Civil Further Hearing 3959/15

Before: Her Honour the President M. Naor

The Applicants: 1. Ibrahim Farhoud Abu al-Qi'an and others

2. Atawa Isa Abu al-Qi'an and others

Versus

The Respondents: The State of Israel – Israel Lands Authority

Request for Further Hearing of the Supreme Court following the Supreme Court's judgment on Permission for Civil Appeal 3094/11 that was delivered on 5.5.2015 by His Honour the Deputy President A Rubinstein and their Honours the judges N. Hendel and D. Barak-Erez.

The Respondent's reply to the request for Further Hearing of 24.9.2015

In the name of the applicants: Attorney Hassan Jabreen; Attorney Suhad Bishara; Attorney Myssana Morany

In the name of the Respondent: Attorney Moshe Golan

Decision

1. Before me is a request to conduct a Further Hearing following this court's judgment on Permission for Civil Appeal 3094/11 from 5.5.2015 (Judges A. Rubenstein; N. Hendel; and D. Barak-Erez), in which the applicants' request for permission for appeal on the judgment of the District Court (Judges S. Dovrat, R. Barkai and A. Vago) in Civil Appeal (B.S. District) 1165-09 Abu al-Qi'an, et. al v. State of Israel (28.2.2011) was rejected on the merits.

Background

2. The applicants belong to the al-Qi'an Bedouin tribe that settled in 1956 in an area in the Nahal Yatir area in the Negev (henceforth: "the village") on the orders of the Military Governor. It is an area under the Respondent's ownership. In addition, all the buildings in the village were erected without permits and in contravention of the law, and stand against them [the buildings] demolition orders that were issued in 2013. (This court rejected requests for permission to appeal that were filed against the demolition orders in Permission for Criminal Appeal 3082/14, *Abu al-Qi'an, et. al. v. the State of Israel* (31.12.2014)). The village is not connected to basic infrastructures, and its residents do not receive welfare, health and education services there. At a distance of about 5 kilometres to the southwest of the village is the Bedouin settlement of Hura, which is recognized by the authorities, and which offers its residents and residents of the area all those community services. Starting from the 1980s, the respondent has conducted negotiations with the residents of the village with the objective of evacuating their houses to Hura, and indeed

most of them moved there in return for receiving a compound in that place. [About] 750-1000 members of the tribe, including the applicants, remained in the village.

3. In 2002, the government decided to build the new settlement of Hiran on part of the territory of the village (government decision no. 2265 of 21.7.2002. See also government decision no. 878 of 1.11.2013). Since then, [the authorities] have been carried out required planning proceedings, which were completed with the publication of the plan in the records on 24.7.2013. The plan calls for the demolition of about 50 buildings that were built in the village. Some of the village's residents, including six of the daughters of applicant 1, filed their objection to the plan, but it was rejected. The other part of the village is planned in the framework of "Yatir Forest" that is intended to be the place for a "metropolitan recreation area and forest park". That plan too calls for the demolition of the houses of members of the tribe who are in that part of the village. The objections that the village's residents filed were rejected, as well as an appeal that the residents filed with the appeals committee.

4. In April 2004, the respondent filed a lawsuit to divest the applicants of possession of the lands (Civil Suit (B.S.) 3326/04, *The State of Israel and the Israel Lands Authority v. Abu al-Qi'an* (30.7.2009)). The respondent claimed that the applicants took possession of lands that were under its ownership and they did not have permission to do so, either with compensation or without compensation, but invaded them and built on them illegally. It also claimed that the applicants' evacuation does not compromise their rights to housing, as they are offered alternative housing in the nearby settlement of Hura. In reply to the complaint, the applicants claimed that they were owners of the rights to the lands, and alternatively they have irrevocable rights to them, which were acquired in return, when they agreed in 1956 to the State's proposal to transfer their place of residence from the Beit-Kama-Lahav area to the Nahal Yatir area. The applicants also claimed that the respondent's behaviour over the years attested to its agreement to giving permission to them to keep the lands and that no evacuation or demolition proceedings had been initiated against them in ten years. The applicants also claimed that their evacuation from the lands would compromise their right to housing, and that the evacuation lawsuits were engendered from the respondent's intention to build a Jewish settlement in the place, which constitutes unacceptable discrimination on the basis of nationality and violates the principle of equality.

