At the Supreme Court Sitting as the High Court of Justice

HCJ 5141/16
HCJ 5506/16

Before:	**Honorable Justice E. Hayut** **Honorable Justice U. Vogelman** **Honorable Justice U. Shoham**
The Petitioners in HCJ 5141/16:	1. **_____ Mahamara** 2. **_____ Mahamara** 3. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
The Petitioners in HCJ 5506/16:	1. **_____ Mahamara** 2. **_____ Mahamara** 3. **_____ Mahamara** 4. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
	v.
The Respondent in HCJ 5141/16:	1. **Commander of Military Forces in the West Bank** 2. **Attorney General**
The Respondents in HCJ 5506/16:	1. **Commander of Military Forces in the West Bank** 2. **Legal Advisor for the Judea and Samaria Area**
	Petitions for *Order Nisi* and Interim Order
Session date:	8 Tamuz 5776 (July 14, 2016)
Representing the Petitioners in HCJ 5141/16:	Adv. Labib Habib
Representing the Petitioners in HCJ 5506/16:	Adv. Michal Pomeranz; Adv. Noa Amrami; Adv. Anu Deuelle Luski

Representing the Respondents in HCJ 5141/16 and the Respondents in HCJ 5506/16:	Adv. Avishai Krauss; Adv. Avinoam Segal-Elad

Judgment

Justice U. Shoham:

1. On June 8, 2016, a murderous attack was carried out in the "Sarona" complex, Tel Aviv, in which four Israelis were killed and 41 Israelis were injured, suffering various degrees of injuries. It was the most severe and deadly attack since the current wave of attacks has begun.

2. The petitions at bar concern forfeiture and demolition orders which were issued by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119** or **the Regulation)**, against two dwellings located in Yatta village in the Hebron area (hereinafter: the **village**), which served as the residence of the perpetrators who carried out the attack. The orders concern the second floor of a dwelling in the village which served as the residence of Haled Muhammad Musa 'Eid Mahamara (hereinafter: **Haled**) who is the son of petitioner 1, and the nephew of petitioner 2 in HCJ 5141/16; and two floors, the first and third floors, in a dwelling in Khirbat Raq'A , located near the village. The third floor served as the residence of Muhammad Ahmed Musa 'Eid Mahamara (hereinafter: **Muhammad**), who is Haled's cousin and the son of petitioners 1 and 2 and the brother of petitioners 3 and 4 in HCJ 5506/16. The forfeiture and demolition order in HCJ 5141/16 was issued on June 22, 2016, and the forfeiture and demolition order in HCJ 5506/16 was issued on July 6, 2016, both by Major General Roni Numa, Commander of IDF Forces in the Judea and Samaria area (hereinafter: the **military commander**). Each one of the orders noted, inter alia, that "this step is taken since the person referenced above executed on June 8, 2016, together with another perpetrator, a shooting attack in the city of Tel Aviv, in which they killed four persons" [this paragraph appears in both orders since, as aforesaid, Haled and Muhammad were involved in the same attack in the "Sarona" complex, Tel Aviv].

The Petitions

3. The petitions at bar were filed by the family members of each one of the perpetrators, having a connection to the dwellings against which the above mentioned orders were issued. Petitioner 3 in HCJ 5141/16 and petitioner 5 in HCJ 5506/16 is a registered not for profit association "**HaMoked: Center for the Defence of the Individual**", which is represented, together with the other petitioners, by Advocate Labib Habib, in HCJ 5141/16, and by Advocates Noa Amrami, Michal Pomeranz and Anu Deuelle Luski, in HCJ 5506/16. The petitioners argue that the decisions of the military commander, being the subject matter of the forfeiture and demolition orders, should be revoked, and in this context they raised general arguments of principle, as well as arguments pertaining to the

specific circumstances of each one of the cases. I shall shortly specify the general arguments which were raised in the petitions, and thereafter I shall discuss petitioners' specific arguments.

General arguments which were raised in both petitions

4. On the general level it is argued, in both petitions at bar, that Regulation 119 is contrary to international humanitarian law which constitutes the only normative basis for the exercise of the powers of the military commander in an occupied territory, and violates several main principles of international law, particularly, the prohibition against collective punishment. The petitioners referred, *inter alia*, to Articles 33 and 53 of the Fourth Geneva Convention (hereinafter: the **Convention**), to Article 75 of the first Protocol of the Convention, and to Articles 46 and 50 of the Hague Regulations, which prohibit the use of collective punishment and the demolition of houses and property of protected persons. In addition, the petitioners relied on different provisions in various UN covenants, such as the Covenant on Civil and Political Rights, and the Covenant on Social and Economic Rights, which according to petitioners also prohibit the taking of collective punishment measures, such as the use of Regulation 119. It was further argued that the decisions made by this court in HCJ 434/79 **Sahweil v. Commander of Judea and Samaria area**, IsrSC 34(1) 464 (1979), and in HCJ 897/86 **Jaber v. GOC Central Command**, IsrSC 41(2) 522 (1987), according to which "**the power pursuant to the above Regulation 119 constitutes domestic law which governs and applies to the Judea and Samaria area and which was not revoked in the era of the previous rule or in the era of the military rule, and no legal reasons were presented to us based on which it should be currently regarded as void**" - are legally erroneous, in view of the fact that according to the petitioners, domestic law, including Regulation 119, cannot override the rules of international law. The petitioners use the opinion given by legal scholars such as: Prof. Yuval Shani; Prof. Mordechai Kremnitzer; Prof. Orna Ben Naftali; and Prof. Guy Harpaz, to support their arguments on the general level.

5. The petitioners argued further that the use of Regulation 119 for the demolition of dwellings of suspects of terrorist activity is not proportionate, since this measure causes harm to innocent individuals living in the same house, and particularly when small children live in these houses. The dis-proportionality is intensified, according to the petitioners, as it has been proved that the house demolition measure does not achieve the desired deterrence – namely, deterrence of potential and actual perpetrators from executing additional attacks. In fact, the petitioners argue that house demolition achieves the opposite result, namely, "**the increase of hostility and hatred**".

According to another argument which was raised by the petitioners, the respondent disregards his obligation to examine, from time to time, the effectiveness of the application of Regulation 119, as well as the rational connection between the use of the Regulation and the desired deterrence. It was also argued that the conviction and punishment of Haled and Muhammad in the framework of the criminal proceedings currently pending against them constitute sufficient deterrence, and that in their case there is no need to use Regulation 119 as well. Finally, in the context of the general arguments, the petitioners raised the argument of discriminatory exercise of power

between Palestinian residents and Jewish perpetrators, such as the murderers of Muhammad Abu Khdeir and the murderers of the Dawabshe family members in Duma village, whose houses were not demolished.

The Petition in HCJ 5141/16 – Specific Arguments

6. The petition in HCJ 5141/16 which was filed on June 27, 2016, stated that shortly after Haled's arrest, on the night between June 14, 2016, and June 15, 2016, military forces arrived to the family house of petitioner 1, and gave notice of the intention to forfeit and demolish the second floor of the building, which served as Haled's residence. On June 19, 2016, the petitioners filed an objection which was denied on June 22, 2016. In response to the objection it was stated that Haled admitted that he had executed the attack in the "Sarona" complex together with the other perpetrator Muhammad, and that all other details of the investigation were under a non-publication order. The denial letter stated further that the demolition of the second floor would be carried out by mechanical engineering equipment, and would be monitored by an engineer who would supervise the works and ascertain that no damage would be caused to the other parts of the building which were not designated for demolition. With respect to the dwelling being the subject matter of the demolition order it was stated that it was an apartment consisting of about 200 square meters, located on the second floor of a two story building. The apartment serves as the residence of petitioner 1 and his wife, Haled's parents, who live there together with their six children, five of whom are minors. The ground floor apartment serves as the residence of the family members of Ibrahim, Haled's uncle, petitioner 2 in HCJ 5141/16. It was also stated that the medical condition of Haled's father, who is a lawyer, had deteriorated, and that he has therefore moved his office to his apartment, which is located, as aforesaid, on the second floor.

