At the Supreme Court in Jerusalem
Sitting as the High Court of Justice

HCJ 1917/12

In the matter of:

1. **B. Shanaytah, ID No. _____**
2. **V. Shanaytah, 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 – Minister of the Interior
represented by counsel from the State Attorney's Office
29 Salah-a-Din St., Jerusalem 91010
Tel: 02-6466590; Fax: 02-6467011

The Respondent

Petition for *Order Nisi*

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause, why he should not make a decision and approve petitioner 1's application (hereinafter: the "**petitioner**") to receive the status of a temporary resident in Israel.

Request for an Interim Order

a. A request for an interim order is hereby filed which is directed at the respondent ordering him to refrain from deporting petitioner 1, B. Shanaytah, ID No. _____ (hereinafter: the "**petitioner**" or "**B**") from Israel, until the proceedings in this petition are terminated.

b. The petitioner, who was born in Israel, is the son of petitioner 2, an Israeli resident. While his mother's application for the arrangement of the status of her children in Israel was approved for all his other siblings, he was the only one of all his brothers and sisters, five in number, who was left without any status and even without an approval for the grant of a stay permit in Israel. The reason for the above is that on the date the application was submitted, which is acknowledged by the respondent, the petitioner was slightly over the age of 18. The petitioner has been living in Jerusalem since he was a minor. An application has already been submitted in his matter back then. However, it was summarily rejected in view of the fact that the family has been living in Jerusalem a few months rather than two years as demanded by the respondent.

c. The application to the Humanitarian Committee, being the subject matter of this petition, was submitted after an appeal in petitioner's matter had been rejected, along with the recommendation of the appellate committee that an application be submitted by the petitioner to the Humanitarian Committee. About nine months have passed since the application was submitted to the Humanitarian Committee, but no answer has been given, despite the provision of section 3A1(d) of the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003, pursuant to which the respondent must make a decision in applications submitted to the Humanitarian Committee within six months.

d. B, a young man, is still single and is supported by his mother like his other siblings. Each day which passes with no status and no rights whatsoever causes him severe damage, and exposes him to the risk of detention, arrest and deportation.

e. The honorable court is requested to prevent B from being exposed to these risks until the proceedings in this petition shall have been exhausted.

f. On the other hand, no damage will be caused to the respondent if an interim order is granted. No security or criminal contention has ever been raised against B. During the proceedings in the appeal in his matter a decision was rendered which prevented his deportation for a long period of time. The respondent has never objected thereto and has never rushed, neither back then nor at this present time, to make a decision in B's application, which has been continuously pending before different tribunals of the respondent since 2008, namely, for about four years (the first application which was summarily rejected was submitted as early as 2006).

g. With respect to the legal tests for the grant of an interim order, the honorable court is referred, in particular, to HCJ 3330/97 **Or Yehuda Municipality v. State of Israel et. al**, IsrSC 51(3) 472.

h. For the completion of the grounds of the application the honorable court is referred to the petition.

A. The Petition

1. This petition concerns a severe violation of the rights of the petitioner, B, and his family, to family life and human dignity.

2. B, who was born in Jerusalem in 1989, is eldest son of petitioner 2, who resides in Jerusalem (hereinafter: "**petitioner 2**"). B has five siblings. The application for the arrangement of the status of all siblings in Israel was approved. When he was a child, the petitioner lived in the Occupied Palestinian Territories (OPT), but when he was still a minor the family moved to live in the Jabal al Mukabbir neighborhood in Jerusalem. Since then and until this present day, he has been living in Jerusalem with his mother who has and still currently supports him.

3. B's mother has already submitted an application for the arrangement of the status of her children in 2006, after the family returned to live in Jerusalem, when B was a minor – however, **her**

application was summarily rejected. The respondent informed petitioner 2, that only after two years of residency in Israel together with her spouse and children she would be entitled to submit an application which would be examined by him. Two years during which petitioner 2 should live in Jerusalem with her husband and children who would be staying in Israel illegally, as a condition for the submission of an application for status and the realization of her constitutional rights. After these two years passed, B was no longer a minor – and the application in his matter was summarily rejected again, and at this time for said reason.

4. According to respondent's policy, since B moved with his family to Jerusalem when he was slightly over the age of 16, and although he was a minor, he was not entitled to receive status and not even a stay permit in Israel.

5. Parents to children over the age of 16 who wish to return to live in Jerusalem after they have been living elsewhere for a while, must accordingly choose between renouncing their right to live in Jerusalem and obtain status to their children therein, or return to Jerusalem and leave any of their children who are over the age of 16, behind.

6. In view of B's age upon the submission of the second application for the arrangement of his status, when he was slightly over the age of 18, and although the family's first application was submitted when he was a minor, his only alternative, according to the decision of the appellate committee, was to apply to the Humanitarian Committee. The application which was submitted to the Committee about nine months ago, remained unanswered. B was left with no rights and without status in Israel – although all of his family members live in Jerusalem lawfully. Hence the petition.

B. The Parties to the Petition

7. B was born in Israel on May 15, 1989 and has an OPT ID No. He is the son of a resident of Jerusalem and the brother of residents of the city. He has been living with his family in their home in Jerusalem since he was a minor.

8. Petitioner 2 is B's mother. She is a resident of Jerusalem and has a permanent status.

9. Petitioner 3, a registered not-for-profit association the offices of which are located in East Jerusalem, 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.

10. The respondent is the body which operates and which is responsible for the approval or denial of the decisions of the Humanitarian Committee, which was established pursuant to section 3A1 of the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003.

C. The Communications with the Respondent until the Appeal

11. Petitioner 2 married an OPT resident. In mid 2006 petitioner 2 moved with her family members, her husband and six children to live fully, continuously and exclusively in the Jabal al Mukabbir neighborhood in Jerusalem. Petitioner 2 is recognized by the National Insurance Institute as a resident of Jerusalem. Her children studied, and some of them still study, in Jerusalem, and petitioner 2 works in the city. Since 2006 the family has conducted its life, on all levels, solely in Jerusalem.

12. After her return to Jerusalem, petitioner 2 submitted, on July 19, 2006, an application for the arrangement of the status of her six children in Israel and a family unification application with her

husband. At that time petitioner 2's six children were minors and were supported by her. Until this day petitioner 2's children are supported by her.

"Exhibit P/1" Confirmations regarding the submission of the applications are attached hereto as Exhibit "**P/1**".

13. The family unification application for B's brothers and sisters was denied after a few days on the grounds of lack of center of life in Israel during the years which preceded the application. Nonetheless, the application pursuant to regulation 12 of the Entry into Israel Regulations, 5734-1974, which was submitted separately for B and his younger brother, due to the fact that they were born in Israel, was not denied. In her visits to the bureau, B's mother was informed that the application was in process.

"Exhibit P/2" The denial of the application for the young siblings and the father is attached hereto as Exhibit **"P/2"**.

