At the Supreme Court **HCJ 5051/11**
Sitting as the High Court of Justice Filing date: July 6, 2011

In the matter of:

1. **_____ Mazaro, ID No. _____**
2. **_____ Mazaro, born on April 1, 1999, Israeli resident**
3. **_____ Mazaro, born on November 17, 2000, Israeli resident**
4. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA**

All represented by counsel, Adv. Adi Lustigman (Lic. No. 29189) whose address for service of process is
27 Shmuel Hanagid Street, Jerusalem 94269
Tel: 02-6222808; Fax: 03-5214947

The Petitioners

v.

State of Israel: Minster of Interior

represented by the State Attorney's Office
29 Salah al-Din Street, Jerusalem
Tel: 02-6466590; Fax: 02-6466713

The Respondent

Petition for *Order Nisi*

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

a. Why he should not arrange the status of petitioner 1 in Israel (hereinafter: **petitioner 1**) by approving her registration in the population registry as a temporary resident of the state of Israel.

b. Why he should not establish and publish guiding criteria for the exercise of his power to grant temporary residency status in Israel vested in him according to section 3A1 of the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 (hereinafter: the **Temporary Order**).

c. Why he should not retract his refusal to provide the transcripts of the humanitarian committee so that the committee's transcripts would be provided as a matter of routine to an applicant requesting it, with the exception of the disclosure of privileged security aspects, if any.

Preface

1. Petitioner 1 is the daughter of an Israeli resident and a resident of the Occupied Palestinian Territories (OPT). After her parents' divorce, the mother of petitioner 1 returned to live in her parents' home in Israel together with petitioner 1. Ever since and until the date hereof, **for 26 years**, petitioner 1 has been living in Israel without any status. When she was still a minor, only 14 years old, petitioner 1 married her cousin, an Israeli resident. The spouses have two children who are also Israeli residents. Respondent's bureau informed the spouses that petitioner 1's status in Israel could not be arranged due to the fact that the marriage of minors could not be recognized. Before her spouse managed to arrange petitioner 1's status he was hit by a stray bullet in the head and ever since he has been disabled, paralyzed and incapacitated. Petitioner 1 remained with the two children without status and without rights.

2. After several attempts to arrange her status failed, petitioner 1 turned to the committee for humanitarian affairs which was established by virtue of the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003, which after years agreed to enable petitioner 1's to continue to stay in Israel under military stay permits, but denied her application for temporary residency status. The committee's denial of her application for temporary residency status was given nearly three years after the application had been submitted with no explanation. The committee stated as follows:

> **The special humanitarian reason for receiving a permit is the fact that you are the only functioning parent of the children. The permit will be in force for as long as you maintain a center of life in Israel and you take care of your minor children and did not change your marital status, subject to security and police evaluation**.

3. It is totally impossible to understand from the decision of the committee why petitioner 1's application for temporary status was denied, had the respondent checked whether the circumstances of the case justified the exercise of his power to give status, and whether weight was given to the fact that petitioner 1 has been living in Israel almost her entire life. Furthermore. The language of the decision indicates that once the children reach adulthood, petitioner 1's stay permits will not be extended. To date, the committee has failed to respond to petitioner 1's requests to receive the transcript of the hearing which was held by it.

The Parties

4. Petitioner 1, _____ Mazaro, born in July 19, 1983, is the daughter of an Israeli resident and married to an Israeli resident, a severely disabled person, and a mother of two young children who are Israeli residents. Petitioner 1 herself has no status in Israel. Hence the petition.

5. Petitioners 2 and 3 are the minor children of petitioner 1. They are Israeli residents.

6. Petitioner 4 is a not-for-profit association which has taken upon itself to assist victims of abuse and deprivation by state authorities, including, *inter alia*, by protecting their rights before the courts either in its own name as a public petitioner or by representing individuals whose rights were injured.

