At the Supreme Court Sitting as the High Court of Justice

HCJ 6896/18

Before:	**Honorable President E. Hayut** **Honorable Justice I. Amit** **Honorable Justice D. Barak-Erez**
The Petitioners:	1. **XXXXX Ta'meh** 2. **XXXXX Ta'meh** 3. **XXXXX Abadi** 4. **HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger**
	v.
The Respondent:	1. **Military Commander in the West Bank** 2. **Head of the Civil Administration** 3. **Legal advisor for the West Bank**
	Petitions for *Order Nisi*
Session Dates	10 Iyar 5779 (May 15, 2019) 9 Tamuz 5780 (July 1, 2020) 28 Tamuz 5781 (July 8, 2021) 22 Heshvan 5782 (October 28, 2021)

Representing the Petitioners: **Adv. Tehila Meir**

Representing the Respondents : **Adv. Sharon Hoash-Eiger**

Judgment

Justice D. Barak-Erez:

1. Which limitations may be imposed on the entry of Judea and Samaria residents into the "seam zone" – forming part of the Area but located on the "Israeli side" of the separation fence – for the agricultural cultivation of their lands? And more specifically, is it justified to determine that permit as aforesaid shall not be given to owners of a small plot of land or of a jointly-owned plot whose relative ownership interest therein does not exceed a certain size? The hearing before us focused on these questions and on sub-questions associated therewith.

General Background

2. As known, in 2002 the government of Israel resolved to erect the separation fence which was intended to separate between the Judea and Samaria Area (hereinafter: the **Area**) and the territories of Israel. However, since parts of the route of the fence pass through the territories of the Area, there is an area which formally belongs to the Area but faces the territory of the state of Israel. This area is referred to as the "seam zone".

3. In 2003, the military commander declared the seam zone a closed military area the entry into and presence therein are prohibited to the residents of the Area without a permit (hereinafter: the **Permit Regime** case) (see: HCJ 9961/03 **HaMoked Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Government of Israel**, paragraphs 3-4 (April 5, 2011)(hereinafter: the **Permit Regime** case); HCJ 3066/20 **Ziad v. Military Commander for the West Bank Area**, paragraph 1 (July 12, 2021)).

4. Seam zone entry permits are given to the residents of the Area for different reasons. Permanent residency certificates are obviously given to the persons residing in said area. In addition, permits are given for commercial needs, agricultural needs and other personal needs.

5. In the Permit Regime case the lawfulness of the declaration of the seam zone as a closed military area and of the permit regime deriving therefrom were discussed. This court (President **D. Beinisch** with the consent of the Deputy President **E. Rivlin** and Justice **A. Procaccia**) dismissed the petitions which had been filed against the implementation of the permit regime in the seam zone, and held that the underlying purpose of the decision to close the seam zone as a closed military area is a proper security purpose. Meanwhile,

the court rejected petitioners' arguments that the security purpose is used as a cover-up of an unlawful purpose – emptying the seam zone from its Palestinian inhabitants and depriving them of their lands. At the same time it was held that:

> "The respondents acknowledge the residents' right to continue to farm their lands and seek to enable those who have a connection to lands in the seam zone to continue to farm them, while enabling family members and other workers to assist them with their work". (the **Permit Regime** case, paragraph 34).

This is the premise underlying the hearing in the proceeding at hand.

6. The proceeding and the conditions for the issue of seam zone entry permits are entrenched in a collection of standing orders (the **Standing Orders**) of the Civil Administration referred to as the "Seam Zone Standing Orders" which are revised from time to time. Upon the commencement of the proceeding at hand the collection of orders and procedures referred to as the "2014 Seam Zone Standing Orders" was in force which entered into effect on January 14, 2014 (hereinafter: the **2014 Standing Orders**). It should already be noted that the relevant changes which were made in the Standing Orders from that time until now shall be specified below. It should also be noted that the current version of the Standing Orders entered into effect in 2021.

7. According to the provisions of the 2014 Standing Orders a farmer permitwas given to any applicant who proved proprietary ties to a plot of land, in the absence of security preclusion. The 2014 Standing Orders stated that:

> "**Farmer permit** – is issued to a Judea and Samaria resident having **proprietary ties** to agricultural lands in the seam zone" (section 2, Article A, Chapter C of the 2014 Standing Orders, emphases appear in the original).

8. On February 15, 2017 the provisions of the Standing Orders were revised, including, *inter alia*, the provisions of Article A, Chapter C thereof (hereinafter: **2017 Standing Orders**). The following are the provisions of the Standing Orders which were in force when the petition was filed which are relevant to the case at hand:

> "**Farmer permit -** is issued to a Judea and Samaria resident having **proprietary ties** to agricultural lands in the seam zone, the purpose of which is to maintain the connection to said lands" (Section 2, Article A, Chapter C of the 2017 Standing Orders, emphases appear in the original).
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> "**Agricultural worker permit** – is issued to a Judea and Samaria resident employed by a farmer on their land **according to an application of the farmer, who is the applicant** for the cultivation of said lands" (Section 3, Article A, Chapter C of the 2017 Standing Orders, emphases appear in the original).

> "**Permit for personal needs -** is issued to a Judea and Samaria resident that **special or humanitarian needs** require his/her presence in the seam zone, and who was invited to the seam zone by a resident having ties to the seam zone, **who is the applicant**" (Section 1, Article C, Chapter C of the 2017 Standing Orders, emphases appear in the original).

To complete the picture it should be noted that a holder of a farmer permitor an agricultural worker permit can uninterruptedly enter the seam zone on a daily basis, over a period of two years. The above applies, with exclusion of cases in which the plot is leased for a shorter period, in which case the permit shall be valid for the term of the lease (see: Section 4, Article A, Chapter C of the 2017 Standing Orders). On the other hand, the term of a permit for personal needs is determined at the discretion of the competent authority according to its purpose and the specific circumstances of the case (Section 2, Article C, Chapter C of the 2017 Standing Orders). The material submitted by the parties in this case indicates that this permit is generally given for a maximum period of three months.

9. The petition at hand focuses on one of the conditions for receiving an agricultural worker permit which was added to the Standing Orders upon their amendment on February 15, 2017, whereby:

> "Agricultural worker permits shall be issued for the farmer's relative portion in the land, according to documents… **As a general rule, there is no sustainable agricultural need when the size of the plot for which the permit is requested is minuscule, not exceeding 330 square meters**" (Section 13(a)(7)(b) Article A Chapter C of the 2017 Standing Orders).

It should also be noted that the 2017 Standing Orders state that in exceptional circumstances and for reasons which shall be recorded, the head of the DCO shall also be entitled to issue a farmer permitto an owner of a miniscule plot as aforesaid. In this context it was stated as follows:

> "In exceptional circumstances and for reasons which shall be recorded, the head of the DCO shall be entitled to issue a farmer permitfor a miniscule plot as aforesaid" (Section 13(a)(7)(b), Article A Chapter, C of the 2017 Standing Orders).

However, as shall be clarified below, the reference to the nature of the rule concerning a miniscule plot as a "presumption" which can be deviated from in exceptional circumstances was subsequently deleted from the later version of the Standing Orders.

10. It was further clarified in the 2017 Standing Orders that an agricultural need shall be defined as –

> "A need to cultivate land for sustainable production of agricultural produce" (Section 11, Article A, Chapter C of the 2017 Standing Orders).

11. Hence, as of 2017 and unlike in the past, the possibility to receive an agricultural worker permit for a "miniscule" plot, the size of which does not exceed 330 square meters, was limited.

12. It should be also noted that in fact, said limitation does not apply only to plots the absolute physical size of which does not exceed 330 square meters, but also to larger plots jointly owned by several owners, such that the relative part of each one of them does not exceed 330 square meters. This conclusion also emerges from the definition of the size of the plot which appeared in the 2017 Standing Orders:

> "The size of the plot shall be the entire area of the plot multiplied by the applicant's relative ownership in the plot." (Section 5, Article A of Chapter C of the 2017 Standing Orders).

The meaning of this rule can be explained by a simple example. Let's take a one dunam plot jointly owned by four siblings in equal non-specific parts. A plot of this size, in and of itself, does not fall under the definition of a "miniscule" plot. However, since the plot is jointly owned by the siblings, the relative part of each one of them ostensibly consists of 250 square meters. Hence, according to the provision concerning a "miniscule plot" which was added to the 2017 Standing Orders, none of them shall be entitled to receive a farmer permit, other than in extraordinary circumstances.

13. To complete the picture it should be noted that according to the 2017 Standing Orders, a permit for personal needs can be received in circumstances in which there is a "proprietary connection to the plot for which permit for agricultural or commercial needs may not be obtained." (Section 6(c), Article C of Chapter C of the 2017 Standing Orders). This permit is given as aforesaid for a maximal period of three months.

The Original Petition and the Early Stages of the Hearing

14. The original petition was filed on October 4, 2018. During the years which passed since then, many updates were received in the form of responses and updating notices, hearings which were held before different panels, an amended petition and an *order nisi* which was issued – all as specified below.

15. The petitioners who filed the original petition are a mother and son. Petitioner 1, born in 1948 (hereinafter: **Petitioner 1**) is one of the owners of land located in Qaffin, a village in the Tulkarm region. The plot consists of 17.5 dunams and it has olive trees. Petitioner 1 inherited her part in the land from her late grandfather. According to the petition, in the past, the family members also cultivated wheat and barley in the plot, but due to difficulties in obtaining seam zone permits, they have abandoned these crops after the separation fence was built. When the petition was filed, Petitioner 1 held a seam zone entry permit, but it was explained that due to her age and medical condition she herself did not cultivate the land and wanted to exercise her right to do so through her son, Petitioner 2 in the original petition (hereinafter: **Petitioner 2**). The additional petitioner in the original petition is "HaMoked Center for the Defence of the Individual founded by

Dr. Lotte Salzberger" (hereinafter also: **HaMoked**) which supports the position of the individual petitioners. As shall be clarified below, subsequently an amended petition was filed in which the reference to Petitioners 1-2 remained unchanged while HaMoked was referred to as Petitioner 4 due to the addition of another individual petitioner.

16. Unlike Petitioner 1's application, Petitioner 2's application for an entry permit into the seam zone for the cultivation of the land was denied in October 2017. On December 25, 2017 Petitioner 2, with the assistance of HaMoked, appealed the above decision. Subsequently, on January 21, 2018, an inquiry was held in Petitioner 2's matter before the Head of the DCO following which he was given, on February 5, 2018 a permit for personal needs for a period of three months only, commencing from February 1, 2018 and ending on May 1, 2018, since according to the Respondents the size of the plot which was inherited by Petitioner 1 from her grandfather consisted of less than 330 square meters and therefore she was not entitled to receive an "agricultural worker" permit for Petitioner 2.

