HCJ 1890/03

Bethlehem Municipality
and 22 others
v
1. State of Israel – Ministry of Defence
2. Gen. Moshe Kaplinsky – IDF Commander in Judaea and Samaria

The Supreme Court sitting as the High Court of Justice
[3 February 2005]
Before Justices D. Beinisch, E. Rivlin, E. Hayut

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

Facts: The site known as Rachel's tomb, which is situated in the outskirts of Bethlehem, is believed to be the tomb of the Biblical Matriarch Rachel and is a holy site to Jews. It is the third holiest site in Jewish tradition, after the Temple Mount and the Machpela Cave.
Because of the persistent terror attacks by Palestinians on Jewish targets since September 2000, and following the discovery of a terror cell that intended to attack a bus of worshippers on their way to the tomb, the respondent made an order to requisition land for the purpose of paving a bypass road that would allow Jewish worshippers to travel safely to Rachel's tomb. The order was amended twice, but the petitioners still argued that the order violated their freedom of movement and property rights.

Held: The respondent has a duty to ensure the realization of the right of freedom of worship by protecting the safety and lives of the worshippers on their way to and from Rachel's tomb. In choosing the measures for realizing this purpose, the respondent must take into account the basic rights of the petitioners, including their property rights and freedom of movement, and he must strike a proper balance between the conflicting rights. In this case, the solution adopted by the respondent did indeed ensure the realization of the worshippers' freedom of worship without violating the essence of the petitioners' freedom of movement and property rights. Therefore no intervention of the court was warranted.

Petition denied.

Legislation cited:

Basic Law: Human Dignity and Liberty, s. 3.

Palestine Order in Council, 1922, art. 83.

Order Concerning the Requisition of Land no. 14/03/T (Judaea and Samaria), 5763-2003.

Order Concerning the Requisition of Land no. 14/03/T (Amendment of Borders) (Judaea and Samaria), 5763-2003.

Order Concerning the Requisition of Land no. 14/03/T (Second Amendment of Borders) (Judaea and Samaria), 5763-2003.

Protection of Holy Places Law, 5727-1967, ss. 1, 2(b).

Israeli Supreme Court cases cited:

HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**. [1]

HCJ 940/04 *Abu Tir v. IDF Commander in Judaea and Samaria* (not yet reported). [2]

HCJ 10356/02 *Hass v. IDF Commander in West Bank* [2004] IsrSC 58(3) 443; **[2004] IsrLR 53**. [3]

HCJ 401/88 *Abu Rian v. IDF Commander in Judaea and Samaria* [1988] IsrSC 42(2) 767. [4]

HCJ 24/91 *Timraz v. IDF Commander in Gaza Strip* [1991] IsrSC 45(2) 325. [5]

HCJ 2717/96 *Wafa v. Minister of Defence* [1996] IsrSC 50(2) 848. [6]

HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**. [7]

HCJ 358/88 *Association for Civil Rights in Israel v. Central Commander* [1989] IsrSC 43(2) 529; **IsrSJ 9 1**. [8]

HCJ 292/83 *Temple Mount Faithful v. Jerusalem District Police Commissioner* [1984] IsrSC 38(2) 449. [9]

HCJ 650/88 *Israel Movement for Progressive Judaism v. Minister of Religious Affairs* [1988] IsrSC 42(3) 377. [10]

HCJ 257/89 *Hoffman v. Western Wall Superintendent* [1994] IsrSC 48(2) 265. [11]

HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* [2001] IsrSC 55(4) 267. [12]
HCJ 7128/96 *Temple Mount Faithful v. Government of Israel* [1997] IsrSC 51(2) 509. [13]
HCJ 2725/93 *Salomon v. Jerusalem District Commissioner of Police* [1995] IsrSC 49(5) 366. [14]
HCJ 4044/93 *Salomon v. Jerusalem District Commissioner of Police* [1995] IsrSC 49(5) 617. [15]
CA 6024/97 *Shavit v. Rishon LeZion Jewish Burial Society* [1999] IsrSC 53(3) 600; **[1998-9] IsrLR 259**. [16]
HCJ 672/87 *Atamalla v. Northern Commander* [1988] IsrSC 42(4) 708. [17]
HCJ 153/83 *Levy v. Southern District Commissioner of Police* [1984] IsrSC 38(2) 393; **IsrSJ 7 109**. [18]
HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**. [19]
HCJ 2481/93 *Dayan v. Wilk* [1994] IsrSC 48(2) 456; **[1992-4] IsrLR 324**. [20]
HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [2003] IsrSC 57(2) 349; **[2002-3] IsrLR 173**. [21]
HCJ 13/86 *Shahin v. IDF Commander in Judaea and Samaria* [1987] IsrSC 41(1) 197. [22]
HCJ 448/85 *Dahar v. Minister of Interior* [1986] IsrSC 40(2) 701. [23]
HCJ 148/79 *Saar v. Minister of Interior* [1980] IsrSC 34(2) 169. [24]
HCJ 4706/02 *Salah v. Minister of Interior* [2002] IsrSC 56(5) 695. [25]
HCJ 174/62 *Religious Coercion Prevention League v. Jerusalem City Council* [1962] IsrSC 16 2665. [26]
HCJ 531/77 *Baruch v. Traffic Comptroller, Tel-Aviv and Central Districts* [1978] IsrSC 32(2) 160. [27]
HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* [1990] IsrSC 44(1) 536. [28]
HCJ 390/79 *Dawikat v. Government of Israel* [1980] IsrSC 34(1) 1. [29]
HCJFH 4466/94 *Nuseibeh v. Minister of Finance* [1995] IsrSC 49(4) 68. [30]

For the petitioner — A. Tussia-Cohen.
For the respondent — A. Licht.

JUDGMENT

Justice D. Beinisch

Before us is a second amended petition, in which the petitioners attack the legality of the Order Concerning the Requisition of Land no. 14/03/T (Second Amendment of Borders) (Judaea and Samaria), 5733-2003, which was made by the IDF Commander in Judaea and Samaria (hereafter: 'the second respondent' or 'the respondent') on 17 August 2004. The order concerns the requisition of a strip of land in the area of Bethlehem, for the purpose of paving a bypass road for Jewish worshippers who wish to go from Jerusalem to the tomb of the Matriarch Rachel (hereafter: 'the tomb') and the building of a wall to protect this road. These walls are supposed to be integrated, as will be clarified below, in the route of the planned 'separation fence' in the Jerusalem area.

Factual background and sequence of proceedings

1. On 9 February 2003, the respondent made the Order Concerning the Requisition of Land no. 14/03/T (Judaea and Samaria), 5763-2003 (hereafter — the original order). By means of this order, the respondent wanted to build walls that would ensure safe passage for worshippers who wished to go to Rachel's tomb by means of the existing access routes from Jerusalem to Rachel's tomb, which is located in the outskirts of Bethlehem, approximately 500 metres south of the municipal boundary of Jerusalem. According to the original planning, the wall was supposed to cross Hebron Road, the main road that goes through Bethlehem and which is currently the main traffic artery to the tomb, so that half of the road would be used only for traffic to the tomb, whereas the other half, on the other side of the wall, would be used by the local residents. In addition, a wall was planned on the other side of that road, as well as a wall along the El-Aida refugee camp, which is situated close to the tomb and has a commanding position over the access road to it (for the route of the original order, see the aerial photograph attached in appendix A). This order requisitioned large areas of land in the area of Bethlehem and Beit Jalla, and the walls that were planned in the order were likely to create a situation of enclosing a whole neighbourhood between them.

The making of the aforesaid order led to the filing of a petition by Bethlehem Municipality (the first petitioner), Bet Jalla Municipality (the

second petitioner), the Jerusalem District Electric Company (the third petitioner, the Moslem Waqf (the twenty-third petitioner) and private residents (petitioners 4-22) who claimed that they were likely to be harmed by the realization of the aforesaid order (hereafter, jointly: 'the petitioners'). In the original petition, which was directed against the aforesaid order, the petitioners claimed that the order should be set aside because, according to them, they were not given a right to present their case before it was published, and because according to them the order departed from the margin of reasonableness and proportionality. Their main argument was that in choosing the aforesaid original solution, the respondent did not give proper weight to the harm that would be caused to the local population and that other alternatives that affect the lives of the local population to a lesser degree were not considered. Within the framework of their petition, the petitioners also proposed several options to the original solution that was chosen. *Inter alia* they proposed that a tunnel should be made to the tomb, or a bypass road should be made for the worshippers, by building a double wall that would pass between the rows of olive orchards on the west side of most of the houses of the petitioners.

