At the Supreme Court Sitting as the High Court of Justice

HCJ 3066/20
HCJ 3067/20
HCJ 3068/20
HCJ 3070/20
HCJ 3071/20
HCJ 5133/20
HCJ 5816/20

Before: **Honorable President E. Hayut**
Honorable Justice G. Karra
Honorable Justice Y. Willner

The Petitioners in HCJ 3066/20:
1. **XXXXX Ziad**
2. **HaMoked - Center for the Defence of the Individual**

The Petitioners in HCJ 3067/20:
1. **XXXXX Yihya**
2. **HaMoked - Center for the Defence of the Individual**

The Petitioners in HCJ 3068/20:
1. **XXXXX Kabha**
2. **XXXXX Kabha**
3. **HaMoked - Center for the Defence of the Individual**

The Petitioners in HCJ 3070/20:
1. **XXXXX Kabha**
2. **HaMoked - Center for the Defence of the Individual**

The Petitioners in HCJ 3071/20:
1. **XXXXX Abu 'Aobeid**
2. **XXXXX Abu 'Aobeid**
3. **HaMoked - Center for the Defence of the Individual**

The Petitioners in HCJ 5133/20:
1. **XXXXX Waked**
2. **XXXXX Waked**
3. **HaMoked - Center for the Defence of the Individual**

The Petitioners in HCJ 5816/20:
1. **XXXXX Waked**
2. **HaMoked - Center for the Defence of the Individual**

v.

The Respondent:	**The Military Commander of the West Bank Area** **Petitions for *Order Nisi***
Representing the Petitioners:	**Adv. Tehila Meir**
Representing the Respondent :	**Adv. Sharon Aviram; Adv. Sivan Dagan**

Judgment

President E. Hayut:

The above seven petitions concern the question of how a proprietary connection can be proved to regulated lands in the "seam zone" – located between the border line of the Judea and Samaria area (hereinafter: "**Judean and Samaria Area**") and the security fence separating between Israel and the Judea and Samaria Area – for the purpose of receiving an entry permit into said zone from the Judea and Samaria Area.

Background

1. In 2002 the Government of Israel resolved to build a fence between the territory of Israel and the Judea and Samaria Area. Certain parts of the fence which was built do not overlap the border line of the Judea and Samaria Area but rather run through the Judea and Samaria Area. The zone between the fence and the border line of the Judea and Samaria Area is known as the "seam zone". The territory of Israel can be entered into from the seam zone without any physical barrier, and in view of the above the military commander declared in 2003 the seam zone as a "closed military area" the entry and exit of which are subject to a specific permit (hereinafter: the "**Permit Regime**"). With respect to entry permits to farmers, residents of the area, wishing to farm their lands located in the seam zone, the Permit Regime was approved in HCJ 9961/03 **HaMoked Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Government of Israel,** Paragraphs 34-33 of the judgment of President **D. Beinisch** (April 5, 2011)(hereinafter: the "**Permit Regime Judgment**").

2. The procedure and conditions for the issue of permits as aforesaid are entrenched in a procedure established by the Civil Administration, which is updated from time to time and is known as the "Seam Zone Standing Orders" (hereinafter: the "**Standing Orders**"). According to the Standing Orders, in their valid version as of the filing date of the petitions at hand (hereinafter: the "**2019 Standing Orders**"), a permit for agricultural purposes was valid for three years (it should be noted that following an amendment from 2021 the validity of the permit was reduced to two years) and an application for a farmer's permit should be supported by documents "proving the proprietary connection" of the applicant to the land – such that if the lands are regulated lands, a "copy of a land registration (*Tabu*) extract" should be attached (Section 13C(1), Article A Chapter C of the 2019 Standing Orders).

3. In the petitions at hand it was argued that the Petitioners had proprietary connections to regulated lands in the seam zone (or were family members of individuals having such proprietary connections, and wished to farm the lands for said proprietary rights owners). Said proprietary connections were not reflected in the Registry, since as claimed by the Petitioners, the rights in the lands were still registered in the names of the individuals from whom the rights were inherited (the testators) rather than in the names of the heirs. The Petitioners argued that until a few years ago they were given seam zone entry permits based on the presentation of an extract in the name of the testator together with an inheritance order, but that as of 2018, the Respondent refused to continue issuing permits for agricultural purposes on the basis of said documents, without explaining the change of his policy. Therefore, the Petitioners request that their connections to lands in the seam zone may be proved by the presentation of an extract in the name of the testator together with an inheritance order, as was done in the past.