17. On February 21, 2018 Petitioner 2 submitted another appeal against the decision not to give him an agricultural worker permit. On May 30, 2018, in the framework of the inquiry of the additional appeal, a tour was conducted in the plot being the subject matter of the application, with the participation of Petitioner 2 and representatives of the Civil Administration. In the summary of the tour it was noted that documents which were presented to the DCO indicated that the size of the plot with respect of which Petitioner 1 had proven proprietary ties amounted to 288 square meters. It was also noted that Petitioner 2 could not point to the exact location of Petitioner 1's part in the land, that the entire plot which was pointed to by Petitioner 2 consisted of about 35 large olive trees and it was only partly cultivated, and that considering the fact that the relative part of Petitioner 1 in the land enables growth of a limited number of mature trees – about 10 according to the estimate of the representatives of the Civil Administration - there was no need to cultivate the land all year round. Therefore, it was determined in the summary of the tour that Petitioner 2 "did not satisfy the required burden of proof to substantiate his claim that under the circumstances there was an agricultural need justifying the issue of an agricultural worker permit for the plot at hand".

18. Subsequently, on June 18, 2018 the Petitioners filed another, third, appeal. In fact, the Petitioners were not summoned to a hearing before the appeals committee even after a request on their behalf was submitted to Respondent 2's public liaison officer. Under these circumstances the original petition was filed.

The Original Petition

19. In the original petition two major remedies were requested. The first – was directed specifically to the issue of an "agricultural worker" entry permit into the seam zone to Petitioner 2. The other – concerned the lawfulness of the provision regarding a miniscule plot which was added to the 2017 Standing Orders, whereby farmer permits shall not be issued to owners of plots the size of which is less than 330 square meters.

20. The petition argued that the miniscule plot amendment drastically reduced the actual ability of the residents of the Area that own agricultural lands in the seam zone to receive permits for the purpose of cultivating their lands. Therefore, the petitioners argued that the amendment broadly violated the proprietary rights of the land owners who were protected residents according to international law, and was therefore contrary to the obligations imposed on the Respondents as well as to case-law. It was specifically argued that Respondents' decision not to enable Petitioner 2's entry into the seam zone for the purpose of cultivating Petitioner 1's plot disproportionately violated Petitioner 1's right to property and Petitioner 2's right to freedom of movement.

21. More specifically, the Petitioners argued that the term "plot size" in the 2017 Standing Orders did not refer to the actual size of the plot, but rather to the relative part of each one of the owners, a detail which has no agricultural or proprietary meaning. The petitioners emphasized that when one plot is owned by several owners, it is a joint ownership of each owner in the entire plot and that according to the inheritance laws ownership is not divided between the heirs into separate units of land. The Petitioners argued that as a result of the miniscule plot presumption, sooner or later, all plots in the seam zone shall be deemed "miniscule plots" which do not require cultivation. According to the Petitioners, the "miniscule plot" amendment to the Standing Orders is contrary to Respondents' prior statements in the Permit Regime case that the right of the land owners in the seam zone to cultivate their land with the assistance of their family members shall be maintained. It was argued that contrary to the above, in fact, this right is currently available only to owners of large plots of land or to owners who inherited the rights in the land together with a small number of heirs, such that the relative part of each one of them in the land exceeds 330 square meters.

22. On October 31, 2018 the Respondents filed an updating notice according to which it was decided that the appeals committee would hear Petitioners' appeal. It was therefore argued that the petition should be deleted without prejudice. On the other hand, the Petitioners argued that the petition should not be deleted since the remedies which had been requested therein were not received and due to the fact that in addition to Petitioners' specific case the petition also concerned Respondents' general policy with respect to miniscule plots. It was subsequently held on November 20, 2018 that the petition would be heard by a panel and that the Respondents should submit their response until 14 days before the date of the hearing (Justice **Y. Elron**). On November 21, 2018 a hearing was held before the appeals committee. In the hearing Petitioner 2 noted that he had received in the past a permit for personal needs valid for three months, but due to the fact that it was received late he entered the seam zone by virtue thereof only once. Petitioner 2 also noted that in that year "we were unable to harvest the olives since we did not receive a permit". On December 10, 2018 the chairman of the appeals committee dismissed Petitioners' appeal. The decision to dismiss stated that there was apparently no agricultural need to cultivate the plot since it was a plot which had a small number of olive trees and that Petitioner 2 "did not prove the need to cultivate them on a daily basis over a period of two years". It was also noted that a DCO inquiry showed that other family members of Petitioner 1 were cultivating the plot.

23. On January 20, 2019 the Petitioners filed an updating notice informing that their appeal was dismissed. It was also argued that Respondents' conclusion that other family

members were cultivating Petitioner 1's plot was wrong. In this context the Petitioners explained that from their perspective Respondents' mistake stemmed from the fact that they "continue to deny the fact that jointly owned plots are not actually divided and the family members jointly cultivate the entire plot."

24. On May 1, 2019 the Respondents filed their Preliminary Response to the petition arguing that the petition should be dismissed in the absence of grounds for interfering with the decision not to issue to Petitioner 2 an entry permit into the seam zone for agricultural needs. The Respondents argued that as a general rule, the discretion to determine the type of permit which shall be held by an individual is vested with the military commander who balances the security aspect against the needs of the population, considering the fact that there is no physical barrier preventing the entry into Israel from the seam zone. With respect to Petitioner 2's specific case it was noted that "According to the inheritance order and Petitioner 1's relative portion which was calculated according to the provisions of the Standing Orders defining how the size of the plot should be calculated, Petitioner 1 had inherited 288 square meters of a 17.5 dunam plot which was divided by way of inheritance between Petitioner 1 and her siblings", and that he was unable to point at the exact location of his mother's plot in the land. It was subsequently noted that Petitioner 2 was unable to refute the presumption that there was no "sustainable" agricultural need to cultivate the plot. It was further argued that Petitioner 2 did not have the need to receive a permit the purpose of which was agricultural cultivation since he received a permit for personal needs valid for three months which enabled him, it was so argued, to maintain his ties to his mother's land.

25. With respect to the general argument concerning the miniscule plot amendment of the Standing Orders it was argued that it was a reasonable amendment which was made on the basis of the professional opinion of the Civil Administration Agriculture Staff Officer from 2016 (hereinafter: the **Agricultural Opinion**) whereby "sustainable" agriculture was not feasible in an area smaller than 330 square meters. According to the Respondents the amendment to the Standing Orders did not violate the right to property since it concerned persons that do not have an actual need to cultivate the plot due to its small size. On the other hand, in their Reply dated May 12, 2021, the Petitioners disputed the manner by which the term "sustainable agriculture" was defined in the Agricultural Opinion. The Petitioners emphasized that agricultural work had great cultural, familial and social value for the land owners in the seam zone, and that it could not be determined whether a need for agricultural cultivation existed based only on a minimum yield which according to the Respondents constituted a "sustainable" agricultural need.

26. On May 15, 2019 a first hearing in the petition was held (by a panel headed by myself which also included Justices **G. Karra** and **Y. Elron**). By the end of the hearing a decision was given whereby an updating notice would be submitted on behalf of the Respondents. It was also noted in the decision that a permit for personal needs would be given to Petitioner 2 until the submission date of said updating notice.

27. Subsequently, on August 16, 2019 an updating notice was filed stating that the publication of an revised version of the Standing Orders was contemplated which shall include several changes that according to the Respondents may make the hearing in the petition redundant. On September 18, 2019 the Respondents filed another updating

notice stating that a collection of "Seam Zone Entry Procedures and Guidelines for 2019" was published (hereinafter: **the 2019 Standing Orders**) which included several relevant changes. First, the 2019 Standing Orders extended the validity of seam zone entry permits for agricultural needs from two to three years (see: Section 4, Article A of Chapter C of the 2019 Standing Orders). Second, it was established in the 2019 Standing Orders that permits for personal needs issued due to proprietary ties to a plot located in the seam zone with respect of which a permit for agricultural need cannot be obtained, may also be issued for a period of three years, subject to the discretion of the military commander (see: Section 6(c), Article C of Chapter C of the 2019 Standing Orders). Third, in the framework of the 2019 Standing Orders a "punch card" entry permit into the seam zone was added, consisting of a limited number of entries for each year (according to the agricultural need to cultivate the land), this in order to enable the extension of the validity of the different permits. It should already be noted that the extension of the validity of the permits according to the provisions of the 2019 Standing Orders was subsequently cancelled in the revised version of the Standing Orders from 2021. Finally, in the framework of the 2019 Standing Orders, the definition of a farmer permitwas changed as follows:

> "Farmer permit – is issued to a resident of Judea and Samaria having proprietary ties to agricultural lands in the seam zone the purpose of which is to enable the cultivation of the agricultural land according to the agricultural need arising from the size of the land and type of the crop, maintaining the ties to these lands. The number of permits and scope of entries shall be determined according to the provisions of these Standing Orders" (Section 2, Article A of Chapter C of the 2019 Standing Orders).

28. It should be noted that the 2019 Standing Orders have also entrenched the "miniscule plot" provisions, but at this stage the provisions which enabled a deviation therefrom in extraordinary circumstances and for reasons which shall be registered have already been deleted. In this context Section 14(a)(7) stated as follows:

> Examination of applicant's portion in the plot – agricultural worker permits shall be issued with respect to the farmer's relative portion in the land, according to documents. It should be emphasized that:
>
> a) Arguments regarding cultivation of additional parts should be supported by suitable documents.
>
> b) As a general rule, there is no sustainable agricultural need when the size of the plot for which the permit is requested is minuscule, not exceeding 330 square meters…" (Section 14(a)(7) of Article A Chapter C of the 2019 Standing Orders).
>
> The 2019 Standing Orders also provided that a resident wishing to access a miniscule plot may apply for a permit for personal needs. In this context it was stated that:

> "If a need arises to enter a miniscule plot, the resident can submit a permit application for "personal needs", which shall be examined according to the provisions of Article C of this Chapter." (*Ibid.*)

29. Given all of the above and considering the extension of the validity of the permits for agricultural or personal needs to three years, the Respondents argued in said updating notice that the petition was no longer relevant. With respect to Petitioner 2's matter it was argued that he should submit a new application for an entry permit into the seam zone according to the updated provisions of the 2019 Standing Orders. On the other hand, the Petitioners reiterated their position and argued that the policy which was challenged in the petition concerning a miniscule plot was not cancelled in the 2019 Standing Orders and therefore according to them the petition was still relevant.

30. On October 23, 2019 a decision was given (by the original panel which heard the petition) whereby the petition would remain pending. It was also decided that the Petitioners would submit an application for an entry permit into the seam zone according to their needs and the provisions of the 2019 Standing Orders, and that the Respondents would file an updating notice concerning the decision which would be made in said application.

31. On January 22, 2020 an updating notice was filed on behalf of the Respondents informing that a decision was made to issue to Petitioner 2 a "punch card permit" for agricultural cultivation valid for three years and limited to 120 entries into the seam zone during the entire validity period of the permit. In addition, the Respondents reiterated their arguments whereby the petition, as was filed, became redundant. On the other hand, in their reply dated February 5, 2020, the Petitioners raised a host of arguments against the miniscule plot provision and with respect to "punch card" permits which are limited to a finite number of entries into the seam zone. Subsequently, in a decision dated February 9, 2020 it was decided that the Petitioners would file an amended petition on the basis of the current legal and factual infrastructure.