2. In response to the original petition, counsel for the respondents gave notice that the second respondent decided to grant the petitioners a possibility of objecting to the order and that it was agreed with counsel for the petitioners that the petition, with its arguments and appendices, with constitute the objection, which would be submitted to the respondent for a decision. Pursuant to this agreement, the petitioners' objection was indeed brought before the respondent, who decided to accept the objection and change the original order. Instead of the solution that was planned within the framework of the original order, which was based, as aforesaid, on making the existing access routes to the tomb secure, the respondent now chose a solution of preparing an alternative route, which would be used only as an access route to Rachel's tomb, and making this road secure by means of walls. For the purpose of the aforesaid change, on 5 August 2003 the respondent issued the Order Concerning the Requisition of Land no. 14/03/T (Amendment of Borders) (Judaea and Samaria), 5763-2003 (hereafter: 'the second order'). According to the route that was planned in the second order, the new road was supposed to start from roadblock 300 in the north, at the entrance to Bethlehem from the direction of Jerusalem, and to circumvent the

houses near Hebron Road where most of the petitioners reside, to the west of those houses. Near the tomb, the planned road was supposed to split and connect up to Rachel's tomb in two ways: one road would go east and join Hebron Road and from there continue south until it reached Rachel's tomb by means of the existing access road, whereas the other would continue south and afterwards turn east to Rachel's tomb. These two access routes to the tomb were supposed to create a ring road that would allow access to and from the area of the tomb. According to the plan, two walls would be built next to the new road, one to prevent shooting from the direction of Bethlehem and the other north of the El-Aida refugee camp and the area adjoining the refugee camp (for the route of the second order, see the aerial photograph which is attached in appendix A).

On 14 August 2003, the petitioners were notified that their objection had been accepted and that there was an intention to change the route, and on 19 August 2003, a tour was conducted in the area of the requisition, in which the petitioners and their counsel participated, in order to show them the route that had been chosen in the second order. On 28 August 2003, the petitioners submitted an objection to this route. Following this objection, a meeting took place between the respondent's representatives and the petitioners' representatives, but this meeting did not produce any results. Consequently, the respondent considered the petitioners' objection on its merits and rejected it. After the objection was rejected, the petitioners filed an amended petition ('the first amended petition'), which was directed against the aforesaid second order.

3. The petitioners' main argument in the first amended petition was that the respondent's decision in making the aforesaid second order also suffered from extreme unreasonablenesss. According to them, this decision did not reflect a proper balance between the rights of the worshippers and the property rights of the local population and their right to freedom of movement within Bethlehem, which they claimed were seriously violated by that order. The petitioners also claimed that it was possible to realize the purpose of the order by means of other measures that would violate the rights of the petitioners to a lesser degree than the method chosen in the second order. It should be noted that the petitioners did not dispute that the second order resulted in a significant reduction in the number of residents whose freedom of movement was harmed as a result of making the access routes to

the tomb secure, as compared with the solution proposed in the original order. The route of the new road that was planned in the second order, which circumvents to the west the houses adjoining Hebron Street in which most of the petitioners reside, led, in the respondents' estimation, to a reduction of approximately 70% in the number of residents whose houses would be surrounded by a wall as compared with the route planned in the original order. Notwithstanding, the petitioners argued that the fact that the solution adopted in the second order was more proportionate (or perhaps we should say less disproportionate) than the solution adopted in the original order still was not capable of making this solution proportionate and reasonable.

It would appear that no one disputes that the main harm that the second order was likely to cause the residents (and especially their freedom of movement) arose from the last part of the route that was planned in the second order, according to which the planned road was supposed to split near the tomb and connect with Rachel's tomb in two ways, as explained above. This last section was going to create an area that was surrounded entirely by walls that enclosed on all sides, even according to the respondents' position, at least five residential houses where six families lived and where there were several shops and offices, including the offices of the Moslem Waqf (hereafter: 'the area'). Indeed, it would appear that even counsel for the respondents was aware that it was this area that was likely to create the greatest violation of freedom of movement, since on page 16 of the respondents' reply to the first amended petition, he said that 'the main harm alleged is to the residents who will live from now on in an area that is surrounded by a wall, without free access to Bethlehem.' It should be noted at this point that this section of the route, and the serious harm that it was likely to inflict on the residents who were going to be enclosed within it, is indeed the part that troubled us more than anything else in the route of the second order.

4. On 29 October 2003, a hearing took place before us with regard to the first amended petition, at the end of which the parties reached an agreement, according to which the parties were prepared to discuss finding concrete solutions for the petitioners who would be harmed by implementing the second order, without the parties waiving their basic arguments. We therefore decided, on the basis of this consent, that the petitioners would submit to counsel for the respondents details of the concrete claims that

ought, in their opinion, to be clarified, and that afterwards a meeting would take place between the parties for detailed discussions. We also decided that the parties would notify us of the results of the negotiations and that on the basis of their notice we would decide how the hearing of the petition would continue.

According to what is stated in the supplementary response of the respondents dated 5 December 2003, of all the petitioners only two petitioners (the Jerusalem District Electric Company and the Moslem Waqf) chose to submit detailed claims to the respondents. In the supplementary response, it was also stated that following the submissions of these two petitioners, a meeting did indeed take place between the parties, but in the end the parties did not succeed in reaching an agreement. In their reply to the supplementary response of the respondents, the petitioners confirmed that they did not succeed in reaching an agreement with the respondents on the questions and claims that were raised by them in the petition, and they gave notice that they therefore wished the court to decide the petition on its merits.

5. On 2 June 2004, after negotiations between the parties failed, we held a further hearing on the first amended petition. The hearing focused mainly on the harm that the second order was likely to cause the residents of the aforesaid area, who were supposed to be surrounded as aforesaid by walls, and on ways of preventing or reducing the harm to those residents. After the hearing, an order *nisi* was made in the petition.

Following the making of the order *nisi* and in view of the court's remarks during the hearing, the respondents asked for additional time in order to reconsider the planned route. Meanwhile, on 30 June 2004, this court gave its judgment in HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [1] with regard to the route of the 'separation fence' in the area north-west of Jerusalem. According to what is stated in the respondents' reply to the second amended petition on 1 November 2004, after that judgment the respondents began a comprehensive reassessment of the route of the 'separation fence' in its entirety, and the respondents' reconsideration of the route in the area of Rachel's tomb was included in this reassessment.

6. At the end of the aforesaid reassessment, the respondents decided once again to change the planned route in the area of Rachel's tomb. Therefore, on 17 August 2004, the respondent issued the Order Concerning the Requisition of Land no. 14/03/T (Second Amendment of Borders)

(Judaea and Samaria), 5763-2003 (hereafter: 'the new order'). The new route is based on the route that was proposed in the second order, in the sense that it includes the preparation of a bypass road, which would be used only as an access route to Rachel's tomb, and which starts at roadblock 300 in the north and circumvents the houses adjoining Hebron Road (where, as aforesaid, most of the petitioners live) to the west. A wall will be built next to the road for the purpose of preventing gunfire from the direction of Bethlehem on passing cars, and a similar wall will be built to the north of the El-Aida refugee camp and north of the area adjoining the refugee camp. The change made by the new order as opposed to the second order is at the end of the road, in the area where it connects with the tomb. Instead of two access routes to the tomb, the new order retains only the road that joins Hebron Road to the east and continues from there to the tomb. By cancelling the ring road which, in the second order, connected between the bypass road and the tomb, and by making do with only one access route to the tomb, the result created by the second order in which some of the residents were going to be enclosed in an area surrounded by walls without free access to Bethlehem is avoided. Therefore, as a result of this last change in the route, none of the buildings belonging to the petitioners, including the Waqf building, is any longer going to be in an area surrounded by walls, and all the petitioners have free and direct access to the city of Bethlehem without any need to pass through a roadblock (for the route of the new order, see the aerial photograph that is attached hereto in appendix B).

The new order was sent to the petitioners, together with explanations for their counsel, and none of the petitioners submitted an objection to the order. But on 27 September 2004 the petitioners notified the court that this change did not satisfy them, and that they insisted upon their complaints being heard. Therefore, on 26 October 2004 the petitioners filed a second amended petition, which is directed against the new order. This is the petition that is before us today.

The arguments of the parties

7. In their second amended petition, the petitioners as aforesaid attack the validity of the new order, namely the Order Concerning the Requisition of Land no. 14/03/T (Second Amendment of Borders) (Judaea and Samaria), 5763-2003. In this petition, the petitioners claim that the making of the new order and the replacement of the previous orders with the new order is still

incapable of solving the problems that the petitioners outlined in the original petition and in the first amended petition. The main argument of the petitioners is that the respondent's decision in making the new order suffers from extreme unreasonableness. According to them, this decision does not reflect a proper balance between the rights of the worshippers and the rights of the local population, and especially their right to freedom of movement. The petitioners do not dispute that the new order does not create a situation where residents are surrounded by walls, and that the new order does indeed reduce the harm to the residents as compared with the previous orders, but they claim that this order still results in unreasonable harm and inconvenience to the residents as a result of the restriction of their freedom of movement, and the disruption of their everyday lives. The petitioners also argue once again that it would be possible to achieve the purpose of the order by means of alternatives that would harm the petitioners less than the option chosen in the new order. Thus, for example, they claim that it would be possible to ensure the security of the worshippers by means of the existing security arrangements, or by digging a tunnel to the tomb. In addition, the petitioners argue that the respondent was motivated by irrelevant considerations in making the order, and they claim that the purpose of the order is not to ensure the security of the worshippers against terror attacks but to 'annex' Rachel's tomb to Jerusalem. The petitioners also argue that the order should be set aside because they claim that they were not given a real right of hearing before the decision was made to issue the new order.

