

HCJ 3511/02

1. **Negev Coexistence Forum**
2. **The Association of Forty**
3. **Communal Council of the Settlement of Um Batin**
- v.
  1. **The Ministry of Infrastructure**
  2. **Drainage and Infrastructure Development Administration**
  3. **Water Commissioner**
  4. **Ministry of the Environment**
  5. **Ministry of Health**
  6. **Ministry of the Interior**
  7. **Ministry of the Treasury**
  8. **Drainage Authority of Shikmah Bsor□**
  9. **Omer Regional Council**
  10. **Meitar Regional Council**
  11. **Tel Sheva Regional Council**
  12. **Bnei Shimon Regional Council**
  13. **The Government of Israel**
  14. **The Israel Lands Administration**

The Supreme Court Sitting as the High Court of Justice

[January 16, 2003]

*Before Justice E. Mazza, Justices D. Dorner and E. Levi*

Petition to the Supreme Court sitting as the High Court of Justice

**Facts:** This petition concerns an urgent petition for an interim order. Petitioners request that the State build a bridge over Wadi Hebron in order to enable children to reach the regional public school. The State recognizes the urgent need for erecting a bridge, but claims that it is not possible within the framework of current regional planning laws.

**Held:** The Supreme Court held that the Basic Law: the Judiciary has a constitutional status superior to ordinary legislation. This superior status is not limited to the Basic Law's grant of jurisdiction but also applies to its conferral of power to grant remedies. The Court, however, will generally abstain from granting a remedy under the Basic Law: The Judiciary if that remedy does not accord with other legislation, even if that legislation is subordinate to the Basic Law. However, in outstanding circumstances, when the case "cries out for help," the court will not abstain from taking advantage of this "unconventional" authority. The Court held that, under the circumstances, use of its authority pursuant to the Basic Law was justified. As such, the Court ordered the State to build, as quickly as possible, a bridge over Wadi Hebron.

**Basic Laws Cited:**

Basic Law: The Judiciary, §15

**Legislation Cited:**

Planning and Building Law-1965, § 151

**Israeli Supreme Court Cases Cited:**

- [1] HCJ 2208/02 *Salama v. Minister of Interior Affairs*, IsrSC 56(5) 950
- [2] HCJ 101/74 *Building and Development in the Negev Inc. v. Minister of Defense*, IsrSC 28(2) 449

**Israeli District Court Cases Cited:**

- [3] CA (Tel-Aviv) 71208/00 *Bar Ilan v. State of Israel* (unreported decision)

**Israeli Magistrate Court Cases Cited:**

- [4] CA (Tel-Aviv) 15237/97 *State of Israel v. Bar Ilan* (unreported decision)

Petition granted.

On behalf of the petitioners— D. Fish; L. Golan  
On behalf of respondents 1-7, 13, 14—A. Koren

## **JUDGMENT**

### **Justice E. Mazza**

This petition, submitted on April 25, 2002, concerns the problem of the sewage flowing in Wadi Hebron, which has been afflicting residents of the scattered Bedouin settlement of “Um Batin.” One petition requested that we issue an interim order requiring the state to immediately erect small bridges for passage by foot and by car over the wadi “in order to immediately alleviate this constraint on the residents’ freedom of movement into the settlement and outside of it, as well as to preserve their health and prevent incidents of drowning.” In response, the State asserted, that, although the government had decided to establish a permanent settlement for the scattered settlement of Um Batin, “until the permanent settlement is planned, there are practical and normative difficulties in arranging access roads to the illegal settlement.” The State described the planning difficulty:

The district planning scheme states that building permits will not be issued, nor will lands be allowed to be used, unless such is done pursuant to the regional scheme. No such regional planning scheme exists for the area where the scattered settlement of Um Batin and the adjacent riverbed are located. Until a detailed planning scheme, which will allow for the issuance of building permits, is approved, or until a regional planning scheme that modifies the above-mentioned rule is approved, no building will be permitted in that area, not even small bridges.

On May 20, 2002, Justice Levi ordered that the application for an interim order be decided by the panel hearing the petition. On September 11, 2002 we held oral arguments and decided:

[t]he petition raises a difficult problem which demands a practical resolution within a short period of time. The solution offered by the government is not satisfactory. We understand that a meeting is to be held on September 30, 2002 for the purpose of developing a solution—unfortunately only temporarily—for the issue dealt with in the petition. Before deciding how to deal with the petition, we ask that, before the end of October, the State Advocate submit supplementary briefs setting out the suggested plan and a tentative schedule for its execution. We expect that the arrangement will be one that can be practically implemented within a short period of time.