The Amended Petition and its Hearing

32. On February 27, 2020 the Amended Petition was filed by the original petitioners and by an additional petitioner, Petitioner 3 in the Amended Petition (hereinafter: the **Additional Petitioner**), who was also issued a "punch card" entry permit into the seam zone for a limited number of 120 entries. In the Amended Petition three major remedies were requested. First, that entry permits with no restrictions on the number of entries shall be issued to Petitioner 2 and the Additional Petitioner. Second, that the provision included in the 2019 Standing Orders preventing the issue of a farmer permit for a miniscule plot the size of which does not exceed 330 square meters shall be cancelled. Third, that the new provisions concerning "punch card" entry permits into the seam zone with a limited quota of entries shall be cancelled. In principle, the Petitioners reiterated their principled arguments which had been raised in the original petition. It was also emphasized that the manner of implementation of the permit regime underwent changes since it had been approved by this court. In this context the Petitioners referred to data which had been presented by the Respondents whereby between the years 2014-2018 the

rate of refusals to issue seam zone permits for agricultural needs spiked from 24% to 72%. According to the Petitioners, despite the fact that the number of farmers having ties to lands in the seam zone has increased over the years, the number of permits allowing entry thereto has decreased.

33. On June 10, 2020 the Respondents filed a preliminary response to the Amended Petition. In principle, the Respondents reiterated their arguments as presented in their preliminary response to the original petition. Among other things it was argued that the purpose of the miniscule plot provision was to reduce the scope of the phenomenon whereby seam zone entry permits were misused to enter Israel unlawfully. It was also added by the Respondents that following the 2019 amendment of the Standing Orders the implications of the miniscule plot provision have significantly decreased, given the fact that a person holding a miniscule plot may submit a permit application for personal needs. It was also noted by the Respondents that there was no preclusion which prevented all heirs of a certain plot from requesting that one or a small number of them, cultivate the entire plot for all of them. Under these circumstances, the heirs who were chosen by their family members to cultivate the entire plot would receive a permit for agricultural needs, and the other heirs would be able to submit an application for a permit for personal needs. With respect to Petitioner 2's specific matter it was argued that the decision to give him an entry permit allowing 120 entries over a period of three years was reasonable and that there was no cause to interfere with said decision, given the fact that there was no actual agricultural need to cultivate the plot, and that Petitioner 2 only wanted to maintain his ties to the land. With respect to the Additional Petitioner it was argued that his plot was not located in the seam zone but rather in the Area and that therefore he could access it without any restriction.

34. On the other hand, in their reply dated June 26, 2020 the Petitioners argued, *inter alia*, that the proper way to deal with cases in which farmer permits were misused was not to limit the issue thereof *ab initio*, but rather to revoke the permits of applicants who breached their terms of use (according to Chapter E of the 2019 Standing Orders concerning "Handling procedures for the misuse of seam zone entry permits"). On the individual level, the Petitioners argued that the plot of the Additional Petitioner was indeed located in the seam zone contrary to Respondents' arguments in that regard, and even emphasized that in the past agricultural entry permits into the seam zone had been issued to him.

35. On July 1, 2020 a hearing was held in the Amended Petition (also by the original panel) by the end of which it was decided that an additional updating notice would be filed on behalf of the Respondents in which answers would be provided to several specific questions which were specified in the decision.

36. On October 26, 2020 an updating notice was filed on behalf of the Respondents. At the outset of the notice it was stated that by the end of one year from the date on which the "punch card" amendment had been made, it was decided to cancel it since it was concluded that its objectives were not met. At the same time, the amendment which extended the validity of the farmer permits to three years would be cancelled such that they would again be valid for two years, and the permits for personal needs would again be valid for a maximal period of three months.

37. It was further informed in the updating notice that the provisions of the 2019 Standing Orders were amended according to the statements given by the state in the hearing which was held on July 1, 2020 and that the amendment would be published and enter into force within a few weeks (hereinafter: the **Amended 2019 Standing Orders**). It should already be noted that a copy of the Amended 2019 Standing Orders was not attached to the updating notice and that the changes which were specified therein were eventually entrenched in the 2021 collection of seam zone entry procedures and guidelines (hereinafter: the **2021 Standing Orders**) which is the version of the Standing Orders currently in force.

38. First, Section 14(a)(7)(a) of Article A, Chapter C of the 2019 Standing Orders was amended to the effect that the Amended 2019 Standing Orders provided as follows:

> "A cultivation permit for agricultural needs shall also be given based on the "scheme" of rights of several right holders whose joint share in the land reaches the bar of 330 square meters – to one of them at their choice. Arguments regarding cultivation of additional parts should be supported by suitable documents."

To complete the picture it shall be noted that as shall be clarified below, said amendment was eventually entrenched in the 2021 Standing Orders.

39. Second, to clarify that a person holding a permit for personal needs which was issued to maintain proprietary ties to land may use it for agricultural cultivation, a clarification was added to Section 1, Article C, Chapter C of the 2019 Standing Orders. Accordingly, the Amended 2019 Standing Orders provided that:

> "A person holding a permit as aforesaid can also use it for any legitimate purpose which is not contrary to the law and security legislation including for agricultural purposes."

To complete the picture it shall be noted that said amendment was also subsequently entrenched in the 2021 Standing Orders.

40. Third, to clarify that a person holding a farmer permit can also receive a permit for personal needs and hold two permits at the same time, Section 6(d) was added to Article C, Chapter C of the 2019 Standing Orders whereby:

> "A person holding a permit according to Article A of this Chapter (permit for agricultural needs) shall not be prevented from receiving a permit for personal needs according to this Article."

As shall be clarified below, this amendment was also eventually entrenched in the 2021 Standing Orders.

41. The preliminary response presented numerical data regarding the number of seam zone entry permits which were issued between the years 2007 - 2009 (data which were presented in the framework of the **Permit Regime** case) and between the years 2013 - 2020. The data which were presented may be interpreted in different ways. According to

the Petitioners the acceptance rate of farmer permit applications was declining. On the other hand, the Respondents are of the opinion that this datum should be analyzed alongside the increase in the acceptance rate of permit applications for personal needs. In any event, there can be no dispute that following the addition of the miniscule plot provision there are persons that have rights in miniscule plots or joint owners of a plot that do not receive permits for agricultural needs even after the existence of proprietary ties to the land was proven and in the absence of a security preclusion.

42. In addition, the Respondents provided data concerning the misuse of entry permits into the seam zone for the purpose of entering Israel unlawfully. The notice stated that according to the experience of "field officials" despite the fact that in the morning hours, thousands of permit holders pass through the entry gates to the seam zone, a patrol conducted several hours later in the said area showed that only a very few individuals were found on their lands, cultivating them. The Respondents have also provided details about public servant certificates which were given by them to Israel Police with respect to illegal aliens apprehended in Israel while holding seam zone entry permits between the years 2016 - 2020. Public servant certificates as aforesaid are issued for the purpose of instituting criminal proceedings for offenses according to Sections 12 and 12A of the Entry into Israel Law, 1952 (for the purpose of substantiating the offense).

43. On November 23, 2020 the Petitioners filed a response to the updating notice on behalf of the state in which they argued that the Respondents did not present a security opinion to justify the miniscule plot rule, but only general estimates regarding the phenomenon of misuse of seam zone entry permits. In this context the Petitioners emphasized that the data which were presented with respect to the public servant certificates issued in connection with the misuse of seam zone entry permits pertained to entry permits of all types and not specifically to farmer permits. The Petitioners emphasized that it emerged from the data provided by the state that as of 2017 there was a decline in the percentage of farmer permit applications which were approved. According to them this trend resulted from the miniscule plot amendment and proved the problematic nature thereof. The Petitioners also emphasized that, in fact, permits for personal needs were given for a maximal period of three months and in certain cases for shorter periods – of one or two months. In any event, the Petitioners argued that an increase in the number of permits for personal needs could not compensate for the decline in the number of permits for agricultural needs.

44. In addition, the Petitioners argue that the revised version of Section 14(a)(7) of the 2019 Standing Orders is not satisfactory. The Petitioners do not accept the demand that a number of plot owners will have to choose one of them to cultivate the plot on their behalf. In this context it was argued that each one of the joint owners of the plot had separate and independent proprietary rights. The Petitioners argue that the demand that the family members choose only one person who shall receive an entry permit into the land while all other family members shall be in fact disconnected therefrom is problematic in two main aspects. First, it was so argued, it violates the property rights of those who are required to relinquish their right to access the land. Second, it harms the ways of life of an agricultural tradition whereby the family members jointly cultivate the land.

45. On December 10, 2020 an *order nisi* was issued in the petition (by the original panel which heard the petition), ordering the Respondents to show cause:

    1. Why Section 14(a)(7) of the 2019 Revised Collection of Seam Zone Standing Orders concerning the "examination of applicant's share in the plot" should not be revoked and/or replaced by another

arrangement providing solution to joint owners of rights in plots of land.

2. Why a seam zone entry permit for agricultural needs should not be given to Petitioner 2, to enable him to farm the plot of land owned by his mother, Petitioner 1."

46. On March 25, 2021 the Respondents filed a response affidavit noting that the changes which were described in the state's response dated October 26, 2020 (see paragraphs 37 – 40 above) were entrenched in the 2021 Standing Orders and that accordingly, Section 12(a)(7) of Article A, Chapter C of the 2021 Standing Orders, which is the current version of the Standing Orders at this time, provides as follows:

> "Examination of applicant's share in the plot – agricultural worker permits shall be issued for **the farmer's pro-rata share in the land**, according to documents. It should be emphasized that:
>
> a) As a general rule, there is no sustainable agricultural need when the size of the plot for which the permit is requested is minuscule, not exceeding 330 square meters. If a need arises to enter a miniscule plot, the resident can submit a permit application for "personal needs", which shall be examined according to the provisions of Article C of this Chapter.
>
> b) A cultivation permit for agricultural needs shall also be given based on the "scheme" of rights of several right holders whose common share in the land reaches the bar of 330 square meters – to one of them at their choice. Arguments regarding cultivation of additional parts should be supported by suitable documents."

The meaning of this change is that the current version of the Standing Orders still includes the restrictive provision concerning a "miniscule plot", but subject to two changes. The amendment enables a number of right holders to reach an agreement whereby only one of them shall cultivate the land and to "accumulate" rights for at least 330 square meters, defining one of them as the person who is entitled to receive a farmer permit against the waiver by the other right holders of their right to receive a farmer permit. On the other hand, the section in its amended version no longer includes an express statement that the miniscule plot rule is a rebuttable presumption.

47. In the framework of the response affidavit the Respondents argue that the arrangement which enables several right holders to combine their rights provides a solution to right holders jointly holding rights in a plot of land, since it enables them to jointly receive a farmer permit. The Respondents also emphasize that the provision does not obligate all plot owners to act jointly, but only to accumulate rights "reaching" a minimal cumulative area of 330 square meters. The Respondents also clarify that in order to accumulate the rights of several right owner in the land, the applicant is required to provide (beyond the required documents which should be submitted to prove the proprietary connection of each one of the right holders to the land): an affidavit or power of attorney signed by the land owners who do not apply for a seam zone entry permits; affidavits of the persons having connection to the land waiving, during the validity of the permit which would be

given to the applicant, their right to receive a seam zone entry permit based on their connection to the plot; an application to cultivate the land by the applicant. It was also clarified that if the applicant wishes to have access to parts of land to which **proprietary connection has not been proven**, then, the applicant is required to support the application by a declaration of the owner(s) of the additional parts of the land stating that they do not receive seam zone entry permits on the basis of their connection to the plot. According to the Respondents it is a proportionate arrangement since in any event "in fact only one family member cultivates the plot and the other right holders do not have an actual need for agricultural cultivation." The Respondents emphasized that in the relevant periods of the year, for instance in the harvest season, permits are also "generously" given by the military commander to the family members of the land owner. In addition, the Respondents reiterate their arguments whereby the "miniscule plot" change which was added to the Standing Orders is required for security reasons and is reasonable, proportionate and satisfies the tests established by this court in the **Permit Regime** case.

