hearing as Soon as Possible

1. A petition is hereby filed on behalf of the petitioners (hereinafter: the **state**) pursuant to Section 30(b) of the Courts Law [Consolidated Version], 5744-1984 (hereinafter: the **Courts Law**) to hold a further hearing in the judgment of this Honorable Court (the Honorable Justices Mazuz, Karra and Willner) which was given on August 10, 2020, in HCJ 4853/20 (hereinafter: the **judgment**).

   It should be noted that this petition is filed at the request of the Prime Minister and Minister of Defense and with the consent of the Attorney General.

   A copy of the judgment is attached and marked **P/1**.

2. If a decision is made to hold a further hearing, for the reasons specified below in great detail, the state shall request that it shall be held as soon as possible, and thereafter the state shall request, that in the framework thereof the position of the Honorable Justice Willner be adopted, who remained in a minority opinion in the judgment being the subject matter of the petition.

Hereinafter all emphases in the document were added by the undersigned, unless otherwise expressly stated].

A. Preface

3. In the judgment being the subject matter of the petition, the Honorable Court ordered (by the majority opinion of the Honorable Justices Mazuz and Karra against the dissenting opinion of the Honorable Justice Willner) to revoke the confiscation and demolition order issued by virtue of Regulation 119 of the Emergency Defense Regulations, 1945 (hereinafter: the "**Regulation**" or "**Regulation 119**" and the "**Defense Regulations**", respectively) for the residential apartment of the perpetrator ____ Abu Baher (hereinafter: the **perpetrator**) who had committed on May 12, 2020, an attack by throwing a brick – half a block weighing 9-11 kg. from the roof of the building in which he had lived at IDF soldiers, as a result of which an IDF soldier, Staff Sergeant Amit Ben Yigal of blessed memory was killed.

4. The majority justices based their decision on that in the absence of involvement and awareness on behalf of the perpetrator's family members, under the circumstances, the demolition for the residential apartment should be revoked, holding that the issue of a demolition order under said circumstances was disproportionate, and therefore ordered that the demolition order be revoked. At the same time, the majority justices held that the military commander was vested with the authority to replace said order with an order to seal the room in which the perpetrator had lived, in view of the special connection between the house being the subject matter of the demolition order and the attack.

5. According to the state, the judgment of the majority justices clearly veers from well rooted case law of the honorable court, which held that awareness or involvement of family members in the attack are not a condition for exercising the authority to demolish a building according to Regulation 119, and as arises from many other cases which have been adjudicated over the last few years, the honorable court did not interfere, in similar circumstances, in demolition orders issued to perpetrators' homes in which their family members, who were not involved in the attack, had been living. The decision in the judgment revoking the demolition order issued for the perpetrator's home due to the harm which shall be inflicted on the perpetrator's family in circumstances in which no involvement is attributed to the family members, despite the existing deterring purpose, **does not reconcile with the spirit of previous judgments of the honorable court**. Therefore, according to the state, it is a rule which "is contrary to previous rules of the Supreme Court" (Section 30(b) of the Courts Law).

   Moreover, the state shall argue that the rule established by the majority opinion is a rule that "due to its importance, difficult nature or novelty" justifies a further hearing by an expanded panel of the honorable court. The above, in view of the fact that this new rule, which gives a **decisive weight** to the involvement or awareness of the perpetrator's abufamily members and the harm inflicted on them, **imposes substantial limitations on express powers vested in the security authorities by virtue of Regulation 119, to the extent of their complete negation in many instances, in a manner which extremely limits the use of the Regulation and the ability to exercise it with respect to perpetrators' homes, in cases in which the military commander is of the opinion that it is required for clear deterring purposes**.

   In addition, the rule established by the majority opinion, against the backdrop of contradicting judicial precedent on this very same issue, creates **uncertainty** as to the

manner by which the power according to Regulation 119 should be exercised by the military commander.

6. Therefore**, the issue underlying the decision in the case at hand, which is the only issue with respect of which the further hearing is requested, is the issue of the implications arising from the lack of awareness or involvement of family members in the attack in the context of the exercise of the power according to Regulation 119, and particularly – is it, as held by the majority opinion in the case at hand, a decisive consideration making the demolition order disproportionate, and requiring the mitigation of the harm by way of partial sealing only**.

The state shall request to hold a further hearing **only on this issue**, and to the extent a decision is made to hold a further hearing by an expanded panel, the state shall request that the Honorable Court adopts the position of Honorable Justice Willner in the judgment being the subject matter of the petition, for the reasons specified therein, as well as the result thereof.

B. The Legal Framework – Regulation 119

7. Regulation 119, in its Hebrew version, provides as follows:

> "The Military Commander may by order direct the confiscation to the Government of Palestine of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed […] any offence against these Regulations involving violence or intimidation or any Military Court offence ; and when any house, structure or land is confiscated as aforesaid, the Military Commander may destroy the house or the structure or anything growing on the land [...]."

8. Hence, Regulation 119 broadly authorizes the military commander to confiscate and demolish or seal a structure which served as the residence of a perpetrator or a structure from which an attack was committed, under certain circumstances specified in the Regulation. However, according to case law of this Honorable Court, even when the military commander decides to exercise the authority vested in him according to Regulation 119, he must exercise said authority in a reasonable and proportionate manner, taking into consideration the entire circumstances which were specified in judicial precedent.

9. According to case law, the purpose of the authority according to Regulation 119 **deterrence**. Hence, the authority is exercised as a penalty for the attack which had been committed in the past, and is exercised only if the military commander concluded that the implementation thereof is required to deter potential perpetrators from committing additional attacks in the future – and for this purpose only.

10. The premise is that in certain cases terror attacks may be prevented in advance, since a potential perpetrator who knows that his family members may be harmed if he carries out his evil plans – may be deterred thereby from committing the attack planned by him. Sometimes, the deterrence also applies to the perpetrator's family members, who may be aware of his plans, causing them to act towards preventing the attack if they fear that their home may be damaged should they fail to do so.

11. According to case law, the harm caused to additional persons living in the perpetrator's home with respect of which a decision was made to exercise the power according to Regulation 119, does not constitute collective punishment, but is rather collateral damage to the deterring purpose of exercising the authority.

Accordingly, for instance, it was held in HCJ 798/89 **Shukri v. Minister of Defense** TakSC 90(1) 75 (1990) (hereinafter: **Shukri**) as follows:

> "**The power vested with the military commander according to Regulation 119 is not the power to impose collective punishment. The exercise of said power is not intended to punish petitioner's family members. It is an administrative power and the purpose of its exercise is deterrence, thus maintaining public order…**
>
> **We are aware of the fact that the demolition of the building shall result in the loss of the home of the petitioner and his mother. Indeed, this is not the purpose of the demolition, but it is the result thereof. The purpose of this harsh result is to deter potential perpetrators of attacks, who must understand that in their actions they harm, by their own deeds, not only public safety and security and not only the lives of innocent people, but also the wellbeing of their own relatives**."
> [Paragraphs 6-8 to the judgment of the Honorable Justice Barak].

12. See also the words of the Honorable Justice (as then titled) Mazza, in the majority opinion in a judgment given by an expanded panel of five Justices in HCJ 6026/94 **Nazal v. Military Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 48(5) 338 (1994)(hereinafter: **Nazal**), as follows:

> "**We should therefore reiterate what has already been said more than once: the purpose of using the measures by the military commander pursuant to the power vested in him according to Regulation 119(1) in its pertinent part, is to deter potential perpetrators from committing murderous deeds, as an essential measure to maintain the security… indeed, the exercise of the above sanction does also have severe punitive implications, affecting not only the perpetrator but also others, mostly his family members living with him, but this is not its purpose and this is not its intention**." [Paragraph 8 of the judgment of the Honorable Justice Mazza]

13. Security bodies are aware of the severity of the exercise of the sanctions according to Regulation 119, particularly when they are exercised in an irreversible manner, such as demolition. The military commander is instructed to use the power vested in him to demolish houses only in those severe cases, in which by their nature the "ordinary" punitive and deterring systems cannot sufficiently deter potential perpetrators.

14. The exercise of the sanction of house demolition is the **consequence of circumstances of time and place**. In the same way that terror changes its manifestations from time to time, so it is incumbent upon the respondent to act according to the circumstances and to the extent required, changing the measures taken to thwart evil deeds and eliminate them in Israel war against the hostile, murderous terror activity.

15. Reference is made to the general, in principle, judgment in HCJ 8091/14 **HaMoked Center for the Defence of the Individual v. Minister of Defense** (reported in Nevo, December 31, 2014)(hereinafter: **HaMoked Center for the Defence of the Individual**), in the opinion of the Honorable Justice Sohlberg, according to which:

> "**Regretfully, we do not live peacefully and safely. Peace is an ideal but the time has not yet come. The IDF, the Police and other security forces must cope with evil, murderous terror, which does not sanctify life but rather worships death. We have come to the point that in their horrific actions the terrorists are willing to die as "martyrs" provided they take Jews with them to hell. A time of war is unlike a time of peace as far as the applicable law is concerned… Moreover: the rules of war between the nations in terms of what is permitted and prohibited also underwent important changes… with all the required due care and safety precautions, it is clear that special laws were designated for time of danger and war, under which damage to the environment cannot be absolutely prevented. However, time of war presents moral challenges. The tools used by the warriors in the battle field, and are necessary for their success in their missions, are tools of killing and destruction, which under normal conditions run contrary to the values of ethics and human rights… For war time special commandments are designed in order to struggle with moral and spiritual crises**" [Paragraph 29 of the judgment of the Honorable Justice Sohlberg].

16. This is the place to reiterate that the taking of measures according to Regulation 119 is based, first and foremost, on a host of balancing actions established by the Honorable Court in its judgments. Balancing between the severity of the attack and the scope of the sanction; balancing between the expected harm to the perpetrator's family and the need to deter potential perpetrators in the future; and balancing between the fundamental right of any person to property and the right and duty of the regime to protect security and public order and the safety and security of Israeli residents and citizens.

