

## JAt the Supreme Court Sitting as the High Court of Justice

HCJ 2205/23

Before: Honorable Justice Y. Willner  
Honorable Justice A. Stein  
Honorable Justice R. Ronen

The Petitioners:

1. Head of Local Council of 'Anin - Muhmmad Issa,
2. Head of Local Council Umm al Rihan - Majdi Zeid
3. [REDACTED] Yassin
4. [REDACTED] Mansour
5. [REDACTED] Yassin
6. [REDACTED] Yassin
7. HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger

v.

The Respondent: Military Commander of the West Bank Area  
Petition for *Order Nisi*

Representing the Petitioners: Adv. Tehila Meir

Representing the Respondent : Adv. Yonatan Berman, Adv. Yael Kolodani

### Judgment

#### Justice R. Ronen:

The petition at hand concerns Petitioners' request that we direct the Respondent – the Military Commander of the West Bank Area (hereinafter: the **Military Commander** or the **Respondent**) to expand the opening hours of the 'Anin Gate (hereinafter also referred to as: the **Gate**) located in the separation fence, such that it shall be opened all days of the week and all day long, or at least three times a day and for longer periods of times compared to the current situation.

#### **Background and the Arguments of the Parties**

1. In 2002 the Government of Israel decided to build the separation fence (which shall also be referred to below as: the **Fence**) with the intent to create a barrier between the Judea and Samaria Area (hereinafter: **Judea and Samaria**) and the State of Israel. The route of the fence was built, in parts, east of the Judea and Samaria borderline (the "green

line"). Consequently, there are areas west of the fence formally belonging to Judea and Samaria. These areas are referred to as the "seam zone".

Since Israel may be entered into from the seam zone without any physical barrier, in 2003 the Military Commander declared the seam zone a "closed military area". The entering into and presence of Judea and Samaria residents in said areas is prohibited without a permit (hereinafter: the **Permit Regime**). As part of the permit regime, farmer entry permits are issued to Judea and Samaria residents wishing to cultivate their lands located in the seam zone. Entry into the seam zone is made through special purpose gates which were built in the fence.

2. The 'Anin gate is an agricultural gate which was built in the separation fence to enable the residents of 'Anin village – having plots of land located in the seam zone – to access their lands. According to the current opening arrangements, the 'Anin gate opens twice a week, twice a day.
3. Petitioner 1 is the head of the local council of 'Anin village. Petitioner 2 is the head of the local council of Umm al Rihan village, located in the seam zone near 'Anin village.

Petitioners 3-6 are residents of 'Anin village holding farmer entry permits into the seam zone to cultivate their lands through the above 'Anin Gate or through the Barta'a checkpoint – which is open all days of the week all day long, but is located farther away from 'Anin village.

Petitioner 7 is a non-profit association working to promote the human rights of Palestinians.

4. In their petition, the Petitioners argue that the opening arrangements of the 'Anin gate disproportionately violate the fundamental rights to property, freedom of occupation and freedom of movement of the residents of 'Anin village and Umm al Rihan village since they do not enable the residents of this area to preserve and maintain their fabric of life as it existed prior to the erection of the fence.

With respect to the residents of 'Anin village it was argued that since the gate opens only twice a week, the farmers residing in the village are forced to choose between two bad options: to either completely abandon their lands on all other days of the week; or invest hours of their time and substantial amounts of money to access their lands through the remote and more congested Barta'a checkpoint, through which the residents' ability to transfer agricultural vehicles and work tools into the seam zone is actually encumbered. It was also argued that in the days in which the 'Anin gate opens, its few and short opening hours harm the farmers' ability to access their lands, cause great inconvenience and prevent them from exiting the seam zone during the work day if necessary.

