In the Supreme Court

P.C.A 3094/11

Before:	His Honor Deputy President E. Rubinstein His Honor Justice N. Hendel Her Honor Justice D. Barak-Erez
The Applicants:	1. Ibrahim Farhud Abu Al-Qi'an *et al* 2. Atwa Issa Abu Al-Qi'an *et al*
	v.
The Respondent:	The State of Israel
	An Application for Permission to Appeal the Judgment of the Be'er Sheva District Court (Deputy President S. Dovrat and Judges R. Barkai and A. Vago) in C.A. 1165/09 dated February 28, 2011
Date of Session:	12th of Sivan, 5774 (June 10, 2014)
On behalf of the Applicants:	Adv. Hassan Jabareen; Adv. Suhad Bishara
On behalf of the Respondent:	Adv. Moshe Golan; Adv. Hani Trudi

J U D G M E N T

Deputy President E. Rubinstein:

1. An application for permission to appeal the judgment of Be'er Sheva District Court (Deputy President **S. Dovrat** and Judges **R. Barkai** and **A. Vago**) in C.A. 1165/09, dated February 28, 2011, which denied the Applicants' appeal of the judgment of Be'er Sheva Magistrate Court (Judge G. **Gideon**) in C.C. 3341/04, dated July 30, 2009; this judgment granted the Respondent's motion to evict the Applicants and to issue a permanent injunction order against them with respect to the land owned by the Respondent, which is located in the area of the Yatir River in the Northern Negev. As will be described, the Applicants, who are members of the Abu Al-Qi'an Bedouin tribe (hereinafter: the "**Tribe**"; the "**Al-Qi'an Tribe**"), have been living for the past 60 years in an unrecognized Bedouin village "**Atir - Umm Al-Hieran**") (hereinafter: the "**Village**"), named after the two complexes that comprise it, which we will address below; As will be detailed below, these proceedings address the Respondent's motion to evict the Applicants from the land it owns, alongside the establishment of the urban town of Hiran at this location, in accordance with the outline schemes that regulate the region.

2. Before presenting the factual background story, I will, at the outset, state the bottom line of my position, which is that after examining all of the material, I am of the opinion that the application for permission to appeal should be granted and the application should be adjudicated as an appeal, however, the appeal itself

should not be accepted. As is known, permission for an appeal to a third instance is considered in matters that go beyond the boundaries of the parties towards a broader public or legal question. Whilst at the end of the day, and despite the Applicants' arguments, as will be specified below, the Application does not raise a general issue on the **legal** level that exceeds the parties' concrete matter - the Respondent, fundamentally, is the owner of the land and is entitled to evict the Applicants therefrom, insofar as the matters are examined as a motion for eviction; However, the issue at the **background** of the Application, which concerns the settlement of the dispersed Bedouin communities on State lands in the Negev, is a matter of public sensitivity and importance, which government authorities and Israeli society have frequently been dealing with for decades. Furthermore, while the Applicants in this Application are two families, consisting of only 13 people out of all residents of the Village at hand, the eviction impacts hundreds of residents, and this, of course, must not be taken lightly. However, as I will elaborate below, I am of the opinion, after examining the matter, that the appeal should not be accepted – first, because the arguments at the core of the Application deal with planning aspects, and their natural and proper place is not within this proceeding since they constitute an indirect challenge of statutory decisions of the authorities, which were thoroughly addressed; Secondly – and beyond the necessary – I am of the opinion that in the circumstances of the matter at hand, one cannot say that the Respondent did not act in a reasonable and proportional manner, and in a way that ultimately does not amount to an infringement of the rights of the Applicants, despite their allegations in this matter.

Background and Previous Proceedings

The Al-Qi’an Tribe and the Atir - Umm Al-Hieran Village

3. As mentioned, the Applicants are members of the Abu Al-Qi’an Bedouin tribe. The history of the Tribe in the years prior to settling on the land which is the subject of this case is in dispute between the parties. However, everyone agrees that in 1956, pursuant to the directive of the military governor of the Negev, the members of the Tribe moved to the area located in the Yatir River region, and split into two complexes: the Atir complex, where Applicant 1 and his family live, and the Umm Al-Hieran complex, where Applicant 2 and his family live. It will be noted here that according to the Respondent, the two neighborhoods do not constitute one village, but are rather two separate complexes that have different settlement characteristics (without taking a position on this matter and for the sake of convenience, I have chosen to refer to both of the complexes together as the "Village"). Similarly, the number of Tribe members residing in the Village is also in dispute – according to the Applicants there are approximately 1,000 people and according to the Respondent there are approximately 750 people; the distance between the complexes is also in dispute – according to the Applicants it is approximately one kilometer and the Respondent estimates it to be two kilometers or more. There is no dispute that the majority of Tribe members moved to the Bedouin town of Hura, and that those who remained – including the Applicants – are the minority. In any event, there is no question **that the Village houses are located on land owned by the Respondent, that was registered in its name on May 9, 1978, at the end of settlement proceedings pursuant to the Land**

Rights Ordinance [New Version], 5729-1969[1]. Additionally, all of the structures in both complexes were built without permits and in violation of the law, and face demolition orders which were issued in 2003 pursuant to Section 212 of the Planning and Building Law, 5725-1965. In this context and for the sake of presenting a complete picture, it will be noted that this Court recently rejected applications for permission to appeal that were filed against the demolition orders (P.C.A. 3082/14, the decision of Justice **U. Shoham** dated September 14, 2014), and that the execution of the orders was recently stayed by a decision of the Kiryat Gat Magistrate Court until March 17, 2015 (C.L.F. 2136-09 the decision of Deputy President **O. Adam** dated December 15, 2014). The Village is not connected to basic infrastructures and its residents do not receive welfare, health or education services therein. The Bedouin town of Hura, which is recognized by the authorities and which offers such community services to its residents and the residents of the region, is located approximately five kilometers southwest of the Village. As will be described in detail, starting in the 1980's, the Respondent negotiated with the residents of the Village with the objective of vacating their houses and relocating to Hura, and indeed most of them moved there, in consideration for receiving a land lot at that location; **The Respondent is also, at the present time, offering the Applicants a land lot in Hura, assistance in developing it and connecting it to infrastructures, as well as monetary compensation, in consideration for them vacating the Village**. The details of the proceedings that will be presented below can be tiresome, due to repetitiveness that stems from the multitude of proceedings, however, I saw it fit to present the entire picture to the extent possible.

The Planning Proceedings with respect to the Village

4. The region where the Village is located is regulated in the Southern District Planning Scheme, DPS 14/4 (hereinafter: the "**District Planning Scheme**"). For the sake of good order, I will hereinbelow address each complex separately:

   The Umm Al-Hieran Complex – The decision to establish the new town of Hiran is grounded in Government Decision no. 2265 from July 21, 2002, in which the establishment of 14 new towns in the northern Negev was declared, based on the work of the "Be'er Sheva Metropolitan" Steering Committee. This decision was implemented in Amendment no. 27 of the District Planning Scheme, which includes, *inter alia*, a specific planning scheme for establishing the town of Hiran (scheme number 107/02/15, hereinafter: the "**Town Planning Scheme**") which was published for validation on May 21, 2003; It will be noted that the establishment of Hiran was also promoted as part of the planning of a cluster of towns with similar character around the Shoket Junction, in the framework of Planning Scheme DPS 23/14/4, the "Be'er Sheva Metropolitan" master plan (hereinafter: the "**Be'er Sheva Metropolitan**"), which was published for validation on August 8, 2012. The Town Scheme covers an area that is owned entirely by the Respondent and designates for demolition approximately 50 structures that were built in the Umm Al-Hieran complex. On April 23, 2008, the

[1] The correct title of the law is: **Land Rights Settlement Ordinance [New Version], 5729-1969**

District Planning and Building Committee decided to deposit the Town Scheme; the Regional Planning and Building Council decided, on December 8, 2009, on the "Establishment of a new suburban community town, Hiran, in the northern Negev, east of Meitar". On October 29, 2010, and after the reexamination of the scheme in light of the fact that the "Integrated National Planning Scheme for Construction" (NPS 35) came into effect, the deposit of the scheme was published. On January 11, 2011, a number of Umm Al-Hieran residents – including 6 of Applicant 1's daughters – filed their objection to the scheme with the Regional Council's Objections Committee, and it was denied in a decision dated December 5, 2011. An appeal on this decision, which was filed with the National Planning and Building Council's Appeals Sub-Committee (hereinafter: the "**Appeals Committee**"), was also denied in a decision dated September 24, 2012 which I will address below. On July 24, 2013, the planning proceeding was completed with the publication of the scheme in the Official Gazette (*Reshumot*); see also Government Decision 878 dated November 10, 2013, entitled "Promoting the Establishment of a New Town in the Negev – Hiran", in the following language:

> "Further to Government Decision no. 2265 dated July 21, 2002, and in accordance with the recommendation of the Regional Planning and Building Council dated December 8, 2009 regarding the establishment of a new suburban community town named "Hiran" in the northern Negev, east of Meitar, to order the Ministry of Construction and Housing act to establish a new town in the Negev – "Hiran" as follows:
>
> 1. To promote the establishment of the permanent town from a broad perspective while considering all of the aspects of establishing the town, with the assistance of the relevant government ministries.
> 2. To prepare, within 60 days, an inter-ministerial plan for realizing the establishment of the town, in coordination with the *Mevuot* Arad Plan.
> 3. To act immediately and in accordance with the law in order to enable the immediate absorption of the core settlement group at the location."

The Atir Complex – This complex is regulated in the framework of the Yatir Forest" Scheme 264/03/11, which addresses forest areas and agricultural areas in the region, including the prescription of their designations and the actions permitted therein, in accordance with the principles outlined in National Planning Scheme (NPS) 22. In this framework, the scheme designates the houses of the Tribe members that are located in the complex for demolition, in accordance with the location's classification as "a metropolitan recreation area and a proposed park forest"; On June 8, 2009, the District Committee's subcommittee decided to deposit the scheme with conditions, and it was approved by the Subcommittee on Principle Planning Matters (the "**SPPM**") on December 12, 2010. Upon the deposit of the scheme, a number of objections were filed, and on December 10, 2012, the Objections Committee instructed the approval of the scheme, subject to a few changes that were made thereto, while denying the objections of the residents of

Atir. An appeal filed by the residents was denied in the Appeal Committee's decision of October 20, 2014.

The Proceedings before the Magistrate Court

5. In April, 2004, the Respondent filed two motions to evict the Applicants from the land and to receive a permanent injunction order – C.C. 3326/04 against Applicant 1, and C.C. 3341/03 [published in Nevo] against Applicant 2; Pursuant to a decision dated April 20, 2006, and due to the identical causes of action, the hearings in the two claims were consolidated. The Respondent claimed that the Applicants took possession of the land it owns and that they are not licensed to be there, with or without consideration, but rather squatted on the land and built thereon illegally. It was further argued that as early as in the 1980's the Respondent held negotiations with the members of the Tribe in order to evict them from the land, and the majority of them indeed consensually moved to live in the town of Hura; also, that the eviction of the Applicants does not violate their right to housing since the Respondent is currently offering them alternative housing in Hura. In response to the motion, it was argued that the Applicants only found out that the Respondent owns the land adjacent to filing their answer, and that laches applies to the motion and that the statute of limitations has expired. On the merits of the matter, they argued that they are the owners of rights to the land, and alternatively, have an irrevocable license thereto, which they purchased for consideration. It was argued that prior to 1948, members of the Tribe resided on the lands owned by them in the area of "*Wadi Zuballa*" (which is currently in the area of Kibbutz Shoval), and that since then, at the orders of the Military Governor of the Negev, they have moved three times: in 1948, to the area of *Khirbet Al-Hozeil*; later on - at an unknown date – to the *Jigily* area (near Kibbutz Lahav); and in 1956, to the land in dispute. It is argued that upon their relocation to the Yatir River, the Sheikh of the Tribe was leased 7,000 dunams in the area. The Applicants also referred to a document dated August 28, 1957 (hereinafter: the "**Lubrani Document**") in which, so it is argued, Mr. Uri Lubrani – the Advisor on Arab Affairs in the Prime Minister's Office at the time – states that the members of the Tribe agreed to transfer their place of residence from the Beit-Kama – Lahav region to the vicinity of the Yatir River, and in consideration received leasing rights to the State lands at that location. It is also argued that the members of the Tribe paid the authorities for the right to reside at the location; moreover, that their waiver of their rights to *Wadi Zuballa* served as consideration in purchasing the license to the land which is the subject of this matter. The Applicants further argued that the authority's conduct throughout the years indicates its consent to granting a license to possess the land, and for example, that the residents of the Village received governmental assistance to rehabilitate structures which were ruined in a flood that occurred in the area in 1997; and that until the filing of a warning order in July, 2003, and the filing of the eviction motions, no demolition or eviction proceedings have been taken against them. The Applicants further argued that their eviction from the land would violate their right to housing, and that the eviction motions stem from the Respondent's intention to establish a Jewish town at the location, which constitutes unlawful discrimination based on grounds of nationality and violates the principle of equality.