5. The Magistrate's Court accepted the respondent's lawsuit. The court did find – counter to the respondent's claim – that the applicants are not trespassers on the lands but had rights to them. However, it was found that it was a free right that was not given in return for any payment, and that can be revoked at any time. It found further that the applicants' presence on the land and its development do not in themselves attest to the possession of ownership of it; that the applicants' buildings [on the land] had been built illegally and they do not give them the right to compensation as a condition of evacuating them; that the investments of the villages' residents in the place, or the government aid that was given to them, in no way overturns the Authority's irrevocable decision; that the applicants' claims regarding discrimination and violation of their constitutional rights – although they may justify the granting of remedy in the fields of constitutional and administrative law before the appropriate court – do not establish a right to the lands and do not stand as a defence for them against the evacuation lawsuit.

6. The applicants appealed the Magistrate's Court ruling. In their appeal, the applicants again claimed that the evacuation lawsuit against them was filed as part of a comprehensive process the purpose of which was to build a Jewish settlement in the place. They also

reiterated the story of the tribe's members, claiming that the permission that the respondent gave them to settle in the lands and to cultivate them constitute a government promise, on the basis of which they invested in the place in the expectation that they would remain there. They alternatively claimed that the respondent's lawsuit was characterized by lack of good faith and unacceptable discrimination, because it was filed, as previously stated, in order to build a Jewish settlement.

The District Court rejected the applicants' appeal. It was again found that the respondent is the owner of the lands and that the applicants have no right to them. It was also found that the applicants were given no government promise with regard to the lands, and that the existence of a lease agreement between the sides, which would attest to the giving of permission to the land in return for compensation, had not been proven. The Court also ruled that attacking the master plans by means of arguments on the constitutional and administrative level belongs in a different court, while the proceedings for evacuation concern themselves with the contractual interest of the sides. Moreover, the court criticized the respondent for having based its lawsuit on the grounds of a "standard" trespass, which represented the applicants as trespassers who had illegally taken possession of the land; whereas the truth of the matter was that they transferred their place of residence to the lands decades ago at the authorities' request, and lived there for years with the permission of the respondent, until the latter decided to repeal it.

The judgment [in the Supreme Court]

7. The applicants filed a request for permission to appeal the ruling of the District Court [to the Supreme Court]. Their claim was that the request raises a general judicial question – is it suitable to discuss the applicants' claims as part of administrative and constitutional jurisprudence in the framework of proceedings for removal, because we are dealing with their evacuation from public lands to which they had moved at the authorities' request and they lived there for years with the respondent's permission. Or whether those claims should be clarified in other proceedings, while the courts in this case must deliberate on the matter in the way that has been circumscribed concerning the parties. Essentially the applicants repeated their claims from the previous proceedings.

8. The [Supreme] court accepted the applicants' request for permission to appeal due to the importance and public sensitivity that is in the background of the request. At the same time, the court emphasized that the request *does not* reveal grounds for an additional appeal on the judicial level, and that decision on this request *is circumscribed to this file* (section 20 of the opinion of Judge A. Rubinstein).

9. On the merits, the [Supreme] court rejected the appeal itself. The majority opinion (Judges A. Rubinstein and N. Hendel) found that the appeal had to be rejected for two reasons. Firstly, the focus of the request was claims on the planning levels (claims directed against the plans of the settlement of Hiran and more broadly – by means of those planning arguments – against the government's decision to build the settlement of Hiran, and also its policy on the issue of the matter of Bedouin settlement in the Negev). The majority opinion stated that those claims constitute an "indirect attack" on the authorities' decisions that do not belong in the framework of the evacuation lawsuit that the respondent filed, and that the applicants should have raised them with a "direct attack" in other deliberative frameworks. Secondly, and more than required, the majority opinion was asked to address the constitutional and administrative claims made by the applicants. In the majority's

opinion, the respondent acted in a way that did not rise to the level of harm to the applicants' rights, despite their claims on that aspect, especially in view of the offers of compensation through land in the settlement of Hura.

