At the Supreme Court **HCJ 4699/14**
Sitting as the High Court of Justice

In the matter of:

1. **_____ Khaleq, ID No. _____**
2. **_____ Khaleq, ID No. _____**
3. **_____ Khaleq, ID No. _____**
4. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger–RA No. 580163517**

all represented by counsel, Adv. Sigi Ben Ari (Lic. No. 37566) and/or Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Hava Matras-Irron (Lic. No. 35174) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. No. 41065) and/or Bilal Sbihat (Lic. No. 49838) and/or Tal Steiner (Lic. No. 62448) and/or Abir Jubran-Dakawar (Lic. No. 44346)

Of HaMoked Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger
4 Abu Obeida St., Jerusalem, 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **Israeli Knesset**
2. **The Prime Minister, Mr. Benjamin Netanyahu**
3. **Minister of the Interior, Mr. Gideon Saar**
4. **Attorney General**

All represented by the State Attorney's Office
29 Salah al-Din Street, Jerusalem
Tel: 02-6466590; Fax: 02-6276317

The Respondents

Petition for *Order Nisi*

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause:

1. Why they should not upgrade the status of petitioner 2, and grant her at least a renewable A/5 visa, in view of the fact that she lives in Israel for a protracted period of time under military residency permits only.

2. Why an exception is not added to section 2 of the **Citizenship and Entry into Israel Law (Temporary Order), 5763-2003**, according to which residents of the Area who live in Israel for a protracted period of time under residency permits in Israel within the framework of family unification proceedings, will be at least granted with a temporary residency license (A/5 visa).

This petition is one of a series of petitions concerning Palestinians, who have been living in Israel for many years with their Israeli family members, under military residency permits only, with no social rights and with no personal security. These people wish to upgrade their status and obtain the status of residents in Israel.

Preface

1. This petition concerns families which have been hanging in mid air for many years. Families, who maintain family life and center of life in Israel for a long time, but due to the **Citizenship and Entry into Israel Law (Temporary Order), 5763-2003** (hereinafter: the **Citizenship and Entry into Israel Law** or the **Temporary Order** or the **Law**), the Palestinian family member resides in Israel under renewable military residency permits, without status, without minimum stability in life, and with limited rights only.

2. A Temporary Order, as indicated by its name, is intended to serve a security purpose for a limited period of time. In view of said classification of the Law, as a Temporary Order, the honorable court approved the Law – in two judgments given by it – and held that it served the security purpose.

3. Thus, the respondents indeed froze the ability to upgrade the status of Palestinians who take part in family unification proceedings, but the lives of families such as petitioners' family did not freeze. These families must attend the bureaus of respondent 3 every year, prove the existence of family life and center of life in Israel, and subject themselves to security and criminal background examinations in order to enable the Palestinian family member to continue to live in Israel under a military residency permit.

4. The purpose of the Law – as stated by the legislator – is to serve a security purpose, and for this reason the respondents prevent the upgrade of the status of spouses and children from the Occupied Palestinian Territories (OPT). However, when a person resides in Israel for many years, and the fact that no risk is posed by his presence in Israel is substantiated on an annual basis, the security reason against the upgrade of his status weakens over the years. On the other hand, the harm caused to him and his family grows.

5. Petitioners' position – which is based on recent judgments of this honorable court – is that with respect to individuals whose matter has been examined so many times, a security argument may no longer be used as a reason not to upgrade their status. This petition concerns these individuals and the demand for the upgrade of their status.

6. The petitioners presented this demand to the respondents, and referred them to the judgments of this honorable court. However, the respondents are set in their ways: they keep extending the Law, without any thorough discussion, automatically.

7. Before the petitioners specify their arguments, they wish to clarify and emphasize, that their general position, as presented in petitioner 4's petitions in HCJ 10650/03 **Abu Gwella v. Minister of the Interior** and HCJ 5030 **HaMoked: Center for the Defence of the Individual v. Minister**

of the Interior, is that the Citizenship and Entry into Israel Law is an injurious, unconstitutional and disproportionate law, which should be revoked.

The Factual Infrastructure

The Parties

8. Petitioner 1 (hereinafter: **petitioner 1**), an Israeli resident, and petitioner 2 (hereinafter: **petitioner 2**), originally a West Bank resident, married in 1996, and in 1998 their daughter, petitioner 3, was born. Ever since she married. Petitioner 2 has been living in Israel, and from 2003 to date she receives residency permits in Israel within the framework of family unification proceedings.

9. Petitioner 4 (hereinafter: **HaMoked**) is a registered not-for-profit association the offices of which are located in Jerusalem, which acts for the promotion of the human rights of Palestinians in OPT. Among other things, petitioner 4 handles family unification proceedings of Palestinians in Israel with their family members from the OPT.

10. The respondents participated, either jointly or severally, in the legislative proceedings involving the renewal of the Temporary Order: respondents 2-4 in the government vote which was held on March 19, 2014 and respondent 1 in the plenum vote which was held on the same day.

Petitioners' matter

11. The application of petitioner 1, a permanent resident in Israel, for family unification with petitioner 2, originally a resident of the OPT, was submitted on November 20, 1996, shortly after their marriage.

12. On November 8, 1998, two years after its submission, the respondent denied the application for the laconic reason that "a center of life was not proved".

13. The spouses appealed said decision and after they have provided, once again, ample evidence concerning their residency in Jerusalem, in August 2000, their family unification application was approved, almost four years after its submission. A first residency permit in Israel was received by petitioner 2 within the framework of the family unification proceedings in September 2000.

