At the Supreme Court sitting as the High Court of Justice

HCJ 3872/21

Before:	Honorable Justice I. Amit Honorable Justice D. Mintz Honorable Justice O. Grosskopf
The Petitioners:	1. ____ Shalby 2. ____ Shalby 3. A. 4. A. 5. HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger
	v.
The Respondents:	1. Military Commander of the West Bank 2. West Bank Legal Advisor
	Petition for Order Nisi
Session date:	June 17, 2021.
Counsel for the Petitioners:	Adv. Nadia Daqqa, Adv. Leah Tsemel
Counsel for the Respondents:	Adv. Areen Safadi-Atillah

Judgment

Justice D. Mintz

Before us is a petition against the confiscation and demolition order issued by Respondent 1 (hereinafter: the Respondent) with respect to a structure located in the village of Turmusaya (hereinafter: the village) where ____ Shalby resided (hereinafter: the structure and the terrorist respectively). The latter is accused of committing a terrorist attack in which Yehuda Guetta, may he rest in peace, (hereinafter: the Deceased) was murdered, and two other Israeli citizens were injured.

1. The indictment describes the chain of events attributed to the terrorist. In brief, having made a decision to carry out a terrorist attack at Tapuah Junction (hereinafter: the junction) and following some preparations and tests ahead of its commission, on May 2, 2021, the terrorist decided to carry out his plan, took a handgun and bullets he had kept in his home and traveled to the junction. Upon arrival at the junction, he fired a large number of bullets towards civilians he identified as Jews, who were standing at the bus stop. The Deceased eventually died as a result of the shooting, and two other civilians were wounded, one of them seriously.

2. On May 5, 2021, the terrorist was arrested by security forces, and on May 19, 2021, the Respondent announced his intent to confiscate and demolish the structure. The Petitioners were given the

opportunity to submit an objection by May 24, 2021. After an extension was granted, on May 26, 2021, an objection was filed on behalf of Petitioner 1, wherein she presented the circumstances of the matter and her arguments and asked the Respondent to withdraw his plan to confiscate and demolish the entire structure. On May 30, 2021, the objection was denied by the office of the Judea and Samaria Area Legal Advisor in a detailed decision and a confiscation and demolition order was issued for the structure.

Hence the petition at bar.

Petitioners' main arguments

3. Petitioners 1-4 are the terrorist's family members. Petitioner 1 is one of his wives, and petitioners 2-4 are their children. Petitioner 5 is a registered non-profit human rights organization. The Petitioners made various arguments against the Respondent's aforesaid decision and against the confiscation and demolition order, including general arguments on the use of Regulation 119 of the Defence (Emergency) Regulations 1945 (hereinafter: Regulation 119 or the Regulation and the Defence Regulations, respectively) and specific arguments regarding the use of the Regulation in the case herein. On the question of principle, the Petitioners argued that the house demolition policy contradicts norms incumbent on the Respondents, including international humanitarian law and international criminal law, and that Regulation 119 is effectively being used as a punitive measure.

4. On the specific circumstances of the case, the Petitioners make several key arguments. First, they argue the structure is not the terrorist's home, as he had been living in the USA for many years, where he has found work and married three more women, one of whom bore him another child. The Petitioners allege that the structure is used as a residence by the Petitioners, and the terrorist visits it rarely and for short durations. He has no spousal relationship with Petitioner 1, and his relations with his children are not optimal as well, which is why, when he arrives at the family home, he sleeps in a separate room. These facts indicate his lack of connection to the family home, that "he is not a resident of the home," and that at most, he can be said to have a connection to a specific room in the structure.

5. The Petitioners further argue the terrorist has a history of mental disorders. He has been hospitalized in a psychiatric hospital in the past, and a history of psychiatric issues emerges from his medical documents and medications he has taken in the past. The treatment he received during his last visit to the country, prior to committing the acts, included depression medication. These findings indicate some difficulty ascribing the offenses to the terrorist and underscore the flaw in the fact that the Petitioners did not receive the investigation materials prior to the indictment.

