2. JAMAL MAHMUD ASSLAN AND 42 OTHERS

v.

COMMANDER AND MILITARY GOVERNOR OF THE GALILEE (NA'AMAN STAVI)

In the Supreme Court Sitting as a High Court of Justice

Oshlan P., Silberg J. and Landau J.

Cherniak for the petitioners
Glekman for the respondent

JUDGMENT

Landau J.

These two petitions have been considered by us as one. In both the petitioners claim that they have a right to live in the village of Rabasiya in the Western Galilee. And this is the background of the petitions: On August 2, 1951 the respondent, Na'aman Stavi, in his capacity as military commander, issued an order under regulation 125 of the Defence (Emergency) Regulations 1945** in which the built-up area of the village Rabasiya was declared a closed place, the leave from and entrance to which would be allowed only upon special permits issued by the respondent or on his behalf. There were no people in the village at the time. On September 24, 1951 a number of past inhabitants entered Rabasiya but were immediately evicted therefrom on the respondent's command. Of those who entered the village, fourteen men and women were brought to trial before a military tribunal and sentenced to imprisonment or fines. In the meantime, on September 26, 1951, the returning villagers, thirty one in number, filed a petition with this Court (H.C. 220/51) in which they demanded that the respondent be forbidden to expel them from the village. An order nisi was issued and on November 30, 1951 it was made absolute on the Court's finding that the Closure Order lacked legal effect since it had not been published in Reshumot *** as required under section 10 of the Law and Administration Ordinance 1948.

Relying upon that judgment, several persons again returned to the village during the period between November 30, 1951 and December

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* (1955) 9 P.D. 689

** These regulations were originally enacted under the British Mandate over Palestine.

*** The official gazette

6, 1951. On December 6, 1951 the respondent's Closure Order was published in Reshumot (Kovetz HaTakanot* No.225) and on December 10, 1951 the Prime Minister promulgated Emergency Regulations (Continuance in Force of Provisions), 1951 (Kovetz HaTakanot no. 226) in which it is stated that any provision of the law in effect on May 14, 1948 that enables the enactment of regulations without publication in Reshumot will be of effect also from that day on, notwithstanding the provision of section 10 of the Law and Administration Ordinance,1948. From the commentary to these Emergency Regulations it appears that they were made so as to fill what the secondary legislator considered to be the loophole found in the judgment in H.C. 220/51 and to validate, notwithstanding, the effect of those orders and regulations that had been lawfully issued but not published in Reshumot. That objective was accomplished by the abovementioned formulation, which restored the effect of the Mandate provisions as to the effect of unpublished regulations (such as regulation 3(2) of the Defence (Emergency) Regulations, 1945) and extended them to regulations and orders issued after the establishment of the State, such as the respondent's abovementioned order. The Emergency Regulations were repealed by the Knesset in the Law and Administration (Amendment No.2) Ordinance, 1952 (Sefer HaHukim 93, from March 13, 1952) which rehearsed their content in different form and received retroactive effect from May 15, 1948.

2. The petition in H.C. 288/51 was filed on December 8, 1951 and in it this Court was requested by forty three petitioners to serve an order nisi upon the respondent that would forbid him to expel them from Rabisiya and prevent them from entering and leaving the village and living therein, and likewise to void the above-mentioned Closure Order to the extent that it attaches to Rabasiya. This Court regarded the Order as being of full effect subsequent to its publication in Reshumot, and the order nisi that was issued on December 9, 1951 confined the proceeding to the issue of only fifteen of the petitioners who claimed that they had returned to the village prior to publication of the Closure Order, that is, before December 6, 1951. Thereafter, on January 29, 1952, forty-five petitioners (including the petitioners in H.C. 288/51 and several additional persons) filed a new petition, H.C. 33/52, for the issue of permits to enter and leave the village in accord with the provisions of the respondent's Closure Order. In that file the order nisi was issued as requested on February 14, 1952.

3. It follows from the aforesaid that the questions calling for clarification are narrowed down to the following:

(a) Did the fifteen petitioners, on whose request the order nisi in H.C. 288/51 issued, or any one of them, return to the village

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* Kovetz HaTakanot is the section of Reshumot containing subsidiary legislation.

prior to December 6,1951? The State Attorney did not dispute that any petitioner who proved this is entitled to live in the village and we likewise heard no objection on his part that such petitioner receive a permit to enter and leave the village in accord with the Closure Order.

