At the Supreme Court Sitting as the High Court of Justice

HCJ 1125/16

Before: Honorable President M. Naor
Honorable Justice M. Mazuz
Honorable Justice A. Baron

The Petitioners:
1. _____ Mar'i, ID No. _____
2. _____ Mar'i, ID No. _____
3. HaMoked: Center for the Defence of the Individual

V.

The Respondents:
1. Military Commander of IDF Forces in the West Bank
2. Legal Advisor for the Judea and Samaria Area

Petition for Order Nisi and Interim Order

Session date: 15 February 2016

Counsel for the Respondents: Adv. Gabi Laski

Counsel for the Petitioners: Adv. Aner Helman, Adv. Tadmor Etzion

Judgment

President M. Naor

1. The petition is directed against a seizure and demolition order issued for the dwelling where it is alleged ____ Mar'i (hereinafter: Mar'i), one of the persons involved in a stabbing attack in Jerusalem had lived. In the attack, Rabbi Nehemya Lavie and Aharaon Benett were murdered, and Bennett's wife and infant son were injured.

Background

2. On October 3, 2015, Muhannad Shafiq Muhammad Halabi (hereinafter: Halabi) murdered Rabbi Nehemya Lavie and soldier Aharon Bennett by stabbing them with a knife, and injured Bennett's wife and infant son. The succession of stabbings ended only when border police officers fired shots that resulted in Halabi's death.

   On October 5, 2015, Mar'i was arrested on suspicion of involvement in the attack. On November 5, 2015, he was indicted at the Jerusalem District Court on 21 counts, including murder, attempted murder, using property for terrorist purposes, providing services to an illegal organization, possession of a knife, unlawful entry into Israel and aiding unlawful entry into Israel (Criminal/Terrorist Case12860-11-15). The main facts described in the indictment are as follows: Halabi and Mar'i met on the day of the attack, after Halabi contacted Mar'i asking for help getting into Jerusalem for prayers at al-Aqsa Mosque. The two entered Israel illegally. After security forces prevented Halabi from entering Temple mount, he told Mar'i he felt humiliated and had an urge to slap the officer who prevented him from accessing Temple Mount. Mar'i responded that he should refrain from doing so because he would be risking arrest. Mar'i said that he should not settle for a slap and that if he wanted to take action he should do "something worthwhile". Mar'i then purchased a large butcher's knife, with Halabi's money, and gave it to him, while encouraging him and convincing him to carry out a stabbing attack that would end in Halabi's death. The two took a photograph together. Mar'i took Halabi's cell phone and driver's license. The two exchanged words of encouragement and Mar'i went to Abu Dis. Later, Halabi carried out the murderous attack. When Mar'i saw the news reports about the attack he bowed down and thanked the Lord. The next day, he posted the picture he had taken with Halabi on his Facebook page and wrote "praise martyrdom" When security forces arrived to arrest him, Mar'i threw Halabi's cell phone out his window and hid his driver's license.

3. Following the terrorist attack, Respondent 1, on the recommendation of the Israel Security Agency (ISA) and with the approval of government level officials, the state attorney and the attorney general, decided to seize and demolish the home of Mar'i's family in the village of Qarawat Bani Hassan in the Salfit district of Samaria (hereinafter: the village), pursuant to the powers vested in him under Regulation 119 of the Defense (Emergency) Regulations (hereinafter: Regulation 119). On December 7, 2015, IDF soldiers arrived at the village and surveyed the house. The structure in question has two stories. The ground floor has no rooms used as dwellings and serves mostly for storage. According to the Petitioners, there is a chicken coop on that floor, and according to the Respondents, Mar'i's brother runs a coffee shop there. The second floor has an apartment with three bedrooms, where Mar'i's parents' (Petitioners 1-2), his two sisters and his brother live. On January 20, 2016, before dawn, Petitioners 1-2 were notified of the plan to seize and demolish the apartment on the second floor, where, as stated in the notice, Mar'i lives (hereinafter: the apartment), given Mar'i's involvement in the execution of the terrorist attack, as detailed in the indictment served against him. The notice stated that the decision could be appealed up to January 24, 2016. The Petitioners filed an appeal against the plan to demolish the apartment on January 25, 2016, asking to receive all

information which provided the basis for the assertion that Mar'i lived there, the investigative material in his matter, and an engineering report or details of the demolition plan. The appeal was rejected on February 7, 2016. The office of Respondent 2 stated that according to information in their possession, Mar'i spent weekends and vacations in the apartment, and was seen in the village about twice a month. It was also clarified that there was no room for doubt with respect to his involvement in the attack and the available evidence sufficed for use of powers under Regulation 119. The Petitioners were referred to Mar'i's criminal defense lawyer for the investigative material. Their request for an engineering report on the demolition was also denied, and it was noted that the apartment would be demolished manually and therefore no harm to the remaining parts of the building or adjacent buildings was expected. Finally, it was noted that the seizure and demolition order would not be carried out prior to February 2, 2016 at 12:00 Noon. Along with the letter, Petitioners were provided with a seizure and demolition order for the apartment (hereinafter: the demolition order). On February 10, 2016, the petition herein was filed. An interim order precluding seizure and demolition of the apartment pending further decision was issued on the same day by Justice E. Hayut.

We note that security officials have taken action to demolish Halabi's home as well and a petition against same has been recently dismissed (HCJ 8567/15 **Halabi v. Commander of IDF Forces in the West Bank** (December 28, 2015) (hereinafter: **Halabi**).

Parties' arguments

4. The Petitioners asked that we instruct the Respondents to refrain from seizing and demolishing the apartment, provide them with details regarding the demolition plan and an engineering report prior to execution of the demolition order and allow them time to have the plans reviewed by their own engineer. Petitioners also asked that, as a condition for execution of the demolition, we instruct the Respondents to present research with respect to the effectiveness of house demolitions as a deterrent. The Petitioners presented principled arguments respecting the legality of the measure of seizing and demolishing homes and with respect to its efficacy in deterring potential terrorists, and demanded the policy on this issue be revisited. On the individual level, the Petitioners argued the apartment should not be demolished because of insufficient ties between same and Mar'I, given that he has been living at the student residence at Abu Dis University for three years and has no room or possessions in the apartment. According to the Petitioners, Mar'i rarely visits the village, and does so only on religious and school holidays. It was also argued that Mar'i was not the person who perpetrated the attack and no determination can be made with respect to his responsibility for it before the criminal case against him is resolved. The latter argument was made with attention to the fact that he had pled not guilty to the charges against him and claimed the statement he had given was obtained using wrongful means. The Petitioners also argued that the demolition of the apartment was disproportionate given the heavy penalty Mar'i was expected to receive, the damage that would be caused to other parts of the building and the harm to his family, who have no connection to the attack. Finally, the Petitioners argued fault with the issuance of the notice of intent to seize and demolish the apartment, given that the it failed to enclose the Hebrew version of the notice and the indictment served against Mar'i. Petitioners contended that the failure to provide them with the requested information undermined their right to plead their case.

5. The Respondents argued the petition must be denied. They contend that there is no reason or justification to revisit, once more, the general arguments against the use of Regulation 119 raised in the petition herein and reviewed and rejected in many judgments. They stressed that use of powers granted under Regulation 119 is essential in order to effect deterrence against further terrorist attacks, given the escalation in the security situation since 2013, and particularly in recent months. Respondents noted that the decision to demolish the apartment was made with attention to the gravity of the incident and mentioned that petitions against the demolition of Halabi's home have just

recently been denied. The Respondents argued the ties between Mar'i and the apartment were sufficient for the purpose of using Regulation 119, as the student residence apartment was a temporary residence only and did not substitute the apartment. They contended that Mar'i stayed in the apartment on weekends and school holidays, sometimes for more than a week and that "further information received" indicates that he had lived in the village for most of his life and, ever since he began studying at university, was seen in the village about twice a month. In addition, the Respondents rejected the argument that Mar'i's responsibility for the attack had not been sufficiently established and argued that the indictment against him serves as substantial administrative evidence. They described the details of Mar'i's statement to the police and noted that the indictment is not based solely on this statement and there is additional evidence, including exhibits seized at the scene of the attack which match the statement, and the picture of Halabi and Mar'i. in this context, Respondents noted that Halabi's driver's license and cell phone were found in Mar'i's possession following the attack. The Respondents rejected the allegation that the Petitioners' right to plead their case had been undermined and noted that the selected method of demolition was conveyed to them at the appeal stage and that the investigative material in Mar'i's case could be obtained from his defense lawyer. The Respondents also stressed that the demolition of the apartment would be attended by a military engineer. Finally, the Respondents argued that given the severity of the attack, a partial demolition or sealing of the apartment would not suffice for achieving the deterrent purpose and noted that such arguments were rejected in the judgment regarding the demolition of Halabi's house.

The hearing before us

6. On February 15, 2016, we held a hearing in the petition, wherein the Petitioners clarified that they were insisting on their arguments on issues of principle. They also stressed that the residency tie is insufficient for the purpose of using Regulation 119. The Petitioners added that Mar'i pays rent at the student residence out of his own pocket and reiterated that he left the apartment some three years ago. They argued that the matter at hand is distinct from other judgments on the issue which addressed minors who were studying away from home or had fled the authorities. In addition, they stated that Mar'i had made motions in his criminal trial impugning the manner in which his police statement had been collected, and that these matters would be examined at trial. Therefore, they contended that the indictment could not be considered sufficient administrative evidence for the purpose of using Regulation 119. The Petitioners repeated their requests to compel the Respondents to provide them with the investigative material in Mar'i's case and the demolition plan forthwith. The Respondents, on their part, argued that the fact that the person in question is a student does not necessarily sever his residency tie to his parents' home, but that rather a lengthy process of severance is at play. They contended that in the case at hand, there are indications that Mar'i has yet to sever ties to the apartment. They stressed that he visited the apartment every weekend and on holidays, had not changed his registered address, and presented himself, in his police statement, as a resident of the village. They contended that the indictment constituted significant administrative evidence sufficient for using powers granted under Regulation 119.

