**At the Supreme Court Sitting as the High Court of Justice**

**HCJ 967/16**
**HCJ 968/16**

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| Before: | **Honorable Deputy President E. Rubinstein**<br>**Honorable Justice I. Amit**<br>**Honorable Justice N. Sohlberg** |
| The Petitioners in HCJ 967/16: | 1. **_____ Harub**<br>2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger** |
| The Petitioners in HCJ 968/16: | 1. **_____ Halil**<br>2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger** |
| | **v.** |
| The Respondents: | 1. **Commander of IDF Forces in the West Bank**<br>2. **Legal Advisor for the Judea and Samaria Area** |
| Petition for *Order Nisi* | |
| Session date: | 1 Adar A 5776 (February 10, 2016) |
| Representing the Petitioners in HCJ 967/16: | Adv. Gaby Lasky |
| Representing the Petitioners in HCJ 967/16: | Adv. Andre Rosenthal |
| Representing the Respondents: | Adv. Run Rosenberg |

# Judgment

Deputy President E. Rubinstein:

1. The petitions at bar pertain to two forfeiture and demolition orders which were issued against the residential units of the petitioners by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945; **The first order** – the subject matter of HCJ 967/16 – pertains to an apartment located in Dayr Samit village which served as the residence of _____ Harub (hereinafter: **Harub**), against whom an indictment was filed whereby he was accused of having committed a shooting and ramming attack from a passing vehicle near the Alon Svut junction in which he killed

Rabbi Yaakov Don, Mr. Ezra Schwartz and Mr. Shadi Arafeh (a Palestinian) God bless their souls, and wounded seven others. **The second order** – the subject matter of HCJ 968/16 – pertains to a house in Dura village which served as the residence of _____ Halil (hereinafter: **Halil**), who was accused of having committed a stabbing attack in the southern part of Tel Aviv, in which he killed Aharon Usayeff and Reuven Aviram God bless their souls, and wounded another person. It should already be noted here that for the purpose of the proceeding at bar the petitioners do not challenge the strength of the evidence presented against Harub and Halil and the mere commitment of the acts attributed to them. In this context they only challenge the use of the measure of demolition under the circumstances and the damage which would be caused as a result there-from to families residing in the buildings; and clearly our judgment below does not establish any hard and fast rules for the criminal proceedings which are heard contemporaneously. Petitioners' objections were denied by the commander of IDF Forces in the Area.

The petitions were filed on February 4, 2016; on that very same day interim orders were issued which prohibited the demolition of the dwellings until a decision was given in the petitions (decision made by Justice **A. Baron**); The hearing was held on February 10, 2016; and the decision is given now. The petitions were heard by us one after the other in the same hearing and the judgments are given together in view of the fact that they both concern similar issues, with a specific reference to each one of them.

**The arguments of the parties in writing and in the hearing**

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2. On the general level it was argued that the demolition of the residential units of an individual or a family for acts of terror which were committed by a family member while no involvement in the terror activities is attributed to the inhabitants of the house, is contrary to international law which prohibits house demolition as a means of collective punishment. On the specific level it was argued that this case concerned a three story building while the apartment designated for demolition was located on the middle floor, and that as a result of the demolition, it was so argued, irreversible harm could be caused to the additional apartments; An engineering opinion supportive of the above was attached to the petition. It was thereafter argued that Harub resided in the ground floor apartment and that the middle floor consisted of two apartments, and hence the forfeiture and demolition order which was issued for the middle floor in its entirety was too broad and disproportionate. It was also argued in this context that on February 2, 2016, on or about 03:15 am soldiers arrived to the home of petitioner 1, woke up the inhabitants of the house and started to drill holes in the walls in preparation for the demolition; although a letter dated February 1, 2016, which denied petitioner's objection against the mere demolition, specifically stated that the realization of the demolition would commence on Thursday February 4, 2016 at 17:00. After the petitioners turned to the respondent on this issue, they were told that the tests were made in a bid to examine other demolition methods by engineering devices, since the specific method for the demolition of the house had not yet been approved. It was argued that the above indicated that there was no room to issue the order for the demolition of the apartment while it was evident that the demolition was based on a problematic factual basis and while no decision regarding the demolition method had yet been made, and particularly, it was so argued, while the respondent insisted on his refusal to transfer to the petitioners the engineering opinion based on which he intended to demolish the apartment. In the hearing it was added in this context that the engineering opinion was not privileged and therefore there was no preclusion which prevented its transfer to the petitioners, and we assume that it was transferred or will be transferred without delay. It was further argued, in writing and verbally, that the respondent did not substantiate the deterrence argument specifically with respect to Harub, since in his interrogation by the police he was not asked whether he would have refrained from committing the

