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At the Supreme Court Sitting as the High Court of Justice

HCJ 1374/23

Before:	Honorable Deputy President Vogelman Honorable Justice A. Baron Honorable Justice G. Canfi-Steinitz
The Petitioners:	1. _____ Souf 2. HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger
	v.
The Respondent:	Commander of IDF Forces in the Judea and Samaria Area
	Petition for *Order Nisi* and Interim Order
Session Date:	1 Adar 5783 (February 2, 2023)
Representing the Petitioners:	Adv. Andre Rosenthal
Representing the Respondent :	Adv. Ran Rosenberg, Adv. Yonatan Zion-Mozes

Judgment

Justice G. Canfi-Steinitz:

1. The petition at hand is directed against a seizure and demolition order issued by the respondent by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945, for the residential home of a perpetrator who had committed a terror attack fueled by nationalism, which included several stabbing and ramming attacks, causing the death of the late Motti Ashkenazi, the late Michael Ladigin and the late Tamir Avichai of blessed memory and injuring four others (hereinafter: the **Demolition Order**, **Regulation 119** and the **Defence Regulations**, respectively).

Background

2. In the morning of November 15, 2022, the perpetrator, Muhammad Mrad Sami Souf, arrived to Ariel Industrial Park West, where he had been working. At the entrance to the industrial zone the perpetrator stabbed a security guard and fled to a nearby gas station, where he stabbed three additional men, stole a vehicle and used it to ram another bystander. Subsequently, the perpetrator exited the vehicle, stabbed another man and stole another vehicle. After crashing into a few vehicles, the perpetrator left the vehicle and tried to run away. The perpetrator was subsequently shot, neutralized and killed by IDF forces while fleeing the scene. Three men were killed and another four were wounded in the perpetrator's murderous killing spree.

3. It emerged from an investigation conducted by the security forces that the perpetrator committed his deeds for clear nationalist reasons, that at the time of the attack he was living with his mother, petitioner 1 (hereinafter: **Petitioner 1**) and five siblings in a 3.5 story building in the village of Hares, and that he had a residential nexus to the entire building. In the interrogations which were conducted by the security forces, petitioner 1 said that she was surprised to hear of her son's involvement in the attack, and even condemned his actions.

4. Following the murderous attack and to deter potential perpetrators from committing acts of terror, the respondent, the Commander of IDF Forces in the Judea and Samaria Area (hereinafter: the **Military Commander**) decided, based on the recommendation of the Israeli Security Service (ISA) and with the consent of the State Attorney and the Attorney General, to exercise the power vested in him by virtue of Regulation 119 and to issue an order directing to seize and demolish the building in which the perpetrator had lived.

5. On January 15, 2023, the military commander gave notice of his intention to seize and demolish the building, giving petitioner 1 the opportunity to appeal the decision by January 18, 2023. An engineering opinion concerning the demolition method was attached to his notice. On January 18, 2023, the non-classified evidentiary material concerning the perpetrator was transferred to petitioner 1's counsel, and later that day, the military commander received the objection of petitioner 1's counsel against his intention to exercise his power by virtue of Regulation 119. Petitioner 1 argued, *inter alia*, that Regulation 119 is not exercised for deterring purposes but rather for punitive purposes. It was further argued that the Regulation had been cancelled by the British Mandate before it left Israel in 1948, and that the use of the Regulation was contrary to international law. The petitioner also argued that the demolition of the building would adversely impact the residential home of seven people, and that it was also expected to adversely impact the property of the neighbors living near the building.

6. On February 8, 2023, the military commander dismissed petitioner 1's objection, specifying the underlying reasons for the dismissal. Among other things, petitioner 1's principled arguments concerning the power by virtue of Regulation 119, and the arguments concerning the validity of the Defence Regulations, were rejected. The individual arguments concerning the demolition method were also rejected. A seizure and demolition order was attached to the response to the objection and it was also noted

that the order would not be actually implemented before February 13, 2023. At her request, petitioner 1 was given an extension to file the petition, until February 16, 2023.

7. On February 16, 2023, the petition at hand was filed. Following the decision of Justice **A. Baron** from that day, the petition was transferred to a panel of Justices to be heard as soon as possible. It was also noted that "the respondent is held to refrain from carrying out the demolition until decided otherwise."

