The Courts

At the Jerusalem District Court **Adm.Pet 8890/09**
Sitting as the Court for Administrative Matters

Before: Honorable Judge Yehudit Tzur – Vice President **June 8, 2009**

In the matter of:
1. **_____ Srur, ID. _____**
2. **_____ Srur, ID. _____**
3. **_____ Srur, ID. _____**
4. **_____ Srur, ID. _____**
5. **HaMoked: Center for the Defence of the Individual**
   represented by attorney Yotam Ben Hillel et al.

The Petitioners

v.

1. **Minister of the Interior**
2. **Director, Population Administration**
3. **Director, Population Administration Office, East Jerusalem**
   represented by Att. Hagai Domborovitch, State's Attorney's Office, Jerusalem District (civil)

The Respondents

Judgment

1. Before me is a petition filed by four members of the Srur family and HaMoked: Center for the Defence of the Individual against the Minister of Interior (hereinafter: the respondent), regarding his decision not to extend the DCO issued stay permits for Israel for _____ and _____ Srur (hereinafter: petitioners 2 and 3) and not to upgrade the status of _____ Srur (hereinafter: petitioner 4) from temporary residency to permanent residency.

Factual background

2. Petitioner 4 was born in Jerusalem on September 30, 1991 and was registered in the population registry in the Area. _____ Srur (hereinafter: petitioner 1), petitioner 4's mother, is a permanent

resident of Israel and his father, petitioner 2, is a resident of the Area. From shortly after his birth until 1993, petitioner 4 lived with his family in the Area. He subsequently moved with them to Jordan where they lived until 1997, at which point they returned to the Area and remained there until they moved to Jerusalem in 2002.

3. On January 26, 2004, petitioner 1 filed an application to register her five children, including petitioner 4, in the population registry in Israel (appendix A to the written response). At the time the application was filed, petitioner 4 was 12 years and three months old. On April 20, 2004, the application was denied owing to the fact that some of the children were born outside of Israel and therefore required an application for family unification, rather than child registration. Another reason for the denial was lack of proof of center of life (appendix C to the written response).

4. On February 2, 2005, following the denial of the application, petitioner 1 filed an application to register two of her daughters who were born in Jerusalem and had not been registered in the Area. This application was initially denied for lack of center of life, yet after an additional application was filed on June 8, 2005, the application was approved on September 9, 2005 and the daughters were registered as permanent residents on November 9, 2005. The position of the National Insurance Institute and the findings of the investigation it carried out were submitted as part of the respondent's examination of the application to register the girls. These submissions indicated the family resides in Israel. Under these circumstances, on March 15, 2006, the respondent decided to approve the application of petitioner 4 *ex gratia* (appendix D to the written response), and he was accordingly registered with an A/5 status for two years on April 9, 2006. On June 18, 2008, the A/5 permit granted to petitioner 4 was extended for a further year (appendix F to the written response).

5. On July 16, 2008, the petitioners filed an application to upgrade the status of petitioner 4 to that of permanent resident (appendix G to the written response). On October 2, 2008, the respondent notified the petitioners that the status of petitioner 4 could not be upgraded to that of a permanent resident as he had lived in the Area and according to the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003(hereinafter: the Temporary Order Law), children over the age of 14 are not entitled to status upgrades. The respondent consented only to extend the A/5 permit held by petitioner 4 for a further year, as stated. It is against this decision by the respondent (not to upgrade the status of petitioner 4) that the petitioners filed the petition before me.

