

HCJ 7007/03

1. Muhammad Ali Kawasmi
2. Muhammad Nabil Hahmat Elatal
3. The Association for Civil Rights in Israel
4. Walid Muhammad abd el Kadr Said
5. Muhammad Salim el Sharif
6. Jamil Ibrahim Dandis
7. Rathab Jaleb Juda Zalum
8. Muhammad Hamza Beduwi Hanini
9. Amjad Matsbah abd el Hafez Shahin

v.

The Commander of IDF Forces in the Judea and Samaria Area

The Supreme Court Sitting as the High Court of Justice
[January 20 2005]

Before Justice D. Beinisch, Justice E. Rivlin & Justice E. E. Levi

Petition for an *Order Nisi*

For Petitioner: Limor Yehuda and Dan Yakir

For Respondents: Yuval Roitman

JUDGMENT

Justice D. Beinisch:

Between the Arab and Jewish population in Hebron there is great tension, reflected in a long saga of bloody eruptions. Inherent in the tension is a continual potential for risk, which led the military commander of the area, for years, to take preventative steps in order to reduce the risk in the area of friction. It is against that background that the closing of petitioners' and others' shops, during various periods during which the concern of risk to human life intensified, should be seen. The original version of the petition before us was directed against orders issued by the commander of the area (hereinafter: "respondent"), ordering the closure of the stores of the Arab residents in the area proximate to the "Beit Hadassah" residential zone, which is the heart of the Jewish community there. Due to developments since the filing of the petition, the petition ended up being restricted to attack of the legality of the order ordering closed nine shops located under the "Beit Hadassah" zone.

Factual and Procedural Background

1. On Shalala Street in the Old City of Hebron there is a commercial center serving the residents of the city, including a large number of shops (according to petitioners' estimation, on "little" Shalala Street there are approximately 120 shops, and on "big" Shalala Street there are approximately 150). On July 31 2003, petitioner no. 3, the Association for Civil Rights in Israel, and petitioners no. 1-2, who are shop

owners on Shalala Street, filed a petition against respondent's decision to order the closure of shops on Shalala Street. At the time the petition was filed, there were more than 100 shops on Shalala Street that were closed by respondent, some on "little" Shalala Street and some on "big" Shalala Street. Since then, the petition has undergone a number of metamorphoses, and as will be detailed below, the many delays in the hearing of the petition were intended to clarify the updated position of the military commander, considering that the security situation in Hebron requires detailed examination of the changes in circumstances from time to time. In the way that events unfolded, from the time of the filing of the petition until the end of its hearing the shop closure orders were reduced substantially, such that there are nine shops remaining which the military commander insists there is a necessity to close.

2. In his preliminary response to the petition of August 20 2003, respondent argued that the closure of the shops is necessary in order to protect the lives of the Jewish residents of Hebron, and especially the lives of the residents in the "Beit Hadassah" zone. In this zone live approximately 30 families, about 200 people in total, and operating there are a daycare and a museum, which, according to respondent's argument, is visited every day by many people. The "Beit Hadassah" zone is located above "little" Shalala Street, and was renovated and inhabited years ago, with the return of the Jewish community, over shops that face "little" Shalala Street.

In his response, respondent discussed the great security tension in the zone between "Beit Romanov" and "Beit Hadassah", which are two concentrations of Jewish population, due to the severe terrorist attacks which characterized the period after September 2000.

Notwithstanding, respondent declared in that response of August 20 2003 that he has decided to undergo a comprehensive examination regarding the possibility of reducing the number of closed shops in the area under discussion in the petition. And indeed, on October 16 2003, respondent announced that as a result of that examination, and in light of the updated security situation report, he had decided to allow the opening of the stores located on "big" Shalala Street. It was also noted in that brief that it had been decided to take engineering steps in order to allow the opening of all the shops located on "little" Shalala Street, except for the shops located under the foundations of the "Beit Hadassah" zone. In light of that announcement, the further hearing of the petition was delayed, in order to make the requested examination possible.

