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At the Supreme Court
Sitting as the High Court of Justice

HCJ 2732/05

Scheduled for: July 3, 2005

1. **Head of Azzun City Council, Mr. _____ Hassin**
2. **Head of Nabi Elias Village, Mr. _____ Rushdi**
3. **HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger - RA**

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The Petitioners

v.

1. **Government of Israel**
2. **Military Commander of the West Bank**

all represented by the State Attorney's Office,
Ministry of Justice, Jerusalem

The Respondents

Respondents' Response

According to the decision of the honorable President A. Barak dated June 26, 2005, and in preparation for the hearing scheduled for July 3, 2005, the respondents hereby respectfully submit their response to the petition.

General

1. This petition concerns a seizure order 37/02 S (hereinafter: the **order**). It is an order for the seizure of land for the erection of a "security fence", which will be hereafter referred to as the "barrier". The lands which were seized are located in the territories of the villages Azzun and Nabi Elias.
2. The segment of the barrier with which the petition is concerned is intended to protect the southern and eastern parts of the Israeli community Zufin.
3. The works in that segment ended, and the barrier in that location has been operational for quite a while. Furthermore, a petition which was filed against this route (HCJ 8532/02 was denied back in **October 14, 2002**.
4. Now, the petitioners request to dismantle the barrier in its entirety and install it on the Judea and Samaria border line, based on the argument that the barrier impinges on their ability to farm the olive orchards which were left behind the barrier, and since according to their argument, the erection of the fence along the current route was based on extraneous considerations.
5. We are of the opinion that the petition should be summarily dismissed in view of the fact that the court's decision regarding said seizure order became *res judicata*, and in view of the long delay in the filing of the petition. In as much as the petitioners have claims concerning traveling difficulties to the other side of the barrier, the solution lies in the improvement of the passage arrangements to the agricultural areas, which works are presently being carried out by the respondents. We would also like to note that, in our view, the arguments raised in the petition were not properly substantiated, and they do not reconcile with the facts as those are known to the respondents.
6. With respect to the legal arguments which were raised in the petition, we would like to note that these arguments are similar to the arguments which were recently discussed by an extended panel in HCJ 7957/04 **Mara'abe v. the Prime Minister of Israel et al.** The state's position, as expressed in said hearings, contrary to petitioners' arguments in this petition, is that the military commander is also authorized to protect Israeli citizens in the Judea and Samaria, including by the erection of the barrier.

In our opinion, the decision in these questions, to the extent required in this petition, should be postponed until a decision is made in the above HCJ 7957/04, and in the other petitions which the same questions raised by this petition (HCJ 4825/04 and HCJ 4938/04).

The Main Facts

7. The order with which the petition is concerned was issued by the military commander on September 5, 2002.

An aerial photograph of the route is attached to the response and marked **RS/1**.

8. Shortly thereafter, owners' tours were carried out in the area, and the land owners were given a seven day period to file appeals against the seizure orders. Some of the inhabitants appealed the order.

After the appeals were rejected, the works for the realization of the order commenced on **October 7, 2002**.

9. A petition which was filed against the order (HCJ 8532/02), was denied on **October 14, 2002**. It was held that:

"We did not find in the seizure orders which were issued, and in respondents' actions, any flaw which justifies our interference. Although the seizure will cause damage, hardships and inconvenience to the residents, we agree that the above measures are intended to constitute an important part of IDF's fighting strategy, with respect of which a decision was made by the competent agencies in charge of security, and as known, this court does not usually interfere with security operational considerations." (emphasis added).

HCJ 8532, 8172/02 **Ibrahim et al., v. Commander of IDF Forces in the West Bank**, TakSC 2002(4) 1078, page 1080.

After the petition was denied, the works for the erection of the barrier were completed. The barrier in the area became operational in July 2003.

10. As indicated by Exhibit E to the petition, petitioners' first application to the respondents was received on **July 29, 2004**. The application concerned one issue only - the addition of another agricultural gate to the barrier near the gas station owned by _____ Mansur.

Only on November 23, 2004, the demand to dismantle the barrier referred to in the petition was raised for the first time, based on arguments similar to those specified in the petition.

On this issue see Exhibit F to the petition.

11. Following receipt of this letter, the petitioners and their counsel had a tour together with respondents' representatives. On February 7, 2005, the petitioners received a detailed response for their application.