Parties' Arguments

Petitioners' Arguments

6. The petitioners argue that one must apply Regulation 12 of the Entry into Israel Regulations 5734-1974 (hereinafter: Regulation 12) to petitioner 4. The purpose of this regulation is to prevent a disconnection or discrepancy between the status of parent who holds permanent residency status and that of his child who was born in Israel. The petitioners argue that in accordance with case law and inasmuch as the application was filed prior to the amendment to the Temporary Order Law in August 2005, the fact that an applicant is registered in the Area does not automatically apply the provisions of the Temporary Order Law to him. Rather, the center of life of a minor applicant must be examined in the two years preceding submission of the application and if a center of life in Israel is demonstrated, the applicant is to be registered as a permanent resident in Israel. According to the petitioners, petitioner 4 resided in the Territories for only 5 out of his 12.5 years, whereas the rest of the time, he lived in Israel and in Jordan and therefore, is not to be considered a resident of the Area for purposes of the Temporary Order Law. The petitioners add that, with respect to Regulation 12, there is no dispute that at the time the application for child registration was submitted on January 26, 2004, the petitioners had been maintaining a center of life in Jerusalem for some two and a half years. Therefore, the respondent should have registered petitioner 4 as a permanent resident of Israel in the

population registry. The petitioners argue that the respondent is ignoring various judgments handed down on this matter.

7. The petitioners argue that even if it is found that the Temporary Order Law applies to petitioner 4, indeed, there is reason to grant him permanent residency status. The petitioners argue that the respondent's decision to grant children who were registered in the Area temporary status initially and upgrade it later to permanent status is a decision which originates in an unacceptable internal procedure of the respondent which is not mentioned in the law. The petitioners argue that according to this procedure, the status of individuals who entered the graduated procedure but were over the age of 14 is not upgraded as such upgrade allegedly contradicts the provisions of the Temporary Order Law. The petitioners argue that Section 3(a)(1) of the Temporary Order Law allows granting permanent status to every child who at the time of submitting an application was under the age of 14. Yet, the respondent's decision to initially grant applicants temporary status for two years and then deny the granting of permanent status at the end of these two years, on the grounds that the applicant is over the age of 14, is unlawful. On this issue, the petitioners refer to Adm.Pet (Jerusalem) 8295/08 **Mashahra v. Minister of Interior** (hereinafter: the **Mashahra** judgment) and to Adm.Pet (Jerusalem) 8336/08 **Zahaika v. Minister of Interior** (hereinafter: the **Zahaika** judgment). The petitioners argue that the respondent is ignoring the findings in these judgments and continues to rely on the same procedure that the court ruled defeats the purpose of the legislation.

8. The petitioners argue that one must reject the respondent's attempt to distinguish the **Mashahra** and **Zahaika** judgments from the case at bar. They argue that in the **Mashahra** case, the practice which denies upgrades to the status of children to whom it was possible to grant permanent residency at the time they filed their application was found to be unacceptable as it subverts the purpose of the Temporary Order Law. The petitioners add that in the **Zahaika** case, like in the case at bar, the relevant application was filed when the applicant was over 12 years old and before the amendment to the Temporary Order Law. The ruling in that case was to grant the applicant permanent residency status. The petitioners refer on this issue also to the judgments on which the **Zahaika** judgment is based – Adm.Pet (Jerusalem) 771/06 **Abu Gweila v. Minister of Interior** and Adm.Pet (Jerusalem) **Hilbiyeh v. Minister of Interior**. According to the petitioners, in these judgments, it was ruled that one must examine the date on which the initial application was submitted for the purpose of determining the age of the child, yet, at the same time, one must examine the application according to the prevailing legal situation rather than the one that existed when the application was submitted. This, despite the fact that the original applications submitted by the applicants in those cases were denied in accordance with the legal situation at the time. The petitioners argue that in our case too, one must view petitioner 4's application as an application in processing (rather than a closed case following denial), since the respondent agreed to reopen it. Alternatively, the petitioners argue that the amended provisions of the Law must be applied even if the decision to renew processing constitutes a new application, as at the time of the decision to renew processing, the petitioner was under 14 years of age, and thus, under the provisions of the amendment, he was entitled to a status upgrade.

