Military Appeals Court
Judea and Samaria
Gaza Strip

Appeals Committee pursuant to Section 85(C) of the Order Regarding Defense (Judea and Samaria) (No. 378), 5730 – 1970

Before: Col. Daniel Friedman – Chairman
Lt. Col. Yuri Kader – Member
Lt. Col. Moshe Shlomo – Member

In the matter of:
1. K. Ajuri
2. A.A. Asida

by attorneys Tamar Peleg, Labib Habib,
Leah Tsemel, and Yossi Wolfson

v.

Commander of IDF Forces in Judea and Samaria
(by Major Ronen Atzmon)

Committee Recommendations

Nature of the hearing

1. On 1 August 2002, the Commander of IDF Forces in Judea and Samaria (hereafter – "regional commander"), signed assigned residence orders, in accordance with his authority pursuant to Section 86(b)(1) of the Defense Regulations (Judea and Samaria) (No. 378), 5730 – 1970, against K. Ajuri (hereinafter: Appellant 1) and Abd A. Asida (hereinafter: Appellant 2). The orders direct the Appellants to reside in the Gaza Strip for a period of two years.

2. On 2 August 2002, the Appellants appealed against the orders issued against them.

3. On 2 August 2002, the regional commander appointed the Committee members to serve as an appeals committee in the matter of this order and ordered the Committee to submit its recommendations.

4. A. In secret session, the Committee heard the testimony of two General Security Service agents, who submitted confidential information and an opinion. The Committee also received, from the

military prosecutors, a number of confidential testimonies from other persons involved in the matter.

B. The Committee allowed the counsel for the Appellants to cross-examine, *in camera*, one of the GSS agents, and also heard at length the Appellants themselves, the father of Appellant 1, and a short testimony of an employee of a UN organization operating in the Gaza Strip.

The legal framework

5. Assigned residence orders issued by the regional commander are based on Section 86(b)(1) of the Order Regarding Defense Regulations, which states that a military commander may direct, by order, that a person be subject to special supervision and that such person:

> **(f) Will be required to reside within a specified area in the region, as the military commander shall set forth by order.**

6. On 1 August 2002, two amendments relevant to the matter herein were made to the provisions of the said Section 86 (Amendment 84), as follows:

A. Instead of "special supervision" shall come "special supervision and assignment of residence."

B. Instead of the word "in the region (subsection 1 above) shall come "or in the Gaza Strip." That is, the regional commander is empowered to assign a place of residence, and "place" shall be deemed to include also the Gaza Strip area.

7. In the military prosecutor's explanation regarding the orders given pursuant to Section 86 (b), he mentions that:

> **In the battle against terror and the effects of terror, the Respondent takes a chain of actions that continues over a long time. This chain is comprised of a combination of measures and the testing of new measures. Examples are detention of other persons, the entry of soldiers into areas of the Palestinian Authority; soldiers staying in the areas of the Palestinian Authority, curfews, prohibiting Palestinians from entering or leaving cities in the Palestinian Authority. Now another measure is being examined, whereby a resident of Judea and Samaria is assigned residence, the place of assigned residence being the Gaza Strip.**
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> **The action is intended to combine a preventive measure – because of the acts attributed to the person himself – with an**

element of deterrence towards perpetual terrorists, and not only suicide-bombers, where it is possible that such measure will deter and prevent future attacks.

8. In the opinion of members of the Committee, the rationale underlying Section 86(b)(1) of the Order Regarding Defense Regulations, together with the said Amendment 84, is similar to the rationale for Section 112(s) of the Emergency Defense Regulations, 1945 (hereafter – "the 1945 Defense Regulations"). For this reason, we deemed it proper to seek assistance in the Supreme Court's decisions regarding the 1945 Defense Regulations.

9. During the course of the hearing, we learned that Appellant 1 has a brother – A. Ajuri (who was killed during our deliberations in this matter) who was wanted for extensive terrorist activity, most prominently the dispatch of terrorists to commit the attack on Nawe Shaanan Street in Tel Aviv (hereafter – "wanted person no. 1"), and that Appellant 2 has a brother – N. Asida – who is wanted for extensive terrorist activities, most prominently the responsibility for the murder of two Israelis in Yizhar, in 1998, and also for the attacks at the entrance to Immanuel last year, which resulted in many casualties (hereafter – "wanted person no. 2").