7. In our decision dated March 17, 2016, the Respondents were requested to notify whether they were willing to consider the hearing held before us as a hearing held as if an order nisi had been issued in the petition. The Respondents answered affirmatively.

8. On March 24, 2016, the Respondents submitted a supplemental brief, in which they stressed that in the circumstances of the matter, the residency required for use of powers under Regulation 119 is present. The Respondents argued that in the case at hand, there is an appropriate and proportionate correlation between the degree of the residency tie to the apartment and the scope of use of Regulation 119 powers, given the need for deterrence against actions as severe as those taken by Mar'i. On March 29, 2016, the Petitioners submitted their response, wherein they emphasized the differences between rulings on the homes of parents of minor students and the case at hand, which

involves a university student who is not supported by his parents and lives in an apartment he pays for with his own money. The Petitioners contended that a student's absence from his parents' home is infrequently temporary and that he has no intention to return to live there, even if he does visit and even if the house does serve as his formal address. The Petitioners further noted that Mar'i left his parents' home several years ago and there is no indication that he intends to return to live here, nor have the Respondents alleged such intent.

Ruling

9. I have no intention of revisiting the general arguments against the legality of the measure of seizing and demolishing homes pursuant to Regulation 119 in the case at hand. Such arguments have been reviewed and rejected in a litany of judgments issued by this Court, including recently (see, e.g.: HCJ 4597/14 HCJ 4597/14 **'Awawdeh v. West Bank Military Commander** (July 1, 2014) (hereinafter: **'Awawdeh**); HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank** (August 11, 2014) (hereinafter: **Qawasmeh**); HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014) (hereinafter: **HaMoked**); a motion for a further hearing of this judgment was dismissed (HCJFH 360/15 **HaMoked v. Minister of Defense** (November 12, 2015)); HCJ 8150/15 **Abu Jamal v. GOC Home Front Command**, para 6 of the opinion of Justice I. Amit and the references therein (December 22, 2015) (hereinafter: **Abu Jamal**); HCJ 5839/15 **Sidr v. IDF Commander of the West Bank**, paragraph F of the opinion of Vice President E. Rubinstein (October 15, 2015) (hereinafter: **Sidr**); HCJ 7040/15 **Hamed v. Military Commander in, the West Bank**, paras. 25-26 of my opinion (November 12, 2015) (hereinafter: **Hamed**); HCJ 1630/16 **Zakariya v. Commander of IDF Forces**, paras. 15-18, 20 and 25 of the opinion of Justice N. Sohlberg (March 23, 2016) (hereinafter: **Zakariya**) (a motion for a further hearing in the aforesaid judgment was denied (HCJFH 2624/16 **Masudi v. IDF Commander in the West Bank** (March 31, 2016)). On the other hand, see dissenting opinion of my colleague Justice M. Mazuz in **Abu Jamal**, HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015) (hereinafter: **'Aliwa**) and in **Zakariya**; the opinion of Justice U. Vogelman in **Sidr** (dissenting) and in **Zakariya**; HCJ 1938/16 **Abu a-Rob v. Commander of IDF Forces in the West Bank**, para. 2 of the opinion of Justice S. Joubran (dissenting) (March 24, 2016) (hereinafter: **Abu a-Rob**)). In my view, there is no need to address these questions from the beginning once more in the case at hand. We must guard against turning this "court of justice into a court of justices" (see HCJ 967/16 **Harub v. Commander of IDF Forces in the West Bank**, para. 7 of the opinion of Vice President E. Rubinstein (February 14, 2016) (hereinafter: **Harub**); **HaMoked**, para. 1 of the opinion of Justice E. Hayut; **Sidr**, para. 6 of the opinion of Justice U. Vogelman (October 15, 2015) (dissenting with respect to the result); **Abu Jamal**, paras. 2-4 of the opinion of Justice Z. Zylbertal (December 22, 2015), **Halabi**, para. 13 of the opinion of Justice E. Rubinstein; and **'Aliwa**, para. 17 of the opinion of Justice U. Shoham; HCJ 1014/16 **Skafi v. Military Commander of the West Bank Area**, para. 11 of the opinion of Justice N. Sohlberg (February 28, 2016).

10. The premise for the deliberation is that Regulation 119 gives the military commander power to order the seizure or demolition of the home of any person suspected or accused of hostile activity toward the State of Israel. As such, judicial review must focus on how this power is exercised. Indeed, over the years, this Court has taken steps to reduce and confine actual use of the measure of seizing, demolishing and sealing homes pursuant to Regulation 119. As part of these efforts, the Court has ruled that this power must be used sparingly, cautiously and subject to the principles of reasonableness and proportionality (see, e.g. **Hamed**, para. 23 of my opinion and the references therein). In addition, it has been clarified that though Regulation 119 comes under the 'preservation of laws" clause in Basic Law: Human Dignity and Liberty, it must, nevertheless, be interpreted in the spirit of the Basic Laws (**HaMoked**, par. 3 of the opinion of Justice E. Hayut; **'Awawdeh**, par. 17; HCJ 10467/03 **Sharabati v. GOC Home Front Command**, IsrSC 58(1) 810, 814 (2003)

(hereinafter: **Sharabati**)). Accordingly, criteria have been put in place for use of this power by the military commander (see **HaMoked**, para. 18 of the opinion of Justice E. Rubinstein).

11. As ruled in consistent jurisprudence over the years, the power granted by Regulation 119 is predicated on a deterrent, rather than punitive objective, meant to prevent further terrorist attacks (see, e.g **HaMoked**, para. 4 of the opinion of Justice Hayut; **Hamed**, para. 24 of my opinion; **'Aliwa**, para. 18 of the opinion of Justice U. Shoham; and yet, see dissenting opinion by Justice M. Mazuz in same case, para. 8 and in **Abu Jamal**, paras. 7 and 147; and **Sidr**, paras. 3-6 of the opinion of Justice Vogelman). In fact, the deterrent power embodied in Regulation 119, which may save lives and prevent death and injury, is the grounds for the conclusion that sometimes there is no recourse but to use it (see, e.g. **Hamed**, para. 24 of my opinion; **Qawasmeh**, paras. 21-24; **Harub**, para. 8 of the opinion of Vice President E. Rubinstein and the references therein). This is the case despite its harsh results. It cannot be denied that this is an extreme, sharp measure that is often used with a heavy heart, particularly given the harm to the terrorists' relatives, who on many occasions, offered him no help, nor had knowledge of his nefarious plans. The question of the effectiveness of the deterrence embodied in house demolitions is for security officials to assess, as they are the expert authority on this and bear responsibility for this matter. The Court tends not to intervene in their assessment (see, **Sharabati**, pp. 814-815); HCJ 6026/94 **Nazzal v. IDF Commander in the Judea and Samaria Area**, IsrSC 48(5) 338, 348-349 (1994) (hereinafter: **Nazzal**); **HaMoked**, para. 37 of the opinion of Justice E. Rubinstein, paras. 5-14 of the opinion of Justice N. Sohlberg and para. 5 of the opinion of Justice E. Hayut; **'Awawdeh**, para. 24; **Harub**, para. 8 of the opinion of Vice President E. Rubinstein; **Halabi**, para. 7 of the opinion of Vice President E. Rubinstein). However, the effectiveness of this measure must be constantly assessed by security officials (**HaMoked**, para. 27 of the opinion of Vice President E. Rubinstein, and para. 6 of the opinion of Justice Hayut; **Sidr**, paras. 2-3 of the opinion of Justice I. Amit; **Abu a-Rob**, paras. 7-8 of the opinion of Vice President E. Rubinstein, para. 3 of the opinion of Justice D. Barak-Erez and para. 4 of the opinion of Justice S. Joubran). It is presumed that this is in fact the case. In any event, in the case at hand, we were presented with no grounds justifying any doubt of same, particularly given that the matter has just recently been examined (see **Hamed**, para. 29 of my opinion). Thus, I shall now turn to examine the specific arguments made in the case at hand.

<u>The residency tie</u>

12. The main argument raised by Petitioners is that Mar'i does not have sufficient ties to the apartment slated for demolition and therefore the demolition must be avoided.

13. Regulation 119 stipulates as follows:

> A Military Commander may by order direct the forfeiture to the Government of Israel of any house, structure, or land from which he has reason to suspect the 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, or attempted to commit, or abetted the commission of, or been accessories after the fact of the commission of, any offence against the Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything on growing on the land…

14. According to its language, all the Regulation requires is for the terrorist to be an "inhabitant" or "resident" of the house slated for demolition. According to case law, the power granted under Regulation 119 may be evoked in any case in which the terrorist has a "tie of residency" to the house (see, **Hamed**, para. 45 of my opinion and the references therein. However, compare, opinion of Justice M. Mazuz (dissenting) in **Abu Jamal**, para. 10 in in **'Aliwa**, para. 13b). In this context, it has been ruled that, for the purpose of this Regulation, a person's absence from his home does not necessarily sever the person's connection to the home, but rather, the matter depends on the nature of the absence. On the practical level, the conclusion on this issue is drawn from the concrete circumstances of the case under review.

15. What is the law when the terrorist does not live exclusively in the house slated for demolition but rather splits his time between that house and other places? This is the issue in the case at hand. Case law indicates that the fact that the terrorist had an alternative residence, in addition to the house slated for demolition (which is normally the home of his relatives) does not suffice, on its own, to sever his tie of residency to the house for the purpose of Regulation 119. So, for instance, it has been ruled that when the terrorist is absent from his home and lives elsewhere, as part of his attempt to escape law enforcement authorities, such absence does not sever the tie of residency to the home (**Nazzal**, pp. 343-344; HCJ 893/04 **Faraj v. IDF Commander of the West Bank**, IsrSC 58(4) 1, 6-7 (2004)). The answer as to whether there is a residency tie to a house slated for demolition in a given case is derived from the facts and overall evidence before the Court in any given case. It is possible to extract several general considerations to aid with the decision from judgments that have addressed this question, particularly judgments that addressed absence from home for the purpose of studies or work.