14. As no answer has been received, petitioners' legal counsel at that time, Advocate Firas Abu Ahmad, wrote to the respondent on February 20, 2007 and on June 4, 2007, and in many other reminder letters which were sent by him thereafter, he requested again to arrange the status of all of the family's children. The respondent has ignored said requests. It should be emphasized that in July 2006, when the first application for B was submitted, as well as in February 2007, B was still a minor.

"Exhibit P/3" The requests which were sent on behalf of petitioner 2 by Advocate Abu Ahmad for the arrangement of the status of her children of February 2007 and June 2007 and reminders which were sent, are attached hereto as Exhibit **"P/3".**

15. Only at a later stage, in February 2008 or thereabouts[1], Advocate Abu Ahmad was informed, for the first time, over a whole year after the application had been submitted to the respondent, that the application for the children was denied in 2006 and that petitioner 2 could submit a new application only as of June 2008 onward – when B was no longer a minor. Petitioner 2 acted according to respondent's directives and submitted, in June 2008, an application for all of her children. Petitioner 2 did not imagine that the respondent advised her to submit an application to his bureau on a date in which, according to him, the arrangement of the status of all of her children would no longer be possible.

"Exhibit P/4" Respondent's letter from the beginning of 2008, is attached hereto as Exhibit **"P/4"**.

"Exhibit P/5" A copy of the application form of June 2008, is attached as Exhibit **"P/5".**

16. Respondent's letter dated June 23, 2008 noted that the registration of the children would be examined within the framework of the family unification application. It was also stated that the matter of the eldest son, B, could not be handled, in view of the fact that during the two years in which the family has been living in Jerusalem, he became an adult. These are the same two years during which the respondent refused to examine the application. A date for the submission of a complete family unification application by the petitioners was scheduled for September 2008, about three months after their request to submit the application.

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[1] This date is inferred by the petitioners from respondent's response to the appeal. However, the date which appears on the document which was received from the respondent in the framework of his response to the appeal, is erased and cannot be seen. The petitioners have in their possession only a copy of the poor quality document, which was received by them.

"Exhibit P/6" The letter dated June 23, 2008 is attached hereto as Exhibit **"P/6"**.

17. On September 4, 2008, a complete family unification application was submitted for the husband and the children. Despite respondent's notice that he would not examine B's matter, an additional application for the registration of B and his brother, who were born in Israel, was submitted (**applications No. 1412/08 and 558/08**).

"Exhibit P/7" The application for B and his brother Mahmad and confirmations of the submission of the applications for the brothers, are attached hereto as Exhibit **"P/7"**.

18. The application for the arrangement of the status of the children was denied for security reasons by three different letters dated March 31, 2009, April 30, 2009 and May 26, 2009. Only the last letter stated (again in an unclear manner) that the security reasons pertained, in fact, only to the father of the family.

"Exhibit P/8 A-C" Respondent's denial letters dated March 31, 2009, April 30, 2009 and May 26, 2009 are attached hereto as Exhibit **"P/8 A-C"**.

19. On May 18, 2009 and June 3, 2009, the petitioners submitted an appeal against the decision and a supplementary argumentation in the appeal. In the May 2009 appeal the petitioners referred to respondent's refusal to examine B's application, notwithstanding the fact that when the application was initially submitted and when his family returned to live in Jerusalem he was still a minor. The petitioners also referred to the lack of explanation as to whom the security allegations pertained.

"Exhibit P/9 A-B" The appeal of May 2009 and the supplementary argumentation of June 2009, are attached hereto as Exhibit **"P/9 A and B"**.

D. Exhaustion of Remedies – The Appeal

20. On December 15, 2009, after more than six months passed from the submission of the appeal without any answer from the respondent, despite the fact that several reminder letter were sent, the petitioners applied to the appellate committee in the matter of B, his father and two of his brothers.

"Exhibit P/10" The appeal of December 2009 is attached hereto as Exhibit **"P/10"**.

21. In B's matter it was argued that according to AP (District – Jerusalem) 8340/08 **Abu Gheit v. Ministry of the Interior** (the judgment of the Honorable Judge Cheshin of December 10, 2008) (hereinafter: **Abu Gheit**) the application, which has already been submitted in 2006, should not have been denied due to lack of center of life. It was argued that the application should have been accepted and that an examination process should have been commenced and concluded by the end of two years by an affirmation of the application. The petitioners referred the respondent to the words of the court in **Abu Gheit** concerning the handling of the application as opposed to its final approval:

> "However, the court's words in **Abu Qweidar** should be carefully examined and it should be noted that <u>they referred to the substantiation of a center of life as a "fundamental principle for the approval of applications for the registration of children", namely, the approval of their status as permanent residents pursuant to regulation 12, and did not refer at all to the question of the "interim" status (in respondents' words) which would be given to the children before the applicant – the parent who is a</u>

> permanent resident – has proved the existence of a center of life in Israel for two years. No specific reference to this question may be found in the above mentioned procedures too. I will therefore discuss this issue. (emphasis added A.L., **Abu Gheit**, paragraph 10).
>
> […]
>
> I believe that the respondent's general position, according to which the children are not entitled to any status until the two year center-of-life requirement was fulfilled, exceeds reasonableness. The reason being, that it is liable to expose them to an unacceptable reality of living in Israel unlawfully for a substantial period of time (about two years), with no schooling (despite the fact that they are of a compulsory education age). This result cannot be reconciled with the recognition of the need to respect 'the child's best interest' (Carlo, para. 2) nor with the special character of Regulation 12, as a regulation intended to advance human rights in the two central aspects at which President Beinisch has pointed: 'the first is the aspect pertaining to the right of the parent to family life. The second aspect relates to the minor's independent and autonomous right to live his life alongside his parents ('Aweisat, para. 20) and indeed, as we have seen, the respondent himself too, after having considered the children's matter once again, decided, "*ex gratia*" and in order to enable the children to properly enroll in school in Israel, that DCO stay permits in Israel would be issued to them, without retracting his general position, according to which the children were not entitled, at this stage, to any legal status in Israel. However, said general position of the respondent is not compatible with the objective of regulation 12 and its underlying reasons. It is therefore my opinion that as a general rule, and in the absence of special reasons to the contrary, the respondent must grant the child a permit to remain in Israel temporarily during the interim period until the center-of-life requirement shall have been fulfilled, which would enable the child to live lawfully with his parents, and to enroll in school in Israel."

22. The petitioners explained in the appeal that indeed, according to the two year test, the registration of the child pursuant to regulation 12, would be made after a center of life for a two year period, before the submission of the application, shall have been proved. However, said determination does not negate the possibility to commence the examination process, which, in any event, takes years, on the date on which the family members proved the existence of a center of life in Israel. Namely, for the purpose of submitting the application, its review and commencement of the examination process, the family should not be required to show that it has been living in Israel for two years, since this would mean that the state demands that **a family with young children shall be living in Israel during a substantial period of time unlawfully,** without status and without rights. Therefore, it was held that the two year test referred to the **approval of the application** – the registration under a permanent or other status, rather than to the participation in the mere process. Said determination is compatible with the obligation to establish a policy which complies with the child's best interest and the constitutional right to family life.

