At the Jerusalem District Court
Sitting as the Court for Administrative Affairs **AP 4724-02-12**

In the matter of: 1. ____ Sawalhi, ID No. _____

2. ____ Sawalhi, ID No. _____

3. HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA

All represented by counsel Adv. Adi Lustigman (Lic. No. 29189) et al.
27 Shmuel Hanagid St., Jerusalem, 94269
Tel: 02-6222808; Fax: 03-5214947

The Petitioners

v.

State of Israel: The Minister of Interior

Represented by the Jerusalem District Attorney

7 Mahal St., Jerusalem

Tel: 02-5419555; Fax: 02-5419581

The Respondents

Administrative Petition

The honorable court is hereby requested to order the respondent to retract his decision to deny the family unification application submitted by petitioner 1 for her husband, petitioner 2, such that the application shall be approved and the petitioner shall receive a permit to remain in Israel within the framework of a family unification procedure.

Preface

A person's right to have a family is one of the foundations of human existence; Its realization is a condition for making the most out of life and it is the essence of life; it is a condition for self realization and for a person's ability to share his life with his spouse and children in a sincere common fate. It reflects the essence of a person's being and the embodiment of his desires. The right to have a family is situated at the highest level of human rights. An infringement on this right is possible only when it is balanced against a conflicting value of special power and importance. In the existing tension between the value of security of life and other human rights, including the right to have a family,

the security consideration prevails only where there is high probability, almost certainty, that if appropriate measures involving the infringement of human rights are not taken, public safety may be materially injured. (Judgment in HCJ 7444/03 **Dakah v. The Minister of Interior**).

1. This petition concerns an indirect security denial by respondent of the family unification application of petitioner 1, a resident of Jerusalem, married for many years to petitioner 2, originally a resident of the Gaza Strip, who has been living with her in Israel since 1998. The petitioners are the parents of four girls, minors, who are also permanent residents of the State of Israel.

2. The petitioner's first family unification application was submitted back in 2001. The application was approved four years later, in 2005, and the petitioner received a permit to remain in Israel. Over the years, applications to extend the permit to remain in Israel have been submitted and the petitioner remained in Israel under these permits.

3. On August 2, 2009, after the submission of an extension application, the petitioners were notified that the application was denied for security reasons. They were informed that the brother of petitioner 2, _____, "was involved in terrorist activity".

4. After lengthy proceedings which resulted from respondent's delays and included three administrative appeals to different instances – the appellate committee approved respondent's denial of the family unification application and rejected the third appeal.

5. Petitioner 2, the sponsored spouse, has never been detained. It has already been clarified that the denial was indirect, due to petitioner's brother, with whom petitioner maintained, as aforesaid, loose relationship. Furthermore, the petitioner has not visited Gaza since December 2008, more than three years. There is great doubt whether respondent's denial of the application falls within the scope of his authority to deny applications for security reasons as set forth in the Citizenship and Entry into Israel (Temporary Order) Law 5763-2003 (hereinafter – the **law** or the **temporary order law**), especially in view of the fact that petitioners have established their home in Jerusalem and have been living there for years, that the petitioner has an Israeli wife and four Israeli daughters and that the application at hand is an application in process, within the framework of which the petitioner has already received several permits to remain in Israel, resulting in a material change of the state of affairs.

6. The petitioners believe that the time has come to bring the above decisions of the respondent and the appellate committee to judicial review.

7. The implications of respondent's decision to deny petitioners' application on the lives of the spouses-petitioners and their minor daughters, cannot be overstated. The only way for the family to remain united is to move to Gaza, with all the glaring difficulties and complexities of the matter. If they fail to do that, and especially due to the extended closure of Gaza, the father will be torn

away from his home and family, due to an indirect security preclusion, for no fault of his own.

8. It is hard to avoid the feeling that the respondent has not given adequate weight to the severe violation of petitioners' fundamental rights and the injury to their lives, future and fate, in accordance with the tools drawn by statute and case law.

9. Such an extreme violation of the constitutional rights of the petitioners, who have been residing in Israel together for over a decade, requires the entire material be examined and the rights be balanced, so as to ensure that respondent's decision is reasonable.

The Facts

The following is the factual infrastructure constituting the basis of petitioners' arguments:

The Parties

10. **Petitioners 1 and 2:** petitioner 1, a resident of the State of Israel, married her husband, petitioner 2, originally a resident of Gaza, in 1995. They have both been living together in Jerusalem on a permanent basis since 1998, some 13 years.

11. Petitioner 3 is a registered not-for-profit association that has taken upon itself to assist victims of cruelty or deprivation by state authorities, including by defending their rights in court, either in its own name as a public petitioner or as counsel to persons whose rights had been violated.