7. The petitioners in HCJ 5141/16 raised in their petition the following arguments: **firstly**, it was argued that there was no residence connection between Haled and the apartment being the subject matter of the demolition order. Therefore, according to petitioners' argument, the order was issued without authority. As specified in the petition, two years and a half before his arrest Haled lived in Jordan where he was studying, and he used to come to the area to visit his family members in the village, for several short visits, in a frequency of about twice a year. His arrival to the family house in the period which preceded his arrest, stemmed, according to the petitioners, from his decision to put his studies on hold and work in Israel, without lawful permit, for a few months.

In support of their argument regarding absence of residence connection, the petitioners rely on HCJ 1125/16 **Mar'i v. Commander of military forces in the West Bank** (March 31, 2016) (hereinafter: **Mar'i**), where the court accepted the argument that no residence connection existed between an adult student who lived in a rented apartment in students' dormitories and the house of his family. **Secondly,** it was argued that the hearing in petitioners' case was flawed, due to the fact that, according to them, the decision of the military commander was delivered to them expeditiously, without a proper examination of all relevant considerations which should have been considered, and without providing information regarding the demolition plan and its ramifications, and details regarding Haled's interrogation. **Thirdly**, the petitioners argued that Haled's culpability for the attack was not adequately proved as required for the purpose of having

an order issued pursuant to Regulation 119. **Fourthly**, it was argued that "the petitioners took no part in the deeds with respect of which the order was issued", and that therefore they are being punished at no fault on their part. In addition, the petitioners expressed the concern that the entire building would collapse if the demolition of the second floor is approved.

8. On July 12, 2016, the petitioners in HCJ 5141/16 were granted leave to attach an opinion of an engineer on their behalf, Nasser Abu Lil (hereinafter: the **engineer Abu Lil**), with respondents' consent. The opinion of the engineer Abu Lil states, *inter alia*, that "**the demolition of the apartment located on the upper floor of the Mahamara family with heavy mechanical engineering tools will cause serious damage to the ground floor apartment.**"

The petition in HCJ 5506/16 – Specific Arguments

9. The petition in HCJ 5506/16 which was filed on July 11, 2016, argues that on June 30, 2016, the petitioners learnt of the intention to forfeit and demolish the first floor, with the exception of the candy factory located therein, and the third floor of a building located in Khirbat Raq'A, near Yatta village. On July 4, 2016, an objection was submitted by the petitioners to the respondents, which objection was denied on July 6, 2016. The denial letter stated that Muhammad admitted in the facts attributed to him in the indictment, and it was clarified that the demolition of the house would be carried out by mechanical engineering equipment under the supervision of a licensed engineer from the engineering corps, "**seeing to that no damage is caused to the other parts of the building**".

10. With respect to the building being the subject matter of the demolition order, the petitioners noted that the entire building was owned by petitioner 1. The first floor of the building serves as the residence of Muhammad's parents, petitioners 1 and 2, who reside there together with four of their eight children. Adjacent to their apartment on the first floor there is a large warehouse which serves as a candy factory, from which the family gains its livelihood and which is owned by the family. On the second floor, the left apartment, serves as the residence of Muhammad's brother – Hussam, petitioner 3, and the right apartment is designated to serve as the residence of another brother of Muhammad – Samir, petitioner 4, both of them together with their spouses. The petitioners argue that the third floor constitutes an independent residential unit in which Muhammad resided alone. It was also argued that Muhammad lived in Jordan between the years 2013-2015, and returned to the village about a year and a half ago. It was stated in this context that "**when Muhammad was home, he spent most of his time in his apartment on the upper floor and almost never visited his parents on the first floor.**"

11. In their petition, the petitioners raised several arguments regarding the demolition order being the subject matter of the petition. **Firstly,** it was argued that the forfeiture and demolition order which was issued by the military commander did not meet the proportionality tests due to the concern that the realization of the demolition order would cause damage to the two apartments located on the second floor, as well as to the candy factory located on the first floor. It was further argued, in this context by the petitioners, that no engineering opinion was given to them by the respondents, but rather, only "**a laconic explanation on how the demolition will be carried out" Secondly**, the

petitioners emphasized that they had no knowledge whatsoever of Muhammad's plans and that had they known of his intentions ahead of time, they would have acted immediately to prevent him from taking part in the attack. It was argued, in this context, that on June 12, 2016, petitioner 1 was arrested, under the suspicion that he had assisted his son. However, in his interrogation he claimed that he was innocent. **Thirdly**, the petitioners argued that there was no residence connection between Muhammad and the apartment located on the first floor of the building. The petitioners argued further, in this context, that the fact that the respondents did not establish a residence connection between Muhammad and the apartments located on the second floor, supports their argument regarding absence of residence connection to the first floor as well. To substantiate their argument, the petitioners referred to HCJ 1624/16 **Hamed v. Military Commander of the West Bank Area** (June 14, 2016) (hereinafter: **Hamed**), where the perpetrator lived on the upper floor of a building which was owned by his family. In said case the military commander decided to demolish the upper housing unit only, which decision was approved by this court. The petitioners argued further that Muhammad's residence connection to the entire building was weak in view of the fact that his permanent residence was in Jordan, and in view of the fact that Muhammad did not directly leave the house to carry out the attack, but rather used a hiding place, namely, "**the house was not used to store firearms or to conspire together with others**".

12. On July 12, 2016, the petitioners in HCJ 5506/16 were granted leave to attach an opinion of the engineer Abu Lil, with respondents' consent, which stated, *inter alia*, that "**the contemplated demolitions and particularly the demolition of the parents' apartment on the first floor using heavy mechanical engineering tools will cause serious damage to the two apartments located on the second floor**."

13. In the context of the petitions an interim order was also requested, prohibiting the forfeiture and demolition of the above buildings until a decision in the petitions was made. On June 27, 2016, an interim injunction was given by Justice **Z. Zylbertal** ordering the respondents to refrain from the forfeiture and demolition of the building being the subject matter of the petition in HCJ 5141/16, until another decision was made. In my decision dated July 11, 2016, I ordered to stay the execution of the demolition order which was issued in the framework of the petition in HCJ 5506/16. On the same day, my colleague, Justice **E. Hayut**, decided that the petitions would be heard jointly.

Respondents' Response to the Petitions

14. The respondents submitted their response to the petitions in HCJ 5141/16 and in HCJ 5506/16, on July, 12, 2016, and on July 13, 2016, respectively. In the beginning of their response, the respondents described the severe attack, being the subject matter of the petitions at bar, and pointed out that the investigation material indicated that the perpetrators, Haled and Muhammad, together with another person (hereinafter: the **defendants**), conspired to carry out an attack for the purpose of killing Jews whoever and wherever they may be. For the purpose of carrying out their plan, the defendants equipped themselves with firearms and acquired materials which would enable them to present themselves as Israeli businessmen. In addition the defendants took with them rat poison and planned to soak therein knives which they had in their possession and use them to stab Israeli citizens. The defendants practiced shooting on different occasions,

to verify that the firearms in their possession were in good working order. After defendants' original plan to carry out an attack in a railroad car did not materialize, Haled and Muhammad arrived on June 8, 2016, at 20:53 to Tel Aviv. On or about 21:30, the perpetrators entered the coffee shop "**Max Brener**" located in the "**Sarona**" complex, and sat at one of the tables. Suddenly, Haled and Muhammad rose from their chairs, pulled out the firearms from the bags they had in their possession and started shooting around indiscriminately, "**with the intention to kill as many Israelis as possible**". During the shooting, and after they had injured several civilians, the shotgun of one of the perpetrators jammed, and they started to run away. Four Israelis were killed in the murderous attack: the late Ido Ben Ari, the late Ilana Nav'eh, the late Milla Mishayev and the late Michael Feigeh. In addition, 41 civilians were injured, four of whom were particularly badly wounded: Assaf Bar, Hagai Klein, Pablo Safran and Tal Ben Artzi.

