At the Supreme Court

HCJFH 5924/20

Before:	**Honorable President E. Hayut**
The Applicants:	1. **Military Commander of the West Bank Area** 2. **Minister of Defense**
	v.
The Respondents:	1. _____ Abu Baher 2. _____ Abu Baher 3. Anonymous 4. _____ Abu Baher 5. _____ Abu Baher 6. HaMoked Center for the Defence of the Individual
	Application for Further Hearing in the judgment of this court dated August 10, 2020 in HCJ 4853/20 given by the Honorable Justices **M. Mazuz**, **G. Karra** and **Y. Willner**
Representing the Applicants:	Adv. Aner Helman; Adv. Jonathan Berman; Adv. Sharon Aviram
Representing the Respondents :	Adv. Nadia Daqqa

DECISION

1. Application for further hearing in the judgment of the Supreme Court in HCJ 4853/20 dated August 10, 2020, which accepted by a majority opinion (Justices **M. Mazuz** and **G. Karra** against the dissenting opinion of Justice **Y. Willner**) a petition filed by the

respondents to revoke a confiscation and demolition order for the residential apartment of _____ Abu Baher (hereinafter: the **perpetrator**), issued by virtue of Regulation 119 of the Emergency Defense Regulations, 1945

Background and Judgment

2. According to the indictment which was filed on June 25, 2020 with the Samaria military court, on May 12, 2020, security forces conducted a routine arrest operation in Yabed Village, *inter alia*, in a house located near the perpetrator's residential home, who was at that time in his apartment located on the top floor of a three story building, where he was living with his extended family. It was further noted in the indictment that on or about 04:30 AM the perpetrator heard shouts from his neighbor's house and when he went up to the roof he realized that the security forces were making arrests. Thereafter the perpetrator went toward the western part of the roof and saw that IDF soldiers were marching in two lines from the junction near the building towards the road underneath it, and decided to take a brick and throw it from the roof at the soldiers who were standing underneath the building. The perpetrator threw half a block weighing 9-11 kg from a height of approximately 13 meter with the intent to cause the death of one of the soldiers. The brick hit very forcefully the head of Staff Sergeant Amit Ben Yigal of blessed memory and caused his death. Immediately after he had thrown the brick, the perpetrator returned to his home and pretended to be sleeping in his children's bedroom. After the security forces left the village, the perpetrator went down to the road underneath the building, saw the pieces of the brick and a pool of blood, realized that he had hit a soldier and threw the pieces of the brick to the vegetation on the side of the road. The indictment attributes to the perpetrator for his above deeds the offense of deliberate causation of death according to security legislation in the area (an offense parallel to the offense of murder) and the offense of obstruction of justice. When the indictment was filed notice on behalf of the military commander of the area concerning his intention to confiscate and demolish the perpetrator's apartment was given to the respondents, and on July 5, 2020, a confiscation and demolition order was issued for the apartment. A petition was filed with this court against said order.

3. The court accepted the petition and held, by a majority opinion, that the confiscation and demolition order should be revoked, retaining the power of the military commander to replace it with a sealing order for the room in which the perpetrator had lived.

Justice **Mazuz** noted that according to his approach the exercise of the power pursuant to Regulation 119 raised a host of complex and difficult legal issues, and added that in his opinion, said issues have not yet been clarified in the judgments of this court in a sufficient and up-to-date manner. However, Justice **Mazuz** did not discuss the authority issue and focused on the discretion of the military commander while exercising the authority. In this context Justice **Mazuz** noted that one of the major issues which were raised and examined by judicial precedent throughout the years with respect to the reasonableness

and proportionality of the exercise of the authority pursuant to Regulation 119, pertained to the involvement of the family members in the attack following which the authority is exercised. In the case at hand, it was so noted, the petitioners (the respondents in the application at hand) are the wife and eight children of the perpetrator, seven of them minors, living in the apartment designated for demolition. No involvement in the attack is attributed to the family members – no argument was raised that they have either assisted, knew or supported the perpetrator after the fact. To the extent the perpetrator is convicted in the criminal proceeding, he is expected to serve a long incarceration sentence, and Justice **Mazuz** emphasized that the demolition of the house would first and foremost impinge on the perpetrator's family members who would be left without a roof over their heads. There is no doubt, it was so held, that the deed attributed to the perpetrator is a severe and despicable offense and that there is a clear connection between his actions and the house designated for demolition. However – "although we are concerned with circumstances that **in as much as they relate to the perpetrator**, there is an ostensible justification to apply the severe sanction of demolition according to Regulation 119, it is still impossible to ignore the harsh harm caused to his innocent **family members** – that no involvement in the attack is attributed to them. Under these circumstances I am of the opinion that in the case at hand the principle of proportionality requires mitigating the harm, by replacing the demolition with **partial sealing** of the house". (paragraph 8 of the judgment of Justice **Mazuz**; emphasis in the original).