48. With respect to Petitioner 2's matter it was argued that he was holding a "Seam Zone Agricultural Worker" permit valid from January 19, 2020 until January 17, 2023 consisting of 120 entries (as noted the punch card arrangement was cancelled, but the permits which were issued by virtue thereof remained in force). He was also issued on June 16, 2020 a permit for "personal needs" valid for one year (it should be noted that the arrangement enabling to issue a permit for personal needs for a period longer than three months was also cancelled since the permit was issued). On July 5, 2021 and on July 6, 2021 briefs were submitted on behalf of the Respondents and on behalf of the Petitioners, respectively, in the framework of which the parties reiterated their main arguments.

49. Finally, on October 28, 2021 another hearing was held in the presence of the parties before this panel. The time to decide has come.

Deliberation and Decision

50. Having examined the arguments of the parties and the different actions which were taken over the years I have concluded that the petition should be accepted.

51. As known, the Judea and Samaria area is under the belligerent occupation of the state of Israel. Accordingly, the executive and administrative powers in the Area are vested with the military commander that must exercise them both according to the norms of Israeli administrative law, including fundamental principles such as fairness, non-arbitrariness, reasonableness and proportionality, and according to the rules of public international law concerning belligerent occupation (see: HCJ 393/82 **Jamayit Iscan Almalmun Althaunia Almahduda Almesaulia v. The Commander of IDF in the Judea and Samaria Area**, IsrSC 37(4) 785, 793-794 (1983) (hereinafter: **Jamayit Iscan**); HCJ 1661/05 **Hof Aza Regional Council v. Israeli Knesset,** IsrSC 59(2) 481, 514-516 (2005) (hereinafter: **Hof Aza**)). According to the rules of international law, the local residents of the Area are a "protected population". In its judgments, this court has applied in this context two main legal sources from international law: the Regulations respecting the Laws and Customs of War on Land from 1907 ancillary to the Fourth Hague Convention

from 1907 (hereinafter: the **Hague Regulations**) and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, Treaties 1 559 (see: **Jamayit Iscan,** page 793; HCJ 2056/04 **Beit Sourik Village Council v. Government of Israel,** IsrSC 58(5) 807, 827 (2004) (hereinafter: **Beit Sourik)**; Hof Aza, pages 517, 584; HCJ 7957/04 **Mar'aba v. Prime Minister of Israel**, IsrSC 60(2) 477, 492 (September 15, 2005)(hereinafter: **Mar'aba**)). This is the starting point of the discussion.

The First Level: The Right to Property and its Violation

52. More specifically, the right which stands at the heart of this discussion is the right to property. The Petitioners, and other land owners like them, appear before us by virtue of their right to enjoy their property, in a manner allowing them to cultivate their lands as they choose. As far as residents of the Judea and Samaria Area who are protected residents are concerned, the protection of their right to property is firstly based, as aforesaid, on the laws of belligerent occupation (see: HCJ 7862/04 **Abu Daher v. Commander of IDF Forces in Judea and Samaria**, paragraph 8 (February 16, 2005) (hereinafter: **Abu Daher**); HCJ 281/11 **Head of Beit Iksa Local Council v. Minister of Defense,** paragraph 26 (September 6, 2011)). A main provision in this context is included in Article 46 of the Hague Regulations which obligates the occupying military power to respect, *inter alia*, the private property of the protected population and prohibits the confiscation thereof **(see: Mar'aba**, page 494; HCJ 1308/17 **Silwad Municipality, et al. v. The Knesset**, paragraph 40 (June 9, 2020) (hereinafter: the **Settlement Law** case)). In this context it was clarified that "the violation of property rights, including the violation of the property rights of individuals, is prohibited according to the laws of war of international law, unless it is necessary for combat purposes: (see: **Abu Daher**, page 377) and that it is incumbent on the military commander to exercise prudent and meticulous discretion before issuing an order violating the right to property of protected residents (see: ***Ibid***., pages 376-378). The above is reinforced by the recognition of the constitutional status of the right to property in the Basic Law: Human Dignity and Liberty (see: HCJ 9593/04 **Morar v. Commander of IDF Forces in Judea and Samaria**, paragraph 14 (June 26, 2006) (hereinafter: **Morar**); the Settlement Law case, paragraph 38).

53. Protecting the right to property in the case at hand is particularly important, for several reasons.

54. First, the erection of the separation fence, for a proper and important purpose in and of itself, was accompanied by a clear undertaking of the state of Israel to maintain the fabric of life of the residents whose life routine was threatened by the fence. As stated in the beginning, the residents of the Area having lands which are located on the Israeli side of the separation fence were subjected to the permit regime, as a necessary evil. However, it was accompanied by the undertaking, which was entrenched in the judgments of this court, to provide maximal protection to their rights and fabric of life. This court recognized the fact that the erection of the separation fence, the closure of the seam zone territories, and the application of the permit regime to the seam zone were acts which would violate the rights of Palestinian residents residing in the seam zone as well as owners of lands or businesses located in this area. In this context it was noted in the **Permit Regime** case that:

> "The declaration of the areas of the seam zone as closed areas, as well as the mere erection of the security fence, severely encumber the Palestinian inhabitants, and in particular, inflict a severe injury on innocent inhabitants who happen to be in the seam zone against their will due to the fact that they live or work in the zone, as their businesses or fields and agricultural lands remained locked within the zone. The application of the permit regime, and the need to obtain a permit in order to enter and leave the zone, imposes a clear restriction on the freedom of movement of the inhabitants of the Area within this zone, and restricts the accessibility of the inhabitants – to their homes, lands and businesses located within the seam zone… Individuals who cultivated their lands in the seam zone, conducted their businesses there and established family and social relations, are forced at this present time, in order to preserve their way of life, to apply for an entry permit based on several limited causes… These harms require the establishment of arrangements which preserve, to the maximum extent possible, the fabric of life which preceded the declaration, subject to security needs which require same. It seems to us, that as a general rule, the arrangements which were established satisfy this requirement" (*Ibid.*, paragraphs 22 and 33).

55. Second, the property discussed in the case at hand is private-family property. In certain cases the right to property is connected to the identity of the owner (see: Margaret Jane Radin, **Reinterpreting Property** 35-71 (1993)). Under these circumstances, beyond its economic value, property has additional values for its owner. A person's property may also have a special emotional value, cultural value as well as historic value (see: **Hof Aza**, pages 798-799). Accordingly, for instance, in the case at hand, the access and cultivation of agricultural land which passed from one generation to another may not only have an economic value but also a symbolic, familial and traditional value, closely connected to the identity of its holder. The Petitioners are correct in arguing that the miniscule plot arrangement severs the cultural tradition of joint cultivation of the land by the family members and may in many cases impair the fabric of life and customs of the land owners in the seam zone.

56. Third, and more generally, the arrangement in the Standing Orders deviates from the laws applicable to joint ownership of land. As is known, according to the joint ownership laws, each one of the owners owns rights in a relative **inseparable** part of the land. In this sense, a model attributing to each one of the joint holders of the land a physical area of a specific size is incompatible with the legal concept of joint ownership of land. As explained in the treatise of Moshe Duchan, the part of each one of the joint owners is "an inseparable part in the entire property and in each part of the property"(Moshe Duchan **Laws of Land in the state of Israel** 98 (1952) (hereinafter: **Duchan**)). In other words, each one of the joint owners has "the property-ownership right and the right to use and enjoy the fruits of their definite and inseparable part" (*Ibid*.). It is further explained by Duchan in his book that the term "joint owners" in the Ottoman law is similar to the term "Tenancy in Common" in English law which means that each one of the joint owners hold a definite but inseparable part of the property and may bequeath or sell it as is (*Ibid*.)

Either way, so long as the land has not been divided between the joint owners it is jointly owned by all of them such that each one of the heirs holds an inseparable part thereof.

57. In addition, it can be noted that *mutatis mutandis*, this is also the approach of the Israeli law to joint ownership which is entrenched in section 27 of the Land Law, 5729-1969 (hereinafter: the **Land Law**), whereby "Land owned by several owners, the ownership of each one of them extends according to their share over the entire property and **no joint owner shall have a specific part thereof**" (emphasis added – D.B.E.). As was also emphasized by the scholar Yehoshua Weisman in this regard: "We do not have joint ownership when a certain part of the property is owned by one person and the other part of the property is owned by another… when a person can point at a definite physical part of the land as exclusively owned by them, we are not concerned with joint ownership" (Yehoshua Weisman **Property Laws – Ownership and Joint Ownership** 126 (1997)). Section 31 of the Land Law further clarifies that unless otherwise determined by the majority land owners of the land, each joint owner may "without the consent of the other joint owners… make reasonable use of the joint land, provided that such use is not thereby prevented from any other joint owner".

58. The creation of joint ownership in this format also reconciles with the inheritance arrangements of land under Ottoman law. Accordingly, section 54 of the Ottoman land law provided in this regard as follows:

> "Upon the demise of the holder of *miri* or *mawaqfa* land – the land is bequeathed to the children… equally and for no recompense" (translated [into Hebrew] by A. Ben Shemesh **Laws of Lands in the state of Israel** 114 (1955)).

It emerges from the above that the land is transferred to all heirs in equal parts without any obligation on their part to pay taxes to the state or register with the land registry (Duchan, page 98. See also: Plia Albek and Run Fleischer Real Property Laws in Israel 173-174 (2005)). The land is transferred such that each one of the heirs owns the land jointly with all other heirs (as opposed to a situation in which each one has a specific part in the land). The mere joint ownership in the plot does not derogate from the rights of each one of the holders. In other words, the proprietary rights of joint owners are not weaker than the proprietary rights of a single property owner. Therefore, an arrangement requiring full waiver by some of the joint owners for the purpose of exercising their proprietary rights deviates from the way joint ownership is perceived by Israeli law.

The Second Level: the Harm Caused to the Right and the Required Balances

59. The aforesaid does not change another fundamental rule whereby the right to property is also subject to limitations and balances which are required for the realization of other rights and interests. The entire permit regime reflects this concept by limiting the entry into the seam zone for security purposes and for the purpose of protecting the right to life and safety of the residents of the state of Israel. This court has already held that the purpose for which the separation fence was erected was a security purpose (see: **Beit**

Sourik, page 831; HCJ 10309 **Alfei Menashe Local Council v. Government of Israel**, paragraph 9 (August 29, 2007)). Particularly, in **Beit Sourik** the argument that the separation fence had been erected for political rather than security purposes was rejected. It was similarly held in the **Permit Regime** case that the body of arrangements referred to as the "permit regime" was founded on security considerations and that the Respondents were aware of "the difficulties created by the permit regime and that they act in different ways to minimize the injury caused as a result of its application, by improving the handling processes of the various applications and by maintaining an ongoing way of life between the territories of the Area and the seam zone" (the **Permit Regime** case, paragraph 39).