The opinion of Judge D. Barak-Erez, which remained as a minority opinion, was different. In her opinion, as soon as it emerged that the applicants were authorized [to be there] and were not trespassers, but who had settled in the place on the basis of orders from the State, the authorities should have reconsidered the situation regarding the format of the evacuation and the compensation that would be given to the residents in the framework of the evacuation process. Since it was not done that way – the State should be ordered to reconsider the compensation that will be given to the applicants in the framework of the evacuation process, examining the possibility of preserving their ties to the surroundings of their places of residence.

The applicants' claims for further hearing

10. Now a request for a further hearing on the ruling has been placed before me. The applicants' claim that with that decision, a new rule was established. According to that rule, the State's ownership of lands confers on it broad discretion to order the evacuation of its residents at any time, even if they have the status of authorized residents without regard to the length of time they have been residing on or in possession of the lands. The reason for that is because their residence or possession does not confer on them any judicial rights whatsoever. The rule also states that for that reason there are no grounds for claims that belong to administrative or constitutional jurisprudence in an evacuation process of this kind. According to the applicants, this rule diverges from the rule that was established in Civil Appeal 496/89, *al-Kalab v. The Ben-Gurion University of the Negev*, judgment 45(4) 343 (1991) (henceforth: the al-Kalab matter). There the court rejected the removal lawsuit that the State had filed against Bedouin residents under similar circumstances, finding that the authorization given to them to settle on the land was irrevocable.

11. On 24.9.2015 the respondent submitted, after it had been requested to do so, its reply to the request. According to the state, no new or solid rule was decided at all in the judgment, but the concrete argument was resolved according to the circumstances of the case. And the respondent also indicated that counter to the applicants' claims, the agreed starting-point of both the majority opinion and the minority opinion was that there is a "normative duality" in the respondent's suit. Accordingly, there is no substance in the applicant's claim that the judgment finds that there is no place for claims that belong to administrative and constitutional law in a process of this kind.

Deliberation

12. The reasons for holding a further hearing were detailed in section 30(B) of the Courts Law [Consolidated version], 5 1985:

"… if the rule that was established in the Supreme Court stands in contradiction to a previous rule of the Supreme Court, or due to the importance, difficulty or innovation of a rule that has been established on a matter, there are, in their opinion, grounds for a further hearing."

13. It is my opinion that the judgment has not set any new or solid rule that justifies a further hearing. First of all, it must be recalled that although the court did accept the applicants'

request for permission to appeal, it indicated in detail that it did so in spite of the fact that the request did *not* show grounds for further hearing on the judicial level. The judgment did not deal with a new or solid judicial issue that calls for a further hearing.

14. Essentially, the ruling dealt with the question of the "correct paths for discussion" of the claims the applicants raised. In that framework, the ruling found that the applicants' claims constituted an "indirect attack" on the authorities' decision that does not belong in the framework of this lawsuit. The issue of the "indirect attack" and the differences between this path of attack and a "direct attack" was already discussed recently by this court with expanded panels (see Civil Further Hearing 1099/13, *State of Israel v. the late Abu Frieh and 34 others* (12.4.2015); Civil Further Hearing 7398/09, *City of Jerusalem v. General Health Service* (14.4.2015). See also, for example, Civil Appeal 6757/13, *Nahum v. State of Israel – Development Authority* (19.8.2015)). I did not find that the judgment diverged from the rules that were established on this subject. It is hard to attack a planning decision in the framework of an indirect attack. One way or another, there is no substance to the applicants' claim that the court set a new rule on the matter of the discretion given to the State on the evacuation of residents, whether they are authorized or not. The court's findings regarding the paths of attack are not essentially connected to the applicants' claims against the evacuation.

