At the Supreme Court in Jerusalem **LHCJA 7233/13**

In the matter of: _____ _____ _____ 'Abbasi
ID No. 080892581
Held in Kziot Prison

Represented by Counsel, Adv. Daniel Shenhar (Lic. No. 41065) and/or Sigi Ben Ari (Lic. No. 37566) and/or Hava Matras-Irron (Lic. No. 35174) and/or Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Bilal Sbihat (Lic. No. 49838) and/or Tal Steiner (Lic. No. 62448) and/or Anat Gonen (Lic. No. 28359)

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The Applicant

v.

Israel Prison Service

Represented by the State Attorney's Office

The Respondent

Application for Leave to Appeal

In view of the decision of the Honorable Registrar L. Benmelech in HCJApp 6716/13, in which the applicant was granted an extension for the filing of this application, the honorable court is hereby requested to grant the applicant leave to appeal the judgment of the Beer Sheva District Court in PP 36242-04-13 (hereinafter: the **petition**), which was given on September 10, 2013 by the Honorable Judge Yaakov Persky.

A copy of the judgment of the honorable court of first instance in PP 36242-04-13 and the protocol of the hearing in the petition dated September 10, 2013 is attached and marked **A/1**.

A copy of the decision of the honorable court in HCJApp 6716/13 dated October 20, 2013, which was served on the undersigned on October 22, 2013, concerning an extension for the filing of this application, is attached and marked **A/5**.

The grounds for the application are as follows:

1. This application concerns respondent's decision to deprive the applicant of his right to see his son, based on the argument that the latter is not registered in the identification card of his father, who was incarcerated before the son was born. The applicant is a resident of Jerusalem, who serves ten-year prison sentence, since March 2010.

2. At the center of this application stand general and weighty issues, which directly affect the ability of prisoners to materialize their lawful right to family life. The court of first instance rejected applicant's petition against respondent's decision and held that respondent's position, according to which **the visits of the minor son would not be allowed for as long as his registration was not arranged by the Ministry of the Interior**, was reasonable, and that he did not find reason to interfere therewith.

3. The court of first instance affirmed an arbitrary and sweeping administrative decision, which was not based on the entire considerations relevant to the matter, but only on the narrow-bureaucratic aspect.

4. Among the considerations that the respondent should have considered in making a decision in such a sensitive matter of a young child visiting his father, one can mention, *inter alia*, the applicant's constitutional right for family relationship with his young son; the long incarceration period which the applicant still has to serve (which amounts to seven years); the fact that the applicant is not entitled to furloughs due to his classification by the respondent as a "security prisoner"; the fact that the applicant's son also has a constitutional right to maintain relationships with him; the fact that he has an admissible administrative evidence, in the form of the birth certificate of applicant's son, which clearly states that the child is applicant's son; and the fact that the application to register the child in his father's identification card was rejected by the Ministry of the Interior in view of the fact that the applicant was incarcerated and that there was no possibility to register him before the father was released from prison.

5. Unfortunately, the honorable court of first instance preferred respondent's disregard of all of these relevant considerations, and relied exclusively on technical-bureaucratic reasons, which are not relied upon by the respondent itself in similar cases (in similar cases which were handled by the undersigned, on behalf of HaMoked for the Defence of the Individual, the respondent was satisfied with the presentation of a birth certificate at prison gate for the purpose of allowing the entry of prisoners' children). Therefore, it seems that the honorable court of first instance has erred.

6. The practical meaning of the decision of the court of first instance is respondent's release of the obligation to take into account all relevant considerations while making an administrative decision, a decision which is so basic and material for the wellbeing of the applicant, or any other prisoner, and his family. Moreover, the decision of the honorable court of first instance may open the gate for the adoption of arbitrary decisions, which restrict fundamental rights of prisoners, based only on technical reasons, as occurred at the case at hand: **preventing a three year old child from visiting his incarcerated father, only because he is not registered with the Ministry of the Interior.**

7. It should be pointed out that the birth certificate of applicant's son, which was attached to the application to allow the child's entry to visit his father, **clearly specifies the identification numbers of the father and mother**. Said certificate does not specify the son's identification number, since his registration with the Ministry of the Interior has not been arranged, and cannot be arranged, according to the procedures of the Ministry of the Interior, due the imprisonment of the father, who is the parent having status in Israel. Consequently, **no identification number was issued to the child upon his birth**, and he has not been registered in the Israeli population registry.