23. The petitioners have also argued that, with respect to families with children over the age of 16, the requirement to show two years of residency in Israel as a pre-condition for the submission of the application, meant that the children would not be able to receive status in Israel and would not be able to continue to live therein with their family. According to the rule that any child of a resident under the age of 18, who lives with his custodial parent in Israel, is entitled to status, a child of a resident will be considered a minor only until the age of 16, since a child who returned with his family to Israel when he was 16 and one month old, would no longer be entitled to obtain status in Israel. Such a determination is obviously contrary to the fundamental principle of the child's best interest and the constitutional right to family life. Such a determination cannot be reconciled with the language and purpose of regulation 12 of the Entry into Israel Regulations, 5734 – 1974, which provides that the status of a minor shall be the same as the status of his parent.

24. It was further noted in the appeal, that according to AAA 8849/03 **Dufish v. Minister of the Interior** (June 2, 2008), a mistake or unjustified delay may constitute grounds for the grant of the status which the applicant was entitled to receive were it not for such mistake or unjustified delay – and in our case, respondent's refusal to accept the application in 2006 and give the children temporary stay permits.

25. On January 14, 2010 a temporary remedy was granted in the appeal which prevented the deportation from Israel of B, his brother and father.

"Exhibit P/11" Decision of the Appellate Committee dated January 14, 2010 is attached hereto as Exhibit **"P/11"**.

26. On January 27, 2011, over a year after the appeal was submitted (and although, according to procedure No. 1.5.0001 which regulates the procedural rules in the appeal, a decision in the appeal should be made within 90 days), the appellate committee rendered a decision concerning B, his brother and father. With respect to B, the appellate committee did not accept petitioners' position according to which the respondent should have considered his age when the first application was submitted, and that respondent's delay in the handling of the application, as his failure to notify of the denial of the application, may not justify the rejection of his application and his separation from his family. However, the petitioners were offered to submit an application concerning B's matter to the Humanitarian Committee.

"Exhibit P/12" The decision of the appellate committee dated January 27, 2011 is attached hereto as Exhibit **"P/12".**

E. The Humanitarian Circumstances and the Application to the Humanitarian Committee

27. According to the decision of the appellate committee, an application to the Humanitarian Committee was submitted on June 12, 2011 in which the respondent was requested to give B a temporary status by virtue of his authority under section 3A1(a)(1) of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003 (hereinafter: the **"Temporary Order Law**").

"Exhibit P/13" The application to the Humanitarian Committee is attached hereto as Exhibit **"P/13".**

28. In the application, the unique humanitarian circumstances of B's case were explained. It was explained that the application concerned a young, single man, supported by his parents, who was born in Israel and was living therein with his entire family. After many years of futile attempts to arrange his status in Israel, B turned 22. To date, he is almost 23 years old. B does cleaning works for his neighbors in Jerusalem. Each time B goes out of his house he is exposed to detention by the security forces, to an arrest or deportation. From time to time B is forcibly taken to a barrier. Hence, he is *de facto* held in a house arrest and he seldom leaves the area in which he lives. B wishes to learn bookkeeping and assist to provide for the family's livelihood, which lives in miserable poverty. However, without a permit he is prohibited from working in an open and orderly manner, from studying, moving – everything is prohibited. His life is not worth living.

29. It was also explained in the application that for years and until this day, B's center of life has been in Israel with his family. B has no other home in the world which he can go to and he is terrified of being forcibly separated from his family members. The fabric of his life was impinged on in any possible way and he lives in fear, instability and uncertainty.

30. It was further explained in the application that B's matter, who was born in Israel, who is the son of an Israeli woman and who has been living in Israel since he was a minor, is not similar to the condition of family members in the classic situation of family unification. The petitioners drew the Committee's attention to the court's decision in **Nebhan** – AP (Jerusalem) 1158/04 **Maison Nebhan et al. v. The Regional Population Administration Bureau** and AAA 2936/06 **State of Israel v. Nebhan**, which was filed by the state in the matter of the same petitioners. This case also involved children who were born in Israel, but the respondent decided to regard them as OPT residents in view of the fact that they were registered in the West Bank and lived there in the past. With the intervention of the court and after the matter was examined by the Humanitarian Committee, it was eventually determined that **the children would be granted status in Israel**.

31. The petitioners explained that in B's matter, a similar solution should be reached. In this case too, B was born in Israel and was a minor when the family returned to live here and when the two first applications in his matter were submitted.

32. The petitioners further noted that a situation in which a person lives in a country for a long time without rights was inappropriate. Indeed, the Citizenship and Entry into Israel Law restricted the grant of status to OPT residents for security reasons – however, it is clear, that the legislator did not intend to apply the law to a case such as B's case, who has never been detained or interrogated – a case of a son of an Israeli resident, who was born in Israel and who has been living therein, even according to the respondent, for many years.

33. Until this day, despite the numerous reminders, and despite the fact that pursuant to section 3A1(d) of the Temporary Order Law applications should be resolved within six months, no decision in the application has been made. Hence this petition.

"Exhibit P/14" Reminder letters to the Committee are attached hereto as "**Exhibit P/14**".

"Exhibit P/15" The Committee's confirmation of its receipt of the application is attached hereto as Exhibit **"P/15".**

F. The Legal Argument

I. <u>The arrangement of the status of children – the general principle which governs the arrangement of status of the children of residents</u>

34. As a matter of social and legal policy, Israel has adopted the principle, according to which the status of the child should be the same as the status of his custodial parent who is a resident of Israel, provided the child lives with his parent within state limits. This principle is derived from fundamental rules, which virtually constitute a law of nature, concerning the rights and duties of the custodial parent towards his minor child, and the protection which society must provide to their relationships. It has been accordingly held that:

> As a general 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 the creation of a gap between the status of a minor child and that of the parent who has custody or is entitled to have custody over him, should be avoided… It is my opinion, that <u>there is no room for distinguishing between the status of a minor child in Israel and the status of his custodial parent, either within the framework of the interpretation of Regulation 12 or by the establishment of an appropriate criterion which will guide the discretion granted to the Minister of Interior in the Entry into Israel Law</u> (emphasis added – A.L.)
>
> HCJ 979/99 **Pavaloayah Carlo (minor) et al. v. Minister of the Interior** TakSC 99(3),108.

35. Thereafter, judgment was rendered in AAA 5569/05 **State of Israel v. Dalel 'Aweisat et al.** (August 10, 2008)(hereinafter: **" 'Aweisat"**), according to which substantial weight should be given to the principle of the child's best interest. With the exception of rare and extreme cases, and in the absence of security or criminal preclusion, the respondent must grant the child the same status as the status of his custodial parent.