60. Accordingly, in the case at hand we do not examine the broad question of the harm inflicted on the right to property as a result of the permit regime as a whole. We are concerned here with a much narrower question – whether, while creating the miniscule plot arrangement, proper balancing was made by the military commander between the need to provide a proper solution to the land owners wishing to enter the seam zone to cultivate their lands and the security objectives that the permit regime wishes to achieve (see and compare: **Mar'abe**, pages 507-509; the **Permit Regime** case, paragraph 29). Therefore, we should examine, according to the data specified above, whether the miniscule plot arrangement, as it is currently entrenched in the 2021 Standing Orders satisfies the proportionality requirement.

61. As is known the proportionality test consists of three sub-tests which were established by this court in its judgments. The burden is imposed on the military commander to show that his actions satisfy these tests: first, that there is a rational connection between the means taken and the purpose that he wishes to achieve. Second, that of all possible means available for achieving the purpose the means taken is the least injurious means. Third, that there is a proper proportion between the damage which shall be caused to the rights of the individual and the gain which shall arise therefrom ("proportionality in the narrow sense"). I shall now examine these sub-tests in view of the circumstances at hand.

62. **The rational connection test**: A rational connection should exist between the underlying purpose of the miniscule plot arrangement and the means which was taken to promote it. The Respondents argued, as recalled, that the underlying purpose of the miniscule plot arrangement was a security purpose. However, in fact, it emerges from the examination of the arguments made in that regard that it is not a direct security purpose. In this context it should be clarified that where there is security concern – permit shall not be granted. At the same time, the Respondents presented to us an indirect security purpose. According to the Respondents, granting seam zone entry permits without examining the need therefore, may lead to misuse of the permits, and accordingly, enable unauthorized entry into Israel.

63. Indeed, the data presented by the Respondents provide a basis to the determination that a phenomenon exists whereby seam zone entry permits are misused for the purpose of entering Israel unlawfully. It can also be said that life experience supports the expectation that the establishment of clear rules for the issue of seam zone entry permits which shall allow entry thereto only to those who really wish to cultivate their lands, will reduce the scope of the misuse of the permits. However, the data which were presented did not show

that violations were committed by the vast majority of the permit holders. In addition, said data did not distinguish between violations committed by holders of permits for personal needs and violations committed by holders of permits for agricultural needs, and therefore could not shed light on the core issues before us. The Respondents also failed to present the number of cases in which farmer permits were confiscated or cancelled due to their violation (let alone the number of cases in which it was found that a farmer permit was misused by an individual who received the permit by virtue of holding joint ownership rights in a plot of land). The data which were presented are general and indicate the existence of a general phenomenon of misuse of permits – as opposed to a unique phenomenon of misuse of farmer permits, let alone misuse of permits issued for the cultivation of small plots.

64. Moreover, on the practical level, in many cases Respondents' allegation that the owner of a miniscule plot does not have an actual need to receive a permit, which increases the concern that the permit shall be misused – does not reflect an actual reality but only an "arithmetic" reality. In fact, most miniscule plots are only artificially miniscule. In the typical case we are concerned with a large plot of land the agricultural cultivation of which is feasible and is considered miniscule only when the relative part of each one of its joint owners is examined. In other words, the provisions of the Standing Orders prevent access to agricultural lands in the seam zone not only from owners of actual miniscule plots, but also from joint owners of larger plots with respect of which an actual cultivation need exists (if waiver was not obtained from some of the other joint owners of the plot of their right to access it).

65. It emerges from the above that the factual infrastructure of Respondents' decision whereby a "limiting" rule is required precisely with respect to permits for agricultural cultivation as opposed to permits for personal needs, commercial needs and the like, is not at all clear. The Respondents have also clarified that the holder of a miniscule plot can be entitled to a permit for personal needs to maintain their ties to the land. Therefore, the application of the first proportionality sub-test shows that even if there is a rational connection between the security objectives on which the miniscule plot amendment was allegedly founded, it is only an indirect connection.

66. **The least injurious means test** – in the framework of the second sub-test we should examine whether another, less harmful measure could have been used to achieve the purpose of the amendment.

67. As argued by the Petitioners, there are additional means which may possibly be used to prevent the misuse of seam zone entry permits. Chapter E of the 2021 Standing Orders which also appeared in the previous versions of the Standing Orders and is captioned "Handling misuse of seam zone permits procedure" establishes rules for handling the phenomenon of misuse of permits in general, and farmer permits in particular. This chapter enables confiscation of seam zone entry and stay permits due to permit misuse (using a permit for purposes other than those specified therein), for security reasons and due to criminal or security offenses which were committed in the seam zone or in Israel while using the permit. In addition, Section 12(a)(2) of Article A, Chapter C of the 2021 Standing Orders provides that for the purpose of making a decision in an application for a seam zone entry permit for agricultural needs it shall be, *inter alia*, examined whether

the permit holder used previous permits which were granted to them for other unauthorized purposes. It emerges from the above that misuse of previous permits shall be used as a consideration for the purpose of issuing a new permit. In addition, each one of the specific chapters relating to the issue of an entry permit notes that a permit may be confiscated or an application to issue a permit may be denied if there is a suspicion that a permit was misused (see: Section 8, Article C, Chapter C of the 2021 Standing Orders; Section 6 Article B Chapter C of the 2021 Standing Orders; Section 3, Article C, Chapter C of the 2021 Standing Orders; Section 5, Article D, Chapter C of the 2021 Standing Orders;). It is also important to clarify that all permits, both farmer permits and permits for personal needs are issued subject to the absence of a security preclusion. As aforesaid, the Respondents did not refer to the number of cases in which farmer permits were confiscated or cancelled due to their misuse. There is therefore no justification to limit the possibility to obtain farmer permits for the purpose of preventing the misuse of permits, given the fact that there are other less injurious alternatives which shall potentially cause less harm to the right to property of individuals who did not misuse their permits.

68. It should be noted in this context that the Respondents also apply the miniscule plot rule when only one (or a small number of owners) out of all joint owners of the plot apply for a farmer permit in order to access the plot. Accordingly, for instance, when a plot is owned by many joint owners but only one or a few of them apply for a seam zone entry permit for agricultural cultivation, they will not receive such a permit, but the rights of each one of them shall have to be "accumulated" with the rights of the other joint owners in order to reach a plot-size larger than 330 square meters. As aforesaid, for this purpose the applicant shall be required to attach to the application – an affidavit or a power of attorney signed by all other joint owners whereby they waive, during the term of the permit, their right to apply for a seam zone entry permit on the basis of their proprietary ties to the plot, as well as an affidavit of the individuals having ties to the plot whereby they also waive their right to apply for a seam zone entry permit for the purpose of cultivating the plot during said period. From the perspective of the least injurious means the alternative requiring a "rights' scheme" could have been considered only in a situation in which a large number of farmer permits is requested with respect to a plot, thus creating a situation in which the plot shall be cultivated by many individuals, at a ratio of more than one person per 330 square meters. However, when only one or a small number of all joint owners of a plot apply for a farmer permit for the purpose of cultivating it, there is no concern that the entry into the seam zone for the cultivation of the plot shall be "over used".

69. And what about Respondents' claim that the rules which apply to a miniscule plot do not harm the right holders due to the fact that a person who does not hold a farmer permit can also cultivate the land while entering the seam zone by virtue of a permit for personal needs? This argument disregards the fact that the amendment to the Standing Orders whereby a permit for personal needs could have been issued for a period of three years (in the framework of the "punch card" permit) was cancelled in the framework of the 2021 Standing Orders and no longer exists. Therefore, an owner of a miniscule plot shall have to renew the permit for personal needs once every three months, which to a certain extent makes the solution offered by the Respondents ineffective.

70. In conclusion, it seems that in order to handle the phenomenon of misuse of seam zone entry permits, the Respondents should use adequate enforcement measures (denying a permit from a person who misused a permit which was given to them in the past and confiscating a permit from a person who uses it for purposes other than those specified in the permit). Using the above enforcement measures shall affect only those who have misused the permit and shall not prevent, in advance, a joint owner sharing ownership of a plot with other heirs or an owner of a miniscule plot from receiving a permit. It is therefore a measure by which the purpose can be achieved while causing less harm to the rights of the individual.

71. **The proportionality test in the narrow sense** – the third sub-test examines the proper relation between the measure which was chosen and the purpose, and in this context the scope of the harm caused to the right is not examined *vis-a-vis* another alternative. The premise underlying the discussion concerning the realization of the right to property is that "when property rights of the individual are concerned, one cannot dismiss the issue on the argument of the "relativity" of the right. In our legal system, property rights of the individual are an important legal value which is protected by both civil and criminal law" (see: HCJ 390/79 **Duweikat v. Government of Israel**, IsrSC 34(1), 13-14 (1979)). The Respondents argued that the miniscule plot arrangement was proportionate, *inter alia*, since according to them the arrangement harmed persons who anyway did not have an actual need to cultivate their lands, and since different types of permits were available aimed at providing a solution to the harm in the appropriate cases.

72. As aforesaid, Respondents' position that there is no actual agricultural need to cultivate a miniscule plot is based on the Agricultural Opinion which stated that "it emerges that there is no actual agricultural need to cultivate a 'miniscule' plot smaller than 330 square meters". The Agricultural Opinion was based on a calculation whereby approximately 64 kg of olives are required to produce a 16 kg olive tin. According to the Agricultural Opinion an average olive tree in the seam zone yields approximately 16 kg of olives per annum, and therefore four olive trees are required to produce one olive tin which, in the average, will occupy an area of approximately 400 square meters. It was therefore determined that in an area smaller than 330 square meter "sustainable agriculture cannot be maintained".

73. However, the determination that sustainable agriculture is measured by the agricultural produce of the land is problematic from the perspective of the right to property. It does not take into consideration the fact that these are agricultural lands in which the agricultural patterns are traditional and familial, reflecting cultural approaches and unique life patterns which are manifested in the cultivation of the land. The value of agriculture for families and communities cannot be measured only by the amount of the produce or its value. This business-economic measure does not necessarily suit the values that land cultivation bestows on land owners, including familial, traditional and cultural values. It was emphasized in prior holdings of this court that the proportionality of the harm caused to the residents of the Area by the permit regime depends on the ability of the owners of agricultural lands to maintain their ties to these lands, *inter alia*, by cultivating them, and that preventing owners of agricultural lands from accessing their lands prevents them from tending their agricultural crops, thus harming their right to property (see and compare: **Morar**, page 861). The above, even if they do not meet a

certain quota. In fact, even the Agricultural Opinion relied on by the Respondents explicitly stated that "agriculture in the seam zone is regarded as traditional familial agriculture which mainly produces for self-consumption."

74. It should be noted that the seam zone consists of agricultural lands in which different crops are grown which are not necessarily olive trees and it is not clear how the calculation method devised by the Respondents for "sustainable" agriculture applies to them (considering the cancellation of the punch card permit pursuant to which a farmer permit subject to a set quota of entries could have been received according to the type of crop in the plot).

