

[emblem of the State of Israel]

At the Supreme Court, sitting as the High Court of Justice

HCI 5593/23

Before: Honorable Justice N. Sohlberg
Honorable Justice Y. Elron
Honorable Justice K. Kabub

Petitioner: [REDACTED] Zagharneh

v.

Respondent: 1. Judea and Samaria Civil Administration
2. GOC Central Command
3. Civil Administration Enforcement Subcommittee
4. Central Planning Bureau, Judea and Samaria Area

Petition for Order Nisi

Counsel for Petitioner: Adv. Khader D'eibas

Counsel for Respondent: Adv. Matan Steinbuch

Judgment

Justice K. Kabub:

1. The petition herein concerns the decision of Respondent 2, the Military Commander in the Area, dated June 11, 2023. This decision rejected the petitioner's request to exclude a structure in his possession from the Order Prohibiting and Stopping Construction 14/11/AB (Seam Barrier) Eshkolot, south of the Meitarim Industrial Zone (Validity Extension 4), 5783-2022 (hereinafter: the Order Prohibiting Construction or the Order). The structure in question is a cinderblock agricultural structure of approximately 70 square meters, in respect of which a stop-work order was issued (Unlawful Construction Case H. 195/22). The structure is located at a distance of approximately 160 meters from the Seam Barrier (hereinafter: the structure).

In the petition, the Court was moved to issue an order nisi instructing the respondents to appear and show cause why the decision should not be revoked, so that the petitioner could pursue planning proceedings to regularize the structure. The petition was filed in tandem with a motion for an interim injunction and a temporary injunction "halting the execution of the demolition order". This motion was denied in my decision, rendered July 20, 2023.

2. I have just recently addressed the background for the construction of the Seam Barrier in the territory of Judea and Samaria in 2002 and its important security purpose (see: HCI 5558/23 **Abu a-Rob v. Commander of IDF Forces in the West Bank**, para. 2 (February 12, 2024) (hereinafter: **Abu a-Rob**);

see also: HCJ 8172/02 **Ibrahim v. Commander of IDF Forces in the West Bank** (October 14, 2002)). In that context, I emphasized that the barrier's construction inherently entails an infringement on Area residents' freedom of movement, their right to property and their ability to make proper use of land they own. At the same time, I noted that despite this infringement, it has been held that construction of the Seam Barrier lies within the sole authority of the Military Commander, insofar as it is required by military needs (Ibid., paragraph 3).

3. On December 8, 2011, the Order Prohibiting and Stopping Construction 14/11/AB (Seam Barrier) 5772-2011, was issued. This order prohibits construction in the vicinity of the Seam Barrier, unless approved by the Military Commander, in order to maintain the barrier's effectiveness and preserve the security purposes underlying its construction (for further discussion and by way of comparison, see: **Abu a-Rob**, para. 4, and the references cited therein). The purpose of this order has been periodically reviewed by the Military Commander, and its validity has been extended from time to time. As emerges from the respondents' response, the security need to validate the order was examined only recently, as part of a "project to extend the orders issued for the construction of the Security Fence", and a "clear need" for validation was found. In these circumstances, on December 14, 2022, the Order Prohibiting Construction was issued. It is valid until December 31, 2027.
4. The Order Prohibiting Construction prohibits any construction on land within its scope (Section 2 of the Order), unless a permit has been granted by the Military Commander (section 3 of the Order; see also section 332(c) of the Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009 (hereinafter: the Order regarding Security Provisions)). Accordingly, regulation 10(a)(2) of the Planning of Cities, Villages and Buildings Regulations (Permit Applications and Conditions) (Judea and Samaria), 5780-2020 (hereinafter: the Regulations) provides that an application for a building permit within the scope of an order prohibiting construction will not be admitted, unless "the applicant has presented an approval under Section 332(c) of the Order regarding Security Provisions, as set out in Form 6 of the First Schedule".
5. It is further noted that the Military Commander's competency to issue orders prohibiting construction was previously grounded in Section 2 of the Order concerning Construction Enforcement (Judea and Samaria) (No. 393), 5730-1970, and is now incorporated into Section 332(b) of the Order regarding Security Provisions, which also includes a complementary power, in Section 332(e), to order the demolition, deconstruction or removal of structures built contrary to an order prohibiting construction (see: **Abu a-Rob**, para. 8, and the references cited there).

Factual Background

6. The structure at issue is located, as noted, approximately 160 meters from the Seam Barrier, near the village of Ramadin in the Hebron District, within the area of the Order Prohibiting Construction. It stands on a parcel of land which the petitioner alleges he owns and possesses. According to the respondents' response, aerial photographs they attached indicate that the structure was not built until 2022.
7. On July 14, 2022, a stop-work order was issued in relation to the structure, and the petitioner was summoned to a hearing concerning the structure before the Supreme Planning Council's Enforcement Subcommittee (hereinafter: the Committee), scheduled for August 3, 2022. As emerges from the respondents' response, despite having been duly summoned, the petitioner and his counsel did not appear for this hearing, which concluded with a decision to issue a final order for the cessation of work and demolition of the structure. A seven-day extension was given for the structure's removal.
8. On August 8, 2022, the petitioner submitted an application for a building permit for the purpose of legalizing the structure (hereinafter: Building Permit Application) with the Judea and Samaria Central Planning Office (hereinafter: Planning Office). Subsequently, on February 12, 2022, the petitioner

submitted a request “to freeze all proceedings” pending a decision on the Building Permit Application to the Committee.

