



**In the Supreme Court in its capacity as the High Court of Justice**

**H CJ 5163/13**

Before: Hon. President (ret.) A. Grunis  
Hon. Judge N. Hendel  
Hon. Judge U. Vogelman

The petitioners:

1. Beit Jala Municipality
2. Issa Haliliah
3. Issa Shatla
4. Salivah Zidan
5. Hanna Teet
6. Odeh Haliliah
7. Nasri Najar
8. Nidal Mubarak
9. Gouda Abu Sa'ad
10. Riad Abu Muhar
11. Yousef Shatla
12. Nachaleh Abu Eid
13. Mina Zidan
14. Ibrahim Abu Awad
15. Yaacoub Abu Amasheh



16. Nader Abu Jatass
17. Louris Haliliah
18. Hachaleh Abu Eid
19. Johnny Shahawan
20. Perach Elallem
21. Emile Elallemouda Elaraj
22. Lamieh Elaraj
23. Bshara Awad
24. Issa Kasfasah
25. Na'ama Abu Mouhar
26. Riad Abu Mouhar
27. Gariss Abu Mouhar
28. Yousrah Salem Nawauwieh
29. Hanna Salivah Kosateh
30. Eskandar Abu Roman
31. Karim Hadawah
32. Akram Hadawah
33. Dr. Bshara Elias Nassrallah
34. Eliad Na'im Jarayes Lachsin
35. Victor Hani

Vs.



The respondents:  
Defense

1. The General Director of the Ministry of Defense
2. The Ministry of Defense
3. The Seam Line (Barrier) Administration
4. The Military Commander in the West Bank
5. Har Gilo Local Committee
6. Salesian Sisters Convent
7. Salesian of Don Bosco
8. The Peace and Security Council
9. The Nature and Parks Authority

Petition for Order Nisi and Interim Injunction

Date of Meeting: 8th of Av, 5774 (4.8.2014)

On behalf of the Petitioners: Jiat Nasser, Adv.

On behalf of Respondents 1-4: Channy Ofek, Adv.

On behalf of Respondent 5: Dr. Gershon Gontovnik, Adv.

On behalf of Respondent 6: Zvi Avni, Adv.

On behalf of Respondent 7: Nahad Arshid, Adv.



On behalf of Respondent 8: Talia Sasson, Adv.

On behalf of Respondent 9: Nirit Aharon, Adv.

### Ruling

#### The President (ret.) A. Grunis:

1. The petition before us is directed against the route of the security fence in the area of Beit Jala, south of Jerusalem. The route at the heart of this petition is located partially in the municipal territory of Jerusalem, and is the separating line between Israel and the Judea and Samaria Area (hereinafter: JSA), and partially goes through JSA. In the petition, it is requested to cancel the seizure orders which have been issued for the purpose of building the fence, in connection with the land located in JSA and in Israel's territory. As a part thereof, it is requested to cancel the Ruling of the Appeal Committee acting according to the Law for the Regulation of Land Seizure in a State of Emergency-1949 (hereinafter: the Law), which rejected the appeal regarding the legality of the seizure orders issued under it for the purpose of building the fence in Israel (Appeal Committee (Tel Aviv-Yaffo) 875/06 Haliliah vs. The Ministry of Defense, ruling dated 24.4.2013, Hon. Judge E. Ravid, Adv. Y. Arbel and Adv. A. Efron).

#### Background and sequence of events

2. For over a decade now, the State of Israel has been working on building a



security fence in a number of sections in what is called the Seam Zone, including in the area of Jerusalem. This, as part of dealing with terrorist threats and with the purpose of hindering and preventing the penetration of terrorists into Israel's territory (for elaboration regarding the background for the building of the security fence, see HJC 2056/04 Beit Surik Village Council vs. Government of Israel, Ruling 58(5) 807, 816-818 (2004) (hereinafter: the Beit Surik Case); regarding the background for the building of the fence in the Jerusalem envelope area, see for example, HCJ 5488/04 Alram Local Council vs. The State of Israel, paragraph 2 (President (ret.) A. Barak (13.12.2006) (hereinafter: the Alram Case); HCJ 9516/10 Walaja Village Council vs. The Military Commander in the West Bank, paragraph 1 (22.8.2011) (hereinafter: the Walaja Case)). As part of the efforts for completing the fence in the Jerusalem area, Respondent 1 has issued on 19.3.2006 a land seizure order according to Section 4(1) of the Law (490-06-62). The purpose of the order was to enable the completion of the fence south of Jerusalem near the Har Gilo settlement, in front of Beit Jala and near two monasteries close to it, Respondents 6 and 7 (hereinafter, respectively: the Women's Convent and the Men's Monastery, and in conjunction: the Monasteries). Both Monasteries include a number of structures, including a winery and an olive press, and their lands, which are also used for various agricultural growths, are located in the Beit Jala Ridge. The aforesaid order was issued with the purpose of allowing building of the fence for a length of about 1,500m, connecting between the



sections of the fence already built in the JSA. According to plan, the fence section for which the aforesaid seizure order was issued would pass close to Highway 60 (the “Tunnels Road”) while leaving the bridge on which this route passes in the “Israeli” side of the fence, to be connected with the route passing through JSA.