Applicant's case – has across-the-board ramifications on the entire population of prisoners

8. Case law provides that leave to appeal is granted in prisoners' petitions when "**a legal problem of importance is brought up or if some other issue of general importance is raised**" (LHCJA 7/86 Weil v. State of Israel et al., TakSC 86(2) 1134 (1986)), or when "**issues exceeding applicant's case which involve issues of vast constitutional, public or legal ramifications**" arise (LHCJA 5318/99 **Kostika v. Committee for the Prevention of Violence in the Family et al.,** TakSC 99(3) 1395 (1999) (all emphases in the application were added by the undersigned, unless otherwise noted – D.S.)

9. Applicant's application raises weighty legal issues, which pertain to the scope of the fundamental rights of prisoners to maintain relationships with their family members who are not incarcerated. Specifically, the application raises a weighty question concerning prisoners classified as "security prisoners", who are Israeli residents married to women who are West Bank residents, wishing to see their children that, unfortunately, were born after their father was imprisoned, or whose registration with the Ministry of the Interior has not been completed before their father's imprisonment.

10. This is the place to shortly elaborate on this issue. The registration procedure of children only one of whose parents is a resident is not automatic. The Ministry of the Interior conducts many "center of life" examinations of the child and his parent before the registration (a procedure which extends over a period of at least six months). Thus, even if the child was born before the father's imprisonment, and even if the father has taken all necessary action and filed an application for the registration of the child, his imprisonment severs the registration procedure, in view of the fact that for registration purposes the father and the child must jointly share a "center of life". Therefore, it is clear why the relevant population is larger in scope than prisoners who were imprisoned after their child was born, as occurred in applicant's case in the current application.

11. This fact – birth after imprisonment, or imprisonment prior to completion of registration proceedings – actually prevents the registration of the newborns with the Ministry of the Interior. The respondent, as aforesaid, decided to prevent the applicant from seeing his son, who was born after his father's imprisonment, only because he is not registered in his identification card. The respondent has thus created a vicious circle in which the father and son are trapped, and from which there is no escape.

12. Respondent's decision referred to above, which has far reaching across-the-board ramifications on the rights of prisoners to family relations, is not based on specific data, relevant to the specific applicant in this case, and hence the danger embedded in leaving the decision in place, as held by the court of first instance.

13. The only thing which was taken into consideration by the respondent in making the administrative decision in the case pending before us was whether or not the child was registered in his father's identification card. The arbitrariness of respondent's decision is outrageous; why did the respondent fail to take into consideration the remaining incarceration period which the applicant must serve? Why did he fail to consider the age of the child who wishes to see his father? Why did he neglect to take into consideration altogether the reason for which the child has not been registered in the father's identification card? Why did he fail to take into account the fact that there was administrative evidence which attested to the existence of family relations between the father and his son, in the form of the child's birth certificate? Obviously, additional parameters may exist, which have not been considered at all, and which could have lead to a different, reasonable and even humane decision.

The registration of applicant's son in the population registry

14. Applicant's son, _____ _____, who is a three years old toddler, lives with his grandfather in Jerusalem. The grandfather was appointed as the child's guardian by the Sharia court.

15. After an application to register the child in applicant's identification card was rejected by the Ministry of the Interior on May 9, 2011, due to the fact that the applicant was a prisoner, the grandfather, applicant's father, had to submit an additional application to the Ministry of the Interior, in which he requested to register the child and give him an identification number based on the guardianship which was granted to him.

16. This application was also rejected on July 23, 2013, based on the argument that the registration application should be filed by the father, "who is still living" (disregarding the fact that the father is a prisoner, that he still has to serve seven years in prison, and that consequently he cannot complete by himself the registration proceeding, as shown above. Although we are not concerned with a legal proceeding which is directed against the Ministry of the Interior, it is hard to ignore the clumsiness and arbitrariness of these decisions).

