At the Supreme Court Sitting as the High Court of Justice

HCJ 1653/24

Before:	Honorable Justice I. Amit Honorable Justice D. Mintz Honorable Justice Y. Elron
The Petitioners:	1. _____ al-Muhtasab 2. _____ al-Muhtasab 3. _____ al-Muhtasab 4. _____ al-Muhtasab
	v.
The Respondents:	1. GOC Home Front Command 2. Minister of Defense 3. Israel Police
	Petition for *Order Nisi*
Session Date:	3 Adar B 5784 (March 13, 2024)
Representing the Petitioners:	Adv. Odeh Nasser
Representing the Respondents :	Adv. Yonatan Berman

Judgment

Justice D. Mintz

Background

1. On October 12, 2023 the perpetrator _____ al-Muhtasab (hereinafter; the **Perpetrator**) committed a terror attack of a nationalist nature near the Shalem police station in the Old City in Jerusalem. As a result of the attack one policeman was critically wounded and another was slightly injured. The perpetrator was neutralized near the scene of the attack by policemen who happened to be there. The petition at hand, which was submitted by the perpetrator's family members – his father, mother and two siblings – is directed against a seizure and demolition order issued by Respondent 1 (hereinafter: the **Demolition Order** and the **Respondent**, respectively) on February 20, 2024 by virtue of

the power vested in him according to Regulation 119 of the Defense (Emergency) Regulations, 1945 (hereinafter: **Regulation 119** or the **Regulation**) for an apartment located in a three story building in the Beit Hanina neighborhood in Jerusalem in which the perpetrator had been living with his family members.

2. In their petition the Petitioners raised various arguments on the principled level noting, *inter alia*, that Regulation 119 was contrary to the norms obligating the Respondent, was not proportionate, constituted prohibited collective punishment and violated the hard core of human dignity. Alongside the above and in principle, the Petitioners also argued that according to the way this court has interpreted the manner by which Regulation 119 should be implemented, it should not have been used in the unique and precedential circumstances of the case at hand and that the discretion was exercised in a flawed and disproportionate manner. This, in view of the fact that this was an attack that did not result in the loss of human life, and considering the fact that we are concerned with a decision to demolish a whole apartment of family members, permanent residents of Israel, who had no involvement whatsoever in the attack. In addition, it cannot be said that currently Jerusalem is flooded with terror attacks, not to mention the fact that the apartment designated for demolition is located in Beit Hanina neighborhood, Jerusalem, a peaceful neighborhood with respect of which a demolition order has never been issued and the demolition shall not serve any deterring purpose.

   In addition, the Petitioners noted that the Respondent has disregarded and disrespectfully dismissed the arguments raised by them concerning the great damage which is expected to be caused to the apartments located near their Apartment, the other apartments of the building and the infrastructure of the building. They argued that the demolition of the Apartment may render the whole building uninhabitable and alternatively, cause substantial damage to nearby apartments. Despite Respondent's allegations that maximum measures shall be taken to mitigate the damage, past experience shows that demolition of the type that the Respondent wishes to employ ("hot detonation") causes severe damage to buildings adjacent to the apartment designated for demolition.

3. The Respondents in their response have broadly discussed Petitioners' principled arguments, and have *inter alia* emphasized the effectiveness of deterrence and the increased security interest underlying the need to deter additional perpetrators, particularly in recent times. Considering the circumstances of the case at hand the Respondents emphasized the severity of the attack which was committed with firearms and caused a critical injury which was one step away from death; against the backdrop of the ongoing Iron Swords war and alongside the different attempts to stimulate other arenas beyond that which is currently taking place in the Gaza Strip; and which was directed against a police station (constituting a governmental symbol) in the city of Jerusalem by a resident of East Jerusalem. Therefore, in the case at hand, after taking into account all the considerations and with the recommendation of the security bodies, the Respondent decided that in view of the increasing need to deter at the present time, the serious circumstances of the case required the issuance of the order despite the fact that it was an attack which did not lead to a person's death. It was emphasized as aforesaid that one of the victims was critically injured and the fact that he did not lose his life was mere luck. Therefore, the gap between the severity of the attack which was committed and another attack which involved loss of life – is almost non-existent. In addition, the

Respondents argued that the non-awareness of the family members does not deprive the Respondent of the power vested in him by virtue of Regulation 119, and that this matter was also taken into account among all other considerations which were considered.