    A copy of the approval of the application for family unification dated August 22, 2000 is attached and marked **P/1**.

    A copy of the residency permit in Israel which was granted to petitioner 2, valid from August 22, 2000 – September 18, 2001 is attached and marked **P/2**.

14. In June 2001, two months before the expiration of the residency permit which was granted to petitioner 2, the spouses turned to the respondent, according to the graduated procedure, and submitted an application for the extension of the residency permit in Israel, together with documents for the substantiation of a center of life in Jerusalem.

15. On December 25, 2002, respondent's letter was received, according to which the family unification was denied "for security reasons".

16. On February 4, 2002, the petitioners turned to the respondent, through HaMoked, and requested him to reconsider the denial of the family unification application, in view of the fact that neither of the spouses has ever been interrogated or detained.

A copy of Hamoked's letter to the respondent dated February 4, 2002 is attached and marked **P/3**.

17. On February 12, 2002 respondent's response was received, which stated that the December 2001 letter should be regarded as a final response.

    A copy of respondent's response dated February 12, 2002 is attached and marked **P/4**.

18. On April 15, 2002, HaMoked requested to receive additional details regarding the security denial.

    A copy of HaMoked's letter dated April 15, 2002 is attached and marked **P/5**.

19. As no response has been received, on September 5, 2002 a petition was filed with the court for administrative affairs (AP 761/02).

    A copy of the petition without its exhibits is attached and marked **P/6**.

20. On October 17, 2002, respondent's preliminary response to the petition was filed. In the response, the respondent notified that following an additional examination, it was resolved not to deny the family unification application. In addition, the respondent notified that the residency permit of petitioner 2 would be extended within the framework of the family unification proceedings. Hence, the respondent decided that the processing of the family unification application, which was submitted in 1996, would continue, without interrupting the continuity thereof. In view of respondent's response, the petition was deleted.

    A copy of respondent's preliminary response is attached and marked **P/7**.

    A copy of the decision concerning the deletion of the petition is attached and marked **P/8**.

21. On November 12, 2002, the petitioners sent the respondent updated center of life documents.

    A copy of the cover letter which was attached to these documents dated November 12, 2002, is attached and marked **P/9**.

22. Only on March 9, 2003, after reminder letters were sent and telephone discussions were held with the respondent and the attorney who handled the petition, the application was approved and the petitioners were summoned to attend respondent's bureau on March 27, 200, for the receipt of a referral to the DCO.

    The approval of the family unification application dated March 27, 2003 is attached and marked **P/10**.

23. Since then and until the date hereof, for about eleven years, petitioner 2 has been staying in Israel by virtue of permits. It should be noted that when the government resolution entered into force in May 2002, petitioner 2 had to complete six months of the graduated procedure, before she could file an application for an A/5 visa.

    Copies of the entry into Israel permits which petitioner 2 received from 2003 to date are attached and marked **P/11 A-N**.

24. On February 21, 2013, the petitioners submitted to the respondent an application for the upgrade of petitioner 2's status and for its adjustment to a temporary residency status (A/5 visa). Said application was based on legal developments which took place regarding the right for upgrade of individuals whose status should have been upgraded on the eve of the government resolution, but

due to a delay in the processing of the application, in its different stages, the upgrade did not materialize (mostly AAA6407/11 **Dejani v. Minister of the Interior** (hereinafter: **Dejani**).

A copy of the upgrade application dated February 21, 2013 is attached and marked **P/12**.

25. On October 9, 2013 respondent's response was received which denied petitioners' upgrade application based on respondent's sweeping decision according to which:

> Following the judgment which was given in AAA 6407/11 **Dejani v. Ministry of the Interior**, which concerned the issue of delays in status upgrade applications, a decision was made by our office, that any status upgrade application which raises the argument that the processing thereof was unjustifiably delayed as specified above, and which was submitted **after January 1, 2010** would be denied on the grounds of delayed submission, in view of the significant evidentiary damage caused to our office.

A copy of respondent's decision dated October 9, 20113 is attached and marked **P/13**.

26. On October 27, 2013, the petitioners appealed respondent's decision which denied their application for the upgrade of petitioner 2's status. The appeal was filed both against respondent's decision not to upgrade petitioner 2's status as well as against his general and sweeping decision, to deny any upgrade application which was submitted after January 1, 2010 by individuals whose status should have been upgraded prior to the government resolution, but was not upgraded due to an unjustified mistake or delay of the Ministry of the Interior.

A copy of the appeal dated October 27, 2013 is attached and marked **P/14**.

27. On February 18, 2014, respondent's response to the appeal was received which stated that his decision to deny the application for the upgrade of Mrs. Khaleq's status remained unchanged. The respondent argued that there was about a five-year delay in the submission of the upgrade application of the Khaleq spouses, who were represented by HaMoked for many years, and that the state's notice in AAA **Dufash** did not open the door for the submission of upgrade applications for an unlimited period of time.

Respondent's denial of the appeal dated February 18, 2014 is attached and marked **P/15**.

28. On March 11, 2014 the petitioners filed an appeal with the appellate committee for foreigners of respondent 3.

A copy of the appeal numbered 203/14 without its exhibits is attached and marked **P/16**.

29. However, on May 1, 2014 the appellate committees of respondent 3 stopped operating and were replaced by the courts of appeals which act in their stead as of June 1, 2014. Therefore the appeal was deleted.

A copy of the decision for the deletion of the appeal is attached and marked **P/17**.