The hearing in the petitions and subsequent developments

4. On September 21, 2020, a preliminary hearing was held in the petition during which the panel requested the Respondent to clarify several questions: **first**, can a temporary farmer's permit be issued to permit applicants who have initiated a registration update proceeding – such that they shall be entitled to a farmer's permit in the period spanning from the initiation of proceedings to modify the registration and until the date on which a decision in the matter is given; **second**, can an heir who inherited a part of a plot also be given a permit to farm the areas of additional heirs based on a power of attorney; **third**, why are heirs of lands in the seam zone charged with an inheritance registration fee in a sum equal to 1% of the value of the land in the framework of the registration update proceeding, which is higher than the amount charged in Israel under similar circumstances.

   By the end of the hearing, the Respondent, at his request, was given time "to formulate a position on the issues which were raised and to present them in an updating notice supported by a suitable affidavit" (decision dated September 21, 2020).

5. On January 4, 2021, the Respondent updated that as of January 30, 2021, the validity of the farmer's permit would be reduced from three to two years, and has also responded in his notice to the three issues which came up in the hearing. **With respect to the issue of a farmer's permit until a decision is made in the registration update proceeding**: the Respondent explained that when a resident applies for an entry permit into regulated lands located in the seam zone which are not registered in the heir's name, they are issued a **permit for personal needs** valid for three months "to maintain their connections to the land", and they are referred to the land registration office to register the plot. Upon the presentation of a certificate confirming that a registration update application was submitted, the resident shall be entitled to a **farmer's permit** until a decision is made in the application, valid for the period established in the Standing Orders (as of January 30, 2021 – up to two years); to the extent the registration update application is denied prior to the termination of said period, the permit is immediately revoked.

With respect to the power of attorney issue the Respondent noted that Section 14(A)(7)(a) of Chapter C of the Standing Orders was amended – such that the wording "claims concerning the farming of additional parts should be supported by suitable documents" which appeared in the 2019 Standing Orders, was replaced, effective as of January 30, 2021, with the following wording: "**An agricultural cultivation permit [sic] shall also be given on the basis of the 'schema' of rights of several rights owners whose common share in the land reaches the bar of 330 square meters, to one of them at their choice. Claims concerning the farming of additional parts should be supported by suitable documents**". The Respondent has further emphasized that as stated by his legal representative in the hearing "**an applicant applying for a farmer's permit can present a power of attorney for the cultivation of plots of other plot owners**" (Paragraph 6(b) of the Updating Notice).

With respect to the inheritance registration fee the Respondent advised that a decision was made to charge a fee in the sum of NIS 160, which is similar to the amount charged in Israel under similar circumstances, and on April 23, 2021, the Respondent advised that an amendment to the relevant regulations had indeed been signed.

6. In their reply the Petitioners notified that they stand by their arguments as specified in the petitions, excluding those relating to three petitions which were heard together with the above captioned petitions, and which were deleted at the request of their petitioners after the specific remedies which had been requested in said petitions were obtained (HCJ 5329/20, HCJ 5131/20 and HCJ 5331/20; Judgments dated February 21, 2021 and May 19, 2021 (hereinafter collectively: the "**Deleted Petitions**")).

7. To complete the picture it should be noted that in recent years several legal proceedings were conducted with respect to issues similar to the issue at hand. Among other things, on March 3, 2020, a judgment was given in five administrative petitions which discussed an issue similar to the issue standing at the center of the petitions at hand, and were filed by some of the Petitioners at hand (AP (Administrative Jerusalem) 62855-07-19, 71670-07-19, 11831-08-19, 21156-09-19 and 6137-12-19; hereinafter collectively: the "**Administrative Petitions**"). The Court for Administrative Affairs (Deputy President **M. Sobel**) held that for the purpose of proving proprietary connection to regulated lands an extract bearing the name of the heir should be presented, and denied the general in-principle argument raised by the Petitioners against the lawfulness of said provision due to lack of subject-matter jurisdiction. In addition, on December 20, 2020, an *order nisi* was issued in HCJ 6896/18 **Ta'ame v. The Military Commander in the West Bank** concerning the miniscule plot condition. In the framework of the *order nisi* the respondents in said petition were required, *inter alia*, to show cause "why Section 14(a)(7) of the amended 2019 seam zone Standing Orders concerning the 'examination of the applicant's share in the plot' should not be deleted and/or replaced by another arrangement providing a solution to owners of jointly-held plots."