Justice **Karra** joined the judgment of Justice **Mazuz** stating that "Justice shall be served if the perpetrator is punished, but the results of his actions should not be borne by others who did no wrong." Justice **Willner**, in a minority opinion, held that the severity of the deed attributed to the perpetrator, its clear connection to the apartment, the use made of the building for carrying out the attack, and the evidentiary infrastructure against the perpetrator – all indicated that the order which was issued for the apartment was proportionate and required to deter against additional attacks such as the attack at hand. Therefore Justice **Willner** was of the opinion that the petition should be denied.

Hence the application at hand.

The Arguments of the Parties

4. The applicants, the military commander for the Judea and Samaria Area and the Minister of Defense (hereinafter: the **applicants**), argue that a new rule was established in the judgment whereby in the event that the perpetrator's family members were not aware of or involved in his actions, the harm inflicted on them is disproportionate and that such circumstances require, at least, to mitigate the harm by replacing the demolition with partial sealing. According to the applicants, the opinion of Justice **Karra** is not limited to the proportionality level and ostensibly raises a question mark as to the mere authority to use Regulation 119 in circumstances in which the family members did not know of the deed and were not involved therein. According to the applicants the majority opinion changes case law on both the rhetoric and consequential levels, although the rule was not changed expressly. According to the applicants, leaving the holdings of the judgment in place shall prejudice judicial certainty since the contradiction between the judgment and other judgments creates ambiguity as to the legal situation concerning the exercise of the authority according to Regulation 119. The applicants therefore request that a further

hearing be held and that a clear rule be established whereby in the framework of the judicial scrutiny exercised over the use of the demolition authority according to Regulation 119, the awareness of the family members does not constitute a decisive consideration for the purpose of implementing the proportionality test.

5. The respondents on their part are of the opinion that the judgment does not veer from case law and only implements the criteria established therein. According to them, the applicants wish to revisit the manner by which case law was implemented in a specific case, and it is for good reason that they refrain from calling for re-evaluation of the general aspects of the rule. The respondents add that according to them the time has ripened for an expanded panel to discuss the general, in principle, legal questions arising from the exercise of the authority according to Regulation 119, *inter alia*, according to international law. The above, particularly in view of the positions of some of the Justices of this court who are of the opinion that this should be done. Therefore, the respondents request to deny the application, and alternatively to accept it and decide that in the further hearing all issues relating to the lawfulness of the use of Regulation 119 shall be discussed.

In their reply to the response the applicants argue that the issue of the authority to use Regulation 119 was not discussed in the judgment and therefore there are no grounds to hold a further hearing in this issue.

Discussion

6. After I have reviewed the judgment, the application and the response thereto, I came to the conclusion that the application for a further hearing in the judgment should be denied.

In HCJ 8091/14 **HaMoked Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014)(hereinafter: **HaMoked**) the court discussed the general, in principle, question of the authority to use Regulation 119 for the purpose of demolishing perpetrators' homes, and it was held that "a distinction should be drawn between the authority to use Regulation 119 and the discretion which should be exercised while using it… the authority exists, and the main question concerns reasonableness and discretion" (paragraph 20 of Justice (as then tiled) **E. Rubinstein**). Throughout the years which passed since the rule in this issue had been established, disputes arose between the Justices of this court regarding the lawfulness of the use of the Regulation and statements were made to the effect that "the implications of the use of Regulation 119 are severe and disturbing" (HCJFH 1561/20 **Hamdan v. Military Commander of the West Bank Area**, paragraph 5 (March 1, 2020)). However, all applications for further hearing in the question of the authority to use Regulation 119 were denied it being held that for the time being there was no need to hold a futher hearing in the isse (see HCJFH 2916/16 **Dwayat v. GOC Home Front Command** (April 10, 2016); HCJFH2624/16 **Masudi v. Commander of IDF Forces in the West Bank** (March 31, 2016); HCJFH 1773/16 **Skafi v. Military Commander of the West Bank Area** (March 2, 2016); HCJFH 8988/15 **Abu Jamal v. GOC Home Front Command** (December 29, 2016); HCJFH 4657/16 **Da'is v. Military Commander of the West Bank Area** (June 9, 2016); HCJFH 9324/17 **Abu Alrub v. Commander of IDF Forces in the West Bank** (November 29, 2017); HCJFH 416/19 **Jabarin v. Military Commander for the West Bank Area** (January 17, 2019); see also: Guy Harpaz and Amichai Chen " House

Demolition for Deterring Purposes: And If There is Justice – It Should Present Itself Forthwith (In a Further Hearing)" **Mishpat U'Mimshal 20** 205 (2019); Tal Mimran "If Not Now, When? Re-examining the Lawfulness and Effectiveness of the House Demolition Policy" **ICON-S-IL Blog** (February 12, 2019)).