Respondent's Arguments

9. The respondent argues that petitioner 4 is a resident of the Area as defined in the Temporary Order Law (prior to its amendment and certainly following it), since he was registered in the population registry of the Area, lived there from birth until age 11 and lacked ties to Israel during all those years. The respondent notes that according to the Temporary Order Law, he had no power to grant Israeli residency permits to children over the age of 12 and was obliged to reject their request *in limine*. The respondent argues that as petitioner 4 filed his application after he turned 12, he was not empowered to grant him stay permits for Israel, but nonetheless agreed to grant him an A/5 visa for two years, beyond the requirements of the law and following the amendment to the Temporary Order Law which

allowed granting status in Israel to applicants who were under 14 years of age at the time the application was submitted.

10. The respondent argues that in accordance with the child registration procedure of June 1, 2007 (appendix A to the written response), a child under the age of 14 who was born in Israel and resided in the Area or was registered therein would receive temporary residency status for two years, at the end of which he would receive status in accordance with the Temporary Order. According to the respondent, the amendment to the Temporary Order Law benefitted petitioner 4 as he was over the age of 12 prior thereto and was not eligible for status in Israel at all, whereas subsequent to the amendment, his application was reviewed and he was granted status in Israel as he was under the age of 14 at the time the application was submitted. The respondent adds that since May 12, 2002, when the government resolution on this issue was passed, upgrades from one status to the next no longer exist.

11. The respondent argues that petitioner 4 was registered in the population registry of the Area and lived with his family in the Area until 2002. Thus, it is clear that his ties are to the Area and not to Israel and therefore, the Temporary Order Law relevant to residents of the Area must be applied to him. The respondent argues that after petitioner 4 held an A/5 status for two years, it was no longer possible to upgrade his status as he was over the age of 14.

12. The respondent argues that the amendment to the Temporary Order Law allows granting an Israeli residency permit to a minor under the age of 14, but that the Temporary Order Law does not stipulate what type of permit is to be granted to the minor and therefore, a child registration procedure was put in place according to which a minor (under the age of 14) is to be granted an A/5 visa for two years, followed by a permanent visa, provided the minor applicant is not 14 at the time. The respondent notes that in the case at hand, the petitioner turned 14 after the two years in which he possessed an A/4 [*sic, recte* A/5] permit had passed, and therefore, it was not possible to upgrade his status to permanent residency in accordance with the provision of said procedure.

13. The respondent argues that the **Mashahra** judgment is different from the case at hand as it involved an application which was filed before the applicant turned 12, unlike the situation in the present case. The respondent also argues that the facts of the **Zahaika** judgment differ from the case at bar, as the decision of the respondent in that case was reached after the amendment to the Temporary Order Law and therefore, it was ruled that the respondent should have reviewed the application in accordance to the age at the time the application was submitted and in accordance to the provisions of the amended Law.

Review and Ruling

14. Having reviewed parties' arguments and the legal and judicial situation I have reached the conclusion that the petition, inasmuch as it relates to petitioner 4, must be accepted and the respondent is to be instructed to grant him a permit for permanent residency in Israel.

15. Regulation 12 stipulates as follows:

> **12. The Israeli status of a child who was born in Israel, but to whom section 4 of the Law of Return 5710-1950 does not apply, shall be the same as the status of his parents; should the parents not share one status, the child shall receive the status of his father or of his guardian, unless the second parent objects to this in writing; should the second parent object, the child shall receive the status of one of the parents, as shall be determined by the Minister.**

The Supreme Court ruled that the purpose of Regulation 12 is not to grant status in Israel "by birth", but to prevent a disconnection or discrepancy between the status of a parent who resides in Israel under the Entry into Israel Law 5712-1952 and the status of his child who was born in Israel and whose birth in Israel did not of itself, grant him legal status in the country. In HCJ 979/99 **Carlo v. Minister of Interior** (hereinafter: the Carlo case), the Honorable President Dorit Beinisch stated:

> **As a rule, our legal system recognizes and respects the value of the integrity of the family unit and the interests of protecting the child's best interests. Therefore, one must prevent the creation of a disconnection or a discrepancy between the status of a minor child and the status of the parent who has custody of him or who is entitled to custody.**

