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**The Jerusalem District Court sitting as a Court for Administrative Affairs**

AP 727/06

**In the matter of:**

1. **……………Nofal , ID No. ……..**
2. **……………Nofal, ID No. ……..**
3. **……………Nofal (Minor)**
4. **……………Nofal (Minor)**
   Petitioners 3 and 4 via Petitioners 1 and 2
5. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger, - Registered non-profit association**
   represented by counsel, Attorney Adi Lustigman (Lic. No. 29189) et al.
   of Shmuel HaNagid St. Jerusalem 94269
   Tel: 02-6222808, Fax: 03-5214947

**The Petitioners**

**v.**

1. **The Minister of the Interior**
2. **The Director of the Population Administration**
3. **The Director of the Population Administration Office in East Jerusalem**

Represented by the Jerusalem District Attorney
4 Uzi Hasson St., Jerusalem,
Tel: 02-6208177, Fax: 02-6223140

# Petition for Order Nisi

A petition is hereby submitted for an *order nisi* directed to the respondents and asking them to show cause:

a. Why they should not make a decision on the request to arrange the status in Israel of Petitioners 3 and 4 and grant the petitioners temporary residency visas;

b. Why Petitioner 1's request for family unification should not be accepted;

c. Why they should not enshrine the rules for processing applications for status for children of Israeli residents, including processing times, in a procedure which shall be made public;

d. Accordingly, why the respondents should not specify a period of time which shall not exceed six months during which they would be obligated to finalize processing applications for status for children of Israeli residents.

## Introduction

1. Petitioner 1 is an Israeli resident and mother of six children. Four of the children hold Israeli status, and the two older daughters, Petitioners 3 and 4 (hereafter – **the girls**), who are minors, have no status. The girls' application was submitted back in 2003, but due to the legal situation at the time, according to which children above the age of 12 who were born and/or registered in the Occupied Palestinian Territories (OPT) would not receive status, the request was not processed. In 2005 the legal situation changed such that minors, children of permanent residents, who are over 14 years of age, could submit an application for a temporary permit to remain in Israel (stay permit), as could spouses from the OPT, who were over the age of 35. The Petitioner hastened to mail in an application for her daughters and husband in September 2005. She received an appointment to come to the office and submit the full application and pay the fees on 28 November 2005. Since then, the petitioners have waited in vain for approval of the request – but the respondent has not replied.

2. Not responding to the petitioners' application for family unification lasted more than nine months is an extreme departure from the range of reasonableness and an injury to the human dignity of the petitioners, particularly considering the minors' application. The petitioners will argue that the respondent has an obligation to process applications within a reasonable time, both generally, and in particular when the applications are those of minors, children of Israeli residents. The conclusion, from the circumstances of the case that shall be described, and from the long period of time during which the respondents failed to reach a decision on the application for status for the minor children of a resident, is that they must be instructed to process the cases of minor children within a specified period of time which does not exceed three months, following which, in the absence of a final decision, temporary residency should be granted. This in accordance to a publicly available procedure and as part of an obligation to proper administration and constitutional principles relating to human dignity and the child's best interest which are in effect in Israel.

## The facts

The following is the evidentiary framework that represents the basis for the petitioners' claims:

## The parties to the petition

3. Petitioner 1 (hereinafter: **the Petitioner**) is a resident of the State of Israel who lives in the Shu'fat refugee camp in Jerusalem. She is the mother of six children. There is no dispute about the Petitioner's center of life being in Jerusalem.

4. Petitioner 2 is the Petitioner's spouse and father of her six children. His application for family unification has received no response for several months.

5. Petitioners 3 and 4 are the daughters of Petitioners 1 and 2. Through HaMoked, their mother filed an application for status for the two girls as far back as 2003, when they were under the ages of 14 and 15. Yet, due to the Citizenship and Entry to Israel Law (Temporary Order) 5763-2003 (hereafter: **the Law**), the application was rejected. At present, their new request of 2005 is unanswered.

6. Petitioner 5 is a registered non-profit association which has set itself the goal of assisting individuals who fall victim to cruelty or discrimination at the hands of government authorities, including protecting their rights before courts, whether independently as a public petitioner, or as counsel to individuals whose rights have been violated.

7. Respondent 1 is the minister authorized by the Entry into Israel Law 5712 – 1952 to handle all issues deriving from this law, including applications for Israeli status, *inter alia* via applications for family unification and child registration.

8. Respondent 2 is the director of Population Administration in Jerusalem. In accordance with the Entry into Israel Regulations 5734 -1974, Respondent 1 has delegated to Respondents 2 and 3 some of his powers regarding processing and approving applications for family unification and status for children submitted by permanent residents who live in East Jerusalem. Respondent 2 also takes part in policy making with respect to applications for status in Israel under the entry into Israel law and the regulations issued pursuant thereto.

9. Respondent 3 (hereinafter: **the respondent**) is the director of the regional office of the Population Administration in East Jerusalem. Pursuant to the Entry into Israel Regulations 5734 -1974, Respondent 1 has delegated to Respondents 2 and 3 some of his powers to Respondents 2 and 3 some of his powers regarding processing and approving applications for family unification and status for children submitted by permanent residents who live in East Jerusalem.