With respect to the residents of Umm al Rihan, it was argued that many of them have relatives residing in 'Anin village and therefore need to access it conveniently and frequently. In this context the Petitioners note that the residents of Umm al Rihan do indeed receive entry permits through the Shaked-Tura gate and the Barta'a checkpoint which are opened all days of the week and all day long; however, accessing 'Anin village

through these checkpoints requires a long and circular drive, depriving the residents of Umm al Rihan of simple and daily access to 'Anin village. The access from the 'Anin gate, on the other hand, is substantially shorter, but as aforesaid this gate is opened only twice a week, twice a day for short periods of time. On this basis, it was argued that the existing opening arrangements of the 'Anin gate do not allow the residents of Umm al Rihan to travel daily and regularly to 'Anin village and back, in a manner which does not allow them to maintain close family relations which include daily and spontaneous visits as they would have done but for the separation fence.

5. In its preliminary response to the Petition the Respondent firstly argues that from the data collected by it following the submission of the Petition it emerges that the **agricultural** use of the 'Anin gate is limited and focuses only on the cultivation of olive groves – which do not require daily tending; while it is mainly used these days for the purpose of entering Israel illegally. Therefore, it was argued that the Respondent intends to change the opening arrangements of the gate and open it only during the harvest and plowing seasons, with the exception of humanitarian cases and pursuant to individual applications which shall be examined according to the customary procedures. In these circumstances the Respondent is of the opinion that the petition should be deleted reserving the parties' arguments with respect to the new administrative decision which shall be adopted, following exhaustion of remedies as required.

In addition, the Respondent argues that the Petition should be dismissed in the absence of grounds for interfering with the opening arrangements of the 'Anin gate. **First**, it was argued that from an examination conducted by Respondent's officials it emerges that in the vast majority of the cases the 'Anin gate is used for entering Israel illegally, rather than for the purpose of cultivating agricultural lands. The Respondent clarifies that farmer entry permits into the seam zone may be used solely for the purpose of entering the seam zone and solely for the purpose of agricultural cultivation. Any other use is therefore contrary to the instructions of the Military Commander.

The Respondent argues further that according to field tours and analyses of aerial photographs from previous years it emerges that in their seam zone plots the residents of 'Anin village maintain olive groves which do not require daily tending of the soil or the trees growing thereon, but only seasonal tending in the harvest and plowing seasons. It was also argued that from the aerial photographs it ostensibly emerges that between 2002 – prior to the erection of the separation fence – and 2022, the nature of the crops in the area has not been changed. Nevertheless, the Petition does not clarify why there is a need to open the 'Anin gate – whose purpose is to facilitate agricultural cultivation – throughout the entire week.

The Respondent adds that for the days and hours in which the 'Anin gate is not open, the residents of Judea and Samaria legally holding a permit may submit an application requesting to add to their permits an additional gate which is open all year round, to the extent it does not require travelling through the territory of the state of Israel.

The Respondent further emphasizes that for the purpose of opening the 'Anin gate for longer hours, military forces will have to be diverted from other operational tasks, in the absence of a special purpose military force designated for this task. Diverting a military

force in the absence of a real need pertaining to the gate's purpose as an agricultural gate, adversely affects the ability of the security forces to perform other security tasks.

With respect to the residents of Umm al Rihan, the Respondent argues that it is in fact a request to change the classification of the 'Anin gate from a seasonal-agricultural gate to a "fabric of life" gate. According to the Respondent, the Petition should be dismissed for several reasons: first, beyond a general argument regarding the existence of family relations between the residents of Umm al Rihan and the residents of 'Anin, the Petitioners failed to specify the needs of the residents of Umm al Rihan in that respect. Accordingly, for instance, they did not present numerical data and did not join individual petitioners who can testify to the fact that there is a real need. Therefore, it is clear that the Petitioners have failed to establish a factual infrastructure justifying the acceptance of their arguments. The Respondent further points out that the Petitioners have not raised these arguments in the past and that they are brought up now for the first time.

