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At the Supreme Court Sitting as the High Court of Justice

HCJ 7787/22

HCJ 7788/22

Before:

Honorable Justice N. Sohlberg
Honorable Justice O. Grosskopf
Honorable Justice G. Canfy-Steinitz

The Petitioners in HCJ 7787/22:

1. _____ 'Abed
2. _____ 'Abed
3. _____ 'Abed
4. _____ 'Abed
5. _____ 'Abed
6. _____ 'Abed
7. HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger

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7. HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger

v.

The Respondents in HCJ 7787/22:

1. Military Commander of the Judea and Samaria Area
2. Legal Advisor of the Judea and Samaria Area

The Respondents in HCJ 7788/22:

1. Military Commander of the Judea and Samaria Area
2. Minister of Defense

Petition for *Order Nisi* and *Interim Order*

Session Date:

6 Kislev 5783 (November 30, 2022)

Representing the Petitioners in HCJ 7787/22:

Adv. 'Odeh Nasser

Representing the Petitioners in HCJ Adv. Nadia Daqqa, Adv. Daniel Shenhar
7788/22:

Representing the Respondent : Adv. Areen Safadi-Atilla

Judgment

Justice G. Canfy-Steinitz:

We have before us two petitions against seizure and demolition orders which were issued by virtue of Regulation 119 of the Defense (Emergency) Regulations, 1945, for the residential homes of two perpetrators who had committed a shooting attack motivated by nationalism which caused the death of the late Major Bar Falah of blessed memory (hereinafter: the **Demolition Orders** and **Regulation 119**, respectively).

HCJ 7787/22 – the petition of the parents and sisters of the perpetrator, Ahmed Iman Ibrahim ‘Abed (hereinafter: **Ahmed**), which was joined by HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger (hereinafter: **HaMoked**), is directed against the seizure and demolition order which had been issued with respect to the first floor and roof of the building located in Kafr Dan, where Ahmed had allegedly resided (hereinafter: **Ahmed's Home**).

HCJ 7788/22 – the petition of the parents, siblings and grandparents of the perpetrator, 'Abed al-Rachman Hani Zubahi ‘Abed (hereinafter: '**Abed**), which was also joined by HaMoked, is directed against the seizure and demolition order which had been issued with respect to the land and the building erected thereon, also located in Kafr Dan, where 'Abed had resided (hereinafter: '**Abed's Home**).

The background of the petitions

1. On the night of September 13, 2022, IDF surveillance identified the two perpetrators in the seam zone near the village of Jalameh located in the area of the Menashe Regional Brigade. IDF forces which were dispatched to the area flanked the perpetrators and initiated the procedure for arresting a suspect. The perpetrators opened fire at the force and the fighters responded with fire and killed the perpetrators. As a result of the firefight, the deputy commander of the Nahal Reconnaissance Unit, the late Major Bar Falah of blessed memory, was sadly killed.
2. In his interrogation, 'Abed's family member, Omar Muhammad Tewfik ‘Abed (hereinafter: **Omar**) said that a day before the attack he had sold 'Abed a "Carlo" gun. When he had asked 'Abed what he needed the gun for, the latter told him that he wanted to shoot at the military using the gun. Omar added in his interrogation that in his opinion 'Abed and his accomplice committed the attack in revenge for the death of their friend who had been killed by IDF fire a few months earlier. It should be noted that an indictment for several firearm offences was filed against Omar, including offences of arms trade.
3. On October 26, 2022 Respondent 1 notified the petitioners, by two separate notices, of his intention to seize and demolish the buildings in which the perpetrators had resided. It

was noted that this measure was taken due to the shooting attack which had been committed by the two and since it served as a measure to deter potential perpetrators from committing terror attacks. An engineering opinion was attached to the notice concerning the demolition method. The petitioners were also given the opportunity to object to the decision by October 31, 2022.

4. On October 31, 2022 and November 3, 2022 petitioners' counsels filed separate objections against the demolition orders. The petitioners argued, inter alia, that the notices which had been sent concerning the intention of respondent 1 to seize and demolish the buildings were given without authority in deviation from the tests of reasonableness and proportionality. It was also argued that the issuance of demolition orders against innocent people constitutes a breach of international law which prohibits collective punishment, and a violation of the fundamental rights of the individuals residing in the buildings.
5. On November 7, 2022 a response to the objections filed on their behalf was sent to petitioners' counsels. The respondents notified that the objection was denied, and respondent 1 discussed the objection and its underlying reasons. In that context, the principled and individual arguments raised by the petitioners concerning the exercise of the power of respondent 1 by virtue of Regulation 119 were rejected.
6. In view of the above, respondent 1 decided that the homes of Ahmed and 'Abed shall be seized and demolished, noting that the orders shall not be carried out before November 10, 2022 at 20:30. In addition, interrogation reports and memoranda from the interrogations of Ahmed's father, uncle and cousin and interrogation reports from the interrogations of 'Abed's father and brother were attached. Following petitioners' request, the respondents notified that the demolition orders will not be carried out before November 15, 2022 at 10:00.
7. On November 15, 2022 the petitions at hand were filed. Pursuant to the decision of Justice **Y. Elron** with respect to the two petitions, the petitions were transferred to a panel of three to be heard as soon as possible. It was also noted that **"in view of the fact that the petition shall be heard within the next few days, and as was held in similar cases, the respondents are held to refrain from carrying out the demolition until decided otherwise."**