7. The respondent is the Minister empowered under the Entry into Israel Law, 5712-1952, to handle all matters arising from said law, including applications for status in Israel. The respondent is

empowered to accept or reject decisions of the committee for humanitarian affairs which is operated by it and which was established pursuant to section 3A1 of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003, and he is also empowered to make decisions pursuant to section 3C of the Temporary Order.

Factual Background

8. Petitioner 1 was born on July 19, 1983, in Nablus to an Israeli mother and a father who was an OPT resident. Petitioner 1 was registered after she was born in the OPT population registry. When she was an infant her parents divorced and petitioner 1 and her sister moved with their mother to Jerusalem. From 1985, when she was only two years old, and until this day – petitioner 1 has been only in Israel. Her mother, who was poor and a single-parent, was unable to meet respondent's requirements and arrange the status of her daughters in Israel. In those years the requirements for the arrangement of the status of a child who was born outside Israel, was registered outside Israel and one of whose parents was not Israeli were not entrenched in an orderly procedure, were not published and were not made available to the public in any manner. Respondent's forms were drafted in Hebrew only and it was very difficult to access respondent's bureau. The mother did not have the financial resources for the purpose of hiring an attorney to carry out the complicated procedures for her and she was unable to understand and carry out the procedural requirements by herself.

   A copy of the mother's identification card in which petitioner 1's details were registered without an identifying number is attached and marked Exhibit **P/1**.

9. Throughout the years, from kindergarten and during her school years petitioner 1 always studied in Israel. After the separation of her parents, petitioner 1's relations with her father and his family were severed. Ever since she was two years old she did not stay in the OPT. Only after her daughter _____ was born, very weak relations with the father were re-established. Said meager relations with the father came to end two years ago, when the father passed away.

10. At the age of 14 petitioner 1 married her cousin, an Israeli resident and moved from the home of her Israeli mother to home of her husband. The spouses have common grandparents who raised petitioner 1 together with her mother ever since she was a baby. When she was a minor and only 14 years old her husband was also unable to arrange her status as his wife, and petitioner 1 remained without status also after her marriage and after her two children were born.

11. In 2001, on or about the time petitioner 1 turned 18 years old, before her husband managed to arrange her status, the husband was shot in the head and fell ill. For a certain period after he was wounded petitioner 1's spouse was in a coma. Currently he is totally incapacitated, paralyzed, fed through a tube and cannot communicate verbally. Petitioner 1 stayed in Israel, her only home, with her husband and two children, Israeli residents – without a status. From 2004 Mr. Mazaro, the husband and father, is hospitalized in the Hertzog hospital and the Fund for the Treatment of Wards was appointed as his guardian. In the absence of status petitioner 1 could not be appointed as her husband's guardian. Mr. Mazaro comes to the family home on holidays and once monthly and is supported by his parents and his wife. Petitioner 1 visits her husband in the Hertzog hospital to the extent possible considering the permits and life constraints.

    A document concerning the hospitalization of Mr. Mazaro in the Hertzog hospital and a document of the Fund for the Treatment of Wards regarding Mr. Mazar's condition, are attached and marked **P/1 A**.

    Social reports regarding the family are attached and marked **P/2**.

12. Being a single mother, petitioner 1 raises her children in poverty and with gret difficulty. Petitioner 1's eldest daughter _____ who is 12 years old was near her father when he was shot and critically wounded. She suffers emotional problems until this day. The son, _____, who is ten years old, has a stomach disease which requires treatment and hospital supervision. Muhammad also has hemoglobin deficiency and severe calcium deficiency as a result of which, among other things, he lost his teeth.

    Medical records regarding the children are attached and marked **P/3**.

Communications with the respondent

13. On November 8, 2005, Mrs. Blumenthal from HaMoked called Mrs. Hagit Weiss, currently the managing director of respondent's East Jerusalem bureau, in a bid to find out what could be done to arrange petitioner 1's status. Mrs. Blumenthal requested that the matter be transferred to respondent's humanitarian committee. In response, Mrs. Weiss said that due to the fact the petitioner 1's mother failed to arrange her status before she turned fourteen and in view of the Temporary Order there was nothing which could be done in her matter and it could not be examined.