The extremely detailed information on the extensive activity of the two wanted persons was submitted to us in secret session, and is found in P/13 and P/14.

This information was assembled from various sources, and we found the information to be extremely credible.

Actions attributed to Appellant 1

10. The actions attributed to Appellant 1 are primarily based on his two confessions, and on the notes taken at the time of his questioning, and differ greatly from the description given them by his counsel in their brief, as if they constituted a "stain" of offenses.

In his confession, Appellant 1 confirms that he was aware that his brother, wanted person no. 1, was wanted by Israel, that he saw his brother and his friends visit his parents' house in the building in which he lives, holding a pistol, a Kalashnikov rifle, and an M-16, knew that he belonged to a terrorist organization, and that he saw his bother Ali hide a Kalashnikov under the floor in the house in which the whole family lived, which contained a number of apartments.

The Appellant understood that his brother, wanted person no. 1, was involved in terrorist activity in that his brother was wounded by an explosive charge that he handled.

He stated that his brother, wanted person no. 1, had a secret apartment "and they would prepare bombs there," and he, the Appellant, was asked once to remove blankets and items from the apartment because his brother had changed the place of hiding. Appellant 1 also visited the apartment several other times.

Appellant 1 added that he had been given the key to the apartment because the blankets and mattresses had been brought to the apartment from the parents' house, that, at the time the blankets and mattresses were removed upon his brother leaving the apartment, two friends of the wanted person were there and they took two bags "containing explosives-related items; I saw them take electric wire out of one of the bags."

In addition, the Appellant assisted members of the wanted person's group to transfer explosives, by serving as a lookout at the time of the transfer of the explosive devices from his brother's apartment to a car parked near the house.

The Appellant further stated that he saw in his brother Rassan's apartment (in the building in which the family resided) one of his wanted brother's friends making a video tape of a young man who was going to commit a suicide attack, and he also saw a Koran resting on the table. He saw the young man and the friend two weeks later. The Appellant admitted that he provided food to members of his brother's group.

The testimony of Appellant 1 indicates that the family members knew that the wanted person is a member in an unlawful organization, and that he had weapons and was involved in terrorist attacks, in dispatching persons to commit attacks, and in organizing attacks.

The testimonies of the Appellant and his father show that the wanted person did not show consideration for the members of the family, and, according to the father's testimony, the father banished the wanted person from his house.

Actions attributed to Appellant 2

11. Appellant 2 had very close relations with his brother, wanted person no. 2, and when the latter was imprisoned for three years, the Appellant visited him in jail twice a week.

    The wanted person told him about his responsibility for the attack in Yizhar. After his brother was released from jail, the Appellant met with him about ten times in the course of the past year, and supplied goods, food, and clean clothes to him.

    Appellant 2 used his car to transport his brother, at the latter's request, and also let his brother use the car. Over the past year, Appellant 2 refrained from letting his brother use the car because he knew that his brother was wanted by the security forces and worried that IDF attempts to strike his brother would damage the car.

    Appellant 2 saw his brother several times when he was carrying a Kalashnikov rifle and knew for sure that he was active on behalf of Hamas.

    Wanted person no. 2 was wounded in the hand while preparing an explosive charge at the parents' home, and the Appellant lent his car to his brother-in-law to take the wanted person to hospital.

A brother of Appellant and the wanted person, , was also wounded, about a year ago, when preparing an explosive charge. Appellant 2 also lent his car to another wanted person, his brother-in-law Y. Asida.

The case of Appellant 2, also, does not involve a "stain" of offenses.

Personal details of Appellant 1

12. Appellant 1 is 28 years old, married with three children (the youngest born a few days ago). He contends that he has never been arrested and that he earns NIS 3,000 – 4,000 a month and supports his parents.

The residence of Appellant 1 was demolished.

Personal details of Appellant 2

13. Appellant 2 is 35 years old, married with five children, works at a gas station, and contends that he earns NIS 3,000 [a month], and that he is also the sole supporter of his parents, and engages in other jobs that enable him to make a livelihood. The residence of Appellant 2 was demolished.