75. The Respondents argue that although according to the data presented in their updating notice dated October 26, 2020, there was a decrease in the number of farmer permits which were issued since the miniscule plot amendment had been added to the Standing Orders in 2017, the harm caused to the right to property has declined given the fact that while the number of farmer permits issued has decreased, the number of permits issued by them for personal needs has increased. I cannot accept this argument. In my opinion granting a permit for personal needs cannot compensate for the denial of the right to receive a farmer permit, particularly in view of the fact that according to the current provisions of the Standing Orders, a permit for agricultural needs is given for a period of two years while a permit for personal needs is given only for a period of three months. In addition, it should be pointed out that the Respondents did not present data showing that the increase in the number of permits for personal needs arose precisely from an increase in the number of permits issued for the purpose of maintaining proprietary ties to land, as opposed to other permits for personal needs which may be given for a wide range of different reasons. In any event, even if there was an increase as aforesaid, it does not rectify the denial of the right of owners of miniscule plots or joint owners of land to receive a farmer permit valid for two years.

The specific circumstances of Petitioner 2 emphasize the difficulties arising from the issue of a permit for personal needs *in lieu* of an agricultural worker permit. In this context Petitioner 2 stressed in the hearing before the appeals committee on November 21, 2018 that a permit for personal needs had been issued to him in the past which was valid for three months, but since it was not timely received by him he could use it only once. A permit for personal needs which is given for the purpose of maintaining proprietary ties to agricultural land requires the permit holder to renew it once every three months, in a repetitive and exhausting format.

76. The Respondents also argue that the miniscule plot arrangement includes a rebuttable presumption, such that an owner of a miniscule plot may rebut and show that despite the fact that they own a miniscule plot with respect of which, initially, there is no "sustainable" agricultural need, they have an agricultural need to cultivate the plot. However, I did not find that Respondents' above argument provides a solution to the problem. In fact, the possibility to rebut the presumption was indeed mentioned in the response affidavit, but it is not included in the current version of the 2021 Standing Orders (as opposed to the past). In their briefs the Respondents noted that they intended to re-entrench the rebuttable presumption in the 2021 Standing Orders, but it seems to be "too little, too late". Moreover: it has not been clarified how and subject to which

conditions the presumption shall be rebutted. In addition, the Respondents did not point at even one case in which the presumption was rebutted. It should be noted that also in the case at hand, Petitioner 2 did not succeed to rebut the presumption. The above, although according to the Respondents' assessments there are more than 10 mature olive trees in Petitioner 1's plot, which is more than twice the number of trees which are required for the purpose of sustainable agriculture, as this term is defined in the Agricultural Opinion relied on by the Respondents. In principle, the difficulty encountered by the Petitioners concerns land in a total size of 17.5 dunams, which is undoubtedly an area in which sustainable agricultural cultivation is feasible, and things speak for themselves.

77. Alternatively, the Respondents argue that Section 12(a)(7)(a) which was added to the 2021 Standing Orders according to which a number of right holders may "accumulate" their rights and agree, subject to the waiver of the rights of the other joint owners, that one of them shall cultivate the plot for the others, reduces the harm caused to the right to property. It is indeed so, but not in a manner which satisfies the law. Limiting the right to property in a manner which requires a "joint action" for the purpose of realizing it is problematic on several levels. First, it is not clear according to which standards the land owners should determine which one of them shall have access to the land. Second, the requirement that one person shall be appointed to cultivate the plot may harm the fabric of life of the protected residents and the possibility to cultivate the plot by the entire family together. Third, reality shows that joint owners of rights in a plot of land cannot always agree on the identity of the joint owner who shall cultivate it. This difficulty becomes more acute when the above rule is strictly applied, even when in fact only a small number of right holders apply for permits (although without an explicit consent in the form of waiver by the other joint owners until reaching a plot-size of 330 square meters). It should be noted that the provisions of the 2021 Standing Orders do not refer to and obviously do not provide a solution to situations in which joint right holders cannot agree on who shall waive their rights in favor of the other.

78. In conclusion, it emerges from the above three sub-tests that preventing agricultural land owners from accessing their lands only because they hold the land jointly with other heirs, or because they own a small plot the produce of which does not exceed one tin of olive oil per annum, causes harm which exceeds the alleged benefit embedded in the miniscule plot arrangement. It disproportionately harms the right of land owners in the seam zone and is therefore unacceptable.

Conclusion

79. As clarified above, the right to property includes a person's right to access their lands and cultivate them regardless of the scope of the produce or the profitability of the cultivation. The harm caused to the right to property is even magnified considering the familial and traditional nature of the agriculture in the seam zone. Indeed, as was held more than once in the past, the purpose for which the separation fence was erected and the permit regime applied in the seam zone is a proper purpose – maintaining the safety and security of Israeli residents and citizens. However, the conclusion arising from the implementation of the three proportionality sub-tests is that the provisions of the Standing Orders

concerning a miniscule plot unlawfully violate the right to property of the owners of agricultural lands in the seam zone.

80. I am therefore of the opinion that the petition should be accepted. Accordingly, if my opinion is heard, I shall propose to my colleagues to make the *order nisi* which was given absolute such that the provision regarding a miniscule plot which was initially included in the 2017 Standing Orders and is currently included in section 12(a)(7) of Article A, Chapter C of the 2021 Standing Orders shall be cancelled, making redundant the provisions of section 5 to Article A, Chapter C of the 2021 Standing Orders establishing the manner by which the size of a plot shall be calculated.

Accordingly, and on the individual level, a seam zone entry permit for agricultural purposes shall be given to Petitioner 2 (an "agricultural worker permit"), enabling him to cultivate the plot of land owned by his mother, Petitioner 1. Parenthetically, it should be noted that it has not been argued at any stage that the refusal to issue the permit to Petitioner 2 was based on a misuse of a permit which had been given to him in the past. Obviously, if it emerges that Petitioner 2 uses the permit for any purpose other than the purposes for which it was given, the Respondents will have to act according to the provisions of Chapter E of the 2021 Standing Orders.

With respect to Petitioner 3, the location of the plot that he wishes to access should be verified by the Respondents. If it emerges that it is located in the seam zone and that he needs an entry permit to access it, I propose that an entry permit for agricultural purposes shall be given to him (an "agricultural worker permit"), no later than 30 days from the date of our judgment.

I also propose that the Respondents shall pay Petitioners' costs at the sum of NIS 25,000.

J u s t i c e

President E. Hayut:

1. I agree with the position of my colleague Justice **D. Barak-Erez** whereby section 12(a)(7) of Article A, Chapter C of the 2021 Standing Orders (hereinafter: the **Plot-Size Examination Section**) raises difficulties with respect to the violation of the right to property of land owners in the seam zone, due to the limitation imposed on their ability to access their lands. However, unlike my colleague, I am of the opinion that grounds for a sweeping cancellation of the Plot-Size Examination Section were not substantiated in the case at hand – and according to my position, in order to reach an arrangement providing a proper solution to joint owners of plots of land, only a partial interference in the implementation of said section is required.

My reasons therefore are as follows.

2. The underlying premise of the deliberation in the matter at hand is the judgment in HCJ 9961/03 **HaMoked Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Government of Israel**, (April 5, 2011)(hereinafter: the **Permit Regime**

case) in which it was held that there was no cause for interfering with the policy whereby the residents of the Area are required to receive an individual permit to access the seam zone. In view of the above it was held that "a person posing no specific security threat is also required to receive a seam zone entry permit […] 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 an individual petition is the proper framework within which arguments concerning a specific violation of rights should be raised" (HCJ 3066/20 **Ziad v. Military Commander for the West Bank Area**, paragraph 11 of my judgment (July 12, 2021 (hereinafter: **Ziad**)). However, as was rightfully emphasized by my colleague Justice **Barak-Erez**, the lawfulness and constitutionality of the permit regime depend, *inter alia*, on the actions taken by the state of Israel to maintain, to the maximum extent possible, the fabric of life of the residents of the Area which were affected by the erection of the separation fence. All of the above, according to the fundamental principles of administrative law, including reasonableness and proportionality, and according to the relevant rules of international law. In this context it should be added and emphasized that as was held in the **Permit Regime** case "the proportionality of the harm inflicted on the rights of the inhabitants should be examined not only against the backdrop of the written arrangements and procedures which were established, but also against the backdrop of the reality in which such arrangements are implemented in practice, commencing from the processing procedure of the applications and ending with the current movement and traffic regime" (*Ibid*., paragraph 38).

3. The policy concerning access to "miniscule" plots in the seam zone – as reflected in the Plot-Size Examination Section – shall satisfy the reasonableness and proportionality tests, if it creates a proper balance between the security considerations underlying the "permit regime" and the obligation to maintain, to the maximum extent possible, the fabric of life in the Area and the obligation to enable land owners reasonable access to their lands.

4. There is no dispute that the Plot-Size Examination Section imposes limitations on the access of owners of lands in the seam zone to their lands and consequently leads to a violation of their right to property. There is also no dispute that the security purpose of this violation – which is mainly identical to the security purpose underlying the "permit regime" as a whole – is a proper purpose (see paragraphs 5 and 59 of the opinion of my colleague Justice **Barak-Erez**). The main dispute in the petition at hand therefore focuses on the question of whether the Plot-Size Examination Section is a reasonable and proportionate measure, or not.

5. The "permit regime" policy naturally involves the concern that entry permits shall be misused, including, *inter alia*, for the purpose of entering Israel unlawfully. It emerges from Respondents' arguments that this concern indeed materializes, and that bodies patrolling the area report of agricultural lands which are almost completely empty, despite the fact that earlier that day thousands of permit holders have entered the seam zone (paragraph 109 of the response affidavit; see also paragraphs 42 and 63 of the opinion of Justice **Barak-Erez**). My colleague Justice **Barak-Erez** noted in this context that the data presented by the Respondents did not refer to misuse precisely by the holders of farmer permits, and according to her it raises difficulties with respect to the factual

infrastructure underlying the Plot-Size Examination Section, as well as with respect to the rational connection test (paragraph 65 of her opinion).

6. Contrary to the position of my colleague, I am of the opinion that the factual database presented by the Respondents properly substantiates the concern that seam zone entry permits are misused and the need to closely supervise the issue of farmer permits. In addition, I am of the opinion that the rational connection requirement between the measure and the purpose is not affected, in the case at hand, by the question of whether an elevated risk is posed by the holders of farmer permits compared to holders of other permits – but rather depends on the question of whether the Plot-Size Examination Section advances **in and of itself** the security purpose in a manner which is "neither marginal nor negligible" (compare, mutatis mutandis: HCJ 1213/10 **Nir v. Chairman of the Knesset**, paragraph 23 of the judgment of President **Beinisch** (February 23, 2012); HCJ 2293/17 **Gersagher v. The Knesset**, paragraph 36 of my judgment (April 23, 2020)).