    Consequently, the judgment does not stand in contradiction to a rule that was set in the al-Kalab case either, to the extent that one was set. In that same case, the court determined that the rule that permits the repeal of permission to reside on lands given with nothing in return (a rule the respondent made use of in this case), shall be restricted to special cases, in a way that even if nothing was paid for the granting of authorization, it is not to be learned from that, that the authorization can be repealed in any situation and on the spot. And indeed, the court emphasized that the matter depends on the special circumstances of every case – every authorization has its own conditions of repeal. As has been stated, the judgment did not deal with this issue at all, and in any case nothing stemming from the judgment contradicts the rule that was set, to the extent that it was set, in the matter of al-Kalab, regarding the difference in circumstances.

15. The judgment also dealt with the fundamental question that the applicants raised on the matter of the application of administrative and constitutional law in a civil court that is deliberating on the authority's evacuation lawsuit. On that matter, the court found explicitly that, "there is not to be found any fundamental rule that separates civil law from constitutional and administrative law, and every case is examined on the merits" (section 30 of the opinion of Judge A. Rubinstein) and that there is "normative duality" in lawsuits of that kind (opinion of Judge D. Barak-Erez, in section 4). Subsequently, and beyond what was needed, the judgment was asked to address the administrative and constitutional claims the applicants raised, and rejected them on the merits based on the known rules regarding the respondent's duty of fairness; the reasonableness of the decision; the right to equality and the right to property (sections 34-38 of Judge A. Rubenstein's opinion). Therefore, and as the respondent claimed, there is no substance to the applicants' claim that a *rule* was established in the judgment, according to which there is no place for submissions that belong to administrative and constitutional law in a proceedings of this kind.

16. The applicants relied to a great extent on their submissions on the opinion of Judge D. Barak-Erez, who was in the minority. And indeed an examination of the judgment shows that the disagreement between the judges was relatively limited. In the words of Judge A.

Rubinstein, "the distance between us looks not to be very big" (section 42 of his opinion). The essence of the disagreement touched on the question of the reasonableness of the respondent's decision on the matter of the compensation the applicants were entitled to in return for evacuating. That question relates to the implementation of the existing law on everything related to the reasonableness of the action of the administrative authority under the circumstances of the case. As Judge D. Barak-Erez pointed out: "I read the judgment of my friend the deputy president A. Rubinstein, and although I agree with a not insubstantial part of the principles on which it is based, I believe that their implementation under the circumstances of the case lead to a different outcome" (section 1 of her opinion). As is known, "questions of the application of existing law – are controversial. Important and sensitive as they may be – they do not justify the holding of a further hearing." (Further Hearing in the High Court of Justice 10480/03, *Busidan v. Bakri* (30.8.2004); Further Hearing in the High Court of Justice 10386/09, *Jerusalem Fund v. Prime Minister of Israel* (24.1.2010)).

17. Beyond that, the court pointed out explicitly that the decision on the request was restricted to this specific file and was not to be seen as binding on other matters. Accordingly, it appears that the applicants are asking to learn far-reaching implications from the judgment that should not be attributed to it. It is possible that a case that brought for future decision will lead to a different outcome on the basis of detailed examination. (Compare to: Further Hearing at the High Court of Justice 9510/10, *Nir Banim Moshav Ovdim for Agricultural Settlement Ltd. v. Kimhi, et. al* (4.9.2011)).

18. In conclusion, this is indeed an issue of importance and public sensitivity, as the judgment that is the object of the request points out. However, that issue is not enough to order that the file be heard in a "fourth reincarnation". This case does not belong to "those most exceptional, most rare cases, for which a further hearing will be held." (Further Hearing at the High Court of Justice 7802/04, *Milo v. Minister of Defence* (7.11.2004)).

19. In closing, the request is rejected. Beyond the letter of the law, there will be no order for expenses.

Given today, 7 Shvat 5776 (17.1.2016).

The President