With respect to the question of whether it was possible to use a less injurious means, such as partial demolition or sealing of the apartment, it was argued that the position of the security bodies was that the benefit arising therefrom at the present time was low and did not achieve, to the required degree, the deterring purpose that the exercise of the power intended to achieve. With respect to the arguments regarding the demolition method, the Respondents stated that according to the engineering opinion which was attached to their response, the chosen method was hot detonation combined with mechanical measures in the living room, and demolition of the other rooms using concrete to fill them up. This method was chosen by the engineer who took into account all the professional considerations which are relevant in the specific circumstances and their impact on the structure, including the expected damage to the surrounding area as a result therefrom. Petitioners' arguments concerning past cases have no merit, and their arguments in this context cannot be proven by raising arguments with respect to certain other cases in which damage was caused to buildings. In addition, Petitioners' arguments concerning the execution of the order in the Beit Hanina neighborhood in Jerusalem should be rejected given the fact that there were a considerable number of cases in the past in which houses were demolished in different neighborhoods in East Jerusalem which strengthened the deterrence against the execution of additional attacks.

Deliberation and decision

4. Having reviewed the Petition and Respondents' response including their appendices, having heard the oral arguments of the parties, having reviewed the privileged opinions which were provided to us and having heard the explanations of Respondents' representatives, I have reached the conclusion that there are no grounds for our intervention in the decision to exercise the power according to Regulation 119 in the case at hand, and I shall therefore propose to my colleagues to dismiss the petition.

5. First, with respect to the principled argument concerning the mere exercise of the power according to Regulation 119. Petitioners' counsel did not focus his arguments on the general-principled level and rightfully so, since it has been repeatedly clarified by this court in numerous judgments that the principled questions concerning the lawfulness of the Regulation and Respondent's power to use it have already been discussed and decided time and again, and there is no room to revisit them whenever the Respondent exercises the power vested in him by virtue thereof (see for instance, as from recently: HCJ 7040/23 **Sabah v. The Military Commander for the West Bank Area**, paragraph 4 (October 8, 2023); HCJ 8315/23 **Safdi v. Commander of IDF Forces in the West Bank**, paragraph 12 (December 5, 2023) (hereinafter: **Safdi**); HCJ 7721/23 **Fadel v. The Military Commander for the West Bank Area**, paragraph 2 of the judgment of Justice A. Stein (December 6, 2023) (hereinafter: **Fadel**); HCJ 788/24 **Masri v. The Military Commander for the West Bank Area**, paragraph 9 (February 11, 2024) (hereinafter: **Masri**)).

6. Petitioners' arguments focused on the specific circumstances of the case at hand including the fact that it is not an attack as a result of which human life was lost, and there is no argument that the family members were involved in the perpetrator's acts. The Petitioners refer in this matter to the judgment which was given in HCJ 8024/14 **Hijazi v. GOC Home Front Command** (December 31, 2014) from which it emerges that when human life was not lost as a result of the perpetrator's acts, the question arises whether they meet the extremely high level which is required to issue an order for the demolition of the home of family members who were not involved in his actions.

   Indeed, there is no dispute that the power should be exercised prudently and proportionately and weight should be given to the consequences of its exercise, and only in severe cases which warrant it. Indeed, it cannot be denied that using the Regulation causes severe harm to the inhabitants of the house designated for demolition. However, the current harsh and complex reality and the high risk level that the state of Israel is forced to deal with – in normal times, in general, and all the more so in a time of war – requires actual deterrence against the execution of additional terror attacks. The need to deter is only strengthened in view of the severe security threats and hostilities encountered by the state over the last six months (see also: **Fadel**, paragraph 4; **Masri**, paragraph 10). The above also applies to the Judea and Samaria area and the Jerusalem district, where, as stated in Respondents' response, the security escalation grows and develops thus increasing the risk of terror attacks and intensifying the need of deterrence. This argument was also supported by the privileged opinion and security material which were submitted to us for our review. Therefore, there is no room to accept Petitioners' argument that the city of Jerusalem does not presently constitute a center of terror activity.