14. On August 15, 2006, a reasoned humanitarian application was submitted to the respondent on behalf of petitioner 1. In view of the fact that at that time it was not possible to apply to the committee directly, and notwithstanding the decisive position of the bureau's managing director, the application was submitted to the East Jerusalem bureau of the respondent who was requested to examine it through the humanitarian committee.

    The humanitarian application is attached and marked **P/4**.

15. On September 25, 2006, the application was denied due to petitioner 1's young age, who has not yet reached the age of twenty five. Needless to point out that said reason is not valid when an application which is based on humanitarian reasons is concerned.

    The denial letter is attached and marked **P/5**.

16. Hence, on November 23, 2006, petitioner 1 submitted an appeal against the denial of her application.

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

17. On December 18, 2006, the respondent dismissed the appeal arguing that that the matter could not be transferred to the humanitarian committee because it did not meet the requirements prescribed by law.

    The dismissal of the appeal dated December 18, 2006 is attached and marked **P/7**.

18. In August 2008 an application was submitted to the humanitarian committee for petitioner 1 by the human rights organization Saint Eve. The petitioners do not have a copy of said application.

19. On September 17, 2008, when she turned twenty five, petitioner 1 submitted a preliminary family unification application with her spouse through petitioner 4, HaMoked.

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

20. Only on December 24, 2008, petitioner 4 was informed that a humanitarian application had been submitted by another organization. The respondent notified, in a telephone inquiry which was

conducted with the clerk Mira Asaraf, that the processing of the application was stayed in view of a pending application before the committee. As the representation was transferred to the offices of petitioner 4, and given a pending humanitarian application, petitioner 4 continued to follow up on the handling of the application *vis-a-vis* the committee.

21. In a telephone conversation dated January 6, 2009, with Ms. Anna Kalbanov, the coordinator of the humanitarian committee, the petitioners were requested to provide a medical opinion regarding the condition of Mr. Mazaro. In a telephone conversation with Ms. Kalbanov from the committee dated June 7, 2009, Ms. Tom from HaMoked requested that the demand for documents be sent in writing due to the difficulty to obtain the documents from the Fund for Treatment of Wards which was responsible for Mr. Mazaro without a demand. In a letter of the same day Ms. for *[sic]*reiterated her request. On June 15, 2009, Ms. for *[sic]*sent another letter to the committee in which she reiterated her request for receipt of a written demand for documents.

    HaMoked's letters dated June 7, 2009, and June 15, 2009, are attached and marked **P/9**.

22. On July 7, 2009, Ms. Karawan from the Fund for Treatment of Wards notified by telephone that the medical opinion had been sent by facsimile to Ms. Kalbanov from the humanitarian committee.

23. In a telephone conversation dated July 13, 2009, with Ms. Anna Kalbanov the petitioners were requested to provide a social report, school reports and explanation of the status with the National Insurance Institute (NII). In a letter from the committee dated July 21, 2009, petitioner 1 was requested to complete a *curriculum vitae* form for security check purposes.

    The letter dated July 21, 2009, is attached and marked **P/10**.

24. On September 14, 2009, the petitioners sent the documents requested by the respondent.

    The letter dated September 14, 2009, is attached and marked **P/11**.

25. On May 17, 2010, June 16, 2010 and July 18, 2010, reminders were sent by the petitioners to the humanitarian committee. On June 30, 2010, the committee notified that the application was in process.

    Petitioners' letters dated May 17, 2010, June 16, 2010 and July 18, 2010, and the committee's letter dated June 30, 2010, are attached and marked **P/12**.

26. In a telephone conversation with Ms. Mishan from the humanitarian committee dated July 13, 2010, the petitioners were requested to transfer to the committee a social report. On October 17, 2010, the report was sent to the bureau.

    Petitioners' letter dated October 17, 2010, is attached and marked **P/13**.

27. On October 24, 2010, petitioner 1 was summoned for a hearing in respondent's East Jerusalem bureau which was scheduled for October 28, 2010.