The Arguments of the Parties

8. The Petitioners are of the opinion that Respondent's policy disproportionately harms their right to own property, their right to freedom of occupation and their right to freedom of movement since, *inter alia*, the need to comply with the registration demand as a

condition for substantiating a proprietary connection does not reconcile with the local law, and particularly with the nature of property rights in "*miri*" lands, which according to the Petitioners, are automatically transferred by way of inheritance without registration. The Petitioners add that some of the farmers in the seam zone object to registration changes for political reasons and that "it is neither customary nor acceptable in this society", since the customary principle in the Palestinian society is the principle of joint ownership and community partnership in the management of agricultural lands.

The Petitioners argue that in the **Permit Regime Judgment** it was held that harming the fabric of life in the seam zone was permitted only if the harm was necessary and required for security reasons. However, according to the Petitioners, the reasons presented by the Respondent in response to their applications prior to the Petitions were not based on a security need, since no specific security risk was posed by any of the Petitioners, and since the general security concerns pertaining to the seam zone – as well as the lack of professional expertise of the bodies examining the permit applications – may be handled in other ways. The Petitioners argue further that in view of the fact that the **Rights Registry** may be revised based on the presentation of the current extract together with an inheritance order, the same documents should also suffice for the purpose of receiving an **entry permit**. They are also of the opinion that Respondent's willingness to grant the petitioners in the Deleted Petitions permits for agricultural purposes, despite the fact that the registration of the rights in their plots has not been amended, affects the force of Respondent's arguments and "whether there is any coherent policy regarding this matter". It was also argued that the real purpose of the registration requirement was to actually divide the rights between the heirs, thus increasing the number of miniscule plots with respect of which the Respondent may refuse to issue a farmer's permit. Finally, it was argued that notwithstanding the content of the updating notice on behalf of the Respondent, the wording of Section 14(A)(7)(a) of the 2021 Standing Orders does not expressly entrench the possibility to obtain an entry permit on the basis of a power of attorney, and therefore it cannot be ascertained that this would also be the interpretation afforded to it by the Respondent in the future. In any event, according to the Petitioners, the provisions of said Section are relevant only to the schema of miniscule plots and cannot provide a solution to owners holding rights in plots of other sizes wishing to jointly cultivate them.

9. The Respondent, on his part, is of the opinion that the Petitions should be dismissed in the absence of grounds for interfering with his policy or with the specific decisions made in Petitioners' applications. According to the Respondent, it is important to update the Rights Registry for seam zone lands, otherwise errors may occur with respect to the status of the rights, and the concern increases that lands shall be taken over and potential buyers shall be harmed. It was also argued that the requirement to update the registration for the purpose of substantiating a connection to lands in the seam zone was discussed and approved in the Permit Regime Judgment; that the Petitioners did not prove that there was any justification to revisit the matter; and that in any event, the conditions for the issue of seam zone entry permits strike a balance between security considerations and the obligation to enable persons having connection to lands reasonable access to their plots and to maintain the fabric of life in the seam zone. The Respondent clarifies that the requirement to present a *Tabu* extract for the purpose of receiving a farmer's permit was originally established in 2005 but has only been partially enforced until 2018, at

which time it was decided to fully enforce it. Said decision was made, according to the Respondent, following a stabbing attack which was committed on December 10, 2017, by a Judea and Samaria resident who held a seam zone entry and work permit, and following administrative work which indicated that the scope of the agriculture in the seam zone did not reconcile with the number of issued permits "in a manner giving rise to the concern that a considerable number of permits were exploited to enter Israel." In this context the Respondent adds that the administrative authority may change its policy and adapt it to the reality of life.

With respect to the argument that updating the Registry is not acceptable in Palestinian society, the Respondent argues that the registration obligation is established in the local law and emphasizes that the lands being the subject matter of the petitions are regulated and registered in the Registry, which indicates that at least at some point in the past, the owners of the rights in said lands decided to register their rights.

Deliberation and Resolution

10. The petitions should be dismissed. The main question to be resolved in the case at hand is whether Respondent's policy – meaning, his decision to fully enforce the requirement to present a *Tabu* extract for the purpose of substantiating proprietary connection to lands located in the seam zone commencing as of 2018 – causes disproportionate harm to Petitioners' rights. Subject to Respondent's clarifications in the proceedings at hand which provided a solution to some of Petitioners' arguments – the amount of the inheritance registration fee has been substantially reduced; it was clarified that an entry permit may be obtained based on a power of attorney; and it was also clarified that an applicant showing that registration update proceedings were initiated will be eligible for a farmer's permit until a decision is made – I am of the opinion that Respondent's policy does not establish grounds for judicial intervention.