6. As mentioned, the Magistrate Court accepted the Respondent's claim and ruled that

it is the owner of the land; that laches does not apply to its claim, since the laches clock begins to run from the time of the notice of revocation of the license to use the land; and that the Applicants did not prove the purchase of rights to the land by virtue of prescription or conflicting possession, since their settlement on the location was at the consent of the Respondent rather than by virtue of a vested right. Furthermore, it was ruled – contrary to the Respondent's argument – that the Applicants are not presumed to be squatters on the land but rather are licensed to be there, but that the license was granted for free, without consideration, and is revocable at any time. In this context, it was emphasized that the Applicants did not prove their alleged rights to the land at *Wadi Zuballa*. It was further ruled that their settlement on the land and their development thereof do not, in and of themselves, testify to the purchase of proprietary rights therein; that the Applicants' structures were built unlawfully and do not entitle them to any compensation as a condition to their eviction; that neither the investments in the location by the Village residents nor the government assistance granted to them make the license irrevocable; and that while the Applicants' arguments regarding discrimination and violation of their constitutional rights could justify granting remedy in the constitutional and administrative fields of law, before the appropriate instance – they do not establish a right to the land and do not serve as a defense against the eviction motion in this proceeding. Hence, the court instructed that the Applicants be evicted from the land.

The Proceedings Before the District Court

7. In their appeal, the Applicants repeated their arguments that the eviction motions against them were filed as part of a comprehensive process, the objective of which is to establish a Jewish town at the location. They reiterated the history of the members of the Tribe, while arguing that the license that the Respondent had granted them to settle on and work the land constitutes a government promise, based upon which they invested in the location with the expectation of staying there. Alternatively, they argued that they should be deemed licensees with a paid – irrevocable – license to the land, based on the grounds specified above. Alternatively, it was argued that the Respondent's claim was fundamentally tainted by *mala fide* and unlawful discrimination, since, as mentioned, it was filed in order to establish a Jewish town. It was further stated that the Respondent did not meet the burden lying on it to point to a public interest which can justify their eviction from the land in these circumstances. The District Court denied the Applicants' appeal, while adopting the Magistrate Court's conclusions; it was emphasized that the Respondent is the owner of the land, and that the Applicants have no right therein. It was also noted that the Applicants did not file a claim memorandum for the land or an appeal on the Respondent's registration thereof. The court further ruled that the Applicants were not given a government promise with respect to the land and that the existence of a lease agreement between the parties, evidencing the grant of a license to the land for consideration, was not proven. It was further held that since the eviction proceedings deal with parties' concrete matters, the place for challenging the planning schemes through administrative and constitutional arguments is in other instances. It was additionally emphasized that the Respondent offered the Applicants a housing solution in the form of alternative land in the town of Hura. It was, however, noted that the Respondent relied in its claims on a "standard" squatting cause of action that depicted the Applicants as

squatters who unlawfully took possession of the land; while the truth of the matter is that they relocated their place of residence to the land decades ago, in accordance with the authorities' demand, and were settled there for years with the permission of the Respondent, until it decided to revoke it.

The Application for Permission to Appeal

8. First, it was argued that the Application raises a general legal question that justifies intervention by a third instance, and that is whether it is appropriate to adjudicate the Applicants' constitutional and administrative law arguments in the framework of the eviction proceedings, given that we are dealing with their eviction from public lands to which they arrived pursuant to the authorities' demand, and on which they have been residing for years with the Respondent's permission and consent; or, whether these arguments should be discussed in other proceedings, while the courts in this proceeding should adjudicate the issue limited to the parties' matter. The Applicants argued that in this case, it is appropriate to deliberate these matters on a public level, rather than only examining the dispute on the private level, in which a land owner who gave a free license may revoke it at any time. It was also argued that the decision to evict the Applicants is an administrative decision, and as such should be examined through the prism of administrative and constitutional law; more specifically, it was argued that the decision lacks relevant factual background, since it was adopted with the purpose of establishing a Jewish town on the location. On the merits of the matter, the Applicants reiterated that they are licensees on the land, and that their investment thereon constitutes consideration in itself. In this context, it was argued that the illegality of the construction does not derogate from the above, since the members of the Tribe were relocated to the location by the authorities, and they had no choice other than to make it suitable for living. The Applicants further argued that the Respondent's decision to evict them must be examined in accordance with the principles of the State's release from a contractual engagement, and accordingly, it must justify such a release on public grounds. It was additionally argued that even if the Applicants' license to the land is revocable, the Respondent should not be allowed to revoke it because of considerations of justice,; since the Applicants have been residing in the location for many years at the authorities' demand, and their eviction could cause them significant financial and mental damage.

9. Finally, the Applicants argued that evicting them in order to establish Hiran constitutes unlawful discrimination and violates their right to equality, property and dignity. It was argued that the Respondent should have included their houses in the planning of the town, and that its decision violates the equality that is required in allocating land resources, and does not take into consideration their rights as natives. The Applicants' argument regarding violation of their right to property was grounded on their investment in the land, and their argument regarding violation of the right to dignity - on the unique fabric of life that they have created in the Village over the years. It was further argued that these violations do not meet the tests of the limitation clause, since the eviction is not for a proper cause; that the Respondent's decision does not meet the proportionality tests, since if the purpose of the eviction is to develop the land for residence, this can also be obtained without the eviction; and that the eviction is the most harmful means, especially in light of the option to legitimize the construction in the Village

in the framework of the Planning Scheme.

The Respondent's Response to the Application

10. In response to the Application it was argued that it does not raise a legal question that bears public implications, but rather addresses the concrete matters of the parties, and primarily focuses on factual determinations. In general, it was argued that when it comes to the eviction of the Applicants, the Respondent acted with consideration and proportionality – from granting a free license to the land, through the negotiations it conducted with the members of the Tribe, and to the housing solution it offered in the past, and is offering in the present, to the residents of the Village – and in a manner that neither deviates from proper administrative activity nor involves any violation of rights. It was specifically argued that the fact that the Respondent owns the land is not disputed, and that the Applicants' position that the license had been paid for is unfounded, since they did not prove their alleged rights to *Wadi Zuballa*. As for the classification of the license that was granted, it is argued that it was granted for free and is revocable at any time, and that the Applicants' investment in the land, which was made without the Respondent's approval and unlawfully, does not make it irrevocable. The Respondent further reiterated that as early as during the 1980's, it negotiated with the members of the Tribe for their eviction from the land, and that there is no substance to the Applicants' arguments that they were granted a government promise regarding the land, or that a representation was made through its conduct that they would be able to stay on the land for an unlimited period of time. In this matter, the Respondent added that the assistance that the Tribe received from the authorities was given as an act of good will, and cannot establish consent to a permanent settlement. It was further argued that the Applicants had a very extended period of time to prepare for the eviction, while being offered an alternative housing solution in Hura, which could have prevented any alleged harm; and that in light of the said solution, the Applicants' claims that they will be left without a roof over their heads were unfounded. Finally, it was noted that there is no substance to the Applicants' arguments regarding violation of basic rights and *mala fide*, since the Respondent is acting to establish towns for the dispersed Bedouin populations – including Hura – which are connected to basic infrastructures and recognized by the welfare services, instead of unrecognized villages, such as Atir - Umm Al-Hieran; and that the Respondent's actions do not amount to discrimination, particularly in light of its said willingness to provide the Applicants with an alternative housing solution.

Update Notice on behalf of the Respondent dated October 22, 2013 – the Appeals Committee's Decision

11. The planning proceedings regarding the land were completed concurrently with these proceedings. Accordingly, the Respondent filed, for our review, the Appeals Committee's decision dated September 24, 2012, in which the appeal, which was filed by 64 of the Umm Al-Hieran residents regarding the planning of the town of Hiran, was denied. The Appeals Committee's decision first reviewed the decision of the Objections Committee dated December 5, 2011, in which it was ruled, *inter alia*, that the earlier settlement of the members of the Tribe was actually in the Atir complex, while an examination of aerial photos shows that there were no buildings

in the Umm Al-Hieran areas when the planning began, and that the expansion on the location occurred in recent years in an attempt to "set facts on the ground"; that those objecting – who at that point objected to the detailed scheme for the establishment of Hiran – did not file any objection to Amendment no. 27 of the District Planning Scheme, something that was emphasized in light of the fact that the change also included a specific scheme for establishing a different town by the name of "Omrit", which was not established due to an objection that was filed at that early stage; and that the majority of the Tribe members relocated to the town of Hura, a solution that is currently still available for the members of the Tribe who remain in Umm Al-Hieran. In the appeal, it was argued that the approval of the scheme means that a Jewish town will be established at the expense of the Bedouin population, in a manner that implements a policy of residential separation and discrimination. It was also argued that the decision is contrary to the principles of administrative law which require the authority to act fairly and efficiently while promoting the interests of the entire public, and that the planning authorities ignored the situation on the ground when they did not consider including the houses of the Village in the Town Scheme. It was further argued that carrying out the scheme constitutes a violation of equality, the right to property and the right to dignity, including the right to housing, a disproportional infringement that is not for a proper cause. In summary, it was argued that the committee's decision is an additional layer in the discriminatory policy in allocating resources for the residential needs of the Bedouin population in the Negev.

12. In the Appeals Committee's decision it was first stated that it is not possible, by means of challenging the planning institutions' decisions, to object to the mere establishment of the town of Hiran, and that the Applicants should have objected to the government decision by virtue of which such decisions were adopted. Moreover, it is inappropriate, at this detailed stage of planning, to challenge the decision not to establish a town in the complex for the dispersed Bedouin populations. In this context, it was noted that the investigator who was appointed to hear the objections to the scheme recommended to avoid legitimizing the existing settlement in Umm Al-Hieran, *inter alia*, since the town of Hura provides the designated planning solution for the members of the Tribe. It was further stated that the scheme is not intended for establishing a town for Jews only, and that the policy of establishing towns for the dispersed Bedouin populations, alongside establishing towns for the general public, does not constitute discrimination, and even takes the needs of the Bedouin into consideration. It was emphasized that for years the government has been establishing designated towns for the Bedouin based on the understanding of their unique needs; and that alongside this, there is also the need to establish towns in the area for the general public. It was further stated that if the appellants will so desire, they will be able to purchase a lot in the town. It was also stated that the Respondent, as the owner of the area, agrees that they are free to file a detailed scheme that will be able to provide a fitting response to their housing needs, and that such a scheme will be discussed within a short period of time. It was also noted that the District Committee's representatives did not, in principle, see a "material difficulty", in including the Applicants' houses in the scheme, but that it is not possible due to the Lands Administration's objection; in this context, it was stated that in the planning institutions' decision whether to legitimize illegal construction, weight should be given to the principle of protecting the rule of law, and the owner of the land should not be forced to

legitimize illegal construction thereon, especially when such construction was done by someone who does not have rights to the land . It was also noted that when the planning proceedings began, there were a small number of tin shacks in the Umm Al-Hieran complex, and that the mass of residential houses on the location was only created in recent years. As for the allegations of discrimination and deprivation, the committee thoroughly reviewed the steps taken by the government and the resources allocated to regulate the settlement of the members of the dispersed populations in the Negev, while emphasizing the preferential and benefiting policy that is applied towards them. It was specifically stated that many resources were invested in settling the members of the Al-Qi'an tribe, including developing the town of Hura to accommodate them.

The First Hearing on November 20, 2013

13. In the hearing, the Applicants' attorneys reiterated their argument that the Respondent, who applies administrative authority in its decisions, must provide a relevant justification to the eviction decision; it was argued that in the circumstances of this matter, when the Applicants relied on the Respondent's actions, the court must address their arguments on the constitutional and administrative level, and not refer them to file a petition against the planning proceedings. It was further argued that the Applicants were aware of the existence of the scheme to establish Hiran, but not of the fact that their houses were not included in the scheme; and that they did not file an objection as part of the planning proceedings since the Respondent only revealed that the town of Hiran is only planned for a Jewish population in the proceeding before the Magistrate Court. The Respondent's attorney stated that, indeed, the investigator initially recommended establishing a Bedouin town in the Atir complex, to which the residents of Umm Al-Hieran would be able to move, but that this recommendation was rejected because of various planning considerations. It was also emphasized that the town of Hiran is planned for the general population and not necessary for Jews, and anyone wishing to do so may reside there by purchasing a lot. In this context, it was noted that in planning towns for the dispersed Bedouin populations, their patterns of life are taken into consideration, and that this is not possible when planning general towns (for example, in terms of the average size of a lot). The Respondent's attorney emphasized that it may be possible to allow a change in the plan that would be suitable for some of those requesting to live in Hiran, however, the town is not defined as Bedouin, but rather as general. Finally he argued that the eviction motions did not land on the Applicants "out of the blue"; that the planning proceedings were neither challenged by the Applicants before the planning entities nor by a petition to the High Court of Justice; and in any event, the planning proceeding with respect to Umm Al-Hieran ended when the Appeals Committee's decision was granted. At the end of the hearing a decision was granted whereby the execution of the judgment, which is the subject of the Application, will be stayed until the Application is ruled upon; the parties were also given permission to file complementary documents.