17. In the framework of these balancing actions, different considerations are taken into account, including, inter alia, the severity of the deeds, the extent to which the perpetrator was involved in the attack; the circumstances of time and place; the residential connection of the perpetrator to the house; the size of the house; the impact that the exercise of the measure shall have on other people, including perpetrator's family members and their circumstances; engineering considerations and such other similar considerations. Only after weighing, examining and balancing the entire relevant considerations, as they apply to the circumstances of the specific case, shall the military commander decide whether the specific case justifies the implementation of the measure of confiscation and demolition or alternatively the sealing of the structure, and to what extent (see, for instance, the judgment in **Nazal**).

18. About 15 years ago, following a decline in terror attacks, a review team headed by Major General Udi Shani had recommended in the framework of a study captioned: "Rethinking House Demolition", to limit the use of Regulation 119 as a method to the point of ceasing the use thereof, reserving the above measure to extreme change of circumstances, which recommendations were adopted and implemented.

    However, following a significant increase in the involvement of east-Jerusalem residents in terror in the years 2008-2009, a resolution was made to renew the use of the measure, and the GOC Home Front Command issued three orders by virtue of his

authority according to Regulation 119, directed against the homes of the perpetrator in Mercaz Harav Yeshiva and perpetrators in two ramming attacks in Jerusalem. The three petitions which had been filed with the Honorable Court against said orders – HCJ 9353/08 **Abu Dahim v. GOC Home Front Command** (reported in Nevo, January 5, 2009) (hereinafter: **Abu Dahim**), HCJ 124/09 **Dwayat v. Minister of Defense** (reported in Nevo, March 18, 2009) (hereinafter: **Dwayat**), HCJ 5696/09 **Moughrabi** v. **GOC Home Front Command** (reported in Nevo, February 15, 2012) (hereinafter: **Moughrabi**) – were denied.

In Judea and Samaria the use of the measure was renewed in 2014, when the military commander decided to use Regulation 119 following a significant deterioration in the security situation, which was manifested in a significant increase in the number of attacks in general and in the number of grassroots terror attacks, as well as in the number of injured Israelis.

19. On December 31, 2014 the judgment of the Honorable Court (the Honorable Deputy President Rubinstein, the Honorable Justice (as then titled) Hayut, the Honorable Justice Sohlberg) was given in the general, in principle, petition in **HaMoked Center for the Defence of the Individual**. In said judgment the court denied the in principle petition of human rights organizations which requested the Honorable Court to declare that the use of Regulation 119 was unlawful and was contrary to international law and local Israeli law. In the decision of the Honorable Court in the above general, in principle, petition, petitioner's arguments therein were rejected, including the arguments that house demolition constituted prohibited collective punishment, and was contrary to the rules of international customary law and the rules of local Israeli law.

In his judgment, the Honorable Deputy President Rubinstein held, inter alia, that "**we decided not to reconsider issues which have already been resolved by this court, even if the grounds therefore do not satisfy the petitioners**" [Paragraph 17 of his judgment] and that "**the purpose of Regulation 119 was to deter rather than to punish; its objective was to give the military commander tools with which effective deterrence may be created, an objective the importance of which cannot be easily disputed**… **With respect to the question of whether the destruction of a specific structure can create effective deterrence, it was held that this court did not enter the shoes of the security forces, which are vested with the discretion to determine when the measure is effective and should be used to achieve deterrence"** [Paragraph 17 of his judgment].

The Honorable Justice Sohlberg held in his judgment that "**we were convinced that once the criteria established by law and case law are met, it is an inevitable necessity. The mere injury caused to the family members of the terrorist does not render the demolition of the house illegal, not even according to the rules of international law"** [Paragraph 4 of his judgment] and that "**The fear from having its house demolished, is intended to encourage the family of the potential terrorist to exert its influence in the right direction, to deprive him from the inner support circle, and cause him to leave terror or neglect the realization thereof. Hence, deterrence has an influence, even if to a small extent, which, under the circumstances of time and place, may be decisive; for good or for evil**" [Paragraph 14 of his judgment].

The Honorable Justice (as then titled) E. Hayut, held in her judgment that "**It seems to me that it is difficult to classify the demolition of a terrorist's home as collective punishment in the acceptable sense, even if as a result of the demolition of his house, his family members who live with him in the same house are also injured…"** [Paragraph 4 of her judgment]

20. According to the above rule, in the last five years the Honorable Court adjudicated dozens of petitions concerning the exercise of the power vested in the military commander according to Regulation 119, and the vast majority of the petitions were denied after a specific examination of the circumstances of each and every case.

The backdrop against which the judgment being the subject matter of the petition was given

C.1 The attack following which the confiscation and demolition order was issued

21. On May 12, 2020, the perpetrator committed an attack by throwing half a block weighing 9-11 kg at IDF soldiers, as a result of which Staff Sergeant Amit Ben Yigal of blessed memory was killed. Following his interrogation, admission and other evidence, an indictment was filed against him with the Samaria military court.

    According to the indictment which was filed against the perpetrator on June 25, 2020, he is accused of the offense of **deliberate causation of death** pursuant to Section 209(a) of the Order concerning Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5779-2009 (**an offense under security legislation which is parallel to the offense of murder**) and of the offense of obstruction of justice (pursuant to section 228(a) of the above order).

22. According to the indictment, on May 12, 2020, security forces conducted a routine arrest operation in Yabed Village, inter alia, for the arrest of ____ Abu Baher and ____ Abu Baher. ____'s house is located near the perpetrator's house. A company of the Golani Brigade, in which the late Staff Sergeant Amit Ben Yigal had served (hereinafter: the **deceased**), took part in said operation.

23. At the time of the operation, the perpetrator was in his apartment located on the top floor of a three story building (hereinafter: the **building**), where he lives with his extended family. On or about 04:30 AM, the perpetrator heard shouts from his neighbor's house. Consequently, the perpetrator went up to southern roof of the building, which is the roof of his home (hereinafter: the **roof**), through a door leading to the roof from his apartment. Initially, he stood on the eastern part of the roof, listened to the shouts from his neighbor's house, ____, and saw and understood that the security forces were making arrests.

24. Thereafter, the perpetrator went toward the western part of the roof and saw IDF soldiers marching in two lines from the junction near the building towards the road underneath it (hereinafter: the **road**), walking along the road near the building, up to the south-western corner of the building. The deceased was among the soldiers.

25. At this stage the perpetrator decided to take a brick and throw it from the roof on which he was standing at the IDF soldiers who were marching underneath the building.

26. For this purpose, the perpetrator approached the brick wall which was located on the roof near its south-western corner. The perpetrator took from the brick wall half a block weighing 9-11 kg (hereinafter: the **half block**) which was disconnected from the brick wall and was laying on it. Then, the perpetrator went toward the corner, heard from the road stretching underneath the corner voices which he recognized as voices of soldiers, and threw the half block at the soldiers, from the **height of approximately 13 meter**, with the intent to cause death.

27. When the half block was thrown, the deceased, who was marching at that time together with his comrades-in-arms on the road underneath the building, looked upwards. **The half block hit his head very forcefully, causing him to fall down and to immediately lose consciousness. He had multiple fractures in his skull and his head was bleeding heavily. The deceased received medical treatment on scene and was evacuated therefrom for further medical treatment, suffering a severe head injury. He later died from his wounds**.

28. Immediately after he had thrown the half block at the deceased, the perpetrator fled from the roof and returned to his home. He entered one of the beds in the room of his children and pretended to be sleeping; trying to look innocent to the security forces which he expected would enter his apartment several minutes later following the attack that he had committed. Shortly thereafter the security forces entered the building, searched the place in order to locate the person who had thrown the half block, and left the apartment. After the security forces had left the village, the perpetrator went down to the road and saw on the road at which he had thrown the half block, a pool of blood and pieces of block. The perpetrator understood that had succeeded to injure a soldier, and threw said pieces of the broken block to the vegetation on the side of the road.

C.2. **The confiscation and demolition order**

29. Considering the severe circumstances of the attack and due to the crucial need to deter additional potential perpetrators; the respondent decided, according to ISA's recommendation and with the consent and agreement of the Attorney General, to exercise his power pursuant to Regulation 119 toward the residential apartment in which the perpetrator had resided – namely, the third (top) floor of the building.

30. It should be noted that the building consists of three floors and is located in Yabed village. The building is owned by the perpetrator's family, and the brothers of the perpetrator reside on the first and second floors thereof with their families. The perpetrator lived in a residential apartment **owned by him**, which is located on the third floor of the building, together with his wife and children (respondent 1 is the perpetrator's wife and their children are respondents 2-9).

31. On June 25, 2020 on or about 10:00, the day on which the indictment was filed against the perpetrator, notice on behalf of the military commander concerning his intention to confiscate and demolish perpetrator's apartment was provided to the respondents, giving them the opportunity to file an appeal in writing against said intention until June 30, 2020, at 11:00.

32. Later that day, June 25, 2020, petitioners' counsel applied and requested a two day extension for the purpose of filing the appeal due to heavy work load. On that vey same day, June 25, 2020, respondent's representative responded and advised that ex gratia, and although the period which was given to file the appeal was reasonable according to the judgements of the Honorable Court, a short extension was approved, such that the last date for filing an appeal was scheduled for July 1, 2020 at 16:00; considering the need to balance between security interests and the application to extend and its underlying reasons.

33. On July 1, 2020 shortly before 16:00, an appeal was filed against the intention of the military commander to confiscate and demolish perpetrator's apartment. The appeal argued, inter alia, that in the absence of details regarding the demolition execution method, there is a serious concern that it would harm additional apartments in the building and in the surrounding area; it was argued that the factual infrastructure was insufficient since the investigation materials have not been transferred to perpetrator's

counsel, and that there was an evidentiary deficiency which should be given weight before determining that it was a deliberate attack; on the general, in principle, level general arguments were raised in the appeal concerning the legality of the use of Regulation 119 for house demolition purposes; on the specific level it was argued that no allegation was made concerning the family members' involvement in the deed, or their knowledge thereof or the existence of preliminary signs concerning its possible occurrence, and therefore the exercise of the power was disproportionate; Discrimination was also argued in that the authority according to Regulation 119 is not applied against Jewish perpetrators.

34. On July 5, 2020 around 17:00 a response letter to the above appeal was sent on behalf of the military commander and a confiscation and demolition order was issued for perpetrator's apartment, clarifying that the order would not be in fact exercised until after July 8, 2020 at 18:00.