3. Residents of Beit Jala have submitted an appeal against the seizure order to the Appeal Committee, according to Section 17 of the Law (hereinafter: the Appeal Committee). Note that the Committee’s authority only extends to the section of the fence passing through Israel’s territory. The appeals were processed for about seven years, during which many witnesses were heard, and a tour was performed in the area in question. During this period, Respondents 1-2 have made several changes to the fence’s route, in response to the Appellants’ claims in their appeal. In 2007, a seizure order was issued (490-75-07) changing the route so that the fence would include within the “JSA side” a few of the Beit Jala residents’ houses that remained on its “Israeli” side. In the Ruling, it was noted that the original route was informed by the presumption that the Women’s Convent prefers to stay on the “Israeli” side of the fence. However, at the end of 2010, the Convent requested to join the procedure as Appellant, and to change the fence’s route. The Committee decided to allow the Convent to join the procedure despite the great delay in its response. In 2011, Respondent 1 issued a new seizure order (490-11-02), with the purpose of including the Women’s



Convent and all its educational institutions on the “JSA side” of the fence. According to the amended route, the fence would cross between the Women’s Convent and part of its lands as well as the Men’s Monastery, which would remain on the “Israeli” side of the fence. It is to be further noted that in 2009, Respondent 8 (hereinafter: the Council) has joined the appeal as amicus curiae, however after a time, had requested to withdraw its affidavit and quit the process. Respondent 5 also joined the appeal as a respondent. Its reason for joining was the fact that the fence’s route passes near the Har Gilo settlement.

4. The Appeal Committee rejected the appeal. In its Decision, it was decided that the route of the fence in question indeed injures the residents of Beit Jala. The injury is expressed via the seizure of land for the purpose of building the fence, and the separation that would be created between the residents and their agricultural land, to which access would be limited to passage through a gate which would be irregularly open, and be subject to a permit regime. However, the Appeal Committee decided that the fence’s route was determined according to military considerations and not extraneous considerations. According to the Committee, engineering constraints also support the route determined, and choosing it would minimize injury to Palestinian lands and olive trees. The Committee rejected two alternative routes which the Appellants proposed to it. According to the first appeal which was proposed and rejected, the fence’s route would be too far diverted to the direction of Gilo stream and Gilo



neighborhood, in a way that would leave Beit Jala's residents' agricultural lands in the "JSA side" of the fence, so that their access to them would not be disturbed. The Appeal Committee noted that the great majority of the aforesaid route is not under its authority. It decided that the aforesaid route indeed makes less injury to the farmers' accessibility to their lands, however accepted the position of Respondents 1-2, according to which the route does not fulfill its security purpose as the route determined by them. The second and main alternative proposed by the Appellants is largely similar to the route proposed by the Council (hereinafter: the Council Route). According to this proposal, the fence would start on the northern side of the bridge over Gilo steam, continue west on an existing dirt road and will cross the steam south. The fence would surround the settlement Har Gilo on all sides and it would become a special security area (SSA). The Appeal Committee noted that the great advantage of this route is in the fact that injury to the land cultivated by Beit Jala's residents is prevented, and the need to build agricultural gates is negated. This alternative was also rejected for the reason that this route is "significantly inferior in terms of security" than the route at the heart of the Appeal (paragraph 51 of the Decision). This, due to the narrow alert area that it enabled, the great closeness of the fence of the Gilo neighborhood houses in Jerusalem, and lack of sufficient response to the threat over the Tunnels Road. Additionally it was decided that the route determined by Respondents 1-2 is better topographically and that the Council Route necessitates seizure of land and injury of trees on a





wider scope.

In addition, it was decided that the injury involved with the fence is proportionate. The Appeal Committee noted Respondents 1-2's willingness to pay, in appropriate cases, compensation and user fees for the land seized for the purpose of building the fence, and decided that setting two agricultural gates in the fence comprises an appropriate solution to the difficulty in cultivating the land. In addition, the Decision mentioned Respondents 1-2's undertaking to regulate access from the monastery to its lands using an electrical gate, and to enable Clerics free passage between the Monasteries. The Committee rejected the Women's Convent's request to determine a route that would leave all of its lands in the "JSA side" of the fence. This, for security reasons and since this would necessitate the issuance of new seizure orders, a move which might involve injury to additional lands and significant delay to the building of the fence. In addition, the Committee commented that given that a significant part of the fence is already built, then demolishing and then reconstructing it would harm the landscape. In addition, claims were rejected regarding the injury caused to the Women's Convent due to surrounding its school by the fence, as well as arguments regarding possible injury that would be caused to the Convent if it's decided to expand it. Finally, the Attorney General's position was accepted, according to which the approval of the route does not breach the conventions between Israel and the Vatican.



5. For the sake of completing the picture, it should be noted that in 2011, the Military Commander in JSA issued a land seizure order (11/8/400), seizing land located in JSA, for the purpose of building a fence to be connected to the fence route discussed before the Appeal Committee. This order is not in the authority of the Appeal Committee and was not discussed by it.