Update Notice on behalf of the Applicants dated December 22, 2013

14. In the notice it was argued that from a planning perspective there is nothing preventing the recognition of Umm Al-Hieran in the Planning Scheme. It was also argued – based on things said in the hearing before us, so it was claimed – that according to the Respondent, Hiran is not intended for Bedouin citizens, and therefore the Applicants' cultural affiliation constitutes a material reason for their exclusion from its planning. In this context, it was noted that in 2012 the "Hiran" settlement group was established near Umm Al-Hieran, consisting of Jewish families waiting to live in the town to be established. It was further argued that the Respondent did not examine whether it is possible to legitimize the houses in the Atir complex, and that the revocation of the decision to adopt the investigator's recommendations was based on irrelevant considerations.

The Respondent's Response dated January 14, 2014

15. In the response, it was noted that the Applicants' arguments against the Planning Scheme belong in the framework of the planning proceedings, and it was again emphasized that the Applicants did not petition the High Court of Justice in this matter. It was also emphasized that the Town Scheme designates the area for the establishment of a general town, and therefore it is not possible to legitimize the Umm Al-Hieran complex in its framework. The Respondent further argued that the Atir and Umm Al-Hieran neighborhoods do not constitute one village but are rather two separate complexes, which have different settlement characteristics. It was noted that the investigator explicitly stated that, from a planning perspective, the Umm Al-Hieran complex is not suitable for the establishment of a Bedouin town, as opposed to her recommendation regarding the Atir complex. In this context, the Respondent stated that the investigator's recommendation regarding the Atir complex was not to recognize it as a town or establish a town there, but rather to determine the area as an area in which it will be possible to plan a town in the future; and that the District Committee’s final decision, not to adopt this recommendation, stemmed from relevant planning considerations and a broad perspective, and was primarily based on the need to continue to establish the status of the town of Hura and to utilize the many resources that were invested therein by building neighborhoods for the Village's residents. It was further argued that the Respondent never said that the town of Hiran is not intended for Bedouin citizens, but that a general town in which any person can reside is planned at that location, as opposed to a town that is specifically planned for the dispersed Bedouin population.

Supplemental Arguments on behalf of the Applicants dated March 6, 2014

16. The Applicants argued, with respect to the Umm Al-Hieran complex, that the eviction decision was adopted in order to settle a different population in the location, and that their cultural affiliation was at the base of the decision. The Respondent's statements that although the Bedouin are allowed to reside in the new town, it is not suitable for them, were brought to support this argument. With respect to Atir, it was argued that designating the location as a park forest for pasture, does not justify evicting its residents, and that the Respondent did not at all examine a planning option of legitimizing the neighborhood. It was also argued that the Respondent did not point to a public justification to revoke their license,

especially when, from a planning perspective, there is nothing preventing the inclusion of the residents of the Village in the scheme; that its decision was based on the notion that the Applicants are squatters on the land, contrary to the facts; that as mentioned, the eviction violates the Applicants' right to dignity, equality and property, and constitutes unjust distribution of the land resources in the region; and that the said violations are not proportional and are not for a proper cause.

Reminder Hearing dated June 10, 2014

17. In the decision dated April 27, 2014, we ordered that a reminder hearing take place before a judgment is granted; at the start of the hearing, we asked the Respondent's attorney whether it is possible to integrate the Applicants' houses in the Town Planning Scheme, and thus reach a practical solution. In response, we were told that the plan is detailed in a way that makes it impossible to deviate from it at this point. The Applicants' attorney argued that even though it is a detailed planning scheme, amendments can still be made to it, if the Respondent is willing to allow it; that public interest warrants first and foremost considering the integration of the existing situation into the planning of the region; and that one must not cling to the fact that detailed plans have already been prepared when it is argued that the plans, in their current format, were not prepared for a proper purpose. At the end of the hearing, we ordered the Respondent to file its position with respect to the possibility of integrating the Applicants' houses in the planning of Hiran, after the parties will conduct a joint meeting on the matter.

Update Notice on behalf of the Respondent, dated October 5, 2014

18. The Respondent notified that the parties met but did not reach agreement. It was argued that the Applicants' houses were built illegally, and it is not possible to leave them standing. It was also stated that the Applicants would be able to reside in the town of Hiran as any other citizen, in accordance with the rules prescribed therefor. The Respondent further argued that the present proceeding is not the appropriate forum for such allegations against government decisions, the District Planning Scheme and the Town Planning Scheme, especially when the scheme has already gone through all of the planning stages, including final approval. It was further argued that when the members of the Tribe came to the region, they first settled in the Atir complex, and that the bulk of the settlement in the Umm Al-Hieran complex only happened in recent years and without permission; it was further stated that the Respondent has been acting to regulate the settlement of the members of the Hura Tribe since the 1980's, taking into account considerations that are based on the manner the population is dispersed and, *inter alia*, the fact that better services can be provided to larger concentrations of population. On a practical level, it was argued that the structures in the location do not comply with the Planning Scheme; and on a principle level, that the Respondent does not wish to build a separate Bedouin neighborhood in the town, which would compromise its general character. It was also clarified that nothing is formally preventing the integration of houses located within the boundaries of the town by way of amending the plan; but, in the case at hand, it is not appropriate to legitimize the Applicants' houses, which were built illegally. Finally, it was emphasized that if any of the Applicants will want to live in the town, this will not prevent the demolition of his house, and that the benefits that are given when regulating the

settlement of Bedouin citizens will not be granted to him when settling in the town of Hiran, since it is a general town; however, that there is a possibility that even in such a case, such resident will be given, *ex gratia*, compensation for the demolition of his house, subject to the approval of the Respondent's Compromise Committee.

Response and Update Notice on behalf of the Applicants dated November 16, 2014

19. In the Applicants' response, it was stated that the Applicants' representatives suggested to approach professional entities to prepare a planning alternative that would allow establishing a new town that will include the integration of the Village's houses, and that the Respondent, on its part, did not offer alternatives to the eviction of the Applicants, and even clarified that there is no place to establish a Bedouin neighborhood in Hiran. They further argued the Respondent should not be allowed to evict the Applicants, who have been living in the location as licensees for approximately 60 years, in order to establish a town without Bedouin people at Umm Al-Hieran, and to designate the area in Atir as a park forest. It was emphasized that the members of the Tribe have been recognized as licensees on the land, thus distinguishing them from the other members of the dispersed populations who are deemed to be squatters and that the Respondent's attempt to undermine this determination must be rejected. Finally, the Applicants argued that the Application is not an objection to the planning proceedings, but rather an examination of the legality and reasonableness of the administrative decision to evict them; that they did not protest the government decision or the Planning Schemes because these did not explicitly state that the town of Hiran is planned as a "Jewish" town that would not include their houses; that in the circumstances of the case, the existence of the Applicants' houses – even though they were built without a permit – actually works towards recognizing and regulating them so as to prevent unnecessary eviction.

Ruling

20. As mentioned at the outset, I will suggest to my colleagues to act pursuant to our authority in Regulation 410 of the Civil Procedure Regulations and adjudicate the Application for Permission to Appeal as an appeal, but not accept the appeal. It will again be emphasized that a "standard" examination of the Application – that is, in light of the customary rules regarding eviction proceedings, and in light of the facts of the case as were determined in the earlier instances – does not, in and of itself, raise a legal question of principle that justifies granting permission to appeal. As was elaborately detailed, the Respondent is the owner of the land in dispute, which was registered in its name in the framework of regulation proceedings; the Applicants did not purchase a right to the land , but rather settled on it as gratuitous licensees, whose license was duly revoked by the Respondent. In this state of affairs, there is no justification to intervene in the judgments of the earlier courts. As mentioned, in light of the general issue at the background of the Application – and since we are dealing with the eviction of many from their current place of residence – I deemed it appropriate to suggest granting permission to appeal and addressing the Applicants' arguments in detail. There is no denying that the matter at hand is intertwined with the general matter of the settlements with the Bedouin in the Negev, which is a public dispute that is being deliberated

in the government and the Knesset. Therefore, the courtroom was filled not only with Bedouin from the Negev, but also with many Knesset Members, almost all of whom were from the Arab public. Indeed, the matter of the lands in the Negev and the rights of the State, on the one hand, and the rights of the Bedouin citizens, on the other hand, is one of the most difficult matters challenging the government system, and it involves charged emotions and political disputes; but we will state here that our ruling is limited to the case before us. While our eyes and ears are not shut to the public matters, these issues go beyond this case to the dispute on the situation in the Negev, the growing and flourishing massive illegal construction there, which anyone driving on the roads of the Negev cannot but notice, and the many attempts to settle it through negotiations, some of which will be described below. In the same breath, we will say that it is obvious that at issue is the eviction of people who have been residing on the location for many years, it is neither an expulsion or an abandonment, but the proposed eviction involves various offers of relocation, construction, compensation and housing options, either in the town of Hura, to which most of the residents of the illegal villages discussed have moved, or in the town of Hiran, which is about to be established, at "general" purchasing terms but apparently with compensation for the investments in construction (even though it was illegal), because of the extended period of time.

On the legal level, I am of the opinion that the Applicants' arguments should not be accepted for the following two reasons: **First**, their arguments in this proceeding do not actually relate to the question of ownership of the land or the classification of the license to it, but rather they are directed against the planning of the town of Hiran, and more broadly – through such planning objections – against the government decision to establish the town of Hiran, and its policy in the matter of regulating Bedouin settlement in the Negev. These arguments constitute an indirect challenge of the decisions of the authorities, which the Applicants should have raised in other procedural frameworks. **Second**, it does not appear that the Respondent's actions do not coincide with the duties imposed upon an administrative authority; they do not involve a violation of the Applicants' legal rights, and in any event, even if there was a violation – it is proportional.

The Background Issue – Regulation of the Settlement of the Dispersed Bedouin Populations in the Negev

21. We will again highlight that the Application before us wishes to bring before, once again, a sensitive and complex political-legal-social issue which has not yet been completely solved – the issue of resolving the questions involved in settling the members of the dispersed Bedouin populations on the lands of the Negev. This matter has been at the focus of many petitions and motions in the past (see in the past decade, *inter alia*, HCJ 8062/05 **Al-Atrash v. The Minister of Health** [published in Nevo] (2005), a petition to obligate the authority to connect a house in an unrecognized village to the national electricity grid; C.A. 9535/06 **Abu Masad v. The Water Commissioner** [published in Nevo] (2011) (hereinafter: the "**Abu Masad Case"**), a motion to compel the authorities to connect running water for the members of the dispersed populations; HCJ 8211/08 **Abu Masad v. The Minister of Health** [published in Nevo] (2011), a petition to establish a health clinic in an unrecognized Bedouin village; HCJ 4714/12 **Hamid v. The Minister of Interior** [published in Nevo] (2012), a petition to allow the members of the dispersed

populations to vote and be elected in the municipal election in the regional councils, near the location of their settlements; and see recently in the matter of enforcement of an administrative promise regarding the eviction of land in the Negev region, C.A. 4228/11 **Mansur v. The State of Israel** [published in Nevo] (December 15, 2014)); This matter is also at the base of petitions currently pending in this court (for example, HCJ 1705/14 **Afash v. The Regional Planning and Building Council** [published in Nevo], a petition that is directed against a planning scheme that involves the eviction of an unrecognized Bedouin village named "*Wadi Al-Naam*"; HCJ 4220/12 **Al-Okabi v. The State of Israel** [published in Nevo] which focuses on the eviction of the residents of the Al-Arakib village, near the town of "Gvaot-Bar").

22. To illustrate the legal complexity of this matter, I found it appropriate to quote from the decision of the Appeals Committee, dated September 24, 2012, which eloquently described it as follows:

> "As is known, the matter of the Bedouin settlement in the Negev is very complex. This is derived from, *inter alia*, the Bedouin's claims to ownership of land which, in general, they have difficulty establishing from a factual and legal perspective; from the material differences between the principles of Israeli law in the matter of rights to the land and the internal property rules that have guided the Bedouin for generations; from the manner of tribal settlement and the dispersing of the settlements; from the fact that this is a population with a nomadic history; from the vast scope of illegal and "wild" construction in these settlements and its dispersing over expanded areas … from the lack of infrastructures for the unrecognized settlements; etc. etc." (paragraph 110 of the decision).

In addition, see the words of President (ret.) **A. Grunis** in A.P.A. 2219/10 **Chairperson of the Abu Basma Local Planning and Building Committee v. *Amutat Regavim*** [published in Nevo] (2013), which were said in the explicit context of planning and building in the Negev:

> "As was mentioned, the matter of settling and building in the dispersed Bedouin populations in the Negev bears social and legal complexity of the highest degree. The complexity is manifested in many intertwined aspects, including: the difficulty in determining a planning policy; the legal and historical disputes regarding ownership of the lands; the actual planning reality; lack of statutory plans; difficulties in enforcing planning and building laws and deficient enforcement; the limited resources allocated for enforcement. One can generalize and say that the complexity is great even compared to planning and building issues that rise in other areas in the State of Israel" (paragraph 13 of the judgment)

Generally speaking, the case before us is clearly characterized by the complexity described above – we are dealing with a Bedouin tribe, who moved to the area in dispute approximately six decades ago, pursuant to instructions by the authorities; according to the property laws of our legal system, the members of the Tribe did not purchase ownership rights to the land, despite having settled there by license; they built extensively and illegally on the location without permits; the majority of the members of the Tribe moved to Hura – a Bedouin town, which is regulated and connected to infrastructures – and those who remained are being required to evacuate their houses, while being offered to move to Hura; in the framework of the overall solution that the authorities have formulated, and as part of a scheme to establish a different town, with a general character, on the location.