36. As indicated by the above determinations of the Honorable Justice President (*emeritus*) Beinisch, the legislative infrastructure, within the framework of which this policy should be implemented, is scrappy and fragmented. However, each provision of the law should be implemented according to the same general principle. It is therefore clear that an authority which acts fairly and reasonably will prefer the means which complies with the above principles and which injures the child's best interest to the least extent possible. Indeed, it is possible that a certain law will limit the respondent in a manner which impinges on the children's best interest. This is the case when the Citizenship and Entry into Israel Law is concerned. A law which was enacted for temporary purposes, but will soon be in effect for ten years and it is not yet the end. However, to the extent that within the framework of a policy which is based on narrow interpretation, the examination of data and exercise of discretion, the injury may be lessened, it is incumbent upon the authority to use the means that would achieve this purpose. In our case the injury inflicted on B, as on other children, does not derive from the law but rather from a policy which was established by the respondent – a policy according to which – not every minor who lives with his custodial parent, an Israeli resident, in Israel, will be able to receive status or permit to stay in Israel with his family.

II. <u>The Humanitarian Committee acts contrary to law and procedure</u>

37. The Humanitarian Committee was established pursuant to section 3A1(a) of the Temporary Order Law, in view of the court's comments in HCJ 7052/03 **Adalah - Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior** (May 14, 2006) (hereinafter: "**Adalah**"), which

discussed the importance of having a mechanism for exceptions against the backdrop of the violation of human rights under the Citizenship and Entry into Israel Law:

> The reason for this being that even where there is no alternative, but to impose a blanket restriction of rights, for the purpose of achieving the proper purpose, there may be circumstances where, *on the one hand*, the violation of the right is very severe, and *on the other hand*, an exceptional protection of the right will not impair the realization of the proper purpose. The creation of a mechanism for exceptions is intended to provide an answer to such circumstances. The exceptions mechanism may mitigate the violation of the rights under the law, without impairing the realization of the proper purpose. Therefore, the creation of such a mechanism is required by the second subtest concerning the choice of the least harmful measure. Indeed, just as every person with administrative authority is liable to exercise discretion on a case-by-case basis and to acknowledge exceptions to rules and established guidelines when the circumstances justify same… it is also the duty of the legislature, when it makes an arrangement that results in a sweeping violation of rights, to consider the establishment of an arrangement for exceptional cases that will enable to find solutions to exceptional cases under circumstances which justify same. (**Adalah**, paragraphs 72-73 of the judgment of President A. Barak. See also the judgment of Justice M. Naor in **Adalah,** paragraphs 20-124).

38. The respondent published a procedure, which regulates the Committee's work. The procedure provides, *inter alia*, that the Minister of the Interior should make his decision in applications which were submitted to the Committee within six months (as prescribed by the law – section 3A1(d)), that before a decision is made the applicant should have a hearing in respondent's bureau and the Committee should record its recommendations and reasons therefore in a precise and detailed manner (paragraph 10 of the procedure).

"Exhibit P/16" Procedure 5.2.0039 is attached hereto as Exhibit **"P/16"**.

39. According to the procedure, the Committee should convene twice a month (paragraph 3.1 of the procedure). In the court hearing and in the Knesset committee it was stated, that in fact, the Committee convened significantly less frequently than established in the procedure. The procedure further provides that following the submission of an application, it would be examined and the Committee's coordinator would inform the applicant whether documents were missing from his application. The fact that the Committee has not requested, to date, any document from the applicant, indicates that the Committee has in its possession all required documents.

40. Data provided in a hearing which was held in the Knesset on October 25, 2010 concerning the Humanitarian Committee, indicate that until that date, about 770 applications were submitted to the Committee. Out of these applications 290 applications were handled, out of which only 45 applications were approved. In only 4 cases out of these applications, the grant of a temporary

status was approved – a negligible percentage of the applications which were handled. In all other cases only permits were approved.

41. Hence, the data indicate that although the respondent is empowered, pursuant to section 3A1(a) of the Temporary Order Law, to grant, within the framework of the Committee, temporary status in Israel, the respondent hardly ever exercises said power.

"Exhibit P/17" Protocol of the hearing which was held by the Internal Affairs Committee is attached hereto as Exhibit **"P/17"**.

"Exhibit P/18" HaMoked's letter to the Information Commissioner under the Freedom of Information Act requesting to receive data concerning the activities of the Committee, which has not yet been answered, is attached hereto as Exhibit **"P/18"**.

42. A power granted consists, *inter alia*, of "the duty to consider the need to exercise it and the proper measures which should be taken in this context" (HCJ 297/82 **Berger et al. v. Minister of the Interior**, IsrSC 37(3) 29, 45). The law provided that a committee which would be established especially for the examination of humanitarian cases would consult the respondent. The objective of said determination was probably that the grant of status, including the nature of the status, would be seriously considered. It seems that nothing was done to have respondent's power exercised in appropriate cases, on an orderly and equal basis, to the maximum extent possible.

43. The importance of a broad and considerate implementation of the humanitarian mechanism which was entrenched in the Citizenship and Entry into Israel Law was emphasized by the Honorable Justice Rubinstein, one of the majority Justices in HCJ 466/07 **Galon v. the State of Israel** (January 11, 2012)(hereinafter: **"Galon"**):

> The authorities should always be "on the alert" both with respect to the security needs as with respect to the possibility to create effective measures which are less injurious. <u>They must also make an effort and examine ways to improve the handling of exceptional cases: both within the framework of the Humanitarian Committee, as by thinking of additional mechanisms which may assist those couples, who were deprived, for the time being, of the opportunity to jointly establish their home in Israel.</u> (ibid., paragraph 48, emphasis added – A.L.)

44. The Honorable Justice Handel, also one of the majority Justices in **Galon**, also emphasized the importance of the Humanitarian Committee for the purpose of reducing the injury caused to the families, and ruled as follows:

> <u>I am of the opinion, without setting limits, that there is room to interpret the powers of the Committee more broadly than it is currently done</u>. The amended law provides in section E(1) that:

> "The fact that the family member of the applicant who applies for a permit or license, who lawfully resides in Israel, is his spouse, or that the spouses share common children, will not, in and of itself, constitute a special humanitarian reason;"

> This provision, like almost any provision, may be interpreted narrowly or broadly. I am of the opinion that it should be interpreted somewhat narrowly, in a manner which would nevertheless expand the discretion of the Humanitarian Committee (*ibid*., paragraph 5. emphases added – A.L.)

45. The Honorable Justice Levy, who, in the first round of the discussions within the framework of HCJ 7052/03 **Adalah v. Minister of the Interior** (May 14, 2006), was one of the majority justices and was of the opinion that the law should not be revoked, changed his position in **Galon** and held that the law was not constitutional and that it should be revoked, *inter alia*, in view of the fact that, in practice, the limitations established by the law were expanded, and due to the Humanitarian Committee's failure to fulfill its obligations:

> A thorough examination is not required to realize that if any changes were made in the law following the examination of its constitutionality, then, such were mostly made in the expansion of the limitations imposed by it, and in the deepening of the violation of protected rights. The last two changes specified above speak for themselves and both of them add to the sweeping purpose of the law and distance it further from the individual approach. With respect to the humanitarian exception, the state representatives testified before us that, in practice, it covered a very limited number of cases. From its establishment, in the first quarter of 2008, it was so declared by the state, about 600 applications were submitted to the Humanitarian Committee. Thus far, the Committee has managed to handle less than half of said applications. Only 33 applications – about one percent of about 3,000 applications for permits which were submitted, on the average, each year, before the law entered into effect, were approved and the applicants were granted stay permits thereunder (*ibid*., paragraph 7. Emphasis added – A.L.).