On December 5 2003, a short time before the date set for a hearing in the petition, respondent informed us that the work to build a seventy meter wall along "little" Shalala Street in the area adjacent to the "Beit Hadassah" zone had been completed, and that said work allows the opening of most of the shops on "little" Shalala Street, except for the shops located under the foundations of that zone. Respondent further updated us that most of the shops on "little" Shalala Street and on "big" Shalala Street which had been closed when the petition was filed, had been opened, and that a substantial part of them had begun to be used for commerce since. Despite the substantial change in respondent's position, petitioners chose not to rescind their petition, as there are still nine shops adjacent to "Beit Hadassah" that are closed, and petitioners made factual and legal arguments regarding the closure orders.

On December 8 2003 we held a hearing in the petition, at the end of which we decided that respondent shall submit an affidavit, in which he will state his reasons for continued closure of the shops which have not yet been permitted to open (that is, the stores that are located under the foundations of the "Beit Hadassah" zone), and clarify whether alternatives for preventing the risk posed by opening those shops have been considered. That additional affidavit, signed by Brigadier General Gadi Eisencott – Commander of the Judea and Samaria Division – was indeed submitted, and on March 30 2004 an additional hearing in the petition was held. At the end of that hearing we decided upon joinder of the owners of the shops about which there was still a dispute, who were not among petitioners, and decided that they shall submit affidavits on their behalf. We further determined that respondent shall reexamine his position according to the arguments in the additional affidavits.

After the joinder of said petitioners (petitioners no. 4-9, hereinafter, for the sake of simplicity, all of the petitioners as a set will be referred to as "petitioners"), the Judea and Samaria Division Commander submitted an additional affidavit on behalf of respondent (affidavit of August 25 2004). In this affidavit it was stated that due to the decision of the Court, a comprehensive examination was carried out by the IDF Central Command, in order to examine the possibility of opening the shops located under the foundations of the "Beit Hadassah" zone. It was stated in that affidavit that after that examination, which included a number of surveys in the field and an engineering examination of the zone, respondent had decided that at this time there are no alternatives allowing him to change his decision.

On August 31 2004 petitioners submitted a supplementary response, from which it appears, *inter alia*, that in addition to the nine shops located under the "Beit Hadassah" zone, there are 14 more shops in the area known as the "Banks Intersection" in Hebron (8 shops at the end of "little" Shalala Street and 6 shops on "big" Shalala Street), whose opening had been forbidden. We thus determined, after the hearing of September 2 2004, that respondent would submit a supplementary affidavit in which the reason preventing the opening of those 14 shops in the "Banks Intersection" area – to the extent that there is such a reason – would be explained. We further decided, with the consent of the parties, not to decide at that time the part of the petition dealing with the shops under the "Beit Hadassah" zone, while determining that "on that issue, a detailed affidavit of the commander of the area and a response on behalf of petitioners were submitted. Petitioners' right to raise that issue again in the further hearing of the petition is reserved."

On October 26 2004 respondent's counsel declared that after the updated security situation report, respondent ordered the opening of the 14 shops located in the "Banks Intersection" area. Regarding the shops located under the foundations of the "Beit Hadassah" zone, however, respondent's position remained as it was: that they should not be allowed to be opened. On this issue respondent reiterated the arguments that were detailed extensively in his supplementary affidavit of August 25 2004.

Thus, the dispute in this petition is limited to the nine shops located under the "Beit Hadassah" zone. On January 11 2005, petitioners submitted a supplementary response relating to those nine shops, and on January 20 2005, we held a hearing, in

which we heard additional arguments by the parties' counsel regarding those shops. The time for decision has now arrived.

The Parties' Arguments

3. Petitioners argue that the closure of the shops constitutes a severe violation of petitioners' private property and livelihood, and that the closure harms commerce in the Old City of Hebron, and disrupts the daily life of the local population. Petitioners raise three main arguments against respondent's decision regarding the closure of the shops. First, they argue that respondent has not proven that there is a real risk to the lives of the residents of "Beit Hadassah" that requires the closure of the shops; second, they argue that respondent's decision does not properly balance between the need to protect the residents of "Beit Hadassah" and the harm caused to petitioners; finally, they argue that respondent did not consider alternatives, the harm to petitioners from which would be lesser. Thus, they argue that respondent's decision must be annulled, whether due to a lack of factual basis, unreasonableness, or lack of proportionality.

