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At the Supreme Court Sitting as the High Court of Justice

HCJ 72/86
(HCJApp No. 454/86)

Before: **Honorable Deputy President M. Ben-Porat**
Honorable Justice M. Elon
Honorable Justice A. Barak

The Petitioners: **1. Galeb Jodi Hassan Zalum**
2. Jamil Ibrahim 'Aweidi Dandis
3. 'Aljuwad Badwi Hanini

v.

The Respondent: **1. Military Commander of the Judea and Samaria Area**
2. Military Commander of the Hebron Area

Petition for *Order Nisi*

Session date: February 9, 1987, March 9, 1987

Representing the Petitioners: Adv. F. Langer

Representing the Respondents: Adv. R. Yarak, Director of HCJ Division at the State Attorney's Office

Judgment

Justice A. Barak

1. A building known as the "Hadassah House" is located in Hebron. The owners of the building are Jewish. After the six days war Jews returned to live in the building. The government resolved (on March 23, 1980) that an additional story would be added to the building and that a field school and a hostel would be erected on site. Currently the building consists of eleven residential apartments, a synagogue and a Yeshiva boarding school. Several families have already moved to live in the apartments, and a few additional families are expected to move into the building in the near future. Currently, about fifteen individuals reside in the building, and according to plan about one hundred families are expected to permanently live in the building. A petition which was directed against the Minister of Defence and against the Military Commander and which requested to order them to

remove from the Hadasah House the Jews who occupied it, was denied by this court (HCJ 175/81 **Al-Natsheh et al. v. Minister of Defence**, IsrSC 35(3) 361). The petitioners in the petition at bar occupy the stores which are located on the ground floor of the Hadassah House, in Shlaleh Street. In January 1986 the army installed a mesh fence in Shlaleh Street, along the side walk, beside the entrances of petitioners' stores. Soldiers search the bags and clothes of the people who wish to enter petitioners' stores. In the petition at bar, which was filed against this situation, the petitioners request that we order the respondents to remove the fence and the soldiers who conduct the above check-ups. In their petition the petitioners point out that they were requested to vacate their stores in consideration for compensation, and that following their refusal to do so, the mesh fence was erected and provocative check-ups were conducted, the sole purpose of which was to harm both customers and the petitioners, thus causing petitioners' departure to the full satisfaction of the Jewish settlers in the Hadassah House. A panel was assigned to hear the petition, and the Attorney General was requested to respond thereto.

2. The notice submitted by the State Attorney's Office stated, that in view of the large number of individuals expected to reside in the Hadassah House, and the symbolic value which was attached to the Hadassah House as representing the renewed Jewish settlement in Hebron and the bloody history of this process – the respondents came to the conclusion that it was necessary to take measures which would ensure that no attempt would be made to violently attack the residents of the Hadassah House. The respondents are of the opinion, that the existence of stores, which passers-by freely go in and out of, carrying with them articles and packages, poses an actual threat to the life and safety of the Hadassah House residents. This situation raises a concern that an attempt will be made – and not necessarily in cooperation with the petitioners or with their knowledge – to bring explosives into the stores in an attempt to demolish the house together with its residents. Truly, said security problem is not new, but recently it received new dimensions, as a result of which more severe measures than those taken in the past were required: the building was enlarged, its symbolism is conspicuous, and it is expected to be occupied by a number of residents significantly exceeding the number of residents which occupied it in the past. The above data, against the backdrop of the experience which has meanwhile accumulated in the fight against terror (and also against the backdrop of the occurrences in Lebanon), brought the respondents to the conclusion that they would not be able to properly maintain the safety of the residents of the Hadassah House without the measures which were taken, the purpose of which was to reduce the risk of bringing explosives into the stores by terrorists under the disguise of innocent shoppers. Hence the need to search the individuals who enter the stores. Clear instructions were given to the soldiers according to which, minimum inconvenience should be caused to the customers as a result of such check-ups. Attached to the notice of the State Attorney's office was an affidavit of Major General Barak, the commander of IDF Forces in the Judea and Samaria Area. In his affidavit he states that the measures which were taken are necessary and required to protect the life and safety of the residents of the Hadassah House and to ensure that no attempt is made to cause damage to the building and its residents, and that they were taken based solely on pertinent and necessary security considerations, free of any extraneous consideration.
3. On February 4, 1986, a discussion was held by the Knesset in a parliamentary question which was submitted by MK Aloni concerning the Hadassah House. In his response, the Minister of Defence, Yitzhak Rabin, pointed out, that in this matter he was acting according to government resolutions. With respect to the harassment and impingement inflicted on the petitioners and their businesses, the Minister of Defence stated:

Indeed, there is a contradiction between the security needs as determined by IDF personnel in charge of the security in Hebron and the statement

made by the director of the civil division at the State Attorney's Office, Mrs. Pliah Albek, who states in paragraph 3 of her letter as follows: "Attention should be paid that the population of the 'Hadassah House' does not become a nuisance to the 'Hadassah House' stores. If new security measures are required to secure the safety of the 'Hadassah House' settlers, it should be ascertained that they do not cause damage or loss to the Arab residents. Alternatively, adequate budget should be allocated in advance for the payment of compensation for any damage caused." I admit that there is a contradiction between the security needs and the statement made by the director of the civil division at the Ministry of Justice. I had no alternative but to accept the opinion of IDF personnel, and I am aware of the contradiction between the two.