In the case at bar, petitioner 4 was born in the country, his mother is a permanent resident of Israel and there is no dispute that he maintained a center of life in Israel for at least two years prior to submitting his application. Therefore, it appears that Regulation 12 must be applied in his case. However, we must first examine whether petitioner 4 falls under the terms of the Temporary Order Law as this law restricts the respondent's discretion to grant status in these circumstances. On this issue, Honorable Judge Adiel has ruled:

> **There is no dispute that this Regulation** (Regulation 12 – Y.T.) **must be superseded by the Temporary Order Law inasmuch as the Temporary Order Law restricts the interior minister's discretion to grant the petitioner status in Israel.** (the **Mashahra** judgment, §5).

16. The first question that must be addressed, therefore, is whether the Temporary Order Law applies to petitioner 4, and more precisely, whether he is a "resident of the Area" as defined in the Temporary Order Law. If the answer is negative, namely, petitioner 4 is not a resident of the Area, indeed the Temporary Order does not apply in his case and imposes no restriction on the respondent's discretion, and petitioner 4 must be granted an Israeli residency permit as stipulated by Regulation 12.

17. Petitioner 4 submitted his application prior to the amendment to the definition of "resident of the Area" in the Temporary Order Law. Therefore, the aforesaid question must be examined in accordance with the original definition in the Law (Adm.Pet 5569/09 **Ministry of Interior v. 'Aweisat**, §11 of the judgment (hereinafter: the **'Aweisat** judgment). The original version of Section 1 of the Temporary Order Law (prior to the amendment) stipulated: "'**Resident of the Area' – includes those who live in the Area but are not registered in the Area's population registry, and excludes those who are residents of Israeli communities in the Area.**"

    In the **'Aweisat** judgment, it was ruled that the registration of the applicant in the Palestinian population registry gives rise to a presumption that he is a resident of the Area. However, this is a refutable presumption and the applicant may present evidence to prove that other than the registration in the registry, he lacks any other tie to the Area, such that the Temporary Order Law does not apply to him. In the case at bar, petitioner 4 was registered in the Palestinian population registry and is therefore presumed to be a resident of the Area as defined in the Temporary Order Law. However, there is no dispute that petitioner 4 was born in Jerusalem, that his mother and some of his siblings are permanent residents of Israel and that at the time the application was submitted he had lived in the Area for only five of his 12 years. Moreover, there is no dispute that at the time the application was submitted, petitioner 4 had been living with his family in Jerusalem for over two years and therefore, his center of life was in Israel. This, as per the procedures of the respondent, who maintains that **"the existence of a center of life in Israel for a period of two years preceding the date on which the application for permanent residency in Israel is submitted is sufficient for considering the applicant as a person whose center of life is in Israel. This is the position of the respondent**

which was determined in accordance to his procedures..." (the **Mashahra** judgment, §8). Therefore, it appears that the applicant has several ties connecting him to Israel rather than to the Area, including maintaining a center of life in Israel at the time the application was submitted. Thus, it is highly doubtful that he could be considered a "resident of the Area" as originally defined in the Temporary Order Law. Under these circumstances one must find that the Temporary Order Law does not apply to petitioner 4 and hence, the respondent's discretion under Regulation 12 is not restricted, and petitioner 4 must be granted a permit for permanent residency in Israel in accordance with Regulation 12.

18. However, even if we assume – to petitioner 4's detriment – that he is indeed a "resident of the Area" as originally defined in the Temporary Order Law (as he is registered in the Palestinian population registry and has lived in the Area for five years (longer than any other country in which he resided at the time the application was filed), indeed, even under the Temporary Order Law, there is room for granting him a permanent residency permit. On this issue, the question is whether, in petitioner 4's case, one is to apply Section 3 of the Temporary Order Law, which was in effect when he submitted his application, or rather, the amended Section 3a of the Temporary Order Law.