30. On May 8, 2014, judgment was given in AAA 9167/11 **Hassan v. Ministry of the Interior** (hereinafter: **Hassan**). In a nutshell, it should be noted, that in said judgment it was held that respondent's refusal to accept upgrade applications according to the **Dufash** judgment, which were submitted after January 1, 2010, was reasonable and proper, even if a mistake or an unjustified

delay occurred at the time in the approval of the family unification application, as happened in petitioners' case.

31. In view of **Hassan**, the petitioners believe that the possibility to apply for an upgrade of petitioner 2's status – according to **Dufash** and the legal developments associated therewith – is no longer viable.

Exhaustion of remedies

32. On February 10, 2014, a position paper regarding the Temporary Order was sent by petitioner 4 to respondent 3. Among other things, petitioner 4 expressed its opinion on the unlawfulness of the Temporary Order, the need to conduct a thorough and substantial debate before taking a vote on the extension of the Temporary Order and the need to provide a solution to individuals who live in Israel for a long period of time under residency permits only. No response was provided to the position paper.

The position paper is attached and marked **P/18**.

33. On March 19, 2014, the validity of the Law was **manipulatively extended, following a quick and non-exhaustive debate,** only – as reported by the media – to have the Law extended before the Knesset's vacation.

The report of Jonathan Liss, *Ha'aretz*, concerning the extension of the Law is attached and marked **P/19**.

34. In the debate itself, MK Hanin Zuabi referred to recent judgments (which will be discussed in detail in this petition below), which urged the legislator to find a solution for Palestininas who live in Israel for many years under residency permits only, and examine the possibility to upgrade their status:

> Now I don't even want to discuss the family unification matter on a general and substantial level, but rather on a practical level. **The courts, in a host of recent judgments, noted that the legislator should change the law and find a solution for individuals who have been residing in Israel for dozens of people** (should be: years) **and receive, every year, year after year,** (they receive) **a security clearance. So, if, over dozens of years, this family receives a security clearance it means that they do not pose a security threat – I will even use the discourse of this Knesset – they do not pose a security threat**. There are thousands of families like this - which every year, every year receive such a clearance. So, if every year they receive the clearance it means that they pass the threat test, so if they pass the threat test why shouldn't they be excluded? Why shouldn't their status be upgraded? And it is not only the opinion of lawyers and human rights associations, but rather of the Israeli courts which say: it is just harassing people, it is just abusing these people (…) and punishing them for having chosen a Palestinian to establish a family.
>
> (Knesset minutes, Vo. 23, meeting 129, March 19, 2014, page 240),

35. The words of MK Zuabi were not responded to by the Minister of the Interior and no discussion of the above referenced judgments was conducted.

36. Thus, by a stroke of a hand, almost automatically which already seems like a habit, the respondents sentenced thousands of families to a harsh fate.

37. On March 25, 2014, a letter concerning petitioner 2's matter was sent to respondent 3 and MK Miri Regev, the chairperson of the Internal Affairs and Environment Committee of the Knesset, in which the petitioners complained of the fact that the position paper which was submitted prior to the extension of the Law was disregarded, and demanded to upgrade her status in view of the fact that she has been living in Israel for many years under residency permits, despite the fact that no security argument was raised against her, and in view of the most recent judgments of this honorable court. The letter remained unanswered.

    The letter dated March 25, 2014 is attached and marked **P/20**.

38. In view of respondents' disregard of petitioners' letters, the latter turn to this honorable court for relief.

The Temporary Order - Background

39. In May 2002, the government of Israel resolved to completely freeze family unification proceedings (hereinafter: **family unification proceedings**) between Israeli residents and their spouses, OPT residents. Following said decision, the Minister of the Interior refused to accept new family unification applications and stopped the processing of family unification applications which have already been submitted but in which a decision has not yet been made. In addition, the Ministry of the Interior stopped the proceedings for status upgrade of OPT residents whose family unification applications have already been approved.

40. In August 2003, the stay of the family unification proceedings with family members OPT residents, was entrenched in the Citizenship and Entry into Israel Law, within the framework of the Temporary Order, which was extended periodically, until this day, and most recently, for the 15th time, on March 19, 2014, as aforesaid.

41. The Temporary Order provides in section 2 thereof, that the Minister of the Interior will not grant a resident of the Area a residency visa in Israel pursuant to the Entry into Israel Law, and that the commander of the Area will not grant a resident of the Area a residency permit in Israel according to security legislation in the Area.

42. However, certain exceptions to the above rule were established in the Law, and those relevant to our case enable:

    a. To grant a residency permit, as opposed to a status of citizenship or residency, to a Palestinian male over 35 years of age and to a Palestinian female who is at least 25 years old, to prevent their separation from their Israeli spouses (section 3 of the Temporary Order);

    b. To grant a residency visa in Israel to a minor up to the age of 14, and a military residency permit to a minor between the ages of 14-18, to prevent their separation from their custodian parents (section 3A of the Temporary Order).

43. Family unification applications of Palestinians being the subject matter of this petition, such as petitioners' application, were approved by the Minister of the Interior and by virtue of said approval, the military commander issued a residency permit to the OPT family member, according to section 3 of the Temporary Order. According to section 2 of the Temporary Order, the status of individuals holding residency permit, will not be upgraded and they will remain without status in Israel.

44. **Hence, the Temporary Order creates a large group of individuals – a group which keeps growing over the years – whose presence in Israel with their Israeli family members is permitted under military residency permits only**.