The Arguments of the Parties in Brief

8. The petitioners challenge in their petition the lawfulness of the Defence Regulations and argue that said regulations were not made part of Israeli law or of the law which applies in the Area, since they had been cancelled by the British government on May 12, 1948 immediately before the end of the British Mandate in Israel. According to them, on that date the British sovereign issued "The Palestine (Revocation) Order In Council, 1948" (hereinafter: **The Palestine (Revocation) Order In Council**), valid from May 14, 1948, in which the Palestine (Defence) Order in Council 1937 and the regulations promulgated thereunder were cancelled, including Regulation 119. The petitioners acknowledge the fact that The Palestine (Revocation) Order In Council was not published in the official gazette, but they are of the opinion that nevertheless said revocation is valid by virtue of Regulation 4(5) of the Defence Regulations stating, according to them, that such revocation shall not be rendered invalid even if it was not publicly published. The petitioners also rely on the situation which existed in Israel when the British Mandate in Israel ended, and particularly on the fact that it was practically impossible to publicly publish notices and legislative acts in the official gazette. The petitioners referred in their petition to a notice which was allegedly published on May 4, 1948 in the schedule of the official gazette and was signed by the prosecutor general, stating in principle that due to said difficulties the High Commissioner had ordered on April 29, 1948 that the manner of publication of notices and legislative acts as aforesaid would be decided by him. The petitioners argue that subsequent legislation of the Knesset or security legislation cannot revive a legislative act which no longer existed.

9. On the general level the petitioners argue that the repeated argument of public deterrence as a justification for and in support of the use of the power by virtue of Regulation 119 should be rejected. They argue that in fact, it has not been proven that the exercise of the power according to Regulation 119 assists to deter potential perpetrators and to prevent terror attacks. It is further argued that we are concerned with unlawful collective punishment, the main purpose of which is revenge, and that the use of Regulation 119 is contrary to the provisions of Israeli law and international law. On the individual level, the petitioners argue that the demolition of the perpetrator's home in the case at hand is expected not only to demolish the residential home of seven people solely due to their kinship with the perpetrator, but also to cause structural damage to buildings located near the building designated for demolition.

10. The military commander for his part, argues that the petition should be dismissed in the absence of legal grounds for interference. In response to petitioners' argument that the Defence Regulations were not made part of the Israeli law, it was argued that similar if not identical arguments were rejected in the past by this court in its judgments. He

accordingly argues that as stated in Section 11A(b) of the Law and Administration Ordinance, 5708-1948 (hereinafter: the **Ordinance**) and in Section 1 of the Interpretation Order (Additional Provisions) (No. 1) (The West Bank Area) (No. 160), 5728-1967, The Palestine (Defence) Order in Council is a "**hidden law**" which "**is not and has never been valid**". It was also argued that it is clear that the publication of a legislative act is a condition for its validity, and that a law which was not published cannot be regarded as a binding act of legislation.

11. With respect to the arguments which were raised on the general-principled level, including the doubts expressed by the petitioners about the deterring purpose underlying Regulation 119 – the military commander argues that these arguments were discussed and rejected by this court in a host of judgments given in that regard, including recently, and therefore there is no room to revisit them. With respect to petitioners' arguments on the individual level concerning the demolition method – the military commander argues that the engineering opinion which was prepared for the demolition states that no structural damage is expected to be caused to adjacent buildings, which gives an appropriate response to petitioners' concerns in this regard.

12. To complete the picture it should be added that on March 2, 2023 after the hearing in the petition, the petitioners filed an application for submitting an affidavit on behalf of petitioner 1, according to which, in a nutshell, "The Israeli occupying military forces" entered her house and checked all of its rooms. As stated in said application, the respondent denied that IDF soldiers entered petitioner 1's house and stated that they have only visited its surrounding area. Anyway, the petitioners did not clarify in their application how said affidavit supports the arguments which were raised by them in their petition and did not raise any additional arguments. In view of the aforesaid, I did not find it necessary to discuss these allegations on their merits.