Against this the respondents argue that the solution chosen in the new order reflects a proper balance between the conflicting interests, and that the decision is reasonable and proportionate. Counsel for the respondents argues that the new order adopts a route that is intended to provide a response to the remarks of the court in the hearing on the first amended petition dated 2 June 2004 and also to the test laid down by this court in *Beit Sourik Village Council v. Government of Israel* [1]. The premise for the reconsideration, according to counsel for the respondents, was a desire to choose a more proportionate solution, which would minimize, in so far as possible, the harm to the local population, without abandoning the need to protect access to the tomb. Therefore, according to him, a route was chosen that provided a security solution that was not ideal, in order to prevent local residents being left on the other side of the separation fence. Counsel for the respondents

argues that the route that was ultimately chosen does indeed provide a solution to the petitioners' problem and to all of the specific claims that they raised in their original petition and in their amended petition. Counsel for the respondents argues that the solution that was ultimately chosen, with certain changes, is based on one of the petitioners' own proposals in their original petition — paving a bypass road for the worshippers. Counsel for the respondents further argues that building the wall and paving the bypass road is clearly intended for a security purpose — the protection of the lives of Israelis going to Rachel's tomb. Counsel for the respondents discusses in his response the need to make access to Rachel's tomb secure for worshippers, and he reviews the terror attacks and operations, which include sniper fire, placing explosive charges, throwing Molotov cocktails and disturbances of public order that have been directed at the tomb since the combat activities and terror attacks began in September 2000. These events have led to the military commander being compelled to adopt measures to protect the site and ensure the safety of the worshippers on their way to and from the tomb, as well as when they are at the site. Therefore, counsel for the respondents in his response discusses how the decision is based on security reasons only and that there is no basis for the petitioners' claims that irrelevant considerations and an intention to annex the area of the tomb to Jerusalem underlie the decision to pave the road and build the walls to protect it. Counsel for the respondents also emphasizes that we are speaking of temporary measures, and he argues that there is no intention at all to decide thereby the permanent status of the tomb and the means of access thereto.

Thus we see that the starting point for our deliberations is that the petitioners do not deny the rights of the worshippers to have access to Rachel's tomb, but according to them this access should be ensured without harming their freedom of movement in Bethlehem and their property rights. The respondents, for their part, recognize their duty to minimize the damage caused to the petitioners' freedom of movement and property rights as a result of the operations undertaken to ensure the worshippers' freedom of access. The main dispute is therefore whether the respondent properly balanced the rights of the worshippers against the rights of the local population.

It should also be noted that the scope of the requisition under the new order (and the route of the bypass road and the walls planned within the

framework of this order) was planned so that it would be integrated with the planned route of the 'separation fence' in the area of Jerusalem. Notwithstanding, as the petitioners state expressly in their petition, the present petition does not concern the 'separation fence,' but merely the question of the legality of the specific requisition order that is the subject of this petition:

> 'It should be noted that this petition is not directed at the "separation fence" that is being built at this time in the territories (and the petitioners in this petition do not wish to address the question of the fence itself at this stage) but *merely at the question of the safe passage to Rachel's tomb*, exactly as the respondents themselves define the order, *which was intended for the purpose of building a wall to protect the worshippers going to Rachel's tomb*' (s. 25 of the second amended petition; emphases in the original).

Indeed, the two parties agreed that the declared purpose of the requisition order in this case is not to prevent the infiltration of terrorists from the territories into Jerusalem, but to create a safe access road for the worshippers who wish to go from Jerusalem to Rachel's tomb. The legal questions that arise in the present case are different from the questions raised by the 'separation fence' in general, and even the considerations that are under discussion are not the same (cf. *Beit Sourik Village Council v. Government of Israel* [1]). Therefore, our judgment will be restricted to the question brought before us by the petitioners — the question of the legality of the new order that is the subject of the second amended petition.

Deliberation

8. In the petition before us, the petitioners do not raise any argument against the *authority* of the respondent to make the order for the requisition of land under discussion. Indeed, the general power of the military commander to requisition land on the basis of the provisions of the Regulations Concerning the Laws and Customs of War on Land, which are appended to the Fourth Hague Convention of 1907 (hereafter: 'the Hague Convention') and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter: 'the Fourth Geneva Convention'), when the conditions under international and Israeli law are satisfied, has been recognized by this court in a series of judgments (see, for

example, *Beit Sourik Village Council v. Government of Israel* [1], at para. 32; HCJ 940/04 *Abu Tir v. IDF Commander in Judaea and Samaria* [2], at para. 10; HCJ 10356/02 *Hass v. IDF Commander in West Bank* [3], at paras. 8-9; HCJ 401/88 *Abu Rian v. IDF Commander in Judaea and Samaria* [4], at p. 770; HCJ 24/91 *Timraz v. IDF Commander in Gaza Strip* [5], at pp. 333-335; HCJ 2717/96 *Wafa v. Minister of Defence* [6], at p. 856). The petitioners in the petition before us argue against the *discretion* of the respondent in making the order and they raise arguments that make allegations of unreasonableness and disproportionality. Indeed, even when he acts with authority, the military commander is liable to exercise his authority (*inter alia*) in accordance with the principles of reasonableness and proportionality, and his discretion will be subject to the scrutiny of this court (see, for example, *Beit Sourik Village Council v. Government of Israel* [1], at para. 24; *Hass v. IDF Commander in West Bank* [3], at para. 10; HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [7], at pp. 375-377 {[redacted]}). Our deliberations will focus, therefore, on the exercising of judicial scrutiny with regard to the military commander's considerations, in accordance with the criteria outlined by the court in its case law rulings.

The arguments concerning irrelevant considerations

9. As stated, one of the petitioners' arguments is that the respondent's decision in making the order was based on an irrelevant consideration. According to them, the consideration that underlies the order was not ensuring the security of the worshippers against terror attacks but the 'annexation' of Rachel's tomb to Jerusalem. Indeed, it is a rule that the administrative authority should act in every case on the basis of relevant considerations only and for the purpose for which the authority was given to it. But in our case we have not been persuaded that a satisfactory factual basis has been established to attribute irrelevant considerations to the respondent in making the order. In his reply, counsel for the respondents discusses how the order was based on security reasons only — the protection of the safety and lives of those coming to pray at Rachel's tomb, and that there is no intention to use the order to determine the permanent status of Rachel's tomb and the means of access thereto. In support of this argument, counsel for the respondents gives details of the threats that exist at this time to the worshippers on the existing access road to the tomb, and he explains why, in the respondent's opinion, the measures chosen to reduce the danger currently

threatening the worshippers are necessary. In his response to the second amended petition, counsel for the respondent argues that since the 'Western Wall tunnel' riots and even more since the events of September 2000, we can see a continuing Palestinian effort to harm the Jewish religious sites that remain in the territories, including Rachel's tomb, the Jewish worshippers who go to those sites and the IDF forces protecting them. Counsel for the respondents also gives details of the terror attacks that were directed against Rachel's tomb since October 2000, which include sniper fire, placing explosive charges, throwing explosive devices, throwing Molotov cocktails and disturbances of the peace. Counsel for the respondent also gave details of the security measures adopted until now, including the guarding and fortification of Rachel's tomb. The respondents' claim is that after protecting the tomb, the security risk lies in the access road to the tomb, which almost entirely passes through hostile territory. Counsel for the respondents further argues that Bethlehem has recently become a terror centre, so that the risk of terror attacks directed at those going to the tomb has increased, and in his supplementary notice dated 8 November 2004, he gives additional details that were only recently cleared for publication. In this notice, counsel for the respondents states that in the weeks preceding the filing of the notice, the General Security Service and the Israel Defence Forces discovered several terror cells in the city of Bethlehem; these included Palestinian policemen who served in Bethlehem. He also says that in the course of investigating the matter, it was discovered that there is a cell that carried out attacks in Bethlehem and the area of Rachel's tomb, and that this cell also planned to carry out an attack against a bullet-proof bus that takes the worshippers to the tomb. According to the plan that was revealed, the cell was supposed to attack the bus by means of a car bomb and afterwards to attack the rescue services who came to aid the injured. The respondents therefore argue that there is a real need to adopt measures to protect the security and lives of the worshippers on the way to Rachel's tomb, and this is the purpose that underlies the order. The supplementary notice was accompanied by a summary prepared by the General Security Service, which describes the information that was obtained as a result of discovering the terror cells. The arguments of counsel for the respondents in his reply to the amended petition and the second amended petition are supported, respectively, by the affidavit of the second respondent, General Moshe Kaplinsky, who is military

commander for the Central District, and the affidavit of Colonel (res.) Dan Tarza, who is the coordinator for planning the route of the 'separation fence.' So we see that the respondents have provided a detailed factual basis from which it can be seen that in the situation prevailing today in Bethlehem, there is a real security risk to the lives of the worshippers who wish to go to Rachel's tomb. By contrast, the petitioners did not prove any facts that could refute the arguments concerning security concerns that were the basis for the decision of the second respondent. Therefore, since the respondent's presumption of administrative propriety has not be rebutted, this argument of the petitioners should be rejected.