15. In their response, the respondents emphasized the continuous deterioration in the security situation and the constant increase in terror activity against the citizens and residents of the state of Israel, commencing from 2013 until these present days. Terror activity takes place both within the territory of the state of Israel including East Jerusalem, and in the Judea and Samaria area (hereinafter: the **Area**). The respondents attached to their response a table specifying the attacks which were carried out since the beginning of 2014, and until the date of the response. Against the backdrop of said security situation, the respondents are of the opinion that the exercise of the power pursuant to Regulation 119 against the buildings which served as the residence of Haled and Muhammad who were involved in the most severe and deadly attack in the present wave of terror, "**is essential, for the purpose of deterring additional potential perpetrators from executing additional similar attacks.**"

16. With respect to the general legal arguments which were raised by the petitioners, the respondents argued that these arguments were discussed by this court many times and were repeatedly rejected by it. The respondents referred, *inter alia*, to the judgment of the Deputy President **E. Rubinstein**, which was given recently (HCJ 2828/16 **Zid v. Commander of IDF Forces in the West Bank** (July 7, 2016) (hereinafter: **Zid**)) and in which it was noted that "**these arguments were raised in many petitions and were rejected on their merits; the vast majority of which recently, and hence, there is no room at this time to re-visit the rule**" (*Ibid*., paragraph 5). In addition, the respondents referred to the judgment in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014) (hereinafter: **HaMoked**), in which the general issues pertaining to the use of Regulation 119 were broadly analyzed. Therefore, the respondents are of the opinion that there is no justification to discuss these arguments again in the context of the petitions at bar.

17. The respondents argued further that the purpose embodied in the exercise of the power pursuant to Regulation 119 is to deter and not to punish. The rationale of using Regulation 119 is based on the assumption that a potential perpetrator may be deterred from realizing his murderous intentions due to the possibility that his family members will be injured, which may prevent the attack. Deterrence is also directed against the perpetrator's family members to the extent they are aware of his plans in order to cause them to take action for the purpose of preventing the execution of the attack. According to the respondents, the injury inflicted upon the individuals residing in the perpetrator's

home does not fall within the realm of collective punishment, but it is rather a by-product which arises from the realization of the deterring purpose of the exercise of the power, as aforesaid. The respondents emphasized that there was no need, according to the applicable rule, to prove that the family members knew or assisted to carry out the attack which was planned and executed by the perpetrator for the purpose of exercising the power pursuant to Regulation 119. The respondents continued to clarify in their response that in view of the severe ramifications arising from the use of Regulation 119, said power was exercised "**only in such severe cases in which the 'ordinary' punitive or deterring methods by their nature cannot provide sufficient and proper deterrence to terrorists and perpetrators in body and mind**." The respondents argued further that the orders in the cases of Haled and Muhammad were issued "**considering the severity of the murderous attack, during which, following detailed planning and preparation, four Israelis were killed in cold blood and others were injured**." The respondents replied to petitioners' argument according to which said measure had no deterring effect and referred to previous judgments given by this court in which it was held, based on professional opinions, that the use of said measure deterred potential perpetrators. The respondents noted in this context that they had in their possession an up-to-date opinion regarding the effectiveness of the use of Regulation 119.

18. With respect to the evidentiary infrastructure which is required for the exercise of the power pursuant to Regulation 119, the respondents noted that the requirement is to administrative evidence, and that in the accumulation of the evidence which lead to the filing of indictments against the two perpetrators and against another person there is more than enough to satisfy the requirement for administrative evidence pointing at the perpetrators' involvement in the attack. The respondents referred, *inter alia*, to perpetrators' admissions in their interrogations, including to Haled's police interrogation dated June 14, 2016; and to Muhammad's police interrogation dated June 9, 2016.

19. In their response the respondents referred to petitioners' specific arguments as specified below:

The Petition in HCJ 5141/16

(a) As to the argument that Haled's family members did not know of his intentions to carry out the attack, the respondents referred to the rule customarily applied by this court, according to which the military commander is not required to prove that the perpetrator's family members were aware of his plans, for the purpose of using Regulation 119. However, the respondents pointed out that in the case at bar Haled's police and Israel Security Agency (ISA) interrogations indicate that his family members were aware of the involvement of their son in negative security activity. Accordingly, for instance, in Haled's police interrogation dated June 16, 2016 (page 3, lines 64-72), he said the following:

Q: Who is Yosef Ismail?

A: **He is a cousin of my father, lives in Yatta, he supports the Islamic state, I sat with him several times and we**

spoke in general about the Islamic state. There are many people in Yatta who support ISIS and wait for the moment that ISIS would arrive to Israel to join them. And one of these persons is Yosef Mahamara Abu Muatsem.

Q: Tell me about your relations with your father and his opinions?

A: Abu from a group known as Jama'at 'Aldawa Waltablia (ascription 'Aldawa). I used to fight with him because **they do not want people to up-rise now but until the 'Mahdi' comes** and it is known that 'Jihad' is a religious obligation and each Muslim ('fared ein') to up-rise "yujahad'., and my father says no 'fared ein' and I always fight with him and once he even hit me" [emphases were added – U.S.].

In his police interrogation dated June 28, 2016, Haled said that he used his uncle's car, petitioner 2, to deal with firearms, and that his father saw him in said circumstances:

Q: You told me that you used the car of your uncle Ibrahim Mahamara [petitioner 2 – U.S.] to deal with firearms, how did your uncle knew that you were dealing with firearms?

A: Once I came to the house and I had two cartridges and my father [petitioner 1 – U.S.] saw me. Thereafter I told my uncle Ibrahim that the things are in the car and before that uncle Ibrahim saw me at Azam's, the guy I bought firearms from, and he knew that we were dealing with firearms.

Q: Your uncle Ibrahim saw the cartridges?

A: I told him that the things were upstairs and he saw me at Azam's and my father saw that I took things down and then my uncle Ibrahim realized that was concealing from my father and also because he saw me at Azam's so he understood that I was dealing with firearms (page 2, lines 35-42).

With respect to petitioner 2, the respondents noted that he was held in administrative detention as of June 10, 2016, due to "**the risk posed by him to the security of the area, after information was received in his matter regarding his involvement in possession and dealing with firearms, as well as information, partially open, which substantiates a suspicion currently under examination regarding his involvement in providing assistance to perpetrators**."

However, the respondents pointed out, to complete the picture that in his ISA interrogation dated June 11, 2016, Haled was asked whether his parents knew of the intention to carry out the attack, and he responded in the negative:

Q: Did your parents know of the attack?

A: No.

Q: Did you speak with your parents about this attack?

A: No.

Q: Why?

A: Because they would have stopped me.

The respondents argue that the above quoted parts indicate that despite the fact that the family members were aware of Haled's extreme views, no steps were taken by them to prevent his involvement in terrorist activity.

(b) The respondents referred to petitioners' arguments regarding the absence of residence connection between Haled and the apartment being the subject matter of the demolition order and emphasized that it should be denied for several reasons: **firstly**, the petitioners do not dispute the fact that Haled returned to reside in Yatta, although he was working unlawfully in Israel, about four months before the attack. The respondents argued, in this context, that the petitioners presented no evidence according to which the center of Haled's life was elsewhere in the relevant period, despite the fact that he lived for about two years in Jordan. **Secondly**, the respondents noted that when Haled was asked in his ISA interrogation dated June 9, 2016, where he was living he said that he was living in the village "**in the apartment of his parents in his own room**". According to the respondents, petitioners' argument according to which Haled left Jordan to save money for his studies is an "outrageous" argument, since the interrogation material indicates that he returned from Jordan for the purpose of executing the attack described above. The respondents argued further that according to the applicable rule, the residence connection which is required for the purpose of using Regulation 119 is not necessarily conditioned on the duration or frequency of the perpetrator's stay in a certain apartment, but rather on the perpetrator's own perception as to where his home is.