45. Thus, a reality was created in which many Palestinians, whose family unification applications with their spouses, Israeli residents, were approved by the Minister of the Interior, live in Jerusalem and elsewhere in Israel, maintain their center of life and raise their children therein, but hold residency permits only, renewable once annually, with no ability to upgrade their status, live safely and obtain social rights. This reality, which continues for years, is shared by many, who live in a personal, family and social state of insecurity, like "present absentees".

The petitions and the Adalah and Gal-on judgments

46. This honorable court discussed twice petitions against the lawfulness of the Temporary Order: a petition against the original version of the Temporary Order (HCJ 7052/03 **Adalah v. Minister of the Interior** (hereinafter: **Adalah**)) and a petition against the amended version of the Law (HCJ 466/07 **Gal-on v. the Attorney General** (hereinafter: **Gal-on**). We shall hereinafter refer to statements made by the court in the two judgments which discussed the Law, and which are relevant to the case at hand.

The security purpose of the Law

47. In **Adalah**, both the state and the Supreme court emphasized, that the sole purpose of the Temporary Order was a security one:

> What is the purpose of the Citizenship and Entry into Israel Law? Opinions are divided on this question in the petition before us. Some of the petitioners and respondent 4 (the 'Jewish Majority in Israel' Society) think that the purpose of the law is not merely a security purpose but also a 'demographic' one. According to them, the law is intended to restrict the increase of the Arab population in Israel by means of marriage to residents of the territories. The respondents, however, argued before us that the purpose of the law is merely a security one. I am of the opinion that the respondents are correct. In my opinion, the purpose of the Citizenship and Entry into Israel Law is a security one and its purpose is to reduce, in so far as possible, the security risk posed by the foreign spouses in Israel. The purpose of the law is not based on demographic considerations. This conclusion is based on the legislative history and on the content of the provisions of the law.
>
> (*Ibid.*, paragraph 79 of the judgment of the Honorable President *emeritus* Barak, Justice Aharon Barak).

48. In the response affidavit submitted by the state in HCJ 466/07 (**Gal-on**), it was also clarified by the state that the purpose of the Temporary Order was a security one, and that its purpose was to prevent the settlement in Israel of individuals who fall within the "risk profile":

> The law was enacted as a Temporary Order, which refers to a time of war. It does not wish to establish a long term demographic policy. The law does not entirely prevent the entry of enemy residents. With respect to residents of the Area, the law is based on a presumed risk profile of terrorists and collaborators. In fact, it mainly acts to **defer the realization of residency in Israel rather than to deny the right, if any**.

> The provisions of the law focus on the security risk, and do not relate at all to a demographic purpose. Thus, if the purpose of the law was a demographic one, there was no room to approve the settlement in Israel of enemy residents who do not fall within the risk profile…
>
> … on the other hand, the law before us, **does not prevent, in the vast majority of cases, settlement in Israel, but rather postpones it until such time as the foreign spouse no longer falls within the risk profile**… even the data, according to which thousands of enemy residents settled down in Israel during the last three years, attest to the fact that the law does not have a demographic purpose.
>
> (*Ibid*., paragraph 153, the emphases were added by the undersigned)

A copy of the relevant pages of the above response affidavit is attached and marked **P/21**.

The Gal-on judgment: the passage of time is meaningful

49. As is known, the **Adalah** petitions were denied by a majority of a single vote. The vast majority of the Justices were, indeed, of the opinion, that the Temporary Order violated the right to equality and the right to have a family, but the late Justice Edmond Levy held that the petitions should be denied in order to enable the state to amend the Temporary Order in a manner which would reduce the violation of constitutional rights.

50. The **Gal-on** petitions were filed after the Temporary Order was amended following the **Adalah** judgment. Although the petitions were denied by a majority opinion, some of the majority Justices warned that the passage of time was meaningful and could affect the decision regarding the constitutionality of the Law.

51. Thus, for instance, the Honorable Justice E. Rubinstein held as follows:

> The legislator must therefore be very attentive to the changing reality, on several levels. Firstly, hopefully, the security situation will improve in the future in a manner which will reduce the need to use protective measures, or at least, render the taking of the risk involved in their partial or complete removal, inevitable. Secondly, changes may occur which will make the specific examination more practical and efficient – thus, giving rise to the second sub-test (the "least injurious measure"). **The authorities must always "be on the alert" with respect to the security needs, as well as with respect to the possibility of creating effective measures which are less injurious.** They must also make an effort and examine the possibility of handling extraordinary cases more efficiently, both within the framework of the humanitarian committee as well as by **thinking of additional mechanisms which may assist those spouses who are currently prevented from establishing their home together in Israel**.
>
> The position which supports the constitutionality of the Temporary Order does not exonerate the legislator, and the executive authority, from seeking for ways to mitigate the decision, for yet another reason: **the right approach of making an effort to go towards someone who did not sin, who pays – as unfortunately happens in times of war – the price for those who did sin**. On many occasions the security forces

> believe, on first sight, that a certain security measure is irreplaceable, and on second sight – after an extensive investment of thought and resources – a proper replacement is found.
>
> (*Ibid.*, paras. 48-49 of the judgment of the Honorable Justice Rubinstein. Emphases were added by the undersigned).