    The summons letter dated October 24, 2010, is attached and marked **P/14**.

28. On October 28, 2010, petitioner 1 attended the hearing in which she explained her difficult life circumstances and provided comprehensive documents regarding the center of her life and the poor medical condition of her husband and children. Advocate Leora Bechor explained in the hearing to Ms. Melamed from respondent's bureau that petitioner 1was *de facto* an Israeli resident where she has been living since she was two years old.

29. On November 17, 2010, December 20, 2010, January 17, 2011 and May 12, 2011, reminder letters were sent to the respondent. In addition, petitioner 4communicated with the committee by telephone to check whether any progress was made in handling the application. On January 23, 2011 the committee notified that the application was in process.

    The reminders and the committee's notice are attached and marked **P/15**.

30. In a letter dated May 2, 2011 which was received in the offices of petitioner 4 on May 22, 2011, the committee notified that the respondent decided to give petitioner 1 stay permits, as aforesaid, on the grounds that petitioner 1 was the only functioning parent. The decision also stipulated that the permit would be in force for as long as the center of life of petitioner 1 would be in Israel, her family status was not changed and she was taking care of her minor children. Respondent's letter is attached and marked **P/16**.

31. On the following day, May 23, 2011, petitioner 1 requested to receive the transcript of the hearing held before the committee. Petitioner 1 requested to receive the transcript again on June 20, 2011. To date no answer has been given.

    Petitioner 1's letters dated May 23, 2011, and June 20, 2011, are attached and marked **P/17**.

32. On June 26, 2011, petitioner 1 received in respondent's bureau a referral for receiving the permit from the coordination office.

The Legal Argument

33. Petitioner 1's condition, *inter alia*, being a single mother of minor children, Israeli residents, whose father, petitioner 1's spouse is incapacitated, requires that status be granted to her in Israel. The committee is vested with the power to grant such status and it is therefore obligated to exercise its discretion as to whether said power should be used by it.

34. The committee discusses severe humanitarian cases, which mostly concern the matters of individuals, members of the weakest population in the state of Israel. It would be proper for the decisions of the committee to be given according to the directives of the respondent himself as established in his own procedure, minimal directives intended to ensure good governance which provide for transparency and reasoning of decisions. The respondent acted contrary to his said obligations in petitioner 1's mater. His decision in not reasonable.

The Committee for Humanitarian Affairs – improper conduct

35. The Committee for Humanitarian Affairs was established by virtue of section 3A of the Temporary Order following the comments of the court in HCJ 7052/03 **Adalah v. Minister of Interior** (May 14, 2006)(hereinafter: **Adalah**), which discussed the importance of an exceptions mechanism in view of human rights' violations caused by the Temporary Order:

> **The reason for this is that even if there is no alternative, for the purpose of achieving the proper purpose, to a blanket restriction of rights, there may be circumstances where, *on the one hand,* the violation of the right is very severe, and *on the other hand,* an exceptional protection of the right will not impair the realization of the proper purpose. The creation of a mechanism for exceptions is intended to provide an answer to such circumstances. The exceptions mechanism may reduce the law's violation of the rights, without impairing the realization of the proper purpose. Therefore, the creation of such a mechanism is required by the second subtest concerning the choice**

> **of the least harmful measure. Indeed, just as every person with administrative authority is liable to exercise discretion on a case-by-case basis and to recognize exceptions to rules and fixed guidelines when the circumstances justify this… so too is it the duty of the legislature, when it makes an arrangement that results in a sweeping violation of rights, to consider providing an arrangement for exceptional cases that will allow a solution to be found in special cases that justify one** (**Adalah**, paragraphs 72-73 of the judgment of President A. Barak. See also the judgment of Justice M. Naor in **Adalah**, paragraphs 20-24).

A procedure which arranges the operations of the committee was published by the respondent, stipulating, *inter alia*, that the Minister of Interior must give his decision in applications submitted to the committee within six months (as prescribed in the law itself) and that the committee should document its recommendations and reasoning in an accurate and detailed manner (paragraph 10 of the procedure).