On January 1, 2003, after the State had submitted several updating statements, petitioners submitted an urgent application for an interim order. The application stated that “due to flooding in Wadi Hebron last week, one of the two unstable, make-shift bridges, which were constructed by the residents of Um Batin of their own accord, collapsed. All agree that these bridges do not provide a solution to the problem and are not a substitute for safe, well-designed bridges. When the bridges collapsed, only a miracle prevented human casualties. The one remaining bridge is narrow and unstable and only allows for individual passage.” Additionally, petitioners explained that “since the bridge that collapsed had been located near a school, and since crossing the strong water currents is dangerous for the children, the settlement’s elementary schools were closed” on rainy days.

In its response, the State reiterated its claim that, from a planning perspective, building even only temporary small bridges is impossible. However, the State noted that significant changes in the planning situation are expected over the next few months, which will allow for the issuing of permits for building stable small bridges.

Following an urgent hearing on January 9, 2003, the State accepted the responsibility “of examining possible legal means of either situating a new small bridge on the location that is predisposed to flooding, or rehabilitating or strengthening the currently standing bridge.” However, in a statement submitted on January 14, 2003, the State asserted that it had not succeeded in finding such a legal means. At the same time, the State claimed that the Ministry of the Interior had committed itself to building such bridges within the coming months, as soon as the planning arrangements were confirmed.

We begin by noting that we have reservations regarding the State’s claim that the Planning and Building Law does not allow the construction of a temporary bridge without a building permit. For example, in the case of the Maccabia Bridge tragedy, the defendants were acquitted of a charge of illegally building a bridge without a permit. The court there stated, based on a number of Supreme Court precedents, that planning laws do not apply to temporary structures. *See Crim. A. (Tel-Aviv) 71208/00 Bar Ilan v. State of Israel*, [3]; CA (Tel-Aviv) 15237/97 *State of Israel v. Bar Ilan*, [4]. However, we need not resolve this issue at this time. This is because we are of the opinion that we have the authority to issue the requested urgent interim order, even under the assumption that planning laws do not allow this.

Section 15(c) of the Basic Law: The Judiciary states:

The Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court.

The normative status of this law is constitutional and superior to ordinary law. *See HCJ 2208/02 Salama v. Minister of Interior Affairs*, [1] at par. 2. This superior status is not limited to the Basic Law’s grant of jurisdiction—an interpretation which may possibly be gleaned from some of the judgments regarding this section—but also applies to its conferral of the power to grant remedies. Justice Berinson noted as much in his

precedent-setting judgment in HCJ 101/74 *Building and Development in the Negev Inc. v. The Minister of Defense*, [2] at 455:

We should note that, just as there is no limit to our subject matter jurisdiction, (aside from refraining from interfering with matters under the authority of another court), similarly, and perhaps even more so, there is no limit to the remedies that this court may offer the citizens who have been harmed by an act or omission of the government or a public authority. This Court may grant any remedy or relief it sees fit as necessary for the sake of justice.

Nevertheless, the High Court of Justice will generally abstain from granting a remedy under section 15(c) of the Basic Law: The Judiciary if that remedy does not accord with other legislation, even if that legislation is subordinate to the Basic Law. However, in outstanding circumstances, when the case “cries out for help,” and there is no alternative way to legally provide “relief for the sake of justice,” the court will not abstain from taking advantage of this “unconventional” authority.

This is a “Kafkaesque” situation that cries out for help. Young children are required to endanger their lives in order to reach the public school that the State of Israel erected near their homes, or, alternatively, to refrain from attending school on rainy days. The State does not deny its duty to build a small bridge for passage over the wadi in order to prevent these dangers. It claims, however, that the law prevents it from doing so for the next few months. It is unthinkable that planning laws are intended to prevent the building of emergency temporary structures for the sake of saving lives. Even if we were to assume that this was their intention, planning laws cannot overcome the constitutional and superior rule found in section 15(c) of the Basic Law: The Judiciary. This is especially true when the rules which here allegedly prevent the granting of building permits for the bridges are located in inferior secondary legislation—regulation 17(2) of the Planning Regulations (Substantial Deviation from a Plan)-2002, and section 8.1 of the regional planning scheme RCP 14/4—and not in the relevant primary legislation, the Planning and Building Law-

1965, § 151.

As such, due to the outstanding circumstances of this case, we have decided to issue an interim order instructing the State to build, in the shortest possible period of time, a stable small bridge over Wadi Hebron, which will allow the children of the scattered settlement of Um Batin to safely cross over the wadi on their way to school. In their final statement, petitioners requested that additional bridges be built on the path to the regional medical clinic and at the entrance to the village. This request was not mentioned in their urgent application on January 1, 2003, or in the hearing which was held on January 9, 2002. As such, we have disregarded this request.

January 16, 2003

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TRANSLATED BY: Leora Dahan  
EDITED BY: Eli Greenbaum

Comments, questions and suggestions are all welcomed, and may be directed towards [elig@supreme.court.gov.il](mailto:elig@supreme.court.gov.il)

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