23. We will not address the government policy on the matter of settling the dispersed Bedouin populations, as this is not subject to review in this proceeding. The entire matter of the Bedouin in the Negev has a complex history; see the interesting article by Hanina Porat "The Development Policy and the Question of the Bedouin in the Negev in the State's Early Years, 1948-1953" **Reflections on the Resurrection of Israel (*Iyunim Betkumat Yisrael*)**, 7 (5757-1997), 389, in which there is a description of the complexity of the relationship, and especially see on pages 436-438, and the problems described which are very reminiscent of the present. The State has indeed been dealing with the matter of lands, their cultivation and the rights to them in the case of nomad populations, such as the Bedouin, since its establishment; regarding the Mandate period and the purchase of lands for Jewish settlement see H. Porat **From Wilderness to Settled Land, The Purchase of Lands and the Settlement of the Negev 1930-1947** (5756-1996); regarding the legal situation, see ***ibid***, first chapter, pages 1-18; see also Havatzelet Yahel's article, "Land Disputes Between the Negev Bedouin and Israel" ISRAEL STUDIES 11(2) (2006) 1-22; as well as the article by H. Yahel, R. Kark & S.J. Frantz, "Fabricating Palestinian History: Are the Negev Bedouin an Indigenous People? Middle East Quarterly (Summer 2012), 3. See also H. Zandberg, **Israel Lands, Zionism and Post-Zionism** (5767-2007), 143, which states that the majority of the Negev lands are *Mewat* lands. According to Section 6 of the Ottoman Land Law of 1858 *Mewat* land is land "which is not in the possession of anybody, and, not having been left or assigned to the inhabitants, is distant from town or village so that the loud voice of a person from the extreme inhabited spot cannot be heard, that is about a mile and a half to the extreme inhabited spot, or a distance of about half an hour"[2]; see P. Albeck and R. Fleischer **Land Laws in Israel** (5765-2005) 86; for extensive review see M. Duchan **Land Laws in the State of Israel**, 5713-1952 47-50.

However, for a more complete picture and an understanding of the material at hand, hereinbelow is a brief review of the steps the government has taken in the

[2] The Ottoman Land Code, Translated by F. Ongley of the Receiver General's Office in British Cyprus,
http://www.archive.org/stream/ottomanlandcode00turkuoft/ottomanlandcode00turkuoft_djvu.txt

matter in the last decade: on September 29, 2003, as part of decision no. 881, the government declared a comprehensive plan for the resolution of the unrecognized villages problem, in the framework of which seven new Bedouin towns were recognized under a new local council named "*Abu Basma*" (for a complete picture, it will be noted that this council has since been dissolved, as part of a decision of then Minister of Interior, Eli Yishai, dated November 5, 2012, and has been split into two regional councils "*Neve Midbar*" and "*Al-Kasom*"); Later on, on July 15, 2007, government decision no. 1999 was adopted, in which it was decided to establish the Authority for the Regulation of Bedouin Settlement in the Negev, and the Minister of Housing and Construction was charged with appointing a public committee that would examine and present its recommendations on the matter. Accordingly, a committee headed by retired Justice **E. Goldberg**, former State Comptroller (hereinafter: the "**Goldberg Committee**"), was established in government decision no. 2491 dated October 28, 2007. The Committee's recommendations were submitted to the Minister of Housing and Construction on December 11, 2008, and the essence thereof was a proposal to formulate a policy that would bring into consideration the claims of the Bedouin population with regards to rights to the land, on the one hand, and the State's needs and resources, on the other hand, while emphasizing that such policy should be implementable within a short period of time. **The Report of the Committee for a Policy Proposal for Regulating Bedouin Settlement in the Negev** (the Goldberg Report) includes extensive background regarding the history of the matter, as well as various positions of the members of the committee, including reservations. On January 18, 2009, in the framework of government decision no. 4411, it was decided that the report's recommendations will be the basis for the regulation of Bedouin settlement in the Negev and a team, headed by Ehud Prawer of the Prime Minister's office, was appointed to implement them; On May 31, 2011, approximately two years later, the report of the implementation team (hereinafter: the "**Prawer Report**") was published, and it recommended an outline that would be implemented within a defined schedule and which included, *inter alia*, and primarily: granting compensations for the ownership claims of the members of the dispersed populations, comprehensive planning of the regulation of the dispersed Bedouin populations as part of the Be’er Sheva Metropolitan Plan, enhanced enforcement against illegal construction, and a plan to advance the economic development and growth of the dispersed populations. Further thereto, it was decided, in government decision no. 3703, dated September 11, 2011, to implement the recommendations of the Prawer Report, along with the publication of a legislative memorandum for the regulation of Bedouin settlement in the Negev, based on the outline proposed therein; it was also decided to conduct a “listening process” to the members of the dispersed populations, and to integrate its conclusions in the legislative memorandum. Accordingly, and in line with government decision no. 5345 dated January 27, 2013, the conclusions that were formulated following the listening process (hereinafter: the "**Begin Report**", named after former minister Ze'ev Binyamin Begin who led this process), were integrated in the **Regulation of Bedouin Settlement in the Negev Bill, 5773-2013** (Government Bills 761 (May 27, 2013), which passed the first hearing on June 24, 2013 (for critique see R. Levine-Schnur **Regulating Bedouin Settlement: A Disengagement Plan for the Negev** (The Israel Democracy Institute, December 2013)); however, the bill's legislative proceedings are currently on hold, and it was explained that this is in order to allow further discussions.

24. As described, many resources have been invested to date in formulating and promoting an efficient and fair solution to this matter, with which the authorities have been dealing for many years (for a description of the steps taken by the government since the 1970's, see the **Goldberg Committee Report**, on page 19, in the chapter entitled "Committees and More Committees"). It will be emphasized that many positive changes occurred over the years with regard to this matter; many individual disputes were settled by consent – for example, in the case at hand, when the majority of the members of the Tribe agreed to move to the town of Hura; new towns have been built on Negev lands, both towns with a Bedouin character, and towns that were meant for the general public; concurrently, enforcement was tightened with respect to illegal construction in the region, which was becoming very extensive, including in the area which is the subject of our discussion, and this is not denied. However, as mentioned, the bill that was meant to bring into action the policy that strives for a comprehensive solution has not yet matured into a binding law in the State of Israel. I will only note that in our opinion time is of the essence, and that the situation does not improve as years pass without a comprehensive and implemented solution, which is essential for the well-being of the entire public; this, because planning and developing of the Negev, settling the residents of the dispersed populations in a regulated and legal, relevant and fair manner, and the elimination of the illegal construction in the region are all national tasks of the highest importance.

Indirect Challenge and Proper Procedural Routes

25. As mentioned, the Applicants claim that the decision to evict them in order to establish a town that is not Bedouin, whilst not including their houses in the planning of such town, was adopted in a manner that does meet the obligations of the administrative authority, and amounts to a violation of their basic rights, which does not comply with the conditions of the limitation clause in the Basic Law: Human Dignity and Liberty According to them, this decision manifests a discriminatory policy and ignores other planning options, including the inclusion of the Village's houses in the town. However, the Applicants, who are professionally represented and are aware of their rights, should have directed these arguments in the framework of other proceedings. I will clarify: While these arguments are allegedly directed only towards the decision to evict, they are being argued before us in the form of challenging the mere establishment of Hiran, which derives from the government's overall policy with respect to the matter of the Bedouin settlement in the Negev.

    The Applicants indeed claim that their Application is not directed against the planning proceedings themselves, but rather seeks to examine the decision to revoke the license that was granted to the Applicants and to evict them, while the reference to the Planning Scheme is incidental to the examination of the Respondent's considerations when adopting the said decision; In their notice dated November 16, 2014, it was even noted that "if and to the extent that the Court will decide that the license is irrevocable, it will not, in light thereof, cancel or change the scheme, but rather the planning institutions will be required to examine the schemes and change them in accordance with the new ruling" (paragraph 31). However, it appears that this is an artificial distinction that results in an indirect

challenge; The fact is that the majority of the Applicants' arguments, and particularly that the Hiran town scheme should include the Village's houses, are in fact focused on planning considerations and aspects which are clearly within the authority of the planning entities. As mentioned, these arguments belong to other proceedings, which the Applicants did not initiate, and do not belong in the framework of their defense against the eviction claim filed by the Respondent. I will add that it is evident that, on a practical level, it is difficult to completely separate the claim for removal from the planning proceeding, since without the removal of the Applicants, it will be impossible to realize the establishment of the town of Hiran in furtherance with the planning proceedings. However, on the legal level, we are dealing with two separate matters, and the Applicants could have voiced their position in both of them – not only in the removal proceeding: the removal claim is adjudicated in the civil courts; and the government decisions, which are subject to judicial review in the High Court of Justice, as well as the rulings of the planning entities and the planning entities, which are ordinarily addressed either in the framework of the planning proceedings, or in the Administrative Matters Courts and in the Supreme Court, as applicable, and in accordance with that prescribed in the Administrative Matters' Courts Law, 5760-2000. This distinction is not a trivial matter; the legislator prescribed how each matter will be handled and this court is not a destination for creating chaos.

26. The Applicants had a number of procedural options in the framework of which they could have presented their arguments; **Firstly**, and particularly with respect to the arguments regarding the mere establishment of the town of Hiran at the location at hand, and with respect to discrimination in allocation of the land resources – the could have petitioned the High Court of Justice against government decision no. 2265, dated July 27, 2002, in which it was decided to establish the town of Hiran; it will be emphasized that the Applicants' arguments include objections to the government's policy in the matter of regulating Bedouin settlement in the Negev, which resulted in the decision to establish Hiran. I will note that residents of Umm Al-Hieran, who filed objections to the specific planning schemes, also indirectly challenged this decision in their arguments against the mere establishment of the town of Hiran. As the Objections Committee stated in its decision dated September 24, 2012, this manner of objection to government decisions is inherently unusual, since the planning institutions may assume, based on the presumption of regularity, that these decisions are adopted lawfully (see A.P.A. 8354/04 **The Association for Aid and Protection of the Right of the Bedouin in Israel v. The National Planning and Buildings Council – Appeals Sub-Committee** [published in Nevo] (2005), in paragraph 20 of Judge **Y. Adiel**'s judgment; Indeed, it will be emphasized that in order for a government decision to be challenged before the High Court of Justice, it must be an operative decision – such as a decision to establish a town – in accordance with the principle of the finality of administrative decisions; see for example, in a similar matter, HCJ 6094/12 **Salim Abu Al-Qi'an v. The Government of Israel** [published in Nevo] (2012); HCJ 6747/05 **Tel-Sheva Local Council v. The Ministry of Interior** [published in Nevo] (2008), in paragraph 9 of Justice **U. Fogelman**'s judgment)). As was stated in the decision of the Objections Committee: "In these circumstances, one cannot object today to the mere establishment of the new town or its necessity at this time, in the framework of the objections to the proposed plan, and any such objection should have been voiced at earlier stages, and in fact, at the stage when

the government decision was adopted, following which the District Planning Scheme was promoted and approved (paragraph 66). It appears that this is *a fortiori* the case in the matter at hand, when the Applicants are presenting such arguments before us, after so much time has passed, and after the decisions and planning train has left the station.

27. **Secondly**, the Applicants' arguments, particularly those that relate to the way the town was planned and the option of including their houses, are directed against the decisions of the various planning entities and should have been argued in accordance with the mechanism prescribed therefor. For example, first of all, the Applicants could have objected to the Town Planning Scheme that was published for validation on May 21, 2003, as part of the approval of Amendment no. 27 of the District Planning Scheme (see, *inter alia*, Sections 100-112 of the Planning and Building Law for the mechanism of objections to plans that have been deposited). It will be emphasized that at such early stage it was possible to object to general and principle determinations with respect to the character of the town and its planning – such as, for example, with respect to it being planned as a general, and not Bedouin, town; or regarding the exclusion of the Applicants' houses from it – but not at the advanced stage when the actual objections were filed, after the scheme was approval by the **SPPM** and when the scheme being challenged is a **specific** scheme, that specifies the change to the Planning Scheme. In this context I will mention that even those residents of the Village who filed objections, directed general and principle planning arguments by means of objections to the detailed scheme, and not at the stage of the approval of Amendment no. 27 to the District Planning Scheme; in the words of the Appeals Committee in its decision dated October 10, 2014, in the matter of the Atir Complex: "When addressing a detailed scheme, the District Committee is not permitted to ponder over normative planning determinations which were expressed in the Regional Planning Scheme or in the District Planning Scheme. These schemes prescribed general planning norms, which the district committee must fill with specific content which will befit such norms and coincide therewith". (paragraph 58; on the normative hierarchy between the planning schemes see HCJ 2920/94 **Adam Teva V'Din *et al* v. The National Planning and Building Council**, PD 50(3) 441 (1996); A.P.A. 9654/06 **The Society for the Protection of Nature *et al* v. The National Council's Appeals Sub-Committee** [published in Nevo] (2008); A.P.A. 8489/07 **Richter v. The Specific Sub-Committee of the District Planning and Building Committee** [published in Nevo] (2009) paragraph 26 of President (ret.) **A. Grunis**' judgment).