6. Given all the above, the Petitioners maintain that the decision made by the Respondent was based on a wrongful, performative procedure, that it lacks a sufficient factual foundation, and that it was given without authority. Additionally, on the merits too, the decision is unreasonable and disproportionate and was made without having considered alternatives that would be less injurious to innocent family members, including minor children, whose best interest is neglected by the Respondent, all while the deterrent purpose for which the power is invoked is questionable.

Respondents' main arguments

7. The Respondents, on the other hand, believe the petition should be dismissed. The arguments on issues of principle made by the Petitioners are not new, and they have been considered and rejected in a wide array of judgments delivered by this court, including recently. With respect to use of the power in this case, the Respondent argues it meets the proportionality and reasonableness requirements, as per

standards set in the jurisprudence of this court, particularly given the increase in terrorist activity in recent years and the gravity of the murderous terrorist attack in the case at hand. The deterrence produced by use of the power has been recognized as effective by the court in the past, and it remains so in the case at hand. The harm to innocents, including minor children, described in the petition, does not constitute collective punishment but rather collateral damage attached to the deterrent objective pursued through use of the power and does not, in and of itself, preclude using said power.

8. With respect to Petitioners' arguments on the specifics of the case at hand, the Respondents argue that the contention that the terrorist is not a "resident" of the home cannot be accepted. Questioning of the terrorist and his son, and further information in the Respondent's possession, reveal that the structure belonged to the terrorist's father, that it was transferred to his possession after the father's passing and that it is registered in his name. Furthermore, given that it is his residence, even if it belonged to his close relatives, the demolition would not be averted. The contention that the terrorist has no "residential ties" to the structure cannot be accepted either. The terrorist splits his life between the USA and the village. So, for instance, from 2006 to 2012, he remained in the Judea and Samaria Area most of the time and lived in the structure. In the past eight years as well, he arrived each year and remained in the structure with his family for two months every year. In 2021 too, prior to committing the terrorist attack, he lived in the structure permanently and continuously for two months. The structure is also where he, for years, hid the gun and bullets he used during his murderous act. The terrorist considers the structure his home and treats it as an owner would. Respondents further clarify that there is no basis for the claim that the terrorist slept in a specific room in the structure - a claim made vaguely without substantiation - since the questioning of the terrorist and his family members clearly indicate he used all parts of the structure, such that his residential ties apply with respect to all parts of the structure. It was also noted that according to the law in practice, occasional residence in a home is sufficient to substantiate residential ties and absence from the home does not, per se, sever such ties.

9. The Respondents further argue that the arguments regarding the terrorist's mental state and the absence of a sufficient evidentiary foundation for the Respondent's decision cannot be accepted. The facts arising from the indictment are grounded in a firm evidentiary foundation which includes the terrorist's admission along with external evidence that distinctly corroborates his involvement in the terrorist attack and the nationalistic motivation for his actions. The terrorist's conduct, both before and after the attack, like his conduct during the investigation so far, reveals no evidence of any sort of psychotic state, but rather indicates "rational" behavior designed to harm Jews. An examination by experts has also failed to reveal evidence of a psychiatric issue or a suicidal plan, and suicidal ideation has been ruled out in the past as well. Even on the assumption that the terrorist has a history of treated depression, clearly, no connection has been proven between the terrorist attack he committed and his mental state. It was further clarified that the allegation of a mental health history was examined by the military prosecution prior to the indictment, and at that point as well, it was found insufficient to rule out the terrorist was aware of his actions at the time the attack was carried out, as alleged.

10. The Petitioners submitted a supplementary notice after receiving materials from the terrorist's investigation. In said notice, the Petitioners claimed the investigation materials point to the unstable relationship the terrorist has with his family members and the negative response of everyone around him to his actions. It was further argued that the materials indicate the motivation for the attack was the terrorist's wish to die as a martyr having despaired of his life, partly due to issues in his marital relationship with Petitioner 1. The Petitioners allege these facts should have been considered as the Respondent exercised his discretion, given his duty to arrive at a proportionate decision and given the deterrent purpose of exercising the power vested in him under Regulation 119.