16. It appears that the general guiding principle on this issue concerns that the question of whether or not the absence is temporary in nature. As ruled in **Nazzal** (p. 344):

> If the absence is temporary in nature, the tie of residency to the permanent home continues, even if the person in question had alternative housing during the relevant incident. This applies, *for example, with respect to a student whose temporary residency in the location where he studies does not sever his tie of residency to his permanent home* (see HCJ 361/82 above), and generally do not give rise to an alternative tie of residency to his temporary residence (cf. HCJ 454/86 **Tamimi v. IDF Commander of the West Bank** and HCJ 299/90 **Nimr v. IDF Commander of the West Bank**..
> (emphases added, M.N.)

When ruling on the question of the temporary nature of a home absence, the Court usually considers whether it has been established that the terrorist has another residency, in addition to the one slated for demolition. In this context, the question of whether he habitually stayed in the house slated for demolition is examined. On this issue, it has been ruled that it is sufficient that a person lives in a home slated for demolition *from time to time*, to give rise to a tie of residency for the purpose of Regulation 119 (HCJ 897/86 **Jaber v. OC Central Command**, IsrSC 41(2) 522, 525 (1987) (hereinafter: **Jaber**)). One of the considerations usually taken into account in this context is the frequency with which the person arrived at the home (see HCJ 1245/91**Fuqha v. Military Commander of the West Bank** (December 31, 1991), wherein it was ruled that the terrorist's frequent visits to his mother's home, including for the purpose of changing clothes and stocking up on food, indicates a tie of residency to the home; see also, **Hamed**, para. 40 of my opinion, where a tie of residency was recognized in the case of a terrorist who slept in his family's home only on some days during the week, while he spent most nights in his workplace, in circumstances where it was not proven that he had another permanent place of residence). Accordingly, the courts did not consider

the fact that a terrorist would live, during his studies, in the vicinity of the academic institution (for instance, in boarding or in a relative's home that is closer to the institution) as necessarily severing the tie of residency to the parents' home for the purpose of Regulation 119 (see HCJ 361/82 **Hamri v. Judea and Samaria Area Commander**, IsrSC 36(3) 439, 441-442 (1982) (hereinafter: **Hamri**), where it was ruled that the fact that the terrorists, who were minors, were away from their parents' home during the schoolyear does not preclude them from being its "inhabitants" during the vacation, when they stay there. In the circumstances of the case, the Court found no need to make a finding on whether the terrorists could be considered "inhabitants" of the home whilst staying in a different village for their studies; see also HCJ 454/86 **Tamimi v. Military Commander of the West Bank** (October 6, 1986) (hereinafter: **Tamimi**), where it was ruled that a terrorist, who was a minor and lived in boarding at his school was an "inhabitant" of his parents' home, since this was his home whenever he was not at school; and HCJ 299/90 **Nimr v. IDF Commander of the West Bank**, IsrSC 45(3) 625, 628 (1991) which also concerned a minor (hereinafter: **Nimr**), wherein it was ruled that there was a tie of residency between the terrorist and his father's home, despite the fact that he was living part time in the homes of his uncles in a different community, close to his academic institution. Thus, the petition of his uncle against the intent to demolish his home was accepted). It is worth noting that in some cases, the ruling in the matter partly relied on the fact that the terrorist was present in the family home at the time of the attack (see: **Hamri**, p. 442; **Tamimi**; **Jaber**, p. 525 and HCJ 2630/90 **Karakra v. IDF Commander of the West Bank**, para. 2 of the opinion of Justice S. Levin, (February 12, 1991)). In contrast, see, **Nimr**, p. 628).

17. And so, the answer to the question whether there is a residency tie lies in the concrete circumstances of each case. In the case before us, parties to the petition agree that Mar'i is an adult, a student at the University of Abu Dis and that he rents a room at the university student residence. Respondents argue that Mar'i is seen in the village about twice a month and that he usually comes to the apartment on weekends and holidays, sometimes staying for more than a week. Petitioners, for their part, do not dispute that Mar'i does visit the village, but, they claim he does so infrequently, only on festivals and school holidays. It follows that in fact, there is no dispute that Mar'i does come to the apartment. In his police statement dated October 6, 2015, Mar'i described himself as a resident of the village, though he later said he "lives in Abu Dis". Add to that the fact that his registered address remains the apartment, and he did not change it. This factor may not be a decisive consideration, certainly not in all cases, but in the case herein it does join the overall factors that do attest Mar'i has a tie to the apartment, including the fact that student residence is, by nature, not a temporary residence. It is my view that in the circumstances described, there is no room for our intervention in the conclusion that a student living in student residence always remains a resident of his parents' home for the purpose of Regulation 119. Everything depends on the overall circumstances, the strength of the tie to the parents' home and perhaps also on whether the person in question had started his own family, etc.

Further arguments

18. Another argument that has been made, as stated, by Petitioners, is that it is not possible to determine to Mar'i was responsible for the attack to the extent required for use of Regulation 119, given that the criminal proceeding against him has not yet been completed. They put particular emphasis on the arguments regarding the wrongful manner, as they allege, in which his statement was collected. According to case law, use of powers under Regulation 119 is not subject to the terrorist's criminal conviction, and *administrative* evidence that the offense was committed by an inhabitant of the house slated for demolition is enough. As ruled, "the military commander does not require a conviction by a judicial instance and he himself is not a court. As far as he is concerned the question is whether a reasonable person would consider the information available to him to have sufficient evidentiary power" (**Hamri**, p. 442, **Jaber**, pp. 524-525; **Sharabti**, pp. 815-816; HCJ 7823/14 **Ja'abis v. GOC Home Front Command**, paras. 10-12 of the opinion of Justice E. Rubinstein (December 31, 2014; **'Aliwa**, para. 20 of the opinion of Justice U. Shoham; **'Awawdeh**, paras. 21, 25). The administrative

evidence against Mar'i include, inter alia, the indictment served against him; his detailed statements to the police; his photograph with Halabi, which he posted on his Facebook page with praise and the fact that Halabi's cell phone and driver's license were found in Mar'i's possession after the attack. The matter at hand is an administrative one and the evidence described above suffices as grounds for use of Regulation 119 (see **Hamri**, p. 442, in which, despite the terrorists' contention that their statements were unlawfully obtained, it was ruled that there was sufficient evidence for use of Regulation 119, partly based on the fact that the affidavits they submitted made no claim that they did not perpetrate the terrorist attack. Conversely, compare dissenting opinion of Justice M. Mazuz in **'Aliwa**, paras. 3 and 13(e); and HCJ 802/89 **Nasman v. IDF Commander in the Gaza Strip**, IsrSC 43(4) 461)1989)).

19. On the proportionality of the demolition, the possibility that Mar'i might receive punishment in the criminal proceeding, perhaps a heavy one, does not preclude use of the powers granted by Regulation 119, given its deterrent purpose (see HCJ 8084/02 **'Abassi v. GOC Home Front Command**, IsrSC 57(2) 55, 60 (2003); **'Awawdeh**, p. 21). With respect to harm to others, with an emphasis on Mar'i's family, following the demolition of the apartment, indeed, this is an important consideration for the examination of the proportionality of using powers under Regulation 119. I do not underestimate this harm whatsoever. However, it must be recalled that this harm is an incidental outcome of using the Regulation, whose purpose, as stated, is not to punish the family but to deter potential terrorists from carrying out further attacks (see, **Nazzal**, pp. 349-350, and compare dissenting opinion of Justice M. Mazuz in in **Abu Jamal**, paras. 16-17). As such, the harm caused as a result of demolishing the apartment must be balanced against the deterrent benefit of this action (see, **HaMoked**, para. 24 of the opinion of Justice E. Rubinstein and para. 4 of the opinion of Justice N. Sohlberg). I believe that in the circumstances of the matter, there is no room to interfere with Respondents' discretion and determine that the demolition of the apartment would be disproportionate. In this decision, I take into consideration, inter alia, the fact that the demolition order refers only to the second floor of the structure, where the living rooms are located and not to the first floor; Respondents' assurance that an engineer would be present at the time of the demolition; their undertaking that the demolition would be carried out manually, which is expected to reduce the damage to the structure and its vicinity and the extreme gravity of the attack. Additionally, I have also considered Respondents' argument that a partial demolition or sealing of the apartment cannot suffice for achieving the deterrent purpose.

20. Finally, I have not been persuaded that the non-disclosure of the information requested by the Petitioners constitutes a flaw that justifies intervention in the Respondents' decision regarding the seizure and demolition of the apartment. On this, I note, that security officials do not have a sweeping obligation to provide persons holding title to a structure that is slated for demolition with engineering reports with respect to the demolition that are in their possession (see, **Hamed**, para. 35 of my opinion, **Qawasmeh**, para. 31). However, I do find it necessary to comment, as a matter of principle, that the Respondents would be advised to make significant efforts to provide persons harmed by orders such as the demolition order before us, with the material which formed the basis for issuing said order. This, given the tight schedules that naturally apply in such cases. It is specifically because of the essence and nature of the power granted in Regulation 119 that there is greater importance to allow persons who stand to suffer harm as a result of its use a real opportunity to make their case to the competent officials (see, **Hamed**, paras. 33-34).