46. The Honorable Justice Arbel, whose judgment in **Galon** formed part of the minority opinion with respect to the end result, provides in a like manner as follows:

> From the date of its enactment as a temporary order, the law was extended twice by the Knesset and ten additional times by government resolutions which were ratified by the Knesset plenum. Twelve extensions. These and other changes occurred in the security arena, some of which are more significant than the others, but a significant change in the law – none whatsoever. An examination of the changes which were made in the law during

> the years which passed from its enactment raises, at least, a concern, that they were intended to entrench the severe impingement embedded in the law, rather than to mitigate it… The above stems from the fact that despite the established possibility to grant a temporary residency visa or a stay permit in Israel in special humanitarian cases (section 3A1 of the law), the data presented by the state raise, at least, queries concerning the criteria according to which the Humanitarian Committee operates and the manner of their application. All of the above, cast a shadow on the argument that the law and the necessity thereof are examined periodically. To date, more than eight years after the enactment of the law, it seems that the temporary arrangement turned, *de facto*, into a permanent arrangement. (paragraph 26 of the judgment of the Honorable Justice Arbel. Emphasis added – A.L.).

47. And the Honorable President, Justice Beinisch, also one of the minority Justices with respect to the end result, refers to the activity of the Humanitarian Committee as follows:

> Although it was argued before us that an attempt was made to limit the applicability of the law by the establishment of a committee for the examination of special humanitarian cases, in fact, the limited number of permits which were granted thus far by the committee, shows that its establishment did not manage to shift the center of gravity towards the execution of an examination on an individual basis as opposed to a sweeping examination – as, in the first judgment, we thought should have been appropriate. (paragraph 2 of the judgment of the Honorable President Justice Beinisch, emphasis added – A.L.).

The Honorable President Beinisch adds in paragraph 16 of her judgment:

> In my opinion, as aforesaid, even in its current form, the law is sweeping and general, and therefore, cannot be upheld due to the disproportionate manner by which it impinges on the right to family life and on the right to equality. The injury should, and may be mitigated by making a change in the arrangement – either by making an individual examination of the family unification applicants; by giving the opportunity to refute the presumption of dangerousness; or by the expansion of the possibility to obtain status in Israel for humanitarian reasons. All of the above should be reflected in the legislation – in a comprehensive immigration arrangement or in interim arrangements until an immigration law is enacted. (emphasis added – A.L.).

48. The importance of the humanitarian consideration, for the purpose of making a decision, by the respondent, in applications for the arrangement of status, is also stressed in AP (Haifa) 1037/03 **Feldman et al. v. Minister of the Interior** (February 1, 2004):

> Respondent's main reason, according to which "a change of status is not approved for adult sons who are not entitled to enter Israel under the Law of Return" (and see paragraphs 7 and 14 of respondent's response and Exhibits C, E and F) only demonstrates that the respondent did not examine the humanitarian issue, otherwise, he would not have reasoned his arguments by saying that the exception did not apply to the petitioner.
>
> Where there is a "humanitarian" exception, the authority must take into account, among its considerations, the individual circumstances of each case. The failure to take these circumstances into account, is like a failure to give them a proper weight, and thus, the discretion is also flawed by unreasonableness (see and compare HCJ 935/89 **Ganor v. State of Israel**, IsrSC 44(2) 485, 513-515; and also Itzhak Zamir, **The Administrative Authority** (Volume B, Nevo, 5756) 763-771).

49. The Humanitarian Committee's failure to refer, in a pertinent manner, to B's request, despite the difficult condition of the family and despite the law pursuant to which a decision should be made within six months, constitutes disrespect of the family's humanitarian condition, which causes a severe injury to B and his family members.

III. <u>According to the Entry into Israel Law temporary status should be given in this case</u>

50. The practice, according to which, despite the fact that it is empowered by law to give temporary status, the Committee grants, in humanitarian cases DCO permits, and only in extremely exceptional cases status, is incompatible with any other area which concerns status in Israel. Thus, for instance, a person recognized as a refugee has an entrenched temporary status. Widows or divorcees of Israelis, are granted, according to established criteria, temporary status (see HCJ 4711/02 **Daniela Hillel et al. v. Minister of the Interior** (August 2, 2009), and the specific cases mentioned therein) and also, children of economic migrants who complied with the criteria established in several government resolutions were granted permanent status, and their parents and siblings who did not comply with the criteria, a temporary status. The grant of status to the parents and siblings stemmed from the clear humane realization that the grant of status solely to the children who complied with the criteria but not to their siblings, would render the mere grant of status meaningless, in view of the fact that the parents would not abandon their children who did not receive status. The respondent disregards this pure and consistent logic when families of Israeli residents from East Jerusalem are concerned, as opposed to families of foreign residents.

51. The legislator acknowledged the importance of granting status to a person who should be permitted to continue to live in Israel for humanitarian reasons. Therefore, the **first** section of the Temporary Order Law – section 3A1(a)(1), enables, firstly, to grant residence:

> Grant temporary residence in Israel to a resident of the region or to a citizen or to a resident of a country listed in the schedule, whose family member lawfully resides in Israel;

Only thereafter, appears section 3A1(a)(2) which enables to:

> approve an application for the grant of a permit to stay in Israel by the region commander, to a resident of the region whose family member lawfully resides in Israel.

52. A military permit does not constitute status. It does not grant social rights, including health insurance. It does not provide any 'prospect' for settling down in Israel. It does not enable, in and of itself, to work in Israel (on this issue see HCJ 6615/11 **Salhab et al. v. Minister of the Interior et al**.). It is all about temporariness and un-relatedness to the state. Not without reason did the Entry into Israel Law, 5712-1952, limit the authority of the Minister to extend visit permits for tourism and work, the parallel of the permits granted to OPT residents, for 27 months only (subject to special exceptions for nursing workers). The law provides that a person should not be allowed to stay in a country for a long period of time without rights. From a certain point, a person's stay becomes permanent and it should be reflected in the nature of the status.

53. Indeed, the Temporary Order Law limited the grant of status for **security reasons only**. However, specifically because of the severe violation of rights arising from the sweeping limitation on the grant of status, which is contrary to basic principles concerning a prolonged stay in Israel – then, in humanitarian cases such as the case at hand, in which the law does not impose on the respondent any restriction which prevents him from granting status, but rather empowers him to grant temporary status, and where it was verified that no specific security preclusion existed – it is incumbent upon the Minister to exercise his power, and at least specify the grounds for his decision to abandon this path.