17. An appeal was filed against this decision, which is still pending. The issue of the child's registration is not expected to be resolved in the foreseeable future.

18. Hence, the vicious circle, into which the applicant and his three years old son were thrown, and of which there is no escape, other than by the intervention of the honorable court: the respondent does not allow the son to see the applicant, since he is not registered in the applicant's identification card; the registration issue is currently unsolvable, in view of the fact that the Ministry of the Interior refuses to register the son in the father's identification card, because he is a prisoner. Thus, the father and his son were prevented from seeing each other for almost six months, and without any time limit.

Appeal as of right

19. The applicant will further argue, that in the proceeding before us, he should be allowed to appeal the decision of the court of first instance as of right, notwithstanding the provisions of section 62C of the Prisons Ordinance [New Version], 5732-1971, pursuant to which the decision of the district court which hears prisoners petitions may be challenged by way of an application for leave to appeal. And note, this honorable

court has discussed, over recent years, in a host of decisions, the issue of a prisoner's right to appeal a decision which was given by a court of first instance, similar to the case at hand.

20. In LHCJA 425/09 **Ferinian v. State Attorney's Office**, TakSC 2009(1), 3408, the Honorable Justice Grunis held, that when a prisoner challenges, for the first time, a judicial decision before the court, a liberal test should be applied to such applications for leave to appeal:

> The question at issue is what test this court should apply when it examines an application for leave to appeal a decision of the district court in the above mentioned matters. In my opinion, a clear distinction should be made between an application for leave to appeal which pertains to proceedings of the first type and that which pertains to proceedings of the second type. The first type concerns, as is recalled, a prisoner's petition regarding his incarceration or detention. Such a petition usually challenges a decision made by the commissioner or any other official of the Israel Prison Service. Hence, the petition challenges, for the first time, before the court, a decision made by an administrative authority. **In view of the fact that this is an initial challenge before the court (or before a quasi judicial tribunal), there is no justification to apply a narrow test… it seems, that there is no need to explain the difference between an application for leave to appeal in the third round, and an application for leave to appeal which is directed against a decision of the district court in a prisoner's petition of the first type, which is actually a "second round". In view of the difference, I am of the opinion that a liberal test should be applied to applications for leave to appeal of the first type** (paragraph 3 of the decision of Justice (as then titled) Grunis).

See also: LHCJA 6956/09 **Yunes v. Israel Prison Service**, TakSC 2010(4), 189, paragraph 35; LHCJA 6080/10 **Tal Yegerman v. Israel Prison Service**, TakSC 2011(1), 1165; LHCJA 6687/09 **Avital v. Israel Prison Service**, Tak SC 2009(3), 3063; LHCJA 4785/08 **Muhammad Rakhid v. State of Israel**, TakSC 2008(3), 2527, paragraph 9; LHCJA 10478/08 **Salach v. State of Israel**, TakSC 2009(1), 1216, paragraph 9; LHCJA 2640/09 **Turk v. Israel Prison Service**, TakSC 2009(2), 2150; LHCJA 6757/08 **'Abuassa v. State of Israel**, TakSC 2008(3), 4223; LHCJA 3045/08 **State of Israel v. Sharon Ferinian**, TakSC 2008(2), 24540; LHCJA 314/06 **State of Israel v. A.,** TakSC 2006(1), 1527.

21. The above indicates that this honorable court tends to regard appeals on decisions in prisoners petitions as appeals as of right, in view of the fact that these decisions were given by the a court of first instance, notwithstanding the fact that the Prisons Ordinance stipulates that these are not appeals as of right and that leave to appeal should be granted in such cases.

22. Alternatively, the applicant will argue that this application for leave to appeal raises weighty legal questions and an issue of general importance, and therefore he should be granted leave to appeal by law.