4. After the petition was filed and as a result thereof – as was undertaken in the State Attorney's notice – an investigation was conducted with respect to petitioners' complaints concerning inadequate conduct of IDF soldiers toward them. In this context, an investigation was also conducted with respect to additional complaints which were submitted after the petition was filed and which were included in affidavits which were submitted to us. A summary report of the Military Counsel to the Southern Command date February 5, 1987 stated that no basis was found to the allegations concerning provocation, degrading treatment or cruel conduct by IDF soldiers and it was therefore resolved to close the file.
5. On June 18, 1986 we (Justices Ben-Porat, Barak and Maltz) visited the scene being the subject matter of the petition and personally saw the measures which were taken. We also received explanations on the scene from Major General Barak and the legal counsels of the parties. Today we also heard the arguments of the parties (Justice Maltz was replaced by our colleague, Justice Elon). The main argument made by Ms. Langer, was that respondents' decision was not premised on security reasons but rather on the desire to remove the petitioners from their stores, in order to "judaize" the area. Ms. Langer based her said argument on the response given by the Minister of Defence in the Knesset. Alternatively, Ms Langer argues, that even if the respondents acted based on security reasons, under the circumstances of the matter a mere concern that a terror attack may be carried out cannot justify a violation of petitioners' right to own property and an impingement on their livelihood. Respondents' actions are not reasonable, in view of the fact that alternative options which can reduce the harm caused to the petitioners, such as turning Shlaleh Street into a pedestrian mall, were not exhausted. On the other hand, Mr. Yarak argued before us that the respondents acted based on security considerations only, and that the measures which were taken were necessary in view of the situation, and that they did not exceed the measures which were required for the protection of the residents of the House. He reiterated respondents' proposal to look for alternative locations in Hebron, in which the petitioners may operate their stores or compensate them for the damage caused to them as a result of loss of customers. He also reiterated the proposal to convert the stores into storage rooms under petitioners' control.
6. This petition raises two questions: firstly, did the respondents act based on security considerations and based on such considerations only? Everybody agrees – and Mr. Yarak reiterated it before us – that should it be resolved, that the considerations which guided the respondents were not security considerations, the petition should be accepted; and secondly, under the circumstances of the matter, did the respondents take lawful measures? I shall examine each question in an orderly fashion.
7. What were the considerations which guided the respondents? In my opinion, we have no basis not to accept the declaration made by Major General Barak, that the respondents were guided by

security considerations and by these considerations only. There is no basis for the argument that the purpose of respondents' actions was to "judaize" the stores. Respondents' proposals – that the stores would remain in the possession of the petitioners who would be entitled to compensation or that the stores would be converted into storage rooms – also indicate that the security consideration was the only consideration on which respondents' actions were premised. In her argument before us, Ms. Langer referred to the response of the Minister of Defence in the Knesset to support her argument. We have reviewed said response, the main parts of which were cited above, and found no basis therein for Ms. Langer's argument. The only thing which was pointed out by the Minister of Defence was that a contradiction indeed existed between the security needs and the wellbeing of the Arab residents, and that the Minister of Defence accepted the position of the security personnel, notwithstanding the above contradiction.

8. Were the measures taken lawful? There is no doubt that formal power to take the necessary measures to protect the life of the settlers in the Hadassah House, is vested with the respondents. Said power is certainly vested with respect to such settlers who constitute part of the IDF forces. This power is quite broad, and applies to any person who is present in the Area, whether a permanent resident of the Area or a new resident thereof (compare H CJ 351/80 (motion 764/80 **Electric Company District of Jerusalem Ltd. v. Minister of Energy and Infrastructures et al.**, IsrSC 35(2) 673). While exercising their power, the respondents must take into consideration, on the one hand, security considerations, and on the other, the best interests of the civil population. They must balance between the different considerations, and the measures taken by them should be proportionate to the severity of the threat, taking into consideration the chances of its occurrence. To the extent that the respondents took measures which comply with the above test, we shall not interfere, even if we are of the opinion, that different measures could have been taken, which would have also complied with the above test. The right to choose between the lawful measures is vested with the respondents. It seems to me, that according to these standards, there is no basis for our intervention. The risk posed to the residents of the Hadassah House is very severe and is life threatening. The measures which were taken indeed impinge on petitioners' livelihood, but basically their rights are maintained, while having been granted the right to be compensated for any damage which may be caused to them. Under these circumstances – and against the backdrop of the probable realization of the threat in view of recent events – it seems to me that the measures which were taken by respondents were lawful. Certainly, the various factors which create the proper balance may change, and it may be fairly assumed that the respondents would examine their position from time to time, with the willingness to take measures which would make it easier on the respondents, without jeopardizing security needs.

The petition is denied. The petitioners will bear respondents' costs, including legal fees, in the sum of NIS 1,500, which amount will bear interest and linkage until its actual payment.

Deputy President M. Ben Porat: I concur.

Justice: M. Elon: I concur.

It was decided as specified in the judgment of Justice Barak.

Given today, 8 Adar 5747 (March 9, 1987).