The petition before us and the Parties' claims

6. Following the Decision, Beit Jala Municipality and the city's residents who were a party to the procedure in the Appeal Committee, have submitted the Petition before us. In the Petition, it is requested to cancel the Appeal Committee's Decision, the seizure orders discussed before it (490-62-06, 490-75-05 and 490-02-11) and the land seizure order issued by the Military Commander in JSA, as aforesaid in the previous paragraph (11/8/400) (all aforesaid orders will hereinafter be referred to in conjunction as: the Seizure Orders). In addition, it is requested to decide that the fence's route proposed by Respondents 1-4, represented by the State Attorney's Office (hereinafter: the Respondents), is neither reasonable nor proportionate, and to instruct the examination of alternatives to it.
7. On 21.7.2013, a temporary injunction was given on the Petition, forbidding the performance of works in the route of the fence at the heart of this Petition, and this until further decision (Judge U. Vogelmann). On 3.2.2014, an order nisi has



been given in the Petition (President A. Grunis and Judges N. Hendel and U. Vogelman).

8. The parties' positions have been presented to us in detail, in writing and orally, and this is the essence of their claims. The Petitioners are claiming that in the Appeal Committee's Decision there occurred various procedural flaws, with special emphasis on the prevention of the Council's participation in the procedure after it was acknowledged as amicus curiae. In addition, they claim that the committee did not properly consider all the evidence that were presented to it and they reject its conclusions on this matter. According to them, the fence route injures their rights disproportionately and it is unreasonable. The injuries are expressed, according to them, via the fence passing through Beit Jala's residents' land; the surrounding of houses in the city by a "choke hold" vis-à-vis the fence; the disconnection to be created between Beit Jala and agricultural lands of its residents and between the Monasteries serving them; and via the environmental injury that the fence would cause. The Petitioners claim that the route determined does not serve any security purpose and that its true purpose is to create territorial continuity between Gilo neighborhood and the Har Gilo settlement in order to enable annexation of the intermediate territory. According to them, the route is illogical, determined without appropriate factual grounds and is inconsistent with the rules of the Israeli administrative law and international law's instructions. The Petitioners propose



adopting the Council Route instead of the route determined. In addition, they claim that it is no longer permissible to act on the seizure orders discussed before the Appeal Committee, since the period during which it was possible to hold territories under them is expired, in accordance with the instructions of Section 6 of the Law. According to the Section, land seized under an order issued on 1.8.1952 or thereafter will not be kept for a period exceeding three years.

9. Respondent 6, the Women's Convent, joins the Petitioners' claims and notes that the Petition reflects its positions. It explains that it saw no need to submit an petition of its own in this matter, among other reasons, due to a change that occurred in its legal representation and due to its ambivalent relation to dealings with the Court. The Women's Monastery is on principle opposed to the building of the fence. According to it, if this can't be avoided, then the fence must be built over the "Green Line" (which is the armistice line between Israel and Jordan), or alternatively according to the Council Route, which is considered the lesser of two evils. According to it, the fence will create a separation between the Convent and its lands used for its livelihood. In addition, it claims that the fence, including its gates to be operated by the military, would harm the landscape and the Convent's character, and would discourage sending the community's children to the educational institutions inside it. Further the Convent claims that the building of the fence is in contradiction with the



agreements signed between Israel and the Vatican.

10. The arguments of Respondent 7, the Men's Monastery, are very similar to the arguments of the Women's Convent. The Men's Monastery particularly emphasizes the injury that would be caused by leaving it on the "Israeli" side of the fence. According to it, the fence would divide between it and the Women's Convent and the cities of Beit Jala and Bethlehem, in which the Salesian Order's (to which it belongs) community, employees and offices all reside. It demands that all its lands and facilities would remain connected, as one single entity, with no fence separating between them and the Beit Jala area. The Monastery rejects the claims according to which it consented to the building of the fence in the discussed route. According to it, in years 2005-2007, the military's representatives have negotiated with the Monastery's representatives regarding the original route of the fence in the area, but these were not finalized in any agreement, and the Monastery notified them that it opposes the building of a fence in any route in the area. These negotiations were made, according to the Monastery, with low levels within it, under the presumption that the building of the fence is considered a fait accompli, and their purpose was to find a solution to practical problems ensuing from it. According to the Monastery, no contact was made between it and the security system regarding the changes that were later made to the route. It admits that its representatives have toured the area with the representatives of the security system in 2014, however



according to it, the tour was purposed to regulate other issues and the fence route before us was not discussed as part of it.

11. The Respondents, however, believe that the Petition should be rejected, and endorse the Appeal Committee's Decision. They detail the considerations on which the determined fence route was based. On the security level, it's noted that the fence is necessary for the defense of Gilo neighborhood in Jerusalem, of the Tunnels Road, of Har Gilo and of other civilian sites the in Jerusalem area, and for the purpose of preventing penetration to Israel by terrorists and illegal aliens. The Respondents emphasize that the building of the fence must be completed soon and the security breach left in the route blocked. According to them, as long as the fence isn't completed in the entire area, the route already built in the area, which is about ten and a half km long and cost over ILS 80 million, would not be able to operate efficiently. In addition, the Respondents describe the topographical considerations, the engineering constraints and the environmental aspects that led to determining the aforesaid route. Among other things, they note that the route chosen is the shortest possible route, and its security efficiency is the greatest. According to them, the route was finalized in cooperation with Respondent 9 (hereinafter: the Nature and Parks Authority), according to whose opinion, this is the alternative that least harms nature and the landscape. According to them, this route has an additional benefit, since it passes through Jerusalem's municipal territory, and therefore enables defense of



Israel's boundaries from within its own territory.