7. In view of the aforesaid and the severe circumstances of the case at hand given the fact that it is an attack in which, as a result of the perpetrator's actions – shooting at policemen in a police station – one of the policemen sustained critical head, chest and stomach injuries, which only miraculously did not take his life, I am of the opinion that there are no grounds for our intervention in Respondent's decision which was given with the recommendation of the security bodies and after the considerations relevant to the matter have been considered. It should be added, as held, that the fact that the perpetrator's family members were not involved in his actions does not prevent the enforcement of a demolition order by virtue of Regulation 119, while "Considerations of deterrence require, at times, according to case law, to deter potential perpetrators who must understand that their actions may also adversely affect the property of their relatives, even when there is no evidence that the family members were aware of the perpetrator's deeds" (HCJ 1633/16 A v. **The Military Commander for the West Bank Area**, paragraph 31 (May 31, 2016); and see also: HCJ 7224/23 **Shkhada v. Commander of IDF Forces in the West Bank**, paragraph 15 (November 8, 2023); **Safdi**, paragraph 20). Hence, part of the deterrence component includes the impact that the perpetrator's deeds may also have on his uninvolved family members.

8. In the hearing before us Petitioners' counsel raised arguments concerning the effectiveness of the deterrence, it was argued, as aforesaid, that said purpose does not materialize when a house in an East Jerusalem neighborhood is demolished, certainly not in Beit Hanina neighborhood. However, as has already been held in this context, the

extent to which house demolition is effective as a deterring measure for potential perpetrators is a professional matter which is determined by the security bodies (see for instance: HCJ 3401/22 **'Atzi v. GOC Central Command**, paragraph 12 (June 8, 2022) (hereinafter: **'Atzi**). As to the effectiveness of the general deterrence of this policy, we have also been presented with a professional opinion on this matter, which includes current intelligence data according to which the use of Regulation 119 contributes to deterrence of terror attacks. The above, in addition to answers and current information received by us from security bodies in the *ex-parte* hearing held before us with the consent of the parties. I therefore find no reason to intervene with Respondent's position that said deterrence also stands when a house in East Jerusalem is demolished.

9. It should be added that I found no merit in Petitioners' arguments concerning the demolition method. These are not only matters in which the Respondent is given extremely broad discretion (see for instance: HCJ 480/21 **Rabha v. Military Commander of the West Bank Area**, paragraph 13 (February 3, 2021); HCJ 7550/23 **Shantir v. Military Commander of the West Bank Area,** paragraph 11 (November 2, 2023); HCJ 2036/23 **Farukh v. Military Commander of the West Bank Area**, paragraph 9 of the judgment of my colleague Justice **I. Amit** (April 10, 2023) (hereinafter: **Farukh**)), but Petitioners' arguments in the case at hand that the Respondent did not take into account the possible impact that the demolition may have on the structure or nearby apartments and decided to "demolish the perpetrator's apartment by hot detonation, without examining a less injurious alternative" (paragraph 56 of the Petition) have no basis whatsoever. The above since, *inter alia,* in view of the possible uncontrolled damage, in the case at hand the demolition method which was chosen includes "controlled hot detonation combined with mechanical measures" **in the living room only** and sealing the other room with concrete, as specified in the engineering opinion dated November 6, 2023. In these circumstances, there is obviously no room to accept Petitioners' arguments which disregard the fact that the professional decision regarding the demolition method has separated between the different parts of the apartment and chose to demolish most of its parts using a measure causing damage more limited in scope than "hot detonation", in view of its impact on the structure. This is in addition to the fact that the Petitioners have not supported their arguments by an opinion on their behalf (despite the fact that in the decision of my colleague Justice **Y. Elron** dated February 28, 2024 they were given the opportunity to submit additional documents). It should also be added that not only was Petitioners' argument, whereby in other cases in which it was argued that maximum efforts will be made to limit the damage to the building as a whole irreversible damages were caused to the buildings, argued without basis; but rather, in all said cases, according to the Petitioners themselves, a whole apartment was demolished by way of hot detonation, unlike the situation in the case at hand.