(b) Are the forty five petitioners in H.C. 33/52 entitled to receive permits to enter and leave the village on the basis of the reasons brought in that petition?

4. As to the fifteen petitioners in H.C. 288/51, petitioner no. 17, Ali Muhamad Abd-el-Hamid, claimed in his affidavit that all these petitioners returned to Rabasiya, some on the second of September (sic) 1951, some on the third, and some on the fourth, that is, during the short six day period between the giving of judgment in H.C. 220/51 and publication of the Closure Order in Reshumot. On the other hand, we were submitted with affidavits on behalf of Police Sergeant Reuven Ben-Zvi who visited the village on December 6, 1951 at approximately 7 P.M., Police Commandant Yitzhak Shvili who visited there on December 7, 1951 at 9 o'clock in the morning and Police Sergeant Yehoshua Shamai who visited there on December 10, 1951 at 9:30 P.M. All these affidavits contradict the content of the affidavit of petitioner no.17. None of these deponents were summoned for cross-examination by the petitioners. As far as we are concerned the most important affidavit is that of Sergeant Ben-Zvi who visited the village on the very day the Order was published. On that day he found six persons in the village and from among the above fifteen petitioners - only petitioner no.35, Miriam Carimu. But the petitioners claim that during those days, while they finished repairing their homes, towards evening they used to send their women and children to pass the night in the neighboring village of Danon and only they themselves spent the night in Rabasiya. According to this argument, it is possible that at 7 o'clock in the evening Sergeant Ben-Zvi did not see the women and children who had already settled in the village but were absent through the night. We therefore turn to the affidavit of Commandant Shvili, who came to the village the following day at 9 o'clock in the morning. He too found there only Miriam Carimu from among the petitioners. He adds further that while he was in the village, petitioner no.17 appeared from the direction of the village Danon in a truck carrying five women and several children with their belongings who arrived so as to enter the village, but he, the Commandant, informed them that the Order had been issued by the Military Commander and consequently they all turned back. Petitioner no. 17 was examined before us and we were not impressed from his answers that the statements in his affidavit are to be believed. In view of the policemen's affidavits we are unconvinced that any of the petitioners in H.C. 288/51 returned to the village before December 6, 1951, except for petitioner no. 35.

5. Among the petitioners in H.C. 33/52, petitioners no.29, Muhamad Abd-el-Hamid Abd El-Aal, and no. 30, Jamila Carimu, are in the same position as petitioner no.35 in H.C. 288/51, for they too were found by Sergeant Ben-Zvi during his inspection of the village on December 6, 1951. These three persons are entitled to live in the village Rabasiya and for that reason there is no cause to withhold from them permits to leave and enter the village.

6. The first argument made by the remaining petitioners in H.C. 33/52 was that the above-mentioned Emergency Regulations which were passed by the Prime Minister are of no effect, and in any event have no retroactive effect, and do not, therefore, have any impact on the legal and factual situation that existed before their promulgation. It follows, the argument continues, that whoever had a right to reside in the village before promulgation of the Regulations, retains that right even after their promulgation. As regards this right, Mr. Cherniak, counsel for the petitioners, referred to the judgment in H.C. 220/51 and its factual findings that the villagers were expelled from the village by the Israel Defense Forces at the time of its occupation in May 1948 but returned to it in the spring of 1949 and lived there until January 1950 when they were again expelled therefrom. Since the petitioners left the village against their wishes, they should be regarded as never having left it. Furthermore, the first fourteen petitioners were arrested in September 1951 and sentenced to imprisonment and fines because they had violated the respondent's Closure Order. Since this Court in H.C. 220/51 declared the Order invalid, it follows that their imprisonment was illegal and they should at the least be considered as having resided in the village on December 6, 1951 when the Order was published in Reshumot. So much, in brief, for the arguments of Mr. Cherniak in H.C. 33/52.