## The matter of Petitioners 1 – 4

10. In 1987, Petitioner 1 married a resident of Nablus – Petitioner 2 (hereafter **the petitioners**). Shortly after the marriage, the petitioners moved to live in Petitioner 2's family home in Nablus. In 2001, the Petitioner retuned to live with her family in Jerusalem. Since then she has lived on the ground floor of her sister, ______'s family home in the Shu'fat refugee camp. The Petitioner and her children are recognized by the National Insurance Institute and insured with the Leumit Health Fund.

11. In 2002, several months after she returned to live in Israel, the Petitioner submitted a request to renew her identity card at the respondent's office. The Petitioner's card was taken and she was given a receipt for submitting a request for renewing a damaged identity card. The Petitioner was not told that her status had been revoked. However, the implication of the respondent's act, according to which she was not entitled to an identity card, even for an interim period, is lack of status during this period. The Petitioner has since repeatedly contacted the Respondent's office, but was rejected each time. She remained without any documentation whatsoever. Only following intervention by Petitioner 5, which included a communication warning of imminent legal action to the Attorney General, was the petitioner's identity card exchanged for a new one and returned to her.

    Petitioner 5's communication on the subject and letter to the Attorney General are attached to the petition and marked **P/1 A and B.**

## Initial contacts with the respondent

12. The petitioners have six children (at the time of the residency reinstatement, they had five children). Apart from the youngest daughter, who was born in Israel in 2004, the children were born in the OPT and registered there at the time. On 13 October 2003, after the identity card was returned, Petitioner 5 submitted a request for status for all the Petitioner's children to the Respondent. On this date Petitioner 4 had not yet turned 14, and Petitioner 3 was under age 15.

    Petitioner 5's letter to the Respondent on the issue of arranging the children's status, is attached to the petition and marked **P/ 2.**

13. On 6 November 2003, the Respondent wrote that since the children "possessed a different status" (registered in the Area) their registration will be discussed in the framework of a family unification application." That and no more. In this connection, note that until said period there was no difference in the method of submitting a request for arranging the status of children born or registered in an area and other children of residents. Both types of requests were reviewed in the framework of a request entitled "Child Registration" by means of an identical form and procedure.

    The Respondent's letter is attached to the petition and marked **P/3**.

14. Thus, on 17 November 2003, Petitioner 5 wrote a request to Attorney Lavi of the Respondent's legal department asking to clarify the policy changes regarding the procedure for arranging the status of residents' children, the nature of the new procedure, a family unification for children, its length, cost, the protocol in which the procedure was anchored, the means of making an contact, etc. In addition, Petitioner 5 argued that when the Respondent's policy changes in such a drastic manner, and particularly when the policy at issue involves minors, children of Israeli residents, the policy should be published, and a period of adjustment during the course of which the families could study and prepare for the new policy should also be determined. The Petitioner attached to its letter examples of various replies given by the Respondent to requests to register children. All the responses addressed the same issue, namely child registration, however, they replies differed substantially from one another. The single common feature was that the responses were so minimalistic to the extent that the resident applicant could not understand what to do in order to arrange for children's status. The Respondent's brief answer in the matter of the petitioners herein was among the replies Petitioner 5 enclosed with its letter.

Petitioner 5's letter is attached to the petition and marked **P/4.**

15. On 1 December 2003, Attorney Lavi, acting on behalf of the respondent, resplied in a laconic letter which did not provide answers to Petitioner 5's questions and claims. Instead, Attorney Lavi drew the Petitioner's attention to the Respondent's replies in pending petitions on other issues, where the pressing issues raised had not been answered.

The Respondent's letter is attached to the petition and marked **P/5**.

16. In the absence of a pertinent answer from Attorney Lavi, Petitioner 5 contacted Attorney Dana, Director of the Respondent's Legal Department, with an additional request to clarify the nature of the new procedure, publish it and allow an adjustment period for the public.

Respondent 5's letter is attached to the petition and marked **P/6.**

17. In the absence of an answer from the respondent, and in order not to delay the registration of the Petitioner's children, Petitioner 5 contacted the Respondent on 25 July 2004 with an <u>additional</u> request to arrange the status of all five of the Petitioner's children.

The letter from the Petitioner 5 is enclosed with the petition, and marked **P/7.**

18. Following a number of reminders sent by Petitioner 5 regarding its request, the Respondent replied on 21 December 2004 (five month after the Petitioner's communication), notifying the Petitioner that she could submit a full family unification application only in February. The Respondent added that the Petitioner was entitled to submit an application only for her three minor children who are under age 12, <u>and not for Petitioners 3 and 4, who were almost 14 and 14</u>, at the time the first application was submitted.

The Respondent's letter is attached to the petition and marked **P/8**.

19. On 11 July 2005, a year after the renewed child registration application was submitted to the Respondent and five months after the Petitioner was allowed to submit the full application at the office, Petitioner 5 wrote to the Respondent, stating that he should grant the application for the children and allow the Petitioner to arrange the status of her infant daughter. She been born in Israel in the interim, but the Respondent had thus far refused to grant her status in accordance with the law, claiming that the Petitioner must continue to wait for a decision.