7. The purpose of the Plot-Size Examination Section, as aforesaid, is to limit the concern that farmer permits shall be misused, the above by determining that a miniscule plot shall not establish "as a general rule" the agricultural need which is required for the purpose of receiving such a permit; and by determining that the "rights' scheme" of the owners of "miniscule" parts in a plot of land for the purpose of giving one of them a farmer permit, shall be possible only subject to the consent of the other right holders. Accordingly, the section limits the possibility to obtain a farmer permit with respect of plots which are not cultivated, or that there is no intention to cultivate, for agricultural needs as they are defined in the Standing Orders. The purpose of the section is therefore consistent with the security need to supervise the persons entering the seam zone and to create a mechanism which shall "assist the security forces and improve their ability to fight Palestinian terror threats the purpose of which is to cause harm to Israel and its inhabitants" (the **Permit Regime** case, paragraph 17 of the judgment of President **Beinisch**). Therefore, I am of the opinion that grounds for interfering with the Plot-Size Examination Section from this aspect have not been proven.

8. In addition, weight should be given to the fact that an application for a farmer permit is not the only possibility available to land owners wishing to access their lands in the seam zone for agricultural purposes. This, since the Standing Orders expressly clarify that a permit for **personal needs** – which is given to persons for whom "special humanitarian needs" require their presence in the seam zone – enables their holder to make with it "any legitimate use which is not contrary to the law and security legislation, **including use for agricultural purposes**" (section 1 Article C Chapter C of the 2021 Standing Orders; emphasis was added).

   What is therefore the difference between a farmer permit and a permit for personal needs which is given, *inter alia*, for "agricultural purposes"? According to the Standing Orders, a farmer permit is given to cultivate the land "according to the agricultural need deriving from the size of the land and the type of the crop", while an "agricultural need" is defined as a "need to cultivate land for **sustainable production** of agricultural produce" (section 10, Article A, Chapter C of the 2021 Standing Orders; emphasis added). The Plot-Size Examination Section provides that "As a general rule, there is no sustainable agricultural

need when the size of the plot for which the permit is requested is minuscule", but a permit for personal needs may be requested for the purpose of accessing a miniscule plot. It emerges from the above that a farmer permit is intended for specific types of agricultural activities – cultivation for sustainable production, as defined in the Standing Orders – while a permit for personal needs can be given for other types of agricultural activities.

9. For the purpose of defining a "sustainable" agricultural need, the Plot-Size Examination Section states as aforesaid that "**As a general rule**, there is no sustainable agricultural need when the size of the plot for which the permit is requested is minuscule, not exceeding 330 square meters." (emphasis added). My colleague Justice **Barak-Erez** noted that in the past the Standing Orders expressly clarified that it was a rebuttable presumption such that "in extraordinary circumstances and for reasons that shall be recorded, the head of the DCO may issue a farmer permit for a miniscule plot, as aforesaid" (section 13(a)(7)(b) Article A, Chapter C of the 2017 Standing Orders; and see paragraph 9 of the opinion of Justice **Barak-Erez**). My colleague also noted that the Standing Orders in their current version – the 2021 Standing Order – do not include an express provision to the effect that it is a rebuttable presumption (paragraphs 46 and 76 of her opinion).

10. In my opinion, the words "As a general rule" which appear in the Plot-Size Examination Section may be regarded as entrenching the presumption which was entrenched in the past in the 2017 Standing Orders. Namely: "As a general rule" there is no agricultural need with respect to a miniscule plot, but the Applicant can prove otherwise – for instance, if their plot forms part of said 5% of the agricultural lands in the seam zone which do not include olive groves, therefore making the calculation underlying the definition of a "miniscule plot" irrelevant for their specific plot (see in this context: paragraph 87of the response affidavit on Respondents' behalf; paragraph 74 of the opinion of Justice **Barak-Erez**). In my opinion, said interpretation of the term "agricultural need" helps permit applicants and mitigates the violation of their right to property, while maintaining the purpose of increasing the supervision over the issuance of farmer permits. At the same time, and in the spirit of the holdings made in the **Permit Regime** case, residents who are of the opinion that they have rebutted said presumption and whose application for a farmer permit was unjustifiably denied – may file an appeal in that regard and may also challenge Respondents' decision by filing a specific petition (*Ibid.*, paragraph 34; see also **Ziad**, paragraphs 11 and 17 of my judgment).

11. Given the above, I am of the opinion that there are no grounds to interfere with Respondents' decision to divide the agricultural needs in the seam zone into two types - sustainable production, and other agricultural purposes - and accordingly into two types of entry permits. Therefore, I found no principled flaw in the fact that the criteria for a farmer permit are different from the criteria for a permit for personal needs, or in the decision to subordinate the grant of a farmer permit to the presentation of an indication to the effect that the applicant can and wishes to maintain sustainable production in the land.

It should be added in this context that the alternate measures proposed by the Petitioners, which were mentioned in paragraph 67 of the opinion of my colleague Justice **Barak-**

Erez - cannot, in my opinion, achieve "to the same extent or to a similar extent" the purpose for which the Plot-Size Examination Section was established (compare, mutatis mutandis: HCJ 7385/13 **Eitan - Israeli Immigration Policy v. Government of Israel**, paragraph 60 of the judgment of Justice **U. Vogelman** (September 22, 2014), and therefore they do not constitute appropriate alternatives to said section. I shall remind the nature of the arrangement which is being examined in the petition at hand: it is a **general and *a priori*** arrangement, whereby a farmer permit shall not be given to residents who do not comply with the terms of the Plot-Size Examination Section, regardless of the identity of these residents or the question of whether any specific security threat was or is posed by them. On the other hand, the alternative of taking sanctions against persons who misused the permit given to them, is a measure that involves an action in retrospect, the implementation of which depends on the violation by the resident of the terms of the permit and on Respondents ability to detect said violation; and the alternative pursuant to which permits are not issued, *ab initio*, to persons posing a security threat, depends on the existence of **concrete** intelligence information about the applicant. Therefore, although these means may help achieve the purpose, in my opinion they cannot replace the benefit embodied in the Plot-Size Examination Section or achieve its purpose to a similar extent.

12. At the same time, I agree with the position of my colleague Justice **Barak-Erez** that the Respondents were unable to prove sufficient justification for some aspects of their policy, given the substantial harm caused to the right to property of the land owners. Considering the need to create a proper balance between this right and the security purpose underlying the declaration of the seam zone as a closed area, I am of the opinion that the proper solution in the case at hand is not to cancel the Plot-Size Examination Section as a whole, but rather to make adjustments in the manner of its implementation to reduce the harm caused to the rights of land owners in the seam zone wishing to maintain agricultural activity therein.

13. As noted by my colleague, the relevant framework for examining the arrangement is the triangular proportionality test and in particular the third test - the test of proportionality in the narrow sense. The question which should be determined in this context is whether there is a proper and reasonable relation between the security benefit deriving from the Plot-Size Examination Section and the violation of the right to property caused by it, and in the past it was held that if a "**certain** reduction in the benefit" causes a "**substantial** reduction in the violation of the constitutional rights" then the measure taken is disproportionate (HCJ 17/1308 **Silwad Municipality v. Knesset**, paragraph 93 of my judgment (June 9, 2020) (emphases appear in the original); **Permit Regime** case, paragraph 41; and compare: HCJ 2056/04 **Beit Sourik Village Council v. Government of Israel**, IsrSC 58(5) 807, 851 (2004)). In the case at hand, an examination of the Plot-Size Examination Section and the manner by which it is applied shows that the current practice is disproportionate in two respects, as specified below.

14. The first issue which justifies, in my opinion, judicial intervention concerns the validity of a permit for personal needs which is given for agricultural purposes. The permit for personal needs, as stated above, is the main alternative available to owners of agricultural lands to access their lands for purposes other than "sustainable" production as this term is defined in the Standing Orders - and therefore it must be ensured that this alternative

is accessible to landowners and that its realization does not impose an unreasonable burden.

15. According to the provisions of the Standing Orders, there is no difference between the actions that the holder of a farmer permit and the actions that the holder of a permit for personal needs can perform in the land **after** entering the seam zone. The main difference between the two types of permits lies, therefore, in the duration of their validity: a farmer permit is valid for two years, while a permit for personal needs is generally valid for three months.

16. In this context I agree with the holding of my colleague Justice **Barak-Erez** that there is no justification to sweepingly limit the validity of permits for personal needs given for agricultural purposes to three months. The Petitioners argued in this regard that as a matter of policy, the Respondents do not issue permits for personal needs for periods longer than three months – however, it should be emphasized that the Standing Orders in their current version do not include a provision limiting the maximal validity of a permit for personal needs. Indeed, certain sections in the Standing Orders define **specific** situations in which such permits shall be valid for three months (for instance, when there is a need to inspect the land or make another house visit (section 4(d) of the "HDCO inquiry" chapter; section 7(c) of the "Appeals Committee" chapter; section 8(b)(2)(b) Article A, Chapter B of the 2021 Standing Orders)); and the Respondents also act in this manner when a resident applies for an entry permit with respect to regulated land which is not registered in the name of its heir (**Ziad**, paragraph 5 of my judgment). However, the Standing Orders only provide in this context that "As a general rule, the validity of the permit [for personal needs] and the number of entries shall be according to its purpose, at the discretion of the authorized body, and according to the specific circumstances of the case." (Section 2. Article C, Chapter C of the 2021 Standing Orders). The above, unlike the provision which expressly provides that a farmer permit shall be valid for two years (Section 4, Article A, Chapter C of the 2021 Standing Orders). Therefore, according to the Standing Orders as drafted, it seems that there is no preclusion to issuing a permit for personal needs for periods longer than three months, to the extent that the above is justified by the circumstances.

17. In view of the above and to ensure that a permit for personal needs shall be able to constitute an appropriate alternative to those who do not meet the conditions of the Plot-Size Examination Section, I am of the opinion that as a general rule, a **permit for personal needs given for agricultural purposes** and a farmer permit should have the same validity – such that both permits shall be valid for two years – as a default arrangement, which may be deviated from for explained reasons. The above will enable to maintain the security purpose for which the farmer permit criteria were limited by the Respondents, while mitigating the harm caused to the right of landowners to property. The above, since even if the landowners cannot or do not wish to maintain "sustainable production", but rather wish to maintain their ties to the land in a different way, they will not be required, as a general rule, to renew their permit once every three months (see in this context paragraph 69 of the opinion of Justice **Barak-Erez**).

18. Another problematic aspect of the current arrangement relates to the implementation of the "rights' scheme" requirement under the Plot-Size Examination Section. In this context

I join the comment of my colleague, Justice **Barak-Erez** with respect to the difficulties arising from the implementation of this requirement in cases in which only one of the joint owners of the plot or a small number of the joint owners submitted an application for a farmer permit with respect to said plot. I accept the position of my colleague whereby the consent of the other joint owners to waive their right in favor of the permit applicant may be required "only in a situation in which a large number of farmer permits is requested with respect to a plot, thus creating a situation in which the plot shall be cultivated by many individuals, at a ratio of more than one person per 330 square meters" (paragraph 68 of her opinion). The above, since when an application for a farmer permit is submitted by only one of the joint owners or by a few of them, there is no concern that the number of permit holders will not conform with the number of persons cultivating the plot – and therefore, *prima facie*, there is no reason to require that the consent or waiver of the other joint owners be obtained by the applicant. Hence, the proposal of my colleague mitigates the infringement of the right of the land owners to property and their ability to maintain their personal, familial and communal ties to the land. At the same time, the harm which shall be consequently caused to the security purpose is minor, if any, since the Respondents are vested with the discretion to limit the number of farmer permits issued with respect to each and every plot, to the extent the concern arises that permits issued with respect to a certain plot are misused.