(c) With respect to petitioners' argument according to which the demolition of Haled's apartment would damage the entire building and adjacent apartments, the respondents reiterated the content of a letter which was sent to the petitioners according to which "**the demolition of the housing unit will be executed by mechanical engineering equipment, seeing to that no damage is caused to other parts of the building. The demolition will be executed and monitored by a licensed engineer from the engineering corps.**" In addition, the respondents argue that petitioners' claim that their right to be heard was violated has no merit, in view of the fact that they were given the opportunity to submit an objection against the decision, as they actually did. The respondents added further, with respect to petitioners' argument that Haled's culpability for the attack has not been properly proved, that the indictment which had been filed against him constituted a significant administrative evidence which could be relied on for the purpose of exercising the power pursuant to Regulation 119. According to the respondents, the accumulation of the administrative evidence in the case at bar "**is more than enough**" for the purpose of exercising said power, in view of Haled's full admission in his actions, in addition to other supporting evidence. Finally, the

respondents argued that they had in their possession privileged material regarding petitioner 2, which is relevant to the petition at hand.

The Petition in HCJ 5506/16

(a) The respondents referred to petitioners' argument according to which no residence connection existed between Muhammad and the first floor, and according to them said argument should be denied in view of Muhammad's statement in his ISA interrogation dated June 9, 2016, which was recorded in a protocol as follows: "**According to the above** [Muhammad – U.S.] **he slept in the entire house, in different rooms, with his parents and siblings and sometimes on the roof. The above explains it in that he had returned from Jordan and was not organized and therefore was assisted by the family's services**". The respondents argued further that petitioner 4, Muhammad's brother, told the ISA field coordinator who arrived to map the family house on June 19, 2016, that the ground floor served as the central space of the house which was used by all family members, including those who were usually living on the upper floors.

(b) The respondents referred to petitioners' concern regarding the stability of the building, and particularly to the stability of the second floor of the building, reiterating the content of the denial letter which was sent to the petitioners, dated July 6, 2016. The respondents noted in this context that the decision not to demolish the second floor was made "*ex gratia*" although a residence connection between Muhammad and the apartments located on this floor could have existed.

(c) With respect to petitioners' argument according to which the family members were not aware of Muhammad's deeds, the respondents noted that such an awareness was not required for the purpose of exercising the power pursuant to Regulation 119. In addition it was argued that "**it is doubtful whether Muhammad's father, petitioner 1, was not aware of his son's activity, at least in general.**" The respondents based this argument on various statements made by Muhammad in his interrogations, including, the contents of the protocol of his ISA interrogation dated June 16, 2016 (page 4, paragraph 5):

> 1. About a year ago when the above returned from Jordan, **he turned to his father Ahmed Musa 'Eid Mahamara and requested him to assist him financially to obtain firearms for the purpose of carrying out an attack against Israel.** The above requested from his father assistance for the purpose of acquiring weapons, flak jacket and hand grenades.
>
> 2. The father of the above told him that if he was certain that the above would kill at least ten Jews in the attack he would have financed the acquisition but he was positive that the above would fail and therefore the issue was dropped.
>
> 3. The above turned to his father on the issue of obtaining firearms because his father can obtain firearms through his siblings, who

to the knowledge of the above have vast connections to firearms [emphases were added by the undersigned – U.S.].

In said interrogation, Muhammad said that he knew an arms dealer who "**works with his father**" and that he had turned directly to said dealer "**in the presence of his father**", and discussed the issue of firearms with him, including the manufacture of improvised firearms (page 5, paragraph 8). The respondents noted, to complete the picture, that in Muhammad's police interrogation dated June 19, 2016, he denied saying that his father was aware of his intentions to carry out an attack (page 3, lines 66-69), and his father also denied the above in the framework of his ISA interrogation which was conducted on June 10, 2016 (page 3, paragraphs 13-14).

The respondents also noted that they had in their possession privileged information which indicated that "**Muhammad's brother, Samir – petitioner 4, was aware of his intentions to carry out the attack. In addition, the respondents have privileged information regarding the accessibility of Muhammad's father – petitioner 1, to firearms in recent years**."

In view of their response to the two petitions, the respondents argue that there is no cause for intervention in the decision of the military commander to exercise his power pursuant to Regulation 119 against the apartments in which the perpetrators lived. The respondents noted, with regard to the two petitions at bar, that they had in their possession a general opinion regarding the effective use of said Regulation as a deterring measure against potential and actual perpetrators.

Discussion of the Petitions

20. On July 14, 2016, a hearing was held in the above captioned petitions in which the parties reiterated their main arguments and during which the respondents agreed that the hearing would be held as if an *order nisi* had been granted. Advocate Labib Habib, who argued for the petitioners in HCJ 5141/16, emphasized that even if respondents version was accepted, according to which Haled arrived to the area for the purpose of carrying out an attack, still a residence connection did not exist between him and his parents' home, in view of the fact that "**he** [Haled] **did not return to reside in this house but only to carry out the attack and die**". Advocate Habib added, in this context, that no conclusions could be drawn from Haled's statement in one protocol regarding the existence of a residence connection between him and his parents' home, and according to Adv. Habib "**there were dozens of long protocols which we did not receive**." In his argument before us, Advocate Habib referred to the statement of petitioner 1, Haled's father, that "**Jihad could be made**" only after the Mahdi comes, and according to him "**one should learn what it means when the Messiah comes. I am not an expert on these things […] the father opposes this activity and he therefore quarreled with his son and hit his son […] the father was not only indifferent to this act but also opposed the concept of uprising. He believed in [unclear] until God arranges things. This is the belief in the Messiah**."

Advocate Pomeranz who argued for the petitioners in HCJ 5506/16 discussed the involvement of Muhammad's family members in the acts attributed to him and according to her "**the father says in his interrogations that had he been aware of it he would**

have killed his son. He had already thrown his son out of the house due to a family fight. The mother fainted when she heard of the attack." With respect to Samir's statement, Muhammad's brother, that the ground floor was used by all of the inhabitants of the house, Advocate Pomeranz noted that "**my colleagues refer to the mapping which was made by the field coordinator, it is not supported by an affidavit, no summary was attached there is no factual infrastructure. The memorandum of the GOC Central Command cannot express the opinion of the field coordinator**." Petitioners' counsels in both petitions argued further that they did not receive the entire relevant interrogation material, which impinged their ability to represent their clients properly.

21. Advocate Avishai Krauss, who argued for the respondents referred to the arguments of Advocate Pomeranz regarding the mapping which was made by the field coordinator in the context of the building being the subject matter of HCJ 5506/16, and noted that it was "**a summary of the mapping with respect to cooperation with the IDF, an internal "classified" document. The paraphrase is one to one. It is in the house itself, in the framework of the mapping. The coordinator was there with the perpetrator's brother. These are things which were said by Samir**". Advocate Krauss added, with respect to Haled's family knowledge of his deeds that "**in the interrogation itself a confrontation, which was referred to by my colleague, was held between the perpetrator and his father which indicates that the father was perfectly aware of the perpetrator's intentions.**" Advocate Krauss also referred to petitioners' argument according to which they did not receive the entire interrogation material and noted that the relevant interrogation material would be made available to them. However, Advocate Krauss pointed out that the material which had already been transferred to petitioners' counsels provided sufficient evidentiary infrastructure to prove their involvement in the attack.

22. During the hearing we proposed to respondents' counsel, in the context of HCJ 5506/16, to demolish the third floor only without demolishing the ground floor, and the latter replied that he would have to examine this issue with the authorized officials.

In the hearing the following evidence was submitted for our review by the respondents:

(-) A copy of a "facebook" page of Haled's sister, in the framework of HCJ 5i41/16 (hereinafter: the **sister**). Translation of the relevant parts of the facebook page was provided by the respondents later on, and the details will be specified below.

(-) Engineering opinions on behalf of the respondents, which were prepared by Captain Daniel Sasson (hereinafter: **engineer Sasson**) consisting of a detailed discussion of the engineering opinions on behalf of the petitioners.