For the reasons specified below I am of the opinion that at this time there is also no reason to veer from this position.

7. Throughout the years the court has stressed the rule whereby "the use of house demolition should realize its purpose, in cases in which the benefit embedded therein exceeds the damage caused by it" and therefore, it was noted that "it should be examined at any time whether indeed – **both generally and according to the specific circumstances of each and every case** – house demolition is proportionate" (HCJFH 360/15 **HaMoked Center for the Defence of the Individual v. Minister of Defence**, paragraph 6 (November 12, 2015); emphasis in the original). Accordingly, criteria were established by judicial precedence limiting the discretion of the authorized bodies in exercising the sanction according to Regulation 119 (See: HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 22 of the judgment of Justice **Danziger** (August 11, 2014); see also HCJ 2722/92 **Al'amarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693, 699-700 (1992)). One of the criteria which were established is the degree of involvement of the inhabitants and family members of the perpetrator in the event as a result of which the Regulation was used. And indeed, this consideration was emphasized in a host of judgments (see for instance: HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485 (1996); HCJ 6026/94 **Nazal v. Commander of IDF Forces in Judea and Samaria Area**, IsrSC 48(5) 339' 349-350 (1994); HCJ 4597/14 **'Awawdeh. v. Military Commander of the West Bank Area**, paragraph 28 (July 1, 2014); HCJ 5510/92 **Turkman v. Minister of Defense**, paragraph 5 (February 15, 1993) (hereinafter: **Turkman**); HCJ 8024/14 **Hijazi v. GOC Home Front Command** (December 31, 2014) (hereinafter: **Hijazi**); see also my opinion in **HaMoked**, paragraph 4).

8. A review of the opinion of the majority Justices in the judgment being the subject matter of the application, leads to the conclusion that no new rule was established therein with respect to the involvement of the perpetrator's family members or with respect to the weight that should be attributed thereto. The majority Justices applied the criteria which were established for this purpose to the circumstances of the case and Justice **Mazuz** has even emphasized in his opinion that similar to **Hijazi** and **Turkman**, his decision was rooted in the circumstances of the specific case (paragraph 8 of his judgment). It seems therefore that the decision of the majority Justices in the case at hand is limited to the specific circumstances of the specific case which was before them, it does not change current case law, and contrary to applicants' argument it does not include any holding to the effect that whenever the military commander exercises his authority according to Regulation 119, he must give **decisive weight** to the awareness and involvement of the family members residing in the house. For the avoidance of doubt it should be clarified and emphasized in this context that the rule in the matter at hand was and remains that the awareness and involvement of the family members in the perpetrator's deeds – although carries weight in the gamut of considerations that the commander should weigh

prior to exercising the authority vested in him by virtue of Regulation 119 – is absolutely not a consideration which tips the scale.

9. The applicants further support their application for further hearing with the argument that a different result could and should have been reached in the case at hand, and they rely in this context on the minority opinion of Justice **Y. Willner**. A different result could and should have probably been reached in the case at hand, but even if the court erred in implementing current case law, this fact alone cannot justify a further hearing, since "a further hearing in not a further appeal" (HCJFH 416/19 **Jabarin v. Military Commander of the West Bank Area**, paragraph 6 (January 17, 2019)). The purpose of the further hearing is not to correct errors in the **implementation** of current case law. A further hearing is a unique proceeding entrenched in the provision of Section 30 of the Courts Law [Consolidated Version], 5744-1984 and it takes place on those exceptional cases in which a new rule was expressly established in a judgment, to the extent said new rule raises a substantial and significant difficulty (see for instance CFH 4335/03 **Benbenisti v. The Official Receiver** (May 20, 2003)). In the case at hand, as aforesaid, no new rule was established.

10. The heart breaks at the loss of the life of Staff Sergeant Amit Ben Yigal of blessed memory and the great rupture in the life of his family members and loved ones which shall never heal. My heart is with them. But for the legal reasons specified above this is not the case for a further hearing.

The application is therefore denied. Expenses are not awarded.

Given today, 20 Tishrei 5781 (October 8, 2020).

President