**Second**, it was argued that the residents of Umm al Rihan can access the 'Anin village through the Shaked-Tura gate and through the Barta'a checkpoint – both defined as "fabric of life" gates and are open all year round. Therefore, according to the Respondent the alternative options available to the Petitioners, alongside the option to submit individual applications to the Military Commander to open the 'Anin gate outside the regular opening hours reconcile with the provisions of the law and with the criteria established by case law with respect to the permit regime.

6. In their reply to the preliminary response, the Petitioners argue that Respondent's allegations that the 'Anin gate is mainly used for entering Israel have no merit; and that the residents of 'Anin make permanent and substantial use of their seam zone entry permits for the purpose of agricultural cultivation. It was also argued that Respondent's argument whereby there is no need to permanently open the 'Anin gate since we are concerned with olive groves, should be dismissed, since according to case law, it is incumbent upon the Respondent to protect the proprietary rights of the residents of Judea and Samaria and enable them to maintain their ties to their seam zone lands and their fabric of life as it existed before the erection of the separation fence. According to the Petitioners, the type of the crops and the efficiency of the agricultural work are not considerations which justify harming the ability of the land owners to access their seam zone lands in a continuous and uninterrupted manner. They also add that prior to the erection of the separation fence they had been growing additional crops, but were forced to cease growing them as a result of the fence. Therefore, the Respondent cannot use the fact that currently only olive groves are grown on the 'Anin lands as an excuse to justify the harmful opening arrangements of the 'Anin gate.

With respect to the residents of Umm al Rihan, the Petitioners reiterate the argument that the Barta'a checkpoint and the Shaked-Tura gate do not constitute a sufficient alternative for them, since travelling through them to 'Anin requires a long circular drive, disproportionate to the short distance between the villages. In addition, in response to Respondent's allegation that individual petitioners were not joined other than the head of the local council, the Petitioners argue that it is a technical allegation and that it is not the real reason underlying Respondent's objection to the Petition. It was further argued

in this context that the residents of Umm al Rihan had requested the head of the local council to represent them in the Petition.

### **Deliberation and Decision**

7. Having considered the arguments of both parties, I have reached the conclusion that the Petition should be dismissed for the reasons specified below, both with respect to the residents of 'Anin and the residents of Umm al Rihan.
8. At the beginning, it should be noted that the Respondent made it clear in its response that it intended to make a decision which would change the opening arrangements of the 'Anin gate and that the Petition should be dismissed for this reason. I am of the opinion that there is no room to accept this argument and dismiss the Petition for this reason since a decision to change the arrangements has not yet been made and the arrangements which are the subject matter of the Petition are the existing arrangements. It is clear that if any change is made in these arrangements – the parties' arguments shall be reserved to them. However, in the Petition at hand the current arrangements shall be examined.

### **The Permit Regime**

9. This court has examined the lawfulness of the permit regime in **HCI 9961/03 HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Government of Israel** (April 5, 2011) (hereinafter: the **HaMoked judgment**). In that case, the severe and substantial harm caused to the freedom of movement of the residents of the Judea and Samaria area as a result of the closure of the seam zone and the implementation of the permit regime was recognized by the court, as well as the numerous hardships inflicted by them both on residents living within the seam zone and those who do not live there but have ties to the seam zone:

Indeed, it is difficult to disagree 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 certainly the harm is particularly severe for on innocent residents 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 enforcement 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 residents of the Area within this zone, and restricts the accessibility of the inhabitants – to their homes, lands and businesses located within the seam zone. As will be further specified below, this state of affairs creates a reality which makes it difficult to maintain the routine of family life, social life, commerce and work, both of the residents who live in the seam zone and of those who are related to them but do not live therein (*Ibid.*, paragraph 22).

Notwithstanding the aforesaid, the court stated that due to the nature and character of the seam zone, being an area which is not separated from the territory of Israel by any

barrier **"there is a security need to establish a mechanism which would enable a close supervision of those who enter through it and which would 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"** (*Ibid.*, paragraph 17).