With respect to the general, in principle, arguments the military commander referred to the judgements of the Honorable Court, which had repeatedly rejected said arguments and approved, time and time again the exercise of the authority according to Regulation 119. It was also noted that the absence of evidence concerning the awareness or involvement of the perpetrator's family members, does not prevent the exercise of the authority according to Regulation 119, and the need to deter applies.

On the proportionality level, it was noted that having examined the circumstances specified in the appeal, the military commander was of the opinion that in view of the severity of the perpetrator's actions and the need to deter potential perpetrators from committing similar murderous attacks in the future, the demolition of the apartment was a proportionate and necessary measure under the circumstances of the case.

With respect to the argument concerning the language of the notice of the intention to confiscate and demolish, it was noted that the notice stated that the intention was formulated against the backdrop of perpetrator's involvement in committing the attack.

With respect to the discrimination argument, the military commander referred to the judgments of the Honorable Court which had rejected similar arguments.

With respect to the arguments concerning lack of evidentiary infrastructure and that the criminal proceeding was still pending, the military commander referred to judgments of the Honorable Court referring to the requirement of administrative evidence rather than criminal conviction, noting that according to judicial precedence the above measure could also be taken in cases in which no indictment has been filed. In this context the military commander also referred to recent judicial precedent whereby indictment which was prepared on the basis of the investigation material which was available to the prosecution, could substantiate sufficient evidentiary infrastructure for the exercise of the authority according to Regulation 119 (in this context the indictment was attached to the response to the appeal).

With respect to the demolition method, the military commander noted that it would be carried out by "controlled hot detonation and/or demolition by heavy machinery", referring to the opinion of a qualified engineer (which was attached to the response to the appeal), indicating that the level of damage and probability that damage would be caused to the other parts of the building and to adjacent buildings – was low.

35. Later that day, on July 5, 2020, respondents' counsel sent a request for extension to file the petition until July 14, 2020, for the purpose of receiving the investigation materials in perpetrator's matter and due to the spread of the corona virus.

On that day, July 5, 2020, the representative of the military commander responded and advised that *ex gratia*, and although the period of time given to file the petition was reasonable according to the holdings of the Honorable Court, the extension was approved as requested, for the reasons which were specified in the request and particularly in view of the corona pandemic. Accordingly, the confiscation and demolition order would not be actually carried out until July 14, 2020 at 18:00; It was emphasized that no additional extensions would granted beyond said extension.

36. On July 14, 2020 the petition in HCJ 4853/20 was filed. On that day a temporary order was granted prohibiting the execution of the demolition by virtue of the order. It was decided that a hearing in the petition shall be scheduled as soon as possible, considering the relevant schedules. Accordingly, a hearing in the petition was held on July 21, 2020.

A photocopy of the petition in HCJ 4853/20 is attached and marked **P/1**.

A photocopy of the state's response in HCJ 4853/20 is attached and marked **P/2**.

A photocopy of the minutes of the hearing in HCJ 4853/20 is attached and marked **P/3**.

D. The Judgment

37. As aforesaid, in the judgment it was decided by a majority opinion (the Honorable Justices Mazuz and Karra) to make the order nisi absolute, such that the confiscation and demolition order being the subject matter of the petition be revoked, while retaining the power of military commander to replace it with a sealing order for the room in which the perpetrator had lived, the above contrary to the dissenting opinion of Justice Willner who was of the opinion that the petition should be denied and that the demolition of the perpetrator's apartment should be approved.

D.1 Justice Willner's minority opinion

38. The Honorable Justice Willner, who wrote the first opinion in the judgment and remained in the minority, rejected in the beginning of her opinion the general, in principle, arguments concerning the lawfulness of the use of Regulation 119, since said arguments had long been examined and rejected in many judgments of this Honorable Court. Thereafter, Justice Willner noted, beyond need, that despite the difficulty embedded in harming family members who were not involved in the attack, the waves of terror experienced by the state of Israel require effective deterrence against additional attacks in the future also in cases such as these:

> Against this backdrop, **implementing the power vested with the military commander by virtue of Regulation 119 for deterrence purposes as aforesaid is an inevitable necessity, despite the obvious difficulty embedded in causing harm to property of family members who were not involved in the unlawful acts of their relative – the perpetrator**. In that regard I wrote in **Naji** as follows: Indeed it is true that protecting human and civil rights is one of the fundamental obligations of a democratic state. However, even more fundamentally, democracy must protect the existence of a political and security infrastructure enabling its citizens to enjoy their above rights. Hence the importance of protecting state security, even at the cost of violating human and civil rights… Moreover, it should be clarified that the use of injurious measures which are required to

> protect state security, does not constitute 'inevitable impingement' of democracy, but rather, it forms an integral part of the democratic system which occasionally needs to protect its continued existence" (See: *Ibid.*, paragraphs 21-23). [Paragraph 10 of the judgment of the Honorable Justice Willner].

39. Thereafter in her opinion, the Honorable Justice Willner noted that the fact that the family was not involved did in fact raised a difficulty in exercising the authority by virtue of Regulation 119, particularly with respect to the perpetrator's minor children residing in the apartment being the subject matter of the demolition order, and the arguments concerning the family's difficult economic condition, but referred to case law whereby the deterring consideration also justified the exercise of the authority under such circumstances:

> "the respondents do not argue that the family members of the perpetrator were involved in this way or another in the act attributed to him, and as aforesaid, it is clear that the harm caused as a result of the realization of the demolition order to family members who did nothing wrong, raises a significant difficulty. The above, particularly with respect to the minor children of the perpetrator, and also in view of the arguments raised in the petition concerning the difficult economic condition of the family. However, **it has long been held that the deterring purpose of Regulation 119 stands and justifies the implementation of the Regulation, even where all other tenants residing in the building which is about to be demolished were not involved in the attack** (See: HCJ 2356/19 **Barguti v. Military Commander of the West Bank Area**, paragraph 15 (April 11, 2019); **Hanatche**, paragraph 21) **and notwithstanding the potential harm to minor tenants as a result of the demolition** (See: **Al-Atzafra,** paragraph 13) [Paragraph 17 of the judgment of the Honorable Justice Willner].

40. In this context, the Honorable Justice Willner noted that updated data were presented to the panel concerning the effectiveness of the deterrence, and held that the data were convincing:

> "Naturally, we cannot elaborate on the content of said opinion, but it should be noted that the data presented therein are convincing and substantiate the contributory effect of Regulation 119 on deterring potential perpetrators from carrying out their malicious intentions." [Paragraph 11 of the judgment of the Honorable Justice Willner].

41. Thereafter, Justice Willner rejected the arguments against the procedure by which the order was issued, in view of the fact that sufficient time was given to file an appeal against the intention to demolish the house, and two extension requests filed by the petitioners in that respect were accepted. She also held that one should assume that together with the indictment the perpetrator was provided with all relevant investigation material pertaining to his case.

42. The Honorable Justice Willner held that a clear connection existed between the apartment and the perpetrator in view of the fact that the apartment was owned by him and that he had committed the attack from the roof of the apartment:

> "since it is owned by him, was used by him as his place of residence and their family members still reside therein. Moreover, the perpetrator caused the deceased's death using a block taken from the roof of the building, which was thrown from said roof at the soldiers who were walking underneath the building (See and compare: **Naji**, paragraph 30) [Paragraph 13 of the judgment of the Honorable Justice Willner].

43. The Honorable Justice Willner held that the order which was issued was proportionate, and therefore the discretion of the military commander should not be interfered with. As to the evidentiary infrastructure she held that administrative evidence sufficed, and that the above applied even more forcefully to the case at hand in which an indictment was filed against the perpetrator for the offense of deliberate causation of death. Justice Willner has also noted that the circumstance of the case at hand require effective deterrence, considering the characteristics of the attack, and the resemblance to previous incidents:

> "Needless to point at the disturbing resemblance between the action of the perpetrator and the attack discussed in **Naji [**an 18 kg block which was thrown at the head of staff sergeant Ronen Lubarsky of blessed memory] […] the recurrence of such actions directed against IDF soldiers in the course of security activities which are carried out in populated areas in Judea and Samaria – mandates effective and substantial deterrence, which shall hopefully prevent potential perpetrators from repeatedly "imitating" them [Paragraph 13 of the judgment of the Honorable Justice Willner].

44. She also noted that the demolition method was proportionate, since as described in the opinion, the demolition would not cause considerable damage to the other parts of the building, to adjacent buildings or to the surrounding area.

45. In view of all of the above – the need to deter, the perpetrator's connection to the apartment being the subject matter of the demolition order and the proportionality of the order – the Honorable Justice Willner was of the opinion that that the demolition order should remain in force and that the petition should be denied.

D.2. <u>The majority opinion (the Honorable Justices Mazuz and Karra)</u>

46. The Honorable Justice Mazuz referred in the beginning of his judgment to statements made by him in past judgments regarding question marks which according to him existed concerning the lawfulness of the use of Regulation 119, and repeated the position expressed by him in previous judgments that the issue should be thoroughly examined. Without derogating from the above, Justice Mazuz noted that in the framework of the current rule, the exercise of said authority requires a very cautious and restrained approach [Paragraphs 2-3 of the judgment of the Honorable Justice Mazuz].

47. Thereafter, Justice Mazuz proceeded to discuss the involvement of the family members and the harm caused to them (paragraph 4), noting that "the need to examine the involvement of the family members, on the one hand, and the harm inflicted on them, on the other, is essential for substantiating the mere justification for the exercise of the power according to Regulation 119, as well as for determining the scope and severity of the sanction which may be used – sealing or demolition, partial or full". The Honorable Justice Mazuz described the circumstances of the case at hand: the

petitioners are perpetrator's wife and eight children, seven of them minors, all living in the apartment against which the authority according to Regulation 119 was exercised; no involvement in the criminal deeds of the perpetrator or retrospective support in his actions was attributed to them. In view of the fact that the perpetrator would be subject to long incarceration sentences, if convicted, the Honorable Justice held that: "harming the house primarily harms his wife and children living in the house, whose demolition shall leave them without a roof over their heads. It was further argued in the petition that this was a poor family." (see paragraph 5). Thereafter, the Honorable Justice held that the above circumstances raised the difficulty "probably the hardest and sharpest difficulty in the implementation of Regulation 119" (see paragraph 6). On the other hand the Honorable Justice Mazuz noted that in the case at hand a clear connection existed between the attack and the house against which the sanction was directed, since the attack was committed from the roof of the house.