Right to present a case

10. An additional argument that the petitioners made is that they were not given a real right to present a case before the decision was made to issue the new order. No one disputes that the petitioners have a right to present their arguments with regard to the area affected by the order (see, for example, *Hass v. IDF Commander in West Bank* [3], at para. 6; HCJ 358/88 *Association for Civil Rights in Israel v. Central Commander* [8], at p. 540); but, according to the respondents, this right was given to the petitioners and was realized *de facto*. Counsel for the respondents claims that the objections of the petitioners to the original order and to the second order were considered carefully and that in formulating the new arrangement the respondents were attentive to the arguments and problems of the petitioners and open to changing their original position. And indeed, a proof of this is the fact that as a result of the petitioners' petitions and objections, the respondent changed his original position and made a significant change in the planning, by adopting an alternative that is based, with certain changes, on one of the alternatives proposed by the petitioners themselves. Moreover, no one doubts that the respondents took care to notify the petitioners that their objection to the original order was accepted and of the intention to change the planning, and they even invited the petitioners and their counsel to tour the area of the requisition in order to show them the second route that was adopted. Moreover, no one disputes that the petitioners were given an opportunity to object to the second order and that the petitioners did indeed do this. As a result of this objection, an additional meetings took place between the respondent's representatives and the petitioners' representatives with the aim of finding solutions that would be acceptable to the two parties. When this

attempt failed, the respondent examined the objection and rejected it in a reasoned and detailed response. Likewise, no one disputes that the petitioners were given an opportunity to object to the new order, which was also sent to the petitioners together with explanations to their attorneys, but none of the petitioners filed an objection to this order. Indeed, the history of the order which is the subject of the petition and the changes that were made to it, to a large extent also as a result of the petitioners' claims with regard to the harm caused to them, shows that the respondents gave every opportunity to persons who might potentially be hurt by the route of the planned road and fence to raise their arguments before making a decision on the final route. In these circumstances, we see no real merit in the claim that the petitioners' were not given the right to present their arguments in this case, even though attention was paid to that right to be heard only after the original petition was filed.

Now that we have rejected the petitioners' arguments with regard to irrelevant reasons and the right to present their case, let us turn to examine the petitioners' main claim in this case, namely the claim that the respondent's decision does not give sufficient weight to the harm caused to the basic rights of the petitioners, and it therefore suffers from unreasonableness and disproportionality.

Reasonableness of the respondent's decision

11. As can be seen from the respondent's affidavit, the order with regard to the requisition of the land was made in order to increase the security of the worshippers on their way to Rachel's tomb. The purpose underlying the order, therefore, is to allow the realization of the worshippers' freedom to worship at Rachel's tomb. The problem is that the means chosen for realizing this purpose inherently involve a violation of the petitioners' property rights and freedom of movement. The question before us is therefore whether the new order properly balances the worshippers' freedom of worship against the petitioners property rights and freedom of movement. Let us first consider the worshippers' freedom of worship at Rachel's tomb and afterwards the proper balance between it and the rights of the petitioners.

Freedom of worship

12. The freedom of religion and worship is recognized in our law as one of the basic human rights. This freedom was already mentioned in article 83 of the Palestine Order in Council, 1922, and in the Declaration of Independence. Freedom of religion and worship has been recognized in the

case law of this court for a long time (see, for example, HCJ 292/83 *Temple Mount Faithful v. Jerusalem District Police Commissioner* [9], at p. 454; [10] HCJ 650/88 *Israel Movement for Progressive Judaism v. Minister of Religious Affairs* [10], at p. 381; HCJ 257/89 *Hoffman v. Western Wall Superintendent* [11], at pp. 340-341; HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* [12], at p. 277). Freedom of worship was recognized as an expression of freedom of religion, and as a branch of freedom of expression (HCJ 7128/96 *Temple Mount Faithful v. Government of Israel* [13], at pp. 523-524; *Hass v. IDF Commander in West Bank* [3], at para. 19), and there are some who also regard it as an aspect of human dignity (President Barak in HCJ 3261/93 *Manning v. Minister of Justice* [14], at p. 286, and in CA 6024/97 *Shavit v. Rishon LeZion Jewish Burial Society* [16], at p. 649 {[redacted]}). Within the scope of freedom of religion and freedom of worship the court has also recognized the yearning of persons of religious belief to pray at sites that are holy to them (*Hass v. IDF Commander in West Bank* [3], at para. 16). To this we can also add the recognition of the freedom of access for members of the various religions to the places that are sacred to them as a right that is worthy of protection, which is also enshrined in Israeli law in the Protection of Holy Places Law, 5727-1967 (ss. 1 and 2(b) of the law).

The status of the freedom of worship was discussed not long ago by this court in *Hass v. IDF Commander in West Bank* [3], *per* Justice Procaccia:

> 'The freedom of religion is a constitutional basic right of the individual, with a preferred status even in relation to other constitutional human rights. The freedom of worship constitutes an expression of freedom of religion, and it is an offshoot of freedom of expression… The constitutional protection given to freedom of worship is therefore similar, in principle, to the protection given to freedom of speech, and the constitutional balancing formula that befits the one is also applicable to the other… We are concerned with a constitutional right of great strength whose weight is great when it is balanced against conflicting social values' (*ibid.* [3], at para. 19).

Moreover:

> 'The freedom of religion and worship… is regarded as a constitutional right of supreme status that should be realized in

> so far as possible in view of the conditions prevailing in the territories, while protecting the safety and lives of the worshippers' (*ibid.* [3], at para. 15).

In that case, the court considered a very similar issue to the one in our case — the legality of a requisition and demolition order that was made by the IDF commander in Judaea and Samaria for the purpose of increasing the security of the persons using the 'Worshippers' Route' in Hebron (a route that is used by the Jewish residents of Kiryat Arba who wish to realize their right to pray at the Machpela Cave). With regard to the rights of the worshippers in that case. Justice Procaccia said (*ibid*. [3], at para. 19):

> 'The worshippers who wish to go to the Machpela Cave by foot on Sabbaths and festivals wish to realize a constitutional right of freedom of worship in a holy place. *This right is of special importance and weight on the scale of constitutional rights*' (emphasis supplied).

13. No one disputes that Rachel's tomb is a holy site for Jews and that this site has been regarded by Jews as a holy site and a place of worship for many generations. Indeed, there is much evidence regarding the sanctity of the site to Jews and pilgrimages that were made to it already from very early times. In his book, *Wars of the Holy Places — the Struggle for Jerusalem and the Holy Places in Israel, Judaea, Samaria and the Gaza Strip* (Jerusalem Institute for Israel Studies, 2000), to which we were referred in the state's reply, Dr S. Berkovitz states that the site recognized today as 'Rachel's tomb, in the outskirts of Bethlehem, has been identified as Rachel's tomb for more than a thousand years. He also adds that Rachel, a holy figure in Judaism, represents motherhood, mercy, redemption and the return to the land of Israel, in both the Bible and in Jewish tradition, and that her tomb is regarded as the third most holy site to Jews, after the Temple Mount and the Machpela Cave (*ibid*., at p. 301). In the aforesaid book, Dr Berkovitz discusses how, notwithstanding its holiness to Islam as well, writers and pilgrims since the Middle Ages, both Jewish and Moslem, have regarded Rachel's tomb as a holy place for Jews. He also says that the right of Jews to have possession of the site and to pray in it was recognized officially already in an edict of the Turkish Sultan in the middle of the nineteenth century, following the thorough renovation made at the site in 1841 under the direction of Moses Montefiore and with his funding (*ibid*., at p. 301, and also at pp. 17-19).

During the period of the British Mandate, the *status quo* was preserved at the site, and Jews were allowed to go to the tomb and pray there (*ibid*., at pp. 26-29). After the War of Independence, when the tomb was under the control of the Kingdom of Jordan, the site was admittedly well preserved, but in practice it was not possible to realize the right of Jews to have access to the tomb (*ibid*., at p. 302). After the Six Day War, control of the tomb returned to Israel and a new status was given to the centrality of the tomb as a site of religious worship. The site was renovated and became both a site of worship and a tourist site. When the boundaries of Jerusalem were extended after the Six Day War, Rachel's tomb was not annexed to Jerusalem, and its status within the municipal boundaries of Bethlehem was maintained. Notwithstanding, the right of access to it was realized, and the tomb became a centre of attraction for many worshippers and tourists (*ibid*., at p. 302).

Counsel for the respondents wishes to add to this that even in the interim agreements between Israel and the Palestinian Liberation Organization and the Palestinian Authority, within which framework the control of Bethlehem, *inter alia*, was transferred to the Palestinian Authority, the right of Jews to realize their right to freedom of worship at the sites holy to them was maintained, and according to these agreements, Israel retained the security control of the tomb and the access routes to it (see also Berkovitz, *Wars of the Holy Places — the Struggle for Jerusalem and the Holy Places in Israel, Judaea, Samaria and the Gaza Strip*, *supra*, at pp. 215-220, 287, 302-303). The petitioners, for their part, do not dispute the right of Jewish worshippers to freedom of worship at Rachel's tomb nor do they even dispute the fact that the worshippers have the right to realize the right of freedom of worship with relative safety. The premise for our deliberations, therefore — without expressing any position as to the political status of Rachel's tomb or the right to have possession of the tomb — is that Jewish worshippers have a basic right to freedom of worship at Rachel's tomb.