To complete the picture, it should be noted that after the petitions had been heard, the petitioners in HCJ 7788/22 were granted leave to submit by December 5, 2022 a supplementary notice for their arguments that 'Abed had no residential ties to that part of the house designated for demolition under the demolition order as shall be specified below. Subsequently, on December 9, 2022 respondents' response was submitted to petitioners' supplementary notice.

Petitioners' arguments in brief

8. The petitioners raise principled arguments concerning Regulation 119 alongside individual arguments, mostly factual ones, against the demolition orders which were issued in their matter.

9. In principle, the petitioners argue that the purpose of this regulation is to impose a collective punishment on innocent people and violate their fundamental rights, as opposed to effective deterrence, contrary to the provisions of international law and Israeli law. It was also argued that in fact, the Regulation does not realize its designated deterring purpose, but rather on the contrary, it deteriorates the security situation and increases the hostility and the hatred. The petitioners added further that the legality of the use of Regulation 119 should be examined by an expanded panel of justices.
10. On the individual level, the petitioners argue that the decision of the military commander is neither proportionate nor reasonable. In this context they raise different arguments with respect to the residential ties between Ahmed and 'Abed and the houses for which the demolition orders were issued.

With respect to **Ahmed's home** it was argued that there were no residential ties between Ahmed and the building. It should be noted that it is a three story building: a ground floor, the residential apartment of Ahmed's grandfather and grandmother which was excluded from the demolition order; above it, a first residential floor in which Ahmed's nuclear family resides, and finally, the top floor – both of which are included in the demolition order. According to the petitioners, in the year which preceded his death Ahmed lived in Qalqiliya, and arrived to the family home only for occasional visits, on holidays and sometimes on the weekends, at which time he used to stay in the apartment on the first residential floor. It was further argued that the top floor was owned by all tenants of the building, including the grandparents, and that contrary to respondents' argument it was not designated for 'Abed's use after his marriage. In these circumstances, the petitioners argued that there was no nexus between 'Abed and the house and that at the most the nexus to the first residential floor was "loose" and did not justify the implementation of Regulation 119.

With respect to **'Abed's home** it was argued that the building which is the subject matter of the demolition order consists of two homes, having two separate entrances, and that only with respect to one of them 'Abed had a residential tie. It was argued that one home, which was built in the 1980's, was located on the northern side of the building, and served as the residential home of 'Abed and 'Abed's nuclear family; while the other residential home, which was built by the end of the 1960's, was located on the southern side of the building and served as the residential home of 'Abed's grandparents, and that there was no residential nexus between 'Abed and said house. It was also argued that an iron gate was located on the southern side of the house enabling passage from the street to the grandparents' home, without passing through the adjacent uncle's home, and that said part of the house had an address which is customarily placed on the entrance of a person who had returned from a pilgrimage – a journey from which the grandfather had returned. According to the petitioners, these facts show that it is a separate and distinct residential unit. It was further argued that it also emerged from the interrogation of 'Abed's father and brother that the southern part of the building belonged to the grandparents.

11. Another argument which was raised in HCJ 7788/22 and which relates to both petitions is that it emerges from the investigation of the "event", as stated by the petitioners, which underlies the orders – that it was not a terror attack directed against a person who is not

involved in combat, but rather, an armed conflict between two armed parties. Under these circumstances, it was argued that Regulation 119 should not be implemented. In addition, in Ahmed's case, it was argued that his involvement in the incident has not been sufficiently proven since it did not emerge from Omar's interrogation that Ahmed took part in the event and its planning.

12. It was further argued by the petitioners on the individual level that they themselves were not involved and had no knowledge of the deeds of 'Abed and Ahmed, and therefore the execution of the orders in their case was disproportionate. It was also argued that the petitioners were not given the opportunity to properly raise their arguments in the hearings which took place prior to the issuance of the seizure and demolition orders, and later on since respondent 1 refrained from giving them relevant interrogation materials and provided them with a very short period of time to file the objection and the petition. Finally, the petitioners argued that the demolition method by way of 'hot detonation', raises a real concern that additional houses in the surrounding area shall be damaged, and therefore sealing instead of demolition should be ordered or at least that the orders shall be carried out in alternative less injurious ways.