12. **The respondent** is the minister authorized under the Entry to Israel Law, 5712-1952, to handle all matters associated with this law, including applications for family unification and for the arrangement of the status of children submitted by permanent residents of Israel residing in East Jerusalem. The respondent has delegated his power to make decisions in applications submitted to the Population Administration bureaus. Additionally, the respondent has delegated his power to the appellate committee which functions as an additional appellate instance.

Petitioners' Case

General

13. Petitioner 1, born in 1975, was born and raised in the Jabel Mukaber neighborhood in Jerusalem. In 1995 she married her spouse, petitioner 2. After their marriage, the couple lived for a short period of time in Gaza, and returned to Israel permanently in 1998. Since then, the family has been living in Jerusalem. Their daughters _____, 17 years old, _____, 15 years old, _____, 12 years old and _____, ten years old, are all registered in the

Israeli population registry and study in schools in Jerusalem. The family is known to the National Insurance Institute and is insured with a health fund in the city. The eldest sister suffers from asthma and needs medical treatments on a regular basis.

Medical records regarding _____'s illness are attached and marked **P/1**.

14. In 2001, petitioner 1 submitted an application for family unification with her husband. The application was approved four years later, in 2005, and petitioner 2 was granted permits to remain in Israel. The permits were renewed on a regular basis, until 2009, when the indirect preclusion was raised against them.

Exhaustion of Proceedings

The Appeal against the Denial

15. On August 2, 2009, a short time before the expiration of petitioner 2's permit, a letter sent by respondent's bureau informed that the application to extend the permit had been denied "for security reasons. The brother of the sponsored _____ is involved in terrorist activity".

The denial letter is attached and marked **P/1a**.

16. On September 17, 2009, the petitioners appealed this decision. In the appeal, the petitioners explained the loose relationship petitioner 2 had with his brother, and clarified the devastating effects that this decision, involving an indirect preclusion, would have on petitioner 2's family life.

The appeal is attached and marked **P/2**.

17. On November 18, 2009, February 4, 2010 and March 7, 2010 the petitioners sent reminder letters regarding the appeal.

The reminder letters are attached and marked **P/3**, **P/4** and **P/5**.

The First Additional Appeal – Additional Appeal 113/10

18. Due to respondent's failure to respond, an additional appeal, appeal 113/10 was submitted against the denial of the application and the denial itself.

The additional appeal is attached and marked **P/6**.

19. At the same time, petitioner 2 was summoned, by telephone, to the offices of the ISA. Captain "Yaniv" who talked with him, clarified that even if all the attorneys in Israel handled his case, his family unification application would not be approved without ISA approval, and that "there were other ways to push for the approval of the application". The ISA interrogator also told him that he was "a fool" and that he did not understand what his interests were. Petitioner 2, who rejected this bold request for collaboration, clarified that he was working and taking care of his wife and daughters, one of whom had

asthma and needed many treatments. He also clarified that he did not have criminal or security record and that he was a law abiding individual.

The conversation held between the petitioner and captain "Yaniv" of the ISA is described in petitioner 2's affidavit on this matter, which was taken immediately after the interrogation, and which is attached and marked **P/7**.

20. On March 11, 2010 the chair of the committee decided that the respondent should respond to the interim remedy within 21 days and to the main remedy within 30 days.

    The decision is attached and marked **P/8**.

21. On April 7, 2010, the chair of the committee decided that no enforcement action should be taken against petitioner 2.

    The decision is attached and marked **P**/9.

22. On April 22, 2010, the chair of the committee decided to grant the respondent a sixty day extension, despite petitioners' objection.

    The decision to grant an extension is attached and marked **P/10**.

23. On June 21, 2010, the chair of the committee decided to grant an additional sixty day extension, despite petitioners' objection.

    The decision to grant an extension is attached and marked **P/11**.

24. On August 17, 2010, the respondents requested an additional extension. Following petitioners' objection, the honorable chair of the committee stated that her decision would be rendered soon, even without the response of respondents' counsel.

    The decision rendered by the chair of the committee is attached and marked **P/12**.

25. On August 29, 2010, the honorable chair of the committee rendered a decision in the additional appeal. In her decision, she accepted the additional appeal in the sense that respondent's decision to deny petitioners' family unification application was voided and the respondent was ordered to hold an oral hearing for the petitioners within sixty days, and continue to process the application.

    The decision is attached and marked **P/13**.

26. On that same day, petitioners sent to the honorable chair of the committee a letter requesting to schedule a date for petitioners' hearing in respondent's bureau and to extend the date for the interim remedy. The chair of the committee granted respondent's counsel two weeks to respond.

The letter and the decision are attached and marked **P/14**.