7. The question as to the validity of the said Emergency Regulations has become academic since their content has since been enacted in statute by the Knesset. Morever, the merit of these arguments was, in effect, refuted by this Court when it refused to issue an order nisi in respect of all the petitioners in H.C. 288/51 after hearing the very same arguments. As to the factual findings in H.C. 220/51, it is doubtful whether those findings are binding in the present proceeding, excepting those that were necessary to the Court's final conclusion that the Closure Order was invalid because it had not been published. In any event, even the finding that the villagers were expelled from the village by the Army in 1948, and again in 1950, does not prove that in September 1951 and thereafter they are to be regarded as if they had lived continuously in their village. A significant period of time transpired between the first expulsion in May 1948 and their return to the village (in the spring of 1949 according to those findings) and we do not know where they lived in the meanwhile and why they procrastinated so in returning. But we can leave aside these questions because in our opinion the petitioners' right to live in the village should not be founded on events that occurred before the judgment in H.C. 220/51; for after that judgment was given a full week passed until the order was published in Reshumot. In the course of that week (from November 30, 1951 until December 6, 1951) the villagers were free to return. Some of them grasped at the opportunity but the remainder did not. Since their freedom of action was restored to them during those days there is no room to return to previous events, as if they continued to live outside the village out of coercion. Even if the petitioner's statements are correct, in that the course of events from the start of the matter vested in them the right to return to the village, they could have realized that right during the above-mentioned interim period, and the right of any person who did not do so has expired. We add here that the petition in H.C. 228/51 tells that Mr. Cherniak

explained the result of the judgment in H.C. 220/51 to the petitioners on December 1, 1951 and advised them to return immediately to the village. The excuses brought therein on behalf of the petitioners to the effect that they were supposedly apprehensive of returning out of fear of the respondent or mistrust in the explanation given to them, are of no substance. For despite this some of them returned at that time and others claim that they returned but have not proven it, as aforesaid.

8. Regarding the fourteen petitioners who were brought to trial in the military tribunal it is stated in the petition (paragraph 9) that they were sentenced to "prison terms and fines", and, in paragraph 17, that the Chief of Staff "reduced their sentences and on December 10, 1951 released those of the first fourteen petitions who were still detained on that day". From this we are given to understand that not all the petitioners were still imprisoned on that day, and it is possible that some of them had served their full term before December 6, 1951 or perhaps had not been sentenced to imprisonment at all but only to payment of a fine. It has not been proven, therefore, who among these petitioners were imprisoned until December 6, 1951 and it has likewise not been proved who among them were in a different situation from the other petitioners who were not brought to trial before the military tribunal. Hence, the additional argument of these fourteen petitioners fails for lack of evidence and there is no need to inquire into the legal merit of the argument as if it has been proved factually.

9. Another argument that was made on behalf of all the petitioners in H.C. 33/52 is that the respondent's refusal to issue them permits to enter and leave Rabasiya is attributable to dishonest intentions and victoriousness. In fact these arguments are addressed primarly to the Closure Order itself. Thus, for instance, Mr. Cherniak noted that the authority of the Minister of Defence to declare security zones is subject to review by the Foreign Affairs and Defense Committee of the Knesset, whereas under regulation 125 the Military Commander may issue closure orders without similar review. He says further that the Closure Order was issued in order to remove the petitioners from their village, which constitutes abuse of the authority vested in the Military Commander under regulation 125. We cannot pay heed to arguments such as these in this petition, where the court is asked to order the issue of permits on the basis of the very same Order. The petitioners cannot attack the Order and at one and the same time request the respondent to act upon it.

10. We must therefore confine the discussion to the arguments addressing the respondent's refusal to issue the petitioners permits to enter and leave the village on the basis of the Order. But the petitioner's standing in this Court is weak in the first place, if they come to seek permits on the basis of the Order: The Closure Order negates their right and the Military commander's permit is a privilege that releases a given person from the general effect of the Order. If the Military Commander deems it proper to refrain from granting this privilege to an applicant, he is not obliged to justify his refusal before this Court, but it is rather the petitioner who has to convince the Court that the Commander acted arbitrarily or out of malice.

11. In the instant case a certificate signed by Mr. P. Lavon, as Deputy Minister of Defense, was submitted as regards both files, and it states that "disclosure of the facts and factors that served as grounds for the decision of the previous Military Governor of the Galilee to declare the village Rabasiya and other places as closed areas, in accord with regulation 125 of the Defense(Emergency) Regulations, 1945, is contrary to the security interests of the State" and Mr. Stavi deposed in reply to the petition that just as security considerations brought about the declaration of the closed areas, such considerations similarly prevented the issue of entrance and leave permits to the petitioners. This answer is sufficient unless the petitioners can convince the court that the security considerations are illusory and brought solely to cover a refusal to issue the permits for invalid reasons. The petitioners indeed tried to prove this. In that respect they refered inter alia to the following facts that are either undisputed or contained in a deposition submitted on their behalf in Motion 128/53, whose deponent was not examined by the State Attorney:

a) The village Rabisiya is not situated on the State border, and does not lie within the security zones adjacent to the borders.