In the engineering opinion which pertains to HCJ 5141/16, engineer Sasson referred to the concerns of the engineer Abu Lil, that a situation may occur in which "**a ceiling will collapse over a ceiling**". Engineer Sasson noted, in this context, that according to his directives "**a controlled demolition would be carried out of the external and peripheral walls only. In this situation the internal walls and internal columns will**

continue to function. The anticipated damage is the removal of the external supports of the ceiling, which would lead to the collapse of parts of the ceiling over the demolition of the external walls". Engineer Sasson emphasized in this context that in no scenario a situation in which "**a ceiling would collapse over a ceiling**" is anticipated. It was further noted in his opinion that "**In the final stage of the demolition, the central part of the ceiling will remain in place, a crack will be created and plastic parts in some areas of the ceiling, as a result of which the external parts of the ceiling will bend and lean on the area in which the external walls used to be**." Engineer Sasson clarified, in this regard, that in no scenario "**an over-load on the supporting elements of the ground floor**" is anticipated. Finally, engineer Sasson noted that according to his directives, the water tanks which were located on the roof and served the entire building would not be demolished.

In the opinion which pertains to HCJ 5506/16, engineer Sasson referred to the concern which was expressed in the petition, according to which the second floor of building might collapse. The opinion states that the demolition will be carried out in a controlled manner, in the framework of which "**the external and peripheral walls only**" will be demolished "**while the ground floor columns will remain in place and will continue to function**." It was also noted that "**in the areas in which no columns were observed and it seems that the cement wall is the element which carries the load no demolition shall be carried out and the wall will remain in its entirety.**" In addition, an engineer from the engineering corps will be present in the demolition, who will ascertain that no damage is caused to the infrastructures of the building. Based on the above, engineer Sasson clarified that no damage was expected to the second floor. Here also, engineer Sasson noted that he according to his directives, the water tanks which were located on the roof and served the entire building would not be demolished

23. Upon the conclusion of the hearing, a decision was given by us, as follows:

> In view of the agreement which was reached between the parties regarding a review of the interrogation materials, Advocates Habib and Pomeranz will be able to submit their written comments to said material by Sunday July 17, 2016. The time for submission of comments on this issue and on the facebook issue and the engineer's comments is postponed to 17:00. In addition, the respondents will submit their response to our recommendation according to which in the petition in HCJ 5506/16 only the third floor will be demolished and the state will refrain from the demolition of the first floor also until Sunday July 17, 2016 at 17:00. Once all additional data are gathered our judgment in the petitions at bar will be given and no additional hearing will be required.

Additional Developments

24. According to said decision the respondents submitted a complementary statement on July 17, 2016, in which they rejected the court's proposal to demolish the third floor only in the context of HCJ 5506/16, stating as follows: "**Considering the severity of the attack and in order to achieve the required deterrence against additional potential**

perpetrators, it is required to forfeit and demolish the first and third floors of the building being the subject matter of the petition […] the demolition of the third floor only – which stands on a certain part of the house, which is in fact smaller than the house – will not achieve the required deterrence under the circumstances of such a severe attack." The respondents pointed out that all floors of the building were inter-connected with one internal staircase, and that there was no separate access to the third floor of the building. Namely, according to the respondents "**it is one structure which serves all members of the family**", and petitioners' attempt in HCJ 5506/16 to present the third floor as a separate housing unit was artificial and did not reconcile with the existing administrative evidence. The respondents argued further that the case at bar differed from **Hamed**, in which case the third floor which was the subject matter of the demolition order, functioned as a separate housing unit, and served as the residence of the perpetrator. According to the respondents, in the case at bar, we are not concerned with a separate housing unit at all. In **Hamed** there was no evidence which created a link between the perpetrator and the ground floor, while in the case at bar, according to the existing evidentiary infrastructure, the house is used by all members of the family. The respondents attached, in the context of their complementary statement, a "summary of the open mapping" dated June 19, 2016, which stated that Samir, Muhammad's brother, was interrogated about the usage of the apartments in the family house. As indicated in said document, the ground floor was used by all members of the family.

25. In addition, the respondents attached a translation of the facebook page of Haled's sister. The attached material indicates that the sister's facebook consists of a publication ("**post**") of another person dated June 9, 2016 (one day after the attack), apparently shared by the sister. Haled's photograph is attached to the post and the sister wrote in connection with said publication "This was said about my brother". The post which was written by someone else consists of a verse which according to the respondents "**characterizes perpetrators**" which says "**Among the believers there are men who did what they promised to Allah, some of whom kept their vows and some of whom are still waiting**" The post continues to state as follows:

> A day which will be remembered by the entire world. The day of the attack of the shahids. A day in which every living person on earth will remember that there are free men who oppose oppression, humiliation and occupation. A day which with Allah's help will re-occur each and every day until Palestine is liberated. Today the two cousins Haled Mahamara and Muhammad Mahamara executed an attack which shocked the foundations of a place called 'Israel' […] The shahid Haled was wounded and Muhammad Mahamara was arrested. This is a message to the entire world, that the next generation is the generation of liberation. They will give their soul and everything they cherish for the liberation of their country and the triumph of justice […] Bless you for what you did and may Allah set you free. Blessed are your parents who brought you to the world because they brought to the world a man in the full sense of the word.

Among other things, the sister's facebook page indicates that on June 9, 2016, one day after the attack, the sister uploaded a photograph of Haled and wrote: "**Be well our hero, with Allah's help you will be fine, you and Muhammad. My beloved brother Haled, I wish you health**." On another occasion the sister shared a photograph from a video of the attack and wrote the following sentence: "**Really, your best guys, dear Yatta and Haled. May God be with you**."

26. In a notice submitted by the petitioners in HCJ 5141/16, where reference was made to the sister's statements, the petitioners noted that the sister neither supported Haled's actions nor attacks in general, but only "**shared information about him and expressed natural feelings of affection and longing written by a sister to her detained and wounded brother**". The petitioners argued further in this context that "**Anyone trying to capitalize on the family's support or knowledge in advance of the son's actions and justify the demolition of the house, must equally refer to the family's lack of awareness and lack of support**." In view of the fact that, as argued, these statements were attributed to Haled's sister and not to any one of the petitioners, a very limited harm to the family should suffice such as, for instance, the sealing of the room in which Haled lived only. The petitioners attached additional statements which appeared on the sister's facebook page, as follows: "**In page No. 1 she shares a news report and writes 'You injured my heart Haled. May God save you and bring you back home'. In page No. 2 the sister describes her yearnings to her brother 'your absence was extended, you who supported me and was dear to me, May God save you and bring you back to my mother and father.' In page No. 3 the sister wishes her mother health and that her son Haled would return to her and to his father'**". The petitioners in HCJ 5141/16 are of the opinion that it is a natural reaction of a sister who expresses yearnings and concern to her detained and wounded brother and that her statements should not be held against her or against the petitioners.

27. The petitioners in HCJ 5506/16 submitted their notice on July 18, 2016, following an extension which was given to them for this purpose. The petitioners argued that it was not practicably possible to refer to the entire documents in Muhammad's interrogation file due to the very short time frame which was established. Therefore, they argued that the court was presented with "**a very partial factual picture**" regarding the residence connection between Muhammad and his parents' house and regarding the involvement of Muhammad's family members in his actions. In addition. The petitioners raised different arguments due to which they are of the opinion that the demolition of the first floor should be avoided. In view of my conclusion on this issue, I found no reason to elaborate on petitioners' arguments in this regard.

Deliberation and Decision

28. After I have reviewed the petitions, respondents' responses and the complementary statements which were submitted by the parties I came to the conclusion that the petition in HCJ 5141/16 should be denied and that the petition in HCJ 5506/16 should be accepted in part.