Procedure 5.2.0039 is attached as Exhibit **P/18**.

36. In AP (Tel Aviv) 2587/08 **Chuko v. Minister of Interior** (February 23, 2009), the court discussed the decision making process of another committee of the respondent, an advisory committee which was also established for the examination of humanitarian cases, although in general and not particularly in connection with the Temporary Order. In **Chuko** the honorable court was of the opinion that the conduct of the inter-ministerial committee which did not reconcile with the committee's procedure could not be upheld. The things which were said with respect to the inter-ministerial committee are also relevant to the case at hand:

> **I join the position of my colleague, the Honorable Judge O. Mudrik in his decision dated January 18, 2009 in AP 2588/08 Netanel Tsigozi v. Minister of Interior who decides as follows: 'Evidently, the inter-ministerial committee acts according to a procedure (5.2.0022). According to the procedure it must document in detail the recommendation and its underlying reasons, it must hold a meeting in which each one of its members expresses his position and maintain a signed transcript of the meeting… the respondent attached to his response an exhibit stating laconically that the inter-ministerial committee recommended to deny the application and that the head of the population administration accepted the recommendation which was thereafter adopted by the Minister of Interior as well. The meeting's transcript forms, the comments made by the members of the committee during the meeting and the reasons given by the committee were not attached to the exhibit… I also join the position of the Honorable Judge Mudrik regarding the facts which are similar to the facts in the case at bar, according to which 'In view of the sensitivity of the issue being the subject matter of the meeting, upholding the procedure which applies to the manner of operation of the inter-ministerial committee precisely as drafted is not a formal but rather a material matter. The head of the population administration and thereafter the minister must be convinced based on the recommendation of the inter-ministerial committee and its reasons that an application such as the application of the petitioners at hand should be denied. In the absence of documentation and in the absence of the reasons of the committee and a transcript of the meeting held by it, it is inconceivable that the head of the population administration and the minister of interior would be able to rationally analyze the reasons of the committee. 'A meetig**

> **held by the committee, in a manner which veers to a large extent from the procedures, constitutes a material flaw in the meeting and decisions of the committee, including the decision of the minister and therefore these decisions must be revoked**.(Emphasis added – A.L.).

And see also AP (Tel Aviv)2588/08 **Tsigozi v. Ministry of Interior** (January 18, 2009); AP 800/07 **Abu Aseb v. Minister of Interior** (December 28, 2009).

37. Indeed, the nature of the proceeding taken by the respondent for the examination of the application is not a mere procedural, but is material and goes down to the root of the matter – the examination of petitioner 1's matter by the humanitarian committee is insufficient if the procedure which has material significance is not fulfilled, if there is no indication in the manuscript or in the language of the decision itself that weight was given to the entire humanitarian circumstances and that respondent's power to consider the grant of a temporary status was exercised.

The duty to transmit to the applicant the committee's manuscript

38. The transmission of the manuscript of the committee for humanitarian affairs is of great importance. The committee operates according to the law and makes its decisions in humanitarian matters which have a crucial effect on a person's fate. Leaving the transcripts of the committee in the dark without transparency does not reconcile with the laws which apply to this issue including the Freedom of Information Act, 5758-1998. A deliberate concealment of the manuscripts prejudices petitioner 1's ability to bring her case up for judicial scrutiny and the court's ability to exercise such scrutiny over respondent's decision. And note well. To petitioner 1's best knowledge and as indicated by respondent's response, there are no privileged security aspects in the committee's manuscripts. To the extent any such aspects do exist, petitioner 1 does not request their disclosure and said aspects alone may obviously remain privileged. This possibility of partial privilege solves, on the one hand, respondent's difficulty, if any, in this regard, and on the other, balances it with petitioner 1's right to see the manuscript of the meeting which was held in her matter *ex parte* and the reasons underlying the committee's decision which denied the remedy requested by her, despite the fact that her matter was recognized as humanitarian.