Petitioner 5's letter is attached to the petition and marked **P/9.**

20. On 24 July 2005, several days after Petitioner 5's letter, the Petitioner was summoned to the office in order to arrange the temporary status of three of her children and the permanent status of her infant daughter. On this date, the Petitioner's three siblings received temporary residence for two years and their infant sister received permanent status.

21. In August 2005, the Temporary Order Law underwent amendments. Among the changes, men above the age of 35 could now participate in the family unification procedure, and children of Israeli residents who are between the ages of 14 and 18 could remain in Israel via DCO permits. Children of residents who are under age 14 could receive temporary status for two years, which would be periodically extended. The amendments now made it possible to submit family unification applications for

Petitioner 2, the Petitioner's husband, and their two older daughters, who were the only ones from among the family's children to remain without status in Israel. Accordingly, Petitioner 5 contacted the Respondent on 12 September 2005, for the third time, with a request to arrange the status of the two girls, Petitioners 3 and 4.

Petitioner 5's letter is attached to the petition and marked **P/10.**

22. On 20 October 2005 Petitioner 5 sent a reminder to the Respondent.

Petitioner 5's letter is attached to the petition and marked **P/11.**

23. In a telephone conversation between Mrs. Blumental on Petitioner 5's behalf and Ms. Asraf representing the Respondent, it was disclosed for the first time that the Petitioner had been given a date on which to submit a family unification application for Petitioner 2, her husband and her daughters, Petitioners 3 and 4, on 20 November 2005. At that time, the Petitioner presented at the office and received a receipt for submission of a family unification application for Petitioner 2. She was informed that the application also included Petitioners 3 and 4.

A receipt for submission of the application is attached to the petition, and marked **P/12**.

## Exhaustion of remedies

24. On 30 January 2006, Petitioner 5 sent a reminder to the Respondent.

Petitioner 5's letter is attached to the petition and marked **P/13**.

25. On 19 March 2006, Petitioner 5 sent the Respondent an additional reminder.

Petitioner 5's letter is attached to the petition, and marked **P/14**.

26. On 24 April 2006 Petitioner 5 sent the respondent an additional reminder.

Petitioner 5's letter is attached to the petition, and marked **P/15.**

27. Almost a year has passed since Petitioner 5 submitted a request to arrange the status of Petitioners 3 and 4, in the wake of the legal changes, but no response has been forthcoming. The Respondent's foot dragging exceeds the criteria of reasonableness. The Respondent clearly attaches no importance to the circumstances of the case, the fact that this is a third application in three years that is submitted for minors, daughters of an Israeli resident, and a request for their father.

### The legal framework

28. The petitioners will claim that by refraining from handling and deciding on the family unification application over such a long period of time, the respondents have conducted themselves unfairly and in excess of the range of reasonableness. The respondents are thereby violating the most basic rights of Petitioners 3 and 4, Petitioner 2 and of the Petitioner and the rest of her children, all residents of the State of Israel.

29. The petitioners will also claim that upon approval of the girls' family unification application, the Respondent would have to grant them temporary residency status in Israel, as they are not residents of the Area. Thus the Temporary Order Law should not be applied to them.

30. Even if the respondents' standard interpretation in cases of this type were to be accepted, i.e. the Temporary Order Law is applied to the girls, the Respondent would have to grant Petitioner 4 temporary residency in Israel, as her age at the time of the initial application for status in Israel was under 14. As such, the 2005 amendments regarding children under 14 years of age [apply].

31. In this state of affairs, only Petitioner 3, who was under 15 years of age at the time the initial application in her matter was submitted to the Respondent, will remain without Israeli status. Thus, of the five siblings and mother, only Petitioner 3 will be forced to arrive at the Nablus DCO several times each year, to receive permits. Only she will have no social rights, including the right to health insurance, despite the fact that she lives in Jerusalem with her mother, brothers and sisters. The petitioners will claim that this situation is unreasonable and requires a special humanitarian solution that would prevent the split status of the family members. The Respondent has the legal authority to grant Petitioner 3 temporary status in Israel on humanitarian grounds. The petitioners will claim that he must exercise his authority in this case.

32. In addition, the petitioners will claim that foot dragging on the requests of minors must be brought to an end by formulating a proper procedure for arranging the status of children who are residents of the country, and determining a time frame for processing requests.

## The right to family life – a constitutional right

33. The conduct of the Respondent, as detailed above, violates the petitioners' right to live together and maintain a family unit as they have chosen to do. An individual's right to marry and start a family is a fundamental right in our legal system. It is derived from the right to dignity and must not be harmed.

34. Israeli law recognizes the value of orderly family life as a central value which is worthy of society's protection:

> **[…] preservation of the unity of the family represents part of the public rule in Israel. The family unit is 'the first unit…of human society' (Justice Cheshin in CivA 238/53 Cohen et al. v. Y.M.); it is an institution which is recognized by society as one of the foundations of social life.' (President Olshen in CivA 337/62 Reisenfeld v .Jacobson et al.). Preservation of the family institution is part of public rule in Israel. Moreover: in the framework of the family unit, preservation of the institution of marriage is a central social value, which forms part of public rule in Israel**.