Deliberation and Decision

13. It emerges from the examination of petitioners' arguments in their petition that they are mainly arguments of a general legal nature concerning the validity of Regulation 119 and the lawfulness of its use for the purpose of issuing seizure and demolition orders. Other than general arguments concerning the demolition method and the concern that damage shall be caused to adjacent buildings, the petitioners did not raise specific arguments directed against the manner by which the respondent has exercised his discretion in the case at hand. Having reviewed the arguments of the parties and the privileged material which was presented to us and having heard the engineer on behalf of the respondent *ex parte*, I have reached the conclusion that the petition should be dismissed in the absence of legal grounds for our interference, and I shall propose to my colleagues to do the same.

14. The petitioners request in their petition to re-examine the validity and lawfulness of the Defence Regulations, and in fact, their applicability as part of the law which applies in the Judea and Samaria Area. In principle, the petitioners argue that the Defence Regulation, including Regulation 119, do not apply to the Area since they were cancelled by the British sovereign on May 12, 1948 in The Palestine (Revocation) Order In Council, which entered into force on May 14, 1948. Despite the fact that this legislative act was not published in the official gazette, the petitioners are of the opinion that it does

not derogate from the validity of the cancellation. The petitioners base their above arguments on two main premises: The **first premise**, is entrenched in Regulation 4(5) of the Defence Regulations which according to them provides that the cancellation shall not be rendered invalid even if it was not publicly published since it states that **"[...] no such order, direction, requirement, notice or appointment shall be, or be rendered invalid as regards any person affected thereby by the fact that the order, direction, requirement, notice or appointment has not been brought to his attention**". The **other premise** is their argument that the British sovereign had the authority to cancel the Defence Regulations without the need to publish the cancellation in view of the situation in Israel at that time. In that regard the petitioners refer to a notice which was signed by the prosecutor general on May 4, 1948. According to the petitioners, subsequent legislation of the Knesset or the military commander in the Area, including Section 11A of the Ordinance which defined the term "hidden law", cannot revive the Defence Regulations as those were previously cancelled by the British sovereign.

15. Petitioners' arguments are not new and had already been discussed and rejected by this court in the past. Accordingly, in HCJ 513/85 **Nazal v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 39(3) 645 (1985), the court examined the question of whether the military commander had the authority according to Regulation 112 (at that time) of the Defence Regulations to issue a deportation order against a resident of the Area who posed a threat to the security of the Area. The court examined, *inter alia*, the argument that The Palestine (Revocation) Order In Council had in fact cancelled the Defence Regulations, including the authority vested with the military commander according to Regulation 112. The court rejected this argument and clarified that "Israeli domestic legislation includes reference to hidden legislation in Section 11A of the Law and Administration Ordinance, 5708-1948 (the Law and Administration Ordinance (Amendment) Law, 5709-1949). A similar provision was included in the security legislation in the Interpretation Order (Additional Provisions) (No. 1) (Judea and Samaria) (No. 160), 5728-1967 (hereinafter: Order No. 160), stating, for the avoidance of doubt, that hidden law is not – and has never been – valid." The court has further held that "hidden legislation is not valid regardless of the Interpretation Order which only clarifies the matter for the avoidance of any doubt. Therefore, Order No. 160 should be regarded as a provision which is mainly declarative and not constructive in nature."

The above Section 11A of the Ordinance provides that:

> "(a) A hidden law is not and has never been valid.
>
> (b) "Hidden Law" in this section means – law as defined in the Interpretation Ordinance, 1949, allegedly enacted in the period spanning between 16 Kislev 5708 (November 29, 1947) and 6 Iyar 5708 (May 15, 1948) and was not published in the official gazette although it is a law whose publication in the official gazette was, prior to said period, either mandatory or customary."

Similar provisions were included in the Interpretation Order (Additional Provisions) (No. 1) (Judea and Samaria) (No. 160), 5728-1967 which was applied to the Area and in

Section 9D of the Interpretation Order [Consolidated Version] (Judea and Samaria) (No. 1729), 5764-2013, which replaced it.