21. In conclusion, I shall suggest to my colleagues to dismiss this petition.

Addendum

22. After reading the opinions of my colleagues, I wish to add a number of comments. There can be no dispute that use of Regulation 119 indeed raises complex questions, particularly given the harm to innocent people that is sometimes involved in using this power. The Court has not been blind to these

questions through the years, and, as stated, has seen use of this power to be an unavoidable necessity and a required measure given the chance that it may help decrease bloodshed. The case law produced over many years on this issue has established that the degree to which the remaining inhabitants of the house slated for demolition were involved in the terrorist's actions is a factor the military commander must take into account when considering using the power granted by Regulation 119 (see, for example, **Qawasmeh**, para. 22; **HaMoked**, para. 4 of the opinion of Justice E. Hayut; HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank**, para. 23 of the opinion of Vice President E. Rubinstein (dissenting on the outcome) (December 1,2015)). It is my view too that this factor may impact the scope of the order issued pursuant to the Regulation. However, the norm is that this consideration is not the only one and lack of evidence of involvement or awareness on the part of the family of terrorist activity does not preclude use of the power (see, for instance, HCJ 2722/92 **Alamarin v. IDF Commander in Gaza Strip**, IsrSC 46(3) 693, 698, 700 (Justice G. Bach) (1992); HCJ 1730/96 **Sabih v. Military Commander of the Judea and Samaria Area**, IsrSC 50(1) 353, 360(1996); HCJ 7473/02 **Bahar v. Military Commander of the West Bank**, IsrSC 56(6) 488, 491 (2002); **'Aliwa**, para. 18 of the opinion of Justice U. Shoham; **HaMoked**, para. 18 of the opinion of Justice E. Rubinstein; **'Awawdeh**, para. 18; HCJ 2/97 **Abu Halaweh v. GOC Home Front Command**, para. 13 (August 11, 1997); **Halabi**, para. 10 of the opinion of Vice President E. Rubinstein; HCJ 6996/02 **Zo'arub v. Military Commander of the Gaza Strip**, IsrSC 56(6) 407, 408-410 (2002); **Zakariya**, para. 21 of the opinion of Justice N. Sohlberg. This rule can be gleaned from other cases as well, for instance, HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**, para. 7 of my judgment (January 5, 2009); HCJ 124/09 **Dwayat v. Minister of Defense**, para. 5 (March 18, 2009); HCJ 987/89 **al-Qahwaji v. Military Commander of the Gaza Strip**, IsrSC 44(2) 227, 230-231, (1990); HCJ 798/89 **Shukri v. Minister of Defense**, para. 4 (January 10, 1990); HCJ 2418/97 **Abu Fara v. Military Commander of the Judea and Samaria Area**, IsrSC 51(1) 226, 228 (1997); HCJ 6288/03 **S'adeh v. GOC Home Front Command**, IsrSC 58(2) 289, 294 (2003); HCJ 5696/09 **Mughrabi v. GOC Home Front Command**, para. 20 of the opinion of Justice H. Melcer (February 15, 2012); **Hamed**, para. 24 of my opinion; HCJ 8066/14 **Abu Jamal v. GOC Home Front Command** (December 31, 2014); **Sidr**, paras. 5-6 of the opinion of Justice I. Amit. See also the position of Justice U. Vogelman in **Sidr**, paras. 2, 5 and 6, and his opinion in **Zakariya** where he acknowledged that this was the case law in place, but doubted the proportionality of using the power granted by Regulation 119 where there was no proof that the suspect's family were involved in the terrorist activity.

It is worth noting that recently, an opinion has been voiced that if the family living in the home slated for demolition manage to persuade using "sufficient administrative evidence" that they tried to prevent the attack, it may serve to deny the decision to demolish the house (**HaMoked**, para. 4 of the opinion of Justice E. Hayut; **Hamed**, para. 4(b) of the opinion of Justice H. Melcer). This is not the case at hand.

As stated, this is a court of justice not a court of justices.

President

Justice M. Mazuz

1. I cannot concur with the opinion of my colleague, President M. Naor, that the petition should be dismissed. I believe Respondent's decision contains flaws that justify revoking the subject of the petition. Therefore, should my opinion be heard, we shall revoke the seizure and demolition order issued under Regulation 119 of the Defence (Emergency) Regulations 1945, (hereinafter: the Defence Regulations and Regulation 119) against the Petitioners' home. Below is my position in brief.

2. **Preliminary comment**: in their written submissions and in the oral arguments made by their counsel before us, alongside specific arguments, Petitioners herein made arguments on issues of principle impugning the legality of the seizure and demolition order issued against their home. These arguments were presented in brief and rejected by my colleague, the President, mostly on the argument that these and other arguments have been considered and rejected on more than one occasion in the jurisprudence of this Court, including in recent judgments (paras. 7-9), my view differs from the President's view on a number of general-principled issues related to use of Regulation 119, but I do not wish to address this herein. I have presented my position and reservations on this issue on several occasions recently, and I see no need to repeat or elaborate on them in the case at hand (see my position in , HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015) (hereinafter: **'Aliwa**); HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015) (hereinafter: **Abu Jamal**); HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank** (December 1,2015) (hereinafter: **Abu Hashiyeh**) and HCJ 1630/16 **Zakariya v. Commander of IDF Forces**, (March 23, 2016).

3. _____ Mar'i (hereinafter: Mar'i), Petitioners' son, was one of the persons involved in a lethal stabbing attack in Jerusalem, as detailed by my colleague, the President. The main specific issue that was raised in the petition herein was the issue of Mar'i's tie to the Petitioners' home, which is the subject of a seizure and demolition order under Regulation 119, and the subject of this petition (hereinafter: the home).

4. Regulation 119 stipulates:

> A Military Commander may by order direct the forfeiture to the Government of Israel of any house, structure, or land from which he has reason to suspect the 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, or attempted to commit, or abetted the commission of, or been accessories after the fact of the commission of, any offence against the Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure..

5. I shall recall the relevant facts, which are largely undisputed: Mar'i is a 22-year-old student who has been living in a student apartment in the University of Abu Dis, near Jerusalem, for some three years. His parents' home is located in the village of Qarawat Bani Hassan in the Salfit district (north-west of Ariel). The Petitioners allege that Mar'i rarely visits his parents' village, on holidays and school vacations, and has no room or possessions in the parents' home. The Respondents claim Mar'i had lived in the village for most of his life and that since starting university, he has been seen in the village "about twice a month", and, at times, on his school vacations and on weekends.

6. The question that arises in the matter at hand, is, therefore, whether, in the circumstances, Mar'i's aforesaid ties to his parents' (the Petitioners) home could render him a "resident", or "inhabitant" of the home.

7. The issue of Mar'i's tie to the home has an impact on two aspects:

a. *The aspect of competency*: Can Mar'i be considered an inhabitant of the home? Inasmuch as Mar'i is not an inhabitant of the home, Respondent 1 (hereinafter: the Respondent) *lacks any competency* to use his power under Regulation 119 against the home.

b. *The aspect of discretion*: Even if it cannot be ruled out that Mar'i is indeed an inhabitant of the home, given the weakness of the tie to the home, in the circumstances at hand, does the Respondent's decision meet the tests of reasonableness and proportionality with respect to the sanction chosen?

Below, I shall consider both questions in order, but first, a few comments on the guiding principles for interpreting the powers granted by Regulation 119 and the limits on its use.

8. Case law has determined that the Defence Regulations, like any other law, must be interpreted in a manner that is consistent with the fundamental values of our legal system (HCJ 680/88 **Schnitzer v. Chief Military Censor**, IsrSC 42(4) 617, 628-629 (January 10, 1989)). It has also been ruled that when interpreting law, one must strive toward an interpretation that promotes fundamental rights (CivA 524/88 **Pri HaEmek v. Sdeh Ya'akov**, IsrSC 45(2) 529, 561 (1991); HCJ 693/91 **Efrat v. Population Administration Officer**, IsrSC 47(1) 749, 763 (1993); Aharon Barak, **Legal Interpretation – Interpreting Statute** (Vol. 2) (1993), 553; **Abu Jamal**, para. 13 of my opinion).

9. Applying these general rules to the matter at hand requires a very careful and restrictive approach to the use of powers under Regulation 119, which should be interpreted in the context of Basic Law: Human Dignity and Liberty and the limitation clause therein, as use of this power involves severe impingements on a number of fundamental rights, including the right to property, the right to human dignity and several rights deriving from human dignity –

> It is well known that the measure included in Regulation 119 is a strong and serious measure and that use thereof shall be made only after careful consideration and examination and only in special circumstances…
> (HCJ 361/82 **Hamri v. Judea and Samaria Area Commander**, IsrSC 36(3) 439, 443 (1982) (hereinafter: **Hamri**)).

And elsewhere:

> …The military commander must make careful and limited use of this power, in keeping with the principles of reasonableness and proportionality… This is all the more the case since the enactment of Basic Law: Human Dignity and Liberty, in light of which the Regulation must be interpreted.
> HCJ 7040/15 **Hamed v. Military Commander in, the West Bank**, paras. 23 (November 12, 2015) (hereinafter: **Hamed**).

See also, HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485, 489; HCJ 8084/02 **'Abassi v. GOC Home Front Command**, IsrSC 57(2) 55, 59 (2003); HCJ 4597/14 HCJ 4597/14 **'Awawdeh v. West Bank Military Commander**, para 17; HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank**, para. 22 (August 11, 2014); **Abu Hashiyeh**, para. 12 of the opinion of the Vice President and para. 5 of my opinion, **Abu Jamal**, para. 8 of my opinion; para. 8 of the opinion of the President in the matter at hand.

10. Use of Regulation 119 harms innocents, and often just innocents. This fact raises difficult questions with respect to the legality of using the Regulation in such cases, as well as regarding breaches of the rules of public international law (see my position on this in **'Aliwa** and in **Abu Jamal**, where I expressed my opinion against using Regulation 119 toward uninvolved relatives). For this reason two,

at least, a very careful and restrictive approach should be taken toward use of powers granted by Regulation 119.

The competency aspect – Can Mar'i be considered an "inhabitant" of the home?