killings had he known that his family home would be demolished, and that this alone was sufficient for the revocation of the demolition order which was issued.

3. In its response the state argued that there was no room to consider the arguments regarding the general lawfulness of the house demolition measure under international law as well as under domestic law, in view of the fact that said arguments have been repeatedly been denied by this court many times, including in recent cases. With respect to the specific arguments – it was argued that there was no basis to the argument that Harub resided in another apartment rather than in the apartment which was designated for demolition, in view of the fact that a visit was conducted on scene and it was found that the apartment on the middle floor served as his residence; in the hearing the state legal counsel clarified that an Israel Security Agency (ISA) coordinator interrogated the family which informed that Harub's apartment was located on the middle floor, whereas the ground floor was used as a storage house. With respect to the argument that the floor consisted of two apartments, it was argued in the hearing that said argument had no merit, in view of the fact that the floor consisted of one apartment which had several bed rooms, rather than two apartments. With respect to the peripheral damage to the other apartments it was argued that it was not planned to demolish the apartment by detonation but rather by manual demolition and therefore no concern for such damage existed. As to the arrival of the forces to petitioners' apartment before dawn for the purpose of making preparations towards the demolition it was stated that there was no dispute that the manner of operation of the forces was problematic, that it was clarified to them and that they were given instructions according to which such incidents were not to recur; however, this did not suffice to cause the revocation of the demolition order. It was also argued that according to information which was in respondents' possession, Harub's family members expressed support in his actions and therefore there was no room to restrict the order and limit it to sealing or partial demolition. With respect to the deterrence arguments, in the hearing an updated opinion of the security forces was submitted to substantiate the argument that the house demolition measure had the power to deter potential perpetrators, as well as an opinion concerning the recent security situation in the Jerusalem area.

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4. In the written petition, petitioners' arguments were made mainly on the general level, namely, against the lawfulness of the use of the house demolition measure. It was argued that the measure was contrary to international law and therefore should not be used; and that its deterring benefit was not proved which also reinforced the conclusion that the use of such measure should be avoided. On the specific level of the petitioner it was argued that despite petitioners' counsel requests of the state to receive the memoranda from Halil's interrogation, they were not transferred to him. In the hearing petitioners' counsel added that two days before the hearing in the petition the memoranda were transferred to him which indicated that Halil had mental problems and that such problems could have possibly affected his actions; hence, the house demolition measure should not be used while the deterring argument was not relevant in view of the fact that the case at bar concerned a perpetrator who did not act for nationalistic motives, but rather as a result of his mental condition.

5. In its response the state argued, like it did in the previous petition, that there was no room to consider the arguments about the lawfulness of the measure in view of the fact that such arguments had already been raised and denied in the past; in addition, as aforesaid, in the hearing the aforementioned opinion was submitted to substantiate the deterrence argument. With respect to the argument about Halil's mental condition it was argued in the hearing that said argument was not raised in the past and it was therefore difficult to respond to it; however notice on behalf of the Israel Prison Service was submitted which indicated Halil denied psychiatric past and did not have psychiatric history.

