

HCJ 2233/20

HCJ 2255/20

Petitioner in HCJ 2233/20: **Pardes Hanna-Karkur Local Council**

Petitioners in HCJ 2255/20: **Ezra Manor and 6 others**

v.

Respondent in HCJ 2233/20: **Ministry of Health**

Respondent in HCJ 2255/20: **Shoham Medical Center**

Attorney for the Petitioner in

HCJ 2233/20: Jubran Jubran, Adv.

Attorney for the Petitioners in

HCJ 2255/20: Yael Havassy Aharoni, Adv.

Attorneys for the Respondents: Udi Eitan, Adv., Michal Hassin, Adv.

Petition for an order nisi and an interim order

Israeli Supreme Court cases cited:

[1] LAA 2199/20 *Peshe Brook v. Ministry of Health* [1] (March 24, 2020)

[2] HCJ 703/19 *M.B.I. Pharma v. Ministry of Health* (Aug. 26, 2019)

The Supreme Court sitting as High Court of Justice

Before: Justice N. Sohlberg, Justice G. Karra, Justice A. Stein

Judgment

Justice A. Stein:

1. The urgent petitions before us challenge the decision of the Ministry of Health (hereinafter: the State) to convert the nursing care departments, the subcritical geriatric department, and two dementia care departments in the Shoham Government Geriatric Center in Pardes Hanna-Karkur (hereinafter: Shoham) for the future hospitalization of moderate to severe coronavirus patients who are to receive dedicated treatment under conditions that will prevent transmission. According to the State's plan and the decision that is the subject of the petitions, this conversion (hereinafter: the conversion process or the process) involves transferring the patients in those departments (hereinafter: the Shoham residents or the residents) to other nursing care frameworks: the Hadar Karkur Nursing Care Hospital in Pardes Hanna, and the Tender Loving Care Nursing Home in Hadera, not far from Pardes Hanna. In order to prevent this process, the Petitioners ask that we issue an order nisi and an interim order that will temporarily, and then permanently, halt it.

Arguments of the Parties

2. According to the Petitioner in HCJ 2232/20, the Pardes-Hanna-Karkur Local Council (hereinafter: the Local Council or the Council), the conversion process is disproportionate in terms of the totality of interests that it affects; the decision in this regard was made without consulting the Council, and without consideration for its implications for the general public of the area that it serves; and in breach of the license and purpose of Shoham as a geriatric hospital, as opposed to a general hospital or other specialized hospital.

3. The Petitioners in HCJ 2255/20 are seven residents of Shoham who are meant to move to the different nursing care facilities mentioned above. These Petitioners are represented by their appointed guardians and attorneys appointed by the guardians. They argue that transferring them – against their will and without sufficient preparation – to other nursing homes will harm them to the point of even endangering their lives. The Petitioners explain and argue in this regard that the transfer from one nursing care facility to another severely impacts the patients. These consequences are related, they argue, to the problems confronting an elderly patient in adapting psychologically, emotionally, and in terms of general functioning, which are documented in medical research and are well-known in the field of geriatrics. It is further argued that the patients

and their families were not given prior notice so that they could prepare for the process. On the legal plane, the Petitioners argue that the conversion process that they challenge in their petition violates their basic right to emotional and physical integrity, and their right to autonomy – rights that they argue must be respected even in a state of emergency. In addition, the Petitioners argue that the process is being carried out without lawful authority, and that it suffers from extreme unreasonableness that goes to the core of the matter.

4. As opposed to this, the State argues that the conversion process, which is intended for immediate implementation, is a necessary evil in the current state of emergency. Our current situation nearly 1500 people have contracted the coronavirus, and over 100 are in a moderate to severe condition, while five have died from the illness. These numbers may grow to national-disaster proportions (as part of the worldwide pandemic). The conversion process forms part of the State of Israel's fight against the coronavirus, and is part of a long list of emergency measures adopted to prevent further transmission of the virus and its spread among the residents of the state. This is a national effort of the first order, in which the State must ensure that it has a large number of hospital beds for moderate to severe coronavirus patients. The conversion process is meant to provide the State and coronavirus patients with 128 hospital beds, and thus its necessity. The State involved the families of the Shoham residents in the conversion process, and its attorney again declared before us that these residents will be transferred to appropriate frameworks, not far from Shoham, for continued, appropriate care for their needs in a sensitive and respectful manner. As for the authority to implement the conversion process, the State argues that it holds such authority at all times, and certainly in times of emergency, by virtue of the general prerogative of the executive branch, and by virtue of the laws treating of emergency powers and the attendant auxiliary powers. The State also argues that Shoham is, first and foremost, a hospital – as its name implies – that is permitted to provide any medical services as the Ministry of Health – i.e., the State – may decide. Such services can include treatment of coronavirus patients, in addition to or instead of geriatric nursing care, if the State so decides – and the State has so decided.