In view of the above, the court took an "overview" of the entry arrangements into the seam zone and the implementation of the permit regime, and reached the conclusion that, in general, they comply with the proportionality tests. The court has specifically referred to the residents having ties to lands in the seam zone and clarified that:

Under the circumstances at hand, *prima facie*, it indeed seems 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, by enabling family members and other workers to assist them with their work. **In addition, special crossings exist the purpose of which is to regulate the entry into the zone – some of which are adapted to agricultural activity according to the seasonal needs. It seems to us that this arrangement provides a reasonable solution which minimizes the violation of the rights of the farmers**, and we assume in our said determination that respondents' concretize with actual content their declarations concerning the importance of providing proper solutions for the needs of the framers in the Area (emphasis added. *Ibid.*, paragraph 34).

At the same time the court left room for the examination of **"specific cases in which severe harm is caused to the right to own property and the right to make a living of Palestinian residents who cannot adequately farm their lands or who encounter other access difficulties, and the respondents, on their part do not take adequate measures to minimize said harm"** (*Ibid.*). These cases, it was so held, may be reviewed within the framework of individual petitions – such as in the Petition at hand.

#### **The residents of 'Anin**

10. Without taking lightly the harm which is evidently caused to the Petitioners (as well as to the other residents of Judea and Samaria) as a result of the closure of the seam zone and the implementation of the permit regime and from the limited opening arrangements of the 'Anin gate, I am of the opinion that the Petition should not be accepted in as much as it relates to the residents of 'Anin.
11. With respect to these residents the Petition clarifies that the only reason underlying their request to expand the opening arrangements of the gate is the agricultural need to farm their lands. The Petitioners do not dispute Respondent's allegation that the only crops currently grown on the lands are olive groves requiring only seasonal tending, in the plowing and harvest seasons. Therefore, I do not think that there is an agricultural need justifying the expansion of the current opening arrangements – in the framework of which the Gate is opened all year round, twice a week.

In their reply to Respondent's preliminary response the Petitioners argued that the violation of their proprietary rights and the harm caused to their ability to maintain their

ties to the lands should be taken into consideration. Indeed, limiting the opening days and hours of the 'Anin gate adversely affects Petitioners' rights – as things also emerge from the **HaMoked** judgment. However, in view of the criteria outlined in said judgment, and since it seems that there is no dispute that the current opening arrangements properly accommodate the **agricultural** needs of the residents of 'Anin to farm the olive groves on their lands – I did not find that said harm is disproportionate to the extent justifying our interference.

### **The residents of Umm al Rihan**

12. With respect to the residents of Umm al Rihan – I am of the opinion that the Petitioners did not establish a sufficient factual infrastructure to substantiate their arguments. As noted in the preliminary response on behalf of the Respondent, no numerical data were presented in the Petition pointing at the number of Umm al Rihan residents having family relations with the residents of 'Anin; and no individual petitioners from the residents of Umm al Rihan were joined to the Petition who can testify to the nature and scope of the harm inflicted on them as a result of the current opening arrangements of the 'Anin gate, and the difficulties associated with the need to take alternative routes.

In addition, it should be noted that as of today the 'Anin gate is classified by the Respondent as a gate designated for agricultural purposes only rather than as "fabric of life" gate. Therefore, in fact, the remedy requested by the Petitioners with respect to the residents of Umm al Rihan is not limited to the expansion of the opening arrangements, but also includes a request to change the current designation of the 'Anin gate. In this state of affairs it seems that the burden imposed on the Petitioners to substantiate their arguments is even heavier, a burden that the Petitioners have failed to meet.

13. In view of the aforesaid, the Petition should be dismissed. Under the circumstances of the matter, no order for costs is issued.

Given today, 20 Av 5783 (August 7, 2023).

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Justice

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Justice

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Justice