29. Firstly, it should be clarified that I do not see any reason, in the framework of the petitions at bar, to address the general issues which concern the authority to issue forfeiture and demolition orders pursuant to Regulation 119. The issue was broadly discussed and decided in the past, including, inter alia, in the judgment which was given in **HaMoked** case, and a petition for a further hearing in this matter was denied (HCJFH 360/15 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (November 12, 2015)). In addition, an application to expand the panel which heard the **Zid** case was recently denied (decision of the President **M. Naor** in HCJ 2828/16 **Zid v. Commander of Military Forces in the West Bank** (May 2, 2016)). Reference shall also be made to my statements in HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015)(hereinafter: **'Aliwa**); and in **Hamed,** regarding our obligation to follow the rules which were established by this court and that there is no need to discuss and decide again all general issues concerning the use of Regulation 119 (and see also the words of my colleague, Justice **U. Vogelman** in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015) in paragraph 6 of his opinion; and the words of my colleague, Justice E. Hayut, in paragraph 1 of her opinion in **HaMoked**; and the words of the President **M. Naor** in HCJ 7040/15 **Hamed v. Military Commander of the West Bank Area** (November 12, 2015)(hereinafter **HCJ Hamed**), in paragraph 26 of her opinion, according to which "**judicial criticism over the exercise of the power according to Regulation 119 of the Defence Regulations should focus on the level of discretion**").

30. A known rule is that the military commander must exercise his power according to Regulation 119 in a prudent and limited manner, and make his decisions according to the principles of reasonableness and proportionality, considering the fact that the scope of the power according to the Regulation is very broad and the exercise thereof may have very severe consequences. Therefore several criteria were established by case law according to which the military commander must act in exercising his said power. Firstly, it was held that the military commander may exercise his power pursuant to Regulation 119 only when said measure serves the Regulation's underlying purpose of deterrence. Namely, this Regulation should not be used to punish the perpetrators or their family members. Indeed, in practice, the use of Regulation 119 may injure uninvolved family members, however this is not the underlying purpose of the Regulation (HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 23 (August 11, 2014) (hereinafter: **Qawasmeh**); HCJ 4597/14 **'Awawdeh v. Military Commander of the West Bank Area**, paragraph 19 (July 1, 2014) (hereinafter**: 'Awawdeh**); HCJ 8084/02 **Abassi v. GOC Home Front Command**, IsrSC 57(2) 55, 60 (2003). As aforesaid, the underlying rationale of Regulation 119 is deterrence and it is premised on the notion that a potential perpetrator who knows that the realization of his murderous plan may injure his family members – may be consequently deterred from carrying out the contemplated attack. It was also held that the military commander must interpret the power vested in him under Regulation 119 according to the spirit of the provisions of the Basic Law: Human Dignity and Liberty. Namely, he must ascertain that the acts of demolition or sealing are executed for a proper cause and in a proportionate manner according to the acceptable proportionality tests (HCJ 5696/09 **Mughrabi v. GOC Home Front Command** (February 15, 2012), paragraph 12 of the opinion of Justice **H. Melcer** (hereinafter: **Mughrabi**); HCJFH 2161/96 **Sherif v. GOC Home Front Command**, IsrSC 50(4) 485, 487 (1996); HCJ 9353/08 **Abu Dheim v. GOC Home**

Front Command (January 5, 2009), paragraph 5 (hereinafter: **Abu Dheim**)). In **Hamed** I specified the considerations that the military commander should consider while exercising the power pursuant to Regulation 119, including, *inter alia*, the following considerations:

> The severity of the acts attributed to the perpetrator; the strength of the evidence existing against him; the scope of involvement, if any, of the other inhabitants of the house in the terrorist activity of the perpetrator; whether it is the perpetrator's residence, and to the extent the case concerns a housing unit separate from the other parts of the building one should examine whether the separate unit may be demolished without jeopardizing the other parts of the building or adjacent buildings. In addition, the respondent should take into account the number of people who may be injured as a result of the demolition of the building, particularly when persons who were not aware of the perpetrator's acts are concerned (see also HCJ 1730/96 **Salem v. Commander of IDF Forces in Judea and Samaria**, IsrSC 50(1) 353, 359 (1996) (hereinafter: **Salem**); **Qawasmeh**, paragraph 22).

It was also held that "**Rigid and exhaustive criteria may not be established for this purpose and each case must be considered according to its special circumstances in their entirety**" (Salem, page 359).

31. I shall firstly discuss petitioners' arguments according to which there is no evidence that the use of Regulation 119 achieves the desired deterrence against potential and actual perpetrators and their argument concerning the discriminatory use of Regulation 119. Only recently, in **Zid** (where I was one of the members of the panel) a comprehensive and up-to-date opinion was presented to us, for our review, regarding the effective use of the power according to Regulation 119, which clearly indicates that the exercise of the power has a significant contribution to the deterrence factor in this time in which we witness increased terror activity.
With respect to the argument of discrimination as compared to Jewish perpetrators, it was held that "**the mere execution of hideous terror acts by Jews, such as the abduction and murder of the youth Mohammed Abu Khdeir, cannot justify, in and of itself, the application of the regulation against Jews, and there is nothing in respondent's decision alone, not to exercise the regulation against the suspects of this murder, which can point at the existence of selective enforcement**" (**Qawasmeh**, paragraph 30). Therefore, the discrimination argument should also be denied and it should be reminded that recently a petition was filed by the Abu Khdeir family in which the demolition of the houses of Jewish perpetrators is requested. The petition has not yet been heard.

32. Before I continue to examine petitioners' specific arguments, I shall shortly discuss the security situation which reveals a significant increase in terrorist activity over the last two years. The scope of the attacks as well as the lever of their severity are constantly on the rise. Only recently, two severe and cruel attacks occurred in which the late Halel Yaffa Ariel, a 13 years old girl, was killed while sleeping, and the late Mr. Michael Mark

was killed and his family members were injured from shots which were fired at the family car. In such circumstances, exceptional measures should be taken to create the required deterrence in an attempt to reduce, to the maximum extent possible, the atrocious terrorist activity, which does not shy away from killing Jews, indiscriminately, only for being Jews. Relevant to this matter are the words of the Deputy President **E. Rubinstein**, in **Zid**, which I would like to join:

> Like other countries of the world which seek life, Israel cannot remain idle when attempts to destroy us are made. Hence, once the security agencies found, following a long and meticulous examination that a certain measure – which does not pose risk to human life but rather to property, without taking it lightly – deters and saves human lives, I believe that despite the difficulty involved therein, we cannot determine that this measure is prohibited as such; the key is a constant examination of the deterrence element, proportionate use of the Regulation by the respondent in the most severe cases and considering, in suitable cases, the use of alternate measures which can achieve the purpose of deterrence (*Ibid*., paragraph 9)

33. Following the above I shall examine the specific arguments which were raised by the petitioners. I shall start by saying that in the case at bar the established evidentiary infrastructure far exceeds the requirement for "**administrative evidence […] that one of the inhabitants of the house carried out one of the acts included in Regulation 119**." (HCJ 7823/14 **Ghabis v. GOC Home Front Command**, paragraph 23 (December 31, 2014)). It should be reminded that in the case at bar an indictment was filed against Haled and Muhammad and the two admitted in the acts attributed to them in their ISA and police interrogations. Haled described the acts carried out by him, in the framework of his police interrogation dated June 14, 2016 (pages 3-4) as follows:

> On June 8, after we purchased the weapons and prepared ourselves, we decided to go and execute the act of revenge in Israel […] the driver made a mistake and let us off at HaShalom station. We got out over there and realized that we could not enter the railroad station because it was heavily secured and then we started walking on the road and looked for a location to carry out the attack […] we went to a place and found that restaurant which had a sign with two words and the last word was 'Max'. We sat at a table and ordered food and beverages. The food arrived, we ate a little and saw that there were many people and decided that the time was right. We stood up and took out the weapons and started shooting. I fired some shots and then the weapon jammed and the same thing happened to Hamudi [Muhammad – U.S.] and we could not take out the knives because people started shooting at us and then we ran away and they chased us [language errors appear in the original – U.S.]