11. As noted above, Mar'i is a 22-year-old student who, for the past three years, has been living in a student apartment in the University of Abu Dis, near Jerusalem, away from his parents' home in the village of Qarawat Bani Hassan in the Salfit district, Samaria. There is no dispute that he visits his parents' home on holidays and school vacations, according to the Respondents, "about twice a month", and occasionally on school holidays and weekends.

12. In these circumstances, can Mar'i be seen as an inhabitant of the home for purposes of Regulation 119? In my opinion, the answer to this is negative.

    Indeed, the answer to the question whether a person counts as an inhabitant of a home for purposes of Regulation 119 is, as noted by my colleague the President, a result of the specific circumstances of each and every case (para. 15). On this issue, one should consider, *inter alia*, the intensity of the tie the person has to the home, his status in it and, inasmuch as he does not permanently reside there, whether the absence from the home is temporary in nature or not. However, contrary to my colleague, the President, I do not believe that the judgments she referenced necessarily support her conclusion that Mar'i should be considered an inhabitant of the Petitioners' home for purposes of using the powers granted by Regulation 119. I shall review the relevant case law below.

    a. In the aforesaid **Hamri**, the position that the terrorists could not be considered inhabitants was, indeed, rejected, but a review of the judgment indicates that the case involved two *school boys*, who lived at their parents' home, but did not stay there during the school year, as they were attending school in a different village. In addition, in that case, the court stressed that its ruling that the terrorists are to be considered inhabitants *was limited to the time they actually stayed in the home*, during their school vacation. These two key elements are not present in the case at hand. These are the remarks made by Justice A. Barak in **Hamri**:

> The very fact that they were not in the parents' home during the school year does not preclude them from living there and being inhabitants of their parents' home *during the holiday, which they spend with their parents*. As such, there is no need to come to a resolution on the question of whether, for purpose of the Regulations, they can be considered inhabitants while staying in a different village for their studies.
> (p. 441, emphasis added. M.M.)

    b. And so in HCJ 454/86 **Tamimi v. Military Commander of the West Bank** (October 6, 1986) (hereinafter: **Tamimi**), the court did, in fact, dismiss the contention that the terrorist was not an inhabitant of the home since he stayed in boarding during the school year, at the same time stressing that *at the time of his arrest, the terrorist was living in the home*, and that one of the attacks he was accused of was perpetrated close to the home. In this, this case also differs from the case at hand.

    c. In HCJ 897/86 **Jaber v. OC Central Command**, IsrSC 41(2) 522, (1987) (hereinafter: **Jaber**), the court upheld the demolition of the room occupied by the terrorist Nader, having ruled that while Nader had lived in the USA for a while,

> In the case at hand, Nader consistently lived in said home during the relevant time, since his first return from the USA.
> (p. 524).

d. In HCJ 6026/94 **Nazzal v. IDF Commander in the Judea and Samaria Area**, IsrSC 48(5) 338 (1994) (hereinafter: **Nazzal**), the court ruled that absence from home in order to flee from security forces does not sever a fugitive's tie to his home. The court ruled that the terrorist had lived in the home on a permanent basis, for an extended period of time prior to the attack due to which the order was issued against said home. However, once he learned he was to be arrested "he disappeared" and became a fugitive. From that point on, he visited his home "from time to time", and spent most of his time "hiding in the homes of various abettors". Still, the house "remained his only home" (p. 344). Similarly, in HCJ 893/04 **Ali Faraj v. IDF Commander of the West Bank**, IsrSC 58(4) 1, (2004), (hereinafter: **Ali Faraj**), it was ruled that the terrorist's absence from his parents' home, at the time he was a fugitive, fleeing security forces who sought to arrest him, did not sever his tie to the home (ibid., p. 7).

13. The aforesaid, put together, indicates that the answer to the question whether or not the terrorist was an inhabitant of the home is decided by the answer to the question of whether the absence was a *temporary* absence from a home that serves as the terrorist's *permanent* residence, or whether this is no longer his residence, having moved elsewhere. The conclusion as to the temporary nature of the absence partly depends on the reason for the absence, its duration, and mostly, whether it is transitory, undertaken for inherently transient reasons, with the intention of returning to permanently reside in the house (**Nazzal**, p. 344).

14. In the case at hand, unlike the cases considered in the judgments listed above, the person in question is not a boy attending boarding school (as was the case in **Hamri** and **Tamimi**), but rather an adult (aged 22), who left his parents' home about three years before the incident which is the subject of the order and lives in his own apartment, at university, far away from his parents. Nor does the case at hand involve an attack perpetrated while the terrorist was *actually living* in the home that is the subject of the demolition order (as was the case in **Hamri**, **Tamimi** and **Jaber**), or where the house itself is tied to the attack (as was the case in **Tamimi**). Nor was the terrorist in the case at hand absent from his parents' home because he was being pursued by security forces (as was the case in **Nazzal** and in **Ali Faraj**), but rather, lived and stayed, in practice, in his apartment in Abu Dis, which was also where he was arrested, rather than his parents' home in the village of Qarawat Bani Hassan, located far away from there.

15. Indeed, it is not possible to set hard-and-fast rules on this issue, but, in my view, unlike someone who abandons their home temporarily as a fugitive on the run, or a boy who attends boarding school (at the time when he is, in fact, staying in the home), or someone who travels abroad for a predetermined amount of time with plans to return to the parents' home, a grown person who leaves his parents' home and lives in his own apartment, even if it is a rental or a student apartment cannot be considered as *temporarily absent from his parents' home with the intention of returning*, and, it follows, can no longer be considered an inhabitant of his parents' home. A grown person who leaves his parents' home, whether for studies or for work, usually does not do so temporarily with the intention of returning, even though he does not yet have a house of his own. This is a phase traversed by most young people on the way to their own home. The fact that the young man or woman continues to visit their parents' home, even if they do so relatively frequently, does not substantiate a finding that the absence is temporary and that they are still inhabitants of the home.

16. And here is the place to return to the principles of interpretation with which we opened, and the need to interpret Regulation 119 restrictively and set limitations on its use, given the grave harm it inflicts on innocents. The remarks made in HCJ 2630/90 **Karakra v. IDF Commander of the West Bank**, (hereinafter: **Karakra**) (February 12, 1991):

> I tend toward the view that given the extremely grave effect the use of the sanction provided for in Regulation 119 of the

> Defence (Emergency) Regulations 1945 has, *the court should set limits on its use and interpret it narrowly, including with respect to classifying the persons who may be harmed thereby*. (Emphasis added, M.M.)

See on this issue the comments I made in **'Aliwa** and in **Abu Jamal**, wherein I addressed the question of the terrorist's tie to the home and its ramifications for the reasonableness and proportionality of using the Regulation 119 sanction, and I shall return to this further down.

17. Given the aforesaid, I believe that the facts in the case at hand do not indicate Mar'i can be considered an "inhabitant" of his parents' home, that his absence is temporary and that he intends to return. On the contrary, the circumstances in the matter at hand lean toward this being an adult who had left his parents' home several years ago and lives in his own apartment, even if it is not a permanent one. Occasional visits to the parents' home on holidays or weekends do not establish an "inhabitant" tie. As stated, the parents' home had no connection to the incident, either in terms of time or place. At the time of the attack and near that time, Mar'i lived and stayed in his apartment in Abu Dis University, far from his parents' home, and this is also where he was arrested. The attack itself took place in Jerusalem, relatively close to his university apartment, with no connection to his parents' home, which, as stated, is located in the Samaria area.

18. The outcome is that since this is not an "inhabitant" of the home, the Respondent is *not competent* to take action against the house under Regulation 119, and, it follows, that the seizure and demolition order he issued lacks legal validity (**Hamri**, p. 441; HCJ 299/90 **Nimr v. IDF Commander of the West Bank**, IsrSC 45(3) 625, 628 (1991), hereinafter: **Nimr**; **Nazzal**, p. 344).

The discretion aspect

19. Even if I presume, as has my colleague, the President, that Mar'i's ties to the house do fulfil the condition of inhabitant according to Regulation 119 – and, as stated, I do not share this view – this remains insufficient for substantiating the legality of the seizure and demolition order issued against the home.

20. Indeed, if he is, in fact, an "inhabitant" of the house, then presumably there is competency to employ Regulation 119 (presumably, since the question of competency is tied to other questions of principle, which, as stated, I shall not address herein). However, competency is one thing and discretion quite another. The power granted in Regulation 119 is discretionary. Therefore, once the incident that allegedly gives rise to competency on the part of the military commander to pursue Regulation 119, he must use his discretion and decide whether, in the overall circumstances, use of this power is justified and if so, how and under what conditions. This discretion must be employed, as detailed, above, using a careful and restrictive approach, "*including with respect to classifying the persons who may be harmed thereby*" (**Karakra**).

21. In the matter herein, even if we presume Mar'i's ties to the house warrant considering him an "inhabitant" thereof, discretion must still be examined: does the decision to issue a seizure and demolition order for the house meet the tests of reasonableness and proportionality given *the weakness of the ties* – regarding which there seems to be no dispute – together with the overall circumstances of the matter, including *lack of any involvement* on the part of the Petitioners in the actions of their son, and a complete lack of connection between the home and the stabbing?

    In my view the answer to this question is *negative.*

22. The tests of proportionality used in administrative and constitutional law, along with the careful and restrictive approach required when infringing on fundamental rights dictate a thorough examination of the circumstances of the case and giving weight, even decisive weight, to the following

considerations: *the strength of the ties* the terrorist has to the house; the presence of *a connection between the house and the attack* which is the cause for the order, and *involvement by the family*, the homeowners, in the actions of the terrorist son. An examination of these elements is essential both for substantiating the justification for using the sanction provided for in Regulation 119 in the first place, and for determining the scope and severity of the sanction to be employed, (full or partial demolition or sealing).