Hearing

11. During the hearing held before us, parties' counsel repeated their arguments, as the Petitioners received clarifications that the structure for which the demolition order was issued is the one in which the Petitioners have resided in recent years, rather than an adjacent structure where the family claims they had lived in the past. Counsel for the petitioners also wished to highlight concern over potential damage to nearby structures during the demolition. The Respondents argued that this contention was not brought up in the petition or the supplementary notice, and that, in any event, an engineering report procured by the Respondents states a low probability of damage. In reference to the supplementary notice filed by the Petitioners, the Respondents argued that even on the assumption that the terrorist wished to die, the nationalistic motivation for the acts remains present, as his proven wish was to die a martyr. The Respondents further argued that according to information in their possession, there are indications members of the terrorist's nuclear family, who reside in the structure, were aware of the terrorist's intention to carry out the attack prior to its commission. During the hearing, the Respondents proposed submitting classified material to corroborate their arguments to the court ex parte. Counsel for the Petitioners did not consent to the submission of said information.

Deliberation and Decision

12. Having reviewed the petition, the Respondents' response and the Petitioners' supplementary response, exhibits included, and having heard oral arguments from the parties, I have reached the conclusion that the petition should be dismissed, and I shall propose to my colleagues to so order.

13. I shall begin by noting that the issues of principle related to exercising the power set forth in Regulation 119 of the Defence Regulations have been thoroughly deliberated by this court on many occasions (see, e.g. HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014); HCJ 6826/20 **Dweikat v. IDF Commander in the Judea and Samaria Area** (October 25, 2020) (hereinafter: **Dweikat**)), and motions for further hearings in these petitions have been rejected on a number of occasions (see, e.g. HCJFH 360/15 **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Minister of Defense** (November 12, 2015); HCJFH 416/19 **Jibrin v. Military Commander of the West Bank** (January 17, 2019); HCJFH 5924/20 **Military Commander of the Judea and Samaria Area v. Abu Baker** (October 8, 2020) (hereinafter: **HCJFH Abu Baker**)). This court has also repeatedly noted that these issues need not be revisited with every individual petition filed with respect to concrete use the Respondent makes of his power to demolish a specific home (HCJ 6420/19 **al-Asafrah v. Military Commander of the West Bank** (November 12, 2019) (hereinafter: **al-Asafrah**); HCJ 4853/20 **Abu Baker v. Military Commander of the West Bank**, paragraph 9 of the opinion of Justice Y. Willner (August 10, 2020) (hereinafter: **Abu Baker**); HCJ 6905/18 **Naji v. Military Commander of the West Bank**, paragraph 19 (December 2, 2018); HCJ 751/20 **Hanatshah v. Military Commander of the West Bank**, paragraph 14 (February 20, 2020); HCJ 1490/20 **Shably v. Military Commander of the West Bank**, paragraph 14 (March 30, 2020)).

14. While the justices of this court have voiced different positions on the legality of the Regulation and the proportionality of using it, so long as case law has not changed, we must follow it, and there is no room to address the arguments on the issues of principle again every time a petition regarding use of the Regulation is brought before us (see, **Abu Baker**, paragraph 9; **HCJFH Abu Baker**, paragraph 7; HCJ 480/**21 Kabha v. Military Commander of the West Bank**, paragraph 8 of the judgment of my colleague, Justice I. Amit (February 3, 2021) (hereinafter: **Kabha**)). In any event, there is no need to review anew the slew of rules that have crystallized in the jurisprudence on the matter, and the

deliberation can focus on the arguments related to the specific circumstances of the case at hand (HCJ 2322/19 **Rafa'ya v. Military Commander of the West Bank**, paragraph 7 of the judgment of my colleague I. Amit (April 11, 2019) (hereinafter: **Rafa'aya**)).

15. The premise for the discussion is that the Respondent must use his discretion with respect to exercising the aforesaid power in keeping with the principles of reasonableness and proportionality, and consider the overall circumstances of the case (HCJ 752/20 **Attawneh v. Military Commander of the West Bank**, paragraph 15 (May 25, 2020) (hereinafter: **Attawneh**); HCJ 1624/16 **Hamad v. Military Commander of the West Bank**, paragraph 21 (June 14, 2016)). When exercising said power, the Respondent must ensure the demolition is carried out in pursuit of a proper purpose and take into consideration, among the relevant factors, the severity of the actions attributed to the terrorist, the strength of the evidence against him, and the number of people expected to be hurt by the exercise of the power and their characteristics (HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank**, paragraph 22 (August 11, 2014) (hereinafter: **Qawasmeh**); HCJ 2356/19 **Barghouti v. Military Commander of the West Bank**, paragraph 12 (April 11, 2019)).