48. Therefore, the Honorable Justice Mazuz held that the principle of proportionality "requires mitigating the harm, by replacing the demolition with **partial sealing** of the house" (see paragraph 8), and held that the order would become absolute retaining respondent's right to replace the confiscation and demolition order with a sealing order "for the room in which the perpetrator resided".

49. The Honorable Justice Karra noted that he could not join the opinion of the Honorable Justice Willner, and reiterated his position that the general, in principle, issues should be revisited by an expanded panel (paragraph 1 of his opinion). The Honorable Justice Karra added that "the multiple and repeated use of the Regulation by the military commander whenever an attack resulting in the loss of human life occurs – arguing that it is a deterring rather than a punitive measure expands the use of the Regulation as a matter of policy, and a sanction which should have been reserved for extreme situations and used rarely, is imposed frequently, let alone regularly" (see paragraph 2) and noted further that the continued use of said measure inflicting severe harm on innocent people constituted collective punishment imposed contrary to the fundamental rule whereby "Every man must pay for his own crimes" (adopting the words of the Honorable Justice (as then titled) Cheshin in a minority opinion, in HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651 (1997)) (hereinafter: **Janimat**).

In conclusion, the Honorable Justice Karra also held that in view of the special connection between the house being the subject matter of the demolition order and the attack, he joined the comment of the Honorable Justice Mazuz to retain the power of the military commander to replace the confiscation and demolition order with a sealing order for the room in the house in which the perpetrator had lived.

E. <u>The Conditions justifying a Further Hearing - General</u>

50. The authority and causes to direct that a further hearing shall be held in a Supreme Court judgment given by a panel of at least three Justices are entrenched in the provisions of section 30 of the Courts Law.

Relevant to the case at hand are the provisions of Section 30(b) of the law:

> "If the Supreme Court did not make a decision as specified in sub-section (a), any litigant may request a further hearing as aforesaid; the president of the Supreme Court or any other Justice or Justices appointed by him for that purpose may accept the request **if the rule established by the Supreme Court is contrary to previous rules of the Supreme Court, or if due to the importance, difficult nature or novelty of the rule a further hearing would be justified, in their opinion**."

51. The rationale justifying a further hearing was explained by the Honorable President Barak, as follows:

> "The underlying purpose of a further hearing is the need to enable the Supreme Court – whose judgments may not be appealed – while sitting in an expanded panel to revisit a rule established by it in a narrower panel, thus enabling exceptional cases to be reviewed by an expanded panel of Justices of the Supreme Court." [MCApp 1481/96 (CFH 2401/95) **Nachmani v. Nachmani**, IsrSC 49(5) 598, 607 (1996); the decision was given by a majority of eight Justices against the dissenting opinion of three others – the undersigned].

52. Judicial precedent added and clarified that a further hearing was not a mere appeal of a judgment, and that the route of further hearing was reserved for exceptional cases. It was accordingly held that "two cumulative conditions are therefore required to justify a further hearing: the first, the importance, difficult nature and novelty of the rule or the fact that it is contrary to previous rule, and the other, pertinent justification to bring the matter for further hearing." [CFH 2485/95 **Apropim Housing and Entrepreneurship v. State of Israel**, pages 4-5 (1995)].

53. In the context of the justification to bring the matter for further hearing, it was noted in the above **Apropim** that: "The importance, difficult nature or novelty of the rule produced by this court must be substantive and significant such that the judgment is substantively flawed, that it violates the basic tenets of the system, or society's concept of justice, that it leads to a result that cannot be tolerated, that it fails to reflect significant changes that have occurred in reality or in the law. The list is clearly an open one. It merely demonstrates the types of arguments that would raise the issue to the level of difficulty, importance or novelty that would justify a further hearing that would in turn, perhaps lead to a change in the rule [paragraph 7 of the decision].

F. <u>The position of the state – a further hearing is justified according to all causes specified in the law</u>

54. The state is of the opinion that in the judgment **<u>all</u>** alternative causes established by Section 30(b) of Courts Law are met justifying acceptance of the request for further hearing according to the law as interpreted by judicial precedent. According to the state, the judgment is contrary to established and consistent rules of this Honorable Court, and

it establishes a rule which due to its importance, difficult nature and novelty justifies a further hearing before an expanded panel of the Honorable Court.

F.1. **The Judgment establishes a new rule contrary to well rooted case law**

55. According to the state the judgment establishes a **new rule** concerning the decisive weight that should be given to the involvement of family members and the collateral harm inflicted on them, while examining the proportionality of exercising the authority by virtue of Regulation 119, in a manner limiting the scope of the military commander's authority.

56. Accordingly, by a majority opinion (delivered by the Honorable Justice Mazuz) it was held that because the perpetrator's relatives were not aware or involved in his activity, the harm inflicted on them was not proportionate. The majority opinion held that under these circumstances it was necessary, at least, to mitigate the harm by replacing the demolition with partial sealing, and the above only due to the special connection between the building and the attack. It should be noted that the opinion of the Honorable Justice Karra, is not limited to the proportionality level, and ostensibly raises a question mark as to the mere **authority** to exercise the power in circumstances in which the family members did not know and were not involved in the deeds.

57. The state shall argue that **this holding is clearly contrary to well rooted case law**.

58. As shall be demonstrated below, in the last four decades, the use of Regulation 119 by the military commander was examined by the Honorable Court in numerous judgements, including in dozens of judgments from recent years. The well rooted case law which was reiterated by the Honorable Court in many cases, is that **the awareness of the perpetrator's relatives to his activity or their involvement therein are not a necessary condition for the exercise of Regulation 119, although they may affect the scope of its use**.

59. It may be **ostensibly** argued that the majority opinion does not expressly change the well rooted case law, because the majority Justices did not entirely repudiate the authority pursuant to Regulation 119 due to the family members' lack of awareness; because case law also gives certain weight to family members' awareness in the context of the **scope** of use of Regulation 119; or because the holding is limited to the circumstances of the case.

    We therefore already wish to respond that a review of the judgments which have been implementing case law over the years shows that this is not the case. According to case law – **on the rhetorical level as well as on the consequential level** – the awareness of the family members and the collateral harm inflicted on them do not constitute a **decisive** consideration in the implementation of the proportionality tests, although they should be taken into account among all other considerations.

60. In this context reference is made to the words of the Honorable Justice Amit in HCJ 2322/19 **Atiya Rafaiyeh v. The Military Commander for the West Bank Area** (reported in Nevo, April 11, 2019)(hereinafter: **Rafaiyeh**):

> "14. One additional point before conclusion. The petitioners noted parenthetically in the petition that they disagreed with and condemned the perpetrator's deeds. This is obviously a proper position. However, **according to case law, the support of the perpetrator's family member in terror activity is indeed a relevant consideration for the exercise of the authority according to Regulation 119, but it is not a necessary condition** (see **Jabarin**, paragraph 12 and the referenced there). Under the circumstances of the case and in view of all of the above, it cannot be said that respondent's decision to exercise his authority, despite the position of the family, is unreasonable to the extent which justifies our interference" [Paragraph 14 of the judgment of Justice Amit].

Reference is also made to the words of the Honorable Justice Elron in HCJ 8786/17 **Abu Alrub v. Commander of IDF Forces in the West Bank** (reported in Nevo, November 26, 2017)(hereinafter: **Abu Alrub**):

> "As to the question of petitioners' awareness of defendant's terrorist intentions, I am of the opinion that it does not tip the scale towards interfering with the discretion of respondent 1. As has been held in the past, the fact that the family members were unaware of the malicious intentions of the perpetrator does not point at a substantial flaw in the military commander's discretion. In view of the deterring purpose underlying the Regulation, which is also directed at the public of potential perpetrators and their environment, the **awareness of the inhabitants of the building which is about to be demolished of the perpetrator's intentions is not a necessary condition for the execution of the order** (see Al'amarin, pages 699-700). I have reviewed the opinion of my colleague Justice M. Mazuz in which he referred, inter alia, to his words in Aljamal whereby the question of the perpetrator's family members' knowledge of his intentions may have a bearing on the use of the demolition sanction. On this issue I shall shortly say that said reference may precisely indicate of an interpretive approach whereby the purpose underlying Regulation 119 is punitive rather than deterring, which is not the case" [Paragraph 17 of the judgment of the Honorable Justice Elron].

In addition see the words of the Honorable Justice Sohlberg in HCJ 799/17 **Kunbar v. GOC Home Front Command** (February 23, 2017)(hereinafter: **Kunbar**)

> "4. In addition, **since we are concerned with deterrence, we must refrain from attributing too much weight to the awareness of the family members: a determination that a necessary condition for the exercise of the authority is a certain 'guilt' on behalf of the family members, assumes that they are being punished for said guilt – without a trial and disproportionately. This is not the case**; the sealing or demolition of a perpetrator's home is intended to deter the next potential perpetrator from committing his evil plan, being aware of the possible fate of his family members thereafter. The

importance of this deterrence is even greater when we are concerned with a 'lone wolf' perpetrator, the intelligence on whom is limited, who is not supported by his family members and who hides his intentions from them. It is was therefore held for good reason that the involvement of family members living in the house was not necessary to substantiate the authority to issue a confiscation and demolition order against a perpetrator's home, and it can also be justified in the absence of proof concerning the awareness of the family members (HCJ 9353/08 Abu Dahim v. GOC Home Front Command [reported in Nevo] paragraph 7 and the references there (January 5, 2009))" [Paragraph 4 of the judgment of the Honorable Justice Sohlberg].