Processing Remanded to Respondent's Bureau

27. Three weeks later, on September 21, 2010, the respondent sent his response that the petitioners were to appear to a hearing in his bureau on October 5, 2010.

    The summons to the hearing is attached and marked **P/15**.

28. On October 4, 2010, the chair of the committee decided, at petitioners' request, to extend the validity of the interim decision according to which petitioner 2 would remain in Israel for an additional 45 day period from the date on which respondent's response to the request was received.

    The decision of the chair of the committee is attached and marked **P/15a**.

29. On October 5, 2010, a hearing was held for petitioners by the respondent in his bureau. In the hearing, petitioner 2 reiterated arguments made in his written submissions regarding the unjustified preclusion raised against him and the injury inflicted upon him and his family as a result of the decision to stop the family unification procedure.

    Transcript of the hearing is attached and marked **P/16**.

30. On November 14, 2010, December 20, 2010, January 17, 2011, February 22, 2011 and March 24, 2011 petitioners sent reminder letters to respondent.

    The reminders are attached and marked **P/17, P/18, P/19, P/20** and **P/21**.

Another Failure to Respond – the Second Additional Appeal – Appeal 127/11

31. Due to respondent's failure to respond to the additional appeal, in contempt of the decision of the committee in the first additional appeal, a second additional appeal, appeal 127/11, was submitted on April 10, 2010.

    The additional appeal is attached and marked **P/22**.

32. On April 17, 2011, the chair of the committee decided that the respondent should respond to the additional appeal within 38 days, taking into consideration the Passover holiday.

    The decision rendered by the chair of the committee is attached and marked **P/23**.

33. On May 26, 2011, after the date scheduled for the submission of respondent's response had elapsed, the petitioners requested the chair of the committee to render a decision in the additional appeal without respondent's response. The

committee decided that the respondent should submit his response immediately.

Petitioner's request and the decision rendered therein are attached and marked **P/24**.

34. Almost two months have elapsed since the above decision of the honorable chair of the committee, and the respondent has failed to respond. On July 14, 2011, the petitioners repeated their request to render a decision in the additional appeal without his response. The chair of the committee decided on that same day that the respondent should respond to the additional appeal within seven days.

    Petitioners' request and the decision rendered therein are attached and marked **P/25**.

35. On July 24, 2011, the respondent submitted his response to the additional appeal. In his response, he mainly argued that the there was no cause for the additional appeal because a response was given about seven months earlier, on December 30, 2011, before the submission of the additional appeal. It should be noted at this early point that the petitioners learned of this response, for the first time, from respondent's response, since the former had not been received by them or by the undersigned. The respondent went further and attached petitioners' reminders carrying a "Received" stamp of respondent's bureau, from the months following the alleged denial (see exhibits P/19-P/21 above). This means that the petitioners waited for seven months from the date of this decision, sent reminder letters, submitted an additional appeal, and only three months after the submission of the additional appeal did the respondent deign to clarify that in fact the application had long since been decided. Despite the fact that petitioners' reminders indicated that they were not aware of the response, the respondent did not find it necessary to inform them of the matter, which consequently lead to the submission of the additional appeal.

    The language of the denial letter itself: "Security officials reiterate their position that the approval of the family unification application should be objected to, since the brother of Mr. Sawalhi, _____, is involved in terrorist activity. Regarding other family members, security information implicates them in associating with terrorists".

    Respondent's response is attached and marked **P/26**.

    The denial letter is attached and marked **P/27**.

36. On July 31, 2011, the petitioners responded to respondent's response. In their response it was stated that as was habitually done by respondent, the summary of the security considerations that was provided was very laconic, and that the additional appeal provided a detailed account of petitioner 2's arguments in writing, presented the legal arguments and explained the circumstances. It was further stated that no new data arose, and that the appellate committee was requested to render a decision in the additional appeal itself.

Petitioners' response is attached and marked **P/28**.

37. On August 2, 2011 the chair of the committee decided that the petitioners should advise if they wished her to review the security material *ex parte*.

    The decision of the chair of the committee is attached and marked **P/29**.

38. The petitioners responded on that same day, pointing out that a procedure concerning the review of classified information by the committee had not yet been established, and that this was a very sensitive situation, in which the petitioners' hands were tied when facing secret allegations. The petitioners requested to be advised of the procedure, if and to the extent that it was established. They also pointed out, that to the best of petitioners' knowledge, the appellate committee held its sessions next to the offices of respondent's legal department, contrary to the provisions of section 9 of the committee's procedure. When privileged material involving highly complex issues is concerned, this fact becomes doubly problematic. The petitioners attached to their decision a notice issued by Ms. Mali Davidian, the person in charge of the Freedom of Information Act in respondent's headquarters dated June 19, 2011, who updated that "The formulation of a procedure *vis-a-vis* security officials for the purpose of enabling the committee to review privileged information is currently in its final stages." To this very day, to petitioners' best knowledge, such a "procedure" has not been established.