16. Additionally, the underlying premise is that in certain situations, use of the power under Regulation 119 for the purpose of saving lives, as a deterrent, cannot be avoided - and has been recognized as proper (see, e.g. HCJ 4597/14 **Awawadeh v. Military Commander of the West Bank**, paragraph 19 (July 1, 2014) (hereinafter: **Awawadeh**); **Kabha**, paragraph 15; **Dweikat**, paragraph 23). The need for deterrence remains even in the case of a home where minors reside, and this fact alone does not suffice for a finding that the Respondent had exceeded the discretion afforded to him (HCJ 2828/16 **Abu Zeid v. Military Commander in the West Bank**, paragraph 8, (July 7, 2016)). In appropriate cases, factoring in all circumstances, preferring deterrence over violating the rights of the home's occupants is the correct course of action even when they are minors (HCJ 8786/17 **Abu al-Rub v. IDF Commander in the West Bank**, paragraph 33 (November 26, 2017); **al-Asafrah**, paragraph 13).

From the general to the particular

17. In the matter at hand, the application of the aforesaid standards leads to the conclusion that the Respondent's decision was based on relevant, material considerations, that the order he issued was proportionate and that the discretion employed by the Respondents in issuing the order was not flawed. The circumstances of the incident indicate a serious, cruel attack, in which the Deceased's life was cut short. The severity of the actions is undisputed. As for the evidentiary foundation against the terrorist, it has been ruled more than once that administrative evidence alone can provide the basis for using Regulation 119 (see, e.g. **Dweikat**, paragraph 56; **Qawasmeh**, paragraph 27; **Awawdeh**, paragraph 25). Not only that, but the fact that an indictment was served against the terrorist alone indicates a substantial evidentiary foundation justifying the order (see, **Rafa'ya**, paragraph 9; **Atawneh**, paragraph 16, **al-Asafrah**, paragraph 10). The aforesaid is truer still in the case herein given the fact that during a hearing held before the military court on June 10, 2021, the court noted in its decision that the terrorist had agreed there was prima facie evidence to sustain a sufficient evidentiary foundation for his remaining in custody pending the end of legal proceedings.

18. In this context, the Petitioners' argument that the evidentiary foundation underlying the decision was insufficient as it did not properly address the issue of the terrorist's mental state at the time of the acts cannot be accepted. As a rule, arguments regarding any mental disorders the terrorist suffers must be supported by evidence (see, e.g., **Rafa'ya**, paragraph 10), which is not the case herein. The documents presented to us indicate the terrorist was examined following his arrest, and no evidence of an active psychiatric issue or suicide plan was found (Israel Prison Services treatment report dated May 6, 2021;

Jerusalem Mental Health Center Emergency Room report, dated June 2, 2021)). The pharmaceutical prescriptions presented by the terrorist (dated April 22, 2021) also do not indicate an active state of psychosis at the time of the attack (compare **Dweikat**, paragraph 57). The additional current document presented by the terrorist, indicating he had been "seen" for "major depression" ("... was seen by me on 5/april/2021, for Major Depressive Disorder") and prescribed the appropriate drugs, was not only prepared after the date of the terrorist attack (as it bears the date May 24, 2021), but it too fails to substantively indicate a psychotic state or anything near it. In any event, the Petitioners have failed to substantiate the argument that the terrorist suffers from a mental disorder amounting to grounds to intervene in the Respondent's decision. In addition to all this, a review of the notes taken during the terrorist's interrogation on May 7, 2021, indicates that, according to the terrorist, he had thought about suicide, but it was not possible due to the religious prohibition that prevented him from doing so. This was why the option of a "martyr's death" and the commission of a terrorist attack came up. The aforesaid suffices to substantiate, to the extent required of administrative evidence, that the terrorist acted out of a nationalistic motivation and that his mental state at the time he committed the acts, as the Petitioners argue, does not alter this conclusion (see HCJ 967/16 **Harub v. Military Commander in the West Bank**, paragraph 10 (February 14, 2016)).