61. See also the words of the Honorable Justice (as then titled) Naor in **Abu Dahim**, as follows:

> "Case law discussed the claim that arose also in the petition in before us, according to which it is neither appropriate nor moral that the terrorists' family members, who did not help him nor were aware of his plans, shall bear his sin. **This claim had also been raised in the past and was rejected.** Justice Turkel wrote in 4 this matter in HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289, 294 (2003)):
>
> "Despite the judicial rationales, the idea that the terrorists' family members, that as far known did not help him nor were aware of his actions are to bear his sin, is morally burdensome. This burden is rooted in the Israel tradition's ancient principle according to which "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin." (Deuteronomy, 24, 16; and compare to Justice M. Cheshin judgment in HCJ 2722/92 Al'amarin v. IDF Commander in the Gaza Strip, IsrSC 46(3) 693, 705-706). Our Sages of Blessed Memory also protested against King David for violating that principle by not sparing the seven sons of Saul (Samuel II, 21, 1-14) and worked hard to settle the difficulty (Yevomos, 79, 1). But the prospect that a house's demolition or sealing shall prevent future bloodshed compel us to harden the heart and have mercy on the living, who may be victims of terrorists' horror doings, more than it is appropriate to spare the house's tenants. There is no other way."
>
> Similarly, it was claimed before us that the terrorist's family members are not related to the terror attack and that the father even opposes such acts. For this matter it is sufficient to refer to the ruling in HCJ 2418/97 Abu-Farah v. IDF Commander in Judea and Samaria Area, Piskei Din 51(1) 226 (1997) and to HCJ 6996/02 Za'arub v. IDF Commander in the Gaza Strip, 56(6) 407 (2002) in which it was ruled that **deterrence considerations sometimes require the deterrence of potential perpetrators who must understand that their actions**

might also harm the well-being of their relatives, also where there is no evidence that the family members were aware of the terrorist's deeds. [Paragraphs 6-7 of the judgment of the Honorable Justice (as then titled) Naor].

62. It was similarly held by the Honorable Justice Sohlberg in paragraph 4 of his judgment in the general, in principle, judgment in HaMoked Center for the Defence of the Individual:

> "The mere injury caused to the family members of the terrorist does not render the demolition of the house illegal, not even according to the rules of international law […] Indeed, when criminal punishment is concerned, unlike deterrence under Regulation 119, the focus is on the offender, rather than on his family members; but as I have noted in the above mentioned Qawasmeh – "also in criminal proceedings the purpose of which is punitive […] innocent family members are injured. The imprisonment of a person for a criminal offense committed by him, necessarily injures his spouse, children and other relatives, both physically and mentally. There is no need to elaborate on the deprivations arising from a person's incarceration, which are suffered by his family members.
>
> **The language of the Regulation explicitly points at the deterring purpose underlying the confiscation and demolition or sealing of a residential home, which necessarily involves impingement of innocent people. Otherwise, how shall deterrence of suicide bombings and the like be achieved?** The sour fruits of the murderous terror compel us to promote deterrence in this manner of horrible acts such as those which were described in the specific petitions: namely, even at the cost of injuring the family members of the terrorists. And it should be noted: the injury with which we are concerned is injury to property, not a physical one. A demolition of a house is on the scales, while on the other tip of the scales, saving of life is weighed."

63. As aforesaid, on the consequential level too, case law shows that the degree of involvement and awareness of the family members is not a decisive consideration for the purpose of implementing the proportionality tests. Accordingly, the holdings of the Honorable Court throughout the years indicate that also in cases where no argument was raised concerning the awareness or involvement of the family members in the attack, it did not lead the Honorable Court, in a host of panels, to interfere with the order to demolish the building in which the perpetrator lived, or any part thereof, for this reason.

See and compare, among many: HCJ 751/20 **Hanatche et al. v. Military Commander of the West Bank Area** (reported in Nevo, February 20, 2020) (hereinafter: **Hanatche**); HCJ 2356/19 **Barghuti v. Military Commander of the West Bank Area**, (reported in Nevo, April 11, 2019); HCJ 974/19 **Dachadche v. Military Commander of the West Bank Area**, (reported in Nevo, March 4, 2019) (hereinafter: **Dachadche**); HCJ 4177/18

A v. Commander of IDF Forces in the West Bank (reported in Nevo, August 3, 2017); HCJ 2828/16 **Abu Zid v. Commander of Military Forces in the West Bank** (reported in Nevo, July 7, 2016) (hereinafter: **Abu Zid**); HCJ 1630/16 **Zakariye v. Commander of IDF Forces** (reported in Nevo, March 23. 2016); **Dwayat**.

64. As has already been clarified above, according to case law, the harm caused to additional persons residing in the house of a perpetrator against whose house a decision was made to exercise the authority according to Regulation 119 does not constitute collective punishment, but is rather a **collateral impingement to the deterring purpose underlying the exercise of the authority** (see **Shukri** and **Nazal** above). And to be precise, giving a decisive weight to the non-involvement of the family members in the attack as was held by the majority Justices in the Judgment, may turn the deterring purpose underlying the order into a punitive purpose which is contrary to the purpose of the order.

65. Indeed, some Justices of the Honorable Court were of the opinion that substantial and even decisive weight should be given to the awareness or involvement of the perpetrator's relatives in the decision of the military commander, but these opinions remained consistently **minority** opinions in the judgments of this Honorable Court – on the consequential level in the cases in which they were expressed, and generally compared to the prevalent current of case law concerning Regulation 119.

66. Known in this context is the position (in a minority opinion) of the Honorable Justice (as then titled) Cheshin in **Janimat**, which was also cited by the majority Justices in the judgment being the subject matter of this request:

> "If we demolish the perpetrator's apartment we will simultaneously demolish the home of this woman and her children. We will thereby punish this woman and her children although they have done no wrong. We do not do such things here. Since the establishment of the state – certainly since the Basic Law: Human Dignity and Liberty – when we shall read into Regulation 119 of the Defense Regulations, we shall read into it and vest it with our values, the values of a free and democratic Jewish state. These values shall guide us directly to ancient times of our people, and our own times no different than those days. They shall say no more, the fathers have eaten sour grapes, and the children's teeth are set on edge. But every one shall die for his own iniquity: every man that eats sour grapes, his teeth shall be set on edge." [Judgment of the Honorable Justice Cheshin].

67. However, as aforesaid, the above were said in the context of a **minority opinion**, while the majority opinion (delivered by the Honorable President Barak with the consent of the Honorable Justice Goldberg) approved the demolition despite the lack of involvement or prior knowledge of the family members. As we shall show below, said minority opinion remained a clear minority opinion in the well rooted case law of the Honorable Court throughout the years.

See for instance the judgement of the Honorable Justice Baron (**in a minority opinion**) in HCJ 6420/19 **Al-Azafra v. Military Commander of the West Bank Area**(reported in Nevo, November 12, 2019): "Given the lack of involvement and lack of knowledge of the family members of the intention to commit the murder, while demolition as aforesaid entails severe violation of fundamental human rights and the effectiveness of this measure in achieving deterrence is still doubtful, my opinion is that the demolition is not proportionate." [Judgment of the Honorable Justice Baron]

And the judgment of the Honorable Justice Karra (**in a minority opinion**) in **Rafaiyeh**: "If respondent 1 used the sanction according to Regulation 119 only against this apartment, the deliberate harm caused to the perpetrator's apartment could have been justified as a consideration to deter the public, when the sanction is directed against the person who committed the offense rather than against his family members who are innocent, who have no involvement in his deeds and even disagree with them. The exercise of Respondent 1's discretion such that harm is caused to the two apartments under the circumstances described above, veers from the required degree to achieve the purpose of deterrence" [Paragraph 7 of the judgment of the Honorable Justice Karra].

Also see and compare to the minority opinions in the following judgments: the judgment of the Honorable Justice Mazuz in **Dachadche;** the judgment of the Honorable Justice Karra in HCJ 8886/18 **Jabarin v. Military Commander of the West Bank Area** (reported in Nevo, January 10, 2019); the judgment of the Honorable Justice Mazuz in **Abu Alrub**; the judgment of the Honorable Justice Mazuz in HCJ 8161/17 **Aljamal v. Commander of IDF Forces in Judean and Samaria** (reported in Nevo, November 7, 2017); the judgment of the Honorable Justice Baron in HCJ 1629/16 **Amar v. Commander of IDF Forces in Judean and Samaria** (reported in Nevo, April 20, 2016).

68. The Honorable Justice Vogelman in his opinion (minority opinion) in HCJ 5839/15 **Sidr v. Commander of IDF Forces in Judea and Samaria** (October 15, 2015) (hereinafter: **Sidr**), which was referred to by the Honorable Justice Mazuz in his judgment being the subject matter of the request at hand, has also expressly clarified that **it was not** the case law, and therefore the Honorable Justice Vogelman refrained from making a decision according to it in that matter:

> "The result of weighing the two scales against each other – between the benefit and the harm to human rights which result from implementing the Regulation's content – is that, at least in the absence of involvement by members of the household, the drastic harm to the rights of the uninvolved pushes the scales and enhances the considerations against such action. Demolition of the home is therefore within authority, but the fault lies rather in the realm of discretion: in this situation the action is not proportional. **All of the above in a nutshell, since it is not the precedent put out by this Court**. Still, I would suggest that we re-evaluate the judicial precedent so as to lay all the cards on the table regarding issues in internal and international law, since **as long as this precedent stands I bow my head before the opinion of this house**. "Only thus can the

> house effect its leadership" (see Yoram Shahar "Unity and Generations in the Supreme Court – the Politics of the Precedent" Legal Studies 16/O 161, 161-162 (2000) [Hebrew]; see for detail on the question of deviation from current precedent Aharon Barak Judge in a Democratic Society 240-270 (2004) [Hebrew]). Indeed, "[…] Following the path of judicial precedent on this matter is not easy" (HaMoked, paragraph 1 of Justice E. Hayut's opinion), **but deviating from the judicial precedent of this Court, which has recently been repeated by it in several panels – is not desirable, lest this court of justice becomes a court of Justices** – a comment rightfully mentioned by Justice E. Hayut in HaMoked which remains relevant; and also famous are the words of Lord Eldon: "It is better that the law should be certain than that every judge should speculate upon improvements in it." [Paragraph 6 of the judgment of the Honorable Justice Vogelman].

69. Hence, the above decision which traditionally reflects the **minority opinion** of the Justices of the Honorable Court, became in the judgment being the subject matter of the request at hand – the **majority opinion**. The state is of the opinion that the novelty of this rule, which was made for the first time in the context of a majority opinion, contrary to a host of numerous judgments which were given by the Honorable Court (some of which quite recently), requires a further hearing by an expanded panel, to set the record straight and establish a clear rule.