b) The majority of the petitioners live to this day in the villages Danon and Sheikh Dahud, at a distance of only several hundred meters from Rabasiya. Topographically, the village Danon commands the vicinity no less than Rabasiya.

c) A number of Jewish settlements have been settled in the area surrounding the village since the establishment of the State.

d) Some of the lands of Rabasiya, to the north and south of the village's built-up area, were leased by the Custodian of Absentee Property to the villagers themselves. Mr. Stavi admitted in his testimony that this was done with his knowledge.

e) If the military authorities once had plans in respect of the village, many years have passed in the meantime and there is no indication that such plans are being implemented,for the village remains desolate as before.

Counsel for the petitioners enumerates all the facts and others too and says that the respondent's refusal to allow the petitioners to return to their village derives from victoriousness and vindictiveness, and that the security reasons are no more than a mask for the respondent's actual motives.

12. In view of all this, it is not surprising for the suspicion to arise that the unrevealed security reasons are no reasons at all. However, the Court cannot rule simply on the basis of fears and suspicions. It requires more concrete grounds for its decision. And here we come up against the same difficulty that this Court (sitting with a different panel) warned of in H.C. 111/53: the submission of the certificate of the Deputy Minister of Defense precludes, in this instance too,any

possibility of material inquiry, and it in eff ct frustrates from the very start any attempt to prove the one argument available to the petitioners - that regarding the respondent's lack of good faith. Mr. Stavi took oath before us that he took into account only security considerations. We have to admit, that in view of the facts enumerated above it was not easy to trust the candor of these words. But, unfortunately finding ourselves in a state of ignorance, we are not prepared to dismiss altogether the possibility that there exists a genunine security consideration, of which we were not informed, sufficient to justify the respondent's position. That is decisive of the petition in H.C. 33/52.

13. The aforesaid is sufficient in terms of the reasoning behind our decision in these two petitions. But we cannot conclude the opinion without adding two comments:

a) We are not convinced that the authorities did all they could to terminate the painful affair of the Rabasiya villagers in proper manner. The lengthy postponement of the hearing of these two petitions was of no avail in prompting a compromise between the parties, and the attempt of one of the Judges to summon the parties together and find a common language between them was also of no avail. It is time now for the authorities to reconsider the entire affair and for such inquiry to be effected at the highest possible echelon. The problem of the Rabasiya villagers is unique and more serious than others and for that reason its settlement requires extraordinary measures. The petitioners reside lawfully in the State. Rabasiya is not situated in a border region. In their present situation, the villagers pose a grave human and economic problem that will continue to bother the authorities. Do there truly exist substantial security considerations that prevent a reasonable solution?

b) This proceeding illustrated vividly, yet again, the deficiencies in the rules of evidence that prevent legal examination of the "security reasons" argument - both regarding the merits of such reasons and the question whether the entire argument is made in good faith. This necessarily casuses the citizen feelings of deprivation and suspicion as to the good intentions of the authorities. This problem does not concern us alone; it has also been considered in other countries - recently by the Supreme Court of the United Sates in U.S. v. Reynolds 73 S.Ct.528 (1953), where the deceased Justice Winson defined the core of the question in the following apt words at p.533:

> "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers".

He suggests there, a kind of compromise solution to the problem, but his proposal, into which it is not appropriate to go at length here, does not commend itself to us as practical and it is also possible that we are not free to adopt it even had we so wished, in light of previous decisions of the Court in the spirit of the English precedents. It

seems to us that this matter should be duly considered by the legislature. We strongly believe that it is possible to find a solution that will satisfy the security considerations that are decisive in the present situation of our country, and will, notwithstanding, allow a certain degree of judicial inquiry into the argument of security reasons when such is made by the authorities.

14. On the basis of the aforesaid we make absolute the orders nisi as regards petitioner No. 35 in H.C. 288/51 and petitioners No. 29 and No.30 in H.C. 33/52 and order the respondent to issue these petitioners permits to leave the area of the village Rabasiya and to enter it. We set aside the orders nisi issued in the two files as regards all the remaining petitioners. There is no order for expenses.

Judgment given on April 28, 1955.