The Respondents are not denying the injury that the fence would cause the Petitioners and the Monasteries, however in their opinion the injury is proportionate, and the corrections made to the route comprise an appropriate response to it. They believe that both gates to be placed in the fence would solve Beit Jala's residents' access difficulties to their lands in Israel, and mention that JSA residents have no given right to enter Israel. The Respondents claim that the gate in the fence, to be operated by the security forces, would solve the access problems between the Women's Convent and its lands and the Men's Monastery, and express willingness to agree on mitigating arrangements for the monks' passage between the two Monasteries. As to the Men's Monastery, the Respondents claim that it expressed its will and gave its consent, in conduct and explicitly, to the route which leaves it on the "Israeli" side of the fence, and that it has no right to argue against it. The Respondents emphasize that the Men's Monastery's produce is sold mainly in Israel, and that it is possible to deal with the separation that would be created between it and the Women's Convent using a daily gate (i.e. which is open every day) to be set in the fence. The Respondents request that the Council would be erased as a Respondent to this Petition and reject the route proposed by it, while explaining in detail its disadvantages, especially on the security and engineering levels. The respondents emphasize that the Council Route in fact aims to change the



fence's route in the general south Jerusalem envelope area, a route where many of its sections have already withstood legal inspection, and this in contrast to the narrow section at the heart of this Petition. According to them, accepting the Petitioners' position would necessitate demolishing the fence that was already built, including the high costs involved in it, and would necessitate a rehabilitation of the landscape and a wide seizure of land. This move might, according to them, incur additional legal proceedings and delay the building of the fence, and would comprise an overturn of several Decisions and Rulings given regarding the fence's route in the south Jerusalem envelope area. Finally, the Respondents reject the claims according to which the seizure orders are expired, and claim that the period in which the Appeal of the orders was discussed is not included in the count of the days for the validity of the orders according to Section 6 of the Law.

12. Respondent 5, Har Gilo Local Committee, believes that the Petition should be rejected. It emphasizes the need for completing the fence and including the Har Gilo settlement on the "Israeli" side of the fence, in light of the security situation in the area. Respondent 5 rejects the claims according to which the route was chosen according to extraneous considerations, and claims and the Petitioners did not propose an alternative route to the route in discussion. Further it requests that the Council be omitted as a Respondent to this claim, and that it would be disallowed from presenting its opinion.





13. The Council, on its part, has requested to join the procedure as amicus curiae. It agreed that there exists a security justification for the building of the fence in the discussed area, however in its opinion the route proposed by it is preferable to the route determined by the Respondents. Its arguments focus on basing this claim and in rejecting the arguments raised by the Respondents regarding the difficulties involved with the route offered by it. The Nature and Parks Authority has also requested to join as a Respondent to this Petition. Despite the delay in submitting their request, and in light of the issue's importance, we have agreed to its request (see my decision from 9.6.2014). In essence, its position is that from the environmental aspect, the route determined by the Respondents, which was planned in cooperation with it, is to be considered as the lesser of two evils and is preferable to the Council Route.
14. On 7.8.2014, we have instructed the Respondents to consider various options according to which both Monasteries would be located on the "Palestinian" side of the fence (President A. Grunis and Judges N. Hendel and U. Vogelmann). In response, the Respondents notified on 4.9.2014, that they have examined the possibility of diverting the fence's route so that the "JSA side" would also include the winery and the factory of the Men's Monastery. However, this possibility was rejected. This, mainly due to security reasons relating to the fence's closeness to crowded civilian sites, and the fact that this would necessitate movement of the security forces down Gilo stream, while exposing



them to risks from the direction of the ridge overlooking the route which would be located on the “JSA side” of the fence. According to them, this is joined by environmental reasons and the concern that this would necessitate additional land seizure, which would incur new objections. Instead, the Respondents presented two new alternatives to the discussed route. According to them, both alternatives leave the Monasteries on the “JSA side” of the fence and preserve their affinity, continuity and freedom of movement between them. The Respondents clarify that they are willing to dialogue with the Monasteries, if they give their consent in principle to one of the proposed alternatives. In the discussion held before us on 30.11.2015, the Respondents noted that if no consent is received for either of the alternatives, they would stick to the original route of the fence.