16. Petitioners' argument that The Palestine (Revocation) Order In Council did not require publication in the official gazette, including both premises thereof, was rejected in HCJ 703/15 **Darwish v. GOC Home Front Command** (March 19, 2015), where identical arguments had been raised by the petitioners (see: paragraph 6 of the judgment). In this context it was held by the court that "it is clearly a hidden law which therefore has no effect; even if certain things were not published in the Mandatory official gazette due to the security situation which existed towards the end of the British Mandate, the reasonable interpretation is that there was no intention to revoke a significant law in this manner, but rather various technical notices" (*Ibid.*, paragraph 12). Hence, the Defence Regulations, including Regulation 119, formed part of the law which applied in the Judea and Samaria Area immediately prior to the establishment of the military regime in the Area (with respect to the validity of Regulation 119 and its applicability in the Area see also: HCJ 274/82 **Hamamreh v. Ministry of Defense,** IsrSC 36(2) 755 (1982)**;** HCJ 2977/91 **Tag v. Minister of Defense IsrSC** 46(5) 467 (1992); HCJ 897/86 **Ja'aber v. GOC Central Command.** IsrSC 41(2) 522 (1987)).

17. Petitioners' arguments on the general-principled level concerning the lawfulness of the use of Regulation 119, have also been discussed and rejected by this court in numerous judgments including recent judgments, in which the authority of the military commander to issue seizure and demolition orders by virtue of said regulation was recognized. Therefore, I see no need to revisit them. (see, a few of many: HCJ 87/23 **Jamjum v. Military Commander of the Judea and Samaria Area**, paragraph 13 (February 5, 2023); HCJ 7787/22 **'Abed v. Military Commander of the Judea and Samaria Area**, paragraphs 19-23 (December 14, 2022) (hereinafter: **'Abed**); HCJ 3401/22 **Aatzi v. GOC Central Command**, paragraph 10 (June 8, 2022); HCJ 2770/22 **Hamarsheh v. Military Commander of the West Bank Area**, paragraph 14 (May 19, 2022) (hereinafter: **Hamarsheh**); On this matter see also decisions which rejected applications for revisiting the issue in the framework of a further hearing: HCJFH 663/22 **Abu Skhidem v. GOC Home Front Command**, paragraph 8 (January 30, 2022); HCJFH 4605/21 **Shalabi v. Military Commander of the West Bank Area**, paragraph 5 (June 30, 2021); HCJFH 9324/17 **Abu Alrub v. Commander of IDF Forces in the West Bank** (November 29, 2017)). So long as these rulings are in place, we should continue to rule according to them (an see the words of President **E. Hayut** in HCJ 1336/16 **Atrash v. GOC Home Front Command**, paragraph 9 (April 3, 2016); and the opinion of Justice **Z. Zylbertal** in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015)).

18. The petitioners reiterate in their petition arguments concerning the effectiveness of using Regulation 119 as a deterring measure against potential perpetrators. It was argued that in practice, it has not been proven that the exercise of the authority under Regulation 119 does indeed realize its deterring purpose, and that it is a disproportionate measure driven by considerations of retaliation and revenge. The arguments directed against the effectiveness of the policy of house demolition do indeed raise a complex issue which has often been discussed by this court. As aforesaid, the main purpose of exercising the authority is a deterring-preventive purpose, aimed at dissuading potential perpetrators

from realizing terror attacks for the fear that their family members shall loose the roof over their heads. As I have noted in **'Abed**, in view of the deterring purpose underlying the exercise of the authority, it is important to substantiate the allegation concerning the effectiveness of the deterrence in preventing terror attacks. However, the balance of harm and benefit with respect to the exercise of the authority cannot be easily measured. It is particularly difficult to measure the benefit embodied in the attacks which were prevented as a result of the exercise of the authority. In this state of affairs, the court relies on the professional opinions of the security bodies which are revised from time to time, and which include indications that it is an effective deterring measure (**Hamarsheh**, paragraph 16). Having reviewed the most updated opinion submitted for our review in the hearing, which is based on ample information from diverse sources, my position is that the opinion provides sufficient support to the notion that the exercise of the authority does indeed realize its deterring purpose. This opinion also conforms, in my view, with life experience which shows that most people take into consideration the best interest of their family members. It therefore only stands to reason that a potential perpetrator contemplating a terror attack may be deterred by the possibility that their family members would be harmed and remain without a roof over their heads.

