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At the Supreme Court Sitting as the High Court of Justice

HCJ 2732/05

Before:

Honorable President A. Barak
Honorable Justice D. Beinisch
Honorable Justice A. Procaccia

The Petitioners:

1. **Head of Azzun City Council, Abed Attif Hassin**
2. **Head of Nabi Elias Village, Khaled Rushdi Alian Radwan**
3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

v.

The Respondent:

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

Petition for *Order Nisi*

Session date:

Sivan 1, 5766 (May 28, 2006)

Representing the Petitioners:

Advocate Michael Sfard

Representing the Respondent:

Advocate Avi Licht

Judgment

President A. Barak:

This petition concerns petitioners' request that we order to dismantle the eastern segment of the security fence which passes through their lands, and which is intended to protect the Zufin settlement.

1. The Zufin settlement is an Israeli settlement in Shomron. It is located near the green line, north of the Alfei Menashe settlement and north-east of the city of Qalqiliya (hereinafter: the **settlement**). Several Palestinian villages are located near the settlement, including Jayyus, Azzun and Nabi Elias. In the framework of the plan of the Government of Israel for the erection of a security fence between Israel and the Area, the route of the fence was also planned and built in this area as part of "phase A" of the security fence (for more details see HCJ 7957/04 **Mar'aba v. Prime Minister of Israel** (not yet reported)(hereinafter: **Alfei Menashe** case). The route of the fence encircles the settlement from the south, the east and the north. The southern segment commences

from the Judea and Samaria border line, north of Qalqiliya, and runs eastward, north and parallel to national route No. 55, for about three kilometers, up to a distance of about five hundred meters south-east of the baseline of the ridge on which the settlement is located (hereinafter: the **southern segment**). From this point the route of the fence runs south-east and thereafter it continues north and west, up to the western edges of the Jayyus village, along the lower parts of hill "1000", a major controlling hill (hereinafter: the **eastern segment**). From this point the route continues to run northwards (hereinafter: the **northern segment**). The eastern segment of the route of the security fence is the subject matter of the petition at hand.

2. The eastern segment is about five kilometers long. The distance between the last buildings of the settlement and the eastern segment of the fence is about two and a half kilometers. This segment consists of lands the total area of which exceeds one thousand dunams, about 650 dunams of which are agricultural lands privately owned by the Palestinian residents of the Area. These areas are located in the seam zone between the fence and the Judea and Samaria border line. The route encircles areas with respect of which there is a master plan for the expansion of the Zufin settlement (hereinafter: **master plan 149/5**). The plan is in its initial planning stages. It has not yet entered into force.
3. The route of the fence in this area was discussed by this court in two previous petitions (HCJ 8172/02 **Ibtisam Mohammad Ibrahim et al. v. The Military Commander** (not reported) and HCJ 8532/02 **Rashid 'Abd Alsalam et al. v. Commander of IDF Forces** (not reported)). The petitions were heard jointly (hereinafter: the **initial petitions**) in the midst of a terror attack which took place at that time and were dismissed (in a judgment dated October 14, 2002). In their request to dismiss them the respondents emphasized that the route of the fence in its eastern segment was determined based on security-operational considerations only (see for instance page 10 of respondents' response dated October 9, 2002 in HCJ 8352/02). Respondents' position was that the distance between the route of the fence in the eastern segment and the houses of the Zufin settlement was required for security reasons. The reason being the need to delay a penetration of terrorists for a period of time which will enable the arrival of security forces to the penetration point. Hence, a geographical security zone is created which enables combat forces to chase after terrorists before they enter the state of Israel (see page 2 of said response). Based on respondents' said position the initial petitions were dismissed (see the sixth paragraph of the judgment). The court held that in view of the security considerations based on which the route of the fence was determined, the injury caused by it to the petitioners was proportionate. At the same time, the court noted in its judgment that the respondents undertook to minimize, to the maximum extent possible, the damage caused to the petitioners. Among other things, the respondents undertook to build agricultural gates which would enable to continue to farm the lands in the seam zone. They also undertook to take into consideration specific problems which would arise after the erection of the fence. Following the dismissal of the petitions the erection of the fence in this area was completed. It became operational in July 2003.
4. The petition at hand was filed two years later (on March 20, 2005). A hearing in the petition was held (on July 3, 2005), and an *order nisi* was issued. The petitioners raise two main arguments. Firstly, that contrary to respondents' statements in the initial petitions, the petitioners learnt that the route of the fence in the eastern segment was not determined based on security considerations, but that its purpose was rather to include, on the "Israeli" side of the fence, areas which were designated for the expansion of the Zufin settlement, and with respect of which only an initial master scheme existed, which did not enter into effect. Secondly, that the undertakings assumed by the respondents in the framework of the initial petitions to facilitate the continued farming of the agricultural lands in the seam zone, were not fulfilled. They argue that over the course of the two years which passed since the erection of the fence has been completed, the respondents did

not provide solutions which would enable the farmers to reach their lands on a regular basis, farm them, and harvest the olive trees in their ownership. Consequently, severe damage was caused to petitioners' livelihood during said two years.