14. The freedom of worship is not an absolute right. It is a relative right that may, in certain circumstances, yield to other public interests or basic rights. The remarks of Justice Barak in *Temple Mount Faithful v. Jerusalem District Police Commissioner* [9], at p. 455, are illuminating in this regard:

> 'Freedom of conscience, belief, religion and worship, in so far as the theory of belief is put into the practice of action, is not an absolute right… my right to pray does not allow me to trespass

> into my neighbour's property or to cause him a nuisance. The freedom of conscience, belief, religion and worship is a relative freedom. It should be balanced against rights and interests that are also worthy of protection, such as private and public property and the freedom of movement. One of the interests that should be taken into account is the interest of public order and public safety.'

Indeed, in certain situations, the military commander may restrict or even prevent the realization of freedom of worship at a certain place in order to protect public order and public safety and in order to protect the lives and safety of the worshippers themselves (see *Hass v. IDF Commander in West Bank* [3], at para. 19; see also HCJ 2725/93 *Salomon v. Jerusalem District Commissioner of Police* [14]; HCJ 4044/93 *Salomon v. Jerusalem District Commissioner of Police* [15]). But before he restricts the worshippers' freedom of worship, the military commander should examine whether he is able to adopt reasonable measures that will allow the realization of the freedom of worship while ensuring the safety of the worshippers. This was discussed by Justice Barak in *Temple Mount Faithful v. Jerusalem District Police Commissioner* [9], at p. 455:

> '… Freedom of conscience, belief, religion and worship is limited and restricted in so far as is necessary and essential in order to protect public safety and public order. Naturally, before any action is carried out that may violate and restrict this freedom because of harm to public safety, the police ought to take all the reasonable steps available to them in order to prevent the violation of public safety, without violating the right to conscience, belief, religion and worship. Therefore, if the concern is one that there will be violence from a group that is hostile to the worshippers, the police should act against this violence, and not against the worshippers. But if reasonable action by the police is not capable, in view of its limitations, of removing the *de facto* harm to public safety, there is no alternative to a restriction on the freedom of conscience and religion, as required in order to protect public safety.'

(See also *Hass v. IDF Commander in West Bank* [3], at para. 19).

In the case before us, the worshippers have not been denied the right of worship by the authorities, but it has been violated as a result of the danger presented to the worshippers by terror activities that may be directed at them. Therefore the respondent decided to search for measures that would reduce the danger to the safety and security of the worshippers while preserving their right of worship. The respondent's decision is to give significant weight to the basic right to freedom of worship, while making a proper balance between the freedom of worship and the public interest of protecting public safety. But in our case, the right of the worshippers to freedom of worship is opposed not only by the interest of public safety but also by the rights of the petitioners to property and freedom of movement, which may be harmed as a result of measures adopted to protect the safety of the worshippers and which are *de facto* harmed by the measures chosen by the respondent (see *Hass v. IDF Commander in West Bank* [3], at para. 18). It should be emphasized that the respondents do not dispute the fact that the petitioners have these basic rights and that the respondent is obliged to take them into account in his decision, whereas the petitioners, for their part, do not question the basic right of the worshippers to freedom of worship at Rachel's tomb. The dispute between the parties therefore concerns the question whether the new order provides a proper balance between the worshippers' freedom of worship and the petitioners' freedom of movement and property rights. Let us first discuss the proper balance between the worshippers' freedom of worship and the petitioners' freedom of movement, and then the proper balance between the worshippers' freedom of worship and the petitioners' property rights.

Freedom of worship versus freedom of movement

15. As stated, the main claim of the petitioners is that realization of the worshippers' freedom of worship in accordance with the order seriously violates the freedom of the petitioners to move within Bethlehem, and for this reason the order should be set aside. Freedom of movement is one of the basic human rights and it has been recognized in our law both as an independent basic right (see, for example, HCJ 672/87 *Atamalla v. Northern Commander* [17], at pp. 709, 712; HCJ 153/83 *Levy v. Southern District Commissioner of Police* [18], at pp. 401-402 {117-118}) and as a right that is derived from the right to liberty (*per* President Barak and Justice Cheshin in HCJ 5016/96 *Horev v. Minister of Transport* [19], at pp. 59 {213} and 147 {} respectively). In addition, there are some authorities who believe that

this freedom is also derived from human dignity (see the remarks of President Barak in *Horev v. Minister of Transport* [19], at p. 59 {213}; *Shavit v. Rishon LeZion Jewish Burial Society* [16], at p. 651 {[redacted]}; and HCJ 2481/93 *Dayan v. Wilk* [20], at p. 472 {341-342}; cf. the position of Justice Tal in *Horev v. Minister of Transport* [19], at p. 181 {[redacted]}.

The status of the freedom of movement in our legal system was discussed by this court in *Horev v. Minister of Transport* [19], where it considered *inter alia* the relationship between the freedom of movement and an injury to religious sensibilities and a religious lifestyle. In that case, President Barak said that freedom of movement is 'one of the more basic rights' (*ibid*. [19], at p. 49 {[redacted]}), that the right to freedom of movement 'is in the first rank of human rights' (*ibid*. [19], at p. 51 {[redacted]}) and that freedom of movement is 'a freedom that is on the very highest level of the scale of rights in Israel' (*ibid*. [19], at p. 53 {[redacted]}). The president also added in *Horev v. Minister of Transport* [19] that 'as a rule, we place the freedom of movement within the boundaries of the state on a similar constitutional level to that of the freedom of expression' (*ibid.* [19], at p. 49 {203}). It should be noted that similar remarks with regard to the status of the freedom of movement were also made by the justices who did not agree with President Barak's majority opinion in *Horev v. Minister of Transport* [19] (see, for example, the remarks of Justice Cheshin (*ibid.* [19], at p. 147 {[redacted]}) and the remarks of Justice Tal (*ibid.* [19], at p. 181 {[redacted]}). On the status of freedom of movement in Israeli law following *Horev v. Minister of Transport* [19], see also Y. Zilbershatz, 'On Freedom of Movement within the State: Following HCJ 5016/96 *Horev v. Minister of Transport*,' 4 *Mishpat uMimshal* (1998) 793, at pp. 806-809.

The freedom of movement is recognized as a basic right also in international law. The freedom of movement within the state is enshrined in a whole host of international conventions and declarations concerning human rights (see, for example, art. 12 of the International Covenant on Civil and Political Rights, 1966, art. 13 of the Universal Declaration of Human Rights, 1948, and art. 2 of the Second Protocol of the European Convention on Human Rights, 1950) and it would appear that it is also enshrined in customary international law (see Zilbershatz, 'On Freedom of Movement within the State: Following HCJ 5016/96 *Horev v. Minister of Transport*,' *supra*, at pp. 800-801).

Notwithstanding, like the freedom of worship and like almost all freedoms, the freedom of movement is not absolute. It is relative, and it should be balanced against other interests and rights. This is the case in our constitutional law (see, for example, *Horev v. Minister of Transport* [19], at pp. 39, 181 {[redacted]}; it is also the case in international law concerning human rights. Thus, for example, art. 12 of the International Covenant on Civil and Political Rights provides:

> '1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement…
>
> …
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> …'

(See also art. 4 of the same Covenant with regard to the possibility of restricting the rights listed therein in situations of national emergency). It should be noted that, in view of the positions of the parties in their arguments before us, we are not called upon to decide the question whether and to what extent the principles of Israeli constitutional law and the international human rights conventions apply in Judaea and Samaria (cf. HCJ 3239/02 *Marab v. IDF Commander in Judaea and Samaria* [21], at p. 364 {[redacted]}; HCJ 13/86 *Shahin v. IDF Commander in Judaea and Samaria* [22], at pp. 210-213). It is sufficient for us to say that within the framework of the duty of the military commander to exercise his discretion reasonably, he must also take into account, among his considerations, the interests and rights of the local population, including the need to minimize the degree of harm to their freedom of movement, and, as aforesaid, the respondents do not deny this. How, then, should the military commander balance the basic right of freedom of movement against the basic right of freedom of worship?

16. The proper balancing formula between these two rights should be determined in accordance with the relative weight of each of these rights, since 'the balancing formulae vary in accordance with the conflicting values'

(*Dayan v. Wilk* [20], at p. 475 {345}) and as Vice-President Ben-Porat said in HCJ 448/85 *Dahar v. Minister of Interior* [23], at p. 708:

> 'The proper criterion is *not* fixed and uniform for all types of case… but a suitable test should be adopted, taking into account the *nature* and importance of the competing principles in our outlook concerning the *relative importance* and degree of *protection* that we wish to give to each principle or interest' (emphases in the original).