19. As for the "residential ties" to the structure: First, the questioning of the terrorist and his family members clearly indicates the home is owned by the terrorist. During questioning, the terrorist himself noted the home had been owned by his father and that he lived in it with his parents, but after they passed away, the home was transferred to his possession (paragraph 2 of the summary of the terrorist's statement). Petitioner 2 also said during questioning that the house is "considered as registered" in the terrorist's name (paragraph 2 of Petitioner 2's questioning report). In any event, even if Petitioners' argument that the structure is owned by the terrorist's father and uncle had been accepted in the beginning, and it seems they did not insist upon it during the hearing, given the clear ties to the structure, as in the case herein, as explained below, "determining the exact proprietary status is not critical" (HCJ 5942/17 **A. v. IDF Commander in the West Bank**, paragraph 11, (August 3, 2017)).

20. At any rate, the Respondent's response and the material submitted clearly indicate that the Respondent's finding of residential ties is substantiated. The terrorist's Judea and Samaria Area arrival and departure record indicates that from 2006 to 2012, the terrorist lived mostly in the village, and that in the past eight years, he spent about two months in the village each year (notably, during the hearing, counsel for the Petitioners submitted to our review a document concerning time spent by the terrorist in Israel since 2001, with similar information). There is no dispute that when living in the village, the terrorist resided in the structure (this is also indicated in paragraph 4 of Petitioner 2's questioning report). The terrorist also renovated the property (paragraph 3 of the summary of the terrorist's statement).

21. The questioning of the terrorist, Petitioner 1 and Petitioner 2, also indicates there is no basis for Petitioners' claim to the effect that the terrorist used only some parts of the structure. In fact, the opposite picture emerges, indicating he has residential ties to all parts of the structure. For instance, the terrorist said the first floor has two bedrooms, which are alternately occupied by himself and by his son ____. He also indicated he lived with his wife and children on the second floor (paragraph 7 of the summary of the terrorist's statement). Petitioner 2 said that, "The whole family uses the whole house," specifying that he, Petitioner 2, his mother, his father, his brother and his sister live in the house (paragraphs 1 and 5 in Petitioner 2's questioning report). He also said that, as a rule, he and his parents live on the first floor, while his father and two siblings live on the second floor (ibid., paragraphs 7-9). The fact that the terrorist uses additional apartments is immaterial on this point. As is known, a person's

absence from their home does not necessarily sever the ties to the home, which derive from "the factual state of affairs and the overall evidence before the court in each and every case," while occasional habitation is sufficient to evoke residential ties for purposes of exercising Regulation 119 (**Rafa'ya**, paragraph 11; HCJ 1125/16 **Mar'i v. Military Commander of the West Bank**, paragraph 16 of the opinion of President (as was her title at the time) M. Naor (March 31, 2016) (hereinafter: **Mar'i**)). In particular, it has been ruled that the fact that a terrorist does not live exclusively in a home slated for demolition, but splits his time between said home and other places, does not, in and of itself, sever his residential ties to the property (**Mar'i**, paragraph 15 of the opinion of President (as was her title at the time) M. Naor). In this case, though the terrorist has additional homes, the residential ties have been well substantiated, as aforesaid. Add to that the fact that the terrorist had lived in the structure for roughly two months prior to carrying out the attack (compare **Mahamreh**, paragraph 39) and the fact that the gun and bullets he used were hidden in the structure (on the issue of storing weapons in the home, see HCJ **'Aliwa v. IDF Commander in the West Bank**, paragraph 13 of the opinion of Justice M. Mazuz (December 1, 2015)).