It should also be noted that I accept Respondents' position that Petitioners' alternative demand to limit the seizure and demolition order (for instance by way of sealing a room only) may adversely affect its deterring purpose or thwart it altogether (see also for instance: HCJ 4088/22 **Alrafai v. Military Commander of the West Bank Area**, paragraph 15 of the judgment of my colleague Justice **Y. Elron (July 7, 2022); 'Atzi,** paragraph 14; **Farukh,** paragraph 8 of the judgment of my colleague Justice **I. Amit**).

I also wish to add that after I have reviewed the opinions of my colleagues, I join the comments of my colleague Justice **Y. Elron**.

Therefore, the Petition is dismissed. Although *order nisi* was not issued in the Petition, for the sake of good order it should be ordered that before the demolition order is carried out, the Petitioners shall be given a seven-day period from the date of our judgment, for evacuation and organization purposes.

J U S T I C E

Justice I. Amit:

1. Dozens of judgments issued by this court regarding seizure and demolition of perpetrators' homes by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**) stated that in view of the consequences relating to the use of the Regulation, the military commander should exercise his discretion in each and every case prudently and in an educated manner, taking into consideration all the required considerations. I shall bring a few short examples of judgments in that regard (emphases were added – IA):

> "In view of the above, the commander's decision to exercise the power vested in him by virtue of Regulation 119, should be made **after exercising prudent discretion** in conformity with the rules of proportionality." (HCJ 6517/23 **Harusheh v. Commander of IDF Forces in the West Bank**, paragraph 23 and the references there (October 2, 2023));
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> "As is known, considering the consequences embedded in the implementation of Regulation 119, it should be used reasonably and proportionately, and **the Respondent should consider all the relevant considerations for this purpose** […]" (HCJ 5338/23 **A v. GOC Home Front Command**, paragraph 12 (August 3, 2023));
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> "Alongside all of the above, the rule is that the military commander should implement Regulation 119 reasonably and proportionately, in view of all the circumstances of the matter, while considering, *inter alia* […]" (HCJ 3231/23 **Hawajeh v. GOC Central Command**, paragraph 12 (May 9, 2023));
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> "The professional discretion as to the effectiveness of Regulation 119 is vested with the security bodies, on the basis of the data and information in their possession, and they are held to **consider the different interests and considerations in each case** and balance between them on the basis of professional and pertinent considerations […] all of the above **without derogating from the need to implement this Regulation in a considered manner, in the appropriate cases and in the required circumstances, against the backdrop of the general security situation**". (HCJ 2036/23 **Farukh v. Military Commander of the West Bank Area**, paragraph 7 (April 10, 2023));

> "There is no dispute that the decision of the commander to exercise the power vested in him and issue a seizure and demolition order against perpetrators' homes, should be made **after exercising prudent and reasonable discretion in conformity with the rules of proportionality**" (HCJ 8604/22 **Tamimi v. GOC Home Front Command,** paragraph 22 and the references there (January 3, 2023)).

2. This prudent approach was expressed, *inter alia*, in that the military commander has limited the use of Regulation 119 to attacks which led to loss of human life. Following this route, this court has approved in said cases the use of Regulation 119 by way of demolition *in lieu* of sealing (with the exception of isolated cases which can be counted on the palm of one hand), based on the understanding and recognition of the deterring purpose in a period of a wave of murderous terror.

3. On the level of deterrence, it makes no difference whether the perpetrator succeeded to carry out his plan or not, and a serious and critical injury is also a serious result in and of itself. Had the level of deterrence been the only consideration in the application of Regulation 119, the Regulation should have also been ostensibly implemented when the attack was thwarted ahead of time, for instance, when the perpetrator made their way to the scene of the attack but was neutralized on their way by the security forces. However, given that it is an extremely severe measure, we do not act in this manner. The above, since the consideration of deterrence is one of **several considerations** that the military commander takes into account while exercising the sanction according to Regulation 119 which is a drastic measure that the harm embedded therein should not be taken lightly (see, for instance: HCJ 2036/23 **Farukh v. the military commander of the West Bank Area**, paragraphs 7 and 18 of the judgment of Justice Kabub (April 10, 2023); HCJ 8315/23 **Safdi v. Commander of IDF Forces in the West Bank**, paragraph 28 (December 5, 2023)).