Discussion and Decision

The Local Council's Petition

5. I am of the opinion that the petition should be denied, as so I will recommend to my colleagues.

6. We are all in the same boat, and the coronavirus does not recognize municipal boundaries. It would appear that this simple, important truth was lost upon the Pardes Hanna-Karkur Local Council. The effort to stop the spread of the virus is the effort of us all, and if we do not support it by increasing the number of places for the hospitalization and treatment of those afflicted with the coronavirus, the virus may spread to every corner of the country, including Pardes Hanna-Karkur. Therefore, the “not in my backyard” attitude expressed between the lines of the Local Council’s petition is incorrect and inappropriate to the difficult situation in which we now find ourselves (and in general).

7. The State – acting through the Ministry of Health and many other execution branches – is responsible for the fight against the coronavirus. Shoham is a hospital that belongs to the State, and it may decide what goes on between its walls to the best of its professional discretion in order to treat patients that it – the State, and not the Pardes Hanna-Karkur Local Council – decides to hospitalize. That authority is granted the State by virtue of its general prerogative as an executive authority, by virtue of the provisions of the Public Health Ordinance in regard to the establishment and administration of hospital and other medical institutions in a state of emergency, by virtue of the provisions of the [Interpretation Law](#) concerning auxiliary powers (see, respectively: sec. 32 of [Basic Law: The Government](#); sec. 20, and specifically sec. 20(i) of the Public Health Ordinance, 1940; as well as sec. 17 of the Interpretation Law, 5741-1981), as well as by virtue of its being the owner of the hospital under discussion.

8. As opposed to that, the Local Council has no authority to intervene in what goes on in government hospitals, or the manner of their administration by the State – even when those hospitals are in their jurisdiction. The authorities of the Council, which are only indirectly related to our issue, are set out in secs. 142, 249(29) and 242 of the Municipalities Ordinance [New Version], and do not extend to the area of government hospitals. The state health institutions are, in any case, not required to hear the opinion of local councils in making decisions in regard to government hospitals – such a hearing is exclusively a voluntary matter that is sometimes desirable and sometimes entirely unnecessary.

9. As for the Local Council's arguments in regard to the well-being of the Shoham residents, with all due respect, those residents – some of whom filed a petition in HCJ 2255/20 – have shown that they know how to speak for themselves by means of their guardians and their lawyers. I will address the arguments of the residents, which should not be taken lightly, in the following section. Before doing so, I will finish this section with the necessary conclusion that the Local Council's petition is groundless, and it were better had it not been filed in the first place.

The Petition of the Residents of Shoham

10. The distress of the elderly population that requires geriatric supervision and care is real. Their distress should not be taken lightly, and we are far from doing so.

11. However, that distress is only one of the distressing matters that the State must address in these difficult days. The daily existential dangers and distress that we face due to the coronavirus pandemic are also real. In the case before us, the State made a decision that balances the residents' right to care and nursing, which is an important part of their right to welfare, against providing for the existential medical needs of those afflicted by the coronavirus, and the need to stop the spread of the virus as quickly as possible. In that framework, the State was forced to decide to inflict relatively minor harm to the residents of Shoham, who will be transferred – unavoidably at short notice – to other nursing frameworks, where they will receive appropriate care, in order to prevent much more severe harm, inter alia, the spread of a dangerous disease, harm to the health of the state's residents, and even death.

12. Clearly, this decision presents a great hardship for the evacuated residents and their families, who are concerned for their well-being. However, none of the residents tried to prove to us – and in any case, did not prove – that his health may severely and irreversibly be harmed as a result of his immediate transfer to another institution. The State's conversion process is, no doubt, no simple matter. However, it is far from being a "tragic choice" of the sort that civilized states are required to make in time of crisis (see: GUIDO CALABRESE & PHILIP BOBBIT, *TRAGIC CHOICES* (1978)), for which we should be thankful. In making this decision, the State exercised professional discretion, and its decision is certainly not disproportionate (see, in a similar matter, the opinion of Justice U. Vogelman in LAA 2199/20 *Peshe Brook v. Ministry of Health* [1], para. 6).

13. The residents further argue that the conversion process, and the manner in which it will be implemented, are not consistent with the directives of the Ministry of Health in terms of the stages of preparation of the government hospitals for the projections of the spread of the coronavirus. This argument lacks substance. The internal work procedures of a governmental agency are not hard-and-fast rules that appear in statutes or regulations, and that must be observed strictly. They certainly do not restrict the authorities granted to the State, to which I referred in addressing the Local Council's petition. This is also the case in regard to the argument that challenges the validity of the projections of the spread of the virus upon which the State relied. Such projected scenarios lie at the core of the professional discretion of the Ministry of Health, in which we do not ordinarily interfere (see, eg., HCJ 703/19 *M.B.I. Pharma v. Ministry of Health* [2], para. 19). Beyond what is required, I would note that a low probability of great harm justifies adopting expensive, and even harsh preventative action.

14. Having reached this point, and seeing that there was no substantial or procedural defect in the conversion process, we have no alternative but to deny the petition of the Shoham residents. At the same time, we wish the Petitioners, and all the other Shoham residents, good health and long life, in the hope that our ship – in which we all sail together – will soon reach safe haven.

15. In conclusion, the both petitions are denied, with no order for costs.

Given this 1st day of Nissan 5780 (March 26, 2020).