22. As for the Petitioners' argument that members of the family, who were not aware of the terrorist's intention to carry out a terrorist attack should not be "punished": The rule is that, "considerations of deterrence sometimes require deterring potential terrorists who must understand that their actions might harm those close to them, even when there is no evidence that members of the family had been aware of the terrorist's actions (HCJ 9353/08 **Abu Dheim v. GOC Homefront Command**, paragraph 7 of the judgment of Justice (as was her title at the time) M. Naor (January 5, 2009)), although awareness on the part of the terrorist's relatives could impact the scope of the demolition order (**Awawdeh**, paragraph 18). In the matter at hand, the Respondent asked to present classified material in this context. However, counsel for the Petitioners did not consent to having the classified material presented ex parte. In the circumstances of the case at hand, I believe the unclassified material sufficiently substantiates the Respondent's decision. Moreover, the Respondent benefits from the presumption of regularity, whereby his decision was made lawfully, and the classified material provides evidentiary support for his arguments (compare, HCJ 1630/16 **Zakaria v. IDF Commander**, paragraph 22, (March 23, 2016); HCJ 1227/98 **Malevsky v. Minister of Interior**, IsrSC 52(4) 690, 711 (1998)).

23. Finally, with respect to the alleged danger of structural damage to nearby structures during the demolition: Even setting aside the fact that this argument was first made during the hearing, the engineering report submitted with the Respondent's response sufficiently allays concern over structural damage around the structure. As detailed in the report, no damage is expected to nearby structures, and some structures are under "low level and low probability" danger. It was also noted that necessary measures to avoid damage to nearby infrastructure would be taken.

Finally, given all considerations listed above, I have not found cause to intervene in the Respondent's decision. Therefore, should my opinion be heard, the petition would be dismissed.

Justice

Justice I. Amit

I concur, and I shall add a remark regarding the Respondent's conduct.

Just recently, the rule whereby, "despite carrying weight in the overall considerations the commander must take into account when exercising the power vested in him by Regulation 119, relatives' awareness of or involvement in the terrorist's actions in no way constitutes a consideration that has the power to tip the scale (HCJFH 5924/20 **Military Commander of the Judea and Samaria Area v. Baker Abu Soheila**

(October 8, 2020)). Note well, **lack of involvement** by family members is only one of several considerations relevant to exercising the power. In my view, **involvement**, including prior knowledge by family members of the terrorist's plans, may serve as a decisive consideration for the exercise of the power granted by Regulation 119.

My colleague, Justice D. Mintz, notes in his judgment that the Respondents claim to have indications of awareness by some members of the nuclear family, and that owing to Petitioners' counsel's objection to the court viewing the classified material, the Respondent benefits from the presumption of regularity.

As a rule, a party opposing the court viewing material ex parte assumes a substantive risk that the court would accept the argument owing to the presumption of regularity (Isaac Amit, Confidentiality and Protected Interests - Disclosure and Review Procedures in Civilian Law 738-741, 770 (2021)). However, in the case herein, the allegation that some members of the family were aware of the terrorist's intentions was never made in the Respondent's response, filed one day prior to the hearing, despite its decisive importance, despite the fact that this contention was made by the petitioners, and despite the fact that the Respondent did address the legal aspect of this argument by noting, "without addressing the factual veracity of the claim" (paragraphs 18 and 83). It is baffling why, instead of talking at length about the legal relevance of non-involvement by family members, the Respondent did not make the important, decisive claim that there was such involvement. Not only was this claim made for the first time parenthetically during the hearing, but it was initially stated that according to information in possession of security officials, involvement by family members "cannot be ruled out." Later during the hearing, the Respondent wished to correct the summary statement to, "there are indications members of the terrorist's nuclear family, who reside in the property, were aware of the terrorist's intention to carry out the attack prior to its commission."

This is not the way to make such an important claim, and the Respondent would have been expected, where he believes there are indications of involvement or awareness by family members, to bring it up and make note of it in the response. In any event, given that the Petitioners refused to allow the court to review the classified material ex parte, the presumption of regularity is restored, and I, therefore, concur with my colleague that the petition should be dismissed.

Justice

Justice O. Grosskopf

I concur with the judgment of my colleague Justice D. Mintz and join the remark made by my colleague Justice I. Amit.

Justice

Decided as stated in the judgment of Justice D. Mintz.

Given today, June 23, 2021.

Justice Justice Justice