Hon. Jus. Barak, as his title was then, in HCJ 693/91**Efrat v. Official in Charge of the Population Registry at the Ministry of Interior et al.**, PD 47(1) 749, 783.

For more on this issue, see:
LCA 238/53 **Cohen and Bulik v. the Attorney General** PD 8(4), 35; HCJ 488/77 **A.**

**et al. v. Attorney General**, PD 32(3) 421, 434; CivA 451/88 **As v. M.Y.** Piskei Din 49(1) 330, 337; CivFH 2401/95 **Nahmani v. Nahmani et al.**, PD 50(4) 661, 683; HCJ 979/99 **Pavaloayah Carlo v. Minister of the Interior** TakSC 99(3)108.

35. The right to family life is perceived as a natural, constitutional right. In the **Stemka** judgment, Hon. Jus. Cheshin discussed the importance of the family unit, which was viewed as a fundamental right, as was Israel's obligation to this right, *inter alia*, by virtue of its being a signatory of international covenants that recognize the importance of the right to family life:

> **Our case, let us remember, focuses on the fundamental right to marriage and family to which the individual – any individual – is entitled. It is superfluous to recall that this right was recognized in international covenants that are universally accepted …**

HCJ 3648/97 **Bijlabahan Patel et al. v. Minister of the Interior**, PD 53(2), 728, 784-785.

36. International law determines that every person has the right to marry and establish a family.

Thus, for example, Section 10(1) of the International Covenant on Economic, Social and Cultural Rights, ratified by Israel on 3 October 1991, determines that:

> **The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses**

See also: Universal Declaration of Human Rights, accepted by the UN General Assembly on 10 December 1948, Art. 8(1), 17(1) and 16(3) of the International Covenant on Civil and Political Rights, came into force with regard to Israel on 3 January 1992.

37. Interference with the integrity the family unit is a violation of human dignity. The petitioners will claim that their right to a normal family life is anchored in Basic Law: Human Dignity and Liberty, in the provisions protecting liberty, dignity and privacy.

## The daughters' status – the general principle in arranging the status of the children of residents

38. As a matter of social and legal policy, Israel adopted the principle that a child's status should be identical to that of his guardian parent, who is a resident of the country, provided that the child lives with this parent in the country.

This principle is derived from fundamental principle which effectively constitute natural justice, regarding the rights and duties a guardian parent with has toward his minor child, and regarding the protection society must provide for the relationship between them.

In accordance with this principle, the court has ruled:

> **As a rule, our legal system recognizes and respects the value of the integrity of the family unit and the interest of protecting the child's wellbeing, and therefore one should avoid creating a gap between the status of a minor child and that of the parent who has custody or is entitled to custody over him… I, myself, believe there is no room for distinguishing between the status of a minor child in Israel and the status of his guardian , whether in the framework of interpreting Regulation 12 or whether by determining an appropriate criterion for guiding the discretion granted to the Minister of Interior in the Entry to Israel Law** (emphasis added – A.L.)

HCJ 979/99 **Pavaloayah Carlo v. Minister of the Interior** TakSC 99(3)108.

39. As emerges from the above quote from Hon. Jus. Beinisch, the constitutional infrastructure in which this policy should be implemented, is a patchwork. Nevertheless, every statutory provision must be implemented accordance to the same general principle. It is clear, therefore, that fair and reasonable treatment by the authority would prefer the measure that corresponds to the above principles and is least harmful to the best interest of the child. This is true also with respect to the framework of the Temporary Order Law, which is the subject matter herein. A law may will restrict the Respondent in a manner that compromises the best interest of the child. Yet, insofar as there is a restrictive interpretation of the harm, and insofar as it is possible to reduce the harm in the framework of examining the particulars and exercising discretion, the authority has an obligation to use the measures allowing for this. In other words, inasmuch as the law so enables and it is possible to find an individual solution, which does not conflict with the purpose of the law and prefers the best interest of the child over harm to the child, the respondent should at least consider this solution.

## Implementation with regard to children born and or registered in the territories

40. With regard to a child born in Israel, Regulation 12 of the Entry into Israel Regulations 5734 – 1974 (hereinafter: the **Regulations**) applies. According to the Regulations, a child born in Israel shall receive the status of his guardian parent. With regard to a child born outside of Israel, Regulation 12 does not apply directly (since according to its language, it refers to "a child born in Israel"). Nevertheless, for many years, until mid-2002, the Respondents treated children born in Israel and abroad according to the same rules and procedures. Their status was reviewed in the framework of a "child registration application", and according to the center of life criterion. The Respondents' policy underwent frequent changes, both regarding children born in Israel and children born abroad. This policy corresponded to the Carlo judgment, whereby a child should not be separated from his guardian parent, and with domestic and international law regarding the best interest of the child.

41. Following Government Resolution 1813 of 12 May 2002, in the matter of halting family unification for residents of the OPT, the Respondents decided that the procedure for arranging the status of children who were born in Israel but registered in the OPT, or born in the OPT would be named family unification (rather than child registration). Accordingly, the Respondents applied the Government Resolution, and

subsequently also the laws enshrining it, with various changes, to children of East Jerusalem residents who were born or registered in the OPT.