11. It has already been held in the **Permit Regime Judgment** that Respondent's policy according to which the entry into the seam zone is contingent on receiving an individual permit, serves a clear security purpose (*Ibid*., Paragraph 17 of the judgment of President **Beinisch**), and I was not convinced that Petitioners' arguments in the case at hand justify deviation from said holding. As noted by the Respondent in his response, in the **Permit Regime Judgment** the demand to present a *Tabu* extract to prove connection to regulated lands was specifically considered (*Ibid*., Paragraph 33 of the judgment of President **Beinisch**). At the same time it was clarified by the court that:

> "[…] we cannot deny the possibility that in specific cases severe harm is caused to the property rights and the right to earn a living of Palestinian residents who cannot adequately farm their lands or who encounter other access difficulties, and the respondents, on their part do not take adequate measures to minimize said harm. As stated above, these cases may be reviewed within the framework of specific petitions, in which the court will be able to examine all relevant arrangements which apply to a certain area, and the specific balancing which takes place therein between the rights of the residents and other interests […]" (*Ibid.*, Paragraph 34 of the judgment of President **Beinisch**).

In other words, it was held in the **Permit Regime Judgment** that there were no grounds for interfering with Respondent's policy pursuant to which a person posing no specific security threat is also required to receive a seam zone entry permit and prove their connection to regulated lands by presenting a *Tabu* extract. The above, notwithstanding the harm caused to the rights of the residents of the area wishing to farm lands in the seam zone, while holding that a specific petition is the proper framework within which arguments concerning specific violation of rights should be raised.

12. The question before us, therefore, is not whether the requirement to present a *Tabu* extract, in and of itself, disproportionately harms Petitioners' rights; but rather whether the decision to fully **enforce** said requirement commencing as of 2018, is unreasonable or causes disproportionate harm to rights as aforesaid.

Respondent's decision should be examined through the mirror of the requirements which apply to any other administrative decision, including the requirements of reasonableness and proportionality (HCJ 1398/07 **Lavi-Goldstein v. Ministry of Education – The Evaluation of Foreign Academic Degrees Department**, Paragraphs 21-22 (May 10, 2010) (hereinafter: "**Lavi-Goldstein**")). As was held in the past, there is nothing inherently inappropriate in a decision of an administrative authority to change an existing policy – and to enforce an existing policy *a fortiori* – and no one is vested with the right that whatever has occurred will occur again (HCJ 4640/19 The **Israel Movement for Reform and Progressive Judaism v. Minister of Education**, Paragraph 69 of the judgment of Justice D. Barak-Erez (April 7, 2021; **Lavi-Goldstein**, Paragraph 21; see also Daphne Barak-Erez **Administrative Law Volume A** 204-205 (2010); and with respect to enforcement policy see: HCJ 3246/17 **Abu Tier v. Commander of IDF Forces**, Paragraphs 28-29 (June 11, 2019)).

13. The Respondent clarified that the decision to enforce the requirement to present an updated extract was made following an attack which had occurred on December 10, 2017, and following a re-examination of his policy which raised the concern that "a considerable number of permits were exploited to enter Israel" (Paragraph 140 of the Preliminary Response). In this context the Respondent clarified that it became evident that the manner by which permit applications were examined "was not sufficiently professional since it was performed by individuals who are required to give answers within a short period of time and are DCO officers who are not professionally qualified […]" (page 8 lines 11-12 of the protocol), and that the number of issued permits exceeded the scope of the agriculture in the seam zone. It emerges from the above that the decision to enforce the requirement to present a *Tabu* extract did indeed stem directly from the security purpose underlying the Permit Regime: meaning, increasing the supervision over the persons entering the seam zone from the Judea and Samaria Area in a bid to reduce the risk of exploiting the possibility of entering Israel through the seam zone. The above decision of the Respondent stemmed from factual developments which occurred after the **Permit Regime Judgment**, which led the Respondent to the conclusion that the supervision over the issuance of entry permits should be increased.

In this context the Petitioners emphasized that permits for **commercial** purposes are not subject to the requirement to update the Registry which applies to applicants for farmer’s

permits. The Respondent explained in his response, *inter alia*, that while a farmer's permit is issued on the basis of documents in the possession of the resident, the permit application for commercial purposes is generally submitted together with additional documents: bill payment confirmations, business license and a confirmation issued by the chamber of commerce whereby "the applicant is indeed a merchant" (Paragraph 147 of the Preliminary Response). Under these circumstances I accept Respondent's argument that with respect to permits for commercial purposes the security need to ascertain applicant's connection to the land is lower. In view of the above, I do not think that the fact that the Registry update requirement is not enforced with respect to permits for commercial purposes, necessarily leads to the conclusion that it should not be enforced also with respect to farmer's permits.