According to the first alternative, a fence would be set on both sides of the road connecting between the Monasteries, and it would continue to the gate of the Men’s Monastery (hereinafter: the Sleeve Alternative). According to this proposal, movement from the Men’s Monastery, on the “Israeli” side of the fence, to the Women’s Convent, on the “JSA side”, would be free. In the opposite direction, access will be kept similarly to the current situation, as well as allowing the movement of people for the purpose of cultivation of the agricultural lands on the “Israeli” side of the fence. The Respondents emphasize that increased sensitivity would be required in the matter of movement from



JSA to Israel, and attention kept lest the passage is used for illegal purposes (without the knowledge of the Monastery). According to them, in light of the trust and respect that they hold for the Monastery, they are prepared to allow its people to perform the gate control, under the security system. This, alongside security elements and cameras to be installed on the gate and reserving the possibility to perform spot checks and security checks by the security system. The Respondents believe that this alternative is indeed less efficient in terms of security than the route at the heart of this Petition, however it responds to the injury to the Monasteries' quality of life, as it would allow convenient access between the Monasteries without need for screening by the security forces. According to them, the marginal addition of environmental harm involved in this alternative is relatively low. The Respondents state that this alternative would necessitate the issuance of the seizure order for the purpose of building the "sleeve's" fences, and in the future might require expropriation and use of land for a limited time which may be extended. They demand that the Parties to this Petition commit to avoiding resistance to these actions. In addition, the Respondents note that if resistance would arise following these moves, this would cause delay to the building of the fence, and in this case they reserve the right to return to the original route until the end of the investigation of the resistance.

According to the second alternative, the Men's Monastery would be surrounded



by a fence so that the Monastery would stay on its “JSA side”, without separation from the Women’s Convent and Beit Jala, while the winery, the factory and the Monastery’s lands would remain on the “Israeli” side of the fence. On the fence, a daily gate would be set for the purpose of employee movement, to be operated by the security forces in coordination with the Monastery (hereinafter: the Envelope Alternative). The Respondents believe that the security efficiency of this alternative is greater than that of the Sleeve Alternative, and that it responds to the need for free movement between the Monasteries and the accessibility of Beit Jala’s residents to the Men’s Monastery. According to them, the additional harm to the environment according to this alternative is also relatively low, though it is greater than what would be caused by the Sleeve Alternative. The Respondents state that on the surface, it appears that this Alternative would necessitate the issuance of additional seizure orders and would likely also require expropriation and use of land for a limited time which may be extended. Therefore, as far as they are concerned, the conditions for the building of the Sleeve Alternative mentioned above are also relevant to the Envelope Alternative.

15. The Respondents’ proposals were rejected by most Parties to this Petition. The Monasteries believe that both Alternatives do not fulfill the Court’s Ruling and comprise a breach of the agreements between Israel and the Vatican. They strictly oppose the possibility that the security checks, as per the Sleeve



Alternative, would be performed by the Men's Monastery and are reluctant to accept any solution involving the separation between the two Monasteries and between them and their lands and facilities. The Men's Monastery, on its part, refuses to commit to avoid opposing the issuance of seizure orders or expropriation in the future, and both Monasteries repeat their endorsement of the Council Route. For similar reasons, both Petitioners also oppose both aforesaid alternatives and argue that these do not mend the injuries of their rights at the heart of this Petition. The Council also believes that both alternatives are inappropriate and according to it, both significantly injure the Israeli security interest. Therefore it repeats the advantages of the alternative proposed by it. The Nature and Parks Authority, for environmental reasons, supports the route at the heart of this Petition or the Sleeve Alternative, and opposes the Envelope Alternative and the Council Route.

16. It is to be further noted that on 8.1.2015, the Petitioners submitted a request for the submission of new evidence. This concerns the recording of an interview made with the Mayor of Gush Ezion and the principal of the Gush Ezion Sadeh School which was broadcast on the news on 27.12.2014. According to the Petitioners, the interview shows that the Gush Ezion Council's (to which Respondent 5 belongs) position has been changed, and that it no longer supports the fence route in the discussed area. Therefore, it is their opinion that it should be examined whether there is a necessity at all to build the fence. The



Monasteries agree to the request, the Council does not oppose it, and the Nature and Parks Authority leaves this consideration to the discretion of the Court. The Respondents oppose the request. In response, the Petitioners note that in another case, the Court has also addressed things published in the media. It should be noted at this point that we did not see fit to accept the Petitioners' request for the submission of the new evidence. The evidence whose submission is requested is a media publication, whose probative force is rather limited (see, for example, HCJ 5144/12 Dallah vs. Dagan (14.8.2012); HCJ 5296/12 Temple Mount and Eretz Yisrael Faithful Movement vs. The Attorney General (27.8.2012)). In addition, anyway there is nothing in this evidence to substantially contribute to this matter. The speakers in the article represent no respondent of this Petition and their position does not affect its fate. This case is not at all similar to the case which the Petitioners referenced in their response, where the Court instructed the respondents to address the things said by the Minister of Defense, who was one of the respondents of the petition, and which were published in the media, regarding the intention to build the security fence in the area relating to that petition (HCJ 7612/12, 8716/12 Battir Village Council vs. The Military Commander in the West Bank (decision from 23.11.2014)). It turned out that the Minister of Defense's position was, regarding the building of the fence in that specific area, that building it was not in high priority justifying its building at the time. For this reason, it was decided to clear the petition, while maintaining the parties' arguments. In contrast,



regarding the current matter, the Respondents repeat and validate their intention to build the fence at this time.