28. That stated above is all the more relevant knowing that the town of "Omrit", which was planned in the framework of Amendment no. 27 to the District Planning Scheme, was not established – as mentioned – due to the objection of the council of unrecognized villages, which was filed at that early stage (on the importance of strict adherence to the mechanism of filing objections in the framework of the planning proceedings, see HCJ 3459/10 **Al-Othman v. The Government of Israel** [published in Nevo] (2011), in paragraphs 9-11 of Justice **U. Fogelman**'s judgment). Additionally, even after the appeals were denied by the National Council, a petition could have been filed to the Administrative Matters' Court regarding the Appeals Committee's decisions; in this matter it will be noted that according to item 10(a) of the First Schedule of the Administrative Matters' Courts Law, the Administrative Matters Court has the authority to adjudicate planning and

building matters; excluded from this authority are, *inter alia*, decisions regarding a national or district planning scheme, against which a petition will be filed to the High Court of Justice (see, for example, HCJ 8119/10 **Friedman v. The Minister of Interior** [published in Nevo] (2011)); The objections of the residents of the Village were filed against the **detailed** planning scheme for the establishment of Hiran, and therefore, *prima facie*, a petition against the decisions of the Appeals Committee in the case at hand belongs in the Administrative Matters' Court. As is known, an appeal by right or by permission, as applicable, on a judgment of an Administrative Matters' Court can be filed to this Court sitting as an Administrative Appeals Court; see Section 12 of the Administrative Matters' Court Law and Regulation 33 of the Administrative Matters' Court (Procedures) Regulations, 5770-2000. However, the Applicants did not file such a petition, neither with respect to the Atir complex nor with respect to the Umm Al-Hieran complex. The Applicants also could have petitioned the High Court of Justice against the **SPPM**'s decision to approve Amendment no. 23 of the District Planning Scheme, in which the designation of Atir and Umm Al-Hieran in the framework of the Be'er Sheva Metropolitan Plan was decided upon (as mentioned, this petition addresses the **District** Planning Scheme – DPS 23/4/14 Be'er Sheva Metropolitan) – such steps were not taken. Above and beyond the necessary, I will further note that it is reasonable to assume – even though we are not setting rules in this matter – that if such a petition were to be filed at the present time, the argument of laches would be raised; from the subjective aspect of laches, there is a question whether the Applicants have not already waived their right to approach the High Court of Justice or the Administrative Matters Court regarding the planning matters. In any event, instead of directing their arguments in the administrative route, the Applicants chose to raise them in the framework of the current proceeding, before three instances, and in the proceedings in the criminal route that related to the eviction orders that were issued, also before three instances (see the abovementioned P.C.A 3082/14). Objectively speaking, alleged changes occurred on the ground, which if reversed would *a priori* involve damage to the Respondent and maybe even to third parties – this in any event is true with respect to the government decision dated July 21, 2002, and the Appeals Sub-Committee decision with respect to Umm Al-Hieran, dated September 24, 2012 (with regard to laches see A.P.A. 2611/08 **Binyamin v. The Tel Aviv Municipality** [published in Nevo] (2010), in paragraph 15). Either way, in my opinion, it is difficult to accept the Applicants' arguments that they did not file such a petition or objections as part of the planning proceedings because they did not know that a town with a general character, which does not include the Village's houses, was being planned on the land. First of all, it stands to reason that both the declaration of the establishment of Hiran in a government decision and Amendment no. 27 of the District Planning Scheme, were published for all to see, as is customary, and in a manner that would have allowed the Applicants to know about their existence (for the provisions regarding the deposit of building plans and the right to review them see Sections 89-96 of the Planning and Building Law). This is especially when, as mentioned, an objection was filed to the establishment of the town of Omrit, which was also planned in the framework of Amendment no. 27. It appears that in this situation – as especially given the existence of negotiations since the 1980's regarding the Tribe's eviction from the Village – it is difficult to assume that the Applicants were not at all aware of the planning schemes at an early stage. Addressing this at the this time means turning the procedures upside-down and attempting to put spokes

in the wheels of the process. This must be said, since the right and relevant move would have been to initiate steps at the appropriate time; and the Applicants are accompanied by legal counsel.

29. In summary, the Applicants' arguments before us deviate from the eviction proceedings and even from the eviction decision, since they are directed against other principle and planning matters and constitute an indirect challenge, when, as described, they could have been raised in the form of a direct challenge. The words of Judge **Shoham** in the above mentioned P.C.A. 3082/14 [published in Nevo] are appropriate in this matter:

> "As for the arguments on the administrative and constitutional level, the applicants had the option of approaching the appropriate judicial instances and objecting to the decision of the National Council's Appeals Sub-Committee. The applicants also had the option of objecting before the competent court to the 2002 government decision to establish the town of Hiran on the location. Nevertheless, the applicants chose, time and again, to raise administrative and constitutional arguments in the framework of an indirect challenge, in a proceeding that relates to the revocation of eviction orders, instead of doing so in the form of a direct challenge before the competent instances. It is not superfluous to reiterate that it is not possible to challenge the decisions of the Appeals Sub-Committee and the government decisions in this procedure by way of an indirect challenge" (paragraphs 12-13)

30. I will now discuss the Applicants' arguments that a principle legal question arises here regarding the applicability of constitutional and administrative law in a civil court adjudicating an eviction claim by the authority. It will be emphasized that there is no principle case law that disconnects civil law from constitutional and administrative law, and each case is examined on its own merits, and subject to the rules of jurisdiction that were outlined in statutes and in case law; the civil and criminal courts – including this court when sitting as a court of civil and criminal appeals – are entrusted with constitutional and administrative law, and their legal tool kit includes the principles and rules of administrative and constitutional law, even when not addressing a High Court of Justice proceeding or an appeal on an administrative petition. Indeed, the administrative courts and the High Court of Justice have special procedures, but this does not turn them into a different entity. This is even more relevant when dealing with relations between the individual and the authority, which of course, is bound by an enhanced obligation to avoid violating individual rights, along with other administrative duties, even when acting in a private capacity (see Daphne Barak-Erez **Administrative Law – Volume 3** (5773-2013) (hereinafter: "**Barak-Erez – Volume 3**") in chapter 23; **Barak-Erez – Volume 1** (5770-2010), on pages 15, 98, 204). In the case at hand, we are dealing with a matter which by its nature has civil aspects and administrative law aspects. Legally, the eviction of land is fundamentally a civil law matter, but it is obvious that when at hand are planning and building

proceedings, on the one hand, and people who have been settled on the land for years, on the other hand, the matter is not separated from principles such as the right to be heard and the right for a hearing, and building and planning matters. However, even sensitive legal proceedings are not exempt from proper procedures.

31. I will emphasize in this context that the Applicants' arguments are not "denied *in limine*" merely because their contents are administrative and constitutional; it is of course possible that there will be a situation in which such arguments will be raised in an "organic" manner – without belonging to another specific procedure – in the framework of proceedings that, by their nature are civil and not administrative-constitutional; see for example, the constitutive constitutional judgment in C.A. 6821/93 **United Mizrachi Bank v. Migdal Ltd. *Kfar Shitufi*** PD 49(4) 221 (1995), in which heavy constitutional matters were examined and addressed, incidental to a proceeding that began as a monetary claim. The constitutional discourse has permeated into all legal fields, especially vis-à-vis the authorities. On more than one occasion, this Court has used the provisions of the Basic Laws in order to grant relief in civil litigation between two private parties (see, for example, D. Barak-Erez and I. Gilead "Human Rights in Contract Law and Tort Law: The Quiet Revolution" ***Kiryat Hamishpat*** 8, 11 (5769); A. Barak "Protected Human Rights and Private Law" **Klinghoffer Book on Public Law** (I. Zamir editor) 162 (1993)); In the context of corporate law, see C.A. 4263/04 ***Kibbutz Mishmar Haemek* v. Adv. Tommy Manor, Liquidator of *Efrochei Hatzafon* Ltd.** [published in Nevo] (2009), Justice **A. Procaccia**'s opinion); this is *a fortiori* the case when dealing, as in the case at hand, with a legal relationship between the individual and the authority. Without setting rules in the matter, it is theoretically possible that constitutional and administrative arguments which will not constitute an indirect challenge – such as arguments relating to a person's property, which is explicitly protected in the Basic Law: Human Dignity and Liberty, will be raised in the framework of an eviction proceeding – particularly since at hand is a relationship between the individual and the authority; this is not the case here. In this context it is also appropriate to address – even briefly – the existence of "civil-administrative" or "administrative-civil" proceedings, which are anchored in both of these legal spheres. Such is, for example, a compensation claim stemming from tender laws, which is prescribed in the third schedule of the Administrative Matters' Court Law, and which is referred to as an "administrative claim". Such a claim is heard before the Administrative Matters' Court and its cause of action is administrative – since it is taken from tender laws – but the requested relief is civil in its nature (compensation) and not administrative in the ordinary sense (for example, a mandatory injunction order revoking or instating an administrative decision), and on a procedural level, the Civil Procedure Regulations apply thereto, unlike administrative petitions and appeals and proceedings before the High Court of Justice (**Barak-Erez – Volume 3**, on pages 174-176; A.P.A. 9660/03 **Municipality of Rechovot v. Schwadron** [published in Nevo] (2005); 3309/11 **Kotlarsky v. Tel Mond Local Council** [published in Nevo] (2013)); The courts have ruled that in this type of claim, which is characterized by its "normative duality", administrative, material and procedural aspects apply – for example, the court can apply *in limine* arguments from administrative law, such as laches or failing to exhaust remedies – albeit at a lower intensity than in administrative petitions and appeals (for example, by considering the laches consideration in the framework of the compensation, as opposed to denying the

claim *in limine*; for elaboration on this matter see the **Schwadron** case and the **Kotlarsky** case; I. Zamir **Administrative Authority – Volume 3** 1608 1686 (5774-1984) (hereinafter: "**Zamir**"); G. Shalev **Contracts and Tenders of the Public Authority** 141-143 (5760-1999). In a similar case – an "ordinary" civil claim directed against an obvious administrative act – I was of the opinion that it is appropriate to apply such "normative duality", which characterizes administrative claims, and apply the doctrine of laches in administrative actions against the authority (C.A. 5110/05 **The State of Israel v. Steinberg** [published in Nevo] (2007).

32. In summary, the mere fact that a certain argument is characterized as constitutional or administrative does not prescribe that it is entirely inappropriate for a civil proceeding. It will be noted, with respect to the distinction between administrative and constitutional law, that judicial review on the administration's discretion is directly impacted by constitutional law, to the extent that some courts which apply such review do not mention the traditional causes of review, but rather examine the administrative act in the prism of the limitation clause in the Basic Law: Human Dignity and Liberty, at least if and to the extent the interests that were violated by the administrative act were recognized as rights (see **Barak-Erez – Volume 2** (5770-2010) on pages 625-630; see **Barak-Erez – Volume 1**, pages 71-76 with respect to the impact of the basic laws on administrative law.) One, of course, can argue against the exaggerated use of constitutional arguments where they are not necessary, but this is not at issue in the case at hand. However, in this case, the Applicants could have raised their arguments by way of a direct challenge as specified, and a late indirect challenge is inappropriate; this is not a matter of procedural nuance but rather a matter of substance.

I will add that the circumstances of this matter provide a clear manifestation of the rationale of not acceding to an indirect challenge, in the absence of a tangible option of acceding to the Applicants' arguments: Had they been examined directly in a timely manner, this Court – had it found it worthy to do so – could have "sent the ball" back to the court of the planning institutions or even of the government, to hold new discussions and even order changes to their plans with respect to the land. However, in light of the circumstances – after many years and resources were invested in the planning scheme, whilst the objections mechanisms were not properly utilized – this is not feasible. Planning proceedings cannot continue indefinitely, and one must take caution not to create an infinite "planning loop" with perpetual circular motion from which one cannot break free, and which will result in the authorities' plans, which complied with the criteria of all of the planning stages, not being realized; such is the case at hand, there is no other choice than not to accede to the Applications. The prolongation of the planning proceedings is a "sore evil" that should not be exacerbated (see A.P.A. 109/12 **Central District Planning and Building District Committee v. *Givat Hairusim* Event Hall Ltd.** [published in Nevo] (2012)). It is difficult to accept the idea that after planning proceeding that focus on the examination of objections and reservations, and which became "administratively conclusive", and during which legal reservations and petitions were not filed despite professional representation – everything should now go back to square one, as though nothing has happened. The planning route has spoken; the residents are not, heaven forbid, abandoned, and are not being evicted without a roof over their heads; their history in the area and the fact that they are citizens of the State who have rights and duties

necessitated offering solutions for their eviction. Indeed, as was specified before us, those moving to Hura were offered an entire set of rights, including developed lands and additional benefits.