39. On August 8, 2011 the honorable chair of the committee decided that the respondent should respond to petitioners' notice within 14 days and that in the absence of a response, a decision would be rendered by the committee.

    Petitioners' notice along with the decision of the chair of the committee and the letter of Ms. Mali Davidian are attached and marked **P/30** and **P/31** respectively.

40. Sixty days after the date of the decision, on October 10, 2011, the petitioners sent the committee a reminder concerning the rendering of a decision in the matter. On October 11, 2011 an interim decision was rendered by the committee. The chair of the committee partially accepted the additional appeal and decided that the respondent should submit the material which served as the basis for his decision to deny the family unification application.

    The material should include the following details:

    a. Was the negative security information implicating petitioner's brother in involvement in terrorist activity and his family members in associating with terrorists, obtained from more than one source of information?

    b. Did the negative security information implicating petitioner's brother in involvement in terrorist activity and his family members in associating with terrorists, rely on a single event?

c. Was the negative security information implicating petitioner's brother in involvement in terrorist activity and his family members in associating with terrorists obtained recently, during the last year?

d. Was the relationship between the petitioner and his family members considered as posing a threat to state security?

The chair of the committee allotted 30 days to receive the material from the respondent.

Petitioners' notice and the committee's decision are attached and marked **P/32** and **P/33**.

41. On November 24, 2011 respondent's counsel submitted her response. The material provided was in fact solely the answers to the questions asked. The answers given were simply yes and no. It was stated that the security information had been obtained from more than one source, that it was up to date, that it did not rely on a single event and that the relationship between the petitioner and his family members had been considered.

42. On December 20 the honorable chair of the committee decided to reject the additional appeal based on this information only.

The decision of the committee is attached and marked **P/35**.

43. Before the petitioners present the legal argument, they wish to reiterate their arguments concerning the security preclusion.

The Arguments against the Denial

44. Petitioner 2's father is deceased. His elderly mother has no security or criminal record.

45. To the best knowledge of the appellant [*sic*] not one of his brothers and sisters has ever been detained or interrogated. The brother, _____, who, according to respondent, is the reason for the denial of the application, **has never been detained or interrogated**. He is married and the father of five children.

46. Petitioner 2 visited his family in Gaza once or twice a year. He usually did not stay there for more than three days. Sometimes he stayed with his family for a week. However, since December 2008, **for about three years**, petitioner 2 has not visited Gaza, and was even prohibited from doing so, having no permit and particularly in view of the harsh conditions in Gaza these days. Indeed, presently, on the one hand, petitioner 2 is not allowed to legally remain with his family in the family home in Jerusalem, and on the other hand, he is not allowed to enter Gaza.

47. Petitioner 2 has brief telephone conversations with _____, when he calls his mother and _____, who lives nearby, answers the phone. Due to the fact that petitioner 2 seldom sees his family and has not been living at home for about 14 years, there is no close and meaningful relationship between him and his brother _____. When petitioner 2 came to visit, he met mainly with his mother and family members, his brothers, sisters and additional family members and their children. He did not meet _____ alone and there is no close, intimate or friendly relationship between them. Since his application was denied, he has been calling his mother's cellular phone directly in order to avoid contact to the maximum extent possible. Petitioner 2 has never visited the house of _____.

48. These arguments are reinforced by the hearing held for petitioner 2 in respondent's bureau on October 5, 2010. It was indicated that petitioner 2 hardly ever speaks with his brother, especially since he was notified that his brother was allegedly involved in terrorist activity.

49. His nuclear family, his wife and children and the welfare of his children are of the utmost importance to petitioner 2. Clearly, tearing the children away from their home and taking them to Gaza would cause them severe damage. There is no need to describe the severity of the damage caused to the children should their father alone be forced to be torn away from them, when there is no certainty that the family members would be able to visit each other should the father of the family be expelled to Gaza, which is under an ongoing closure and a Hamas regime.

    The current condition in Gaza, including, *inter alia*, the fact that 70% of its population relies on humanitarian aid, is described in a report published by NGO Gisha in the following link:
    http://www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf

    The Legal Framework

    Indirect security preclusion seals the fate of the family and violates their constitutional right to family life

50. Good governance, the rules of natural justice and basic humane principles preclude punishing a person for the sins of his friend or family member. As phrased by the court in one of the cases:

> "**Values of a free, democratic, Jewish state. These values will lead us directly to ancient times of our people, and these days are like those days: people will no longer say: The parents have eaten sour grapes and the children's teeth are set on edge. Each person eating sour grapes his teeth will be set on edge.**"

    (HCJ 2006/97 **Abu Phara v. OC Central Command**, IsrSC 51(2), 651, pages 654-655, based on Jeremiah 31, 29, minority opinion, Honorable Justice Cheshin).