The proceedings before the court of first instance

23. The petition which was filed on April 21, 2013 concerns applicant's request that the honorable court of first instance orders the respondent to permit his father, Mr. _____ 'Abbasi, and his brother, Mr. _____ 'Abbasi, to enter the incarceration facilities under his responsibility, to visit him.

24. Following the filing of said petition, in April 2013, the respondent has also refused to permit the entry of petitioner's son, _____ _____, who was not even three years old, to visit him in prison. The reason which was given: the son is registered in his father's identification card.

25. In view of the above, on May 21, 2013 HaMoked for the Defence of the Individual (hereinafter: **HaMoked**) applied to the commander of the Kziot prison, in which the applicant is held, and requested that the respondent would continue to permit applicant's young child to enter prison, to visit him. The birth certificate and a former entry permit into prison which was granted to the son by the respondent were attached to the request. No response to this request has been received in HaMoked's offices.

    A copy of the letter dated May 21, 2013 with its enclosures, is attached and marked **A/2.**

26. In view of the fact that said request was disregarded as described above, the petitioner himself checked the matter *vis-à-vis* the responsible officials in prison, and was told that they were adamant not to allow the entry of the young son. Furthermore, they have even told the applicant that since he preferred to file petitions against the respondent, he should also solve this problem in court(!).

27. Respondent's said conduct left the applicant no alternative, and he was forced to file with the honorable court of first instance, through HaMoked, an application for leave to file an updating notice and to amend the petition, on July 4, 2013.

28. The application emphasized that his son was born **after** his father was arrested, and that consequently, he was not registered in his father's identification card (it was explained there that the Ministry of the Interior did not enable the registration of children of Palestinian prisoners, residents of East Jerusalem, who were born after the father's imprisonment). It was further emphasized, that the birth certificate which was issued upon the son's birth, and which was attached to the application, clearly stated that the child _____ _____, was applicant's son.

29. It was further emphasized, that until recently, the respondent allowed the son _____ _____, to visit his father in prison, when his escorts brought with them the above mentioned birth certificate.

30. Thus, in the application to amend the petition the applicant added to the original remedy which was requested in the petition an additional remedy: that the honorable court would direct the respondent to also allow his young son _____ _____ to enter prison, to visit him.

    A copy of the notice concerning the amendment of the petition is attached and marked **A/3**.

31. In respondent's response to the petition, which was handed over to the undersigned at the hearing before the honorable court of first instance, respondent's counsel argued that the birth certificate which was presented as a document that affirmed the family relation between the child and his father could not be relied on. It was further stated there that the birth certificate "is not legible or clear enough", and that "it does not specify the identification numbers of the father and mother." In view of all of the above, the respondent insisted on his position not to allow the entry of applicant's minor son into prison, to visit him.

    A copy of respondent's response is attached and marked **A/4**.

32. On September 10, 2013 the court of first instance rejected applicant's petition. The honorable court of first instance held that respondent's position, not to allow the entry of applicant's young son into prison, to visit him, without any time limit, was reasonable. The court added that "even if it turns out that the baby's entry was mistakenly approved in the past, it does not justify his entry from now on, and in this regard respondent's position makes sense and it mainly concerns compliance with the rule according to which the relation between the visitor and the prisoner must be proved". The court also rejected the original part of the petition which concerned applicant's request to allow the entry of his father and brother to visit him in prison (the applicant does not wish to appeal this part of the judgment).

33. **Hence this application, for leave to appeal the judgment of the court of first instance**.

The Legal Aspect

> The constitutional concept that gives human rights a supreme normative status also has ramifications for the human rights of a prisoner, and his ability to realize these rights when he is in prison. The constitutional system in Israel is based on the presumption that a person‘s basic rights should not be denied or restricted unless there is a recognized conflicting interest, whether private or public, that is of sufficient weight to justify this. The same presumption also applies to sentenced offenders. This means that **the protection of human rights is also extended to prisoners after they are sentenced, and a violation of their rights may be allowed only where a conflicting public interest of great significance justifies it**. (quoted from the judgment of the Honorable Justice Procaccia in HCJ 2245/06 **Dobrin v. Israel Prison Service**, TakSC 2006(2), 3564, 3570).