14. In their appeal, the Appellants argue against the orders, as follows:

A. The order against them constitutes collective punishment.

B. The danger that they pose does not justify such a drastic measure.

C. There are no grounds and factual basis for the order.

D. The amendment to Section 86 of the Defense Regulations was made without authority.

E. The military commander exceeded his territorial authority.

F. International law prohibits expulsion.

G. Domestic Israeli law prohibits expulsion.

The argument regarding collective punishment

15. In preface to our comments, we should mention that the acts and omissions of the Appellants together with their wanted brothers, as set forth in Sections 10 and 11 above, are serious actions in and of themselves for which the Appellants are to be condemned.

16. As stated in Section 7 above, the purpose of assigned residence is also to provide an element of deterrence to potential suicide-bombers and attackers.

17. The Supreme Court held in numerous decisions that "the objective of the orders under review (demolition of houses) is not punishment of the families of the terrorist perpetrators of the attacks, but deterrence of potential offenders, at least some of whom are liable to be deterred from doing the action if they are aware that doing so endangers not only their life but also their relatives'

residence. This consideration is also likely to affect terrorists who intend to sacrifice their lives in perpetrating a suicide attack (HCJ 1730/96, *Adel Sabiah v. Major General Ilan Biran, Piskei Din* 50 (1) 353).

18. In HCJ 2272/92, *Al Amrin v. Commander of IDF Forces in the Gaza Strip, Piskei Din* 50 (1) 363, the Honorable Justice Back points out that:

> **The use of demolition or sealing pursuant to the said Section 119 undoubtedly constitutes a severe sanction, and it must be realized that the use of this deterrent means is liable to result in suffering and hardship to persons who did not themselves commit an offense.**

19. Demolition or sealing of houses is one of the tools by which the IDF seeks to be aided in its difficult battle against terror, as the military prosecutor mentioned.

    The army is currently trying another means, whose objective is also to deter potential suicide-bombers or attackers, whereby if they know that damage will be caused to their relatives, they will refrain from performing hostile acts.

20. At this point, it should be mentioned that the two Appellants are themselves involved in their brothers' actions, as set forth in Sections 10 and 11, and that the orders were not issued against them solely because of their biological relationship to the two wanted persons.

    In light of the aforesaid, we reject the argument alleging collective punishment.

Degree of danger

21. The taking of the present measure – assigned residence for two years – is a less severe measure than that of administrative detention, to which the Appellants' counsel agreed at the end of the hearing on 5 August 2002, for according to the present order, the Appellants will not be imprisoned, but will be able to continue living their lives in a different place.

22. The Appellants mention in Section 9 of their appeal that, expulsion has only been implemented in the cases of "persons at the top of the pyramid" of the terrorist structure, and sought to strengthen their argument by referring to three Supreme Court judgments; however, the Appellants ignored the fact that the "persons at the top of the pyramid" were expelled forever, whereas the order issued against the Appellants is assigned residence for only two years, which indicates that, if the sanction is more moderate, a lesser degree of danger needs to be shown.

23. In practice, the effect of assigned residence is built on two foundations – danger and deterrence, with the relationship between them being determined in each case by its circumstances.

    It should be mentioned that we received a (confidential) expert opinion from a GSS agent referred to as Gid'on (P/12) regarding the deterrent aspect, and we were also informed that, *in at least two*

cases, attacks were prevented as a result of the attackers' fear of sanctions that were liable to be taken against their families.

Lack of grounds and factual basis for the order

24. In the assigned residence orders, the regional commander stated his decision, but did not set forth the facts on which he relied in making it.

    At the beginning of the Committee's hearings, the military prosecutor provided Appellants' counsel with details on the activity of the two wanted persons, the brothers of the Appellants, and also provided counsel with the confessions made by the Appellants to police interrogators (P/1, P/2, P/3), memoranda relating to the interrogation of the Appellants by the security services (P/5-11), and testimonies of others who were involved in the activity of wanted person no. 1.

    These documents are sufficient to reject the contention of the lack of grounds and factual basis for the orders.