As aforesaid, Muhammad also admitted in the deeds attributed to him in his police interrogation dated June 9, 2016 (pages 7-8):

> At 21:15 we arrived to Tel Aviv […] after we got out at the railroad station Haled erased everything he had on his phone and we walked straight on the road according to the traffic signs and looked for a crowded place in order to carry out the shooting attack […] we walked about 200 meters and arrived to a place with stores and buildings […] we entered a coffee shop and sat there on chairs in the coffee shop's yard […] and each one of us put his bag with the firearms near his legs […] and after five minutes Haled and I said to each other let's go meaning let's go and carry out the shooting attack against Israeli citizens. Haled and I each one opened the bag he carried with him and we took out the guns and stood up and I loaded the gun and shot at the people who were in the coffee shop and Haled Mahamara also started shooting at the people who were in the coffee shop […] and then we saw that armed security guards with handguns were approaching us and then we started to run away from the coffee shop's yard [language errors appear in the original – U.S.]

34. Therefore, the argument which was half-heartedly raised in HCJ 5141/16 according to which Haled's culpability was not sufficiently proved for the purpose of using Regulation 119 – should be denied. Having reached thus far, I shall turn to examine the main arguments which were raised by the petitioners in their petitions.

35. The petitioners in both petitions claimed that the family members of Haled and Muhammad were not aware of the deeds attributed to the two and of the attack which was carried out. As known, it has already been held by this court more than once, that "**the authority of the commander extends also to those parts of an apartment or house which are owned or used by the members of the family of the suspect or by others, with regard to whom it has not been proved that they took part in the criminal activity of the suspect or encouraged it or were even aware of it**". (HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693, 698 (1992); see also, **Salem,** page 359; and **Abu Dheim**, paragraph 7). Also relevant to this matter are the words of Justice Turkel in HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289, 294 (2003): "**The idea that the perpetrator's family members are to bear his sin is morally burdensome […] But the prospect that the 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 atrocious acts of perpetrators, more than it is appropriate to spare the inhabitants of the house. There is no other way**." Nevertheless, the military commander can take into account, in the framework of the considerations considered by him for the purpose of exercising the power vested in him pursuant to Regulation 119, the scope of the family members' involvement in the acts of the perpetrator (HCJ 1633/16 **A v. Military Commander of the West Bank Area** (May 31, 2016)(hereinafter: **A**); and **HCJ Hamed**, the words of Justice **H. Melcer**, paragraph 5 of his opinion, and the words of Justice **N. Sohlberg**, paragraph 1(7)).

36. In the case at bar, there is reason to believe that the atmosphere in the perpetrators' homes encouraged them, in this way or another, to be involved in security activity against Israelis. We shall briefly refer to the different statements attributed to the family members

of the perpetrators. In the framework of the interrogation of the family members of the perpetrator in HCJ 5141/16, there were indications that petitioners 1-2 were aware of the fact that Haled was dealing with firearms. In addition, Haled's sister shared on her facebook page posts which supported the attack, and even published her own "posts" which stated that she was proud of her brother, and in so doing, she in fact expressed a certain support for his actions. With respect to the statements of petitioner 1, Haled's father, that Jihad should not be carried out until the coming of the Mahdi, these things may be interpreted either way, by it may be at least said that the father was aware of the extreme views held by his son, and in fact did nothing to prevent him from carrying out his evil plans.

With respect to HCJ 5506/16, Muhammad's interrogations indicate that Muhammad's father was aware of the fact that his son was interested in obtaining firearms. Muhammad even said, in his ISA interrogation dated June 16, 2016 that he requested financial assistance from his father for the purpose of carrying out an attack against Israelis and Jews (which was denied later on). It therefore seems that the awareness of Haled and Muhammad's family members of the desire of the two to obtain firearms, in addition to different statements of the family members, are indicative of the "**general family atmosphere**" which encouraged the perpetrators to continue and bring to fruition their evil plan (see in this regard **A**, paragraph 32).

Residence Connection

37. The rule is that for the purpose of exercising the power by virtue of Regulation 119, there is no need to prove that the perpetrator was the owner of the property in which he lived, but rather, a **residence** connection should be established between him and the building, being the subject matter of the demolition order (**HCJ Hamed**, paragraph 45). It was also held that according to the language of Regulation 119, an order for the demolition of a house in which the perpetrator lived as a lessee may be issued (HCJ 542/89 **Al Jamal v. Commander of IDF Forces in Judea and Samaria** (July 31, 1989) ; HCJ 1056/89 **Alsheikh v. Minister of Defense** (March 27, 1990); HCJ 869/90 **Lafruk v. Commander of Judea and Samaria Area – Beit El** (May 3, 1990); HCJ 3567/90 **Sabar v. Minister of Defense** (December 31, 1990)). However, when the apartment is owned by a third party, who is unrelated to the perpetrator, a decision may be made in certain cases not to demolish the entire building and to even refrain from executing the entire forfeiture and demolition order (**HCJ Hamed**, paragraphs 46-48; HCJ 6745/15 **Hashiyeh v. Military Commander of the West Bank Area**, paragraph 18 of the opinion of the Deputy President **E. Rubinstein** (December 1, 2015)).

38. The question of whether residence connection exists between the perpetrator and a specific building, is context dependent, and is based on the specific circumstances of each case on its merits. The military commander must examine, inter alia, the magnitude of the connection between the person and the house, whether he used to stay therein and in which frequency; whether the perpetrator had another place of residence other than the house designated for demolition; and to the extent the perpetrator did not live permanently in the house, the military commander should examine whether the absence of the perpetrator from the house was temporary, or not. It should be emphasized that the absence of a person from the his family's home, does not immediately disconnect his

connection to the house, and it depends on the nature and duration of the absence and its reasons (**HCJ Hamed**, paragraph 45; HCJ 6026/94 **Nazal v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 48(5) 338, 344-345 (1994); HCJ 893/04 **Faraj v. Commander of IDF Forces in the West Bank**, IsrSC 58(4) 1, 6 (2004)).

39. In the case at bar, the petitioners argue that no residence connection existed between the perpetrators and the apartments, being the subject matter of the demolition orders, due to the long stay of Haled and Muhammad in Jordan, prior to the execution of the murderous attack. With respect to Muhammad it was additionally argued that the fact that he did not directly come from the house to execute the attack, weakened his residence connection to the house which is designated for demolition. The arguments regarding lack of residence connection should be denied. In my opinion, the fact that Haled and Muhammad stayed in Jordan before the attack has no effect on the question of whether a residence connection exists between them and the buildings designated for demolition, due to the fact that Haled and Muhammad returned to the Judea and Samaria area and lived in their parents' homes for several months, before the attack. In their police and ISA interrogations the two said that they resided in their parents' homes in the village, and it seems that the purpose of their return to the area was to carry out the attack. Under these circumstances, the petitioners did not satisfy the burden, which lies on their shoulders, to prove that the perpetrators have another center of life, other than the family home in the village. Therefore, the residence connection between the perpetrators and the houses being the subject matter of the demolition orders was properly proved by the respondents and I found no reason for intervention in the discretion of the military commander on this issue.

40. At the same time, I reached the conclusion that in the petition in HCJ 5506/16 petitioners' arguments should be partially accepted, as much as it concerns the intention to demolish the first floor (in addition to the third floor), of the building owned by Muhammad's family. As specified above, while using the power vested in him pursuant to Regulation 119, the military commander should "examine whether the housing unit of the suspect may be demolished without causing damage to other parts of the building or adjacent buildings" (**Salem**, page 359). It was also held that the military commander is obligated "**to use this power in a prudent and limited manner, according to the principles of reasonableness and proportionality**" (**HCJ Hamed**, paragraph 23). In the case at bar I reached the conclusion that it suffices to demolish the third floor of the building being the subject matter of the demolition order in HCJ 5506/16, having been convinced that the housing unit which served as the residence of the perpetrator can be isolated from the other apartments of the building. Needless to point out that the principles of reasonableness and proportionality should be meticulously adhered to also when a severe and deadly attack is concerned, such as the attack which was carried out in the "Sarona" complex. The evidentiary infrastructure which was presented to us, for our review, indicates that Muhammad lived on the third floor in a separate housing unit, which consisted of a bedroom, kitchen and bathroom. I do not think that the fact that Muhammad also stayed, occasionally, on the first floor, leads to the conclusion that a clear connection exists between him and the apartments on this floor in a manner which justifies the demolition of the entire floor, with the exception of the candy factory.