Such cases involving a decision which harms an individual who has done nothing wrong, require an especially thorough and meticulous examination. And note, respondent's power to deny applications due to the actions of family members, was not meant to punish the petitioner and his family members, but to be used only in cases involving a real security concern.

51. In HCJ 7444/03 **Dakah v. The Minister of Interior**, the court established the circumstances under which the competent authority may deny a family unification procedure of a spouse residing in the Area, due to kinship between the spouse and a person posing a security threat – where there is no security information regarding direct involvement on his part in activities against the security of Israel. In paragraphs 15-16 of the **Dakah** judgment it was stated as follows:

> **"The right to have a family is situated at the highest level of human rights. An infringement of such right may be allowed only when it is balanced against an opposing value having special power and importance**. **In the existing tension between the value of security of life and other human rights, including the right to have a family, the security consideration prevails only where there is high probability, almost reaching certainty, that that if appropriate measures involving the infringement of human rights are not taken, public safety may be materially injured.**
>
> **The burden to prove the probability of a security risk to an extent which justifies an infringement of human rights lies on the state… the state must prove that the probability of a threat to public safety is at the highest level, reaching, at least near certainty, and that it is impossible to defend against it without violating human rights**. (Emphasis added, A.L.).

52. In paragraph 41 of the **Dakah** judgment, the court requires that the Ministry of Interior differentiate between a direct threat and an indirect threat:

> **Against the violation of the right to have a family, the competent authority should weigh the existence of a security preclusion involving the permit applicant – a direct preclusion involving the applicant himself, or an indirect preclusion which may result from his relationships with family members posing a security threat… the threat posed by the applicant of the permit, which stems, in its entirety, from his family relationships with parties associated with terrorism, is a complex issue, which is subject to probability assessment and requires careful discretion. The indirect threat should be carefully assessed, and attributed its proper relative weight only, nothing more than that. A sweeping conclusion that each and every permit applicant,**

> **who has family ties with a person involved in terrorist activity is disqualified, *a priori*, from family unification, should be avoided. In each particular case, the probability that the permit applicant himself would be subject to influence and pressure by family members, thus becoming a source of direct security threat, should be examined.**

53. Regarding the indirect threat, the court determines, that "objective information" should be used, such as:

> **Information regarding the long presence in Israel, for years, of the foreign spouse, against whom not even the slightest piece of information has been obtained associating him with any activity against Israel, despite having family relationships with terrorists. Such information may refute, at least prima facie, a presumption of an indirect security preclusion; When the case concerns women from the Area who live in Israel for years within the framework of family unification, who raise a number of children and share the burden of providing for the family, the concern that the potential risk of getting involved in terrorist activity would be realized by them in view of family ties to relatives involved in terrorist activity may be small…**

54. The petitioners in this case have been married for about 17 years. For the past 14 years, Jerusalem has been their sole home. It is where they live their lives and raise their daughters. No direct security information has ever been presented against the petitioner, and he has never been detained. On the contrary, his family unification application was approved after a long wait and the petitioner has been living in Israel throughout the years under permits, during which time the family has established itself in Jerusalem.

Increased burden of proof concerning denial of a pending application

55. It should be remembered that section 3D of the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003, does not apply directly to pending family unification applications, but only to applications which did not receive an initial approval. Therefore, in cases such as petitioners' case, strong and up-to-date information which allegedly proves that petitioner 2 poses clear and present security threat in view of his family relationships is required. On this issue see the judgment of the court in AP 8182/08 **Marb'u v. The Ministry of Interior** (judgment of Honorable Vice President, Justice Cheshin dated November 20, 2008):

> **I am also of the opinion that lesser weight is afforded to a security preclusion when an application under section 4(1) of the law, which applies to our case, is concerned, as compared with section 4(2) of the law (and in fact under section 4(1) as compared with all other sections of the law**

> **specified in section 3D of the law). I am also of the opinion that lesser weight is afforded to a security preclusion when section 4(1) of the law is concerned, which left the discretion to extend the foreign resident's permit to remain in Israel at the hands of the Minister of Interior, even after he has decided, based on the opinion of security officials, that a security preclusion existed. This conclusion arises not only from the language of the section – which is drafted in the positive ("the Minister of Interior may"), as opposed to the negative language that generally characterizes the temporary order law – but also from the logic and purpose of the section. Clearly, a denial of an application to extend a permit which has already been granted is not the same as a refusal to grant a permit which has not yet been approved. When considering an application to extend a permit, the Minister of Interior should indeed take into consideration the security preclusion, but this is not the sole consideration. The Minister of Interior should, in any event, weigh the security preclusion on the one hand and the circumstances of the petitioners on the other, before making his decision.** (Paragraph 15 of the judgment).