23. In **'Aliwa** and in **Abu Jamal**, I addressed these considerations and distinctions. In this context, *inter alia*, I wrote the following in **Abu Jamal**:

> 15. Proper exercise of discretion as to whether the sanction under Regulation 119 should be exercised, while proper weight is given to the connection between the perpetrator and the building against which the sanction is directed and to the proportionality of the sanction, requires an examination of a host of relevant circumstances – which pertain to the perpetrator, his family members and the building against which the sanction is sought to be taken – the main principles of which are as follows:
>
> A. Was the house actually used for the terror activity of the perpetrator, such as shooting from the house, storage of firearm, or usage of the house for the purpose of meeting with his terrorism accomplices (compare: Sahweil and Hamed mentioned above); or whether it was used by the perpetrator as his residence only?
>
> B. What is the connection between the perpetrator and the building – is the house owned by the perpetrator or is he only an "ancillary tenant" in a property which belongs to his parents or family members, or does he only rent the apartment which belongs to another? (Compare recently Hamed which limited the possibility to act against a house in which the perpetrator had the status of a mere lessee).
>
> C. How and to what extent did the perpetrator use the house – did he live there on a permanent basis or only visited it and slept there occasionally? Which parts of the building were used by him alone, and which parts did he use together with his nuclear family or extended family?
>
> D. Were the inhabitants of the house involved in the activities of the perpetrator (whether or not he is a family member), and if the answer is positive – what is the type and scope of such involvement – only awareness of his mere involvement in terror activity, awareness of the specific action being the subject matter of the order, support or actual assistance to terror activity?

E. What happened to the perpetrator – was he killed during the attack, arrested and incarcerated for many years, or maybe escaped?

16. A prudent examination of these circumstances and passing them through the melting pot of the proportionality test will lead to the conclusion of whether there is a basis and justification under the relevant circumstances to exercise the sanction according to Regulation 119, and if the answer is positive, under what terms and conditions: seizure only, sealing (partial or full), or demolition (partial or full). The perpetrator's connection to the house and the involvement of the family members in his actions, as specified above, are fundamental components in making a decision regarding the mere exercise of the sanction, its type and scope.

(see also **'Aliwa**, para. 13).

24. Also in **Abu Jamal**, I addressed, in detail, the great – moral and legal – difficulty involved in using the sanction provided for in Regulation 119 toward the home of innocent relatives, that is, in the case of relatives who had no involvement, in terms of knowledge or assistance in the actions of the perpetrator. I also expressed my view which wholly denies use of the sanction under Regulation 119 toward involved relatives. I shall cite some of the comments there, which are relevant to the matter at hand –

> 7. The conscious and deliberate infliction of harm on innocent people, and even more so, a severe violation of their constitutional rights, only for other potential perpetrators "to see and beware", is inconceivable conduct in any other context…
>
> 13. I am of the opinion that the power according to Regulation 119 should be exercised in view of the fundamental principles which derive from the mere fact that the state of Israel is a **Jewish state** ("a man shall be put to death for his own sin") and a democratic state (compare: HCJ 73/53 **"Kol Ha'am" v. Minister of Interior**, IsrSC 7, 871 (1953)), and in view of the **principles of our constitutional law**, mainly from the aspects of proportionality, as well as in view of universal values. I am of the opinion that all these principles **inevitably** lead to the conclusion that the sanction under Regulation 119 may not be taken against uninvolved family members, regardless of the severity of the event and the deterring purpose underlying the use of the power. Needless to point out that apparently the biblical principle according to which "a man shall be put to death for his own sin" constitutes the ideological basis of the prohibition against collective punishment in international law.
>
> In my opinion, a sanction which directs itself to harm innocent people, cannot be upheld, whether we define the flaw as a violation of right, act in excess of authority, unreasonableness or disproportionality…

> 14. In my opinion, considering the severe violation of the rights of those who did not sin, the inevitable conclusion which arises is that in cases in which no evidence exists regarding connection and involvement of the family members in the criminal act, the order should not be directed against them, and accordingly one should consider to refrain from exercising the sanction or at least limit it to the perpetrator's part in the house alone. Where data exist which attest to the fact that the family members were connected or involved in the deed, the scope of such involvement should be examined as well as other circumstances, as specified below, and appropriate and proportionate weight should be given to them in a decision as to whether the sanction should be taken.
>
> …
>
> 16. … I am of the opinion that interpretation in the spirit of the Basic Law and the fundamental values of our legal system as aforesaid in a bid to refrain from causing a severe harm to those who did not sin, leads to the inevitable conclusion that where there is no evidence of connection and involvement of the family members in the criminal act the order should not be aimed at causing them harm, but rather one should examine whether it may be directed only against the perpetrator's part in the house, or whether the exercise of any sanction against the house may be avoided. **A sanction which is, in and of itself, aimed at causing harm to innocent people cannot be justified, in my opinion, under any circumstances**.
>
> (emphasis in original).

25. **In conclusion**: In my view, a review of the overall circumstances in the case at hand leads to the clear conclusion that there is no basis for using the powers granted in Regulation 119 against the Petitioners' home, either in terms of competency, or in terms of discreation.

    I have stated above, that in my view, in the matter at hand, Mar'i does not have residency ties to the home of his parents (the Petitioners) and he cannot be considered an inhabitant of the home. It follows that there is no authority to take action against the home due to Mar'i's actions. However, even if we presume that Mar'i can be considered, just barely, an inhabitant of the home, the overall circumstances still, in my view, lead to the conclusion that using the power granted in Regulation 119 in this case would be neither reasonable nor proportionate, and therefore, wrongful. As stated, Mar'i's ties to the home, if there are such, are weak. To that, one must add the complete lack of connection between the home and the stabbing attack. The terrorist did not travel to the scene of the attack from the home; he did not actively live in the house either before or after the attack, but rather in his apartment in Abu Dis University, where he was also arrested (compare: HCJ 434/79 **Sahweil v. Military Commander of the Judea and Samaria Area** (November 6, 1979), and **Hamed**, noted above). Nor are the Petitioners alleged to have had any knowledge or involvement in the actions of their son in the case at that. The *cumulative* effect of these factors *dictates*, in my view, the conclusion that the seizure and demolition order issued for the home of the Petitioners must be revoked, should we wish to avoid rendering entirely meaningless the many remarks made by this

court, to which I referred in the opening, with respect to the careful, restrictive approach to be taken regarding use of the powers granted by Regulation 119.

To complete the picture, I shall note that Mar'i is standing trial for his involvement in the lethal stabbing and he is expected to receive a very serious sentence for his depraved acts. I shall also recall that the person who actually perpetrated the lethal stabbing attack (Muhanad Halabi) was killed at the scene by security forces, a demolition order has been issued against his home and the petition filed against it has long since been dismissed (HCJ 8567/15 **Shafiq Halabi v. Commander of IDF Forces in the West Bank** (December 28, 2015)). Thus, this is not a situation wherein the murderous attack shall be allowed to be pass without a serious response, including in terms of deterrence.

26. As a final comment, I shall add that with respect to the issue of deterrence, referred to by my colleague, Justice Baron, the issue of deterrence as the purpose for using the sanction provided for in Regulation 119 raises a litany of difficult questions. I addressed some of these, in brief, in **'Aliwa** (para. 8 of my opinion therein) and in **Abu Jamal**, I added that my view, detailed therein, which denies use of Regulation 119 against the home of uninvolved relatives, does not contradict the purpose of deterrence, but is rather, consistent with considerations of deterrence:

> A deterring purpose assumes that a rational connection exists between the prohibited action and the sanction. Said purpose does not reconcile with the infliction of harm on innocent people. Focusing the sanction only against family members who were involved in the terror activity, and on the other hand, leaving uninvolved family members unharmed, may create an incentive for the family members to act for the prevention of attacks when they become aware of such intention, in a bid to avoid the expected sanction. On the other hand, taking the sanction against those who are not involved as well, does not create an incentive for the family members to act for the prevention of the terror activity in view of the fact that the sanction would be taken against them in any event, even if they act for the prevention thereof (without success). The other circumstance which were specified above, such as the use of the building for terror activity or the rights of the perpetrator in the housing unit and the scope of his presence and use thereof, also strive to focus the deterrence on a pertinent prevention of terror activity while limiting and restricting the harm caused to innocent people. (**Abu Jamal**, para. 17).

27. Given all the above, I am of the opinion that the petition must be accepted and the seizure and demolition order issued against Petitioners' home must be revoked.

Justice

Justice A. Baron

1. Recently, petitions directed against house demolitions have become one of the central issues on the agenda of the Supreme Court sitting as the High Court of Justice. A wave of terrorism is (again) washing over the country, striking at innocent people and severely undermining the sense of personal safety among the entire public. Hate and loathing has spread on the internet, and the campaign of incitement constantly streams through the information highway, finding willing believers. Some are calling the current wave of terrorism the "intifada of the youth" or "the knife intifada", and it seems to be motivated not just by nationalist ideology, but also by the fame terrorists gain in the virtual

community and in the media. Among the terrorists, there are women, men, young girls and boys and even children, family men, working men, who, one morning, decide to step out of their life's routine, pick up whatever comes their way – a kitchen knife, a pocket knife, scissors, or anything else they might find, go out of their house, and kill Jews. Attacks have also included ramming cars into people and murderous shooting attacks. Fighting terrorism is difficult, and no doubt, necessary. However, as terrorism intensifies, just then, our duty as a society to examine the propriety of the methods we use to fight terrorism, also intensifies. Inasmuch as the measure of seizing, sealing or demolishing homes (hereinafter in brief: house demolitions) of allegedly innocent people, it appears that there is no dispute that the questions are exacting ((HCJ 8567/15 **Halabi v. Commander of IDF Forces in the West Bank**, para 7, (December 28, 2015); HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense**, paras. 20-24 (December 31, 2014) (hereinafter: **HaMoked**); HCJFH 360/15 **HaMoked v. Minister of Defense** (November 12, 2015), para. 6 (hereinafter: further hearing in **HaMoked**)).