Respondent, on the other hand, argues that the decision to close the shops located under the foundations of the "Beit Hadassah" zone was made for operational and security considerations *par excellence*. He argues that there is a severe security risk to the lives of the residents in the zone, and that said risk requires closure of the shops under the zone. The closure decision was made, he argues, after various alternatives were examined, but it was found that they cannot provide an appropriate response to the existing security threats. He thus claims that it is a reasonable and proportional decision, which should not be intervened in.

Discussion

4. Before discussing the parties' arguments, which are, as mentioned, their main arguments, we note that among their arguments a dispute arose regarding petitioners' rights in said shops, which are located under the "Beit Hadassah" zone. Respondent claims that all the shops located under the "Beit Hadassah" zone are not owned by petitioners or by any other Palestinian residents. He claims that since 1967 the shops are owned by the Custodian of Government and Abandoned Property in the Civilian Administration. According to the result of respondent's inquiry, the shops were rented in the past to Palestinian residents, but the rental of the shops was terminated in 1986, and since then, and until the closure decision, they were used by Palestinian residents with no legal permit, and with no payment of rent. Petitioners on the other hand claim that the shops have been in the possession of petitioners' families for many decades, and that they should be recognized, at very least, as protected tenants. They also argue that it was respondent who began to unilaterally refuse to receive rent from petitioners. In any case, argue petitioners, if respondent has claims on that plane, he must clarify them in the fitting framework, and that such an argument has no relevance to their petition. We accept petitioners' argument that the decision of petitioners' property rights in these shops is not needed in the framework of the petition before us, and we assume, for the sake of petitioners, and without deciding the matter, that petitioners have a right to use these shops for commerce, by force of their long term possession, and that said right is impinged upon as a result of the military commander's decision to close them (*compare* H CJ 72/86 *Zalum v. The*

Military Commander of the Judea and Samaria Area, 41 PD (1) 528 (hereinafter: "Zalum"); H CJ 175/81 *Al Natasha v. The Minister of Defense*, 35 PD (3) 361). The central question raised for our decision is, thus, whether the harm to petitioners is legal.

5. The question of the proper balance between the need to defend the safety and lives of the residents of "Beit Hadassah" and the need to reduce the harm caused to petitioners who make their living from the shops located on the bottom floor of "Beit Hadassah" was already discussed by this Court in *Zalum*. In that case, dealing with the same shops under discussion in this petition, and with arguments very similar to those raised before us, petitioners petitioned against the harm caused them as a result of other security means employed by respondent at that time for protecting the residents of "Beit Hadassah". In that case the Court (per *Barak, J.*) determined:

"There is no doubt that the respondents have the formal authority to take the necessary steps to protect the lives of the settlers in Beit Hadassah. That authority certainly exists regarding the settlers who constitute part of the IDF forces. That authority is most wide, and it covers everyone located in the *area*, whether he is one of the permanent residents of the *area* or one of its new residents (...). In employing their authority, respondents must on the one hand consider the security considerations, and on the other hand, the good of the civilian population. They must balance between the various considerations, and the means that they employ must fit the level of danger while taking the chance of its occurrence into account. Where respondents have employed means that fulfill this test, we shall not intervene, even if we are of the opinion that it might have been possible to have employed other means which also are in line with this test. The choice between legal means is respondents'"(*ibid*, at pp. 531-532).

In that case (erection of a link fence on Shalala Street, along the sidewalk beside the entrance to petitioners' shops, and positioning of soldiers who examine the clothing and items carried by people wishing to enter petitioners' shops), the Court determined that the means employed by respondents are legal, and added:

"Of course, the various factors that create the proper balance are likely to change, and there is a presumption that respondents will from time to time examine their position, with a willingness to employ means which can ease the situation of petitioners, without harming the security needs" (*ibid*, at p. 532).

That is the normative and factual basis in the background of the petition before us, and it goes without saying that the considerations outlined by the Court in *Zalum* are the guiding considerations in this case as well. We have, therefore, only to examine whether in the circumstances of the case before us there is a basis to respondent's argument that there is a real security risk to the residents of "Beit Hadassah", and whether the means chosen by respondent properly balances between the need to protect the residents of "Beit Hadassah" and the need to reduce the harm caused to petitioners. In other words, the question is whether in the present

circumstances the closure of these shops constitutes a proper balance between the harm to the local residents and security needs.