In the case before us, we are presented with a conflict between two basic rights of equal weight. As we have seen above (in paras. 12 and 15), both the freedom of worship and the freedom of movement have been recognized in our case law as being on the highest level of the scale of rights (with regard to the freedom of worship, see *Hass v. IDF Commander in West Bank* [3], at paras. 15, 19; and with regard to the freedom of movement, see *Horev v. Minister of Transport* [19], at pp. 49-53 {202-207}). Moreover, both the freedom of worship and the freedom of movement have been recognized in the case law of this court as having the same weight as freedom of expression (see *Hass v. IDF Commander in West Bank* [3], at para. 19, and *Gur Aryeh v. Second Television and Radio Authority* [12], at p. 285, with regard to freedom of worship; and see *Horev v. Minister of Transport* [19], at p. 49 {202-203}, *Dahar v. Minister of Interior* [23], at pp. 706, 708, and *Levy v. Southern District Commissioner of Police* [18], at pp. 401-402 {117-118} with regard to freedom of movement). In addition, with regard to both of them an identical balancing formula has been applied in order to balance them against the same public interests (with regard to the freedom of worship, see, for example, HCJ 292/83 *Temple Mount Faithful v. Jerusalem District Police Commissioner* [9], at p. 456; HCJ 7128/96 *Temple Mount Faithful v. Government of Israel* [13], at pp. 523-534; and with regard to freedom of movement, see, for example, the remarks of President Barak in *Horev v. Minister of Transport* [19], at p. 54 {[redacted]}: 'In view of the close relationship between the freedom of movement inside the state and the freedom of expression and worship, it seems to me that the same requirement of likelihood [that applies with regard to a violation of the freedom of expression and the freedom of worship] should apply to a violation of the freedom of movement in the state' (square parentheses supplied)).

The result implied by the conclusion that we are concerned with a conflict between two rights of equal weight is that the balance required in this case is a horizontal balance, which will allow the coexistence of both of these rights. The remarks made in *Dayan v. Wilk* [20], at p. 480 {353} (with regard to the balance between the right to hold a meeting and procession as opposed to the right to privacy in a person's home) are pertinent:

> 'We are concerned with two human rights of equal standing, and the balance between them must therefore find expression in a reciprocal waiver whereby each right must make a concession to the other in order to allow the coexistence of both… The balance required between the rights is a horizontal balance.'

Indeed, 'in the organized life of society, there is no "all or nothing." There is "give and take," and a balance between the different interests' (Justice Barak in HCJ 148/79 *Saar v. Minister of Interior* [24], at p. 178). Therefore, the freedom of worship should not be realized at the price of a total denial of freedom of movement, and the freedom of worship should not be denied absolutely in order to satisfy the freedom of movement, but a reciprocal restriction is required on the scope of the protection given to each of these liberties, so that the 'essence' of each of the competing values is preserved (*Dayan v. Wilk* [20], at p. 481 {354}). We must therefore find the balance that will allow the freedom of worship to be allowed in essence, without violating the essence of the freedom of movement (*Levy v. Southern District Commissioner of Police* [18], at p. 402 {118}). Within the framework of this balance, we should seek to preserve the 'essence' of each of these liberties, and the violation should only affect their 'exterior.' We should also take into account the extent and nature of the violation (*Shavit v. Rishon LeZion Jewish Burial Society* [16], at p. 651 {[redacted]}).

Against this background, let us examine the nature and intensity of the violation of the petitioners' freedom of movement in this case, in order to examine whether the new order does indeed result in the realization of the essence of the freedom of worship without harming the essence of the freedom of movement, as required by the horizontal balance between these two liberties of equal weight.

17. How, then, should we examine the extent of the violation of the freedom of movement of the petitioners, who argue with regard to their right to move within the city of Bethlehem, when their place of residence or work

is in the area close to Rachel's tomb? From the case law of this court we can derive several subtests or criteria for examining the intensity of the violation of the individual's freedom of movement, of which the main ones are the geographic scope of the restriction on movement, the degree of intensity of the restriction on movement, the period of time during which the restriction remains in force, and the interests that the freedom of movement seeks to realize.

With regard to the criterion concerning the *geographic scope of the restriction of movement*, Justice Türkel said in HCJ 4706/02 *Salah v. Minister of Interior* [25], at p. 704:

> 'It need not be said that the most serious violation of the freedom of movement and the right to liberty is the imprisonment of a person in a jail, by virtue of an arrest warrant or a prison sentence, and the restriction of his movements behind the prison walls. Less serious than this is the restriction of freedom of movement to a specific place of residence, such as an alternative to arrest that makes the accused's bail conditional upon his living at a specific address ("house arrest"). Less serious still is a restriction of movement to the limits of a certain city, and less serious still is a restriction of movement by means of a prohibition to enter the limits of a certain city. Less than this is a restriction on the freedom of movement by means of a prohibition against leaving the country… less than this is a restriction by means of a prohibition against entering a certain country, such as a prohibition against entering an enemy country…'

Similar remarks were also made by Justice Goldberg in *Atamalla v. Northern Commander* [17], at p. 710:

> 'Restrictive orders are of different and varied kinds, and the degree of restriction caused by them are not always equal. A restrictive order that imposes "house arrest" on the person affected by the restriction… cannot be compared to a restrictive order that restricts his movements to an area within which he is allowed to move freely. And a restriction to a specific area, for someone who lives and works there, cannot be compared to such a restriction for someone who was "exiled" to the area by virtue

> of the order, just as someone who is prohibited from leaving Israel cannot be compared to someone whose movement is restricted within Israel.'

(See also the remarks of Justice Bach in *Dahar v. Minister of Interior* [23], at pp. 714-715; and see the remarks of Justice Cheshin (in a minority opinion) in *Horev v. Minister of Transport* [19], at p. 147 {[redacted]}).

An additional criterion, as we have said, is *the degree of intensity of the restriction on movement*. It is clear that the violation involved in a complete denial of the freedom of movement is more serious than a violation caused by a partial restriction on the freedom of movement, and the smaller the extent of the restriction, so the intensity of the violation will be less. Thus, for example, it was held with regard to the intensity of the violation of freedom of movement in the context of the closure of roads that the closure of a road that is the only means of access cannot be compare to the closure of a road where there are alternative access routes nearby; the closure of a main traffic artery cannot be compared to the closure of a road inside a neighbourhood; and the closure of a road that is tantamount to blocking access absolutely cannot be compared to a closure than results merely in a longer route and an inconvenience for the persons using the road; and the smaller the increase in time and convenience caused by the alternative route are, the smaller the intensity of the violation of freedom of movement (*Horev v. Minister of Transport* [19], *per* President Barak, at p. 67 {[redacted]}, *per* Justice Or at pp. 98-102 {[redacted]}, *per* Justice Cheshin at pp. 145-146 {[redacted]}, *per* Justice Levin at p. 162 {[redacted]}; HCJ 174/62 *Religious Coercion Prevention League v. Jerusalem City Council* [26], at p. 2668; HCJ 531/77 *Baruch v. Traffic Comptroller, Tel-Aviv and Central Districts* [27], at pp. 165, 167). Indeed, an absolute denial of movement cannot be compared to a traffic delay or inconvenience, and the smaller the degree of the inconvenience, the smaller is the intensity of the violation of the freedom of movement. Thus it was held, with regard to evaluating the intensity of the harm caused by the separation fence, that considerations such as the number and location of the exit gates and crossings planned in the fence, the distance between them and the place of residence and place of work of the local residents and the convenience and speed of passing through those gates and crossings should be taken into account (see *Abu Tir v. IDF Commander in Judaea and Samaria* [2], at para. 12; and cf. also *Beit Sourik Village Council v.*

Government of Israel [1], at paras. 60, 74, 76 and especially para. 82; see also K. Michael and A. Ramon, *Jerusalem Surrounded by a Fence — the Building of the Security Fence ('The Separation Fence') Around Jerusalem* (Jerusalem Institute for Israel Studies, 2004), at pp. 79-82).

According to the criterion of *the period of time during which the restriction remains in force*, the longer the period of the restriction of freedom of movement, the greater the intensity of the violation (*Salah v. Minister of Interior* [25], at p. 705). A curfew that denies the right of a person to leave his home for several hours cannot be compared to house arrest that denies a person the right to leave his home for several weeks or even months; similarly, a restriction on the right to leave Israel for several days cannot be compared to a restriction of this right for several months or even years (*Salah v. Minister of Interior* [25], at p. 705); similarly, the closure of a part of a traffic artery for the duration of prayers cannot be compared to a closure for the whole of the Sabbath (*Horev v. Minister of Transport* [19], at p. 66 {[redacted]}).

According to the criterion of *the personal interest of a person in realizing freedom of movement*, the purpose of the movement or travel is considered in order to assess the intensity of the violation of freedom of movement. The restriction of the movement of someone whose travel is essential and important may increase the violation thereof. Indeed, someone whose travel is intended for the purpose of urgent medical treatment cannot be compared to someone whose travel is intended for the purpose of a pleasure trip (*Salah v. Minister of Interior* [25], at p. 705). A similar test was proposed by Prof. Zilbershatz in her article 'On Freedom of Movement within the State: Following HCJ 5016/96 *Horev v. Minister of Transport*,' *supra*, with regard to the freedom of movement:

> 'The more important the purpose of the movement, the greater will be the constitutional protection that should be given to the right to freedom of movement… according to this, it is definitely possible that certain movement for a purpose that is not essential, such as for the purpose of travel only, will be recognized as a basic right that should be protected, but to a lesser degree than movement for an essential purpose, such as for the saving of life' (*ibid*., at p. 815).