It should be noted that in that case the court decided, after it reviewed the privileged information, to approve respondent's decision. See also **Dakah** above.

56. It is astonishing that the respondent has chosen to take such far reaching step – denial of the application, and at the same time he is in no hurry to make a decision in the appeal and in the hearing and to respond to the two additional appeals which the petitioners were forced to submit. While the respondent takes his time with his responses, petitioner 2 remains in Israel legally, at respondent's knowledge, most of the time in accordance with an interim decision. It is clear that had the danger been so great so as to require such an extreme step, the respondent would have expedited the proceedings to remove the danger from our area. The slow manner in which the respondent has chosen to handle petitioner 2's matter sheds light on the real need to take the measure of denying the application.

The Right to Family Life – A Constitutional Right

57. Respondent's above-described conduct violates petitioners' right to live together and maintain a family unit as they choose. A person's right to marry and establish a family unit is a fundamental right in our legal system. It must not be violated and it is derived from the right of every person to dignity. The judgment on the question of the constitutionality of the Citizenship and Entry to Israel Law, elevated the status of the right to family life in Israel to that of a constitutional right, established in Basic Law: Human Dignity and Liberty. President Barak, whose opinion concerning the final result of the judgment, was a minority opinion, summarized, with the consent of eight of the eleven

Justices who presided over the case, the rule which was established in said judgment regarding the status of the right to family life in Israel:

> **From human dignity, which is based on the autonomy of the individual to shape his life, stems the derivative right to establish the family unit and to continue to live together as one unit. Does this lead to the conclusion that the realization of the constitutional right to live together also means the constitutional right to realize this right in Israel? My answer to this question is that the constitutional right to establish a family unit means the right to establish the family unit in Israel. Indeed, the Israeli spouse has a constitutional right, which derives from human dignity, to live with his foreign spouse in Israel and to raise his children in Israel. The constitutional right of a spouse to realize his family unit is, first and foremost, his right to do so in his own country. The right of an Israeli to family life means his right to realize it in Israel**. HCJ 7052/03 **Adalah - the Legal Center for Arab Minority Rights in Israel v. The Minister of Interior**, rendered on May 14, 2006, paragraph 34 of President Barak's judgment.

58. Granting the right to family life the status of a constitutional right is followed by the determination that any violation of this right should be made in accordance with Basic Law: Human Dignity and Liberty – based only on substantial considerations and based on a solid evidentiary infrastructure attesting to these considerations. This determination imposes upon the respondent a heightened obligation to maintain an administrative apparatus that ensures that the discretion to deny family unification applications, a discretion which violates a protected constitutional right, is exercised only where such denial is fully justified. This also applies to extended delays and exaggerated bureaucratic obstacles, conduct which is clearly demonstrated in our case and which is not compatible with the rule of law.

    See also: Honorable Justice Barak, as then titled, HCJ 693/91 **Efrat v. Head of Population Registry in the Ministry of Interior et al**., IsrSC 47(1) 749, 783; CA 238/53 **Cohen and Bulik v. Attorney General**, IsrSC 8(4), 35; HCJ 488/77 **A. et al. v. Attorney General**, IsrSC 32(3) 421, 434; CA 451/88 **A. v. The State of Israel**, IsrSC 49(1) 330, 337; CFH 2401/95 **Nachmani v. Nachmani et al.** IsrSC 50(4) 661, 683; HCJ 979/99 **Pavaloya Carlo v. The Minister of Interior**, TakSC 99(3) 108.

59. Recently, a judgment was rendered concerning the constitutionality of the temporary order law (HCJ 466/07 **Galon et al. v. The Minister of Interior**, rendered on January 11, 2012). The law was upheld by a majority opinion of

six versus five Justices. Honourable Justice *emeritus* Edmond Levy, who joined the majority opinion in **Adalah**, wrote most of the minority opinion in this judgment, and referred to the grant of constitutional status to the right, as a core right of the concept of dignity:

> **The right to equality and the right to family life are at the core of the concept of human dignity, and have a constitutional status which embodies the fundamental values of the State of Israel. Well remembered are the words of Justice M. Landau that "The fundamental principle that all men are equal before the law is the heart and soul of our entire constitutional regime" (HCJ 98/69 Bergman v. The Minister of Finance, 23(1) 693, 698 (1969)). "It is like a plant requiring constant nurturing" added Elyakim Rubinstein, "It is like an irrigated field expecting not only rain from the sky but also the steady hand of man" ("On Equality to Arabs in Israel" Routes of Law and Governance 278, 280 (5763 – 2003)). "A person's right to have a family" wrote my colleague, Justice A. Procaccia "is of the foundations of human existence. It is difficult to imagine human rights having similar importance and power. Among human rights a person's right to have a family is situated at the highest level. It embodies the essence of a person's being and the realization of his self"** (HCJ 7052/03 the above **Adalah,** pages 496-497)(paragraph 8 of the judgment).