19. The petitioners base their arguments concerning the ineffective use of Regulation 119, *inter alia,* on a presentation which was prepared in the past by a committee headed by Major General Udi Shani and which engaged in "re-thinking house demolition". Following the recommendations of this committee, the policy of house demolition was suspended for a few years. It emerges from a review of the presentation that not only the effectiveness of the deterrence was re-visited, with respect of which it was noted that "the intelligence bodies are in total agreement about the connection between the demolition of perpetrators' homes and deterrence", but also the need to take into account, alongside the consideration of deterrence, additional considerations. These considerations include ethical, moral, political, image and other considerations, which may impact the balance of cost and benefit in the implementation of the house demolition policy. Indeed, this policy should be reviewed from time to time in accordance with the changing circumstances, as has been done in the past. This is also respondent's view who believes that the exercise of the authority is the product of "the circumstances of time and place", including the scope, frequency and intensity of the terror attacks. Regretfully, the current security reality and the surge of terrorism, which does not subside, claiming many victims, do not make it easy to change the above policy at this time. Anyway, in the case at hand the military commander found that the circumstances of time and place required the exercise of the authority to deter potential perpetrators and prevent additional victims, and I found no reason justifying interference with his evaluation and discretion.

20. And finally, with respect to petitioners' arguments concerning the demolition method and the concern that damage shall be caused to nearby houses. The rule on this subject made it clear that the military commander is held to take the required measures to prevent damage to adjacent houses (HCJ 8124/04 **al-Ja'abari v. Commander of IDF Forces in the West Bank** (October 12, 2004); **Hamarsheh**, paragraph 22). However, the demolition method is subject to the wide discretion of the military commander and the professional bodies acting on his behalf. Therefore, in the absence of exceptional circumstances, the court shall not put itself in his shoes (HCJ 480/21 **Rabha v. Military**

Commander of the West Bank Area, paragraph 13 (February 3, 2021); **Qawasmeh**, paragraph 31). In the case at hand, the engineering opinion noted that no damage is expected to be caused to structural or non-structural construction elements of nearby buildings. With respect to infrastructures which may be harmed and nearby windows, it was clarified in the opinion and in the hearing before us that an effort shall be made to disassemble them before the activity in a manner preventing them from being harmed. In these circumstances, I did not find legal grounds for interfering with the decision of the military commander.

21. Hence – since the petitioners were unable to substantiate legal grounds justifying interference with the decision of the military commander, I shall propose to my colleagues to dismiss the petition. I shall also propose that under the circumstances of the matter, petitioner 1 shall be given 7 days as of the date of this judgment for organization purposes, before the demolition order is realized.

J U S T I C E

Deputy President U. Vogelman:

22. In the framework of the petition before us the petitioners request once again that we re-visit the principled issues raised by the house demolition policy and the exercise of the power according to Regulation 119 of the Defence (Emergency) Regulations, 1945.

In this context, I can only reiterate what I have said several times in the past:

> "I have expressed my opinion on the prevailing rule concerning house demolition by virtue of Regulation 119 of the Defense Regulation and the general difficulties associated therewith more than once (see for instance my opinion in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015); in HCJ 1630/16 **Zakariye v. Commander of IDF Forces** (March 23, 2016); in HCJ 1336/16 **Atrash v. GOC Home Front Command**, paragraph 1 of my opinion (April 3, 2016); in HCJ 5141/16 **Mahamara v. Commander of Military Forces in the West Bank** (July 24, 2016); and in HCJ 5943/17 **A. v. Commander of Military Forces in the West Bank** (August 3, 2017)). As I have noted in these cases, although I am of the opinion that said rule should be re-visited and all aspects thereof be fully discussed, it is binding until it is changed, to the extent it is changed, by an expanded panel" (HJC 628/18 **Kamil v. Commander of IDF Forces in the West Bank**, paragraph 13 (February 28, 2018); see also HCJ 2770/22 **Hamarsheh v. Military Commander of the West Bank,** paragraph 1 of my opinion (May 19, 2022) (hereinafter: **Hamarsheh**); HCJ 752/20 **'Atawaneh v. Military Commander of Judea and Samaria**, paragraph 2 of my opinion (May 25, 2020); HCJ 1490/20 **Shibli v. Military Commander of the West Bank Area**,

paragraph 1 of my opinion (March 30, 2020)(hereinafter: **Shibli**); HCJ 2356/19 **Barghuti v. Military Commander of the West Bank Area** (April 11, 2019)).