42. As of today, according to the Temporary Order Law, children born and/or registered in the OPT who are over age 14, are not entitled to status in Israel, but rather to a stay permit only. Children below age 14 will receive temporary residency for two years, but their status will not be changed to permanent residency at the end of the period. Instead, the residency visa will be renewed for as long as the Temporary Order Law remains in force.

43. Thus, according to the legal situation, as a rule, a child born or registered in the Area is a resident of the Area and the provisions of the Temporary Order Law apply to him. However, the applicability of the law to the matter at hand is not self-evident, since Petitioners 3 and 4 are able to prove that they are not "residents of the Area." Prima facie, they are not "residents of the Area" at all. The fact that their mother is from Jerusalem and that Jerusalem is the center of their life is proven and undisputed. The question that arises is whether, the Law's definition indicates that birth and/or registration in the OPT is conclusive evidence. In order to answer this we need to examine the definition of "resident of the Area" in the Temporary Order Law. The definition appears in Section 1 of the Order as follows:

> **[S]omeone who has been registered in the population registry of the Area, as well as someone who resides in the Area notwithstanding the fact that he has not been registered in the population registry of the Area, but excluding a resident of an Israeli settlement in the Area.**

This definition strongly implies a presumption of residency with respect to anyone is registered in the population registry of the Area or resides in the Area. However, the definition does not imply that a person who is registered in the population registry of the Area, but proves that he is not a resident thereof in practice, is in fact a resident of the Area. In other words, this is a rebuttable presumption rather than a conclusive presumption. In the case before us, the rebuttable presumption had already been refuted, when both the Ministry of Interior and the National Insurance Institute recognized the Petitioner as a resident of the State of Israel, <u>who has resided in Israel since 2001 with all her children</u>.

44. The respondents rely on the Citizenship and Entry into Israel Law (Temporary Order Law) 5763-2003. However the provisions of this statute cannot assist them in this case. A similar matter was reviewed in AP 822/02 **Ghosha v. Director of the Regional Population Registry Office et al**. In that case, the Respondents sought to apply the law to the children of a Jerusalem resident and her husband, an OPT resident. The Respondents claimed that since the children were registered in the population registry of the OPT, they were "residents of the Area', who come under the terms of the law. The Court rejected this claim, and held that whether the children were "residents of the Area" or not depended on an examination of their center of life. In that instance, the children had been born in Israel and Regulation 12 applied to them. However the rationale of the judgment addresses the need to examine where the place of residence was. It was held that the place of registration, does not, ipso facto, provide conclusive evidence regarding the place of residence:

> **… if the Petitioners are to be considered as having a center of life in Israel, then they are entitled to be registered by virtue of Regulation 12, even if the registration is to be deemed as the granting of a residency visa. The Citizenship**

> **and Entry into Israel Law will not stand in the way of the Petitioners in this case, since this law only applies to residents of the Area.**
>
> […]
>
> **The letter of the population registry office of 31 July 2002, in which the application was rejected, indicates that the respondents relied solely on the fact that the Petitioners were registered in the population registry of the Area as sufficient grounds for rejecting the application and demanding it be submitted as part their father's family unification application, This letter does not indicate that the Respondents examined whether the registration reflects the actual situation insofar as it relates to the Petitioners' center of life...**

(*Ibid,*. sections 7-9).

45. In the judgment given in AP 1158/04 **Nabhan v. Regional Population Administration Office**, dated 14 February 2006, concerning the status of children born in Israel but registered in the OPT and come under the terms of the definition of resident of the Area in Section 1 of the Law, Hon. Jus. Okon ruled:

> **Registration in the Area cannot ipso facto demonstrate the true desire of the minors, who were born in Israel, and were children of an Israeli resident."**

The reasoning behind the words of Hon. Jus. Okon, which led to a decision that the Respondents must grant the children status in Israel, equally applies to our matters. Being born in the OPT cannot change this holding per se, since the child does not choose where he is born. In a situation where the girls' mother and other siblings are deemed to be Israeli residents, there is no logic in determining that the residency of the two additional minor sisters, whose center of life had always been the same as their mother's and other siblings, is in another place.

## Application vis-à-vis the petitioners

46. There is no dispute between the parties about the Petitioners' center of life being inside Jerusalem city limits. It was for this reason that the Petitioner's residency was reinstated and her application to register four of her six children was granted. These four children were under age 12 at the time and met the terms of the law in effect then. The decision to grant the four children status but to refuse to even discuss the application of the two additional, minor sisters was not based on any relevant or substantive cause, but on a legal age restriction, which has meanwhile been removed.

47. In accordance with the policy described above, which was also expressed in case law, the trend should be that all the Petitioner's children receive status in Israel

Her four younger children have already received status – three of them, born outside Israel, received temporary residency status. The youngest girl, born in Israel, received permanent residency status.

Note that there is a procedure relating to children who were born outside Israel and are not residents of the Area, according to which they receive temporary residency for two years and permanent status thereafter.

48. It is now time to grant Petitioners 3 and 4, who were born outside Israel, temporary residency status for two consecutive years. The two petitioners are not residents of the Area according to the legal definition, since they are able to prove that despite being born and registered in the OPT, they are residents of Jerusalem – as determined with respect to the rest of their family.