The Right to Prison Visits by Relatives and the Respondent's Obligation to Arrange them

34. The right to family visits in incarceration facilities is a fundamental right, both of the prisoners and of their family members. This is a fundamental right premised on the perception of the individual as a social being, living within the framework of family and community.

35. The right to family visits is rooted in a number of Israeli and international legal sources. Among these sources, one may mention the Fourth Geneva

Convention (which provides in Article 116 that "Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible."), Section 47 of the Prisons Ordinance [New Version], 5732-1971 and the Prison Service Commission Order 04.42.00 entitled "Prisoner Visitation Arrangements", which provides in section 1 that:

> **The visit is one of the important means of communication between the prisoner and his family, friends and acquaintances**. The visit may help the prisoner while in prison and encourage him in times of crisis.

36. And it was so held in this regard in the judgment of Justice Procaccia in LHCJA 6956/09 **Maher Yunis et al. v. Israel Prison Service**, TakSC 2010(4), 189 (hereinafter: **LHCJA Maher**)**,** in paragraph 8, there:

> Indeed, prison leaves and visits may also be regarded as part of the human rights to which they are entitled also while in prison, and which are not necessarily nullified merely due to the deprivation of liberty resulting from the incarceration, fruit of the penal sanction. **Leaves and family visits are some of the means of communication between a person-prisoner and the world and his close vicinity. He needs them by virtue of his nature. They are part of his self as a human being; They are part of his human dignity. They make an important contribution to his welfare and rehabilitation during his incarceration.**

37. The UN Minimum Standard for the Treatment of Prisoners, 1955 provides, in rule 37:

> Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

38. A comprehensive study of the Red Cross concerning customary international humanitarian law stipulated **that the right of detainees and prisoners to receive visits was a recognized right under customary international law**:

> **Rule 126: Civilian internees and persons deprived of their liberty in connection with non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable**.
>
> … In a resolution adopted in 1999, the UN General Assembly demanded that Yugoslavia respect the requirement to allow detainees to receive family visits in the context of the conflict in Kosovo (UNGA Res.54/183). In the **Greek case** in 1969, the European Court of Human Rights condemned the severe limitations on family visits to detainees. In 1993, the Inter-American Commission on Human Rights recommended that Peru allow relatives to visit

> prisoners belonging to the Tupac Amaru Revolutionary Movement.
>
> (JM Henckaerts, L. Doswald-Beck, **Customary International Humanitarian Law** p. 448-449 (Volume I: Rules. 2005)).

39. Moreover. The visitation right is not only the right of the prisoner alone. It is only recognized by international law as the right of the prisoner's family members, whose relations with him were severed upon his incarceration. The above is summarized by one of the scholars as follows:

> People who are sent to prison lose the right to free movement but retain other rights as human beings. One of the most important of these is the right to contact with their families. **As well as being a right for the prisoner, it is equally a right for the family members who are not in prison**. They retain the right of contact with their father or mother, son or daughter, brother or sister who has been sent to prison. Prison administrations have a responsibility to ensure that these relationships can be maintained and developed. Provision for all levels of communication with immediate family members should be based on this principle. It follows that the loss or restriction of family visits should not be used as a punishment under any circumstances.
>
> (Coyle A. **A Human Rights Approach to Prison Management: a Handbook for Prison Staff** International Centre for Prison Studies (King's College, University of London and the UK Foreign and Commonwealth Office) 2002. P 95).

40. Section 13A of Commission Order 04.42.00, which concerns, as specified above, prisoner visitation arrangements, stipulates that a visitor must identify himself at prison gate by an official certificate. The section does not provide which certificates are deemed "official" and which ones are not considered by the respondent as such. Section 9B of same order stipulates that a child, who comes to visit his parent with his guardian, is entitled to visit the parent in prison.