14. In his Preliminary Response the Respondent pointed at another purpose, secondary to the security purpose: the advantages in maintaining an updated public land registry. According to the Respondent, in the absence of a consistent and reliable registration, as years go by and "layers of inheritance" are added, it becomes more difficult to decide whether the permit applicant does indeed have proprietary rights in the plot. I find Respondent's above reasons acceptable and therefore, Petitioners' argument that the Registry modification stage may be "skipped over" and that it is sufficient to present an inheritance order together with a *Tabu* extract in the name of the testator – should be denied.

15. The above is coupled with the fact that according to Respondent's current policy, a resident submitting an application for a farmer's permit to cultivate regulated lands which are not registered in the name of the heir, is granted a permit for personal needs valid for three months and is referred to the land registry to register the plot; and from the date an application for a Registry update is submitted, the resident is eligible to receive a farmer's permit until a decision is made in their application, valid for the period of time set out in the Standing Orders (Paragraph 6(c) of the Updating Notice dated January 4, 2021). It was further clarified that permit applicants can present a power of attorney in order to cultivate plots owned by other right-holders, and following the comments of this court in the preliminary hearing, the inheritance registration fee was substantially reduced to an amount similar to the amount charged in Israel under similar circumstances. The above makes things easier for owners of proprietary rights in lands wishing to initiate a Registry update proceeding. Therefore, I do not think that Respondent's current policy, as a whole, unreasonably encumbers permit applicants or disproportionately harms their rights.

16. With respect to Petitioners' argument about the existence of a local custom concerning the concept of joint ownership of land and joint cultivation of plots: without deciding on the question of whether such custom exists or on its weight and importance, it should be noted that the Petitioners have not sufficiently clarified why said alleged custom stands in conflict with Respondent's requirement to update the registration of the rights as a condition for receiving a seam zone entry permit. The Petitions concern, as aforesaid, **regulated** lands in the seam zone, meaning that the owners of the rights in said lands were registered in the Registry at a certain stage notwithstanding the alleged local custom. Therefore, it is not clear why the Registry update, particularly by the registration of several heirs as the right-holders in the land, harms said local custom.

17. For the reasons specified above, I am of the opinion that the policy whereby receiving a farmer's permit depends on the presentation of a *Tabu* extract in the name of the heir, satisfies the tests of reasonableness and proportionality and does not establish grounds for judicial intervention. Said policy is based on a security purpose which had already been approved in the **Permit Regime Judgment** as well as on occurrences from recent years which reinforced the need to supervise the permit issuance proceeding. As specified above, in the framework of this policy a solution is also provided to the residents wishing to farm plots owned by other right-holders, and it has not been proved that the Registry update proceeding imposes any difficulty excessively limiting the access of the residents of the area to their plots; the above, particularly in view of the fact that the amount of the inheritance registration fee has been reduced.

    And it should be clarified – as stated in the **Permit Regime Judgment**, with respect to individual decisions made in Petitioners' matter, they can apply to the Court for Administrative Affairs (item 3(E) of the Fourth Addendum to the Courts for Administrative Affairs Law, 5760-2000) – as indeed was done by some of the Petitioners in the framework of the administrative petitions (see Paragraph 7 above).

18. Parenthetically it should be noted that the above petitions are not the proper framework for reviewing Petitioners' arguments concerning Section 14(A)(7)(a) of the Standing Orders, which according to them does not clearly entrench the possibility to receive a permit based on a power of attorney, since the petitions do not directly raise arguments regarding the cultivation of lands based on a power of attorney, and the remedies which were requested in the petitions also fail to address this matter. However, Respondent's clarification is hereby noted and recorded whereby "a person applying for a farmer's permit can present a power of attorney in order to cultivate plots owned by other land owners" and whereby "a farmer's permit may also be issued in cases in which the 'schema' of rights of several right owners whose joint share in the land reaches the bar of 330 square meters – to one of them at their choice, provided that the consent of all other right-owners in the land is presented" (Paragraph 6(b) of the Updating Notice dated January 4, 2021).

19. In conclusion, I shall propose to my colleagues to dismiss the petitions. However, and in view of the contribution of the above captioned petitions to the clarification of the issues and the decision to reduce the amount of the inheritance registration fee, I propose that we obligate the Respondents to pay Petitioners' costs and attorneys' fees in the total amount of NIS 7,500 for all petitions.

The President

Justice Y. Willner

I concur.

Justice

Justice G. Karra

I concur.

Justice

Decided as stated in the judgment of President E. Hayut.

Given today, 3 Av, 5781 (July 12, 2021).

The President Justice Justice