In this context the petitioners were also notified that the respondents intended, following petitioners' request, to open the "_____ Mansur gate" shortly, upon the completion of the infrastructure works associated therewith.

12. The petition was filed on March 20, 2005.

13. The efforts to solve the way of life issues which were raised by the petitioners, continued after the petition was filed.

Thus, the works for the erection of a new agricultural gate, and for the preparation of an access road thereto continued. The works have recently ended. The gate will be opened in coordination with the inhabitants, according to their needs.

In addition, a decision regarding changes in the entry arrangements into the seam zone was made. The relevant change for the purpose of the petition is that permits to farmers, which were given in the past for a few months, were replaced by permits valid for two years.

The security reasons for the erection of the barrier

14. The purpose of the route in the relevant segment, which passes through the lands of Azzun and Nabi Elias, is to protect the southern and eastern parts of the Israeli community Zufin, and the access road thereto. The length of the barrier in the relevant segment is about 9.4 Km.
15. The barrier commences from the Judea and Samaria border line and continues alongside the access road to Zufin, and serves as a security barrier between the city of Qalqiliya and the Eyal-Zufim road.
16. The barrier continues towards the southern part of Zufin alongside the bottom of the hill on which the community is located. In some parts of this segment private lands owned by Israelis and public lands were used.

Thereafter, the barrier continues southward and circumvents a minefield located in the area.

17. The barrier continues to move northeast, near the ridgeline which overlooks the Jayyus village from the south. In this segment the route is also used as an observation over road 55, which leads to Karnei Shomron, Ma'ale Shomron, Ginot Shomron and such other communities, of the first part, and to Qalqilya, of the other part.

In the planning of the route in the area, weight was given to a plan which is still in planning stages, but has not yet been approved, plan 149/5.

18. The relevant segment ends at a hill, located west of Jayyus village and east of Zufin. Said hill is a main strategic point in the area. The inclusion of the hill in the seam zone gives significant advantage to the force which protects the community, and prevents its seizure by terrorists as a basis for attacks against IDF forces and the inhabitants of Zufin.
19. It should be noted, that had the barrier in this area been planned today, the south-east corner of the route would have been planned differently. Plan 149/5 would not have been taken into account and after the detour around the minefield the route would have continued directly towards the strategic hill.

Way of life arrangements

20. In the area, which remained on the other side of the barrier, no Palestinian residents live, other than 15 Bedouins that hold permanent resident certificates of the seam zone. Said residents did not join as petitioners in this petition.
21. The petition focuses on the difficulties experienced by of the inhabitants of the Azzun and Nabi Elias villages who wish to reach the agricultural lands located on the other side of the barrier.

According to the data in respondents' possession, the lands of the Azzun and Nabi Elias villages cover about 23,500 dunam, out of which about 1,163 dunam are located on the other side of the barrier, being the subject matter of this petition, namely, **about 5% only of the lands of the villages.**

Moreover, only 654 dunam in the seam zone are owned by the inhabitants of the villages. All other lands are unfarmed, public lands.

22. The private lands are mostly used to grow olives, which require seasonal farming – the plowing season and the harvest season. The inhabitants of the villages can enter the seam zone to farm the land through a number of crossings in this area:

The Zufim crossing, **which is all day long**. In fact, the vast majority of farmers passes through this gate, and reaches their lands by travelling the road, which forms part of the barrier's layout. In the last harvest season most inhabitants reached their lands through said crossing.

Another agricultural gate is located near the Jayyus village, which enables entry into the lands located on the east side of the seam zone.

As aforesaid, in the last few days works which would enable the opening of another agricultural gate were completed – "_____ Mansur gate", which provides a more convenient access to the lands located near the southeast part of the barrier.

23. According to DCO's data, 445 farmers, residents of the villages, received entry permits into the seam zone for the purpose of farming their lands. 209 farmers, whose permits expired, have already received new **biennial** entry permits, especially designated for farmers. All other farmers will receive the biennial permit, after the permits in their possession expire, and assuming applications to that effect are submitted by them.

It should be further noted that from all applicants who submitted applications for entry permits into the seam zone, only six applications were rejected, for security reasons only, and decisions have not yet been made in the applications of nine applicants, which is less than three percent from all applicants.