Respondents' response

13. On the other hand the respondents argue that the petitions should be dismissed in the absence of legal grounds for interference. In response to the principled arguments which were raised in the petitions the respondents argue that they have already been discussed and rejected in the past by this court in a host of judgments given in that regard, including recently, and therefore there is no room to re-visit them. The same applies to petitioners' arguments concerning the purpose of Regulation 119 and the effective results of its implementation, which have only recently been discussed and rejected in judgments given in that regard.
14. On the individual level, the respondents referred to the residential ties:

With respect to **Ahmed's home** the respondents argued that it emerged from the interrogation of the family members that Ahmed lived in the residential apartment on the first floor and also used the roof, where he intended to live after his marriage. It was also argued that Ahmed had a certain tie to the grandparents' apartment on the ground floor, but that eventually it was decided not to exercise the power with respect to said floor, but only with respect to the first floor and the roof to which he had a clear residential nexus. The above shows, it was so argued, that the decision is proportionate.

With respect to **'Abed's home** it was argued that the attempt to divide the building into two separate residential units was artificial. In particular, it was argued that there is no way to enter the southern part of the building from the adjacent street, other than through the entrance which is located in the northern area, or through the adjacent house where 'Abed's uncle lives. With respect to the possibility to enter from the south it was argued that whether the entrance into the southern part of the house is from the uncle's house or whether it is from the courtyard of the uncle's house, it does not change the conclusion that there is no way to enter the southern part of the house **directly** from the adjacent street. Anyway, the manner by which one enters the southern part of the house cannot in

and of itself substantiate the argument that this part constitutes a separate residential unit, and that an inspection of the property including the sequence of its rooms shows that it is one residential unit. It was also argued that there is no importance to the inscription which appears on the southern side of the house since these kind of addresses are also customarily written on the walls surrounding the house and not only on the front entrance. It was also argued that the attempt to limit the scope of the order could erode the deterring purpose underlying the use of Regulation 119.

15. With respect to petitioners' arguments regarding the event underlying the demolition orders, it was argued that according to the description of the severe attack it appeared that the perpetrators shot at IDF forces while the forces were carrying out an arrest procedure, using guns which had been purchased by the perpetrators for the purpose of shooting at IDF soldiers. According to the respondents, under these circumstances, and taking into account the existing administrative evidence and the standards which were established by case law, the power to use Regulation 119 was invoked. It was further argued that the allocation of the responsibility between the perpetrators is irrelevant for this purpose, since where both had jointly committed the attack the necessary elements were satisfied for the purpose of exercising the power against their residential homes.
16. With respect to petitioners' involvement and awareness, it was argued that although there is no evidence that the petitioners knew of the attack or were involved in it in any other way, it was held by case law that this consideration was not a necessary condition for the purpose of exercising the power according to Regulation 119. In the case at hand it was argued that respondent 1's decision weighed many factors, and in view of the severity of the circumstances of the specific case, it was found that there was room for exercising said power.
17. With respect to the hearing proceedings regarding the issuance of the orders, it was argued that the petitioners are not vested with a right to receive interrogation materials in the framework of a criminal proceeding that they are not party to, and anyway, the respondents attached to their response to petitioners' objections all of the relevant interrogation materials which could have been revealed. It was also argued that the petitioners were given sufficient time to file the objections and the petitions considering the short periods of time required as a result of the deterring purpose underlying the power according to Regulation 119, and considering the extension which was given to the petitioners for the purpose of filing the petitions.
18. Finally, with respect to the demolition method it was argued that the two alternatives which were proposed in the engineering opinions were thoroughly examined by respondent 1, who reached the conclusion that maximum efforts are being taken such that the demolition shall have focused and controlled characteristics, and that consequently there is only a low likelihood that damage will be caused to the adjacent buildings. It was also noted that it has been acknowledged by case law that the demolition method is one of the professional issues in which respondent 1 is vested with particularly broad discretion, and that he is held to act in that respect with the necessary caution.