House demolitions spells a severe impingement of the fundamental and human rights of the terrorist's family members – who, under ordinary circumstances, would not be alleged to have any involvement in the attack carried out by the terrorist.

> Indeed, the demolition or sealing of a house in which lives a person who has not sinned is in contrary with the right to own **property**, the right to **dignity** and even the right to housing which is derived there-from [concerning the right to housing, compare: LCA 5368/01 Yehuda v. Tshuva, IsrSC 58(1) 214, 220-221 (2003); LCA 4905/98 Gamzo v. Yeshayhu, IsrSC 55(3) 360, 375 (2001)]. As noted many times in the judgments of this court, such demolition and sealing cannot be reconciled with **concepts of justice** and basic moral principles, including the principle according to which "The son shall not share the guilt of the father, nor will the father share the guilt of the son." [Ezekiel, 18, 20; see also: Salem, page 365]. The above violations become much more severe when, as a result of the exercise of the authority, children are left without a roof over their heads. In such an event, the petitioners note, the exercise of the authority is in contrary with the principle of the **child's best interest**, a principle which runs like a golden thread through a host of legal arrangements, local and international, all of which are designed to protect the rights of those who need, due to their age, special protection.
> (All emphases added, A.B.) (remarks of Justice Y. Danziger in HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank**, para. 23, (August 11, 2014) (hereinafter: **Qawasmeh**)

(see also: HCJ 5839/15 **Sidr v. IDF Commander of the West Bank**, remarks of Justice U. Vogelman, paras. 4-5 (October 15, 2015) (hereinafter: **Sidr**); HCJ 4597/14 **'Awawdeh v. West Bank Military Commander**, remarks of Vice President (as was her title then) M. Naor, para. 17. (July 1, 2014) (hereinafter: **'Awawdeh**)).

2. As noted by my colleague, President M. Naor, the premise for the deliberation herein is that the military commander is competent to order the seizing, sealing or demolition of the home of a person accused or suspected of hostile activity against the State of Israel, pursuant to Regulation 119 of the Defence (Emergency) Regulations 1945. The Court has long since followed this case law, and, so long as it remains unchanged, it must clearly be followed, particularly given that a recent request for a

further hearing of the matter has been rejected (see further hearing in **HaMoked** and the references therein; see also HCJFH 2624/16 **Masudi v. IDF Commander in the West Bank** (March 31, 2016)). However, it is noted that the view that this case law should be revisited by an extended panel of HCJ justices has been voiced in a slew of judgments, some very recent (see, e.g. remarks of Justice U. Vogelman in **Sidr** (para. 6) and HCJ 1630/16 **Zakariya v. Commander of IDF Forces**, para. 3, (March 23, 2016) (hereinafter: **Zakariya**); remarks made by Justice M. Mazuz in **Zakariya** (para. 5), remarks of Justice S. Joubran in HCJ 1938/16 **Abu a-Rob v. Commander of IDF Forces in the West Bank**, para. 6 (March 24, 2016) (hereinafter: **Abu a-Rob**)).

At the same time, case law has clarified that the military's power to order house demolitions is discretionary and must be employed with care and in special, exceptional cases:

> It is well known that the measure included in Regulation 119 is a strong and serious measure and that use thereof shall be made only after careful consideration and examination and only in special circumstances (HCJ 434/79).
> (HCJ 361/82 **Hamri v. Judea and Samaria Area Commander**, IsrSC 36(3) 439, 443 (1982); see also HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank**, remarks of Vice-President E. Rubinstein, para. 12, (December 1,2015) (hereinafter: **Abu Hashiyeh**).

House demolitions constitute a measure that is intended to prevent a potential terrorist from carrying out the next attack, thus, saving lives. Its purpose is *deterrence*. Contrary to the impression drawn by a large segment of the population, house demolitions are not an act of retribution or *punishment* against a certain family for a terrorist attack perpetrated by a son or daughter, and this measure must not be used simply to appease public opinion (remarks made by Vice President E. Rubinstein in **Abu a-Rob**, para. 7; HCJ 967/16 **Harub v. Commander of IDF Forces in the West Bank**, para. 8 (February 14, 2016); **Qawasmeh**, para. 23; HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 458, 488 (1996); HCJ 698/85 **Dajlas v. Military Commander of the Judea and Samaria Area**, IsrSC 46(2) 42, 44 (1986)). On one level, deterrence works on the potential terrorist who fears harm would come to his family due to his actions; on another level, deterrence works on the family of the potential terrorist, giving it incentive to take action to dissuade him from carrying out an attack:

> In traditional Palestinian society, the family plays a central role in the life of the suicide attacker and makes a critical contribution to the shaping of his personality and the degree to which he is prepared to give his life for his religion or people (Emmanuel Goss, "Democracy's Fight against Suicide Terrorists – does the free world have the moral and legal tools for this fight?" (Sefer, Dalia Dorner, 219, 246 (2009)). Gross illustrates and notes that family support, and the public show of family support, benefits terrorist organizations – 'by broadening the organization's circle of support among the Palestinian population, and thereby, increasing its ability to recruit more suicide attackers in future". Deterrence helps neutralize the family element as a terrorism intensifier, and drives the family unit to take action to reduce it. Fear of demolition of its home is meant to steer the potential terrorist's family toward the desirable path, to dissuade it from providing the terrorist with a close circle of support, thereby moving him away from terrorism or its

execution".
(see remarks of Justice N. Sohlberg in HCJ 7040/15 **Hamed v. Military Commander in, the West Bank**, paras. 1(g) (November 12, 2015) (hereinafter: **Hamed**).

3. I shall expand, at this point, on the issue of *deterrence*. The position taken by the Respondent, in the case at hand, as well as in a number of similar petitions, is that the measure of house demolitions has proven to achieve effective deterrence against attacks. Generally, the question of the effectiveness of the deterrence produced by house demolitions is for security officials to assess – as this is their expertise, and the Court tends not to introduce upon it (**Halabi**, para. 10; **HaMoked**, para. 17 of the opinion of Justice (as was his title then) E. Rubinstein; **'Awawdeh**, para. 19; **Qawasmeh**, para. 25; HCJ 6288/03 **S'adeh v. GOC Home Front Command**, IsrSC 58(2) 289, 292 (2003) (hereinafter: **S'adeh**)). This is the rule, and yet, it must be recognized that the effectiveness of the deterrence produced by house demolitions is a serious, troubling issue, which preoccupies the Court and will likely continue to preoccupy it in the foreseeable future.

   The common justification for using house demolitions is based on the position that when a chance to prevent bloodshed hangs in the balance against the property of the terrorist's family "**Lives which may fall victim to the heinous acts of terrorists must be spared, more than the inhabitants of the home**" (remarks of Justice J. Turkel in **S'adeh**, p. 294). It is difficult to dispute this. However, in practice, the issue of deterrence is not all that clear, and certainly not unequivocal. Though the deterrence rationale cannot be ruled out, there is reasonable cause to believe that house demolitions only have a localized deterrent effect, specific to time and place, while, on the other hand, this measure is known to have the extremely deleterious effect of escalating the relations between the two sides, fueling hate and even terrorist attacks against Israel (see, e.g. the thorough review by Justice E. Hayut in **HaMoked**, para. 5 of her opinion). And, in the words of Justice S. Joubran:

> The orders [demolition orders, A. Baron] may have an adverse effect since they may regretfully create situations in which the exercise of the authority will cause agitation which will result in increased motivation to carry out attacks. I was not convinced that the material which was presented to us sufficiently establishes the conclusion that the use of forfeiture and demolition orders creates real and effective deterrence against the execution of attacks.
> (**Abu a-Rob**, para. 4).

   This was the very position held by security forces until recently. Due to the questionable effectiveness of the deterrence, in 2005, a committee appointed by the chief of staff and headed by Maj. Gen. Ehud Shani, recommended ceasing demolitions of terrorists' family homes, and resorting to the measure only in extreme security situations. The recommendations made by the committee were adopted by the chief of staff, and indeed, between 2005 and 2014, the power to order house demolitions was hardly used in the Judea and Samaria Area, and in East Jerusalem, security officials ordered the demolition of homes in isolated cases only, in 2008-2009 (see, **'Awawdeh**, para. 24; see remarks of Justice M. Mazuz in **Abu Hashiyeh**, para. 7; the review by Justice H. Melcer in **Hamed**, paras. 3-4 of his opinion; remarks of Justice N. Sohlberg in **HaMoked**, para. 3 of his opinion; **Sidr**, remarks of Justice U. Vogelman, para. 3).