24. DCO representatives maintain ongoing relations with the representatives of the Palestinian Authority and the heads of the villages for the purpose of facilitating the farming of the land. These relations strengthen during the harvest season.

During the last harvest season, following the great efforts which were invested, not even one complaint was transferred to DCO's representatives from the heads of the councils, regarding difficulties in the harvest or in the entry into the seam zone.

Furthermore, on December 15, 2004, the head of the Azzun council informed the head of the DCO that the last harvest season was successful, and that the inhabitants managed to reach their lands.

The arguments raised in the petition

25. The arguments raised in the petition are divided into two levels. On the factual level, it is argued that the inhabitants of the villages cannot reach their lands. On the legal level, it is argued that the barrier in the area annexes an occupied territory, and that the planning of the route was based on an extraneous and inappropriate consideration, rather than on a military need. In addition it is argued that the route runs in the area contrary to the advisory opinion of the International Court of Justice in Hague.

The requested remedy is to have the barrier dismantled in the entire requested area, and the re-establishment thereof along the Judea and Samaria border line.

The focus of the discussion

26. Firstly we would like to point out that we disagree with petitioners' legal analysis. The respondents are of the opinion that the military commander is also authorized and obligated to protect the inhabitants of Zufin, by virtue of international law as well as by virtue of internal Israeli law.

In addition, the respondents are of the opinion that there is no obligation under the advisory opinion of the court to dismantle the barrier.

The respondents are also of the opinion that there is a military need for the seizure order all along the way.

However, we chose not discuss in length the legal issues, in view of the fact that identical arguments were discussed in the last few weeks before extended panels of this honorable court (HCJ 4825/04, 4938/05 and HCJ 7957/04, 1348/05, 3290/05, 2942/05, 4050/05).

The position of the state concerning the legal arguments which are raised in the petition before us was broadly presented before these panels. Said general position also applies to the route being the subject matter of this petition.

It is our position that to the extent a decision in the legal issues before us is required, a decision in the above petitions should be awaited for, as there is no room to re-discuss the same issues in this petition as well.

27. Nevertheless, we chose to relate to the main factual issues which were raised in this petition, concerning the way of life issue and the threshold arguments relevant to this petition.

Res Judicata and Laches

28. As shown by above, the order which is discussed in this petition, and the issue of the seam zone in the area, have already been brought up for discussion before this honorable court in the past.

The petition against the lawfulness of the route was denied in HCJ 8172/02, 8532/02 **Ibrahim v. Commander of IDF Forces in Judea and Samaria**. Based on this judgment the barrier was erected. The barrier was erected at a cost of dozens of millions of NIS.

Therefore, it is our position that to date, arguments against the lawfulness of the route may not be raised in a new petition, which is not premised on any new reason which could not have been ascertained in the relevant time.

Furthermore, the petition before us was filed about two years and a half after commencement of the works, and about a year and a half after their termination. From this aspect the petition was infected by a heavy delay.

29. It is important to note that should the requested remedy be given, the barrier in the entire area would have to be dismantled and a new barrier would have to be built.

According to the data in respondents' possession the cost of building the barrier in the area amounted to 95.7 million NIS. The dismantling cost amounts to 30-35 million NIS, and the cost of building a new barrier will amount to about 50 million NIS.

The letter of the head of the seam zone project on this issue is attached to this response and marked **RS/2**.

It is our position, that on this ground only the petition, in as much as it pertains to remedies associated with the dismantling of the barrier, should be summarily dismissed.

30. However, the respondents agree that as far as arguments concerning way of life arrangements are raised, the threshold arguments do not apply thereto, and the respondents are obligated to minimize the harm caused to the inhabitants, to the maximum extent required, regardless of the denial of the petition in HCJ 8532/02.

Therefore, it is our position that this petition should focus on arguments concerning way of life.

The proportionality of way of life arrangements

31. Firstly, we would like to note that some of the arguments in the petition are not accurate and with respect to another part thereof, its factual basis is unclear.

Firstly, contrary to the allegations made throughout the petition, access to the agricultural lands is not prohibited. The farmers are entitled to farm the land and take care of the trees all year long, and not only during harvest time only, as the petition alleges. Zufim gate, which is the main gate through which the lands may be accessed, provides access to the agricultural lands all day long. Following entry through the gate, the lands may be reached by travelling the road which forms part of the barrier's layout.