6. Respondent's position is, as mentioned, that due to the severe security risk posed by the possibility of entering the shops, the opening of the shops located under and adjacent to "Beit Hadassah" should not be allowed. In his affidavit, the Commander of the Judea and Samaria Division argues that according to his professional assessment, there is a real risk that these shops will be used in order to insert explosives into them, for the purpose of harming the Israeli residents living in the zone. According to his argument, opening of the shops will allow the terrorist organizations to secretly insert explosives into the shops, in amounts capable of collapsing the foundations of the building and harming the residents living within. Brigadier General Eisencott emphasizes that between the shops under the foundations of "Beit Hadassah" and the ground floor of "Beit Hadassah" there is a common wall, and that detonation of explosives inside the shops is liable to bring about the collapse of the entire building on its inhabitants.

Note that already in *Zalum*, the commanders of the *area* argued that "the existence of the shops, in which passersby enter and exit undisturbed carrying various items and packages, constitutes a real risk to the lives and safety of the inhabitants of Beit Hadassah. This situation creates concern of an attempt – not necessarily with the participation or knowledge of petitioners – to insert explosives into the shops, in an attempt to collapse the building on its inhabitants" (*ibid*, at p. 530). In that case, that argument was accepted by the Court, which determined that "the danger posed to those in Beit Hadassah is most great, and reaches the level of endangering human life" (*ibid*, at p. 532). The dispute between the parties before us is whether this risk exists today as well. Petitioners claim that there has been a substantial calming during the recent period, and that there is no comparison between the situation today and the situation there in past years. According to their argument, respondent has not shown that the concern he claims is more than an abstract one. In his affidavit, Brigadier General Eisencott argues that the security situation in the city of Hebron is much more severe than it was when *Zalum* was decided, and that the risks posed today to IDF forces and to the Israeli residents living in the city are many times more severe. In this affidavit it is claimed that the activity of the Palestinian terrorist organizations, including in the city of Hebron, is many times more intensive and severe than it was at that time. It is further argued in this affidavit that since the commencement of the combat in September 2000, there is, in Hebron, and especially in the area in which the Israeli and Palestinian populations live side by side, a special security situation, which is characterized by acts of terrorism and combat on a wide scale, including a long series of terrorist attacks in the area under discussion in the petition. According to the argument of Brigadier General Eisencott, the terrorist activity in Hebron has created daily threats upon the Israeli citizens living in Hebron and upon the army and police forces there, which have taken a heavy toll in blood. It is further argued that during the period of the present conflict, wide scale use of explosive charges has been made by the Palestinian terrorist organizations in order to harm buildings and people, both in the Gaza Strip and in the Judea and Samaria area. Brigadier General Eisencott further argues in his affidavit that rings of terrorist organizations wishing to commit fatal terrorist attacks are active in the zone of the city of Hebron, and that these rings use explosives to a great extent, *inter alia*, for the purpose of preparing explosive vests. He thus argues that the terrorist infrastructure active today in the city of

Hebron has the ability and the willingness to manufacture explosives in large scale, and to use them in order to kill, and that that fact intensifies the concern of insertion of explosives in to the shops under the foundations of the "Beit Hadassah" zone. Respondent's position is therefore that the factual data stated above is sufficient to provide a basis for real concern for the safety of the residents of "Beit Hadassah".

7. It is uncontroversial that the responsibility for the safety and security of the residents of "Beit Hadassah" rests upon the shoulders of respondent and the other commanders of the area, and that these officials are permitted, and even obligated, to take steps to defend the residents of "Beit Hadassah". However, it is also uncontroversial that across from respondent's duty to provide for the security of the residents of "Beit Hadassah", stands his duty to provide for the well being of the local Palestinian population, whose daily lives are disrupted by the security means being employed. We must therefore examine whether or not the means chosen by respondent properly balances between the need to defend the residents of "Beit Hadassah" and the need to reduce the harm caused to petitioners.

