

**HCJ 2150/07**

***Abu Safiya v. Minister of Defence***

**Date of judgment: 29 December 2009**

**Synopsis**

Road 443 was closed to the traffic of Palestinian vehicles in 2002, as a result of the security situation and following attacks that took place along the route of the road. From then until now, the road has been closed to the traffic of Palestinian vehicles. The issue of this petition is the request of the petitioners, who are inhabitants of several villages located near road 443, that the Court should order the respondents, including the Minister of Defence and the IDF Commander in the territory, to allow free traffic of Palestinians, on foot and by car, on road 443.

The Supreme Court granted the petition in part. The majority opinion, which was written by Justice U. Vogelman, held that although the military commander is competent to impose traffic restrictions by virtue of his duty to preserve public order and security on traffic routes in Judaea and Samaria, his authority does not extend to imposing a permanent and complete ban on the traffic of Palestinian vehicles on the road. This is because a complete ban makes the road one that is used solely for 'internal' Israeli traffic - between the centre of Israel and Jerusalem - rather than one that serves the needs of the local population, even though land was expropriated from the inhabitants of the territories in order to construct it. An arrangement that completely prohibits the traffic of Palestinians on the road exceeds the authority of the military commander, in the special circumstances of the case, and is inconsistent with the rules of international law regarding a belligerent occupation. Justice Vogelman went on to hold that despite the existence of an alternative road for Palestinian traffic in the territory, a complete ban on the inhabitants of the territory using a road that was intended to serve them did not properly balance the rights of the Palestinians as 'protected inhabitants' against security needs, since alternative security measures did exist, and the complete ban was therefore disproportionate. Justice Vogelman emphasized

that the judgment did not determine future security arrangements; these will be determined by the military commander, in a manner that will provide protection for the Israeli inhabitants using the road. The judgment will come into effect five months from the date on which it was given, in order to allow the military commander to determine the necessary security arrangements.

Justice E.E. Levy was of the opinion that the military commander acted within the scope of his authority when he decided to close the road to Palestinian traffic as a result of the serious terrorist attacks in which Israelis were murdered on and near the road. Notwithstanding, Justice Levy held that the security measures and their proportionality should be examined in accordance with current circumstances, and in the prevailing circumstances of a relative calm in the security position, an absolute closure on a permanent basis was not a proportionate measure. Since it was proved that the military commander himself was of the opinion that an absolute closure should be avoided and that he wished to find a more proportionate solution, there was no reason, in Justice Levy's opinion, to grant an absolute order in the petition, and it would be better to allow the military commander to propose a suitable solution. In any case, Justice Levy emphasized, five months was not a sufficient period of time for the proper implementation of the judgment, and the result might be perilous.

President Beinisch agreed with the opinion and reasoning of Justice Vogelmann, both with regard to the lack of authority and with regard to the question of proportionality, and emphasized that in practice the three justices all agreed that the sweeping closure of road 443 to Palestinian traffic was not currently proportionate, and that an alternative solution needed to be found to protect the safety of persons travelling on the road. President Beinisch added that the freedom of movement is a basic human freedom, and that every effort should also be made to uphold it in the territories that are held by the State of Israel under a belligerent occupation. She therefore held that the military commander should refrain, in so far as possible, from adopting such an extreme measure as an absolute ban on the use of a certain road by the

protected inhabitants, which caused serious suffering to a whole population and disrupted their lives. Notwithstanding, President Beinisch warned against referring to security measures adopted in order to protect persons travelling on the roads as segregation based on improper reasons of race and ethnicity, and she held that the comparison made by the petitioners between preventing the traffic of Palestinian inhabitants along road 443 and the crime of Apartheid was so extreme and radical that there was no basis for raising it at all.