23. As is known, authority is one thing and discretion is another. However, alongside the principled arguments discussed by my colleague in the case at hand, the petitioners did not raise arguments against the manner by which the authority was exercised, other than with respect to the demolition method. On this last matter it should be reminded that it is incumbent on the military commander to ascertain, in advance, that the demolition method taken does not cause damage to parts of the building that should not be harmed (**Hamarsheh**, paragraph 4). In an *ex-parte* hearing we received a detailed explanation of the demolition method and found that all of the aspects relevant to the matter were taken into consideration as specified by my colleague. To the extent unplanned damage is eventually caused – the door is not locked before a claim for compensation (HCJ 7045/15 **Hamed v. Military Commander of the West Bank Area**, paragraphs 56-59 of the opinion of President **M. Naor** (November 12, 2015); see also: HCJ 2828/16 **Abu Zied v. Commander of Military Forces in the West Bank**, paragraph 8 (July 7, 2016)).

Subject to the aforesaid I join the conclusion of my colleague, Justice **G. Canfi-Steinitz** that given the existing rule, there are no legal grounds for interfering with the decision of the military commander and accordingly, the petition should be dismissed.

DEPUTY PRESIDENT

Justice A. Baron

Muhammad Mrad Sami Souf (hereinafter: the **Perpetrator**), embarked, on November 15, 2022, on a cruel and horrendous killing spree. He stabbed and rammed and stabbed again more and more innocent victims, only because they are Jewish. The perpetrator killed the late Motti Ashkenazi, the late Michael Ladigin and the late Tamir Avichai of blessed memory, and wounded four others. The loss and pain are unbearable.

Without derogating, not one bit, from the horrible severity of the acts of murder and violence committed by the perpetrator, it must be clearly said that the purpose of the power vested in the military commander to issue house demolition orders is to deter and not to penalize. In addition, and as noted by my colleague Deputy President **U. Vogelman**, authority is one thing and discretion is another. On this matter, I stay firm in my opinion that "As a general rule, the demolition of a house only on the basis of the severity of the deeds attributed to the perpetrator, without giving any weight to the knowledge or involvement of his family members in his deeds, does not satisfy the proportionality test" (HCJ 6420/19 **Al'azafreh v. The Military. Commander of the West Bank Area** (November 12, 2019); for a broader explanation see my words in HCJ 1125/16 **Mar'i v. Commander of Military Forces in the West Bank** (March 31, 2016)). And it should be clarified: my approach to the matter stems from the heavy doubts that in my opinion hover over the deterring power embodied in the measure of house demolition (see, for instance, my words in HCJ 87/23 **Jamjum v. Military Commander for Judea and Samaria** (February 5, 2023)). Not only that there is

difficulty in quantifying the numbers and the manner by which house demolition prevents acts of terror, but there is also difficulty in quantifying the manner by which this measure works in the opposite direction: fueling acts of violence and hatred against Jews.

In the case at hand, while examining the proportionality of the demolition order which was issued with respect to the residential house of the perpetrator, appropriate weight and significance should be given not only to the gravity of his actions; but also to the fact that the house designated for demolition is also the residential home of the perpetrator's mother and five siblings, four of whom are minors (the youngest one is about two and a half years old). There is no dispute that the family members had no involvement or knowledge of his murderous acts. In addition, they have not demonstrated any support for his actions after the fact. In these circumstances I am of the opinion that the demolition order which was issued for the house is not proportionate. Therefore, if my opinion was heard we would have issued an *order nisi* in the petition.

J U S T I C E

Decided by a majority of votes as stated in the judgment of Justice **G. Canfi-Steinitz**.

Given today, 13 Adar 5783 (March 6, 2023).

Deputy President | Justice | Justice