4. It seems that were the deterring power of house demolitions clear and indisputable – the road to a determination that this measure is *always* an unavoidable necessity would have been short. However, if it were clear that, in terms of deterrence, the damage caused by house demolitions outweighs the benefits, then all would agree that the measure should *no* longer be used, as its purpose, as noted, is

not punitive. However, the situation is that at present there is no real possibility to *empirically* check the rate to which use of house demolitions prevents attacks or saves lives (remarks of Justice A. Goldberg in HCJ 2006/97 **Ghneiamt v. GOC Central Command** IsrSC 51(2) 651, 655 (1997); **'Awawdeh**, para. 24; **Hamed**, para. 1(e) of the opinion of Justice N. Sohlberg). At the same time, it also seems that it is difficult to know, let alone quantify, the extent to which house demolitions have the opposite effect, that is, encourage or increase hate and other violent acts against Jews. In these circumstances, the major points for discussion in recent judgment on the question of whether house demolitions do deter potential terrorists revolved around classified reports provided by the military commander, which detailed cases in which terrorist attacks have been prevented due to concern over the demolition of the family home. The spirit that arises from case law, with respect to these findings is that it *cannot be ruled out* that house demolitions do have some deterring power – however, at the same time, the *doubts* regarding this deterring power cannot be removed (see, e.g. Justice U. Shoham in HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank**, paras. 21-22 (December 1, 2015); President M. Naor in **Hamed**, paras. 28-29; **Sidr**, remarks of Justice I. Amit, para. 2). In this context, it has been ruled, in case law, that the military commander's policy on house demolitions requires constant monitoring and examination:

> … [A]s broad as the discretion of the military commander may be, as discussed by us above, I am of the opinion that the principle of proportionality does not reconcile with the presumption that choosing the drastic option of house demolition or even the sealing thereof always achieves the longed-for objective of deterrence, unless data are brought to substantiate said presumption in a manner which can be examined. We accept the fact that it is hard to be measured, and the court mentioned it more than once (HCJ 2006/97 Janimat v. GOC Central Command, IsrSC 51(2) 651, 655 (1997); 'Awawdeh, paragraph 24; Qawasmeh, paragraph 25). However, as aforesaid, in my opinion, the use of a tool the ramifications of which on a person's property are so grave, justifies a constant examination of the question whether it bears the expected fruit; This is so especially in view of the fact that even IDF agencies raised arguments in that regard, and see for instance the presentation of Maj.Gen. Shani, which, on the one hand, stated that there was a consensus among the intelligence agencies of its effectiveness, while on the other, proclaimed, under the caption "Main Conclusions" that "the demolition tool within the context of the deterring element is 'worn out'" (slide No. 20). Therefore, I am of the opinion that State agencies should examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to bring to this court in the future, if so required, and to the extent possible, data which point at the effectiveness of house demolition for deterrence purposes, to such an extent which justifies the damage caused to individuals who are neither suspects nor accused. (remarks of Justice (as was his title then) E. Rubinstein in **HaMoked**, para. 27) (see also: **Halabi**, para. 13, **Hamed**, para. 27 of the opinion of President M. Naor).

5. My view is that the doubts regarding the deterring power house demolitions produce not only a duty for constant self-examination on the part of security officials, but also serve as a *significant*

consideration for the court when examining the *proportionality* of the use the military commander makes of this measure. This is particularly the case given the provisions of Basic Law: Human Dignity and Liberty and the limitations clause therein:

> The authority is required to act according to a test of proportionality: the measure being taken should rationally lead to the achievement of the worthy purpose; the measure being taken should violate the protected human right – the right to property – to the least possible degree for achieving the purpose. (See: **Sharif**, pp. 60-61, HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**, para. 5 of my judgment (January 5, 2009) and the reference therein (hereinafter: **Abu Dheim**)) (Remarks of President M. Naor in **Hamed**, para. 23).

Under the "narrow" proportionality test (the third sub-test), the measure taken by the authority must provide for a proper balance between the public good that arises from its use and the degree of harm caused as a result of its use (for more on the three proportionality subtests see HCJ 1661/05 **Gaza Coast Regional Council v. Israeli Knesset**, paras. 66-67 and the references therein (June 9, 2005)). In the matter at hand, the deterrence benefit produced by demolishing the homes of terrorists must be weighed against the impingement on the fundamental rights of these family members, given that none of them had a part in the heinous acts perpetrated by the terrorist in their midst. Following on the aforesaid on the issue of the effectiveness of the deterrence, it is clear that the vaguer, more doubtful the deterrence effected by house demolitions, the greater the doubt that there is a proper balance between the benefit they provide and the degree of harm to the terrorists' families.

6. Case law has long since established criteria for examining the proportionality of a house demolition in a specific case. These include, *inter alia*, "the severity of the acts that are attributed to the suspect; the number and characteristics of the persons who may be harmed as a result of the exercise of the authority; the strength of the evidence and the scope of involvement, if any, of the other inhabitants of the house. The military commander is also required to examine whether the authority may be exercised only against that part of the house in which the suspect lived; whether the demolition may be executed without jeopardizing adjacent buildings and whether it is sufficient to seal the house or parts thereof as a less injurious means as compared to demolition" (**Qawasmeh**, remarks of Justice Y. Danziger, para. 22; see also, **HaMoked**, remarks of Justice (as was his title then E. Rubinstein, para. 18; HCJ 2722/92 **Alamarin v. IDF Commander in Gaza Strip** (1992)). However, in practice, we find that the severity of the acts attributed to the terrorist whose family home has been slated for demolition had won center stage and the severity of said acts was sufficient justification for using the demolition sanction (see for instance, HCJ 10467/03 **Sharabati v. GOC Home Front Command**, IsrSC 58(1) 810, 814 (2003)).

   As for the remarks of the President elsewhere: "When the acts attributed to the suspect are particularly grave, this may be sufficient to justify use of the exceptional sanction of demolishing the home [of the terrorist, A. B.], for considerations related to deterrence" (**Hamed**, remarks of Presidennt M. Naor, para. 24). My view is different. As a rule, using the power to demolish homes based on the severity of the acts attributed to the terrorist alone, without giving any weight to the degree of involvement by family members in said acts, I believe, fails to meet the test of proportionality in the narrow sense in circumstances where the deterring power of demolitions is, at the least, not unequivocal. Note, that the jurisprudence of this Court has highlighted the importance to be attached to the family's knowledge of or involvement in the murderous plans of its offspring with respect to examining the proportionality of the decision to demolish the family's home (see remarks of Justice E. Hayut in **HaMoked**, para. 4; and the remarks of Justice U. Vogelman in **Sidr** (para. 6) and **Zakariya** (para. 2); and, recently, the remarks of Justice S. Joubran in **Abu a-Rob** (para. 2).

7. This is the place to stress the following: as noted above, case law has acknowledged that the Respondent has the power to order the demolition of terrorists' homes. So long as this case law remains intact, it is not to be departed from, as stressed by my colleague, the President. However, the *proportionality* of using the measure of house demolitions, given its inherent nature, must be examined on its merits in each petition, according to the circumstances of the case. This is the case when constitutional human rights are at stake, and given the increased use the Respondent has sought to make of the house demolition measure.

   The aforesaid is not meant to take lightly the heinous acts committed by terrorists with blood on their hands. However, it should be recalled that at the time of the demolition, the terrorists themselves are often no longer alive, and in any event, no longer live in the house slated for demolition. Thus, the house in question is the dwelling of the terrorist's relatives and while he may have been in their midst, they allegedly had no part in his action, and they often include children and infants. Naturally, in situations like the current one, when we constantly hear news of terrible violent acts perpetrated for nationalistic reasons and out of pure hatred, the public wants revenge and punishment. These are human emotions, brought on by the impossible predicament we are in. However, these emotions cannot be assuaged by house demolitions, which, as stated, are meant to deter the next terrorist attack, not serve as punishment.

8. To clarify – the intention is not that without active, direct participation by the terrorist's family in the terrorist attack, a demolition should not be ordered. However, it is also difficult to accept the current situation in which a terrorist's family has *no way* to prevent the demolition of its home if one of its sons decides, on his own, to carry out an attack. When the terrorist act in question is grievous, it may be sufficient that some family members *knew* about the terrorist's murderous inclinations – on for this purpose, *constructive* knowledge, or turning a blind eye, may suffice. Sometimes this type of knowledge can be deduced *circumstantially*, based on the nature of the relationship between the terrorist and his family, noting also its intensity (whether the terrorist lives with the family permanently or temporarily), and the terrorist's age (a minor versus a person who lives independently). In addition, in this context, "alarm bells" may be significant, for instance, comments made by the terrorist on social media, or an association with persons affiliated with a terrorist organization. Family support for an act of terrorism may be deduced from its actions after the fact – for instance, if it receives monetary compensation for the act from a terrorism-supporting organization, or even expresses support for the terrorist's actions verbally or otherwise. Note that the aforesaid is not conclusive and clearly, each case should be considered on its merits, given the overall circumstances.

9. From the general to the particular.

   I agree with my colleague the President that in the case at hand, it is possible to make a determination, to the degree required for this proceeding, the responsibility of the Petitioners' son, _____ Mar'i (hereinafter: Mar'i) for the attack due to which their home has been slated for demolition. I also agree with my colleague that, in the case at hand, Mar'i does have a tie of residency to the Petitioners' home, despite the fact that he also lives in student residence. As a rule, it seems to me that the tie of residency required under the relevant Regulation is not necessarily a result of how frequently a person stays in the apartment or how many personal effects he has there – but of what a person sees as his home. The impression drawn from the material presented to us is that even if Mar'i spends most of his time in the student residence, due to his studies, his home has been and remains his parents' home, where he goes every time there is time off school. In this state of affairs, there is a tie of residency, even if not tight, which ostensibly activates the military commander's power to order the demolition of the Petitioners' home.

However, the Respondent makes no claim of involvement, or even knowledge, on the part of the Petitioners, with respect to the heinous acts attributed to Mar'i. It appears that this is no coincidence, as this criterion was never taken into account by the Respondent when issuing the demolition order for Petitioners' home. This, despite the fact that it is relevant to the examination of the proportionality of the house demolition – therefore, the Respondent's disregard for this consideration cannot be accepted. Moreover, Mar'i's residency tie to the home is *a weak tie*, since he spent most of his time away from the parents' home, which ostensibly indicates the family had no constructive knowledge of the planned acts. In these circumstances, it appears that despite having competency, the military commander's discretion with respect to the seizure and demolition order issued against the Petitioners' home has been flawed.

I have ultimately reached the same conclusion as my colleague Justice Mazuz, albeit for different reasons, that the petition must be accepted.

Justice

Decided by the majority opinions of Justices M. Mazuz and A. Baron, contrary to the dissenting opinion of President M. Naor to accept the petition, render the order nisi absolute and revoke the seizure and demolition order issued by the Respondent.

Given today, 21 Adar. 5776 (March 31, 2016)

President Justice Justice