39. The Freedom of Information Act and the judgments of the Supreme Court which preceded it entrenched the right to receive information from the authorities. See for instance HCJ 142/70 **Shapira v. The district committee of the Israel Bar Association**. The law recognizes the right to information for the proper functioning of a democratic regime including the realization of the right of the individual to establish his positions based on the information which was gathered about him by the state, as a trustee, and the participation of the individual in exercising supervision and control over the authorities. AAA 7024/03 **Advocate Arie Geva v. Yael German, Neo publishers** (December 27, 2004).

40. In AP (Jerusalem) 22336-04-10 **Abdul v. Person in Charge of the Freedom of Information Act** (September 21, 2010) a case identical to the case at hand was discussed. In that case the respondent refused to transfer to the petitioner, a Somalian national who argued that he was a refugee, the transcript of the committee's meeting which was held in his matter, also a committee of the respondent that decided to let the petitioner stay in Israel, but not under an A/5 status which is given to persons who were recognized as refugees. In **Abdul** the court emphasized the importance of disclosing the transcript of the committee which discusses humanitarian matters that affect a person's fate and held that the petitioner should be immediately provided with the transcript in his matter. We shall bring the reasoning of the honorable court which is also relevant to the case at hand:

> **In conclusion, I found respondent's decision according to which the petitioner would not be provided with the transcript of the meeting held in his matter before the advisory committee to be unreasonable in view of the fact that it fails to properly balance between the general interest to enable the authority to hold an open and sincere internal meeting, and the legitimate and important interest of the petitioner to bring the decision which was made in his case for judicial review, being aware of all facts and having the ability to present them before the appropriate judicial instance and to respond to them in a full and comprehensive manner. I do not think that a meeting such as the meeting held in petitioner's matter is of the kind which cannot be held with the required openness and sincerity unless the exception stipulated in section 9(4)(b) of the Freedom of Information Act applies thereto, and I did not find how this case differs from the case of a disabled person before a medical committee who receives for his review the transcript of the meeting. In addition, it should be noted that the transparency consideration should also be taken into account in the case at hand and I did not find in the arguments of respondent's counsel any reference thereto. Petitioner's counsel justifiably argued that we were concerned with a committee which has been operating for eight years and which has been holding many meetings in matters such as petitioner's matter in view of the fact that infiltration of refugees into Israel was not a rare event. It is a matter of public importance and I was not presented with any good reason for having the matter of these people discussed in the dark**.

41. Accordingly, it has been recently held in HCJ 10041/08 **Hajaz v. State of Israel**:

> **The state will use its best efforts to transfer before the hearing the transcript of the meeting held by the committee for humanitarian affairs and the grounds for its decision**.

Following said decision the respondent transferred the transcript of the meeting held by the humanitarian committee, the same committee with which we are concerned in the petition at hand.

42. It is therefore unclear why the respondent failed to do it in this case.

<u>Violation of constitutional rights – the right to family life, the right to dignity</u>

43. Among the fundamental values of our system the right to family life and the right to dignity are recognized and relevant to the case at hand. In the judgment concerning the constitutionality of the Citizenship and Entry into Israel Law, the status of the right to family life in Israel was elevated to that of a constitutional right which was entrenched in the Basic Law: Human Dignity and Liberty. President Barak who held a minority opinion with respect to the final result of the judgment, summarized, with the consent of eight out of the eleven justices of the panel, the rule which was established in the judgment regarding the status of the right to family life in Israel:

> **From human dignity, which is based on the autonomy of the individual to shape his life, we derive the derivative right of establishing the family unit and continuing to live together as one unit. Does this imply also the conclusion that realizing the constitutional right to live together also means the constitutional right to realize this in Israel? My answer to this question is that the constitutional right to establish a family unit means the right to**

> **establish the family unit in Israel... The right of an Israeli to family life means his right to realize it in Israel**. HCJ 7052/03 **Adalah – Legal Centre for Arab Minority Rights in Israel v. Minister of Interior,** given on May 14, 2006, paragraph 34of the judgment of President Barak.