Deliberation and Decision

19. Petitioners' principled arguments were discussed and rejected in the past by this court in numerous judgments, including recently, in which case law recognized the power vested in the military commander to issue seizure and demolition orders by virtue of Regulation 119 (see, out of many: HCJ 4359/22 **Abu Shakir v. Commander of IDF Forces in the West Bank**, paragraph 16 of the judgment of Justice **A. Stein** (July 17, 2022) (hereinafter: **Abu Shakir**); HCJ 4088/22 **Al-Rafai v. Military Commander of the West Bank Area**, paragraph 10 of the judgment of Justice **Y. Elron** (July 7, 2022); HCJ 3401/22 **Atzi v. GOC Central Command**, paragraph 7 (June 8, 2022) (hereinafter: **Atzi**); HCJ 2770/22 **Hamarsheh v. Military Commander of the West Bank Area**, paragraph 14 (May 19, 2022) (hereinafter: **Hamarsheh**); HCJ 1618/22 **Jaradat v. Military Commander of the West Bank Area**, paragraph 6 (April 6, 2022)). Applications for a further hearing which were filed in that regard have also been denied, making it clear that notwithstanding the harsh consequences caused as a result of the implementation of Regulation 119, the rule on that matter stands (see: 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); and see also: HCJ 6826/20 **Dweikat v. Commander of IDF Forces in the Judea and Samaria Area** (October 25, 2020) (hereinafter: **Dweikat**), in which the principled arguments which were raised against the use of Regulation 119 and its underlying deterring purpose were examined on their merit.
20. Case law on this matter repeatedly clarified that the purpose of the Regulation is to prevent and deter and not to punish. The above for the purpose of saving lives with the intent to dissuade potential perpetrators from realizing their murderous plans (see, out of many: **Hamarsheh**, paragraph 15; **Atzi**, paragraph 11). It was noted that house demolition is an extreme and severe measure entailing the loss of the roof above the heads of the perpetrator's family members, even if they did not assist him and even if they had no knowledge of his malicious plans. However, it was acknowledged that "considerations of deterrence sometimes require to deter potential perpetrators who must understand that their actions may also affect the wellbeing of their relatives, the above also when there is no evidence that the family members were aware of the perpetrator's deeds" (HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**, paragraph 7 of the judgment of Justice **M. Naor** (January 5, 2009)). It was also held that the court does not have the adequate tools to examine whether the demolition of the building would in fact lead to effective deterrence – and that with respect to this matter the court relies on the professional opinions of the security bodies, which are updated from time to time and are reviewed by this court, from which it appears that the use of Regulation 119 does indeed have a substantial deterring effect (HCJ 7040/15 **Hamed v. Military Commander of the West Bank Area**, paragraph 27 (November 15, 2015) (hereinafter: **Hamed**); **Dweikat**, paragraph 24; **Hamarsheh**, paragraph 16).
21. In view of the harsh consequences arising from the use of Regulation 119 and the harm caused to uninvolved family members it was clarified that the military commander should exercise his power in a cautious, proportionate and limited manner befitting, to the maximum extent possible, the values which are protected by the Basic Law: Human Dignity and Liberty (**Dweikat**, paragraph 21; HCJ 480/21 **Rabha v. Military**

Commander of the West Bank Area, paragraph 13 (February 3, 2021) (hereinafter: **Rabha**); HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 22 (August 11, 2014) (hereinafter: **Qawasmeh**). In this context, the military commander should take into account while making his decision a host of considerations and balance between them before exercising his power (see in that regard: **Qawasmeh**, paragraph 22). The focus in examining the decisions of the military commander has therefore shifted from the level of the authority to the level of the discretion. However, with respect to this level of reasonableness and proportionality, this court has also established a set of rules outlining the manner by which the military commander should exercise his discretion – and so long as they stand we should continue to follow them and decide according to them (see: the judgment of Justice **Z. Zilbertal** in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015)).

22. The petitioners raise once again in their petitions doubts about the deterring effect of the policy of house demolition, the above particularly compared to the damage which is caused by the implementation of this policy which according to them exceeds the benefit which is derived therefrom. It is argued that in fact, the policy of house demolition does not realize its designated deterring purpose, and can actually lead to further escalation in the security situation. It should be noted that these arguments raise a complex issue involving factual questions, which have been frequently discussed by this court (for a discussion of the effectiveness of the deterrence see: HCJ 8091/14 **HaMoked Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014) (hereinafter: **HaMoked**); **Hamed**). As aforesaid, the major purpose for exercising the power is to prevent and deter. Its purpose is to dissuade potential perpetrators from realizing attacks for the fear that their family members shall be severely harmed. In view of the deterring purpose underlying the exercise of the power, it is important to substantiate the argument that deterrence effectively prevents terror attacks. In this context one cannot disregard the argument that the exercise of the power may broaden the circle of violence and hatred and encourage the commission of additional terror attacks. However, the balance of harm and benefit concerning the exercise of the power cannot be easily measured. While the harm, or at least part of it, is clear and visible to us, it is difficult to see the benefit manifested in the attacks which were prevented as a result of the exercise of the power. In this state of affairs, the court relies, as aforesaid, on the professional opinions of the security bodies which are updated from time to time, and which are based on data indicating that it is indeed an effective deterring measure and that the benefit achieved by it exceeds its harm. It is a professional body having expertise and experience, with a wide view of the security needs, closely familiar with the mood on the ground and has a clear advantage in evaluating the effectiveness of employing this authority. On the basis of these opinions, I am convinced that the exercise of the authority does indeed realize its purpose.
23. It should be added in this regard that one cannot disregard the severe security circumstances experienced by us these days, where terror attacks became a routine phenomenon claiming victims on a daily basis. In view of the escalation in acts of terror, their scope and gravity, it seems that there is no alternative but to take deterring measures to protect the public from additional terror attacks.