33. Furthermore, as to the applicability of **administrative** law, the civil courts operate in the framework of the jurisdiction granted to them by virtue of the Courts Law [Consolidated Version], 5744-1984, and particularly by virtue of Section 51, which grants general jurisdiction to the Magistrate Court to address civil claims (up to a certain amount), and Section 40 of the law that grants general jurisdiction to the District Court to address "any civil or criminal matter that is not in the jurisdiction of the magistrate court". These courts also undertook, on a substantive level, to address administrative matters, which were perceived as "civil claims" or "civil matters", even though the boundaries of this jurisdiction are not sufficiently clear (**Zamir**, on pages 1610-1611, 1711). Furthermore, according to **Zamir**, the civil courts also have authority to address administrative matters by way of an indirect challenge through Section 76 of the Courts Law, pursuant to which "If a matter is duly brought before the court and a question, which needs to be ruled upon in order to examine the matter, is incidentally raised, the court may rule thereon for the purpose of such matter, even if the matter of the question is within the exclusive jurisdiction of another court or tribunal." In the matter at hand we have been dealing with a removal proceeding; the administrative aspect arises, as described, from the Applicants' defense arguments before the Magistrate Court and thereafter, in their appeal arguments before the District Court and in the current Application, and is not required in order to rule on the eviction matter itself. However, since at issue are proceedings vis-à-vis an administrative authority, the necessary tangency to administrative law exists.

    In any event, an argument against the manner in which an administrative authority was exercised will only be adjudicated in an indirect challenge in extraordinary cases since "as a rule, the courts will not tend to grant relief in the case of an indirect challenge" (P.C.A. 2385/14 **Ben Gurion University in the Negev v. Be'er Sheva Region Municipal Union** [published in Nevo] (2014), in paragraph 11; C.A. 7958/10 **Pelephone Communications Ltd. v. The State of Israel** [published in Nevo] (2012), in paragraphs 31-32 of my opinion, and the references presented there). In the case at hand the exceptions which ordinarily justify an examination by means of an indirect challenge do not apply: "When an administrative act is flawed by a severe moral or legal flaw which is obvious on the face of things; in addition, the litigating party must also prove the existence of special circumstances that justify non-compliance with the provisions of the law, such as special urgency or irrevocable damage which is expected to be caused thereto as a result of the performance of the decision within a short period of time before approaching and receiving an answer from a judicial instance" (***ibid***). Furthermore, as Justice **Y. Zamir** stated, "a scent of taking the law into one's own hands and unjustified laches in raising arguments" emerges from the indirect challenge (P.C.A. 4398/99 **Harel v. The State of Israel**, PD 54(3) 637, 646-647 (2000)). It will be noted that according to the relative voidness rule, an indirect challenge will only be beneficial when the administrative flaw would have resulted in voidness, although an erosion of the rule has been evident, in the sense that courts have also recognized the possibility of an indirect challenge when the result of the flaw is not voidness – see **Barak-Erez – Volume 2**, on pages 822-827).

34. In any event, in light of the sensitivity involved in this case, and since the civil courts are not "disconnected" from constitutional and administrative law, I have deemed it appropriate, within the limits of the authority to exercise indirect review, to briefly address the Applicants' administrative and constitutional arguments, even though this proceeding is not the natural place to do so. The Respondent is acting here as the owner of proprietary rights to land, and, as a public trustee, it is required to make decisions that relate to the management of the assets and their allocation in a manner that coincides with the principles of public law (see **Barak-Erez – Volume 3**, in page 20; HCJ 6698/95 **Ka'adan v. The Israel Lands Administration**, PD 54(1) 258 (2000) (hereinafter: the "**Ka'adan** Case"); HCJ 244/00 **The New Discourse Organization for a Democratic Discourse in Israel v. The Minister of National Infrastructures**, PD 56(6) 25 (2002)).

35. Did the Respondent act fairly? I will mention that this duty is deemed the most important one imposed on the authority, from which other specific duties are derived: it is the "broadest common denominator of the various duties imposed on administrative authorities" (**Barak-Erez – Volume 2**, on page 630). This statement does not require evidence, and is considered to be "basics", but this Court returns to it time and again ("The State's obligation to diligent fairness in its conduct in all of its ways is as clear to me as the noon-day sun, to the extent that it does not need supporting references" C.A. 10011/07 **Foor Investment Management Company v. The Ashkelon Assessment Officer** [published in Nevo] (2010) in paragraph 17 of my opinion; C.F.A. 3993/07 **Jerusalem Assessment Officer 3 v. Ikafood Ltd.** [published in Nevo] (2011) in paragraph 6 of my opinion and the references presented there; and see recently A.P.A. 7752/12 **Assal v. The Israel Land Administration** [published in Nevo] (2014) in paragraph 25). It appears to me – and this is the main point here – that **one cannot say that the Respondent did not act in a fair and *bona fide* manner with respect to the eviction of the Applicants**. First, the Respondent conducted negotiations with the members of the Tribe starting in the 1980's, regarding their eviction from the Village, in return for receiving a lot in the town of Hura. It was back then that the Respondent disclosed its intention to evict them, even though at such stage this had not been expressed in the form of a government decision and detailed planning proceedings. Over the years, a number of neighborhoods were built in the town of Hura in order to take in the members of the Tribe; as mentioned, the town of Hura is recognized by the authorities, is connected to basic infrastructures, and offers community services to its residents and to the residents of the region. The Respondent's offer to the Applicants to move to Hura, where they are entitled to receive a new lot and additional benefits is still open. Indeed, as a trustee of public lands – the Respondent must act for the benefit of the entire public – both for the benefit of the Bedouin population and the benefit of other populations. We will add – with regard to transparency – that the Respondent acted in a disclosed manner and duly published its decisions. It appears that the Respondent's actions in this context were based on a relevant factual and normative foundation, *inter alia*, the government decision to establish Hiran, the Applicant's lack of rights to the land and the illegal construction thereon, the existence of an immediate and available solution in the form of moving to the town of Hura and the existence of negotiations to realize these objective since the 1980's. With respect to the planning proceedings in particular, it will be noted that the planning institutions' decisions were adopted after they

examined the aerial photos of the area of the Village, and as mentioned, based on the investigator's recommendations. In this last context I will add that, *prima facie,* there does not appear to be any flaw in the **SPPM**'s decision to reconsider and revoke its decision to adopt the investigator's recommendation. An administrative decision can be reconsidered, as long as it is not done based on irrelevant considerations. It appears that the decision to revoke was based solely on planning considerations, mainly the need to continue to establish the town of Hura as the planning solution for the members of the Tribe.

36. Moreover, *prima facie,* there does not appear to be any flaw of unreasonableness in the decision to evict. This is not an arbitrary decision; it was part of a process following a government decision, in the framework of a broader move of regulating the settlement in the Negev by the owner of the land. The decision to evict does not, in the circumstances at hand, deviate from a reasonable balance between interests of the entire public and those of the Village's residents; the granting of good terms to the Applicants to relocate to Hura in order to allow the establishment of a general town. *Prima facie*, the planning proceedings for Hiran are not flawed by unreasonableness. Although, as mentioned earlier, it is possible that it would have been appropriate to bring the Village's houses into consideration in the planning of the town to begin with, both because the eviction motion – but not the actual planning proceedings – was originally based on the argument that the Applicants are squatters on the land, when in fact they were there as licensees; and because of the thing stated by the planning institutions that, from a principle/planning perspective, there was nothing to prevent the inclusion of the Applicants' houses in the Town Planning Scheme. Additionally, the policy that the government adopted in the matter in recent years actually indicates an attempt to legitimize – when possible and at terms and conditions – existing construction of the members of the dispersed populations in the framework of the settlement of the Negev (see below paragraph 36). However, nothing stated above derogates from the fact that, *prima facie*, once the decision to evict and the planning proceedings have passed all of the relevant stages in the law, they are not, based on their concrete content, tainted by unreasonableness.

37. As to the Applicants' arguments regarding the violation of equality, including discrimination in the allocation of land to the Bedouin population, the Respondent, as an administrative authority, is obligated by the principle of equality, including in the allocation of State lands; the authority is entrusted with such lands and must take public considerations into account when planning and allocating them. However, the planned town **does not prevent** members of the dispersed populations from living therein but rather is planned as a town with a general character, and not as a Bedouin town, with all that that entails from a planning perspective; anyone desiring to live in Hiran may do so, subject to the law and the terms prescribed therein. Indeed, it stands to reason and it is also stated in the State's responses and in the planning institutions' decisions, that the majority of the population that will wish to live there is Jewish – and accordingly the detailed scheme includes the establishment of institutions that are intended for the religious Jewish public, such as a ritual bath and a synagogue; however, this does not prevent residents from the dispersed populations from living in the town, nor does it "prevent giving a different 'national color' to the educational institutions and/or the religious institutions within the boundaries of the scheme in the future, if and

to the extent this will turn out to be necessary, all, taking into consideration the dynamics of the settlement on the ground" (paragraph 87 of the Appeals Committee's decision); it was further noted that the "Hiran" settlement group constitutes a negligible percent of the anticipated number of residents in the town (according to the Respondent, approximately 5%). As mentioned, the possibility of compensating those who will decide to live in Hiran is being discussed, because of the investments in their previous residences. We will also mention the possibility to receive a lot and additional benefits in the town of Hura, as the vast majority of the members of the Tribe chose. It could be argued that by planning towns only for Bedouin residents the authority is acting in a manner that actually somewhat discriminates members of other populations; however, as it was held in HCJ 528/88 **Avitan v. The Israel Land Administration** PD 43(4) 297 (1989) – in which a Jewish resident's petition to purchase a lot in the "Segev Shalom" Bedouin village was denied – the equality principle coincides with the possibility of planning separate towns for minority communities, in a manner that will allow them to maintain their character (see **Barak-Erez – Volume 3**, on page 562; for critique on such planning policy also in the context of the Ultra-Orthodox population, and the members of the Arab minority, see G. Gontovnik, **Discrimination in Housing and Cultural Groups – Between Legal Walls and Social Fences** (5774-2014), on pages 246-252, and the references mentioned there in note 391). This matter is extremely complex in and of itself, but this is not the place to address it.

38. The Applicants argued that their right to property was violated, and according to them, their houses should have been legitimized as part of the planning of the town. Indeed, the Applicants were settled on the ground, by license from the Respondent, for more than a few years – and are not, as the Respondent initially claimed, squatters like in other places; of course, the question which arises is what weight should to be attributed to this. In any event, one cannot say that the mere presence on the land and the construction thereon vested them with proprietary rights to the land; their houses were built without permit and illegally. It is obvious that the authority should not be obligated to legitimize illegal construction; furthermore, protecting the rule of law and preventing the encouragement of construction crime constitute legitimate planning considerations (see recently, A.P.A. 6738/13 **The State of Israel v. S. Y. Shepets Vaknin Construction Contractors Ltd.** [published in Nevo] (December 2, 2014) in paragraphs 3-5 of my opinion). The aforesaid also coincides with the correct approach vis-à-vis illegal construction, which unfortunately is a common phenomenon, against which the authorities must act with full force (see, for example, P.C.A. 4088 **Badir v. The Israel Land Authority** [published in Nevo] (2014) in paragraph 22). Indeed – and this also emerges from the State's notice dated October 5, 2014 – with respect to the members of the dispersed populations, and in light of the special circumstances that have been created, particularly since many of them were transferred to their place of residence by the authorities, this consideration can support the legitimization of illegal construction, subject to a broad perspective of the dispersal of the population on the lands of the Negev and within the boundaries of the Be'er Sheva Metropolitan Plan, and while taking the needs of all of the populations into consideration (regrading this matter see the Goldberg Report, in paragraph 110, and the Begin Report, on pages 5-6; see also A.P.A. 9057/09 **Igner v. *Hashmura* Ltd.** [published in Nevo] (2010) and A.P.A. 65/13 **Haifa District Planning and**

Building Committee v. ***Naot Mizrachi*** **Ltd.** [published in Nevo] (2013));

It will further be mentioned that all of the reports prepared in this matter, as well as the explanatory notes for the legislative memorandum for regulating Bedouin settlement in the Negev, stated that enhancing the enforcement against illegal construction, alongside finding a solution that is satisfactory to the members of the dispersed populations, is a fundamental principle of the proper policy (see the Goldberg Report, in paragraph 63; the **Abu Masad** Case, in paragraph 62 of Justice **A. Procaccia**'s judgment). In this case, the Respondent objects, for reasons that are based on broad planning considerations, to legitimizing the Applicants' houses, and it cannot be forced to do so, especially when they do not possess rights to the land . Furthermore, even if the Applicants did possess rights to the land , this would not be sufficient to derogate from the planning authorities' powers – subject, of course, to the law and the authority's administrative duties – pursuant to the case law that the use of property is subject to planning (C.A. 377/87 **Kalka Nachum Ltd. v. The State of Israel**, PD 41(4) 673 (1987); P.C.A. 2041/11 ***Kibbutz Yagur*** **v. The Haifa District Planning and Building Committee** [Published in Nevo] (2011)). As far as I am concerned, I would like to clearly emphasize that in my opinion legitimizing illegal construction creates a "boomerang effect" and the authorities must apply great caution when doing so it.