52. And it was so held by the Honorable Justice Hendel in his judgment:

> My colleagues have discussed in length the fact that the amended law was enacted in the form of a temporary order which was extended about twelve times. In the former round of the case in **Adalah**, my colleague, deputy president E. Rivlin, was of the opinion that due to said classification of the law there was no need to intervene therewith. According to him, in the context of this discussion, the long time which passed and the numerous extensions of the amended law, not only fail to strengthen the position of the state, but may probably have the opposite effect. In my opinion, it is sufficient to say that the above legal situation does not support the position of the state.
>
> The temporary (order) endured for a long time and did not change. The difficult climate has been accompanying us year round, for many years. Sitting in this court, we are obligated, while exercising judicial review, to watch the clock. I am of the opinion, as aforesaid, that there is no reason to revoke the law for being unconstitutional. However, the state would do well to should it enact a law which would refer to the issue of immigration in the present context and in general. According to the updating notice of the state's representative, the competent authorities indeed vigorously act in this direction. Indeed, if not, two things are expected from the point of view of the constitutional review. The first one is that the discussion concerning the extension of the amended law will be an in-depth and thorough discussion - substantial rather than formal. The second one is **that the legislator will be attentive to the changing reality for the purpose of considering whether the impingement is still justified**.
>
> (*Ibid*., paragraph 7 of the judgment of the Honorable Justice Hendel. Emphasis added by the undersigned).

53. Hence, it is clear that the judgments in **Adalah** and **Gal-on** were given against the backdrop of a specific reality and in view of the classification of the law as a temporary order. In view of the above, it is not surprising that lately, the Justices of this honorable court started to discuss cases of individuals, with respect of whom the declared security purpose is no longer valid. We shall now discuss these cases.

<u>Legal developments following the Gal-on judgment</u>

54. Recently, the Justices of this honorable court started to draw the attention of the respondents to the need to consider the condition of individuals, who have been living in Israel for many years under military residency permits, within the framework of family unification proceedings with Israeli family members. In cases of individuals like petitioner 2, whose application for permit renewal is re-examined *de novo* every year, for many years, the security purpose of the Temporary Order,

which ostensibly justifies not to upgrade the status, is no longer relevant, and therefore her status should be upgraded:

> Under these circumstances, it seems that the provision regarding the stay of status upgrade of individuals, who fall under the transitional provisions, is no longer necessary in view of the security purpose of the Temporary Order Law – a purpose which was emphasized by this court when it examined the constitutionality thereof. Firstly, as far as the latter are concerned, not only that an individual examination may be conducted, but rather, such an examination is actually conducted once annually upon the renewal of the permit. Secondly, these individuals have been subordinated, for over a decade, to the examination of the security agencies, in view of the fact that permits are renewed only in the absence of security preclusion. Thirdly, even after a person's status in Israel is upgraded – from residency under a DCO permit to residency under an A/5 temporary residency visa (and this is the category with which we are concerned) – he continues to be subordinated to security examination, in view of the provisions set forth in respondent's procedures within the framework of the graduated procedure.
>
> Therefore, **I am also of the opinion that the legislator should reconsider the limitation imposed on the upgrade of the status of individuals who live in Israel lawfully under a residency permit pursuant to the transitional provisions of the Temporary Order**.
>
> (paragraph 19 of the judgment of the Honorable Justice Vogelman in AAA 6407/11 **Dejani v. Ministry of the Interior** (hereinafter: **Dejani**), Emphasis added by the undersigned)

55. The Honorable Justice Naor emphasized in **Dejani** that the position concerning the need to upgrade the status was not limited only to cases of individuals whose family unification applications were negligently handled by the Ministry of the Interior, as a result of which the commencement of their family unification procedure was delayed, but was rather a general position:

> I wish to make a general comment concerning the failure to upgrade the status of individuals who embarked on the graduated procedure prior to the government resolution of 2002: as mentioned by my colleague, we denied petitions against the lawfulness of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003. The validity of said law was extended until now from time to time. **I am of the opinion that it would be appropriate – if and when the law is extended again – to take into consideration the condition of the individuals who do not receive an upgrade despite the fact that they have commenced the graduated procedure such a long time ago**. Perhaps with respect to them, after such a long stay in Israel, an individual examination may be conducted (see and compare my position in HCJ 7052/03 **Adalah - Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior**, IsrSC 61(2) 202 (2006), paragraphs 19-23 of my judgment). Perhaps the fact that the petitioners and others like them do not receive an upgrade despite the fact that they live in Israel for such a long time, is the underlying basis for the approach manifested by the **Dufash** judgment, and by the many other judgments which were submitted by petitioners' counsel and

> the judgments which were mentioned by my colleague, Justice Vogelman, and myself. However, **it is my opinion that the solution for the failure to upgrade, should be general rather than conditioned on the question, which may no longer be properly examined, why the processing of this or other family unification application was delayed over a decade ago. The above said should be considered by the legislator.**
>
> (**Dejani,** paragraph 6 of the judgment of the Honorable Justice Naor. Emphases added by the undersigned).

56. The need to find a solution for individuals whose status was frozen for such a long time in view of the Temporary Order, was discussed in additional judgments of this honorable court:

> From a wider perspective, which exceeds the boundaries of this case, here too, there is an acute need for a legislative review of the arrangement of the status of individuals whose status was "frozen" and who found themselves in this "in-between" state, "hanging in midair", for many years. I have no choice but to join, on this issue, the words of the Deputy President, M. Naor in **Dejani** according to which "it would be appropriate… to take into consideration the condition of the individuals who do not receive an upgrade despite the fact that they have commenced the graduated procedure such a long time ago." (paragraph 6 of her judgment).
>
> (AAA 4014/11 **Abu 'Eid v. Ministry of the Interior**, paragraph 38 of the judgment of the Honorable Justice Barak-Erez).