70. In this context, the state notes that only a few months ago in the framework of the judgment in **Hanatche**, the court has **unanimously** adopted the position of the Honorable Justice Willner (who wrote the main judgment in that case) that "according to case law the fact that the above [the families of the perpetrators and the inhabitants of the building – the undersigned] were not involved does not prevent the execution of said orders, despite the alleged proprietary harm" (see paragraph 21). A request for further hearing was filed in the above judgment which had unanimously denied the petitions, HCJFH 1561/20 **Hamdan v. The Military Commander** (March 1, 2020) (hereinafter: **HCJFH Hamdan**) in which it was held by the Honorable President Hayut as follows:

> "Before me is a request for a further hearing in a judgment of the Supreme Court […] which denied the petition of the applicants on the execution of an order for confiscation and demolition of an apartment in a condominium by virtue of Regulation 119 […]
>
> In the judgment being the subject matter of the request for a further hearing the court held that there was no room to interfere with the decision to demolish the apartment**, since it has long been established in case law that the fact that family members or other inhabitants residing in the building were not involved did not prevent the execution of the demolition orders by virtue of Regulation 119**. […]
>
> The request for a further hearing should be denied.

> As is known, a condition for a further hearing in a judgment is that a rule was established therein which "is in contrary with previous rule of the Supreme Court, or that due to its importance, difficult nature or novelty" justifies a further hearing (see: Section 30(b) of the Courts Law [Consolidated Version], 5744-1984). This is not the situation in the case at hand. The court has unanimously approved the demolition according to a rule which was expressed in a large number of judgments given by this court in connection with Regulation 119." [Paragraphs 1-5 of the decision of the Honorable President Hayut].

71. Hence, in her decision in the above **HCJFH Hamdan** the Honorable President Hayut confirmed that the judgment of the Honorable Justice Willner in **Hanatche** followed case law, inter alia, with respect to the question of the weight which should be attributed to the awareness of the family members to the attack while implementing the proportionality tests of the exercise of the authority according to Regulation 119 (namely, an indecisive consideration). However, in the judgment being the subject matter of the request at hand, the Honorable Justice Willner adhered to her position which reflects case law as expressed in a large number of judgments, but in this case she remained in the minority.

And note well: on the one hand – the traditional minority opinion became the majority opinion; on the other hand – the well rooted judicial precedent of the Honorable Court, as expressed in a large number of judgments, became a minority opinion. **Hence is the novelty of the judgment being the subject matter of the request at hand, hence is the contradiction with the existing rule**.

72. We shall add to the above that letting the general, in principle, holdings of the judgment stand, impinges on judicial certainty, since the clear contradiction between this judgment and many other dozens of judgments of the Honorable Court given in recent years – **creates ambiguity as to the legal situation concerning the exercise of the authority**, considering the fact that only a short while ago a petition was denied concerning a demolition order which was issued following an incident of a very similar nature (HCJ 6905/18 **Naji v. Military Commander of the West Bank Area** (reported in Nevo, December 2, 2018) and in view of the fact that it was held in a large number of judgments that lack of family members' awareness was not a consideration which tipped the scales towards revoking or limiting a demolition order. **The above reason also justifies a further hearing in the issue, to establish a clear rule and set the record straight**.

F.2 The difficult nature of the rule and its importance – impinging on the measures available to the military commander to deal with attacks and acts of terror

73. According to the state, the adoption of the majority opinion, whereby in the absence of family members' awareness, the demolition of the perpetrator's home becomes a disproportionate action due to the collateral harm inflicted on them, shall substantially limit the use of the measure which proved to be effective in the state's fight against terror. Therefore it is a **difficult** rule.

74. And note well: the new rule which was established in the judgment entails substantial practical implications since where it would seem that the perpetrator's family members were not involved and unaware of the attack, or at least, where there would be no indications to that effect, the military commander shall not be able to exercise the authority vested in him by virtue of Regulation 119 effectively at his discretion – particularly by way of house demolition. The approach of the majority opinion extremely limits the military commander's discretion in implementing Regulation 119, and hence the impingement on deterrence.

75. According to an examination of dozens of cases which were adjudicated by the Honorable Court in the last five years (2015-2020), in the vast majority of the cases the military commander had no evidence or indications concerning the awareness or involvement of the family members in the deed. Therefore, had the majority opinion in the proceeding being the subject matter of this request been accepted in said cases, demolition could not have ostensibly been carried out in the vast majority of cases in which the authority has been exercised in recent years, requiring the state to settle at most, for partial sealing of the house (and also, in circumstances in which special connection exists between the building and the attack, as was emphasized in the majority opinion of the proceeding being the subject matter of this request).

    It should be emphasized in this context that even in those cases in which the perpetrator's family members were aware of the deed or involved therein, it is unclear according to the majority opinion in the judgment being the subject matter of the request at hand what is the required scope of awareness or involvement which would justify the execution of the confiscation and demolition order.

76. Hence, **we are not concerned with a vague concern of across-the-board implications, but rather with an assessment arising from the analysis of cases in which the authority has been exercised in recent years as discussed in a long succession of judgments of the Honorable Court**.

77. As noted above, according to the state, we are literally concerned with issues of life and death, since the effectiveness of the use of Regulation 119 in preventing the next murderous attack has been adjudicated by the Honorable Court more than once, and it has been clarified that it was a substantial deterring measure.

78. In the proceeding being the subject matter of this request, the court has also been presented, *ex parte*, with an updated opinion concerning the effectiveness of the deterrence. The Honorable Justice Willner referred to it in her judgment: "Naturally, we cannot elaborate on the content of said opinion, **but it should be noted that the data presented therein are convincing and substantiate the contributory effect of Regulation 119 on deterring potential perpetrators from carrying out their malicious intentions**." (Paragraph 11 of the judgment of the Honorable Justice Willner; emphases added).

79. Also see the words of the Honorable Justice Sohlberg in **Kunbar**:

"And finally, as I have noted, we are concerned with deterrence rather than with punishment. My colleague, Justice A. Baron, is doubtful as to the effectiveness of sealing or demolition of a house as deterrence. This doubt is not new with us, and it accompanies the discussion of Regulation 119 from its commencement. The assumption that the practice of house demolition is harmful and does not promote deterrence, is obviously legitimate, but being a Justice I must rely only what my eyes can see and examine: not feelings but rather a professional opinion of the Israel Security Service (ISA). It is incumbent on the military commander to base his decision on factual infrastructure which includes a thorough, continuous and up-to-date examination of the issue of deterrence. **Indeed, we have been presented with an opinion of ISA professionals. We have thoroughly reviewed it and as far as I am concerned, there is no good reason to dispute its conclusion, based on its content and in response to our questions**. I do not share my colleague's statement that the deterring picture arising from the opinion is not so clear and that it evidently raises serious questions "concerning the scope of cases in which house demolition has an adverse effect, encouraging or intensifying hatred and other violent acts against Jews." As far as I am concerned, if I was of the opinion that house demolition intensified hatred and additional violent acts against Jews, my conclusion would have been totally different: I would have accepted the petition without any hesitation, and would have directed to revoke the decision of the military commander to seal the perpetrator's house. In the absence of effective deterrence, there is no justification for using said practice, regardless of the severity of the deed, the awareness of the family members or their age. **However, the opinion presented a decisive picture, whereby the benefit clearly exceeds the damage: "respondents' very clear conclusion is that the benefit here exceeds dozen times the damage which may exist**." These were the words of respondents' counsel and a review of the opinion shows that this is indeed the position held by ISA professionals (I have discussed the empirical study in the above issue and its limitations in the above HaMoked Center for the Defence of the Individual, paragraphs 6-14). As far as I am concerned the respondent has satisfied, to the maximum extent possible under the circumstances, the burden imposed on him to substantiate his professional position that the sealing or demolition of a perpetrator's home can save human lives." [Paragraph 5 of the judgment of the Honorable Justice Sohlberg].

(Also see, *inter alia*, HCJ 5141/16 **Mahamara v. Commander of Military Forces in the West Bank**, paragraph 31 (July 24, 2016)

To the extent the court so wishes, the court hall be presented with the privileged opinion concerning the effectiveness of the deterrence arising from the implementation of Regulation 119, which was presented to the honorable panel, *ex part* only.

G. <u>To the crux of the matter – the state request to set the record straight and establish a clear rule whereby the awareness of family members is not a decisive consideration in the the framework of the proportionality tests of the injury, for the purpose of exercising the authority by way of demolition</u>

80. The state shall argue that the rule established by the majority opinion in the judgment whereby in circumstances in which the perpetrator's family members are not aware of his deeds, Regulation 119 **<u>may not be used</u>** for the purpose of **<u>demolishing</u>** the building in which the perpetrator lived (as opposed to its partial sealing, only due to the special connection between the building and the attack); substantially limits, ***de facto***, the authority vested with the military commander by virtue of Regulation 119. WE shall specify.

81. While examining the manner by which the authority vested in him by virtue of Regulation 119 should be exercised, the military commander should take into account a wide range of considerations, including the awareness of the perpetrator's family members of his deeds. According to the rule established by the Honorable Court, the list of considerations is not closed and in the framework thereof "balancing is made between the severity of the attack and the scope of the sanction, between the harm expected to be inflicted on the perpetrator's family and the need to deter future potential perpetrators; between the fundamental right of every person to his property and the right and duty of the regime to protect security and maintain public order. Furthermore: in the framework of the said balancing weight is given to the perpetrator's connection to the house; the size of the house; the impact of the sanction on other people. The sanctions of sealing and demolition are used only if they are required in view of proper balancing between the relevant considerations." (See paragraph 13 of the judgment of the Honorable President Barak in HCJ 6299/97 **Yassin v. Military Commander in the Judea and Samaria Area** (Nevo, December 9, 1997).