<u>Prisoner's Human Rights Remain Intact during his Incarceration</u>

41. The right to family visits in incarceration facilities is also derived from the governing concept, both in international law and Israeli law, that mere arrest or imprisonment does not nullify the fundamental rights of the prisoner. Prison walls limit the prisoner's freedom of movement, with all ensuing consequences, but they do not nullify his other fundamental rights, excluding those denied him in accordance with an explicit provision of the law:

> **It is a major rule with us that he is entitled to any and all human rights as a human being, even when he is detained**

> **or imprisoned, and the imprisonment alone cannot deprive him of any right whatsoever, unless this is mandated by and arises from the deprivation of his right to free movement, or when there is an explicit provision of the law to that effect…** This rule has been rooted in Jewish heritage for ages: As stated in Deuteronomy 25, 3: 'then thy brother should seem vile unto thee', the sages established a major rule in Hebraic penal doctrine: 'when beaten – he is like your brother' (Mishna, Makot, 3, 15). **And this major rule is relevant not only after he has completed his sentence but also while serving a sentence, because he is your brother and friend, and he retains and is entitled to his rights and dignity as a human being**.
>
> (HCJ 337/84 **Hokma v. Minister of Interior**, IsrSC 38(2) 826, 832; and see also: **Dobrin**, paragraph 14 of the judgment rendered by Justice Procaccia; PPA 4463/94 **Golan v. IPS**; PPA 4/82 **State of Israel v. Tamir**, IsrSC 37(3) 201, 207; HCJ 114/86 **Weil v. State of Israel**, IsrSC 41(3) 477, 490).

42. And it was recently so held in the comprehensive judgment of Justice Danziger in **Maher**, in paragraph 36, there:

> The approach of Israeli jurisprudence concerning the purpose of a person's incarceration is that it is exhausted by the deprivation of the individual's personal liberty, by way of limiting his right to free movement. According to this approach, even when a person is incarcerated, he continues to retain any human rights afforded to him. Indeed, "when admitted into prison a person loses his liberty but he does not lose his dignity."

43. Article 10(1) of the Covenant on Civil and Political Rights provides that:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

This Article was interpreted by the human rights committee, the body responsible for the implementation of the covenant, in CCPR General Comment No. 21 dated April 10, 1992, in a very broad manner:

> [R]espect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. **Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment**.

44. The principle under which prisoners are entitled to all human rights other than those nullified by the mere fact of the incarceration, was also established in articles 1 and 5 of the Basic Principles for the Treatment of Prisoners, adopted

by the General Assembly of the UN (in resolution 45/111 dated December 14, 1990). Article 1 provides that:

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.

And according to article 5:

> Except for those limitations that are demonstrably necessitated by the fact of incarceration, **all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights**, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

45. The various provisions concerning the right to prison visits enable the imposition of limitations on this right, including, *inter alia*, for security reasons, as noted above. However, as with any limitation on a fundamental right, such limitations must be imposed within the framework of the principles of reasonableness and proportionality, giving weight to the importance of the fundamental right being violated.

The Right to Family Life

46. Preventing family members from visiting their incarcerated loved ones, and especially preventing a meeting between father and son, severely violates the fundamental right of the family members as well as the prisoners to family life. The right to family life is and has always been regarded by society, at all times and in all cultures, as a supreme value.

47. The Supreme Court has emphasized time and again the great importance of the right to family life in many judgments, and especially in **Adalah** (HCJ 7052/03 **Adalah v. Minister of Interior**, TakSC 2006(2), 1754).

Accordingly, for instance writes Honorable President (*emeritus*) Barak in paragraph 25 of his judgment:

> It is our main and basic duty to preserve, nurture and protect **the most basic and ancient family unit in the history of mankind, which was, is and will be the element that preserves and ensures the existence of the human race, namely the natural family**…
>
> The family relationship… lies at the basis of Israeli jurisprudence. The family has an essential and central role in the life of the individual and in the life of society. Family relationships, which the law protects and which it seeks to develop, are some of the strongest and most significant in a person's life.