And also:

> Parenthetically, I would like to join the comments made by the court in **Dejani** (paragraph 6 of the judgment of the Deputy President M. Naor; paragraphs 17-19 of the judgment of Justice U. Vogelman) concerning the need to find a solution for the individuals who entered the graduated procedure prior to the government resolution, but cannot upgrade their status due to the Temporary Order Law. Like my colleagues, I am of the opinion that there is room to consider the possibility to conduct individual examinations of upgrade applications of such individuals. **In fact, many of them reside in Israel for many years and are subordinated to continuous examination by the various authorities. The cases of these applicants undergo individual examinations by the security agencies as part of the procedure for the extension of their residency permits each and every year, and it therefore seems that the conduct of an individual examination for the purpose of upgrading their status would not impose an unbearable burden on the state**. The arrangement of their status within the framework of such a solution, seems more just and simpler than an examination of the conduct of the authority in the processing of applications which were filed in the 90's. Such an examination is often made against the backdrop of a lacking factual infrastructure and in addition, imposes a heavy burden on the parties who are required to bring evidence regarding events which occurred more than a decade ago.

> (AAA 9168/11 **A v. Ministry of the Interior**, the judgment of the Honorable Justice Zylbertal. Emphasis added by the undersigned)

And in addition:

> … we are concerned with a complex situation which creates a difficulty, when there is a difference between the various family members, some of whom have status in Israel and some of whom stay by virtue residency permits. However, the legal situation, which was discussed many times by this court in its judgments, dictates the result. We can join our voice once again to the comments of Justice Zylbertal in paragraph 23 of his judgment in AAA 9168/11 **A v. Ministry of the Interior** (November 25, 2003), who, following previous judicial comments, called **for finding an individual solution in such cases, and the call has been laid at the authorities' doorstep**.
>
> (AAA 6480/12 **Dahnus (Rajbi) v. Ministry of the Interior**, judgment of the Honorable Justice Rubinstein. Emphasis added by the undersigned).

57. As described above, despite repeated statements of the court on this issue, the respondents did not take into consideration said comments – and it even seems that they have completely disregarded them – when they extended the Law once again.

Reducing the number of individuals who are entitled to receive status upgrade

58. As is known, in AAA 8849/03 **Dufash v. Director of the Population Administration Office** (given on June 2, 2008, hereinafter: **Dufash**), this honorable court held that the status of an applicant in a family unification procedure may be upgraded, **notwithstanding the provisions of the Temporary Order Law**, even if his status was not upgraded prior to the government resolution dated May 12, 2002, which froze the family unification proceedings, if the failure to upgrade resulted from respondent's mistake or unjustified delay. Thus, a limited group of individuals was created, which succeeded to prove that their status was not timely upgraded, due to failures of the Ministry of the Interior, following which their status was upgraded notwithstanding the restrictions imposed by the Temporary Order.

59. It should be further noted, that the courts found it appropriate to broaden the above **Dufash** judgment, and determined that an unjustified delay in the initial approval of a family unification application, constituted, in certain circumstances, a reason for an upgrade of status (see for instance AP (Jerusalem) 8228/08 **Hirbawi v. Minister of the Interior**; AP (Jerusalem) 7887-07-10 **Tufaha v. Minister of the Interior**; AP (Jerusalem) 4469-04-11 **Bader v. Minister of the Interior**).

60. The **Dejani** judgment, as well as the **Abu 'Eid** and **A** judgments which were given later on, concerned applications for an upgrade of status according to the **Dufash** judgment. These judgments stated, parenthetically, that the examination of upgrade applications according to the "**Dufash**" arguments posed a difficulty, in view of the long time which passed from the effective date – May 12, 2002. In view of said difficulty, the court added in said judgments its comments, which were quoted broadly above, concerning the need to find a solution for individuals who lived in Israel for many years under permits only.

61. Respondent 2 rejoices at the statements of the **Dejani** judgment as one who finds great spoil – but only at some of them. Ever since the **Dejani** judgment was given, petitioner 4 has been receiving denials of status upgrade applications of applicants represented by it, according to which their upgrade applications were denied, for the following reason:

> Following the judgment which was given in AAA 6407/11 **Dejani v. Ministry of the Interior**, which concerned the issue of delays in status upgrade applications, a decision was made by our office, that any status upgrade application which raises the argument that the processing thereof was unjustifiably delayed as specified above, and which was submitted **after January 1, 2010** would be denied for a delayed submission, in view of the significant evidentiary damage caused to our office (attached as Exhibit P/12).

62. It should be emphasized that it is a new policy, which is applied retroactively and with respect of which notice was not given to the public on the relevant date.

63. Hence, respondent 3 has recently started to reduce the number of individuals who may join the group, which is anyway limited, of people who achieved some more stability in their lives by having their status upgraded after many years during which they have been living in Israel.

64. And on the other hand, respondent 3 ignored the repeated statements of the court regarding the need to find a comprehensive solution for the individuals who lived in Israel without status for years. Petitioners' position is that respondent 3 distorts the intention of the court as expressed in its statements in **Dejani**, **Abu 'Eid** and **A.**, by selectively choosing the statements which suit his purpose, and by ignoring those calling for an action and change.

65. In other words: where they were requested to expand – the respondents chose to limit. Where they were requested to give relaxations – the respondents chose to impose difficulties. The above new policy of the respondent justifies and strengthens petitioners' position, according to which a comprehensive solution must be found for petitioner 2 and individuals in her condition.