82. And it should be clarified that the state does not wish to dispute in the framework of the request at hand the rule established by the Honorable Court whereby the awareness of the family members is a one of the considerations which should be taken into account while determining the manner by which the military commander should exercise the authority vested in him by virtue of Regulation 119. However, in the judgment, a **<u>decisive</u>** weight was given to the consideration concerning the awareness of the perpetrator's family members, in a manner substantially limiting, de facto, the discretion to the point that bears on the mere authority to implement the Regulation by way of demolishing the house in which the perpetrator lived

83. We have broadly described the novelty of the rule established in the judgment being the subject matter of the request at hand, compared to long-standing rulings of the Honorable Court in which demolition orders were approved in the absence of indications concerning the awareness of the perpetrator's family members. Now, we wish to somewhat elaborate on the rationale underlying this well rooted case law, whereby the awareness of the perpetrator's family members of his deeds is indeed one of the gamut of considerations which should be taken into account while exercising the

authority according to Regulation 119, but it is not a decisive datum for the purpose of implementing the authority by way of demolition.

84. **Firstly, any sanction used against a perpetrator who committed a terror attack, including sanctions the purpose of which is, inter alia, to deter, in a bid to impact the array of incentives of a potential perpetrator – including deprivation of freedom and economic punishment, obviously causes collateral harm to his family members and friends, even if they have done nothing wrong**.

85. The starting point in the case at hand is that the military commander uses Regulation 119 for **deterring purposes**. Said deterrence is manifested in two ways. The first and major one is deterring potential perpetrators from committing terror attacks, for the fear that their actions would cause their family members to remain without a roof over their heads. The other, is deterring the family members of said potential perpetrators, to act ahead of time in a bid to dissuade any of their family members who they think may participate in an act of terror, from taking such action. The position of the state in connection with the deterring purpose underlying the use of Regulation 119 has been consistently presented throughout the years and has been recognized by the Honorable Court as a proper purpose.

86. Hence, the main deterring purpose that the state wishes to implement while using Regulation 119 is primarily directed toward the potential perpetrator, and its purpose is to dissuade him from committing an act of terror, in view of the harm which may be inflicted on him and his family members living with him by exercising the authority pursuant to Regulation 119 against the building in which he lives.

87. The state shall argue that any sanction having a deterring purpose, which is directed at a specific person, embeds negative implications on his close circle. The Honorable Justice Sohlberg referred to this issue in **HaMoked Center for the Defence of the Individual**:

> "It should also be reminded and remembered, and clarified to all those who may be at a loss: we are not concerned with punishment but rather with deterrence. Indeed, the classification of the demolition of a family's home as "punishment" or "deterrence", does not change the end-result as far as the family is concerned. The end-result is the suffering which arises from the loss of one's home. However, we were convinced that once the criteria established by law and case law are met, it is an inevitable necessity. The mere injury caused to the family members of the terrorist does not render the demolition of the house illegal, not even according to the rules of international law, as shown by my colleague. **Indeed, when criminal punishment is concerned, unlike deterrence under Regulation 119, the focus is on the offender, rather than on his family members; but as I have noted in the above mentioned Qawasmeh – "also in criminal proceedings the purpose of which is punitive – as distinct from the deterring purpose herein – innocent family members are injured. The imprisonment of a person for a criminal offense committed**

> **by him, necessarily injures his spouse, children and other relatives, both physically and mentally. There is no need to elaborate on the deprivations arising from a person's incarceration, which are suffered by his family members." The language of the Regulation explicitly points at the deterring purpose underlying the seizure and demolition or sealing of a residential home, which necessarily involves impingement of innocent people. Otherwise, how shall deterrence of suicide bombings and the like be achieved? The sour fruits of the murderous terror compel us to promote deterrence in this manner of horrible acts such as those which were described in the specific petitions: namely, even at the cost of injuring the family members of the terrorists. And it should be noted: the injury with which we are concerned is injury to property, not a physical one. A demolition of a house is on the scales, while on the other tip of the scales, saving of life is weighed**.[Paragraph 4 of the judgment of the Honorable Justice Sohlberg]

Also relevant to the case at hand are the words of the Honorable President Naor in HCJ 7040/15 **Hamed v. Military Commander in the West Bank Area** (November 12, 2015)

> As held by case law, the purpose of the Regulation is to deter and not to punish. This purpose was recognized as proper purpose (for criticism on this approach see, for instance: David Krechmer "HCJ Criticism on sealing and demolition of houses in the Territories" Klinghofer Book on Public Law 305, 314, 319-327 (1993); Amichai Cohen and Tal Mimran "Cost without Benefit in House Demolition Policy: following HCJ 4597/14 Muhammad Hassan Khalil 'Awawdeh v. Military Commander of the West Bank Area", case law news flashes 31 5, 11-21 (2014)). **House demolition is indeed a severe and difficult measure – mainly due to the fact that it impinges on the family members of the perpetrator who on certain occasions did not assist him and were not aware of his plans. And 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**". (HaMoked case, paragraph 3 [sic] of the judgment of my colleague Justice N. Sohlberg). **However, given the deterring force embedded in the use of the Regulation, sometimes there is no alternative but to use it** (see, for instance: HCJ 6288/03 Sa'ada v. GOC Home Front Command, IsrSC 58(2) 289, 294 (2003)). **It was therefore held by this court that when the acts attributed to a suspect are particularly severe, it may possibly justify the use of the extraordinary sanction of the demolition of his house based on considerations of deterrence** (see: HCJ 8066/14 Abu Jamal v. GOC Home Front Command, paragraph 9 of the judgment of Justice E. Rubinstein (December 31, 2014)(hereinafter: **Abu Jamal**); HCJ 10467/03 Sharbati v. GOC Home Front Command, IsrSC 58(1) 810,

814 (2003) (hereinafter: **Sharbati**). [Paragraph 24 of the judgment of the Honorable President (as then titled) Naor]

See also the words of the Honorable Justice (as then titled) Naor in **Abu Dahim**, as follows:

> "6. Case law discussed the claim that arose also in the petition in before us, according to which it is neither appropriate nor moral that the terrorists' family members, who did not help him nor were aware of his plans, shall bear his sin. **This claim had also been raised in the past and was rejected.** Justice Turkel wrote in 4 this matter in HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289, 294 (2003)):
>
> > 'Despite the judicial rationales, the idea that the terrorists' family members, that as far known did not help him nor were aware of his actions are to bear his sin, is morally burdensome. This burden is rooted in the Israel tradition's ancient principle according to which "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin." (Deuteronomy, 24, 16; and compare to Justice M. Cheshin judgment in HCJ 2722/92 Al'amarin v. IDF Commander in the Gaza Strip, IsrSC 46(3) 693, 705-706). Our Sages of Blessed Memory also protested against King David for violating that principle by not sparing the seven sons of Saul (Samuel II, 21, 1-14) and worked hard to settle the difficulty (Yevomos, 79, 1). But the prospect that a house's demolition or sealing shall prevent future bloodshed compel us to harden the heart and have mercy on the living, who may be victims of terrorists' horror doings, more than it is appropriate to spare the house's tenants. There is no other way."
>
> 7. Similarly, it was claimed before us that the terrorist's family members are not related to the terror attack and that the father even opposes such acts. For this matter it is sufficient to refer to the ruling in HCJ 2418/97 Abu-Farah v. IDF Commander in Judea and Samaria Area, Piskei Din 51(1) 226 (1997) and to HCJ 6996/02 Za'arub v. IDF Commander in the Gaza Strip, 56(6) 407 (2002) in which it was ruled that **deterrence considerations sometimes require the deterrence of potential perpetrators who must understand that their actions might also harm the well-being of their relatives, also where there is no evidence that the family members were aware of the terrorist's deeds.** [Paragraphs 6-7 of the judgment of the Honorable Justice (as then titled) Naor].

See also the long standing judgment of the Honorable Court in HCJ 698/85 **Dajalas v. Commander of IDF Forces in the Judea and Samaria Area**, [IsrSC] 40(2) 42 (1986):

> "It should also be added that there is no basis for petitioners' complaint that house demolition constitutes collective punishment. According to them, only the perpetrators and offenders themselves should be punished, while house demolition injures the other family members who shall remain homeless. This interpretation, had it been accepted by us, would have rendered futile the above Regulation and its provisions and the only thing remaining would have been the possibility to punish a perpetrator living alone at home. This argument has already been rejected by this honorable court in the above HCJ 361/82 [4], in page 442. Justice Barak held in that case that 'according to Ms. Zemel the authority pursuant to Regulation 119 may not be used if two reside in the house, only one of whom has committed a prohibited deed according to the Regulations. This conclusion is *prima facie* frivolous both in terms of the Regulation's language and in terms of its underlying legislative policy'. **All the more so, the purpose of the Regulation is to 'achieve the deterring effect' (HCJ 126/83 [5], page 173; the above HCJ 434/79 [1]), and this effect, by its nature, should apply not only to the perpetrator himself but also to those living around him, and certainly to his family members living with him (HCJ 126/83 [5], page 172). He must know that his criminal acts shall not only injure him, but that they may cause great suffering to his family members. From this perspective the above sanction of demolition does not differ from the punishment of incarceration imposed on the head of the family, father of young children, who shall be left without a supporter and without a provider. Here too the family members are injured. In any event, and it has already been often discussed by the courts in their judgments, a petitioner must take it into account before committing his crimes and understand that his family members shall also have to suffer from the consequences of his deeds. The same rule applies, as aforesaid, to the sanction of demolition.** Needless to add that the sanction of 'collective punishment' has nothing to do with the sanction of house demolition; in the case at hand it is clear that the perpetrators came from certain houses and said houses – and not others – are about to be demolished. The 'punishment' is not imposed on other houses of un-related persons, and it is difficult to understand what are the sources of the argument that we are concerned with a collective punishment in the case at hand." [page 45 of the judgment of the Honorable Justice Ben-Dror].

88. We would also like to point at the words of the Honorable Justice Sohlberg in **Kunbar**, where he pointed at the theoretical difficulty in attributing great weight to the awareness of the family members, precisely because it veers the discussion into the punitive realm: "[…] since we are concerned with deterrence, we must refrain from attributing too

much weight to the awareness of the family members: a determination that a necessary condition for the exercise of the authority is a certain 'guilt' on behalf of the family members, assumes that they are being punished for said guilt – without a trial and disproportionately. This is not the case; […] [*Ibid.*, paragraph 4].

89. **Secondly, on the consequential level, the implementation of the rule established in the judgment substantially limits the authority of the military commander to use Regulation 119, and substantially impinges on the measures available to the military commander in his combat against terror**.