The Individual Arguments

24. I shall start by saying that I found no merit in petitioners' argument that the proceeding in which the order was issued in their matter was flawed with respect to the periods of time which were given to them for the purpose of filing the objection and the petition, and the interrogation materials which were made available to them. As stated in respondents' response, the relevant interrogation materials which could have been disclosed were transferred to the petitioners for their review and the petitioners were even given, at their request, an extension to file the petition. Therefore, the arguments in that regard should be denied.

25. The petitioners argue that in the case at hand the military commander does not have the power to issue a demolition order against the buildings since the incident underlying the orders does not constitute an act of terror. It was argued in this context that according to the incident's investigative report which was published by the IDF spokesperson, fire was exchanged between two armed parties and in fact it was an armed conflict with IDF soldiers. I found no merit in this argument. The military commander may exercise the power vested in him by virtue of Regulation 119 against suspects involved in hostile activity against the state of Israel. Notwithstanding the broad language of the Regulation, case law has clarified that the purpose of said power is to deter persons involved in terrorism (see: **HaMoked**, paragraphs 1 and 18; **Qawasmeh**, paragraph 21; H CJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank**, paragraph 11 (December 1, 2015); H CJ 2528/16 **Mazalhe v. Military Commander of the West Bank**, paragraph 24 (June 15, 2016); H CJ 7961/18 **Na'alawa v. Military Commander of the West Bank Area**, paragraph 16 (December 6, 2018)). In the case at hand, petitioners' arguments as if we are concerned with an armed conflict with IDF soldiers as opposed to an act of terror do not reconcile with the facts arising from the administrative evidence presented by the respondents. It emerges from Omar's testimony, which was specified above, that 'Abed purchased the gun one day prior to the attack for the purpose of using it to shoot at IDF soldiers. Omar added that in his opinion 'Abed and his accomplice committed the attack in revenge for the death of their friend who had been killed by IDF fire a few months earlier. It should be noted that it emerges from the interrogation report of Ahmed's father that Ahmed had the photograph of said friend hanging on the wall of his room next to a poster praising martyrs. These data establish the required level of certainty substantiating the fact that it was a pre-meditated shooting attack, committed for nationalist reasons in retaliation for the death of the friend of the two perpetrators. The fact that the target of the attack was IDF soldiers does not obliterate the fact that it was an act of terror since we are concerned with individuals who did not come to fight but rather to commit an attack (and compare the exercise of the power in similar cases in which an attack was committed against IDF soldiers: H CJ 5667/91 **Jabarin v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 46(1) 858 (1992); H CJ 6905/18 **Naji v. Military Commander of the West Bank Area** (December 2, 2018); H CJ 4177/18 **Kabha v. Military Commander of the West Bank Area** (June 7, 2018)). In these circumstances, the above evidence can provide sufficient administrative evidentiary infrastructure for the exercise of the power.

26. The argument whereby Ahmed's involvement in the incident has not been sufficiently proven cannot be accepted as well. A review of Omar's interrogation report shows that Omar was not aware of Ahmed's involvement in the planned attack, but it does not lead to the conclusion that his involvement in the incident has not been proven. Far from it. Even if the acquisition of the gun was made by 'Abed alone, there is no dispute that Ahmed was physically present at the scene of the incident and fully participated in the commission of the attack. The above sufficiently shows that the attack was carried out jointly by the two perpetrators, and that Ahmed's part in the attack was not smaller than 'Abed's part therein
27. We shall now discuss petitioners' arguments concerning the absence of residential ties to the homes which are the subject matter of the demolition orders.

With reference to **Ahmed's house**, petitioners' argument, as recalled, is that Ahmed was no longer living in the house but was only visiting it from time to time. A review of the interrogation reports of Ahmed's father and uncle shows that petitioners' arguments have no merit and that Ahmed had been living in his parents' house all his life, and that his residential tie to the house which is the subject matter of the order was never disconnected. In this context, it emerges from the interrogation that there was also a residential tie to the roof of the house (which is currently not built), on which an additional floor should have been built to be used by Ahmed after his marriage. It should be reminded in this context that in Ahmed's case the military commander decided to exclude from the demolition order the apartment of Ahmed's grandparents which is located on the ground floor of the building. The above, despite the fact that Ahmed had a certain tie to his grandparents' apartment where, according to the testimony of his family members, he had occasionally slept to help his grandfather. The above shows that discretion has been exercised and that the proportionality of the order was strictly maintained, limiting it only to areas to which Ahmed had a clear residential tie.