**Words of the families of the victims**

6. It should also be noted that in the hearing in HCJ 967/16 spoke, after permission was granted, the aunt of the late Ezra Schwartz and the sister of the late Rabbi Don, that as recalled, Harub is accused of their killing, and they submitted to us letters from Ezra Schwartz' mother and from Yaakov Don's wife. The spirit of the things was a request from this court to enable the security forces to demolish Harub's home, not out of revenge but for deterrence purposes, so that similar cases would not recur in the future. In HCJ 968/16 we heard the brother of the late Reuven Aviram who had a similar message. We explained to the families that without derogating from their great pain and agony, which we whole heartedly shared, the issue which we had to consider was the deterring basis rather than punishment which was considered by another forum, the criminal one.

**Deliberation and Decision**

7. Following our review of petitioners' arguments, the state's response and the material which was attached and after we heard the parties in the hearing and reviewed the opinion of the ISA, we decided not to accept the petition. With respect to the general arguments concerning the lawfulness of the measure of house forfeiture and demolition by virtue of Regulation 119 – these arguments have just been raised and denied by this court only recently several times and there is no room to revisit them in view of the fact that no change of circumstances occurred which justifies it (HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (2014) (hereinafter: **HaMoked**); a further hearing in this judgment was denied (HCJFH 360/15 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (November 12, 2015)); see also **Sidr**, paragraph 6, HCJ 7040/15 **Fadel Mustafa v. Military Commander of the West Bank Area**, paragraphs 25-26 of the judgment of the President (November 12, 2015)(hereinafter: **Mustafa**); and in contrast, see the minority opinion of my colleague Justice **M. Mazuz** in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015)(hereinafter: **Abu Jamal**). In addition, see the comments of my colleagues **E. Hayut, U. Vogelman and Z. Zylbertal**, in a number of different judgments on this issue, according to which once the court meticulously examined an issue which was submitted to it, its conclusion binds all, lest *in lieu* of a court of law we shall turn into a court of justices, and the meaning of the above is clear (see **HaMoked**, paragraph 1 of the opinion of Justice **Hayut,** HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank**, paragraph 6 of the opinion of Justice **Vogelman** (October 15, 2015); **Abu Jamal**, paragraphs 2-4 of the opinion of Justice **Zylbertal**; and see also HCJ 8567/15 **Halabi v. Commander of IDF Forces in the West Bank**, paragraph 13 (December 28, 2015)(hereinafter: **Halabi**)).

8. At the same time we wish to emphasize once again what we emphasize in each such case that the measure of sealing or demolition of homes is used for deterrence purposes only and not as a punitive measure, although it cannot be denied that it also causes proprietary damage to the family members who may not be involved in terror (HCJ 698/85 **Dejales v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 40(2) 42, 44 (1986); HCJ 4772/91 **Hizran et al. v. Commander of IDF Forces,** IsrSC 46(2) 150 (1992); HCJ 8084/02 **Abassi v. GOC Home Front Command**, IsrSC 57(2) 55, 60 (2003); HCJ 5290/14 **Qawasmeh v. Military Commander for the West Bank Area**, paragraph 23 (2014); HCJ 4597/14 **'Awawdeh v. Military Commander for the West Bank**, paragraph 19 (2014); **HaMoked,** paragraph 17; **Halabi**, paragraph 7)). It is not easy for any of us to try these cases, and I am certain that the same applies to the security and legal agencies of the respondents; the magnitude of security events which we encounter at this time, more forcefully emphasizes the fact that the need to create deterrence is genuine and substantial. The up-to-date opinion which was submitted by the ISA indicates, without going into detail for reasons of privileged sources and identities, that the measure of house demolition does essentially have a real deterring effect upon potential perpetrators who avoid such terror activities due to the concern of demolition. As was held in the past by this court, although exceptions may occur and although the terror which we currently encounter has not yet been eradicated, we are confident that the security forces will

incessantly continue to examine the effectiveness of the procedure and it seems that this route is actually being followed (see **HaMoked**, paragraph 27; **Mustafa**, paragraph 27; **Abu Hashiyeh**, paragraph 19), and the above also applies to the opinion. At this time, what we saw suffices to establish the deterrence argument as argued by the respondents.