A similar approach was expressed in *Horev v. Minister of Transport* [19], where all the justices agreed that a restriction of movement on Bar-Ilan Street should be done in a way that left the road open to traffic for security and emergency vehicles (see, for example, the remarks of President Barak, *ibid*. [19], at p. 67 {[redacted]} and the remarks of Justice Tal at p. 183 {[redacted]}). Indeed, when examining the intensity of the violation involved in restricting movement, we should recognize that the right of movement is not merely a right in itself, but it is also a right that is required in order to realize additional rights and interests. Thus, for example, it was held in *Horev v. Minister of Transport* [19] that the harm to the secular public that used Bar-Ilan Road for the purpose of travelling from one part of Jerusalem to another part thereof was less than the harm to the secular public that lived in the area, *inter alia* because the 'latter segment of the public has other special needs. The difficulties with which it will need to contend are different. The violation of the freedom of movement and other interests whose realization depends on the freedom of movement of this segment of the public is different' (Justice Or, *ibid*. [19], at p. 104 {[redacted]}; see also the remarks of President Barak, *ibid*. [19], at pp. 67-68 {[redacted]}, and the remarks of Vice-President S. Levin, *ibid*. [19], at pp. 163, 167 {[redacted], [redacted]}, and of Justice Mazza, *ibid*. [19], at pp. 170-171 {[redacted]}). Thus, for example, it was held in *Beit Sourik Village Council v. Government of Israel* [1] that when the route of the 'separation fence' separates farmers from their land which is the source of their livelihood, this is a serious violation of their freedom of movement (*ibid.* [1], at paras. 60, 68-71, 80, 82). Therefore, when examining the intensity of the violation arising from the restriction of the freedom of movement, we should also take into account the purpose of the movement and the strength of the interests for the realization of which that movement is required.

Against the background of these criteria, let us examine the violation of the freedom of movement in this case.

From general principles to the specific case

18. When making the order with regard to the requisition of land, the respondent sought as aforesaid to increase the security of the worshippers on their way to Rachel's tomb, in order to allow the realization of the worshippers' freedom of worship. The respondent chose to realize this purpose (which no one disputes is a proper purpose) by means of a bypass road, which will be used only as a means of access to Rachel's tomb, and the

protection of this road by means of walls. The solution of paving a bypass road for the worshippers is an appropriate solution because it allows the access of the worshippers to Rachel's tomb to be guaranteed in order that they can realize their right to freedom of worship on the site, without harming the freedom of movement of the local population on the existing roads in Bethlehem, as was likely to have happened according to the original order. Counsel for the respondents also argues that when the new arrangement that guarantees the safe access of the worshippers to the tomb is put into operation, it will be possible to remove the restrictions that currently exist on the freedom of movement of most of the residents who live between roadblock 300, which is situated south of Jerusalem, and Rachel's tomb. Moreover, the harm caused by the new order to the freedom of movement of the residents is far smaller (both from the viewpoint of the number of residents harmed and from the viewpoint of the intensity of the harm) as compared with the solution proposed in the original order and the second order, and the petitioners do not deny this. What therefore remains of the violation of the residents' freedom of movement?

A study of the arguments of the parties and of the maps and aerial photographs that were attached to their arguments shows that even after the change in the route within the framework of the new order, there are several residents whose freedom of movement is still harmed to a certain degree as a result of the protective measure adopted to enable the access of the worshippers to the tomb. As a result of the amendment to the route that was made in the second order (and was also retained in the new order), the movement of most of the petitioners, who live along Hebron Road, is not affected by the requisition order, since the road that will be paved will circumvent, as aforesaid, their houses to the west, in an area without buildings. Thus, according to the respondents' estimation, the number of residents whose freedom of movement will be harmed was reduced by approximately 70% as compared with the original order. The harm that remains is to several dozen residents who live in the vicinity of Rachel's tomb, in an area where the bypass road will connect with Hebron Road in the east, and from there continue southwards to the tomb. As a result of the amendment made in the new order, those residents who live close to the tomb will no longer be surrounded by walls, and their movement to the other parts of Bethlehem will be unrestricted, without any need to go through

roadblocks. Notwithstanding, the harm is reflected in the fact that the movement of the residents who live close to the tomb will be affected in the sense that they will not be able to cross Hebron Street, but will need to go round the area of the requisition order to the south.

Thus we see that the second order led to a significant reduction in the number of residents whose freedom of movement is affected, whereas the new order led to a significant reduction in the intensity of the violation of the freedom of movement of the remaining residents that are affected. Indeed, in assessing the extent of the harm caused by the route chosen to the local residents, we should take into account not only the number of the residents that are affected, but also the intensity of the violation of their rights. The remarks made recently in *Abu Tir v. IDF Commander in Judaea and Samaria* [2], which concerns the route of the separation fence in the area of the village Tzur-Bahar, are pertinent in this respect:

> 'In assessing the proportionality of the proper route, we should take into account both the number of the owners of rights who are likely to be harmed and also the intensity of the violated rights. A weighting of these components is required in accordance with their relative weight in order to arrive at a determination of a route that will, from an overall perspective, cause the least possible harm to the local inhabitants. An examine of the *number* of owners of rights who are harmed by each option is insufficient. Without assessing the *intensity of their rights* that are expected to the violated it is impossible to assess the proportionality of the chosen option… an assessment of the intensity of the rights being violated must be made at the same time as the number of residents that are harmed are taken into account, while making a proper weighting between them' (*ibid*. [2], at para. 12; emphases in the original).

The reduction in the intensity of the violation of the freedom of movement within the framework of the new order, as compared with the second order, is mainly expressed in two of the criteria mentioned above: the geographic scope of the restriction on movement, and the degree of intensity of the restriction on movement.

From the viewpoint of the geographic scope of the restriction on movement, according to the second order that was cancelled, the residents in

the area of the ring road that was planned close to Rachel's tomb were supposed to be enclosed in an area surrounded by walls; going from this area, even to Bethlehem itself, required passing through a roadblock. In other words, according to the second order we are not speaking of restricting the ability of the aforesaid residents to enter Jerusalem or even restricting them to the boundaries of Bethlehem, but of restricting them to a very small area. According to the new order, however, the ring road has been cancelled and none of the petitioners will find himself any longer in an area surrounded by walls. The restriction on the movement of the residents is now limited, from the viewpoint of its geographical scope, to a restriction on their movement into Jerusalem, and even this restriction does not arise directly from the requisition order that is the subject of the petition before us. It is therefore clear that from the viewpoint of this criterion there has been a huge reduction in the violation of the freedom of movement.

From the viewpoint of the criterion that concerns the intensity of the restriction on movement, we are also speaking of a significant reduction in the intensity of the violation. According to the solution that was proposed in the second order, in order to leave the aforesaid area, the residents of the area were supposed to travel to roadblock 300 (a distance of approximately 250 metres) and pass through the roadblock in order to enter Bethlehem. But according to the solution that was ultimately adopted in the new order, the movement of all of the petitioners within Bethlehem is free and direct, without any need to pass through a roadblock. The movement of the residents of the aforesaid area to the west will now be absolutely unimpeded, whereas their movement to the east, to the other side of Hebron Road, will require circumventing Rachel's tomb and the walls that protect the access to it from the south. This circumvention does admittedly lengthen the travel time of the residents of the area on their way to the eastern part of Bethlehem by several hundred metres, and this involves a certain nuisance and inconvenience, but it is clear that this nuisance is much less than the nuisance that they would have suffered as a result of the need to go through a roadblock every time that the residents of the area wanted to enter the area or to go from it to Bethlehem. This is a level of nuisance that a person is likely to experience in everyday life in circumstances where entry into a certain road is prohibited for traffic reasons or because of public order.

Justice D. Beinisch

Even from the perspective of the criterion concerning the interests whose realization is dependent on the freedom of movement of the residents of the area, we can see a significant reduction in the harm caused by the requisition order to the petitioners. The solution that was proposed within the framework of the second order was likely to harm the normal lives of the residents who lived in the aforesaid area most seriously. The result of the second order was that even the most basic everyday activities — such as going to work and to school, buying essential items, medical treatment, etc. — required the residents to leave the area and to pass an army roadblock, something that would have caused the residents great hardship in conducting their daily lives. The lives of the residents of the area were likely to be harmed also by the fact that the entry of guests and visitors, as well as service providers (including the employees of the first petitioner and the third petitioner) into the area would have been restricted. Now that the restriction on movement to and from the aforesaid area has been removed to a large extent, this will result in a significant improvement in the daily lives of the petitioners who live there from the viewpoint of the interests whose realization depends on the freedom of movement.