#### Discussion and ruling

17. As aforementioned, according to Section 6 of the Law, no land must be kept whose seizure order was issued after 1.8.1952, for a period exceeding three years. According to the Petitioners, this period has long passed. In light of the result of the procedure, we did not see fit to elaborate on the matter. However, we will comment and that appears that the seizure order has not been implemented in this case, and therefore allegedly the period of three years, which is the longest period of holding land under the seizure order, has yet to pass. It is also possible that the long period in which the procedures had undergone in the Appeal Committee and in this Court should be ignored. Anyway, it seems that allegedly, there is nothing to prevent expropriation of the relevant lands in accordance with the Land Ordinance (Acquisition for Public Purposes), 1943 (as done in the case judged in this Court in HCJ 2779/07 Battir Village Council vs. The Military Commander in the West Bank (25.1.2012)).
18. An additional preliminary comment concerns the fact that the route of the fence before us partially passes through JSA and partially through Israel, on Jerusalem's municipal territory. This fact is significant in terms of the laws applying to the various sections of the fence. The decision regarding the



question of the fence's legality in JSA is made based on a two-phase examination: in the first phase, the very authority to build the fence is examined. In this matter, it's already been determined that the Military Commander is authorized to build a security fence in JSA for the sake of defending the state of Israel and its citizens, as long as his decision is based on military-security considerations rather than political considerations (see, for example, the Beit Surik Case, pp. 829-830; HCJ 7957/04 Marabah vs. The Prime Minister of Israel, Ruling 60(2) 477, 493, 498, 546 (2005) (hereinafter: the Marabah Case)). In the second phase, the manner of implementing the authority, and the Military Commander's discretion in deciding the fence's route should be examined (see, for example, HCJ 4387/06 Masha Village Council vs. The Prime Minister, paragraph 15 (11.4.2010) (hereinafter: the Masha Case)). Implementation of the authority to build the fence should be performed in a proportionate and reasonable fashion, with appropriate balance between the security consideration at the heart of the building of the fence and other considerations, primarily the area's residents' rights, which may be injured as a result of building the fence (see the Marabah Case pp. 503, 506-507, HCJ 10202/06 Dhahiriya Municipality vs. The Military Commander in the West Bank, paragraphs 11 and 14 (12.11.2012) (hereinafter: the Dhahiriya Municipality Case)). The main criterion used by the Court in approaching these questions is the principle of proportionality (see: Beit Surik Case, pp. 840; Marabah Case, pp. 507). Regarding the fence sections located in Israel, the





question regarding the Military Commander's authority is inapplicable. The authority in this matter is given to the decision makers according to internal Israeli Law (see: Alram Case, paragraphs 40-45). The decision regarding the fence's route in Israel must also comply with the proportionality and reasonableness principles, and to reflect an appropriate balance between the entirety of the relevant considerations, similar to the considerations mentioned above (see, for example, *ibid* paragraph 45; H CJ 1676/09 The Defense Ministry Director vs. Kalandia Village Council, paragraph 19 (30.11.2011); H CJ 6193/05 Ras Khamis Residents Committee vs. The Competent Authority According to the Land Seizure Regulation Law, paragraphs 14-16 (25.11.2008) (hereinafter: the Ras Khamis Case); H CJ 1073/04 Salameh vs. The Minister of Defense, paragraphs 12-13 (6.8.2006) (hereinafter: the Salameh Case)).

19. In the discussed case, and as determined in previous cases, it cannot be said that the decision regarding the building of the fence was made without authority. The remaining question, then, relates to the manner of the authority's implementation and consideration in determining the fence's route. The main criterion for the decision in this question is, as mentioned, the proportionality principle (as to the position according to which similarity exists between the fundamental principles applying according to International Law regarding the building of the fence in JSA, and the principles applying according to Israeli Law regarding the building of the fence in Israeli territory, see: Alram Case,



paragraph 46).

20. The route of the fence discussed before us, which is about 1,500m long, involves, as aforesaid, injury to rights. The injuries are caused by the fence's passage on Beit Jala's residents' and the Monasteries' lands, and the separation that would be caused between those entities and their agricultural lands. Additional injuries are rooted in the fact that the Men's Monastery is expected to stay on the "Israeli" side of the fence, which would cross between it and the Women's Convent, Beit Jala and Bethlehem, where its community, employees and the offices of its Order are located. As stated during the Petition discussions and as indicated by our Decision from 7.8.2014, we are unsatisfied with the alternative by which the Men's Monastery would be forced to remain on the "Israeli" side of the fence. Indeed, we have the impression that both Monasteries have supported, or unfortunately failed to oppose, in the beginning to the possibility that they will be left on the "Israeli" side of the fence. The Monasteries have joined the legal procedure late, years following the issuance of the seizure orders and after works have started for the building of the fence in the area. The Men's Monastery has joined the procedure in the Appeal Committee only in 2012, over a year after the Women's Monastery joined. In the aforesaid period, the Men's Monastery's representatives have kept in touch with the Respondents' representatives for the purpose of coordinating the route, and detailed negotiations were held between them in this matter. As part of this, in 2006, the Men's Monastery even contacted Israeli companies providing