And note well. We cannot accept the argument of petitioners' counsel in HCJ 967/16 according to which the respondent must prove that the deterrence is indeed effective in the **subjective** and specific case, by having the perpetrator interrogated by the police and by posing the question of whether the demolition of his home would have deterred him from committing the attack. Obviously, a perpetrator who decided to commit a terror attack and take the lives of the innocent, said perpetrator was not deterred in any way, including by the possibility that his family home would be demolished; he regarded himself as a "shahid", who approaches other, higher spheres. However, even if the test is applied on specific cases – see Mustafa, paragraph 29; Abu Hashiyeh, paragraph 19 – we are concerned with an **objective** rather than with a subjective test, namely, we must ask whether the measure can deter individuals such as the perpetrator who will reconsider their actions before they commit such an atrocious deed. As aforesaid, the opinion which was presented to us sufficiently substantiates the argument at this time with respect to the various cases which were described therein. Therefore, **Harub**'s answer to his interrogators (interrogation dated November 22, 2015, three days after the attack), in which he said in response to a question posed to him that should he be released he would "do the same thing, with God's help this time the shahada will be complete and more Jews will be killed" (page 4). This answer makes no difference in the overall context. The same applies to **Halil**'s testimony dated November 20, 2015, a day after the attack, who wanted to die as a shahid to "finish with this life…", and when asked why he decided to kill Jews he said "if I commit suicide I will go to hell and this is contrary to the spirit of Islam, and if I kill a Jew and I am killed I will go to heaven" (page 3).

9. As to the specific circumstances: **with respect to petitioners' case in HCJ 967/16 -** - as aforesaid, the main specific argument is, once the argument that he did not live on that floor was refuted, that Harub's apartment occupies only part of the middle floor rather than the entire floor, and therefore at the most only said part should be demolished. In the hearing – as aforesaid – we were presented with a document on behalf of the ISA which visited the building being the subject matter of the petition immediately after the attack. As stated therein, the floor which served as Harub's residence consists of one apartment comprising of two bedrooms, a living room, entrance hall and two toilettes; Hence, *albeit* petitioners' argument, it seems from the drawing of the apartment that we are concerned with one apartment which was used *inter alia* by Harub, rather than with two separate apartments. Accordingly, there is no room for a partial demolition of the part since we are concerned with one apartment which served as the residence of Harub, who killed three and injured seven (see **Halabi**, paragraph 10; HCJ 7040/15 **Fadel Hamed v. Military Commander of the West Bank Area** (November 15, 2015), paragraphs 23-24; HCJ 10467/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1) 810, 814 (2003)). However, we wish to reiterate in this context that the security forces should not have entered the family home at dawn, several days before the date which was scheduled in the decision which denied their objection, for the purpose of making preparations towards the demolition; the respondents undertake that such conduct would not recur, which undertaking is recorded by us. With respect to the argument that peripheral damage may be caused as a result of the demolition, it was clarified by the respondents that they did not intend to detonate the apartment but rather to demolish it manually, and hence, there was no concern for peripheral damage; special care must be applied, and in any event, if damage is caused, the door for compensation is not closed (see **Sidr**, paragraph 9; **Mustafa**, paragraph 58).

