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At the Supreme Court Sitting as the High Court of Justice

H CJ 4331/10

Before:

**Honorable Vice President E. Rivlin
Honorable Justice E. Hayut
Honorable Justice U. Vogelman**

The Petitioners:

1. **City of Hebron**
2. **The Committee for the Development of Hebron**
3. **Munzer Ahmad Jaber**
4. **Kayed Sa'id D'ana**
5. **Hisham Jamil Suleiman**
6. **'Abd al-Mun'im Musa As'ad**

v.

The Respondent:

1. **State of Israel**
2. **Ministry of Defense**
3. **Military Commander of the Judea and Samaria Area**
4. **Military Legal Advisor for the Judea and Samaria Area**

Petition for *Order Nisi* and *Interim Injunction*

Session date:

24 Tevet 5772 (January 19, 2012)

Representing the Petitioners:

Adv. Samer Shehadeh

Representing the Respondent:

Adv. Michal Tzuk

Judgment

Vice President E. Rivlin

1. The petition before us is directed against a land seizure order issued by the commander of the IDF in the Area (hereinafter: **the seizure order**), with respect to lands on which an access route between Kiryat Arba and the Tomb of the Patriarchs ("Dana Way") is located. This is a

pedestrian path which was originally cleared unlawfully and not by the state. In a previous proceeding (HCJ 5979/07), a petition was filed against the state, on the allegation that it had not enforced the law in a number of cases in which private property in the Hebron area had been invaded, including property on which Dana Way was cleared. The state initially announced that it had pursued unlawful building proceedings with regards to this issue, and that a demolition order had been issued and would be executed soon. However, later, the state said that the civil administration was considering the possibility of issuing a seizure order with respect to Dana Way on security-operations grounds, following a request by the army. The aforesaid seizure order was ultimately issued. The remedy sought in the petition herein is the revocation of said seizure order.

3.[sic] The petitioners claim that the seizure order is inconsistent with the "Operational Plan for Securing the Jewish Settlements in Hebron". This plan was submitted to the court by the state in a separate proceeding (HCJ 11235/04 **City of Hebron v. State of Israel** (Unreported, June 6, 2011)). The petitioners submit that this plan does not mention a security reason for seizing the land on which Dana Way is located. The petitioners further claim that the state's initial position, namely that it would execute the demolition order issued for the structures on Dana Way serves as a further indication that there is no security reason for the seizure thereof. The petitioners maintain that the issuance of the order constitutes a disproportionate violation of the landowners' property rights and that it is contrary to international law.

4. The respondents, on their part, insist upon the security necessity that forms the basis for issuing the seizure order. Dana Way, the respondents claim, is used as an alternative to Worshippers' Way which leads to the Tomb of the Patriarchs. Unlike Dana Way, Worshippers' Way is topographically inferior and runs very close to a densely built Palestinian residential area. As such, Dana Way has a number of advantages in terms of security: it better enables the army to protect individuals using the path; it reduces friction with the Palestinian population and it serves as an escape route from Worshippers' Way toward Kiryat Arba. The respondents emphasize that the high risk involved in traveling on the eastern part of Worshippers' Way unfortunately materialized in 2002, when 12 combat soldiers were killed in a terrorist attack on this route and that the area is still rife with terrorist activity and attempted terrorist attacks. The respondents add that they constantly strive to reduce and ease the restrictions imposed on the civilian population in the area, subject to periodic security assessments. At times, the lifting of restrictions has resulted in increased risk on Worshippers' Way and a greater need for an escape route.

The respondents add that the lands the seizure of which is required are not farmed and that the size of the overall seized area is no more than one dunum. They also note that the land seizure will not restrict the movement of the Palestinian population and will not preclude crossing from one side of the path to the other. The court emphasizes that the state has made it clear that the Palestinian population is permitted to use the path and that it is a pedestrian path only. The respondents note that during the staff work conducted prior to the issuance of the order, the existence of a security necessity came under review and less injurious alternatives were considered. The respondents further claim that the land seizure is in conformity with international law, as interpreted in past rulings made by this court, as well as with Israeli administrative and constitutional law.