Exceeding the authority granted by Section 86 of the Order Regarding Defense Regulations

25. We find this argument to be baseless.

    Section 86(b)(1) states that a person subject to supervision may be required to live in a specified area, as determined by the military commander.

    The meaning of this provision is clearly "assigned residence."

    In implementing the amendment by the addition in the heading, the regional commander did not change the substance, but stated the heading of the section. In either event, the action is within his authority.

Exceeding territorial authority

26. According to the Israeli-Palestinian Interim Agreement Regarding the West Bank and the Gaza Strip, signed on 28 September 1995, the two sides view the West Bank and the Gaza Strip as one territorial unit, whose integrity and status will be preserved, and which territory will come under the jurisdiction of the Palestinian Council (Article 11 of the agreement).

27. Clearly, Jordan is not making any demand for the territory situated in Judea and Samaria and is not the sovereign there, just as Egypt, which held the Gaza Strip from the time that the British Mandate ended until the Six Day War, did not apply its sovereignty over this strip of land and did not grant its residents Egyptian nationality. Thus, it may be concluded that the Palestinian authority is the sovereign in the two areas – Judea and Samaria and the Gaza Strip.

We are aware that the military commander in the Gaza Strip issued a similar amendment, with the requisite changes, to the Order Regarding Defense Regulations (Amendment 84), to the amendment made by the regional commander of Judea and Samaria.

28. In light of the fact that one sovereign is involved and, in the wording of the question, "the same state" is involved, the regional commander, who currently is in control of the region, may establish in Amendment 84 to the Defense Regulations that the Appellants be moved to another part of the "same state," and, in doing so, he does not exceed his territorial authority.

Prohibition on expulsion

29. The Appellants argue, in Sections 5 to 30, that the individual or mass forced transfer of protected persons is a grave breach of Article 49 of the [Fourth] Geneva Convention, whether the transfer is from occupied territory to the sovereign territory of a state other than the occupying state, or from occupied territory to occupied territory, for whatever reason.

To strengthen their argument, they rely, inter alia, on the minority opinion of Justice Back in HCJ 785/87, *Afo v. Commander of IDF Forces in the West Bank et al*., Piskei Din 42 (2) 4.

30. The argument regarding the prohibition against expulsion from the area, set forth in Article 49 of the Geneva Convention, was heard many times by the Supreme Court and *was rejected.*

In HCJ 97/79, *Awad v. Commander of Forces in Judea and Samaria*, Piskei Din 33 (3) 309, 316, 317, President Zusman held:

> **I did not find any substance in the argument that the use of the said Section 112 is inconsistent with Article 49 of the Fourth Geneva Convention, of August 1949, regarding the protection of civilians in time of war. As explained by Dr. Pictet in the commentary that he wrote on the convention (at page 10), this convention is intended to protect civilians against arbitrary action of the occupying army, and the purpose of the said Article 49 is to prevent acts, such as atrocities that were committed by the Germans during World War II, during which millions of civilians were expelled from their homes for various purposes, generally to Germany to work at forced labor for the enemy, and Jews and others were deported to concentration camps where they were tortured and murdered.**
>
> **Clearly, the said convention does not derogate from the duty of the occupying power to maintain public order in the occupied territory, which is imposed on it by Article 43**

of the Hague Convention of 1907, nor from its right to take necessary security measures. See, at page 115, Pictet, *Humanitarian Law and the Protection of War Victims.*

…. This matter has no connection to the deportation for purposes of forced labor, torture, and extermination that were committed in World War II; furthermore, the intention of the respondent is to remove the petitioner from the country, and not to bring him into the country, to distance him because of the danger he poses to public welfare, and not to bring him closer to exploit his work capability and to achieve benefit from him for the sake of the State of Israel.

31. President Shamgar discussed the matter at length in HCJ 785/87, *Afo v. Commander of IDF Forces in the West Bank*, and it seems to us that there is no reason to relate to all the details of the judgment, which constitutes a binding principle of law.