49. Even if this interpretation of the law by the Petitioners, which was recognized in Ghosha and Nabhan, is not accepted, the Petitioners should nevertheless be granted temporary status: Petitioner 4 is entitled to this status since her age was less than 14 in 2003, when the initial application to grant her status in Israel was submitted. Thus the present version of the law in the matter of children under age of 14 applies in her case.

Although Petitioner 3 was nearing the age of 15 when the application was submitted, it would not be reasonable to discriminate against her, as compared to her five other siblings and leave her alone without status in Israel. According to Section 3(c) of the Temporary Order Law, the Minister of Interior may grant citizenship or a permit for residency in Israel if granting the permit or citizenship is designed to promote a unique or important interest of the state. This section grants the Respondents discretion in special cases. The Petitioners argue that the State has an interest in not splitting the status of siblings and causing humanitarian injustice, as will occur in the present case if Petitioner 3 remains with her family in Jerusalem, but without a stable status. Let us recall that the only reason for the Temporary Order Law is security, and Petitioner 3 has never been suspected of any activity compromising state security or any other negative activities whatsoever.

## The respondent must examine humanitarian considerations

50. On the importance of the humanitarian consideration in a country governed by law:

> **The State of Israel is a country governed by law; the State of Israel is a democracy which respects human rights, and which seriously weighs humanitarian considerations** (HCJ 794/98 **Obeid et al. v. Minister of Defense** PD 55(5) 769,774).

51. The judgment in AP 1037/03 **Feldman et al. v. Minister of Interior** is instructive on the importance of the humanitarian consideration when the Respondent is deciding a request for status:

> **The Respondent's main reasoning, according to which "one does not approve change of status to adult children who are not entitled under the Law of Return," (and see sections 7 and 14 of the Respondent's written submission and exhibits C,E, and F) illustrates that the Respondent did not examine the humanitarian aspects, otherwise he would have justified his claims on the basis that the Petitioners do not come under the terms of this exception.**

> **In a situation where there is a "humanitarian" exception, the authority has an obligation to include among its considerations, the personal background of each case. Not weighing these circumstances is akin to not giving them the weight they deserve, and as such, the discretion exercised is marked by lack of reasonableness (see and compare HCJ 935/89 Ganor v. State of Israel, PD 44(2) 485, 513-515; as well as Itzhak Zamir, The Administrative Authority (Volume 2, Nevo, 5756) – 771, 763).**

52. The respondents disregard the restrictive clause in the Law which allows discretion in special cases, if only in cases that particularly cry out for help, like the case of Petitioner 3 which is before us. In this case, refraining from using discretion under the restrictive clause will result in a split between the status of the daughter _____ and her five other siblings, who are entitled to status in Israel, without any pertinent reason. As a result of this, only Petitioner 3, out of the siblings, is not entitled to a stable status in Israel, to health insurance and to the security that accompanies lawful presence in the country. Only she will be periodically exposed to the threat of deportation, delays and restrictions which accompany the absence of status. All this, with respect to the daughter of a resident, who lives in Israel with her mother and siblings – all recognized as Israeli residents.

## Violation of basic human rights

## Children's rights to protection by society

53. The Petitioner, a resident of the State of Israel, has a right to live securely with her children in Israel with their legal status settled. This right stems from the Petitioner's right, as a permanent resident of Israel, as well as from her basic rights as a mother, not to be prevented by her state from protecting her children and caring for them to the best of her abilities. The State has a clear and natural obligation not just to prevent this from occurring, but rather to actively protect a person from any harm to his ability to give his children the protection they need.

54. The respondents are ignoring the principle of the best interest of the child, a fundamental principle in the exercise of any administrative or judicial discretion regarding minors. As long as the child is a minor and as long as his parent functions properly, the best interest of the child requires allowing him to grow up in the family unit that supports him. The refusal to register the child as an Israeli resident, while his parent is an Israeli resident whose place of residence is in Israel, puts the child at risk of separation from his parents, (the temporary permits do not always overlap and are not granted during closure and other periods), harm to his development and intervenes in the family unit to his detriment. Alternatively, the child will have no choice but to remain with his parents in Israel, but without stable and clear status, for as long as the difficulties of living without status do not defeat the family.

55. In Israeli law, the child's best interest is a basic and well rooted principle. On the importance of the family unit and the legal limits of state intervention therein, see the remarks of Hon. President Shamgar in AP 2266/93 **A v. B** PD 49(1), 221, 235-236:

> **The right of parents to have custody of their children and raise them, with all that this involves is a natural and primary legal right with respect to the natural bond between**

> **parents and their children (AP 577/83 The State Attorney v. A., PD 38 (1) 461). This right is expressed in the family's privacy and autonomy: the parents are autonomous in making decisions pertaining to children – education, lifestyle, place of residence etc., and intervention by society and the State in these decisions constitute an exception which requires justification (see the above AP 577/83, pp. 468, 485). This approach is rotted in the recognition that the family unit is 'the most fundamental and ancient social unit in the history of humanity, which has always been and always will be the foundation that serves and ensures the existence of human society'.** Justice Alon (as was his title then) in AP 488/77 **A. et al. v. State Attorney**, PD 32(3) 421, p. 434).