54. HCJ 1905/03 **'Aqel v. State of Israel-Minister of the Interior et al**. (December 5, 2010), concerned the matter of a family which consisted of two parents who were OPT residents, an adult daughter, who was born and registered in the OPT but was raised in Israel, and an additional son who was born in Israel. The family members have resided in Israel for about 20 years unlawfully. The Humanitarian Committee decided to grant the adult son temporary status, and arrange the stay of the parents and the adult daughter, who was born in the OPT, by stay permits. With respect to the daughter, it was held, that stay permits did not provide a sufficient solution, and that her status in Israel should be arranged by a temporary residence visa. This Honorable Court did not forsake the family, despite the fact that said case concerned parents who were both OPT residents – unlike our case, which concerns the son of an Israeli resident who was born in Israel and who has been living here with his entire family since he was a minor, and in whose matter an application was submitted when he was a minor.

IV. <u>The implication of the age of the minor upon the submission of the application and the implication of respondent's summary rejection thereof</u>

55. The application for B was submitted when he was a minor, who was living in Israel with his entire family. Due to respondent's policy not to enable **even the submission of an application** for a child before a center of life in Israel for two years has been proved, petitioner 2's application was summarily dismissed. Eventually, petitioner 2 was permitted to submit an application for her children only in June 2008, two years after the family has returned to live in Israel, when B was already over 18.

56. Indeed, in **Abu Gheit** respondent's said policy was disqualified, and it was clarified that although the two year period was a reasonable period of time for the examination of residency, it did not refer to the mere submission of the application and the grant of an interim status:

> I am of the opinion that the fact they had moved in January 2007 from their permanent residence in the Area (since 1993) to their rented house in Jerusalem and that the children enrolled in schools therein, is not sufficient to determine that they have established their center of life in Israel. In order to prove a center of life and intent to settle down in a country, a longer period of residency in Israel and assimilation therein is required. Respondent requirement "to show a center of life in Israel during the two years which preceded the application" is therefore a reasonable requirement, as was held in **Abu Qweidar**. However, the court's words in **Abu Qweidar** should be carefully examined and it should be noted that they referred to the substantiation of a center of life as a "fundamental principle for the approval of applications for the registration of children", namely, the approval of their status as permanent residents pursuant to regulation 12, and did not refer at all to the question of the "interim" status (in respondents' words) which would be given to the children before the applicant – the parent who is a permanent resident – has proved the existence of a center of life in Israel for two years. No specific reference to this question may be found in the above mentioned procedures too. I will therefore discuss this issue (*ibid*., paragraph 10. emphases added - A.L.).

The court further holds in **Abu Gheit**:

> As is recalled, respondents' general position is that according to the provisions of the two procedures mentioned above, "there is no possibility to give an 'interim' status to children for whom an application for registration in Israel was submitted, before the existence of a preceding center of life was proved" (respondents' supplementary argument, paragraph 3). However, as noted above, the respondents notified the court that they have decided "*ex gratia*" to give the children DCO permits which would make their stay in Israel possible, so as to enable them to start the school year in an orderly fashion. The petitioners, as is recalled, rejected this offer and reiterated their position that the children should be granted a temporary residence visa (A/5).
>
> I believe that the respondent's general position, according to which the children are not entitled to any status until the two year center-of-life requirement was fulfilled, exceeds reasonableness. The reason being, that it is liable to expose them to an unacceptable reality of living in Israel unlawfully for a substantial period of time (about two years), with no schooling (despite the fact that they are of a compulsory education age). This result cannot be reconciled with the recognition of the need to respect 'the child's best interest' (Carlo, para. 2) nor with the special character of Regulation 12, as a regulation intended to advance human rights in the two central aspects at which President Beinisch has pointed: 'the first is the aspect pertaining to the right of the parent to a family life. The second aspect relates to the

> minor's independent and autonomous right to live his life alongside his parents ('Aweisat, para. 20) and indeed, as we have seen, the respondent himself too, after he has considered the children's matter once again, decided, "*ex gratia*" and in order to enable the children to properly enroll in school in Israel, that DCO stay permits in Israel would be issued to them, without retracting his general position, according to which the children were not entitled at this stage to any legal status in Israel. However, said general position of the respondent is not compatible with the objective of regulation 12 and its underlying reasons. It is therefore my opinion that as a general rule, and in the absence of special reasons to the contrary, the respondent must grant the child a permit to remain in Israel temporarily during the interim period until the center-of-life requirement shall have been fulfilled, which would enable the child to live lawfully with his parents, and to enroll in school in Israel. The parties disagree on whether, for the attainment of this purpose, which is also entrenched in the Compulsory Education Law, 5709-1949 (see section 2(a) of the law), a DCO permit suffices or whether a temporary residence visa (A/5) is required. In view of the fact that petitioner 2 has succeeded to enroll the children in schools in Jerusalem, even if after extensive efforts and many difficulties (as alleged in the petition), despite the fact that, to date, the respondent has not granted them any status in Israel, I am not required to decide on this issue. (Paragraphs 11 and 12 of the judgment).

And see also AP (Jerusalem) 1140/06 **Za'atra v. Minister of the Interior et al**. (judgment of the Honorable Judge Sobel dated November 3, 2007) and see the court's criticism of the failure to implement the judgments rendered in **Abu Gheit** and **Za'atra** in AP (Jerusalem) 727/06 **Nofal v. the Minister of the Interior et al**. (May 22, 2011).

It should be noted that on this issue AAA 8630/11 **Raduan v. Minister of the Interior** is pending.

57. Indeed, **Abu Gheit**, according to its circumstances, concerned the enrollment of the children in school – however, the determinations made therein are even more relevant to a case which concerns not only enrollment in school, but also the mere living with one's family in Israel. The provisions of the Citizenship and Entry into Israel Law, pursuant to which each child of a resident who lives with his parent in Israel is entitled to receive status or a stay permit are not arbitrary provisions. They were intended to serve a certain purpose. A humane purpose which exists from time immemorial and which was also entrenched in the laws of Israel, according to which a parent and his minor child (on the date the application was submitted) should be permitted to live together and the child should have rights in his place of residence.

58. Despite the law which imposes upon the state a duty to protect the child's best interest, the determinations made in **Abu Gheit**, and the Citizenship and Entry into Israel Law which explicitly enables the arrangement of the status/stay in Israel of a child up to the age of 18, according to respondent's policy, parents will be able to arrange the status of their children only if they moved to live in Israel when their eldest son or daughter was under 16. If the child was 16 years old, after two years of center of life in Israel, the child would be over the age of 18, and would no longer be

entitled to receive status. The outcome of this policy is the deprivation of a resident of the state from his right to return to live in his country with his minor children, it being clear that the parent cannot be expected to leave any of his minor children behind.