    The High Court adopted the holding in HCJ 97/79, cited above, and in HCJ 698/80, *Qawasme v. Minister of Defense* et al., Piskei Din 35 (1) 627, regarding the interpretation of Article 49 of the Geneva Convention and also adopted the comments of the Honorable Justice Vitkon in HCJ 390/79, *Azat Dweiqat*, Piskei Din 34 (1)

    The Geneva Convention should be perceived as part of international treaty-based law, and, therefore, according to the accepted understanding in the accepted judicial systems and also in Israel – an injured person is not able to file suit in the state for relief against its agencies and demand his rights. The right of such action is granted only in the states that are parties to the said convention, and even this litigation cannot be conducted in the court of a state, but in an international forum.

32. In HCJ 2977/91, *Muhammad Sallem v. Commander of IDF Forces, Piskei Din* 46 (5), Justice Dov Levin held that:

    The Geneva Convention was not adopted into legislation and did not become a substantive part of Israeli municipal law, even though the State of Israel declared that the humanitarian sections of this convention would apply de facto in the said territories. This declaration is an internal

directive according to which the military commander acts…

33. Pictet, the official commentator of the Geneva Convention on behalf of the Red Cross, in discussing Article 78 of the convention (in which he refers to Article 49, which deals with assigned residence and administrative internment in the occupied territory) states that assigned residence and administrative internment are severe security measures that a state may take against protected persons, when less severe security measures do not achieve their purpose – preserving the security of the area.

Earlier Articles referred to "measures of control" without giving any further details; the present text picks out two of them – assigned residence and internment – as being the most severe to which the detaining State may resort when other measures have proved inadequate.

34. To the best of our knowledge, following the judgment in HCJ 785/87, the Supreme Court has not ruled that the Geneva Convention attained the status of international customary law.

35. In addition to the aforesaid, Article 43 of the Hague Regulations Regarding the Laws and Customs of War on Land holds that, not only does the state have the power to use assigned residence as a measure, the taking of such a measure is part of its duty to ensure public order and safety.

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in place in the country.

36. The extensive confidential material and disclosed material presented to us during the hearing was received from varied sources, and also included confessions of the Appellants, and other statements, and is surely sufficient to form the factual basis contended by the regional commander regarding the two wanted persons and to indicate the involvement of the Appellants.

37. The Appellants themselves testified at length and their attorneys were given the opportunity to question them as they wished, and they were also allowed to question one of the GSS agents for much longer than the matter called for.

38. It should be mentioned that we preferred the statements that the Appellants gave to the police and to the GSS over their weak and unconvincing explanations that they made when questioned before us.

    It should be mentioned that the statement of Appellant 2 was written by him in Arabic.

39. Regarding assigned residence of relatives of terrorists, there is a conflict between two poles –

    One, the rule that "The soul that sinneth, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son: the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him" (Ezekiel 18, 20).

    At the other pole: the state must protect itself from those who seek to destroy it.

40. On the one hand, a person who sinned shall die, and the sin of the sons shall not be borne by the fathers, and on the other hand, the government has the duty to take the actions necessary to preserve public order and a normal way of life.

41. Everyone knows and feels the extreme willingness of terrorist organizations to commit murderous attacks against Israelis, civilians and soldiers alike, that has developed recently, in which the perpetrators of the attacks are willing to commit suicide. This is clearly fanaticism gone crazy. In the necessity to fight this phenomenon, the security authorities must take all measures they can in the battle in which the state is involved, and to try every measure that is liable to suppress the suicides and the attacks.

42. The human heart has difficulty accepting and agreeing with the harsh measures of demolition of houses, administrative detention, deportation, and the like, and it is even more difficult to digest these acts when we know that a substantial portion of the persons harmed are not related to the hard core of terrorism, that families are caused to suffer hunger when the terrorist head of the family is exiled, and others are left without housing after their homes in which suicide bombers resided – suicide bombers who showed no consideration for their families – were demolished; however, common sense tells us that the State of Israel must protect its residents in every legitimate manner that is deemed so by every enlightened state in the world that encounters a wave of terror of the inhumane kind that the State of Israel has encountered.

43. If we desire life, we must prevent ourselves from committing suicide together with those suicide-terrorists.

    As shown above, the Supreme Court has in the past approved harsher sanctions than assigned residence, although the persons harmed are not the primary offenders, in that the state must also take this severe measure in a further attempt to protect its citizens and prevent the terror, even at the price of harming individuals, particularly when such action is considered lawful.