5. Respondents' position in the petition at hand has materially changed from the date the petition was filed and until the date of the final hearing. In their preliminary response (dated May 19, 2005) the respondents requested that we dismiss the petition on the grounds that a court judgment (*Res Judicata*) already existed in connection therewith. In the response to the *order nisi* (dated June 30, 2005) the respondents notified – and hence their position changed – that the existence of master plan 149/5 was taken into consideration in the planning of the route of the eastern segment, along the security consideration which led to the determination that the route should pass through this area, namely, the need to provide for protected observation over route 55. The respondents notified that "had the security fence been planned today, the southeast corner of the route would have been planned differently, without taking into consideration plan 149/5 (paragraph 19 of the state's response). In the supplementary response (dated February 19, 2006) – which was submitted after our judgment in **Alfei Menashe** and following a re-examination of the route of the fence in the eastern segment – the respondents notified that they decided to change the route of the fence in this area. It was decided to build a new route which would directly connect the southern segment with the northern segment, and would, in fact, make the eastern segment redundant (hereinafter: the **new route**). The new route is about 1,350 meters long. The respondents estimate that for its construction, private lands of about thirty dunams will have to be expropriated, and that about 75 dunams of the lands of the Azzun village will remain in the seam zone, 72 dunams of which in private ownership. This means that according to the new route lands of about 1,000 dunams, consisting of more than 650 dunams of privately owned agricultural lands, will no longer be located within the seam zone, and will remain on the "Palestinian" side of the fence. The respondents noted that the land expropriation procedures for the construction of the new route have commenced, and that the construction of the fence would start immediately upon the termination of the legal proceedings involved in the issue of the expropriation orders. The respondents also noted that after the completion of the new route, a decision regarding the future of the current route of the eastern segment would be made, in view of the security situation. In the final hearing held before us (on May 28, 2006), and in response to our comments, the respondents notified that they agreed to have the fence in the eastern segment dismantled within six months from the completion of the construction of the fence along the new route. The respondents clarified further that during the construction of the fence along the new route, additional agricultural gates would be opened in the eastern segment and changes in the entry arrangements into the seam zone would be made, to make it easier for the petitioners to farm their lands. In addition, upon the completion of the construction of the fence along the new route, and until such time as the existing fence in the eastern segment would be dismantled, the agricultural gates in the eastern segment would be opened for free passage of the Palestinian residents.
6. In view of respondents' above position, we decide to accept the petition and make the *order nisi* absolute. We hold that the route of the separation fence in the eastern segment is unlawful and we hereby declare that it is null and void. At the request of the state, we suspend the annulment declaration until six months after the completion of the construction of the new route. All necessary measures should be taken to ensure that the suspension period will be as short as possible. Clearly, nothing in the above may be construed as an expression of an opinion concerning the lawfulness of the new route planned by the respondents, or as an expression of an opinion in other petitions which pertain to the route of fence in the northern or southern segments (see for instance HCJ 10905/05 **Mayor of Jayyus v. The Prime Minister**).

7. A severe phenomenon was revealed in the petition at hand. In the initial petition the Supreme Court was not presented with the full picture. The court dismissed the initial petition based on information which was only partially substantiated. The State Attorney's Office acted properly to have notified the court of the fact that plan 149/5 had been taken into consideration, immediately when it became aware of same. Against this backdrop – and in view of our **Alfei Menashe** judgment - the respondents acted properly to have changed the route of the fence at their own initiative. However, the petition at hand reveals an unacceptable incident, whereby the information which was provided to the court did not reflect the entire considerations which were taken into account by the decision makers. Consequently, a petition was dismissed, which even the respondent currently agrees, should have been accepted. We received an explanation of the special circumstances in which the security personnel had acted and as a result of which the mishap occurred. We hope that this will not happen again.

The result is that we make the *order nisi* absolute as follows:

- (a) The route of the fence in the eastern segment is null and void. We suspend the annulment declaration until the elapse of six months from the completion of construction of the fence along the new route.
- (b) At the same time, the respondents will continue with the implementation of the movement relaxations which are intended to facilitate the continued farming of the lands located in the seam zone in the eastern segment of the fence, as stated in their notice dated June 30, 2005. Upon the completion of the construction of the fence along the new route, and until the current fence is dismantled, the respondents will open the agricultural gates in the eastern segment for free passage, as stated in their notice dated February 19, 2006.
- (c) The respondents will bear petitioners' costs in the sum of 50,000 ILS.

The President

Justice D. Beinisch:

I concur.

Justice

Justice A. Procaccia:

I concur.

Justice

Decided as specified in the judgment of President A. Barak.

Given today, Sivan 19, 5766 (June 15, 2006).

The President

Justice

Justice