With respect to 'Abed's home, petitioners' argument is that 'Abed had a residential tie only to the northern part of the house which is the subject matter of the demolition order, while the southern part constituted a separate residential unit serving as the residential home of 'Abed's grandparents. For this reason it was argued that the harm to the building, if permitted, should be limited solely to the room in which 'Abed had slept or at least to the northern part of the house. Having heard the detailed arguments of the parties on this matter and after their supplementary notices were filed, I found no flaw in the discretion of the military commander who was of the opinion that we are concerned with one residential unit rather than with two independent residential units. It should be noted that both parties based their arguments in this regard on the floor plan of the house which was attached to the engineering opinion filed on behalf of the respondents. A review of this plan shows that the house is composed of a set of rooms with one main entrance, with an exit to a rear balcony. The rooms of the grandparents are located on the southern part of the building near the rear balcony. The petitioners argue that there is an entrance gate leading from the street into the southern part of the house which shows that this is a separate and independent residential unit. Photographs of said gate were attached to petitioners' supplementary notice which was filed after the petitions had been heard. However, even if we assume that there is indeed an additional entrance gate in the southern part of the house, it does not, in and of itself, show that we are concerned with

two separate and distinct residential units. As aforesaid, the floor plan which is not in dispute shows that we are concerned with one set of rooms which extends over one residential floor consisting of the parents' rooms, the rooms of the siblings and the grandparents' rooms, with the possibility to pass through the different rooms from within the building and the common balcony. In view of the aforesaid, I accept respondents' argument that all parts of the house should be regarded as one residential home – to which the perpetrator had a residential tie in the case at hand (and compare: H CJ 2/97 **Abu Hallawa v. GOC Home Front Command**, paragraph 12 (August 11, 1997); H CJ 4772/91 **Hizran v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 46(2) 150, 154 (1992); see also: H CJ 745/22 **Jaradat v. Military Commander of the West Bank Area**, paragraphs 21-22 (February 20, 2022); **Atzi**, paragraph 14).

As a general rule, the military commander is vested with the discretion to decide on the scope of the demolition which depends, *inter alia*, on considerations relating to the ability to achieve the deterring purpose of the demolition (H CJ 5943/17 **A v. Commander of IDF Forces in the West Bank**, paragraph 10 (August 3, 2017)). While examining the proportionality of the order it should be considered whether the residential unit in which the perpetrator resided can be separated from other parts of the building. In the case at hand, given the structure of the residential unit and all of the circumstances which were described above, I did not find that the decision of the military commander not to separate the grandparents' rooms from the rooms of the other family members, is a decision which does not meet the tests of proportionality. In view of the aforesaid, my conclusion is that there are no legal grounds for interfering with the discretion of the military commander with respect to the scope of the demolition in the case of 'Abed's home.

28. In addition, the argument that the family members were not involved in the incident and were not aware of the intentions of the perpetrators cannot prevent the exercise of the authority. Indeed, no indications emerged from the data presented to the military commander about the awareness of the family members of the perpetrators' intentions to commit the attack. However, it does not, in and of itself, justify interference with the discretion of the military commander. In that regard it was held that "**The awareness or involvement of the family members in the deeds of the perpetrator – although it carries weight in the gamut of the considerations that the military should take into account while exercising the power vested in him by virtue of Regulation 119 – it does not constitute a consideration which tips the scales**" (H CJFH 5924/20 **Military Commander of the Judea and Samaria Area v. Abu Suhila**, paragraph 7 (October 8, 2020); and see also: **Rabha**, paragraph 12).
29. With respect to the arguments relating to the demolition method. There is no dispute that it is incumbent on the military commander to take the necessary measures to prevent adjacent buildings from suffering damage (H CJ 8124/04 **Al-Jabari v. Commander of IDF Forces in the West Bank** (October 12, 2014); H CJ 6932/94 **Abu Alrub v. Military Commander of the Judea and Samaria Area** (February 19, 1995)). It emerges from the engineering opinions which were attached to the demolition orders in petitioners' cases, that the demolition shall be carried out by way of hot detonation together with mechanical means and that there is a low likelihood that damage shall occur. It was also noted that an effort shall be made to disassemble infrastructures which may be harmed to prevent them from being damaged. In these circumstances, the argument that there is

a concern that damage shall be caused to adjacent buildings does not establish legal grounds for interfering with the discretion of the military commander.

30. It arises from all of the above that the petitioners were unable to establish legal grounds justifying judicial interference with the decision of respondent 1 to issue a demolition order against the homes of the perpetrators. Therefore, I shall propose to my colleagues to dismiss the petitions.

JUSTICE

Justice N. Sohlberg:

I concur.