60. International law provides too that every person has the liberty to marry and establish a family. Accordingly, for instance, Article 10(1) of the International Convention on Economic, Social and Cultural Rights, ratified by Israel on October 3, 1991, provides 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…**

See also: The Universal Declaration on Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948, Article 8(1); Article 17(1) and Article 16(3) of the International Convention on Civil and Political Rights, entered into effect in Israel on January 3, 1992.

61. The refusal to enable the arrangement of the status of their father in the absence of unequivocal justification, nullifies all normative aspects of the family's life and causes great tension, instability, uncertainty and insecurity in the lives of its members, elements which are so important for the proper development of children.

62. In Israeli jurisprudence the principle of a child's best interest is a fundamental and well rooted principle. In CA 2266/93 **A v. A**, IsrSC 49(1) 221, Justice Shamgar held that the State should intervene to protect the child from having his rights violated.

63. The right of minor children to live with their parents was recognized by the Supreme Court as an elementary and constitutional right. See: remarks of Justice Goldberg in HCJ 1689/94 **Harari et al. v. The Minister of Interior**, IsrSC 51 (1) 15, in page 20, opposite the letter B.

64. The Convention on the Rights of the Child sets a number of provisions imposing an obligation to protect the child's family unit. The preamble to the Convention provides as follows:

> **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 […]**
>
> **[…] the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding […]**

Article 3(1) of the Convention provides:

> **In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration…**

Article 9(1) provides:

> **States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.**

The provisions of the Convention on the Rights of the Child are increasingly recognized as a complementary source for the rights of children and as guidance for interpreting the "child's best interest" as a governing consideration in our legal system: see CA 3077/90 **A. et al. v. A.**, IsrSC 49(2) 578, 593 (honorable Justice Cheshin); CA 2266/93 **A., minor et al. v. A.**, IsrSC 49(1) 221, in pages 232-233, 249, 251-252 (Honorable President *emeritus* Shamgar); CFH 7015/94 **Attorney General v. A.,** IsrSC 50(1) 48, 66 (Honorable Justice Dorner); HCJ 5227/97 **David v. Supreme Rabbinical Court** (TakSC 98(3) 443) in paragraph 10 of the judgment of the Honorable Justice Cheshin.

65. Petitioners' daughters are severely harmed by respondent's failure to arrange the status of their father, the scandalous conduct of the respondent who has been handling the application for over two and-a-half years, as well as by the devastating decision made by him. The psychological stress at home resulting from not having a permit to remain in Israel, the injury to the family and the uncertainty concerning whether all family members will continue to live together in their home in Jerusalem - all of the above cause irreparable damage to the girls, and that, almost in a perfunctory manner, without grounds and indirectly.

<u>Unreasonableness and Unfairness</u>

66. It is the obligation of an administrative authority to act reasonably, proportionately, fairly and for the purpose of attaining a proper purpose. These are the overarching principles that govern the scope of respondent's discretion.

    See on this issue: HCJ 1689/94 **Harari et al. v. The Minister of Interior**, IsrSC 51 (1) 15, and HCJ 840/79 **Contractors' Center v. Government of Israel and HaBonim of Israel**, IsrSC 34(3), 729, particularly pages 745-746, the remarks made by Honourable Justice (as then titled) Barak as follows:

> **The State, through those acting on its behalf, is the trustee of the public, and public interests as well as public assets were deposited with it to be used for the benefit of the public… this special status imposes on the State the obligation to act reasonably, honestly, with integrity and in good faith. The State may not discriminate, act arbitrarily or in bad faith or be in a conflict of interests. In short, it should act fairly**.

67. The remarks made by the honorable court in HCJ 188/53 **Abu Gosh v. The Military Commander of the Jerusalem Corridor**, IsrSC 7(2) 941, 943 are relevant to our case:

> **There is no magic in the words 'security reasons' and 'security conditions' and such other similar expressions, to justify the actions of the competent authority and to prevent this court from examining the justification of statements and actions. If the court realizes that these words are used only as a smoke screen for arbitrariness, malicious acts and illegal intentions, it shall not hesitate to clearly and openly state so, for the sake of truth, so that justice is done for the citizen who has been illegally injured**.