59. Alternatively, respondent's policy encourages the desertion and abandonment of children, in cases in which the parents' consideration is not to harm the younger children of the family, who are still entitled to status. In such cases the parents will return to Israel despite the fact that they have a minor over the age of 16 in the family. This policy can neither be reconciled with the law concerning the child's best interest, pursuant to which only extreme and rare cases would justify the failure to arrange the status of a minor child alongside his parents (see **'Aweisat**), nor with the language of the Citizenship and Entry into Israel Law which provides for the arrangement of the status or stay in Israel of a child up to the age of 18. It leads to the recurrence of severe humanitarian cases, like the case at hand, in which only one child out of all of the children of the family is left behind, without an authorization to continue to live with his family members in Israel.

60. It should be pointed out again, that when the first application was submitted and when the family returned to live in Israel, B was a minor. This date should be referred to as the due date for the purpose of making a decision concerning the status which should be granted to him and he should be regarded as a minor, in the deliberations of the Humanitarian Committee. See AAA 5718/09 **State of Israel v. Srur (April 27, 2011)**. Otherwise, the inevitable conclusion would be that parents can, in fact, arrange the status of their minor children only if they moved to live in Israel when their children were under the age of 16, rather than up to the age of 18, as permitted by the law.

61. The purpose underlying the need to confirm that a center-of-life was established may be attained by proportionate means within the framework of an examination process, which will not only require the family to create a center of life in Israel, but will also facilitate it in a lawful manner. Relevant to our case, respectively, are the words of this Honorable Court concerning the interpretation of the Citizenship and Entry into Israel Law:

> … weight must be given to the general assumption according to which the purpose of every act of legislation is to realize the basic values of the system rather than to oppose them (see HCJ 953/87 **Poraz v. Mayor of Tel Aviv-Yafo**, *Piskei Din* 42(2) 309, 329-331 (1988)). Derived from this premise is the notion that one must adopt a "restrictive and narrow interpretation of a provision of the law that negates or limits a human right" (see Barak - *Legislative Interpretation*, 558). In the case before us an interpretation of the term "resident of the area" which does not necessarily apply to all those who are registered in the registry of the Area but only to those who indeed live in the Area, is the interpretation which causes less harm to the rights of family members of Israeli residents to lead family life in Israel together with their minor children. This right was recognized by a majority of the judicial panel in **Adalah**, as a basic constitutional right, which is derived from human dignity. (**'Aweisat**, paragraph 14. Emphasis added –A.L.)

If this is so with respect to the interpretation of the law, it is only obvious that a similar attitude must be adopted with respect to a policy that was outlined by the respondent.

62. In HCJ 7444/03 **Dakah v. Minister of the Interior** (February 2, 2010), which concerned an adult spouse, against whom it was argued that a security preclusion existed which prevented her from entering Israel, it was held:

> 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).

And it has been further held:

> In view of a situation, in which a fundamental right of spouses, Israeli citizens and residents, to unite with their spouses from the Area, is violated, the Temporary Order Law should be interpreted according to the purposive approach, which limits the scope of such violation only to the extent which is necessary to realize the security interest. In view of the great force of the fundamental right to have a family which is regarded as a constitutional right of the first degree which is granted to the individual, only a very powerful security interest may justify the infringement thereof. […] (*ibid*. paragraphs 13 and 20 of the judgment of the Honorable Justice A. Procaccia).

63. The respondent did not present any proper objective for reducing the children's age, below the ages which are prescribed by law for the grant of status. An authority which acts fairly and reasonably will always choose the means, which complies with the above quoted principles from **Dakah**, and which injures the child's best interest, to the least extent possible. To the extent that in the process of the examination of the data and the exercise of the discretion, the injury may be mitigated, then, the authority is obligated to prefer the best interest of the child and the family over the possibility of causing them damage. Respondent's policy extremely exceeds the above described principles without any proper objective.

64. Respondent's conduct in petitioners' matter is therefore in contrary with the Basic Law: Human Dignity and Liberty and basic humane principles:

> The courts have consistently held, that a law which violates human rights must be interpreted narrowly: "It is a well established rule that a law which deprives a citizen from rights or which limits them should be interpreted narrowly." Justice Etzioni noted on this issue as follows: "When the authority in question materially violates a fundamental right of a citizen in a free society, we shall not hesitate to favor the interpretation which limits the violation of human rights, since the legislator is bound to respect these rights." A similar approach was expressed by Justice Elon, who held as follows: "Any provision which violates a person's liberty and rights should be interpreted in a narrow and limited manner. (Aharon Barak, **Interpretation in Law**, second volume: Interpretation of the Legislation, page 555-556).

65. Following the Citizenship and Entry into Israel Law, no child of an Israeli resident who is over the age of 14, will receive a permanent status in Israel. Young children at this age will receive stay permits only. Even the Humanitarian Committee is empowered to give them, at the most, temporary status, which subordinates them to an endless annual examination by the respondent. If that severe impingement was not enough, the respondent outlined a policy which further expands the impingement, since, according to said policy, children, like B, who moved to Israel when they were over the age of 16, are unable to obtain any status whatsoever, and they are doomed to be torn apart from their families despite the exceptions of the law which enable, security wise, to grant status or permit to a child until the age of 18.

V. Failure to render a decision in the application – respondent's obligation to act promptly

66. The respondent is obligated to handle petitioners' matter fairly, reasonably and promptly. The Citizenship and Entry into Israel Law (Temporary Order) 5763-2003, provides in section 3(a)(1)(d) thereof, that the Minister of the Interior should make a decision in a humanitarian application which was submitted to the Committee, within six months. However, nine months have passed from the date on which the application was submitted, and no decision has yet been rendered.

67. The obligation to act within a reasonable time, and not to delay and neglect applications which are pending before the authority, is one of the foundations of good governance. This applies even more forcefully, when the time schedule is established by law. And not without reason. See on this issue CA 4809/91 **Local Planning and Building Committee, Jerusalem v. Kahati et al.,** IsrSC 48(2) 190, 219; HCJ 6300/93 **Institute for the Training of Women Rabbinical Advocates v. Minister of Religious Affairs**-, IsrSC 48(4) 441, 451.

68. A competent authority must act reasonably. Reasonableness also means upholding a reasonable time schedule.

69. There is no doubt that respondent's conduct is not only delayed and inefficient, but it extremely exceeds what is expected of a reasonable administrative authority, which is responsible for significant aspects of the lives of those who need its services.

VI. The right to family life – a constitutional right

70. Respondent's conduct described above violates petitioners' right to lead normative life together and maintain a family unit at their choice.

71. In **Adalah**, which concerned the constitutionality of the Citizenship and Entry into Israel Law, the status of the right to family life in Israel was elevated to that of a constitutional right, as part of human dignity which is entrenched in the Basic Law: Human Dignity and Liberty.