4. The Respondents noted in their response that the case at hand is unique and precedential in that the military commander wishes to act according to Regulation 119 also in a terror attack which did not eventually lead to the loss of human life. However, in fact, it is not the first time, since in the past the military commander wanted to use Regulation 119 in the event in which Yehuda Glick was shot (later Member of Knesset Glick) and was critically injured. The court emphasized that although the perpetrator's acts were extremely severe, "they have not eventually resulted in the loss of human life […] and part of the considerations as to whether or not the Regulation should be used consists, *inter alia*, of the results of the action." In these circumstances, an order *nisi* was issued (HCJ 8024/14 **Hijazi v. GOC Home Front Command** (December 31, 2014) (hereinafter: **Glick**)). Consequently, the military commander notified that he decided to order the sealing of the perpetrator's home *in lieu* of its demolition. In view of the aforesaid it was held that "since a change was made from a general decision to demolish and seal to a partial decision to seal only the perpetrator's room, and this is the decision which is before us now – it entertains proportionality, which is also relevant when deterrence is concerned. We see no reason to intervene in this new and more measured decision". (**Glick**, supplementary judgment dated June 15, 2015).

5. The case at hand is very similar in its circumstances to the Glick case: a terror attack which led to a severe result of a critical injury; the perpetrator was an Israeli resident living in Abu Tur neighborhood in Jerusalem (and in the case at hand in Beit Hanina neighborhood); no argument was made concerning the family members' awareness or involvement not even by way of encouragement or words of praise after the attack; the apartment was not owned by the perpetrator but rather by his parents; and the attack was carried out in the midst of "a wave of terror which afflicts Jerusalem lately" (*Ibid*., paragraph C). In light of the similarity to the **Glick** case, and since there seems to be in the decision of the military commander an ostensible innovation in the manner by which Regulation 119 is applied, the matter should be re-examined by the authorized bodies. Therefore, if my opinion is heard, we shall act in the same manner that this court acted in Glick, and will issue an order *nisi* on whether the measure of demolition should be used here. An *order nisi* indicates that the case which is the subject of the Petition raises questions that should be re-visited.

J U S T I C E

Justice Y. Elron:

1. I agree with the opinion of my colleague, Justice **D. Mintz**, according to which the Petition should be dismissed. I shall therefore add only a few comments.

2. The perpetrator whose deeds led to the issuance of the seizure and demolition order at hand had committed on October 12, 2023, a terror attack near the Shalem police station in the Old City in Jerusalem. Consequently, as specified below, one policeman was critically injured and an additional policeman was slightly injured. The severe injuries inflicted by the perpetrator on the policeman who was critically injured were described by Respondents' counsel in the hearing before us, to the extent possible and without infringing on his privacy.

3. I have expressed my principled position regarding the use of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**) in a numerous number of cases in the past (including: HCJ 4088/22 **Alrafai v. Military Commander of the West Bank Area** (July 7, 2022); HCJ 3401/22 **'Atzi v. GOC Central Command** (June 8, 2022) (hereinafter: **'Atzi**); HCJ 925/22 Jaradat v. **Military Commander of the West Bank Area** (February 24, 2022); and also recently, in detail, in HCJ 8315/23 **Safdi v. Commander of IDF Forces in the West Bank** (December 5, 2023) (hereinafter: **Safdi**)).

4. The Petitioners argued that Regulation 119 was implemented in a precedential manner in an incident which "did not result in the loss of human life", in their words. On the other hand, the Respondents, in their oral and written responses, emphasized that despite the fact that no policeman was killed, the perpetrator had critically injured one of the policeman who was "only one step away from death". According to them, against the backdrop of the current security situation there is a need to provide an adequate solution

for state security and the safety of its citizens and residents. The Respondents have also referred to a current opinion of the Israel Security Agency (ISA) concerning the great deterring effect of the demolition of the perpetrator's home.