The Legal Argument

> In exercising its discretion, the administrative authority is limited by the general rules of administrative law. It must act within the limits of its authority under the law; it must take into account all relevant considerations for the purpose of achieving the purpose of the law and refrain from taking into account extraneous considerations; it must exercise its discretion equally and refrain from discrimination; it must act fairly and honestly; and it must act according to a standard of conduct which is within the realm of reasonableness. This standard reflects, *inter alia*, the proper balance between the different relevant considerations. Theses general rules apply to all cases in which discretion is vested with the administrative authorities (HCJ 4422/92 **Shlomo Ofran v. Israel Land Administration**, IsrSC 47(3) 853, paragraph 8 of the judgment of the Honorable Justice Dorner).

Unreasonableness and Arbitrariness

66. As described above, the position of the state, which was also accepted by this honorable court, is that the purpose of the Temporary Order is a security one. The state has even stated, in its response affidavit in HCJ 466/07 that in order to achieve the security purpose of the Law, it only "postpones the settlement" in Israel "until such time as the foreign spouse no longer falls within the risk profile" (namely, when women are over 25 years of age and men are over 35 years of age).

67. The group of individuals with which this petition is concerned has long left the realm of the "risk profile". These individuals satisfy the exceptions of the Temporary Order and their life in Israel is

regulated by military residency permits. They prove to respondent 3, year after year, that they do not pose a security threat, and their permit is renewed. Each year, when their permit is renewed, the security argument in their case weakens.

68. The above should be coupled with the statements of the court concerning the Temporary Order itself, including the statements regarding the need to re-examine the required scope of harm inflicted on family members of Israelis; to re-examine the security needs; to conduct a comprehensive, thorough and substantial discussion regarding the renewal of the Law.

69. In view of all of the above, it is not without reason that the court found it necessary to express its opinion regarding said individuals and state that it would be appropriate to remove, in their case, the restriction imposed on the upgrade of status, and enable them to live in Israel under an actual residency visa.

70. Hence, leaving individuals like petitioner 2 without status, and the arrangement of their stay in Israel by residency permits only, despite the fact that it has been proved time and time again that they do not pose a security threat, do not satisfy the demand of reasonableness.

Disproportionate violation of human rights

> The lawfulness of a governmental act is therefore conditioned on the question of whether the governmental act taken – and which is (rationally) adequate for achieving a proper purpose – violates values and protectable principles in a disproportionate manner. The requirement is that the governmental act – which is adequate for achieving the proper purpose – violates protectable principles and values to the least extent possible, and that there is a proper proportion between the injury caused by it and the benefit which arises from the achievement of the proper purpose. Hence the need to examine the protectable values and principles, as only with relation to them the proportionality of the measure taken may be determined. Human rights are situated in the center of such values and principles (HCJ 4330/93 **Ganem v. Israeli Bar Association, Tel Aviv District Committee**, IsrSC 50(4)221, paragraph 12 of the judgment of the Honorable President (as then titled) Barak).

71. We would like to remind once again, that the declared purpose of the Temporary Order is a security purpose. However, when an individual like petitioner 2 "exits" the risk profile, lives in Israel for many years under a permit, and her matter is re-examined, year after year, by the security agencies, the security argument raised against her gradually loses its meaning.

72. On the other hand, the Temporary Order severely violates human rights – even of individuals who "get" to live here under residency permits. We shall explain.

73. Firstly, it should be reminded that different graduated procedures were established by the state of Israel for the arrangement of the status of foreign family members of citizens and permanent residents (particularly, spouses and children of permanent residents who were born outside Israel). Over the course of the different graduated procedures, the foreign family member lives in Israel under different temporary residency permits, until permanent status is obtained (citizenship or residency).

See on this issue: HCJ 7139/02 **Abas-Batsa v. Minister of the Interior**; HCJ 2208/02 **Salame v. Minister of the Interior**; AAA 4614/05 **State of Israel v. Oren**.

74. The Temporary Order imposes restrictions on the graduated procedure between Israelis and their family members from the OPT, and the family member from the OPT must satisfy certain special criteria for the purpose of embarking on the family unification procedure (sections 3, 3A of the Temporary Order). In addition, the spouse from the OPT will receive a residency permit only and will not "progress" in the graduated procedure towards a temporary residency visa or a permanent status.

75. Thus, inequality is created between Israelis with spouses from the OPT and Israelis whose spouses are not "residents of the Area", and the right to family life is violated.

76. Indeed, this honorable court held in HCJ 466/07 that the violation of the rights by the Temporary Order meets the conditions of the limitation clause, including the condition of proportionality. However, petitioners' position is that when individuals who lawfully live in Israel for many years are concerned, the constitutional balance changes in favor of the violated rights and the impingement is no longer proportionate.

77. Even if we assume, for discussion purposes, that the first sub-test of proportionality – the rational connection test – is satisfied in the case before us, then the second sub-test – the least injurious means – is not satisfied. Petitioners' position is that where it has been proved, over the course of many years, that no security threat is posed by a certain individual, then the same purpose – security protection – may be achieved by a less injurious measure, namely by status upgrade to an actual residency visa.

78. The third sub-test is not satisfied in the case at hand as well, since, in view of the weakness of the security argument in cases concerning individuals like petitioner 2, the relation between the injury and the benefit is no longer appropriate.

    For a detailed discussion of the proportionality tests see, for instance, HCJ 5016/96 **Horev v. Minister of Transport**.