68. The Sawalhi family is an ordinary family, living in Jerusalem. Respondent's decision, which was made without real discretion after having received the position of the security agencies, requires petitioner 2, who has not visited Gaza for three years, to leave the country and his family, or, alternatively, to expel five Israeli residents to Gaza, in a manner that will materially injure them and may even endanger their own status as Israeli residents. This is the inevitable outcome of the decision and the respondent must consider it when sentencing the family to these terrible consequences. The right to family life is a constitutional right in Israel. The respondent should find a way to enable petitioner 1 to realize her right to family life, in a reasonable manner and without forcing her to relocate.

The principle of proportionality – The obligation to implement laws that infringe on fundamental rights in a restrictive manner

> **The interpretation and implementation of the above-referenced provisions of the law are affected by the constitutional obligation to protect the right to have a family as a governing-right to the extent permitted by law, giving a proper and proportionate weight to the security interest in as much as the existence of our daily life requires, and to the extent necessary only. The proper balance between a person's fundamental right and the security interest is required not only for the examination of the constitutionality of the temporary order law. It is similarly required for the interpretation of the law and its implementation in practice. Indeed, "Infringement of human right will be allowed only when it is required for the realization of a public interest of such power which justifies, according to our constitutional concept, a proportionate infringement of such right** (**Adalah**, my judgment, paragraph 4). (paragraph 13 of the Dakah judgment) (emphasis added – A. L.)

69. A proper balance between the indirect security allegations and the inevitable violation of petitioners' right to family life – should have caused the respondent to decide to continue approving the family unification application. Accordingly, for instance, in the above mentioned **Dakah** matter, various

restrictions were imposed, where the case involved a severe security preclusion against the petitioner's three brothers and father, who were engaged in security activity which amounted to terrorism, including, among other things, training with al-Qaeda and terrorist activity in the Occupied Palestinian Territories. Petitioners' case is completely different. Nevertheless, **even in Dakah, the court did not rule out a possible change of the arrangement after some time, including consideration of granting temporary status in the future**. See paragraph 53 of the judgment of Honorable Justice Procaccia.

70. Granting the right to family life the status of a constitutional right encompasses the determination that any violation of this right should be made in accordance with Basic Law: Human Dignity and Liberty – based only on substantial considerations, supported by a solid evidentiary infrastructure attesting to such relevant considerations. This determination imposes upon the respondent a heightened obligation to maintain an administrative apparatus that ensures that the discretion to deny family unification applications, a discretion which violates a protected constitutional right, is exercised only where such denial is fully justified.

71. In petitioners' case, arrangements have not been considered. In fact – the petitioners believe that no real discretion was exercised, at least as far as considering alternatives is concerned. The respondent made up his mind – the application is denied, and thus the family is sentenced to be torn away from the father, or, alternatively, to be expelled, *de facto*, to Gaza, despite the fact that petitioner 2 himself has never been involved in any activity which poses a threat to Israel’s security.

72. The chair of the appellate committee discussed the proportionality of the decision made in petitioners' case. She was not convinced that the matter had been thoroughly examined. However, surprisingly, she decided that the family would be broken-up based on respondent's laconic answers to her questions. Obviously, this does not constitute a thorough examination and it is impossible to seriously decide that respondent's decision was reasonable and proportionate. Therefore, this decision must not be accepted, as it is based on partial information and was rendered without granting the right to present arguments.

73. The tests of proportionality are well rooted in our legal principles. In this case, where a fundamental right is violated, the respondent must consider the proportionality of the decision before making one that has a devastating effect on petitioners' family and rights.

Conclusion

[excerpt from poem, omitted from translation]

74. Petitioners' family life will be unrecognizably changed should respondent's decision be upheld, particularly considering they face threat of removal to Gaza, which is under a closure, and after they had built their home in Israel, a home in which the family has been living together for 15 years.

75. Statute and case law instruct that petitioners' lives should not be so severely disrupted, unless a meticulous examination has been conducted and only if it is necessary due to a specific, clear and immediate danger posed by petitioner's presence in Israel. The scandalous conduct of the respondent and the impotence of the appellate committee indicate that no such examination has been conducted.

76. The violation of the constitutional right of petitioner 1 to family life, the injury to the welfare of the four girls of the family, contrary to the fundamental principle of the child's best interest – is greater than necessary and severely exceeds reason.

77. **The honourable court is requested to accept the petition and order the respondent to approve petitioners' application, in the sense that petitioner is granted permits to remain in Israel. In addition, the court is hereby requested to order the respondent to pay legal fees and trial costs.**

Jerusalem, February 1, 2012

[signed]

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Adi Lustigman, Adv.

Counsel to the Petitioners