44. It should be recalled that, "at the basis of the military commander's authority lies not only the deterrence of the terrorist himself but also others who surround him" (HCJ 608/85, *DGL"S v. Commander of IDF Forces, Pisqe Din* 40 (2) 42, 44), and thus the deterrence of large numbers of persons is completely legitimate and comes within the considerations that are taken into account.

    Again, we mention that this is not a matter of the Appellants being punished because they are the brothers of wanted persons, but from the fact that they have committed security offenses.

45. The difficulty in reaching a decision in the Appellants' matter results from their being at polar opposites, which requires us to consider how to balance the different interests.

46. In these current, troubling times, when most, and the best, troops are busy around the clock in seeking to prevent attacks and capture the perpetrators, it is clear that the need to take harsh steps, such as assigned residence, prevails over the damage, inconvenience, and harm caused to individual persons, who very possibly in normal times, or more accurately days in which attacks occur less frequently, would be harmed to a lesser extent.

47. Therefore, we must consider the especially grave security situation that leads to destruction of every good plot of land, the severity of the acts of each of the wanted persons that are the subject of the hearing, the part of the Appellants and their active connection with the wanted persons, and also the personal and family situation of each of them.

In the matter of Appellant 1

48. As we mentioned above, the Appellant's brother – wanted person no. 1 – was killed during the course of the hearing before the Committee: the Appellant's counsel argues that the assigned residence order harms only the family of the dead terrorist, and is thus unreasonable.

    In HCJ 6026/94, *Abd Al Rahim Hassan Nidal v. The Commander of IDF Forces*, Piskei *Din* 48 (5) 38, the Supreme Court rejected this argument and held that the scope and reasonableness of the means available to the competent security authorities in maintaining security cannot be measured solely on the background of the changing circumstances.

49. A. The severity of the acts and the extensive terrorist activity of the Appellant's brother – wanted person no. 1 – are especially grave.

    B. Appellant 1's ties with his brother and the actual assistance that he provided him, as stated in Section 10 above, are also serious, and are aggravated in light of the fact that the Appellant does not contend that his wanted brother forced him to provide the assistance. Thus, the Appellant surely had the option not to assist his brother and collaborate with him.

    C. Furthermore, even other relatives were swept into becoming involved in the attacks and some of them also provided meaningful assistance to wanted person no. 1.

50. On the other hand, the Appellant is 28 years old, has three children, and his past is free of criminal or security-related offenses. He has difficulty providing a livelihood for his family and his house was demolished.

51. *Having considered the matter of the Appellant, we conclude that the deterrent element is to be preferred over the personal considerations of the Appellant, and that the order issued against him by the regional commander should be implemented in an attempt to cause potential terrorists to consider the damage that is liable to be caused to their families if they commit such attacks.*

We recommend, therefore, that the assigned residence order issued against Appellant 1 be approved.

In the matter of Appellant 2

52. A. In this case, too, the severity of the acts and the extensive terrorist activity of the Appellant's brother – wanted person no. 2 – are especially grave.

B. Appellant 2's ties with his brother and the actual assistance that he provided him, as stated in Section 11 above, are significantly less serious than those of Appellant 1. He, too, does not contend that his wanted brother forced him to provide the assistance.

53. On the other hand, the Appellant is 35 years old, has five children, and contends that he supports his parents. His house, too, was demolished.

54. *In these circumstances, and after weighing all the considerations that we deem relevant, in the case of Appellant 2 also, the deterrent interest should be preferred over the personal considerations, and the order that the military commander issued against him should be approved.*

We refer the military commander's attention to the fact that the acts committed by Appellant 2 are less severe than those committed by Appellant 1, which is relevant in the matter of setting the period for which the order shall be in effect.

We recommend that the assigned residence order issued against Appellant 2 also be approved.

Given today, 12 August 2002 in the absence of the parties.

The decision will be forwarded to the parties by fax and will be delivered to them at the court clerk's office.

[signed]	*[signed]*	*[signed]*
Member	Member	Member