10. As to the petitioners in HCJ 968/16 – as recalled, the main specific argument is that Halil was mentally disturbed and that the attack might have been committed against this backdrop rather than

for nationalistic reasons. A perusal of his statement to the police indicates *prima facie* – in the part which cited above – that Halil wanted to commit suicide and did what he did in a bid to die as a "shahid" and go to heaven, instead of committing suicide which would have caused him to go, according to his belief, to hell. We are of the opinion that this does not suffice for having the demolition order revoked. **Firstly**, the mere desire of Halil to die as a shahid – "and kill any Jew who crosses my way" in his words (***ibid***) – establishes a nationalistic motive for Halil's actions; see and compare **Abu Hashiyeh**, paragraph 32. **Secondly**, a medical psychiatric document dated December 1, 2015, on behalf of the Israel Prison Service (IPS) which was presented to us indicates, as aforesaid, that Halil himself denied thereafter any psychiatric history and also denied that he wanted to commit suicide; indeed, his learned counsel presented a medical document issued by a Palestinian psychiatrist dated December 10, 2015, which was given at the request of the family, regarding complaints of fatigue, sleep deficiency and headaches and aggressive social behavior, as a result of which he was given medication against personality disorder and restlessness; all of the above for about four months from January through April 2014. However, this document does not describe a psychotic condition or anything of that sort. In addition, an IPS examination indicates that there is no evidence of an active psychotic or effective condition, or of dangerousness. The above sufficiently establishes, to the extent required when administrative evidence is concerned, that Halil did what he did – causing the death of two and the injury of an additional person – out of a nationalistic motive. Therefore there is no reason to intervene in respondent's decision to use the exceptional measure of house demolition by virtue of Regulation 119.

11. In shall end by bringing a citation from my judgment in **Halabi**, paragraph 13 which are relevant to the case at bar:

> Neither one of us likes the issue of house demolition, to say the least, and it has been repeatedly said in our judgments, including the spirit arising from current judgment and the policy requires constant review and constant supervision as to the gains of deterrence… But we sit amongst our people in the current threatening everyday reality, and the security agencies – the GOC Central Command who decides and signs affidavits, as well as other officers like him, the Attorney General and the State Attorney's Office, and our basic assumption is that the position is brought to us following deliberations with the Military Advocate and his team and the political level in an affidavit of the Cabinet Secretary - believe not only in the lawfulness of the measure but also in its specific necessity; we cannot assume that things are made only to appease public opinion following severe attacks. We found no clear reason to say that their positions and affidavits have no merit.
>
> This is with respect to the security considerations. With respect to the balancing between security considerations and violation of the rights of the inhabitants who reside in the house – my opinion is that despite the intrinsic and agonizing difficulty – **if the life of one person, the future victim, is saved, and also – indeed – the life of the deterred perpetrator, following the deterrence achieved by the demolition** (see **Mesilat Yesharim**, Rabbi Moshe Haim Luzato, Italy-Holland-Eretz Yisrael the 18th Century, end of chapter 19), **and all the more so, if more than one is saved, since perpetrators are prepared to injure many people including the elderly and young infants – then the price of the unfortunate demolition, which is an act against property rather than against a person, will not be unjustified.** We are concerned with human

lives, not less, and the **sanctity of life** should have top priority on the moral-ethical level; As was long ago stated by Justice Turkel:

> The prospect that a demolition or sealing of a house shall prevent future bloodshed compels us to harden the heart and have mercy on the living, who may be victims of terrorists' horror doings, more than it is appropriate to spare the inhabitants of the house. There is no other way." HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, paragraph 3 (2003); see also paragraph 4 of the opinion of Justice Sohlberg in **HaMoked**).

> And it should be remembered, the inhabitants of the house will not be physically injured God forbid. Until it is possible to take another route the authorities must make any effort to limit the harm by the mere decisions, by proportionality according to the circumstances and by compensating the neighbors to the extent their property is God forbid damaged. And finally, I suggest that the authorities in their deliberations also take into consideration the comments of Justice Amit in paragraph 7 of his judgment in **Abu Jamal**. Hence, ended but not completed.

12. In conclusion, we do not accept the petitions. The interim orders will expire within one week from the date of this judgment to enable the families to make the necessary arrangements.

Given today, 5 Adar A 5776 (February 14, 2016).

Deputy President Justice Justice