19. In conclusion of the above: I join the position of my colleague, Justice **Barak-Erez** that the Plot-Size Examination Section leads to a disproportionate infringement of the right to property of land owners in the seam zone and therefore cannot stand in its current format.

20. With respect to the appropriate remedy under the circumstances, I propose that the Respondents shall be given 90 days to amend the provisions of the Standing Orders in a manner which shall provide a proper solution to the difficulties I have specified above and the disproportionate harm caused to the rights of the residents of the Area to property on the following three levels: implementing the "rights' scheme" condition concerning the demand for waiver or consent on behalf of all other joint owners only if there is a concern of misuse of permits given with respect to a certain plot (paragraph 16 above; and see also paragraph 68 of the opinion of Justice **Barak-Erez**); reinstating the nature of the miniscule plot rule as a rebuttable presumption, including the possibility to prove an agricultural need with respect to a miniscule plot (paragraph 9 above; and see also paragraph 76 of the opinion of Justice **Barak-Erez**); and extending the validity of a permit for personal needs given for agricultural purposes, such that it constitutes an appropriate alternative to a farmer permit (paragraphs 14 and 15 above).

21. With respect to the specific remedy to Petitioner 2, I join the position of my colleague and her reasons for granting an agricultural worker permit enabling him to cultivate the plot of Petitioner 1. With respect to Petitioner 3 – as recalled, said petitioner was joined to the petition at a later stage and under these circumstances I am of the opinion that in addition to conditioning the permit on "clarifying that it is located in the seam zone and that he needs an entry permit to access it" (paragraph 80 of my colleague's opinion), this remedy should also be subjected to the condition that Petitioner 3 satisfies the material conditions for receiving a farmer permit according to the Standing Orders.

T h e P r e s i d e n t

Justice I. Amit:

1. Having read the opinions of my colleagues, President **Hayut** and Justice **Barak-Erez,** I agree with their main comments, and join the operative remedy as specified in the judgment of the President.

2. My colleague, Justice **Barak-Erez** reviewed in her judgment the numerous and frequent changes that the permit regime in the seam zone underwent over the last years, evidencing the complexity of the matter,

3. I will preface by saying that precisely in light of the familial-traditional-cultural value of the cultivation of land discussed by my colleague, I do not believe that a legal analysis of the joint ownership right is needed. In an ordinary situation, when there are several joint owners, similar to the plot at hand which is 17.5 dunams, an argument shall not be heard between the joint owners that each one of them has rights in an indefinite part of the land. The reality on the ground is that each one of the owners knows exactly where the area which belongs to them and their family is located, which olive trees were planted by their family, and during the harvest season each family harvests the olive trees belonging to it. I shall refer below to the issue of the olive trees and the harvest season.

4. Respondents' policy which is manifested in the "Plot-Size Examination Section", limits the access of "miniscule" plot owners in the seam zone wishing to cultivate their land. This policy entails a substantial infringement of the land owners' property rights. It should be kept in mind that the permit regime in the seam zone was established with Respondents' recognition of the residents' right to continue cultivating their land, and as was clarified by my colleague, Justice **Barak-Erez**, this is the premise on which our decision in the petition at hand should be based.

   On the other hand, it emerges from Respondents' position that there is a phenomenon whereby thousands of permit holders enter the seam zone daily, while in practice there are agricultural plots of land which are almost completely empty. This phenomenon supports Respondents' position that the concern of misuse of entry permits, including for the purpose of entering Israel illegally, is realized. It should be mentioned that the entry into the seam zone enables entry into the territory of Israel without interruption. Hence, Respondents' attempts to deal with the phenomenon of misuse of permits, including by the section, are intended to serve a proper security purpose. It seems that this is not in dispute.

   As years go by and the number of heirs increases, there is a growth in the number of owners whose rights in the land pertain to only a few tens of meters. We do not have to go too far, as the Petitioners themselves argued that "as a result of the miniscule plot presumption, sooner or later, all plots in the seam zone shall be deemed "miniscule plots" which do not require cultivation" (paragraph 21 of the judgment of my colleague Justice **Barak-Erez**). The growing number of owners against the phenomenon of misuse of

permits and the need to exert supervision, and the reality on the ground showing that the number of permit holders entering the seam zone is much smaller than the number of persons actually present in the zone - all of the above strengthen the security interest.

Hence, this is the balancing which should be made in the case at hand. Petitioners' right to property and their right to cultivate their land as they please – on the one hand; against the security interest, including the concern that illegal aliens enter the territory of the State of Israel, with all risks involved therein – on the other.

5. A farmer permit, as defined in the Standing Orders, is issued to a resident "having a proprietary connection to agricultural lands in the seam zone, and its purpose is to enable the cultivation of agricultural land, **according to need** while maintaining the connection to these lands." I am willing to assume that even in an area smaller than 330 square meters, a sufficient number of olive trees may be found which, from the land owners' perspective, justify tending.

However, olive trees do not require daily care, and the Respondents declared that during the harvest season, the military commander anyway grants permits "generously" not only to the landowners but also to their family members, thus accommodating the familial-traditional-cultural value of the connection to the land. The above is entrenched in section 16 of the Standing Orders which provides as follows:

> "The olive harvest – recognizing the unique nature and importance of the harvest season, in the harvest season agricultural worker permits beyond the set quota may be requested for the farmer's family members:
> a. The validity of said permits shall be established each year by the Head of Crossings and Seam Zone Department, on the basis of a seasonal evaluation concerning the harvest times.
> b. The employer shall submit a list of family members for the harvest season from August 16th until August 30th, in the regular administrative route.
> c. Priority shall be given to first degree relatives and to anyone against whom no security preclusion is outstanding."

The President noted in paragraph 9 of her judgment that 95% of the agricultural areas in the seam zone consist of olive groves. Even if we assume that the percentage of olive groves is lower, they still occupy most of the area, such that Respondents' special reference to the olive harvest season and the generous issuance of permits to the land owner's family members can solve a considerable part of the problems. It is possible, and I do not establish any rule in that regard, that in view of the familial-traditional-cultural value associated with olive trees, there is room to expand the special harvest season procedure to an additional period or periods in the year.

6. Like my colleague the President, I am also of the opinion that in the examination of the proportionality of the relevant provision of the Standing Orders and Respondents' policy, in order to satisfy the **rational connection** requirement, there is no need to demand from the Respondents to establish grounds distinguishing between violations by holders of "permits for personal needs" and violations by holders of "permits for agricultural

needs". As described, the Respondents are required to deal with a general and wide phenomenon of misuse of entry permits into the seam zone. In view of the findings whereby thousands of individuals enter the seam zone daily but the agricultural lands stand almost empty, I see no reason to obligate the Respondents to segment the permit holders into different groups and sub-groups in order to substantiate the existence of a rational connection between the measure taken and achieving the required purpose. Indeed, as noted by the President, it is sufficient that the "Plot-Size Examination Section" in and of itself advances the security purpose in a manner which is "neither marginal nor negligible" to meet the rational connection requirement (paragraph 5 of her judgment).

7. With respect to the **least injurious means** test, I am also of the opinion that the means specified in the judgment of Justice **Barak-Erez** (paragraph 67) cannot achieve by themselves the required purpose. Accordingly, for instance, it is clear that the sanction of permit confiscation, where a permit which had been given was misused, is insufficient to achieve the required purpose. As was explained by the President, sanctions can be imposed only in retrospect, after the relevant bodies have managed to locate those who have misused the permit, while the Respondents wish to deal, ahead of time, with the wide spread phenomenon of unlawful entry into Israel through the seam zone. The above is clear, and no further elaboration is required.

8. We are therefore left with the proportionality test in the narrow sense. Here too, I join the position of my colleagues that the difference between the validity of permits given for agricultural purposes – which are given for two years, and the validity of permits given for personal needs (for agricultural purposes) – which are given for three months – is problematic. The situation of a landowner enjoying "industrial peace" for two years by virtue of one permit cannot be compared to the situation of a landowner who needs **eight permits** over a period of two years and is required to renew the permit once every three months "in a repetitive and exhausting format" (in the words of Justice **Barak-Erez**), including the uncertainty involved therein. I am also of the opinion that the above difference makes it very difficult to accept the argument that a permit for personal needs compensates for the denial of the right to receive a farmer permit.

9. Another issue concerns the "rights' scheme" provision. I am also of the opinion that the demand that the permit applicant provide a waiver on behalf of all other joint owners of the plot of their entitlement to receive a permit is problematic. My colleague, Justice **Barak-Erez** discussed the infringement embedded in the demand that only one joint owner cultivate the land, particularly in view of the familial nature and cultural and traditional aspects accompanying the cultivation of the land. I agree with the above.

   According to the solution proposed by the President in her judgment, the waiver on behalf of the joint owners shall be required "only in a situation in which a large number of farmer permits is requested with respect to a plot, thus creating a situation in which the plot shall be cultivated by many individuals, at a ratio of more than one person per 330 square meters" (as cited by her from the judgment of Justice **Barak-Erez**); On the other hand, when a permit is requested by one or a small number of farmers and there is no concern that the number of permit holders shall be inconsistent with the number of individuals cultivating the plot, a waiver as aforesaid should not be required.

The above solution, although mitigating the harm caused to the rights of the land owners, is not free of difficulties. It may lead to a "first come first served" situation, namely, that the joint owner who was the first to submit a permit application will be entitled to cultivate the land, and how can we ascertain that the other joint owners agree on who shall receive the permit and who shall relinquish their rights? In my opinion, the above only demonstrates the problematic nature of the current arrangement and the need to establish a more befitting arrangement which shall enable, to the maximum extent possible, all joint owners to enter and cultivate the plot, even if intermittently (namely, not necessarily a simultaneous entry of all joint owners).

Nevertheless, and not without hesitation, I am of the opinion that the solution proposed by the President is the least of all evils, *in lieu* of the cancellation of the rights' scheme section as proposed by Justice **Barak-Erez**. The above shall prevent a situation in which a farmer permit is given to 10 heirs each holding a miniscule area.

10. Another point that should be clarified is the possibility to rebut the miniscule plot presumption, as referred to by the President in paragraphs 8-9 of her judgment. In any event, my colleague, Justice **Barak-Erez** noted that said possibility was omitted while the Standing Orders were amended, and that it is not included in the current version of the 2021 Standing Orders. As stated in paragraph 76 of her judgment, the Respondents noted that they intended to return the possibility to rebut the presumption to the current version of the Standing Orders, and this should be done.

11. In view of the above comments, I join the operative remedy specified in paragraph 20 of the President's judgment and the specific remedy with respect to Petitioners 2 and 3 specified in paragraph 21 of her judgment.

J u s t i c e

It was unanimously decided to accept the petition as stated in paragraph 19 of the opinion of the President **E. Hayut**. It was subsequently decided by the majority opinion of the President and Justice **I. Amit** that the remedy shall be as specified in paragraphs 20-21 of the opinion of the President, against the dissenting opinion of Justice **D. Barak-Erez**.

Given today, Adar B 3, 5782 (March 6, 2022).

The President **Justice** **Justice**