39. Again: I have not failed to notice the fact that the eviction motion was originally based on the unlawful squatting argument, when in fact the Applicants were there by virtue of a gratuitous and revocable license; This is why it was argued that the decision to evict was adopted based on a factual background that was lacking. In this matter it was noted in the Appeals Committee's decision that there is a principle impediment to legitimizing the construction on the location since it is illegal; and that the mere fact that the Applicants had settled there by license does not constitute a legitimization for illegal construction on the location, and it cannot violate the Respondent's right to evict the land. However, I do not rule out the possibility that it could have influenced the planning considerations at the basis, such that the possibility of including the Applicants' houses in the planning of the town would have been considered. It will be noted in this matter that the government decision to establish the town and the subsequent planning proceedings occurred several years before the Goldberg Report which recommended, *inter alia*, to include and legitimize the houses of the dispersed populations in the plan as part of the planning of the Negev region, wherever possible, in accordance with planning and other considerations: "In principle, it is recommended to recognize, to the extent possible, each of the unrecognized villages that has a minimal mass of residents, as will be determined, and which will have a municipal carrying capacity, strictly provided that such recognition will not contradict a district planning scheme" (paragraph 110 of the report); this principle is also expressed in the Begin Report. However, as mentioned, this is subject to broad considerations that are considered by the authorities, and in the case at hand, one must remember that the majority of the members of the Tribe settled in Hura, and that the illegal construction increased over the years. In this latter matter I will quote from the decision of the National Council's Appeals Committee dated September 24, 2012, paragraph 105:

"In any event, we will note that the factual background

presented before us supports the arguments of the representatives of the District Committee and the Administration, that the main mass of structures in the Umm Al-Hieran complexes was indeed built in recent years, when the preparation of the motion to establish the new town of Hiran had already begun, while the older Bedouin settlement, of the members of the Al-Qi'an tribe is in the Atir complex, which is not within the boundaries of the scheme. This fact was reported to us by "direct testimony" of Ms. Ruth Chen and Ms. Michal Darwin Kleinhaus, who were present in the oral hearing before us, on behalf of Architect Yoram Fogel, who prepared the plan for the Administration, and who informed us that in 1998, upon the beginning of the planning of the town of Hiran, when they themselves visited the area of the scheme, together with the district planner and additional entities, they discovered that there were only a few individual structures spread out, and there were mostly tin shacks in the area. Aerial photographs that were submitted to us from 1995 and 1998, and which were also presented to the objections sub-committee, support this state of affairs. We will note that similar data also emerge from aerial photographs of the Israel Mapping Center, in the GIS Department of the Ministry of Construction and Housing, where available data from the years 1999 through 2010 were found. The findings that emerge from these aerial photographs are that during the mentioned decade construction accelerated in the two concentrations in the area of the location of stage A of the Hiran scheme – the central one on the hill and the southern one in the *wadi*. Thus, while in 1999 there were 10 structures in the central site and 12 structures in the southern site (and it is possible that some of the structures served and serve agricultural purposes, and not necessarily residential ones), in 2004 there were 13 and 12 structures, respectively; in 2007 there were 16 and 17 structures, respectively; in 2008 there were 18 and 18 structures, respectively; and in 2010 there were 23 and 13 structures, respectively; in other words, during the decade the number of structures almost doubled to approximately 40 structures. We will note that the stated in the Lubrani Document, upon which the appellants relied, does not present a settlement picture that is contradictory to these findings, quite the opposite. Mr. Lubrani specifies in this document, *inter alia*, that the members of the Al-Qi'an tribe 'which consists of approximately 200 persons, settled following the War of Independence, on abandoned land around Beit Kama – Dvir – Lahav […] without lease agreements … due to pressure that was applied by the military

> government … approximately 2/3 of them agreed … to relocate their place of residence to the **vicinity of Atir**…' (emphasis added). Meaning, the early settlement was in Atir, as opposed to Umm Al-Hieran. If this is not sufficient, the representatives of the District Committee are correct that had there been houses in the Umm Al-Hieran complex in the early Bedouin settlement, it would have been expected that during the discussions regarding District Planning Scheme 27/14/4 – which was initially promoted as a joint scheme for the towns of Hiran and Omrit – an objection against the town of Hiran would have been filed by the Council of Unrecognized Villages, due to the settlement of the dispersed populations in the area, while in fact, such an objection was filed only with respect to the town of Omrit."

40. In summary, it is will be emphasized in this context – without in any way taking lightly the difficulty involved in evicting a person from the place where he resided for many years – that the eviction of the Applicants indeed does not leave them in a hopeless situation. They may move to the town of Hura, at the beneficial terms and conditions that were prescribed, and this pulls the rug from under the claim of infringement of right to property; approximately two thirds of the members of the Tribe did so. At the present time, after the adoption of decision no. 1028 of the Israel Lands Administration – which increases the compensation given to the members of the dispersed populations in return for their eviction of the unrecognized villages –Applicants who will move to Hura will be entitled to better terms than those received by the members of the Tribe who moved during the 1980's and 1990's. Alternatively, the Applicants, just as any other citizen, may purchase a lot in the town of Hiran, when it will be established, in accordance with the terms which apply to everyone. Furthermore, according to the Respondent's notice dated October 5, 2014, a Village resident who will purchase a lot in the town of Hiran may be entitled to receive compensation for the demolishing of his house – subject to the approval of the compromise committee – a benefit that is ordinarily granted to the members of the dispersed populations who move to a Bedouin town. Furthermore, in our opinion, the Respondent should consider, in an appropriate and fair manner, that residents who will prove that they are from the "core historical group" who arrived at Umm Al-Hieran as licensees, receive a certain benefit in the framework of the marketing tenders in the new town of Hiran; this would also give certain attention by the authorities to the fact that some of those affected by the matter were licensees and not squatters. It will be noted, for the completion of the picture, that a number of members of the Tribe who reside in Hura recently filed a petition to obligate the authorities to market lots in neighborhood 12 of the town to them (HCJ 7348/14 **Kiyan *et al* v.** The Authority for the Regulation of Bedouin Settlement in the Negev [published in Nevo]). In response to the petition, it was argued that these lots are first and foremost intended for the members of the Tribe who are on the land that is intended for the establishment of Hiran, and that there is no intention to market them until there is a ruling in the current Application. In light of that stated, on December 14, 2014, a decision in Petition 7348/14 was granted, pursuant to which the parties will submit their updated position after the granting of a judgment in this Application. Without

expressing any opinion in that petition, I will note that it appears as though there is great demand for these lots, but the Respondent is obligated, as part of the plan for planning the region, to supply them to the remaining residents of Atir - Umm Al-Hieran. In such circumstances, it seems to me – even if they think otherwise - that the Applicants have a fair solution, and they should exercise it. Finally, even if it will be said that the Respondent's decisions in this case violate the Applicants' **rights**, and in the entirety of the matter, this is not the case, *prima facie* they are not flawed by lack of proportionality. Generally speaking, it can be said that the purpose of the Respondent's actions is to establish the town of Hiran. It appears that the means it took to that end do not deviate, in these circumstances, from the limitation clause and the boundaries of proportionality. It seems that the means the authority has chosen achieve their purpose; that at this time there are no other means that would be less harmful (after, as mentioned, other options were considered and ruled out); and that on the normative level (meaning, the narrow proportionality test) the purpose which the Respondent is aiming to achieve – the establishment of the general town of Hiran, on the one hand, and the enhancement of the Bedouin town of Hura – is important enough to justify the alleged infringements involved in the achievement thereof.

The Sum of the Matter

41. In summary, I will suggest to my colleagues to accede to the Application for permission to appeal, but not to the appeal itself, for the reasons detailed above; I am sorry that attempts to reach a compromise did not succeed, and we would have been happy had they succeeded. I will note that in the abovementioned **Al-Okabi** case, we also suggested to the parties, at the end of the last session in the case, to conduct a mediation proceeding in order to reach an agreement (see decision dated June 2, 2014). It is obvious that a compromise approach is appropriate in legal disputes such as these, which emerge incidentally to the matter of the Bedouin settlement in the Negev, until the long awaited constitution of a comprehensive arrangement of this matter which – to the extent possible – will prevent additional disputes of this kind which frequently land in court; if common sense will prevail and various politics will be set aside, there is a greater chance for this to happen. The authorities and the dispersed Bedouin populations alike must promote practical solutions to the disputes, and the sooner the better. Although we are not accepting the appeal, in these circumstances there is no order for expenses.

42. Subsequently to the above, I read the opinion by my colleague, Justice Barak-Erez. It appears that the gap between us is not very large; See paragraph 40 above and the suggestion to consider granting a certain benefit in the marketing tenders to the proven licensees. However, I am afraid that on a practical level, the meaning of a suggestion that is more far reaching than the one I suggested, such as that of my colleague, could – *inter alia* – significantly delay the establishment of the town of Hiran, without grounds in the planning proceedings, all as was described above. I am of the opinion therefore that we must suffice with that which is stated in paragraph 40.

Deputy President

Justice Hendel:

I concur with the judgment of my colleague, the Deputy President.

Justice

Justice D. Barak-Erez:

1. I have read the judgment of my colleague Deputy President **E. Rubinstein**, and while I agree with a considerable part of the principles upon which it is based, I am of the opinion that their application in the circumstances of the matter leads to a different result.

The Main Factual Background

2. In order to clarify my position I wish to pinpoint the factual base underlying the current proceeding: The Applicants, who belong to the Al-Qi'an Bedouin tribe, have been residing in the Umm Al-Hieran region since the 1950's after the State permitted them to reside there following their eviction from their previous place of residence. Thus, legally speaking, their status is that of licensees. This, contrary to the State's original arguments in this proceeding, and in a not inconsiderable part of the planning proceedings – that the Applicants are trespassers. At a certain point, as part of the development of the Negev, it was decided to plan the area in which the Applicants reside, including the establishment of a new town named Hiran on the location. The Applicants participated in the planning proceedings and filed objections to the proposed scheme, but did not exhaust these proceedings by way of filing a petition to the Administrative Matters Court against the decision of the National Planning and Building Council's Appeals Sub-Committee (hereinafter: the "**Appeals Committee**") after it rejected the appeal they filed. Concurrently, a proceeding was being held in the courts regarding the eviction of the Applicants from the location. This proceeding reached our doorstep in the framework of this Application. According to the Applicants, the State should have taken into consideration the fact that they were legal licensees on the location and allowed them to stay thereon, even if in the framework of the new planning, especially once the State declared before us, throughout the entire proceeding, that the new town that is being established in a "general" town, meaning, not a town that is "closed" to Bedouin citizens who will wish to live there.

3. Similarly to my colleague, I am also of the opinion that the Applicants cannot, at this stage, raise arguments that relate to the planning proceedings. Once the Applicants chose not to exhaust the paths that were open to them to challenge the planning proceedings, the planning decisions became a *fait accompli* which can no longer be appealed. Also, on a formal level, the proceeding before us is not about planning, but rather only about the matter of evicting the Applicants from the location. Hence, the question of the manner in which the planning authorities should have planned the town of Hiran is not the question presented before us and therefore, I will not rule upon it. Nevertheless, I will note that I find much logic in the approach of my colleague, the Deputy President, that it would have been appropriate to try and include the Applicants' houses in the planning scheme of the new town to begin with, considering the fact that they are licensees who have been residing there for decades, and considering that it emerged from the Appeals Committee's decision that there is nothing preventing that from a planning

perspective. In reality, this was not done, and lessons should be learned from this for other planning proceedings. However, as stated, this matter is not presented to us. The matter that was presented to us revolves around the eviction of the Applicants, and that is what I will focus on.

The Normative Framework: The Normative Duality

4. The starting point for the discussion in the matter of the Applicants in this case must be the joint application of public and private law principles in their matter, in the framework of the principle of normative duality (See: Daphne Barak-Erez **Administrative Law** Volume 3 12-23 (2013)). This is what the Applicants argued, and on a principle level, this is a starting part to which my colleague also agrees.

5. Therefore, the decision to evict the Applicants, who were licensees for decades, must be examined both through the prism of the laws of license to land (see: Nina Zaltzman "License to Land" ***Hapraklit*** 42 24 (1995); Nina Zaltzman "'Gratuitous License' as 'Lending of Land'" ***Iyunei Mishpat*** 35 265, 271-272 (2012)), and through the prism of public law, which requires that decisions be reached while protecting fairness and based on the consideration of all relevant considerations.

6. **The Laws of License to Land** – a license is a flexible legal institution, the proper and just contents of which are given by the courts in the circumstances of the matter (see: Joshua Weisman **Law of Property; Possession and Use** 488 (2005) (hereinafter: "**Weisman**"). A license without consideration is generally reversible and revocable, but there are cases in which justice requires preventing the granter of the license from revoking it, for example, in the circumstances of estoppel, and each case will be decided based on its concrete facts (see: **Weisman**, on pages 480-484; and Miguel Deutch **Property** Volume 2 414-415 (1999)). As part of the justice tests that the courts applied in applications to revoke licenses to settle on land, significant weight has been attributed, *inter alia*, to the question of the duration of the use of the land and reliance of those residing on it (see, for example, C.A. 633/08 **Israel Land Administration v. Hitman** [published in Nevo] in paragraphs 23-24 of the judgment of my colleague, (then) Justice **E. Rubinstein** (hereinafter: the "**Hitman** Case)).