And in **Dobrin**, Honorable Justice Procaccia writes (in paragraph 12 of her judgment):

> In the hierarchy of constitutional human rights**, after the protection of the right to life and bodily integrity, comes the constitutional protection of the right to parenthood and family.** The purpose of the right to bodily integrity is to protect life; the right to family gives life meaning and reason…
>
> **Accordingly, this right enjoys a high ranking among the constitutional human rights. In its importance, it precedes the right to property, to freedom of vocation, and even to personal privacy. 'It reflects the essence of the human's existence, the embodiment of the realization of the human's self.'**

48. Family rights are also recognized and protected by international public law. Article 46 of the Hague Regulations provides:

> **Family honor and rights**, a person's life, personal property as well as religious faiths and worship customs **must be respected**.

And in **Stamka** it was held that:

> Israel is obligated to protect the family unit under international treaties (HCJ 3648/97 **Stamka v. Minister of Interior**, IsrSC 53(2) 728, 787).

And see also: Articles 17 and 23 of the Convention on Civil and Political Rights, 1966; Article 12 and article 16(3) of the Universal Declaration of Human Rights, 1948; Article 12 of the European Convention on Human Rights; Article 27 of the Fourth Geneva Convention; Article 10(1) of the International Convention on Economic, Social and Cultural Rights of 1966; The preamble of the Convention on the Rights of the Child of 1989.

Limiting a Fundamental Right – Principles of Reasonableness and Proportionality

49. Under the various provisions concerning the right to prison visits, limitations may be imposed on the right, for various reasons. Thus, regulation 30(c) of the Prison Regulations authorizes the commissioner or his deputy to deny visits of a prisoner with respect of whom reasonable grounds exist to suspect that he may take advantage of the visits for activity intended to harm state security, as specified above. This period may be extended for an additional period of three months at a time.

50. However, like any limitation imposed on a fundamental right, such limitations must comply with the principles of reasonableness and proportionality and proper weight should be given to the importance of the violated right. A

violation of a human right, and in our case the violation of petitioner's right to be visited in prison by his son, is lawful only if it meets the competence test and the test of proper balancing between such right and other interests for which the administrative authority is responsible. The more important and central the violated right, the greater the weight that should be attributed to it in the act of balancing it against opposing interests of the administrative authority (PPA 4463/94, LHCJA 4409/94 **Golan v. Israel Prison Service**, IsrSC 50(4) 136, 156).

51. The weight attributed to the evidence underlying the administrative decision depends on the nature of the decision. The weight of the evidence must reflect the importance of the right or interest being violated by the decision and the extent of the violation. The fact that respondent's decision violates petitioner's fundamental rights, obligates the respondent to base its decision on weighty estimates and data (see EA 2/84 **Neiman v. Chairman of Central Elections Committee**, IsrSC 39(2) 225, 249-250).

52. Even if the respondent is of the opinion that the mere fact that the applicant sees his young son, who does not have an identification number, causes damage of any kind to an unknown public interest, then, upon denying such visitation right, the respondent should have complied with the proportionality principle. This principle focuses on the relation between the objective the achievement of which is being sought, and the means used to achieve it.

53. One of the subtests of the proportionality principle is the least injurious measure test. This means that in the spectrum of measures which can be used to achieve the objective, the measure used must violate the constitutional right to the least extent possible (HCJ 2056/04 **Beit Sourik Village Council v. The Government of Israel**, IsrSC 58(5) 807, 839-840).

54. This imposes upon the respondent the obligation to examine the evidence before it carefully and on an individual basis; to thoroughly examine whether such evidence is sufficient to enable the prisoner and his son to realize their right to family life; to conclude whether as a result of the administrative decision in applicant's matter his right to see his son would be unbearably violated, and whether a different, less sweeping, administrative decision may be made, which can reconcile between the maintenance of the relationship between the father and son, and the upholding of proper procedures of good governance.

All of the above indicate, that respondent's sweeping decision is inappropriate as it is incompatible with the basic principles underlying a proper administrative proceeding. Therefore, the honorable court is hereby requested to give the applicant leave to appeal.

Jerusalem, October 24, 2013

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Daniel Shenhar, Adv.
Counsel to the Petitioner

(File No. 66642)