5. The petition must be dismissed.

Petitioners' arguments fail to establish the claim that there is no security reason for the seizure order. In contrast, respondents' position that due to the high risk involved in traveling on Worshippers' Way there is a need for an alternative, less dangerous route which would also serve as an escape route from Worshippers' Way should the need arise, is supported by past incidents in

the area in general and on Worshippers' Way in particular. As has been written about Worshippers' Way:

No major effort of persuasion is required in order to prove that a major security risk is to be expected due to the passage of thousands of pedestrians in an area prone to attacks, whose alleys are so narrow that a vehicle cannot pass through certain parts of them, and abandoned buildings alongside of which might serve as hideouts for terrorists. Such terrain conditions justify, prima facie, taking measures to reinforce the security of pedestrians in the passage. They may not support the claim according to which, it is an irrelevant, hidden, motivation which led to the issuance of the order. (HCI 10356/02 Haas v. IDF Commander in the West Bank, IsrSC 58(3) 443, 460 (2004), hereinafter: **Haas**).

In fact, petitioners' argument that there is no real security need for seizing Dana Way is based on the change in the position of the state, which initially said that it would take action to execute the demolition order issued with respect to the path, and later said that the path was required for security purposes that necessitate seizing the lands. According to the state's submission at the relevant time, the change followed a request from the army, which was thoroughly reviewed before being deemed justified. This conclusion has also been sanctioned by the new military commander of the Area. A change in position in these circumstance is not unacceptable per se, certainly not in an area where the situation on the ground is dynamic. In any event, we did not find that the petitioners had laid a solid foundation to indicate that there was a different motivation, unrelated to security, for the seizure order. The same holds true for petitioners' argument that the fact that Dana Way was not included in the Operational Plan for Securing the Jewish Settlements in Hebron, previously submitted to the court by the state, necessarily indicates that the route is not required for security purposes. As aforesaid, a plan that is primarily concerned with security can adjust itself to the situation on the ground, particularly considering that Dana Way existed at the time the plan was submitted, even if its seizure had not yet been regulated.

6. Given our conclusion with respect to the presence of a legitimate security necessity for Dana Way, we have not found that the seizure of land in order to legalize the route is either unconstitutional or contrary to international law. The arguments petitioners make on this issue do not concern their particular case or its circumstances, but rather the general power of the military commander to seize land in order to protect the security of worshippers wishing to arrive at the Tomb of the Patriarchs. This general issue was reviewed and ruled in **Haas**: "Given the constitutional power of the right of prayer at a holy site, the commander deemed fit to allow the passage while taking enhanced security measures. Such balance, prima facie, satisfies the reasonability test" (Ibid., p. 466). In this case, the position of the state, which was not contradicted, indicates that the harm caused to the petitioners has been reduced a minimum; thus with respect to the size of the seized area, the fact that it is not farmed, the fact that the petitioners' freedom of movement and that of the general population of the area is not restricted and the fact that this is a pedestrian path that does not enable vehicular traffic. In fact, it seems that the petitioners' main complaint is that the seizure order legitimizes the illegal act of clearing the path. This is not the correct interpretation. Indeed, in cases like these, offenders should not be rewarded, and the state has acknowledged this in the very fact that it initially took the position that the demolition order should be executed. However, in this case, there is a true security need for the path. The situation has unfolded such that the demolition order cannot be executed without ignoring this need, which, at the end of the day, concerns saving lives. Therefore, despite the

discomfort, to say the list, caused by the manner in which the path was created, we have arrived at a result wherein there is no cause for our intervention.

The petition is therefore dismissed. No costs order issued.

Given Today, 8 Shvat, 5772 (February 1, 2012).

Vice President

Justice

Justice