The right of minor children to live with their parents has been recognized as an elementary and constitutional right by the Supreme Court. See the words of Justice Goldberg in HCJ 1689/94 **Harari et al. v. Minister of Interior**, PD 51(1) 15, on p.20 opposite the letter *beth* (b).

56. The international Convention on the Rights of the Child, which the State of Israel as well as almost all the nations of the world ratified, sets forth a number of provisions requiring protection for the child's family unit.

The Preamble to the Convention states that the States Parties are:

> **Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community […].**

See also Articles 1, 3(1) 4, 5, 7, 9(1), 10 (1) of the Convention. The provisions contained in the Convention with regard to children's rights are increasingly recognized as an additional source for and a guide to interpreting "the child's best interest" as a superior consideration in our law: see AP 3077/90 **A. et al v. B.** PD 49 (2) 578, 593 (Hon. Jus. Cheshin); AP 226/93 **A. (a minor) et al. v B.** PD 49(1) 221, pp. 232-233, 249,251-252 (Hon. President Shamgar); CivFH 7015/94 **The Attorney General v. A.**, PD 50(1) 48, 66 (Hon Jus. Dorner). The respondents must exercise their powers in a manner corresponding to the child's best interest as interpreted in the provisions of the Convention. See also Articles 24 (1) and (2), 17, 23, 26 of the International Covenant on Civil and Political Rights

57. Causing harm to children and separating them from their parents may have serious psychological and medical repercussions. Thus, the Respondent's policy also impacts children's rights to physical integrity, in the context of the children's the right to have the State and their parents protect them and secure their proper psychological and physical development during the critical years of childhood.

## Parents' obligations to their children

*58.* The parents' obligation towards their children and the prohibition on neglect are well anchored in Israeli legislation. For example, Section 15 of the Legal Capacity and Guardianship Law 5722-1962, entitled 'The Parents' Role' sets forth:

> Parental g**uardianship includes the duty and the right to care for the minor's needs…. and it is joined to the right to have custody of the minor and determine his place of residence, and the power to represent him.**

Section 323 of the Penal Code 5737-1977 sets forth:

> **A parent or person responsible for a minor who is a member of his household is obligated to provide him with the necessities of life, care for his health, protect him from abuse, prevent injury to his person or other harm to his wellbeing and health. Such person shall be deemed responsible for any effects on the life or health of the minor which result from his failure to fulfill said duty**.

See also Section 373 of the Law

59. The Respondents' policy prevents parents from fulfilling these duties. In so doing, the Respondents are forcing the parents to become criminals. Worse still, the Respondents' fatally policy harms the family unit and as such undermines the central social tool for protecting children's bodies, lives and dignity.

## The authority's duty to act with the appropriate speed

60. The Respondent has an obligation to treat the Petitioners fairly, reasonably and process their matters with due haste. Section 9 of the Procedural Code Amendment (Decisions and Statement of Reasons), 5719-1958 does exempt the Respondent from its provisions, but this does not exempt the Respondents from the duties applicable to any public authority to treat persons contacting it fairly and reasonably.

Hon Jus. D. Levin held as such in HCJ 6300/93 **Rabbinical Advocates Training Institute for Women v. Minister of Religious Affairs et al**., PD 48(4) 441, 451:

> **A competent authority must act reasonably. Acting reasonably means, *inter alia*, meeting a reasonable timetable.**

On this matter see also:

HCJ 758/88 **Kendle et al. v. Minister of Interior** PD 46(4) 505, HCJ 4174/93 **Wialeb v. Minister of Interior** (unreported), Section 4 of the judgment; HCJ 1689/94 **Harari et al. v. Minister of Interior** PD 51(1)15.

61. The Respondent's obligation to treat the Petitioners' matter with due speed is also anchored in Section 11 of the Law of Interpretation 5741-1981, which sets forth that:

> **Where there is authority or an obligation to take a certain action without a schedule for doing, there is authority or an obligation to take such action in due speed and repeat it periodically as circumstances require.**

62. The duty to take action within a reasonable time frame and not to neglect or delay pending applications awaiting a decision by the authority is one of the fundamental principles of good governance.

    In this matter see AP 4809/91 **The Jerusalem Local Planning and Building Committee v. Kahati et al.** PD 58(2) 190, 219.

63. The Supreme Court emphasized these matters in its judgment HCJ 3680/95 **Tiberias v. Ministry of Interior** TakSC 96 (1), 673. In that case, the Court affirmed that the Respondent's policy of examining whether a marriage is real before registering a person presenting a marriage certificate as married in the population registry in certain cases was reasonable. The examination itself was found to be reasonable, but the Court added that:

    > **One hopes that it (the examination, A.L.) is performed efficiently and with due speed, and one assumes that in the case before us, too, the examination will not take a long time.**

    The words of the Hon. President Barak at page 673.

64. In refraining from approving the Petitioners' application for many months, the respondent dragged its feet. This conduct was neither fast nor efficient, and in fact, it was a far cry from what is expected by reasonable conduct on the part of an administrative authority governing significant aspects of the lives of those who require its services.

## Lack of reasonableness and fairness

65. An administrative authority has an obligation to act reasonably, proportionality and fairly in pursuit of an appropriate purpose. These are supreme principles, commanding the scope of the Respondents' discretion.