72. The determination that the right to family life is a constitutional right, entails the determination that any violation of this right should be effected according to the Basic law: Human Dignity and Liberty – based only on weighty considerations and on a solid evidentiary infrastructure which attests to such considerations. Said determination imposes on the respondent an increased duty to exercise special care and maintain an administrative system, which would ensure that his power to deny family unification applications which are submitted to him, a power which infringes on a protected constitutional right, is used only in cases which fully justify same. The same applies to foot dragging and the imposition of excessive bureaucratic obstacles, conduct which, in any event, is contrary to the rule of law.

See also: **Galon** above; the Honorable Justice Barak, as then titled, in HCJ 693/91 **Efrat v. Director of Population**

Registration at the Ministry of the 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. State of Israel**, IsrSC 49(1) 330, 337; CFH 979/99 **Pavaloayah Carlo v. Minister of the Interior** TakSC 99(3),108.

73. International law also provides that the family unit must be protected. Hence, for instance, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, which was 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, which was 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 Covenant on Civil and Political Rights, which entered into force in Israel on January 3, 1992.

By his conduct the respondent destroys petitioners' family life.

VII. <u>The violation of petitioner's rights</u>

74. To date, B is still supported by his mother. The fact that the respondent declined to examine his application until he became an adult, at which time he declined again to examine it because he became an adult, should not work to his detriment. In any event, it is clear that under the above described circumstances, as a whole, B should not be torn apart from his family members.

75. The child's best interest is a fundamental and well rooted principle in Israeli jurisprudence. In HCJ 2266/93 **A. v. A.,** IsrSC 49(1) 221, it was ruled by Justice Shamgar that the state should intervene for the purpose of protecting a child against a violation of his rights.

76. The right of minor children to live together with their parents was 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 the Interior**, IsrSC 51(1) 15, page 20, opposite the letter B.

77. The Convention on the Rights of the Child consists of a host of provisions which impose an obligation to protect the child's family unit. The Convention's preamble provides as follows:

> [The States parties to the present convention 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 […]
>
> […] 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 supplementary source for the rights of the child and as a guide for the interpretation of 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, 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. The High Rabbinical Court of Jerusalem** (TakSC 98(3) 443) paragraph 10 of the judgment of the Honorable Justice Cheshin.

VIII. The duties of the custodian

78. When petitioner 2 moved to Israel she was the custodian of her minor child. To date too, petitioner 2 is the custodian, who is in charge of B, supports him and takes care of him.

79. The duty of the custodian toward the children under his/her custody and the prohibition to neglect them are well rooted in Israeli jurisprudence. Thus, for instance, section 15 of the Legal Competence and Guardianship Law, 5722-1962, entitled 'Functions of the Parents', provides:

> The guardianship of the parents shall include the duty and the right to take care of the needs of the minor… it shall also include the right to the custody of the minor, to determine his place of residence and the authority to act on his behalf.

80. Section 323 of the Penal Law, 5737-1977, provides:

> A parent or the person responsible for a minor member of his household, is under obligation to provide his necessities of life, to care for his health, and to prevent his abuse, bodily harm or other injury to his welfare and health; and he shall be held to have caused any consequences to the life or health of the minor as a result from his failure to meet the said obligation.
>
> And see also section 373 of the law.

81. The decision of the respondent to deny B's application to receive status in Israel, infringes on the ability of petitioner 2, an Israeli resident who lives in Jerusalem, to realize her constitutional rights and prevents her from fulfilling the above obligations. Thus, the respondent causes the parents to be offenders despite their will. And even worse than that: respondent's policy severely impinges on petitioners' family unit and in so doing it thwarts the main social means for the protection of petitioner's body, life and dignity.

IX. Lack of reasonableness and fairness

82. The administrative authority must act reasonably, proportionally, fairly and for the attainment of a proper purpose. These are governing principles which control respondent's scope of discretion. Respondent's decision to disregard the date on which the application was submitted and the date on which the family returned to live in Israel – on which dates B was a minor, and the fact that no response has been provided by the Humanitarian Committee's during a period which exceeds by far the period of time which was established by a **statutory provision** in that regard, constitutes a conduct which extremely exceeds reasonableness. On this issue se: HCJ 1689/94 **Harari et al. v. Minister of the Interior**, IsrSC 51(1), 15 and HCJ 840/79 **The Contractors and Builders Center in Israel v. The Government of Israel**, IsrSC 34(3), 729, and in particular pages 745-746, the words of the Honorable Justice Barak, as follows:

> The state, through those who act on its behalf, is the trustee of the public, and the public interest and properties were entrusted to it to be used for the benefit of the public at large… this special status imposes on the state the obligation to act reasonably, honestly, based on pure motives and in good faith. The state must not discriminate against, act arbitrarily or in bad faith, or be in a conflict of interests situation. Shortly, it must act fairly.

83. The words of the Honorable Court in AP (District – Jerusalem) 411/05 **Khaldeh et al. v. Ministry of the Interior** (December 15, 2005) are relevant and precise:

> Not many years will pass before we rub our eyes with amazement on the question of how we have accepted what is already obvious at this present time. The piling up of bureaucratic obstacles is another way of saying the obvious, which is, that the respondent does not wish to approve these applications. We cannot refrain from wondering with how many "supposedly" bureaucratic and with how many legal "arguments" we are willing to cover ourselves and which administrative maneuvers may be carried out – to prevent a pertinent handling of applications of this sort – commencing with the actual line before the bureaus and ending with the piles of documents which should be submitted to the respondent. A proper law requires a reasonable mechanism, which would make its realization possible. A proper law with inappropriate means is not less troublesome than a sweeping prohibition. To avoid a situation in which we handle licensing issues like peddlers in the market, the law should be better adhered to, and arguments concerning lack of a substantial and valid marital connection between spouses, parents of seven children, the youngest one of whom is three years old, should better be based on real arguments, rather than

on a telephone conversation which has not been answered and on separate dwellings for livelihood purposes.

G. Conclusion

84. A situation whereby a parent cannot arrange the status of his minor child in the country in which he lives is improper. A situation whereby a person lives in a country for a long time without rights is improper.

85. The consequences of the failure to make a decision in the applications of B and his mother are very severe. The family lives in constant stress, instability and uncertainty concerning their future life together with their eldest and beloved son. B's daily actions are limited. He is not authorized to study, work and make a living, live full life. He has no social rights, medical and economic security. The present in which he lives is unbearable and the future is vague and unclear.

86. The Committee was established to handle humanitarian cases, following the judgment of the High Court of Justice. The handling of humanitarian cases should also be made within a reasonable period of time – a period of time which was established in the Citizenship and Entry into Israel Law.

87. The respondent should not ignore the plea of petitioner 2, an Israeli resident, whose children were all granted either status or stay permit in Israel, to continue to live together as a family, in their country, in their home, in Jerusalem.

88. B's matter should be resolved and he should be granted status in Israel.

Therefore, the honorable court is hereby requested to grant an *Order Nisi* as requested in the beginning of this petition, and after receiving respondent's response thereto, make it absolute. The court is further requested to order the respondent to pay petitioners' trial costs and attorneys' fees.

Today: February 28, 2012

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Adi Lustigman, Advocate

Counsel to the petitioners