90. As noted above, a review of the dozens orders issued between 2015-2020 shows that in the vast majority of these cases family members who had no involvement in the perpetrator's deeds or any awareness thereof, were living in the buildings which were the subject matter of said orders. **Therefore, if the judgment being the subject matter of the request dictates the rule in this matter, changing the well rooted case law described above, the authority of the military commander to use Regulation 119 effectively, at his discretion, would be substantially limited**.

91. It should be noted that beyond the position of the state that the requirement of awareness or involvement of family members as a decisive condition for the exercise of the authority pursuant to Regulation 119 by way of demolition, is not justified on its merits, it is also a very cumbersome requirement on the evidentiary level, which shall substantially limit the ability to exercise the authority in the most effective manner as the military commander may deem proper at his discretion. And note well: even if we assume that in a certain case family members were aware of the deed or of the perpetrator's intentions, the security forces may not always have evidentiary indications with respect thereto (see in this context the words of the Honorable Justice Sohlberg in **Kunbar** cited above), certainly not within a short period of time after the attack – in a manner impinging on the effective use of the Regulation.

G.1. From the General to the particular – the circumstances of the case at hand justify the exercise of the authority according to Regulation 119 by way of demolition and do not establish cause for judicial interference

92. According to the state, if the entire circumstances of the case at hand are examined according to the well rooted rule concerning the criteria for the implementation of Regulation 119, and even if we examine the situation according to the **entire** considerations referred to by the Honorable Justice Mazuz in **Abu Jamal**, we shall find that the confiscation and demolition order for the perpetrator's residential apartment was duly issued and is proportionate and reasonable under the circumstances.

93. **Firstly**, the connection between the perpetrator and the apartment and the building is not in dispute since the perpetrator himself is the **owner of the apartment** which was used by him and by his immediate family for **permanent residential** purposes. Therefore, questions which were discussed in great detail in many judgments concerning residential ties, the owner-lessee relations and such other issues affecting the authority and its exercise, do not arise in the case at hand (also compare to **Abu Jamal**,

paragraphs 15(b) and 15(c) of the judgment of the Honorable Justice Mazuz (in a minority opinion)).

94. **Secondly**, the perpetrator is an adult who caused the deceased's death by taking a brick from the roof of the residential building and throwing it from said roof at the soldiers who were marching underneath the building. There was no dispute between the Justices in the judgment (the minority opinion and the majority opinion) that a **special and clear connection existed between the attack and the building itself which reinforces the justification to exercise the authority according to Regulation 119**.

And note well: the Honorable Court stated that "in the case at hand a **clear** connection exists between the apartment and the perpetrator and his criminal acts – a connection providing a sound basis to the order which was issued for the apartment." (see paragraph 13 of the judgment of the Honorable Justice Willner in a minority opinion). The majority opinion has also recognized the existence of "a clear connection between the perpetrator's deed and the house against which the sanction according to Regulation 119 is directed, since the attack was committed from the roof of the house" (see paragraph 7 of the judgment of the Honorable Justice Mazuz; paragraph 3 of the judgment of the Honorable Justice Karra).

In this context it should be noted that the connection between the building and the attack as a result of which a decision was made to use the sanction is entrenched not only in the judgments of the Honorable Court (see also the judgment of the Honorable Justice Mazuz (in a minority opinion) in **Abu Jamal**, paragraph 15(a) of his judgment), but also in the language of the Regulation itself, the first alternative of which refers to the exercise of the authority pursuant to Regulation 119 against a building from which an attack was committed. Although it is not the alternative which applies to the exercise of the authority in the case at hand, it indicates that it is a very relevant detail.

95. **Thirdly**, the leeway given by the majority justices to the military commander to consider partial sealing of the house by "replacing the demolition with partial sealing of the house" is inappropriate under the circumstances of the case since, as aforesaid, the perpetrator is the father of the family and the owner of the entire property, unlike the case discussed in HCJ 8154/15 **Alian v. GOC Home Front Command** (reported in Nevo, December 22, 2015) to which reference was made by the majority opinion, which concerned a single adult who lived with his father and other family members. In addition, in the case at hand and as specified in the indictment, after the attack, the perpetrator pretended to be sleeping in the bedroom of his children, which stresses the fact that the separation between the rooms in the case at hand is quite artificial and that there are no grounds to interfere with the decision of the military commander that the order would apply to the residential apartment in its entirety.

96. **Fourthly**, we are concerned with a very severe attack which resulted in the tragic death of the deceased, a young man. On this issue, see the words of the Honorable Justice Willner in paragraph 15 of her judgment: "Hence, the severity of the perpetrator's actions is not in dispute and there is no need to discuss it any further. A review of the indictment filed against the perpetrator shows that he threw a heavy block from great height toward the road underneath the building, after he had heard voices from the road

which he had identified as voices of IDF soldiers. The block which had been thrown caused the death of the deceased, a young man – a tragic result that speaks for itself."

97. Fifthly, considering the purpose of the authority according to Regulation 119 – deterrence of potential perpetrators – the characteristics of the specific attack and the possible recurrence thereof should be taken into account , as written in the judgment of the Honorable Justice Willner: "Needless to point at the disturbing resemblance between the action of the perpetrator and the attack discussed in **Naji** [where an 18 kg block was thrown at the head of staff sergeant Ronen Lubarsky of blessed memory] […] the recurrence of such actions directed against IDF soldiers in the course of security activities which are carried out in populated areas in Judea and Samaria – mandates effective and substantial deterrence, which shall hopefully prevent potential perpetrators from repeatedly "imitating" them (Paragraph 15 of the judgment of the Honorable Justice Willner).

98. On the other hand, as aforesaid, are the considerations of the injury caused to the perpetrator's immediate family – his wife and eight children with respect of whom there are no indications that they were aware of his deeds or supported them. As aforesaid, there is no dispute that in the balancing of the considerations to determine the manner by which the authority of the military commander should be exercised, the involvement of the residing family members is **also** taken into account. And indeed, this consideration was weighed by the military commander in real time when he examined the possible issuance of the confiscation and demolition standing at the center of the judgment being the subject matter of the request. The military commander has eventually concluded that said consideration was surmounted by the need to deter perpetrators. As aforesaid, the position of the state is that the consideration of the family members' involvement or awareness is not a decisive consideration under the specific circumstances in view of the reasons specified above. The reason that perpetrator's minor children reside in the house being the subject matter of the confiscation order cannot constitute a decisive consideration in the matter as well since it would also, de facto, substantially limit the authority of the military commander by virtue of Regulation 119.

99. The Honorable Court has discussed more than once arguments concerning the harm caused to minor children as a result of the implementation of the Regulation. Accordingly, for instance it was held in **Kunbar** that the harm caused to the perpetrator's family and the minor children was collateral harm, similar to a situation in which a incarceration sentence is imposed on a criminal defendant but those who suffer are also the family members:

> With respect to the considerations delineating the proportionality of the decision in the case at hand: the ages of the perpetrator's children and the awareness of the family members. My colleagues are of the opinion that under the circumstances of the case at hand these considerations do not justify the acceptance of the petition and I agree with them. I also agree that these considerations are relevant to a certain extent to the manner by which the authority is exercised (see my inion in HCJ 5614/16 Treire Nasser Mahmud Halil v. Military Commander of the West Bank [Reported in Nevo] August 3, 206);

> and in HCJ 9034/16 Abu Sabich v. GOC Home Front Command [Reported in Nevo] (December 18, 2016)). The demolition of a family's home is a difficult and disturbing thing, particularly when the family consists of young children. **However it does not mean that immunity is thereby granted against the exercise of the authority when deterrence against the recurrence of similar actions is required. When the respondent is of the opinion that such deterrence is required, the perpetrator's environment may indeed also pay a price, including his young children. The suffering of the children is disturbing, but sometimes it is inevitable.** Similarly, when criminal punishment is concerned, the penalty is imposed on the defendant but the family suffers as well (HCJ 5290/14 Qawasmeh v. Military Commander of the West Bank Area [Reported in Nevo] (August 11, 2014)); regretfully, this is also the case here. [Paragraph 3 of the judgment of the Honorable Justice Sohlberg].

100. In addition, see the words of the Honorable Deputy President (as then titled) Rubinstein in **Abu Zid**:

> "The above said with respect to family members in general, apply to minor children in particular; although in the case in which minor children reside in the house the injury is somewhat intensified in view of the principle which is based on the child's best interest, it does not mean that the respondent exceeded the limits of the discretion vested in him, since it is only natural that where residential buildings are concerned their inhabitants also include minor children, and the need to deter stands (HCJ 2006/97 Janimat v. GOC Central Command, IsrSC 51(2) 651, 653-654 (1997); Qawasmeh paragraphs 21 and 26)". [Paragraph 8 of the judgment of the Honorable Justice Rubinstein].

H. Conclusion

101. In view of all of the above the state shall argue that there is a substantial justification for a further hearing in the judgment, whereby it was ruled that in the absence of family members' awareness of the perpetrator's intentions, demolition according to Regulation 119 is disproportionate due to the collateral harm inflicted on them, and that the issue should be resolved by an expanded panel of the Honorable Court, to set the record straight and stablish a clear rule in this matter.

As aforesaid, according to the state, a new rule was established in the judgment concerning the scope of the military commander's authority according to Regulation 119 to issue an order for the **demolition** of a perpetrator's home, giving a **decisive weight** to the awareness of the family members residing in the house. This new rule is both difficult and important. It embeds significant across-the-board implications and fails to reconcile with well rooted judicial precedent of the Honorable Court, including from recent time.

102. The state shall therefore request the Honorable Court to hold a further hearing in the judgment on the above issue, and if so resolved, it shall request to revoke the judgment and hold *in lieu* thereof that under the circumstances there are no grounds to interfere with the military commander's discretion to issue the order, all according to the position of the Honorable Justice Willner in the judgment being the subject matter of the request and in the spirit of the well rooted case law on this issue.

Today, 5 Elul 5780
August 25, 2020

Aner Helman, Adv. Director of HCJ Department, State Attorney's Office	**Jonathan Berman, Adv**. Senior Deputy at the HCJ Department, State Attorney's Office	**Sharon Aviram, Adv.** Deputy at the HCJ Department, State Attorney's Office