Petitioners claim that there is no proper proportion between the security benefit intended to stem from the means chosen by respondent and the severe harm which that means causes petitioners – the loss of their livelihoods. Petitioners further argue that respondent did not take into account alternatives whose harm to petitioners is lesser. Respondent argues, on the other hand, that the issue was reexamined by him a number of times, with willingness to examine means which could reduce the harm to petitioners without detracting from the security needs. According to his argument, such a renewed examination led him to the conclusion that the shops on "big" Shalala Street can be opened, whilst taking more than negligible security risks, and that most of the shops on "little" Shalala Street can be opened, by erecting a wall along the road that will prevent throwing of explosive charges from the street to the "Beit Hadassah" neighborhood located next to it. He further notes that as a result of the Court's decision of September 2 2004, an additional security status report was formulated by respondent, leading to the decision to open the shops located in the "Banks Intersection" area, for the purpose of easing the day to day lives of the Palestinian residents there, and despite the risk involved. According to his argument, these decisions were the result of a balance which is performed by the military commander, at all times, between the operational-military considerations and the considerations regarding the daily functioning of the Palestinian population, and are also the result of the efforts invested in minimizing the harm caused to the local residents. Respondent claims that these efforts, including the solution approved for "little" Shalala Street, involving investment of great monetary and human resources in a complex engineering project for walling the street, testify to his commitment to the functionality of the daily lives of the Palestinian residents of Hebron, and his willingness to ease their daily lives, to the extent that the security situation allows. Respondent further argues that regarding the shops under the foundations of the "Beit Hadassah" zone as well, a comprehensive examination was carried out by the IDF Central Command, including a number of surveys in the field, and an engineering examination of the zone. However, he argues, even after a comprehensive examination, and despite his willingness to find solutions which can ease petitioners' situation, respondent and the rest of the commanders of the *area* reached the conclusion that there is no alternative to closure of the shops located under the

foundations of the "Beit Hadassah" zone. According to his argument, the alternatives that were raised, including searching every person that enters the area of the shops, would not properly ensure the security of the residents of the zone, and some would harm commerce on "little" Shalala Street even more than the option that was chosen. Thus, respondent claims that the decision is reasonable and proportional, and, in the circumstances of the case, reflects a proper balance between the considerations on each side of the scales.

8. In the circumstances of this case, after we sent respondent, a number of times, to carry out reexaminations in order to limit the closure orders he issued, we have been persuaded that such examinations indeed were carried out with the recognition of the duty to reduce the harm to the Palestinian residents. In light of the comprehensive examinations carried out by respondent, which were detailed in the affidavits submitted on his behalf, we do not find cause to intervene in the professional assessments of the commanders of the *area* regarding the effectiveness of the existing means for confronting the threats to the safety of the residents of "Beit Hadassah" (*see and compare: H CJ 1890/03 The Bethlehem Municipality v. The State of Israel* (yet unpublished), paragraph 19). The means ultimately chosen – closure of nine shops which are located underneath the "Beit Hadassah" zone – indeed harms petitioners, who earn their livelihood from those shops. It is a harmful means toward the possessors of the shops who have made their living from them in the past; there is no doubt that as a result of the constant friction with the Jewish population there, and the various security means that have been employed for years, they, and their daily lives, as well as their participation in local commerce, are severely harmed, all when there is no claim that the risk stems from them personally. However, we do not see that we have cause to intervene in the decision of the military commander. Considering the resources respondent has invested in reducing the harm to the Palestinian population, manifest in substantial reduction of the number of closed shops, in the walling of the street and in additional acts described above, and considering the risk pointed out by respondent as a real risk posed at this time to the lives of the residents of the "Beit Hadassah" zone, we do not find that respondent's decision to leave these nine shops closed strays beyond the zone of reasonable discretion granted to the military. We add that the military commander's considerations are located within the purpose of defense of the residents, for whose security he is responsible. In light of the resources invested there, nor should it be said that other, less harmful alternatives were not examined, simply because he reached the conclusion that another means cannot at this time ensure the lives of the Jewish residents of the zone. However, it is needless to emphasize that the closure orders are limited in time, and are examined by the military commander periodically. There is a presumption that when the data will indicate that the passage of time has indeed reduced the risk which he wishes to prevent, the military commander will reexamine the proper balance, in order to allow the possessors of the shops to return to them and to maintain routine daily commerce there, for their benefit and the benefit of the general population in Hebron. We add that until the shops' opening becomes possible, it is appropriate to consider granting compensation for the harm caused them by the closing of their shops, as respondents offered in *Zalum*.

Thus, the petition is rejected.

Justice E. Rivlin:

I concur.

Justice E. E. Levy:

I concur.

Thus, it was decided according to the judgment of *Beinisch J.*

Given today, 10 Nisan 5765 (April 19 2005).