7. **Public Law: Fairness, the Duty to Consider all Relevant Considerations and the Decision's Factual Foundation** – as was also stated by my colleague, Deputy President **Rubinstein**, the authority must act fairly with a citizen with whom it interacts. This fairness requires, *inter alia*, willingness to genuinely consider data presented thereto that do not seemingly coincide with the authority's representatives' previous thoughts and plans. However, administrative fairness is not limited to this. Every administrative decision must be based on the weighing of all considerations relevant to the matter. Indeed, the authority has extensive discretion with regard to balancing the considerations. However, it is not permitted to ignore a relevant consideration or not bring it into consideration to begin with (see: H.C.J.F.H. 3299/93 **Wechselbaum v. The Minister of Defense**, PD 49(2) 195 (1995)). Moreover, the exercise of administrative discretion must be based on a correct factual foundation. When an administrative decision is adopted based on a factual foundation that is later discovered to have been incorrect, the authority must reexamine whether it must update its decision in light of the amended factual

platform underlying the matter. In the typical case, the courts address cases in which the authority adopted a decision that is desirable for an individual, and it requests to change it after it is discovered that it was based on a mistake. It has been held that if at issue is a "material mistake", it will be able to do so (see: Daphne Barak-Erez **Administrative Law Volume 1** 389 (2010)). This is also true, *mutatis mutandis*, in those cases in which the authority's original decision was harder on the individual, due to a mistake. In this case as well, the authority must reexamine whether its decision should be updated – to benefit the individual.

8. In furtherance thereto, it is necessary to further examine the relevant considerations that apply to the eviction of those residing on public lands, by virtue of permission they received. I am of the opinion that these considerations include, at the very least, reference to the following questions: what are the reasons underlying the decision to evict the licensees? Were the terms of the license violated? What is the intensity of the injury to the licensees and what is the degree of their reliance on the permission they had received? Does the eviction derive from a new planning of the land, and at what stage are the planning proceedings? Are the licensees entitled to receive compensation for their eviction? If the eviction derives from re-planning of the land and in such circumstances in which those licensees are indeed entitled to receive compensation for their eviction, additional questions arise: Does the re-planning allow compensation in the form of continued residence on the location as part of the construction that is being planned thereon? Does the compensation plan take into account the preferences of the licensees and the linkages they have created to the location, as well as to the community created thereon? It goes without saying that it is the authority that is entrusted with balancing between the considerations. Furthermore, the proper balance between the considerations could change from case to case. Thus, if the land is planned for public use that does not coincide with continued residence on the location (due to the planning of an industrial area, a nature reserve, etc.), there is no doubt that the weight that is to be attributed to the licensee's interest to remain on the location is small, and at times completely diminished. It will be emphasized there is an entire web of considerations which the authority must take into consideration prior to evicting the licensee from the land, and it goes without saying that he does not have an inherent "veto right" against the planning of the area on which he resides. In a State where the inventory of land is very limited, the authorities are required, and at times even obligated, to revoke licenses to land, for example, in order to crowd construction while taking into consideration the needs of future generations (see: Daphne Barak-Erez and Oren Perez "Planning in Israel's Lands: Toward Sustainable Development" ***Mishpat Umimshal*** 7 868 (2005)). However, alongside this, it is clear that revoking licenses is an administrative act that must be made based on reasoning and in a reasonable manner and in this sense, the interests of the licensees, *a fortiori* when dealing with licensees who have been residing on the location for decades, must also be taken into consideration prior to reaching a decision (see and compare: P.C.A. 7244/13 **Salam v. The Estate of the Late Gershon Valchinsky** [published in Nevo] paragraph 19 (February 18, 2014)).

9. **The Procedural Duality** – The case before us is complex not only because it combines private law and public law, but also because two procedural systems apply to it - that of the planning proceedings and that of the eviction proceedings. The planning proceeding is conducted in the planning institutions, and can

eventually be appealed in the form of an administrative petition. In contrast, the eviction proceeding is performed in a separate route, generally by way of filing an eviction motion (see also: The Public Lands (Eviction of Land) Law, 5741-1981). As part of the planning proceeding, the licensees residing in an area that the State wishes to re-plan may argue that such planning should be completely avoided and the present state should remain as is, or that the re-planning should consider their preferences and the community they have formed in the location. In contrast, the scope of arguments that can be raised in the framework of the eviction proceedings depends on the question whether the planning proceeding addresses the future or has already been completed. As far as the eviction decision is reached before the planning proceeding has begun – the licensees can argue broadly against the need to evict them and the State, on the other hand, can presents reasons for the eviction that are unrelated to the future planning, for example, due to their violation of the terms of the license. In contrast, if the eviction decision is reached simultaneously with the planning proceeding or thereafter – the arguments that can be raised against it are limited to those arguments that could not have been raised in the framework of the planning proceeding. Accordingly, if the planning proceeding is complete, the licensees may argue against the compensation format that is being offered to them if they are entitled to compensation (for example, will it allow them to stay in the vicinity, even if not in the existing houses, to the extent this is possible in the framework of the new planning), but not against the mere eviction from the existing houses on the location, if these do not coincide with the new planning.

10. The reciprocal relationship between the two said sets of rules is especially complex when the State requests to revoke the license that was given to the licensees after the planning proceedings have already begun, but before they were completed. I am of the opinion that in this case the court must examine whether there is a good reason to revoke the license and evict the licensees regardless of the planning proceedings and what that reason is (for example, there could be significance to the question whether the terms of license were violated and whether such a violation is material). If such a reason exists the court will order the removal of the licensees even without waiting for a ruling in the planning proceedings. In contrast, if the eviction of the licensees is required for the purpose of a future realization of planning schemes that have not yet been approved, and to which the licensees object, it would, in general, be appropriate to stay the ruling on the removal motions until the exhaustion of the planning proceedings (including the legal proceedings that can be initiated against them), which are the proper "geometrical location" to address the licensees' arguments with respect to the planning of the land upon which they reside. This so as to avoid a situation in which conflicting rulings will be reached in the framework of the planning proceedings and the eviction proceedings that are being held concurrently. This will also allow the authorities that are re-planning the area in which the licensees reside to genuinely examine the question whether the new intended use of the land allows the licensees' continued residence on the location, considering the entire circumstances, including the duration of time they have resided there. This will allow to take into consideration the licensees' interests when re-planning these lands, especially when dealing with licensees who have been residing on the location for many years and who were not squatters thereon, but rather settled there to begin with at the consent of the relevant authorities.

11. Hence, my colleague, the Deputy President, is correct that the fact that the legal proceedings relating to the planning proceeding were not exhausted, significantly limits the scope of matters that are examined by us. The planning proceeding is the appropriate framework for examining the proper balance between the licensees' interests, including the linkages they created to their location and their reliance on the license that had been granted to them, and the public need for re-planning, as well as for examining the question of finding the solutions for the licensees to continue to reside on the location, in the framework of the re-planning.

The Normative Framework: From Theory to Practice

12. My colleague examines the question of the reasonableness of the decision to evict the Applicants from the location where they reside, while emphasizing two considerations: The policy that relates to the regulation of Bedouin settlement in the Negev and the fact that the eviction of the Applicants is accompanied by an allegedly fair plan of compensation in the format of allocating lots in another Bedouin settlement in the Negev (which includes the allocation of lots to all of the adult males in accordance with an age threshold requirement). Taking these two facts into consideration, my colleague is of the opinion that the decision that was reached is reasonable. My opinion is different. Indeed, there is no doubt that these are relevant facts. However, in the framework of the decision to evict, and specifically regarding the format of compensation involved, the State did not at all take into consideration an additional important, even critical, fact – the fact that the Applicants have been licensees on the location for decades. In this matter the State relied on erroneous information that the Applicants are trespassers. Furthermore, the State did not reexamine its decisions once the correct facts were discovered. It did not at all take into consideration the linkage the licensees developed to their place of residence, the degree in which they relied on the license and the intensity of the harm to them after residing in the location for decades. As mentioned, these considerations bear significance in the prism of the law of property, which recognizes that the revocation of a license after decades is not a trivial matter. They also bear significance in the prism of public law, which is responsible for the duty of fairness, as well as for the duties deriving therefrom, including the duty to take all the relevant considerations into consideration and to base administrative decisions on a correct factual foundation.

13. Given the above, I am of the opinion that it is correct to examine the case before us considering its special characteristics: The fact that at issue are persons against whom there is no claim of trespassing, persons who were licensees and who settled on the location in accordance with the State's instructions, meaning, they are not residents with an implied license, but were rather granted an explicit license to settle on the location. Particularly given the considerations that relate to the protection of public lands against trespassers, I am of the opinion that the State must act fairly when examining the matters of those against whom there is no claim of trespassing.

The Appropriate Relief

14. In practice, there is no dispute in the case before us that the Applicants are entitled to receive compensation for their eviction from the land, since even the State is offering such compensation. Furthermore, my colleague also recognizes the special characteristics of the Applicants and calls for them to be treated fairly. He even adds, at the margins of his judgment, a recommendation to consider granting those who wish it, a certain benefit in the framework of the marketing tenders in the new town of Hiran. This is correct, but in my opinion insufficient. Indeed, once the Appeals Committee denied the Applicants' appeal in which they requested, at the least, to legitimize their houses as part of the Hiran Town Planning Scheme, and since the Applicants did not challenge this decision, it must be deemed a *fait accompli*, and it is difficult to see how the Applicants can continue to live in their houses that do not comply with the planning that has become final.

15. However, once it became clear that the Applicants are licensees and not trespassers, the authorities were obligated to exercise renewed discretion regarding the format of the eviction and the compensation that will be granted to the residents as part of the eviction proceedings, and they did not do this. They did not do this, but rather continued to insist on the decision that originally relied upon an erroneous factual foundation, and consequently, on lacking considerations that were adapted to that factual foundation. The conclusion my colleague reached does not provide any practical reflection of the fact that the decision regarding the eviction, and especially the compensation involved therein, violated the rules of public law, and therefore it is inappropriate for the Court to allow it to be executed in its original format, without exercising renewed discretion. This result also coexists with the fact that the traditional ruling of this Court was diligent about the fact that when a motion for removal is filed against possessors of land, and in the interim it is discovered that they are in fact licensees, the motion will be denied (see: C.A. 44/65 **Pritzker v. Shahin**, PD 22(1) 675 (1966)). The time may have come to reexamine whether this rule is relevant to any event in which it is discovered during the legal proceeding that the possessors, are not, in fact, trespassers. However, there is no doubt that at the current time this is the binding case law and in any event, it is especially true in the case of licensees whose residence on the land resulted from an explicit instruction by the authorities, as opposed to an implicit license which can be argued after years. Hence, as the earlier instances which addressed the case have already noted, it was inappropriate to file the claim in the format in which it was filed. The result is that both in terms of procedure and in terms of substantive public law, it is impossible to reach another conclusion other than that the claim was filed in a flawed manner and that it also continued to be adjudicated without the authorities exercising renewed discretion in the matter.

16. Therefore, I am of the opinion that the authorities must reexamine the format of the compensation that will be granted to the Applicants in the framework of the eviction, taking into consideration, *inter alia*, that the Applicants are, as mentioned, licensees that have been residing on the location for approximately sixty years, and that the State adamantly states that the new town does not have a unique nature and is open to all persons, including the Applicants themselves if they will so desire. For example, the State can consider the possibility of offering the Applicants (and any of the additional residents of the location who can prove that they have been licensees on the location for many years) additional

possibilities of receiving compensation, other than moving to Hura, including the possibility of receiving a lot in the new town of Hiran, in accordance with the size of the lots that is planned in this town (which is smaller than the lots offered to the Applicants in Hura) instead of receiving the lots that were offered to them in Hura (considering the fact that even the State stated in its response dated October 5, 2014, the possibility of granting compensation to any of the Applicants who will demolish his house and purchase a lot in Hiran). Additionally, the State should also consider the date of eviction, taking into consideration the fact that a stay in the eviction until the beginning of the execution of the planning in Hiran could open the path to alternative compensation by means of receiving a lot instead and building thereon in accordance with the new planning. This is not the only option, but it should also be genuinely and sincerely examined. The compensation offered in Hura may be more generous in terms of the willingness to allocate relatively larger lots, and also to the children's generation, however this does not put an end to examining other options. Since arguments on this matter were not raised before us, I will not address the questions that might arise given the preference to the selected format of compensation to allocate lots on a gender basis, questions which have complex aspects in a context such as this. In any event, as I stated above, the planning scheme that applies to the land cannot be challenged as part of this proceeding, and so can’t the demolition orders that were issued against the houses, which the Applicants built without permits, be challenged in this framework. However, the Applicants' obligation to demolish these houses does not mean that, in the framework of the eviction proceedings, their status as licensees on the location or the community they created thereon can be ignored.

17. As to my colleague's last remark, I will add and clarify that I do not see eye to eye with him that this suggestion would delay the establishment of the town. The result of my judgment is directed towards the compensation that will be granted in the framework of the existing planning, and we have not been presented with any data that would indicate that compensation of such or similar kind would result in delaying the establishment of the town.

18. Epilog: Indeed, the Applicants cannot receive the entire relief they requested, after failing to exhausted the means of challenging the planning in the region. However, one can also not reconcile with the flaws that tainted the conduct of the authorities in all that relates to the decision to evict and the compensation involved therein. I am of the opinion that there must be a practical reflection – as opposed to merely a recommendation – of the principles that my colleague outlined in his opinion. Therefore, if my opinion was to be heard, we would accept the appeal and instruct the State to reconsider the compensation that is to be granted to the Applicants in the framework of the eviction proceedings, while examining the possibility of preserving their linkage to their residential environment, as stated in paragraph 16 above.

Justice

Decided by a majority of opinions as stated in the judgment of the Deputy President.

Given today, the 16th of Iyar 5775 (May 5, 2015).

Deputy President	Justice	Justice