Having read the opinion of my colleague, Justice **O. Grosskopf**, I wish to add that in the controversy (on a single issue) between my colleague Justice **G. Canfy-Steinitz** and my colleague, Justice **Grosskopf**, concerning the scope of the demolition of the home of the perpetrator 'Abed al-Rahman Hani Tzubahi 'Abed, I join the opinion of my colleague [Justice G. Canfy-Steinitz] that there are no legal grounds justifying interference with the discretion of the military commander and in his determination that the building, including all of its parts – shall be demolished. As stated in her opinion, it clearly emerges from the floor plan of the building, which is not in dispute, that we are not concerned with two separate residential units, but rather with one common building, consisting of one set of rooms, located on the same residential level. Indeed, the building has a main entrance on its northern side, as well as a secondary, separate entrance on its southern side, but it does not affect the above conclusion. In addition, the building was partly built in an earlier period (the southern area) and another part was added thereto several years later (the northern area), but it also does not suffice. As aforesaid, according to the full picture which arises from the scheme of the entire building we are concerned with one building, and there is no justification to artificially divide it into different wings; one demolished, one spared.

The question may arise, why isn't it possible to show some leniency towards the family members of the perpetrator and assume, in their favor, notwithstanding the conclusions arising from the floor plan, that the southern part of the building is a separate unit since a separation line can conceptually be drawn between the building's southern and northern parts? The answer is that Respondent's conclusion that we are concerned with a single, integrated residential unit, which was reached at the end of the factual examination that had been conducted, and the accuracy thereof, are of great importance. As argued by the respondents in their response, an artificial attempt to reduce the scope of the seizure and demolition order by creating conceptual distinctions between different parts of the same building and drawing a bordering line distinguishing one area from the other, may erode the deterring purpose underlying the use of Regulation 119 of the Defense (Emergency) Regulations, 1945; the sole purpose of which is to save lives, literally. We should therefore stick to the facts at hand and make our decision accordingly.

It cannot be denied, as held by Justice **S. Netanyahu** in HCJ 4772/91 **Hizran v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 46(2) 150, 155 (1992), in circumstances similar to those at hand "[...] **I do not disregard the fact that the demolition of a whole house**

does not only harm the petitioners themselves but also their family members". However, as she subsequently said **"This is the outcome of the need to deter the public, for all to see and know, that in their vicious acts they do not only harm the individual, put public safety at risk and subject themselves to a heavy punishment, but also bring disaster on the individuals living with them [...]."** Indeed, despite the human complexity and the distress inherent in these situations, it has often been held that "the power of the commander also extends over those parts of the apartment or house owned or used by the suspect's family members or others, whose involvement, encouragement or even awareness of the suspect's criminal activity has not been proven" (HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693, 698 (1992)). Similarly, in the case at hand too, since it was found that we are concerned with one building, despite the difficulty involved therein and even if the family members did not take part in the vicious act, we have no alternative but to determine that there is no legal justification for our interference with the discretion of the military commander and with his decision to issue an order for the demolition of the whole building.

Therefore, as aforesaid, I join the opinion of my colleague **Canfy-Steinitz** that the petitions should be dismissed.

JUSTICE

Justice O. Grosskopf:

1. I agree with most of the opinion of my colleague, Justice Gila Canfy-Steinitz. However, with respect to one point, which was discussed in HCJ 7788/22, and concerns the scope of the demolition order issued by respondent 1, I disagree with her and do not share her opinion. In my opinion, the decision of respondent 1 to include in the demolition order which was issued against the residential home of 'Abed al-Rahman Hani Tzubahi 'Abed (hereinafter: **'Abed** and **'Abed's Home**, respectively) the entire building, without distinguishing between the residential unit located on the northern part of the building (hereinafter: the **Northern Unit**) and the residential unit located on the southern part of the building (hereinafter: the **Southern Unit**) - justifies our interference. I shall explain.
2. As my colleague wrote **"the military commander should exercise his power in a cautious, proportionate and limited manner befitting, to the maximum extent possible, the values which are protected by the Basic Law: Human Dignity and Liberty"** (paragraph 21 of her opinion). In the framework of the commander's above duty, and in view the requirement that a residential nexus exists between the perpetrator and the building designated for demolition (see for instance HCJ 5943/17 **Anonymous v. Commander of IDF Forces in the West Bank**, paragraphs 10-11 (August 3, 2017) (hereinafter: **Anonymous**); HCJ 745/22 **Jaradat v. Military Commander for the West Bank Area**, paragraph 17 (February 20, 2022)), it was held in the past that while exercising his power, the commander should draw a distinction to the maximum extent possible, between the residential unit in which the perpetrator lived and adjacent independent units, with which the perpetrator did not have a "direct" residential nexus, the above even when such units are located in the same building (see for instance HCJ 1730/96 **Salem v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC

50(1) 353, 359 (1996) (hereinafter: **Salem**); H CJ 5141/16 **Mahamara v. Commander of IDF Forces in the West Bank**, paragraph 40(July 24, 2016) (hereinafter: **Mahamara**); H CJ 5614/16 **Halil v. Military Commander of the West Bank Area**, paragraph 10 (August 3, 2016); **Anonymous**, paragraphs 10-11; H CJ 2770/22 **Hamarsha v. Military Commander of the West Bank Area**, paragraphs 18-19 of the opinion of President **E. Hayut**, and paragraph 3 of the opinion of the Deputy President **U. Vogelman** (May 19, 2022) (hereinafter: **Hamarsha**). In the framework of said separation, it was so held "**A relevant consideration is whether the residence of the alleged perpetrator can be considered a residential unit which is separate from the other parts of the building**" and in this context "**it should be examined whether the suspect's residential unit may be demolished without harming the other parts of the building or adjacent buildings**" (**Salem**, page 359).