The facts in the case at bar are not materially different from the facts of the **Hamed** case which concerned a three story building that was owned by the family in the Qalandia refugee camp and in which the perpetrator resided in a separate housing unit on the third floor. In that case it was decided to demolish the third floor only, a decision which was approved by this court. Even if the military commander did not have evidence to the fact that the perpetrator also stayed on the first floor, it stands to reason that a person who resides on the third floor will visit, in this frequency or another, the ground floor of the building, where his family members reside. In conclusion, I am of the opinion that the principle of proportionality requires, in the case at bar, to refrain from the demolition of the first floor and to be satisfied with the demolition of the third floor which served as the residence of the perpetrator Muhammad.

The Demolition Method

41. Finally, I will say a few words about the demolition method of the two houses. I have broadly described the content of the engineering opinions which were submitted on behalf of the litigants. In the opinion which pertains to Haled's family home, engineer Sasson referred to petitioners' main concern of a "**collapse of ceiling over ceiling**" and clarified that in no scenario, damage of this sort may occur. With respect to Muhammad's family home, the petitioners focused their arguments on the damage that would be caused to the entire building as a result of the demolition of the first floor. Since I have expressed my opinion that this floor should not be demolished, the need to discuss petitioners' arguments on this issue becomes redundant. It should be noted that according to the opinion of engineer Sasson the demolition of the third floor will not cause damage to the entire building. Therefore, there is no room for intervention in the decision of the military commander regarding the demolition method, subject to the provisions of paragraph 40 above.

42. In conclusion, I am of the opinion that in HCJ 5141/16 the military commander exercised his discretion reasonably and proportionately, and I do not think that there is any reason to intervene in his decision. With respect to the petition in HCJ 5506/16 I am of the opinion that only the demolition of the third floor should be approved, and that the first floor should not be demolished, for the reasons specified above.

Therefore, I shall propose to my colleagues to dismiss the petition in HCJ 5141/16 and to partially accept the petition in HCJ 5506/16 as specified in paragraph 42 above. The interim injunctions which were issued on June 27, 2016 and on July 11, 2016 will expire within ten days from the date of this judgment to give the petitioners sufficient time to make the necessary arrangements.

J u s t i c e

Justice E. Hayut:

1. As noted by me in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Minister of Defense (December 31, 2014)**

(hereinafter: the **general petition**) taking the path of case law on the issue of house demolition according to Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: the Defence Regulations) is not at all easy, but for as long as this rule has not been changed by an expanded panel and is still valid, it is inconceivable that the conclusions on this general issue will differ from one panel to the other, depending on the identity of its member-Justices.

2. Recently the President decided in HCJ 2828/16 **Abu Zid v. Commander of the Military Forces in the West Bank** (May 2, 2016) to dismiss an application to expand the panel before which arguments were raised regarding the exercise of the power to issue forfeiture and demolition orders according to Regulation 119 of the Defence Regulations, for the reasons specified in said decision. Hence, and as I wrote in the same context in HCJ 1336/16 **Atrash v. GOC Home Front Command**, paragraph 9 of my judgment (April 3, 2016) "**the underlying premise of the discussion in the petitions at bar is that the respondent has the authority to use Regulation 119**."

   Nevertheless, as indicated by my colleague Justice **U. Shoham**, said severe measure of house demolition which sometimes harms uninvolved family members should be used with a measuring cup, meticulously and proportionately, subject to a constant systemic examination of the deterring effect achieved as a result of the use thereof. With respect to said examination it is needless to point out that only two weeks ago an up-to-date opinion was presented to this court in a similar proceeding (HCJ 2828/16 **Abu Zid v. Military of IDF Forces in the West Bank** (July 7, 2016) (hereinafter: **Abu Zid**)) from which the court learnt that there is "**definitely a substantial basis for the argument that this measure does indeed deter potential perpetrators from the execution of similar actions, and the substantive evidence exceeds by far indications in the opposite direction**" (*Ibid*., paragraph 7). It seems to me that in view of the short period of time which passed from the date on which the judgment in **Abu Zid** was given, the above conclusion is also applicable to the petitions at bar.

3. With respect to the specific circumstances of the cases being the subject matter of the petitions at bar, like my colleague **U. Shoham**, I am also of the opinion that the demolition of the first floor of petitioners' home in HCJ 5506/16 does not satisfy the proportionality requirement and like him I am also of the opinion that in the case at bar, it is sufficient to demolish the third floor only, since the evidence which was presented indicates that it was the one which served as the residence of the perpetrator Muhammad. With respect to the specific circumstances pertaining to the home of the petitioners in HCJ 5141/16 I join the conclusion of my colleague Justice **U. Shoham** that this petition should be dismissed.

J u s t i c e

Justice U. Vogelman

No judge is an island entire of itself. Each judge is a piece of the continent (see as a paraphrase to the poem of **John Donne – No Man is an Island** – translated by Rami Dizani). Currently,

the rule regarding house demolition by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945, stands. As I have already mentioned elsewhere, although I do not agree with it (see HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank**, paragraph 2 of my opinion (October 15, 2015 (hereinafter: **Sidr**)) – this rule is binding until it is changed, to the extent it is changed, by an expanded panel (see my position in HCJ 1630/16 **Zakaria v. Commander of IDF Forces**, paragraph 3 of my opinion (March 23, 2016)).

Considering the current rule there is no alternative but to dismiss the petition in HCJ 5141/16. The reasons of Justice **U. Shoham** in this regard are substantially acceptable to me, without going into the question of the ostensible involvement of the family members of the suspect (and on this issue it should be noted, without making a hard and fast rule, that it seems to me that a distinction should be drawn between the knowledge of the family members *ab initio* and their knowledge *ipso facto*; and between a general awareness of the family members of a certain world view held by the suspect and their knowledge of a specific plan to commit an attack which is about to be carried out).

However, even under this rule, the exercise of the power must satisfy the proportionality tests (see also **Sidr**, paragraph 1 of my opinion and the references there). The authority should not be exercised in an excessive manner beyond that which is required. The measure taken should violate the protected human right to the least extent possible for the purpose of achieving the objective (HCJFH 2161/96 **Sherif v. GOC Home Front Command**, IsrSC 50(4) 485, 490 (1996)). Indeed, "**the scope of proper sealing [and in this case – demolition; U.V] in each case has no measure, and it is not for us to establish precise measures for it […]"** (HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289, 293 (2003)). However, my colleague has justifiably held, in my opinion, that with respect to the petition in HCJ 5506/16 "the housing unit which served as the residence of the perpetrator can be isolated from the other apartments of the building" (paragraph 40 of his opinion). Where, in the building, a "clear distinction" may be drawn between the perpetrator and the family members, the demolition of the entire building constitutes a measure which does not maintain a proper and reasonable relation between the murderous conduct of the perpetrator and the suffering which will be caused to the other members of the family. There is nothing new in this determination (see and compare HCJ 5510/92 **Turkman v. Minister of Defense**, IsrSC 48(1) 217, 220 (1993)). For this reason I join the opinion of my colleague that the first floor of the building should not be demolished.

In view of the above I join the conclusion reached by my colleague Justice U. Shoham in the two petitions at bar.

J u s t i c e

Decided as specified in the judgment of Justice U. Shoham.

Given today, 18 Tamuz 5776 (July 24, 2016).

J u s t i c e J u s t i c e J u s t i c e