9. Pursuant to the Committee’s decision of August 3, 2022, on September 15, 2022, a final order was issued for cessation of work and demolition of the structure (no. 622536), and the petitioner was granted an additional period of seven days for the removal of the structure.
10. On December 1, 2022, the Central Planning Office rejected the Building Permit Application, based on Section 10(a)(2) of the Regulations, and since it did not enclose the required approval from the Military Commander. According to the respondents’ response, this decision was sent to the petitioner’s counsel on January 17, 2023, and granted him an additional 14-day period to remove the structure.
11. Subsequently, on January 26, 2023, the petitioner submitted a “request for confirmation of receipt of the permit application” to the Military Commander, pursuant to Section 10(a)(2) of the Regulations (hereinafter: the Exclusion Request). As emerges from the respondents’ response, this request was reviewed by the Military Commander and denied on June 11, 2023. The decision stated, inter alia, that construction of the structure near the Security Fence “materially harms the security effectiveness of the Barrier” and that, after examining all relevant considerations, the Military Commander found that the structure could not be excluded from the scope of the Order Prohibiting Construction.
12. Hence, the petition before us, filed on July 20, 2023.

Parties’ arguments

13. In brief, the petitioner argues that the Military Commander’s decision to deny the exclusion falls far outside the bounds of reasonableness. In this context, the petitioner argues that the structure is located “at a reasonable distance from the Separation Fence”, that “no security incident has ever occurred in the area” and therefore the structure does not pose a security risk. It is further argued that the Military Commander’s decision disproportionately infringes on the petitioner’s constitutional right to property, and therefore, a planning solution should be preferred over the structure’s demolition.
14. The respondents argued that the petition should be dismissed in limine and on its merits. They first emphasized that the petitioner took the law into his own hands by building the structure without first requesting a building permit or approval for its exclusion from the scope of the Order Prohibiting Construction. It was further argued that the petitioner also elected not to appear at the hearing held before the Committee. The respondents also argued that, on the merits, the petition does not present grounds for intervention in the Military Commander’s decision, which is based on the security purpose underlying the construction of the Seam Barrier and the issuance of the Order Prohibiting Construction. As to the petitioner’s argument that the structure does not constitute a security risk, the respondents argued that, in this regard, the Military Commander is vested with broad discretion, in which the Court should not intervene other than in exceptional cases.

The Court notes further that the respondents’ response stated that on August 22, 2023, that is, after the petition was filed, the head of the Keshet Tzva’im headquarters held a hearing in the petitioner’s case, after it had been referred to him. According to the response, the hearing concluded with the decision that there was no room to approve a planning procedure for the structure, and, therefore, the Military Commander’s June 11, 2023, decision would remain in force.

Deliberation and decision

15. As explained below, I have found that the petition must be dismissed in limine and on its merits.
16. It is an established rule that “taking the law into one’s own hands and seeking equitable relief are foes and cannot dwell together under the same roof” (HCJ 1433/23 **Salim v. Commander of IDF Forces in Judea and Samaria**, para. 8 (March 28, 2023), and the references cited therein; **Abu a-Rob**, para. 22).

As is known, the fact that the petitioner built the structure in this case unlawfully is sufficient to justify dismissing his petition in limine (**Abu a-Rob**, para. 23; H CJ 2442/23 '**Ar'arah v. Military Commander in the West Bank**, para. 5 (September 28, 2023) (hereinafter: '**Ar'arah**)). As has been held more than once, "this rule applies to any structure built unlawfully and all the more so when dealing with a structure built within the scope of an order prohibiting construction" (H CJ 1434/23 **Mahamid v. Commander of IDF Forces in Judea and Samaria**, para. 7 (March 29, 2023); see also: **Abu a-Rob**, para. 22; '**Ar'arah**, para. 5). It should be recalled that neither the petitioner, nor anyone acting on his behalf, appeared at the hearing held on his application before the Supreme Planning Council's Enforcement Subcommittee.

17. As noted above, on the merits, too, I am of the view that no cause has arisen for our intervention. There is no dispute that the decision at issue in this case was *intra vires*, and it is well established that this Court does not set itself up as an "expert in security and military affairs". Therefore, and given the broad discretion afforded to the Military Commander in security matters, substantial grounds are required to justify judicial intervention at the level of discretion. In the case at hand, the petitioner has not met the burden required to point to any flaw in the Military Commander's exercise of discretion and his contention that excluding the structure would not compromise security was raised in a conclusory manner (see and compare: '**Ar'arah**, para. 7). Likewise, contrary to the petitioner's argument, we have recently held that:

Security need, in the context of an order that is inherently anticipatory, may crystallize on the basis of an operational assessment of security risks that have not yet materialized, since the respondents are clearly "not expected to simply wait for security risks they anticipate to materialize; they must act day and night to prevent terrorist attacks that leave dead and wounded in their wake" (H CJ 7007/23 **Tayyem v. Commander of IDF Forces in the West Bank**, para. 14 (December 21, 2023)).

18. Note well. I do not disregard the injury entailed in the construction of the Seam Barrier and the issuance of the Order Prohibiting Construction, including harm to the right to property, but alongside this, I have borne in mind the case law according to which "the right to property does not mean that an individual has the right to build illegally and in breach of the planning and building laws applicable to him" (H CJ 4588/18 **St. Yves Catholic Center for Human Rights v. Military Commander in the West Bank**, para. 31 (April 30, 2019)). Despite this harm, it appears that the respondents have, on several occasions, weighed all the relevant considerations in our case and concluded that the security purpose must prevail over the infringement of the petitioner's rights.

I have found no cause for intervention in this decision.

19. In conclusion, the petition is hereby dismissed. The petitioner shall pay to the respondents their costs in the amount of 3,000 ILS [~ 1,010 USD].

Given today, the 3rd of Adar I 5784 (February 12, 2024).

Justice

Justice

Justice