water, electricity and telephone infrastructure for the purpose of coordinating the services' provision to the Monastery after it is disconnected from the services it received from the Palestinian Authority. In any case, even if we did accept the claim that there has been delay in the Monasteries' conduct, under the current circumstances, I do not believe that this reason alone justifies preventing them from being heard and raising their arguments in this procedure. This, due to the injury that might be caused to them and in consideration of the great public interest involved in this Petition (compare, APA 867/11 Tel Aviv-Yaffo Municipality vs. EBC Management and Holdings Ltd., paragraph 27 (28.12.2014); Masha Case, paragraphs 12-14). The Respondents' conduct in the above procedure indicates that they also understand the need to take the Monasteries' position into account. This can be seen vis-à-vis their noteworthy willingness to make changes to the fence's route, to examine alternatives to the route and to maintain dialogue with the Monasteries. This, in order to minimize the injury to the Monasteries and the protected residents.

21. Regarding this matter, various alternatives have been raised by the Parties to the route at the heart of this Petition, with the purpose of making sure that both Monasteries are located on the "JSA side" of the fence. However, as aforesaid, despite the efforts to reach an understanding, so far, they did not succeed. One additional route proposed, as aforesaid is the Council Route. It is to be noted that the Council's choice to withdraw its affidavit from the discussion before



the Appeal Committee, and to avoid submitting the proposed route to the Committee for examination, indeed raises difficulties. However, under the current circumstances, we believe that this is not enough to dismiss the presentation of the Council Route in the procedure before us, and it has indeed been presented to us in detail. After examining the Council Route, we have reached the conclusion that it does not comply with the security purposes at the heart of the fence as much as the route determined by the Respondents. In this decision, we have given great weight to the Petitioners' detailed opposition to this route. However, since this concerns a question entirely located in the field of security estimation and specialty, and given that the Respondents are the ones with the knowledge and responsibility in this matter (see, for example, the Masha Case, paragraph 22; the Beit Surik Case, pp. 842-844, 846; HCJ 8414/05 Yasin vs. The Government of Israel, paragraph 29 (4.9.2007); the Walaja Case, paragraph 14; the Alram Case, paragraph 48). In this matter, the Petitioners failed to lift the heavy burden of disproving the Respondents' professional opinion and to convince us that the route suggested by the Council is preferable to the one determined by the Respondents. In light of the above, we cannot accept the claim that the Council Route comprises an appropriate alternative to the route discussed in the current Petition.

22. In contrast to the Council Route, two other alternatives (the Sleeve Alternative and the Envelope Alternative) were proposed by the Respondents, following



our Decision from 7.8.2014. These alternatives involve, at least presumably, less injury to the Monasteries and those needing their services, in light of the inclusion of the Men’s Monastery on the “JSA side” of the fence. In addition – we believe that these alternatives sufficiently fulfill the security purposes at the heart of the fence. Under these circumstances, we were not convinced that the fence could not be built in a route enabling fulfilling the security purposes at its heart, but that would involve less injury to the rights of the Monasteries and the protected residents. Specifically, we are in doubt as to whether there exists a possibility to build the fence in a route that would not necessitate leaving the Men’s Monastery on the “Israeli” side of the fence, including the resulting injuries to its rights and the rights of its community, the area’s inhabitants. However, at this stage and in light of the information brought before us, it is impossible for us to decide whether these indeed comprise real and sustainable alternatives to the route in question. This, seeing as the preliminary conditions for the implementation of the two proposed alternatives have not been fulfilled. As aforesaid, the conditions set by the Respondents for the performance of both alternatives offered by them, and mainly receiving the Monasteries’ consent and obligation to avoid resisting the actions involved in this. The Monasteries oppose both alternatives, and the Petitioners and the Nature and Parks Authority are reluctant to accept them as well. In addition, it has been noted that the building of the fence according to both of the above alternatives might necessitate the issuance of additional seizure orders, as well as additional



expropriation and use of land for a limited period. At this stage, it has not yet been clarified whether this would indeed be necessary and whether such acts might injure the rights of additional entities whose position has not yet been heard and who are not a party to the current procedure (compare, Ras Khamis Case, paragraph 23, Salameh Case, paragraph 16). In light of all this, the probability and applicability of both alternatives proposed by the Respondents are unclear. Seeing as such, in this current point in time it is impossible to evaluate the probability of these alternatives or to express a clear opinion regarding their proportionality.

23. In light of the aforesaid, we do not see fit to express, at this point, a binding position on the question of whether these comprise appropriate alternatives. At this time, it is enough to state that on the surface, the Sleeve Alternative, and especially the possibility to delegate the authority for security checks at the Men's Monastery gate to the Monastery, incurs significant difficulties. This, for security considerations, for practical considerations and for considerations concerning delegation of control authority to the Monastery's employees. The question of whether the Envelope Alternative is a sustainable possibility was not satisfactorily clarified to us and in lack of further details in this matter, this question cannot be decided. In our opinion, the Respondents must reexamine whether it is possible to determine an alternative route for the fence that would enable the inclusion of the Men's Monastery on its "JSA side". It should be



clarified that it is not our intention that they should necessarily act according to the alternatives offered in the aforesaid procedure. As is well known, application of the proportionality tests does not necessarily result in only one “correct” answer. The Authorities might be faced with a number of possibilities, which would all be found in the “proportionality area” and the choice between them is given to them. It should be mentioned that anyway any route chosen by the Respondents would be subject to judicial review. In this matter, President A. Barak’s words are relevant, written regarding the Marabah Case, on pp. 555, though said in a slightly different context, according to which:

“And what is the answer if examining an alternative route would lead to the conclusion that the only route fulfilling the minimum security requirement is the existing one? For without it there would be no safety for Israelis; for with it there is great injury to the village residents’ quality of life? What is the answer in this situation (“absolute” application of proportionality in the narrow sense: Surik Case, pp. 840)? This is the most difficult question. ...How shall we resolve this difficulty in the case before us? It seems to us that it is not yet time to deal with this difficulty, and perhaps that time will never come. It should be hoped that examining the second condition of the proportionality test would enable a



change to the fence's route, in the spirit of our comments, in a way that would find a new route whose injury to the lives of the local residents would be far lesser than the one caused by the present route..."

24. In light of our aforesaid conclusion, we do not see fit to determine at this time whether the rest of the injuries involved with the building of the fence are proportionate. My intention is especially regarding the injury arising from the fence's passage through Beit Jala's residents' lands and the Monasteries', and the separation of these entities from their lands. Anyway the possibility to examine these injuries is highly limited in light of our conclusion that a renewed examination of the fence's route is needed. This, seeing as any change made to the route might also affect the proportionality of the aforesaid injuries. Thus, for example, the potential changes to the fence's route might also change the regulation of passage to the Petitioners' and the Monasteries' lands. In this context, we will comment that it is understood that every effort should be made in order to minimize the injury to the area's inhabitants, the monks and the Monasteries' employees. It's to be hoped that in this aspect, too, cooperation will be had between the relevant entities in order to reach an agreement which would enable as convenient access as possible between the Monasteries, the area's inhabitants, and their lands (on the issue of passage regulation, see, for example, H CJ 11344/03 Salim vs. IDF Forces Commander in Judea and





Samaria, paragraphs 41-43 (9.9.2009); HCJ 1182/08 Nasser vs. The Government of Israel, paragraph 23 (17.8.2010); Masha Case, paragraphs 24-25; Beit Surik Case, pp. 851-854; Alram Case, paragraph 55).

25. As part of the reexamination, the aspect of time should also be considered. As we have seen, the procedures before the Appeal Committee lasted for about seven years. If there is a need to issue one or more new seizure orders regarding a different route of the fence, and if the affected parties would oppose the orders and appeal to the Appeal Committee, as they are entitled to do, this matter should be considered. It should not be acceptable that the issuance of a new order would delay this matter for another long period. Eventually, and since this concerns a fence with the purpose of protecting Israel's inhabitants, the period of time which may go by without completing the fence bears great weight.

The President (ret.)

Judge U. Vogelmann:

My colleague, the President (ret.) A. Grunis, found that that the Respondents must reconsider the route of the separation fence in the section at the heart of this Petition, so that there would be no separation between the Salesian Sisters Convent and Salesian of Don Bosco. In my view, despite the aspect of time on which my colleague the President insists, there can be no escape from changing the route in the focused aspect explained by my colleague and for his reasons, in a way that

---

Latin Patriarchate Rd. 40, P.O.B. 1244, Jerusalem 91000

شارع البطريركية اللاتينية 40, ص.ب. 1244, القدس 91000

דרך הפטריארכיה הלטינית 40, ת.ד. 1244, ירושלים 91000

טלפון, هاتف: +972 6264662

www.saintyves.org

פקס, فاكس: +972 (0)2 6264663

(0)2

Fax:



would prevent disruption to the territorial continuity between the Monasteries – between them and themselves – and also there should be no separation between the local Christian communities in Beit Jala and Bethlehem (note: I do not set my opinion at this stage relating the question of potential separation between the Monasteries and the agricultural lands cultivated by the monks). In this sense, I agree that the order nisi will become permanent.

To this I will add that I concur with my colleague’s decision that there is no cause to intervene with the Military Commander’s discretion, which did not see fit to accept the route suggested by the Peace and Security Council for having, in its view, significant security flaws, particularly in the aspect of lack of efficient alert area, due to the great closeness of the route to the borders of the Gilo neighborhood. The aforesaid is not to dismiss the Council’s principle opinion and the professional opinion’s weight. However, in the words of President A. Barak – “This matter regards two military approaches. Each possesses advantages and flaws in the military field. In this state of things we must lay the Military Commander’s professional opinion at the base of our Ruling” (HCJ 2056/04 Beit Surik Village Council vs. The Government of Israel, Ruling 58(5) 807, 845 (2004)).

Judge



Judge N. Hendel:

I concur with the Ruling of my colleague the President (ret.) A. Grunis and with the comment of my colleague Judge U. Vogelmann.

Therefore, we make the order nisi permanent but in the following sense: the Respondents must reconsider, soon, the various alternatives of the separation fence's route in the section at the heart of this Petition. No order for costs will be issued.

Given today, 13<sup>th</sup> of Nisan, 5775 (2.4.2015)

The President (ret.)

Judge

Judge