Secondly, the above indicates that other arguments which were raised in the petition, which stem from the erroneous determination that the farmers were severed from the land, have no factual basis.

Thirdly, the petition specifies data concerning a decline in the production of the olive trees located on the other side of the fence. It is unclear what is the source of said data and to which extent they can be relied on. In this respect, it should be remembered that no complaints of residents of the villages, being the subject matter of the petition, were received by the DCO concerning any disturbance to the farming of the land or the harvest. The Head of the Azzun City Council reported to the head of the DCO that the 2004 harvest was successful and that no problems were encountered as far as entry into the seam zone was concerned.

32. Based on the above, we will argue that the route is proportionate, for several reasons:

Firstly, the agricultural areas of the residents of the villages, the petitioners in this petition, which are located behind the barrier, in the area being the subject matter of this petition, are relatively limited (it should be noted that for the purpose of the construction of the barrier in other areas additional lands of the villagers were seized).

Secondly, in the relevant area agricultural gates were erected, and an additional gate, the Zufim gate, is also used by villagers to enter their lands. As aforesaid, the Zufim gate is open 24 hours, and therefore the farmers who have permits can freely pass through it.

Thirdly, a decision was made to open an additional agricultural gate, which should solve the accessibility difficulties to the olive trees which are located near the south eastern part of the barrier, being the subject matter of the petition.

Fourthly, the respondents granted permits to hundreds of farmers allowing them to enter the seam zone areas. It should be emphasized that such permits were issued to about 97% of all farmers who applied and requested permits as aforesaid.

33. Indeed, the fact that a small part of the lands of the villages is located on the other side of the barrier, encumbers some of the villagers to a certain extent. However, against this encumbrance stands the decisive security need to defend the Zufin settlement and its access roads.

The meaning of the requested remedy

34. The remedy requested in the petition is the dismantling of the barrier and its erection on the Judea and Samaria border line. The meaning of this demand is:

Firstly, putting the lives of the Zufin residents at real risk, both within settlement limits as well as on the access roads to the settlement.

Secondly, the erection of the barrier on the Judea and Samaria border line will also create a security risk to the inhabitants of the Kochav Yair and Zur Yigal located within the boundaries of Israel, in close proximity to the Judea and Samaria border line, and will require, in any event, a certain protrusion of the barrier into Judea and Samaria. The erection of the barrier in this area will cause additional injury to lands of Palestinian residents.

Thirdly, the dismantling of the barrier and its erection on the Judea and Samaria border line involves a heavy cost of dozens of millions of NIS.

We are of the opinion that the requested remedy in the petition is unreasonable and disproportionate under the circumstances, as compared to the alleged injury. Therefore, for this reason too, the entire petition should be denied.

35. We would also like to note that contrary to petitioners' claims, a review of the relevant route shows that in most of its parts it passes near the access road to the settlement, and the southern houses of the settlement. The eastern part of the route passes near a hill which has a material security importance in the defense of the settlement.

Indeed, in the south eastern part of the settlement there is a short segment, one of the considerations for the erection of which was the existence of a plan which still undergoes approval proceedings. Had this segment of the barrier been planned today, it would have been planned in a slightly different manner, and would not have included the entire area of the plan.

However, we are of the opinion that this segment of the barrier should not be dismantled, in view of the fact that most of the lands beyond this segment are public lands rather than agricultural lands. Therefore the injury caused by this segment to everyday life is scarce. Furthermore, for the relatively few agricultural lands located in the area, it was decided to open a new agricultural gate, which facilitates, to a very large extent, the access thereto.

On the other hand, the filing of the petition was heavily delayed, whereas the dismantling of the barrier and its re-pavement in this segment is extremely costly.

36. In conclusion, we are of the opinion, that there is no flaw in the segment of the barrier being the subject matter of the petition at hand, which justifies the dismantling and erection thereof on the Judea and Samaria border line.

Therefore, the honorable court is requested to deny the petition.

37. The facts in this response are supported by the affidavit of Colonel (res.) Dan Tirza who serves as the head of "rainbow colors" administration at the Central Command, and is in charge of the planning of the route of the barrier.

Today: June 30, 2005
Sivan 23, 5765

(signed)
Avi Licht
Senior Deputy State's Attorney