66. The failure to respond to the applications of Petitioners 2 and Petitioners 3 and 4, who are minors, for many months, and the absence of a decision on their applications constitute deficient conduct by reason of extreme unreasonableness.

    In this matter see: HCJ 1689/94 ) Harari et al. v. Minister of Interior, PD 51(1) 15, and HCJ 840/79, Association of Contractors v. the State of Israel and HaBonim of Israel, PD 34(3) 729 and particularly pp. 745-746. As Hon. Jus. (in his position at the time) Barak remarked:

    > **The State, via those acting on its behalf, is a public trustee, and the public's interest and assets have been entrusted to it to be used for the general good…This special status imposes the obligation on the part of the State to act reasonably, honestly and in good faith. The State may not discriminate, act arbitrarily or in bad faith, and must not be placed in a situation of conflict of interests. In short, it must act fairly.**

## The duty to formulate and publicize a fair and reasonable policy

67. There is no need to elaborate on the great importance of making state decisions and procedures public.

68. The public's right to know and receive information from government authorities concerning their activities has been explicitly recognized in Israeli statute and case law. The public's right to know is an essential tool for public monitoring of state actions; it is important for ensuring public trust in the authorities' activities, as there can no public trust on the basis of what is concealed. The public's right to know is the right of every member of the public to have direct access to information kept by government authorities by virtue of their positions. The public's right to know is juxtaposed with the "obligation of holders of public office to provide information to members of the public." (HCJ 90/1601-1604 **Shalit et al. v. Peres et al.** PD 41(3) 365).

On the duty to publish criteria and procedures see HCJ 5537/91 **Efrati v. Ostfeld et al.**, PD 46(3) 501; HCJ 3648/98 **Stemka et al. v. Minister of Interior et al.** PD 53(2) 728, 767-768.

69. In the absence of a procedure regarding the Respondent's manner of processing status applications for children, or if such a procedure exists secretly without publication, many families who have no legal counsel do not know how to have their children granted status. Other families wait in vain for the day when their children are registered. Additionally, formulating and reaching a decision in writing and publishing it, provides some additional guarantee that the decision is based at least in part, on discretion.

70. The application submitted by the Petitioners herein was initially delayed as a result of the absence of guidelines on the manner in which the Respondents' new policy respecting family unification for children is to be applied. Processing of the Petitioner's most recent application for family unification her husband and two daughters, left with no status in Israel, has already been delayed for nine months, and the Respondents is still dragging its feet.

71. The Petitioner's daughters have been harmed by the Respondents' conduct, which is expressed in the complete lack of obligation to process the matter within a reasonable time. They are detained at roadblocks. They hardly leave their home and risk being expelled.

72. Petitioner 5, a non-profit organization that promotes human rights, processes many cases in which proceedings in the matter of children are drawn out over many years. The present case is but an example that reflects the somber situation facing residetns, and is certainly not an exceptional case from among those processed by the Respondent's.

73. In view of the aforementioned, the Petitioners seek to prevent the situation described herein from recurring, by formulating a procedure for processing applications for status for children and making it public. In formulating the procedure, Respondent would undertake, *inter alia*, to establish clear and reasonable standards for processing applications and meet specified time frames.

74. Considering the severity of the problem presented by the protracted handling of children's applications by the Respondent's staff and the serious implications on the welfare of minors, the Respondent is requested to undertake to finalize applications for status to children within no more than three months, prior to completing the general procedure. It must be established that inasmuch as the Respondent does not

reach a decision within the specified time period for reasons unrelated to the applicants, he shall grant the minors provisory temporary residency.

## Conclusion

75. What emerges from all the foregoing is that the respondents have an obligation to accept the Petitioner's application for family unification with her husband and two daughters and to and grant the latter temporary residency in Israel. The Petitioners are not residents of the Area and even if the Respondent chooses to deem them as such, it is incumbent upon him to grant Petitioner 4 temporary residency status, in accordance with the Temporary Order Law, as she was under the age of 14 at the time the initial application on her behalf was submitted. In this instance, only Petitioner 3 will remain without Israeli status. The Petitioners argue that the Respondents have a duty to examine her case under Section 3(c) of the Law, on humanitarian grounds.

76. Finally, the Petitioners' case is but one instance in which the Respondent has delayed processing despite the fact that the applications concern minors. Because the matter herein concerns children, it is particularly important that status be granted using simple and speedy procedures, which do not place difficult obstacles in the path of residents from all walks of life.

77. The Respondents must therefore be instructed to formulate clear procedures indicating a specific time frame not exceeding three months, for reaching a decision on an application for status for minors. The procedures must be made public in an appropriate manner, allowing access by the entire population, and in the Arabic language.

The Court is requested to instruct the Respondents to abide by the rule of law and the criteria of reasonableness and fairness and to guarantee the wellbeing and rights of residents of the State and their children.

For all these reasons the Honorable Court is requested to grant an *order nisi* as requested and render it absolute having received the Respondents' reply. The Honorable Court is also requested to instruct the Respondents to pay attorney's fees and legal costs.

Jerusalem, today, 24 July 2006

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Adi Lustigman, Adv.
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