With regard to the period of time during which the restriction remains in force, there is no change in the new order as compared with the two previous orders. The respondents admittedly emphasize that these are temporary measures and according to them when the security position improves and the danger to the lives of the worshippers going to the tomb decreases, it will be possible to dismantle the walls and remove the restrictions on the petitioners' freedom of movement, but naturally this is an unknown period of time that depends on all the circumstances that prevail in the territories, which may continue for a long time.

The conclusion is therefore that even the new order contains a certain violation of the freedom of movement, but this is a considerably smaller violation than the violation that was involved in the original order and the second order. We naturally accept the petitioners' basic argument that the mere fact that the respondents thought of adopting more harmful measures does not necessarily make the measure that was ultimately chosen reasonable and proportionate. But on the merits of the matter we have been persuaded that the harm that remains — a certain extra distance in the travel route of a small number of the petitioners when they go to the eastern part of

Bethlehem — is not a serious and significant violation of the freedom of movement, which departs from the margin of proportionate and reasonable measures that the respondents, who are responsible for security and normal life in the territories, are entitled to introduce (see *Horev v. Minister of Transport* [19], at p. 67 {[redacted]} (*per* President Barak); *Religious Coercion Prevention League v. Jerusalem City Council* [26], at p. 2668; *Baruch v. Traffic Comptroller, Tel-Aviv and Central Districts* [27], at p. 165).

19. The petitioners further argue that it would have been possible to realize the purpose of the order — providing safe access for the worshippers who wish to realize their right to freedom of worship at Rachel's tomb — by other means that would harm the petitioners to a lesser degree. Thus, for example, they argue that it would have been possible to ensure the security of the worshippers by means of the existing security arrangements (transporting the worshippers in a bullet-proof bus with an army convoy to the tomb), or by digging a tunnel to the tomb.

The respondents utterly reject the petitioners' arguments. According to them, the measures proposed by the petitioners are inappropriate for realizing the purpose of the order and they even raise a doubt as to whether these measures would cause less harm to the petitioners. The respondents' argument is that in the current situation, where only the area of the tomb itself is protected, the security weak point is the means of access to the tomb, which passes almost entirely through hostile territory. They also argue that the traffic to the tomb and from it is a preferred target for terror attacks, and that the existing method of exposed traffic by means of a bullet-proof bus and an army convoy does not provide a proper security solution to the danger presented to the lives of the worshippers and the soldiers who accompany them. These arguments are now strengthened, *inter alia*, by the information that was recently revealed by the General Security Service as a result of discovering several terror cells in Bethlehem, as stated in the respondents' supplementary notice of 8 November 2004. According to this, the GSS discovered the existence of a terror cell operated by a Palestinian policeman, which carried out attacks in Bethlehem and the area of Rachel's tomb, and it had even planned to carry out an attack on a bullet-proof bus of worshippers by means of a car bomb. The respondents even went so far as to claim that leaving the existing position as it was involved much greater harm to the local residents, since the existing position necessitates many restrictions on

movement, whereas the solution proposed in the new order will make it possible to remove these restrictions.

With regard to the petitioners' proposal that a tunnel should be dug to the tomb, the respondents argue that it is not at all clear whether this solution can be implemented from an engineering point of view, and in any case the digging of a tunnel under a hostile area is not a good solution. According to them, this solution involves a risk that a terrorist will infiltrate the tunnel or an explosive charge will be placed in the tunnel, which may turn the tunnel into a death trap for those in it. Therefore they claim that this solution requires a military presence to be kept in the area above the tunnel and at its entrances, and therefore this solution will not lead to a change in the military deployment in the area, and will merely increase the danger to those coming to the tomb. In addition, the respondents also claim that it is precisely a tunnel that has the characteristics of a permanent solution, whereas the respondents wish to find a solution to a temporary and specific security situation.

Thus we see that the parties disagree with regard to the security measures that are appropriate for realizing the purpose of the order and with regard to the effectiveness of the measures proposed by the petitioners. As a rule, in such a dispute on military-professional questions, on which the court does not have any expertise of its own, the court will give considerable weight to the professional opinion of the military authorities, which has the professional expertise and the responsibility for security (see *Beit Sourik Village Council v. Government of Israel* [1], at para. 47, and the references cited there). In the present case the petitioners have not discharged the burden of persuading us that their position with regard to the effectiveness of the measures that they proposed should be preferred to the opinion of the military commander.

Moreover, when we reached the conclusion that the harm resulting from the measure chosen by the respondents is not a serious and significant violation of the freedom of movement, and that this measure does not depart from the margin of proportionate and reasonable measures that the respondents are given, we are not required to decide the question of the effectiveness and propriety of the measures proposed by the petitioners. Indeed, there are often several ways of realizing the purpose, which are all proportionate and reasonable. The military commander has the authority to choose between these methods, and as long as the military commander does

not depart from the 'margin of proportionality' and the 'margin of reasonableness,' the court will not intervene in his discretion (*Beit Sourik Village Council v. Government of Israel* [1], at para. 42). Indeed:

> 'It is only natural that the court does not put itself in the military authority's place… in order to substitute the discretion of the court for the discretion of the commander. It considers the question whether, in view of all the data, the adoption of the aforesaid measure falls within the margin of measures that can be regarded, in the circumstances of the case, as reasonable…' (*per* President Shamgar in HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* [28], at p. 539; see also *Ajuri v. IDF Commander in West Bank* [7], at pp. 375-376 {[redacted]}; *Beit Sourik Village Council v. Government of Israel* [1], at para. 46).

In summary, after we have examined the nature and intensity of the violation to the freedom of movement in this case, we have reached the conclusion that the solution chosen by the respondents within the framework of the new order does indeed guarantee the essence of the realization of the freedom of worship without violating the essence of the freedom of movement. The respondent's decision within the framework of the new order succeeds in preserving the 'essence' of both of these two liberties of equal weight, and this is therefore a reasonable balance that does not justify any intervention.

Freedom of worship versus property rights

20. Property rights are also included among the basic human rights. Property rights have been recognized as basic rights worthy of protection in the case law of this court (see, for example, HCJ 390/79 *Dawikat v. Government of Israel* [29], at pp. 14-15; HCJFH 4466/94 *Nuseibeh v. Minister of Finance* [30], at pp. 83-85) and have also been given explicit constitutional expression in s. 3 of the Basic Law: Human Dignity and Liberty. These rights are also recognized in international law, and in so far as territories held under belligerent occupation are concerned, they are enshrined, *inter alia*, in the Hague Convention and the Fourth Geneva Convention. Notwithstanding, property rights are not absolute, and they may give way to other public interests and basic rights (see, for example, *Hass v. IDF Commander in West Bank* [3], at para. 17; *Ajuri v. IDF Commander in West Bank* [7], at pp. 365 {[redacted]}).

Justice D. Beinisch

The balance between the freedom of worship and private property rights was considered recently in *Hass v. IDF Commander in West Bank* [3]. In that case the court reached the conclusion that 'there is no need to adopt a decisive position with regard to the conceptual ranking of the right of worship and the right of property in order to decide the question of how to balance between them in a case of a conflict.' This was because, in the circumstances of that case, the court reached the conclusion that 'Even if we assume, for the purposes of this case, that we are concerned with constitutional rights of equal standing and importance, even so, in the horizontal balance between them' the balance made by the respondent satisfies the test of constitutionality (*ibid*. [3], at para. 20). These remarks are also appropriate in the case before us, and we too shall follow the same path, since we have been persuaded that the violation of property rights in this case is marginal. Counsel for the respondents claims in his reply to the second amended petition that the harm caused by the new order to private land is 'absolutely marginal,' in his words, and even the petitioners placed their main emphasis on the violation of freedom of movement and did not point to any concrete violation of the property rights of any of the petitioners. Counsel for the respondents claims that within the framework of the planning of the route an effort was made to rely, in so far as possible, on the existing borders of parcels of land, that only a few petitioners were harmed by the requisition of the land and that even so we are speaking merely of the requisition of small parts of parcels. Counsel for the respondents further states that for this requisition fair rent and compensation will be paid. Therefore we have been persuaded that the balance between the freedom of worship and property rights does not depart from the margin of reasonableness in this case, even if we assume that we are speaking of two rights of equal weight, and that the proper balance between them is therefore a horizontal balance. We have also made a note of the statement made by counsel for the respondents that the respondents will be prepared to examine any application for an amendment of the route at a specific point, in order to reduce the harm to the owners of the land.

Summary

21. Jewish worshippers have a basic right to freedom of worship at Rachel's tomb and the respondent has the duty to ensure the realization of this right by protecting the safety and lives of the worshippers. Within the

framework of choosing the measures for realizing this purpose, the respondent must take into account the basic rights of the petitioners, including property rights and the freedom of movement, and he must strike a proper balance between these rights. In this case, the solution adopted by the respondent, after he reconsidered the original plans and adopted a course that follows the case law of this court, does indeed ensure the realization of the worshippers' freedom of worship without violating the essence of the petitioners' freedom of movement and property rights. We have therefore not found that the arrangement determined by the respondent at the end of the proceedings contains any unreasonableness that justifies our intervention therein.

For these reasons, the petition is denied.

Justice E. Rivlin

I agree.

Justice E. Hayut

I agree.

Petition denied.

24 Shevat 5765.

3 February 2005.