3. In my opinion, unlike with respect to the northern unit, the respondents did not present to us sufficient factual infrastructure establishing a direct residential nexus between 'Abed and the southern unit of the building, justifying its demolition. I shall briefly explain my position.
4. There is no argument that 'Abed himself used the southern unit, and in fact, in view of the above, the circumstances of the building are similar to the circumstances of the residential home of the other perpetrator, Ahmed Ayman Ibrahim A'bed (hereinafter: **Ahmed** and **Ahmed's Home**, respectively). Namely, one building used by three generations: the perpetrator's grandparents live in one part of the building; while the perpetrator and his nuclear family (his parents and siblings) lived in its other part. The difference between the two houses lies in the manner of the division: while in Ahmed's case we are concerned with a split-level building (the grandparents live on the ground floor, while the perpetrator and his nuclear family live on two upper floors); in 'Abed's home the division is on the same level (the grandparents live in the southern unit while the perpetrator and his nuclear family live in the northern unit). In this state of affairs and in view of the fact that the respondents did not think that the required residential nexus could be established between Ahmed and the ground floor, it is difficult to establish a similar nexus between 'Abed and the southern unit – since both are the grandparents' apartments.
5. The respondents are trying to overcome this difficulty by arguing that while in Ahmed's case the parts of the house are divisible, and therefore there is no justification for demolishing the part which is used by the perpetrator's grandparents, in the case of 'Abed's home we are concerned with one indivisible residential unit, which justifies the demolition of the entire building. However, different data support the conclusion that in the case of 'Abed's home the two units should also be classified as divisible residential units. I shall specify these data:
 - a. Historically, the southern unit was built first (in the 1960's) as a stand-alone unit. Only at a later stage (in 1980's) the northern unit was built for 'Abed's nuclear family.
 - b. In both terms of ownership and uses, petitioners' argument that the southern unit belonged and was used solely by the grandparents, while the northern unit belonged and was solely used by 'Abed and his nuclear family – has not been refuted (the

above arises clearly from the memorandum of the interrogation of 'Abed's father dated September 14, 2022 [one day after the shooting attack], where he described the home in which he and his son were living in a manner consistent solely with the northern unit, and this unit alone).

- c. Functionally, not only in the past, but also currently, the southern unit is a stand-alone residential unit. In addition to the two living rooms, it also has a separate kitchen and a separate bathroom distinct from the kitchen and bathroom of the northern unit (compare HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693, 700 (1992); **Hamarsha**, paragraph 18; **Mahamara**, paragraph 40)). And note well, the fact that the kitchen and bathrooms of the southern unit are accessible from the yard is an architectural matter which concerns the design of the building – rather than the uses made thereof (compare HCJ 4772/91 **Iyad Diab Ahmed Hizran v. Commander of IDF Forces in the Judea and Samaria Area**, ISRsc 46(2) 150, 160 (March 23, 1992)).
 - d. In addition, in terms of planning, there is no problem to "sever" the southern unit from the northern unit since there is no direct passage between them (other than through the common storage room), and it emerges from petitioners' supplementary notice dated December 5, 2022 filed in HCJ 7782/22 that indeed, as argued, a separate rear entrance exists which leads from the street to the southern unit.
6. Given all of the above I am of the opinion that respondents' argument that the distinction between the southern unit and the northern unit is "artificial" in view of the proximity of the building's main entrance to the northern unit and in view of the lack of covered passage between the bedrooms of the southern unit and the kitchen and bathroom of this unit does not prove a sufficient residential nexus. At the very least, there is doubt about the existence of a residential nexus as required between 'Abed and the southern unit of the building, and in my opinion this doubt justifies the limitation of the scope of use of respondent 1's power (see **Anonymous**, paragraph 11).
 7. In view of all of the above, if my opinion was heard, we would have dismissed the two petitions but would have ordered the military commander to refrain from carrying out the demolition order as it relates to the southern unit of 'Abed's home – the residential unit which is owned and used by 'Abed's grandparents.

It was decided by a majority opinion as stated in the opinion of Justice **G. Canfy-Steinitz**.

Given today, 20 Kislev 5783 (December 14, 2022).

Justice

Justice

Justice