5. Indeed, in the implementation of Regulation 119 the deterring effect is the key consideration, while the extent to which the house demolition policy of perpetrators' homes is effective is determined by the security bodies on the basis of data and facts ('**Atzi**, paragraph 12). In view of the aforesaid, I asked the security bodies in the hearing whether it was possible, in the case at hand, to obtain the required deterrence using more moderate measures, for instance by only sealing the apartment. The security bodies insisted that this measure was insufficient for a host of reasons which were discussed by them in detail *ex-parte*, and their reasons are convincing.

   Moreover, it should be emphasized that this is an administrative proceeding with a deterring purpose rather than a criminal proceeding where there is a clear distinction between an attempt to commit an offense and the completed commission of the offense. In criminal law this distinction is significant on many levels, including the punishment (see, for instance, section 27 of the Penal Law, 1977); and it stems from the fact that the criminal law promotes the principle of retaliation and is not fed by considerations of deterrence alone.

   Conversely, the importance of this distinction when we examine whether there is reason to interfere with the discretion of Respondent 1 in the implementation of Regulation 119 – is not so significant, since Regulation 119 promotes, first and foremost, the purpose of public deterrence. For deterrence purposes an offender who did everything to complete their actions but failed, is like an offender who committed an offense to completion. Anyway, house demolition is not a punishment but is rather deterring in nature. Therefore, I see no reason to strictly limit the power vested in Respondent 1 by virtue of Regulation 119 and allow its implementation only in cases in which the perpetrator has succeeded in their plan to kill the victim.

6. Furthermore; in the case at hand, the case as a whole embodies serious circumstances – the attack was committed near a police station constituting a governmental symbol. In addition, as aforesaid, one of the policemen was critically injured from the shooting in several places – including his head, chest and stomach. He underwent numerous medical procedures, is in rehabilitation and his medical condition is described as "complex". Another severe aspect arises from the timing of the attack – several days after October 7, 2023.

7. However, it cannot be denied that in the past the implementation of Regulation 119 was more measured. Presently, in the circumstances of the time and the situation, we were presented with the need to intensify the use of Regulation 119. There is no doubt that things are not as they used to be, nor is it a period of a "wave of terror". We are in a time of war, a difficult war which broke out a few days before the attack at hand.

   As I have recently noted in another context: "[…] if as a general rule a very considerable weight should be given to the consideration of state security, then in a time of war the weight of said consideration is even greater" (Criminal Appeal 1350/24 **MK Almog**

Cohen v. State of Israel, paragraph 16 (March 14, 2024)). Hence, what in the past seemed like a step which could be avoided, is currently unavoidable as a result of the harsh reality which was imposed on the state of Israel.

8. Similar to other cases, we do not enthusiastically allow the demolition of a perpetrator's home, all the more so when there is no argument for any awareness or involvement on behalf of his family members. As I have noted in **Safdi**:

> "There is no dispute that the use of Regulation 119 was and still is drastic, particularly when the immediate family of the perpetrator, his parents, brothers and sisters bear some of the consequences of his actions after the demolition of the house and its adjacent storage rooms. […] The use of the Regulation is meant to deter potential perpetrators from committing similar actions, the intensity of which has regretfully increased these days, hideous acts, under the auspices of terror organizations, which do not refrain from taking any measure to continue harming innocent Jews and citizens, whatever their religion may be. Our duty is to find the right balance between maintaining the values of the state of Israel and its primary duty to continue and protect its existence and the sanctity of life of its citizens" (*Ibid*., paragraph 28).

9. The issue before us should be examined in view of the circumstances of each case, on the basis of the position of the security bodies, in a serious and responsible manner. These considerations lead me in the case at hand to my conclusion that there are no grounds for our intervention in Respondent 1's discretion in issuing the seizure and demolition order. Therefore, the Petition should be **dismissed**.

J U S T I C E

Decided by a majority of opinions as stated in the judgment of Justice **D. Mintz**, contrary to the dissenting opinion of Justice **I. Amit**.

Given today, 10 Adar B 5784 (March 20, 2024).

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