    Section 3(1) of the Temporary Order Law, prior to its amendment, stipulated as follows:

    > **The Minister of Interior or the commander of the Area, as the case may be, may grant a resident of the Area… a permit to reside in Israel or a stay permit for Israel in order to prevent the separation of a child under 12 years of age from his parent who is lawfully present in Israel.**

    Regarding minors over the age of 12 – the regular rule stipulated in Section 2 of the law applies:

    > **During such period in which this Law is in effect... the Minister of Interior shall not grant citizenship and shall not give a resident of the Area a permit to reside in Israel pursuant to the Entry into Israel Law and the commander of the Area shall not give such resident a stay permit for Israel pursuant to the security legislation in the Area.**

    Section 3a (amended) of the Temporary Order Law stipulates as follows:

    > **Notwithstanding the provisions of Section 2, the Minister of Interior may, at his discretion – grant a minor who is a resident of the Area and under 14 years of age, a permit to reside in Israel in order to prevent his separation from his custodial parent who is lawfully present in Israel;**

    Petitioner 4 was over the age of 12 and under the age of 14 at the time his application was submitted. Therefore, according to the original version of the Temporary Order Law which was in effect when he submitted his application, the respondent was not empowered to grant him status in Israel. On the other hand, according to the amendment to the Temporary Order and on the now self-evident assumption that one must examine the age of the applicant at the time he submitted his application (see the **Zahaika** judgment, §13 of the **Mashahra** judgment), indeed, petitioner 4 is entitled to status in Israel.

19. Should the amended Section 3(a) be applied to petitioner 4 despite the fact that it came into effect only after he submitted his application? The parties devoted much of their arguments to this question, yet the answer is clear and in fact, the respondent himself agreed, and rightfully so, to apply (*ex gratia*) the amended Section 3(a) to petitioner 4 and grant him an A/5 visa, which he could do solely under the amended section and in contravention of the original Section 3, which did not grant him the

power to do so at all (as petitioner 4 was over 12 years old when the application was submitted). In so doing, the respondent acted rightfully, since in terms of the substantive rights vested in petitioner 4, it is clear that he was entitled to status in Israel after the amendment to Section 3, as at the time, he was under 14 years of age. The section was amended on August 1, 2005 and the petitioner was born on September 30, 1991. Therefore, at the time of the amendment he was not yet 14 years of age (he was 13 and ten months old). If the petitioner had filed his application between August 1, 2005 and September 9, 2005, the petitioner would have had to apply the amended section to him, as he had not yet reached the age of 14. Alternatively, if the respondent were to decide on the petitioner's application after the amendment to the Law, indeed, then too he would have had to apply the amended section, in accordance with the **Zahaika** judgment. Additionally, it seems that logic would have required the respondent to apply the amended section to the application as there is no point whatsoever in discriminating against petitioner 4 only because the respondent hastened to reach a decision on his application before the amendment to the petition, compared to other applicants on whose application the respondent reached a decision only after the amendment and to whom it was decided to apply the amended section (in accordance with to the **Zahaika** judgment).

20. As stated, the respondent rightfully applied the amended Section 3 to petitioner 4, but decided, in accordance with a procedure he put in place, not to grant him permanent status in Israel, but rather only an A/5 visa for two years, after which he was already 14 years of age and his status could no longer be upgraded (according to the Temporary Order Law). The central question to be examined, therefore, is whether the respondent erred in following the procedure he formulated and granting petitioner 4 a temporary permit only, or whether he should have granted him permanent residency status in Israel. The respondent claims that the Temporary Order Law indeed vests him with the power to grant an Israeli residency permit to a minor under the age of 14, but does not stipulate what type of permit is to be given to said minor, and therefore, he operates according to the provisions of the procedure he put together. This argument must be rejected. First, the language of the amended version of Section 3 can, in fact, lead to the conclusion that the respondent must grant a permanent permit rather than a temporary one. Under the original version of the section, the respondent had the power to grant the respondent [*sic*] a permit for permanent residency in Israel or a temporary stay permit for Israel, whereas in the amended version, the power relates only to a "permit for residency in Israel". One may assume from this omission that the section now relates only to a permanent permit and not a temporary one. Second, the respondent's practice of granting applicants over the age of 12 a temporary stay permit for two years, in accordance with the procedure, has already been struck down by this court in the **Mashahra** judgment, after it was determined that it foils the purpose of the Temporary Order Law. On this matter Judge Adiel ruled:

> …**As a result of the procedure set by the respondent, according to which permits for permanent residency are not to be given in the first stage regardless, but only temporary stay permits for Israel for a period of two years, and according to the respondent's interpretation of the provision of the aforesaid Section 3a of the Temporary Order Law, it has been found that in practice, the respondent prevents the granting of permanent residency permits to anyone who, at the time the initial application was filed, was over the age of 12. The respondent achieves this by first granting temporary residency permits in Israel for two years, which results in the applicant necessarily being over 14 years of age at the end of this period, at which point, according to the respondent's interpretation of Section 3a of the Temporary Order Law, he is no longer able to grant him a permit for permanent residency in Israel. I consider this result unreasonable and find it defeats the purpose of the legislation which was meant to allow the granting of permanent residency permits to minors under the age of 14.**
> (the **Mashahra** judgment, §12).

Third, this practice of the respondent contradicts not only the purpose of the Temporary Order Law, but also the purpose of Regulation 12, which the respondent must consider when he decides to grant status to minors. With regard to the purpose of Regulation 12, the Honorable President Beinisch has found:

> **… What is the purpose at the basis of Regulation 12? It seems that the situation envisioned by the secondary legislator and which he sought to prevent, was the creation of a disconnection or discrepancy between the status of a parent who resides in Israel under the Entry into Israel Law and that of his child who was born in Israel and whose birth in Israel does not, of itself, grant him legal status in the country. As a rule, our legal system recognizes and respects the value of the integrity of the family unit and the interests of protecting the child's best interests. Therefore, one must prevent the creation of a disconnection or a discrepancy between the status of a minor child and the status of the parent who has custody of him or who is entitled to custody. From the point of view of granting residency permits in Israel also, it seems that there is no justification for creating such a discrepancy, as the justifications which lie at the foundation of granting the residency permit to the parent will apply, as a rule, also to his child who was born in Israel and who is with him.**
> (the **Carlo** case above, §2).

The respondent's practice effectively leads to a situation whereby it is impossible to grant permanent status in Israel to applicants who are over the age of 12. They can only receive temporary status, in contrast to the status of their parents, who are permanent residents in Israel. Therefore, it appears that this practice of the respondent is not implied by the language of the amended Section 3 and also contradicts both the purpose of Regulation 12 and the purpose of the Temporary Order Law and therefore, must be struck down.

21. In view of all the above, I have reached the conclusion that the respondent must grant petitioner 4 permanent residency status in Israel, whether pursuant to Regulation 12 or the amended Section 3 of the Temporary Order Law. Therefore, the petition, inasmuch as it relates to petitioner 4, must be accepted. With regards to petitioners 1-3, it appears that the petition has been made redundant, since these petitioners' stay permits were extended by the respondent on December 17, 2008, after submission of the petition. As for the respondent's general policy which, as stated, no longer relates to the petitioners before me, on May 14, 2009, the respondent notified the court that the relevant officials would be holding a meeting in the near future to resolve the matter in accordance with the agreements reached in the framework of Adm.Pet 612/04 **Dahoud v. Ministry of Interior**. This should provide a solution for the problem raised by the petitioners in accordance with the agreements which were validated in the judgment.

In light of the above, I have decided to accept the petition in the matter of petitioner 4 and instruct the respondent to grant him a permit for permanent residency in Israel.

The respondent shall pay for petitioners' expenses and legal fees to the sum of ILS 5,000 plus V.A.T.

The secretariat will send the judgment to the parties.

Given today 16 Sivan 5769 (June 8 2009) in the absence of parties' counsel.

Yehudit Tzur, Vice President