79. Therefore, as far as such individuals are concerned, the measure taken to achieve the security purpose is no longer proportionate. It violates human rights – including the right to family life and the right to equality – beyond the required extent. Said disproportionate violation does not satisfy the criteria outlined by the Justices of this honorable court when they approved the validity of the Temporary Order in the **Gal-on** judgment. Accordingly, when individuals such as petitioner 2 are concerned, the provision of the Law which prevents status upgrade does not satisfy the tests of proportionality and should be revoked.

Extension of the Temporary Order

> "… the most important restriction is the mere fact that the proposed law (the Citizenship and Entry into Israel Law, the undersigned) is a temporary order for one year, rather than a general provision not limited by time… the interval will allow us to examine during the up-coming year long term solutions… ".
>
> (the words of the attorney general, M. Mazuz, in the meeting of the committee for internal affairs of the Knesset of July 14, 2003, prior to the enactment of the Citizenship and Entry into Israel Law).
>
> But even if we disregard the complex question – whether it is appropriate that the laws of the Knesset, and particularly a law with such a significant effect, would be extended by a governmental order, which is approved by

> the parliament in a short procedure and by a single vote which may not be based on all relevant data, I am afraid that we can no longer adopt the approach taken at the time by my colleague, Deputy President E. Rivlin, and which was appropriate at the time, according to which "there is no room for a judicial declaration invalidating the Temporary Order: the new law has not yet matured – if indeed the incoming Knesset decides to enact such a law, and on the other and the current law is about to expire" (the above HCJ 7052/03 **Adalah**, page 545). Ostensibly, the legislator has intentionally chosen not to give the Citizenship Law a permanent seat in the book of statutes, and designated for it, *ab initio*, a short life span. But what was designated to be a temporary order turned, unfortunately, into a "long lasting order".
>
> (The late Honorable Justice Levy in **Gal-on**, paragraph 33 of his judgment).

80. Not only the **Dejani**, **Abu 'Eid**, **A**. and **Dahnus** judgments were disregarded by the respondents when the extension of the Temporary Order was discussed by them. The Law in its entirety was not thoroughly and properly discussed, as the respondents are obligated to do when a law which so severely violates human rights is extended.

81. As described above, the respondents dedicated only one day for the extension of the Law, and squeezed into it both the government discussion as well as the debate in the Knesset plenum. The issue has not been discussed at all by the committee for internal affairs of the Knesset, and it is clear, that in such an expedited and superficial proceeding, the complete factual picture has not been presented before the decision makers before the fate of thousands was sealed.

82. All of the above, in complete contradiction with the statements of the Justices in **Gal-on,** who**,** as a condition for the validation of the Law, instructed the legislator to thoroughly consider and examine the reality, prior to the extension of the Law:

> The legislator must therefore be very attentive to the changing reality, on several levels. Firstly, hopefully, the security situation will improve in the future in a manner which will reduce the need to use protective measures, or at least, render the taking of the risk involved in their partial or complete removal, inevitable. Secondly, changes may occur which will make the specific examination more practical and efficient – thus, giving rise to the second sub-test (the "least injurious measure"). The authorities must always "be on the alert" with respect to the security needs, as well as with respect to the possibility of creating effective measures which are less injurious. They must also make an effort and examine the possibility of handling extraordinary cases more efficiently, both within the framework of the humanitarian committee as well as by thinking of additional mechanisms which may assist those spouses who are currently prevented from establishing their home together in Israel.
>
> (paragraph 48 of the judgment of the Honorable Justice Rubinstein in **Gal-on**)

83. Also, the classification of the Law as a renewable Temporary Order cannot be used by the legislator as an excuse for the failure to conduct a thorough discussion prior to its renewal from time to time:

> The measure of a temporary order, which is sometimes accompanied by a sense of urgency, can neither be used to replace the need – and certainly not for years – to conduct a serious, cautious and balanced discussion and public debate for the establishment of substantial arrangements, nor can it be used to circumvent the review mechanisms and supervision over the legislative act (and compare: The Poultry Breeders Association in Israel, *Ibid*).
>
> (paragraph 27 of the judgment of the Honorable Justice Arbel in **Gal-on**).

84. Instead, the respondents choose to extend the Law, again and again and again and again. And this time, like in previous times, the Law was extended as a matter of routine.

Conclusion

85. Petitioner 2 lives in Israel lawfully, under a permit, for many years. The limitation imposed on her by the Temporary Order, according to which her status may not be upgraded, does no longer serve the security purposes for which it was intended in her case, in view of the duration of her life in Israel and the proof regarding the absence of security threat.

86. This honorable court has indeed validated the Temporary Order and held that it satisfied the constitutional standards, but in recent judgments it transferred – again and again and again – the matter of individuals like petitioner 2, who live in Israel for many years under a residency permit only, to respondents' attention.

87. However, the respondents, on their part, disregarded – on the first hand – explicit and repeated statements of this court, and limited – on the other – the scope of the group of individuals who are entitled to have their status upgraded based on arguments of delay and evidentiary damage.

88. The demand presented in this petition is simple: to order the respondent to implement the comments of the court in **Dejani** and the judgments which followed it, both with respect to petitioner 2 as well as with respect to the other individuals in her condition. Should it fail to do so, the Temporary Order will become even more injurious – beyond the standards which guided the majority justices in **Gal-on**, when they held that the Law satisfied the conditions of the limitation clause.

Hence, in view of all of the above reasons, the honorable court is hereby requested to issue an *order nisi* as requested in the beginning of this petition, and after receiving respondents' response, make the order absolute, and obligate the respondents to pay costs of trial.

July 3, 2014

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