44. Recognizing the right to family life as a constitutional right entails the determination that any violation of the right must be made according to the Basic Law: Human Dignity and Liberty – only for weighty considerations. The refusal to give petitioner 1 status, be it even a temporary one, predestines the family to difficult life in Israel and encumbers petitioner 1's ability to raise her children and maintain family life with them.

The rights of the children – the rights of the parent

45. Respondent's denial of the status application, be it even a temporary one, for petitioner 1, status which gives her and her children some stability, minimal social rights, severely and irreversibly violates petitioners' rights, who experience real existential hardship.

46. In Israeli jurisprudence the principle of the child's best interest is a fundamental and entrenched principle. In CA 2266/93 **A v. A**, IsrSC 49(1) 221, it was held by the Honorable Justice Shamgar that the state should intervene to protect the child against a violation of his rights. The right of minor children to live with their parents was recognized as an elementary and constitutional right by the Supreme Court. See: the words of the Honorable Justice Goldberg in HCJ 1689/94 **Harari et al. v. Minister of Interior**, IsrSC 51(1) 15, page 20, across the letter B.

47. The Convention on the Rights of the Child sets a host of provisions which require that the child's family unit be protected. The preamble to the Convention provides as follows:

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

Article 3(1) of the Convention stipulates:

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

48. In HCJFH 8916/02 **Dimitrov v. Ministry of Interior – Population Administration** (July 6, 2003) it was held that the principle of the child's best interest can justify the arrangement of status of his parent even contrary to the general rule that the child goes after his parents and not *vise versa*:

> **The principle of the child's best interest has long been recognized as a central value in our legal system, and there is no need to discuss at length its importance. Indeed, as a general rule "it is impossible to discuss matters pertaining to minors without having their best interests examined" (CA 7206/93 Gabay v. Gabay, IsrSC 51(2) 241, 251). In making his decision which determines the fate in Israel of a foreign parent, it is also incumbent on the Minister of Interior to consider, *inter alia,* the best interests of the child of that parent and the effect of said decision on his condition. Respondent's position, as aforesaid, is that despite the fact that as a general rule the**

connection of parenthood to an Israeli citizen, in and of itself, does not grant permanent status in Israel, he also agrees that each case should be examined on its merit in a bid to examine whether special humanitarian needs apply thereto which justify a deviation from the regular rule. Taking into consideration special needs can also include the needs of the child of the foreign parent. The child's best interest therefore constitutes a consideration which the respondent must take into account in the examination process. See also: AAA 10993/08 **A v. State of Israel** (not reported, March 10, 2010) paragraph 4 of the judgment of Justice N. Hendel)(Ibid., paragraph 8 of the decision of Justice E. Mazza).

49. Accordingly, temporary status was given to parents of children, Israeli citizens, in the framework of several proceedings. See for instance, AP (Jerusalem) 705/07 **Muskara v. Minister of Interior** (December 21, 2009); AP 3143/04 (Tel Aviv) **Mariano v. Ministry of Interior** (May 22, 2005). In addition, in recent years the respondent entrenched various procedures for the arrangement of the status of children of illegal aliens who integrated in Israel and accordingly, for the arrangement of the status of their parents as temporary residents. (See Government Resolution 1289, Government Resolution 156 of 2006 and Government Resolution 2183 of August 2010). As a general rule, according to said government resolutions it suffices that a child has integrated in Israel for five years for the arrangement of his permanent status and temporary status of his parents wo stay in Israel unlawfully. The above described arrangements are proper and humane. They derive from Israel's commitment to the principles of the child's best interest and reflect the state's responsibility to the ramifications of the absence of an orderly emigration policy and lack of enforcement for years. However, the arrangement of the status of parents of children from Ghana, the Philippines and the Ivory Coast, cannot be reconciled with the decisive and unexplained refusal to give status to the mother of children, Israeli residents, who herself was raised here from early childhood as the daughter of an Israeli resident. The reason underlying the grant of status to parents of children who are Israeli residents is clear. It is clearly inhuman to accept a situation in which a person lives in a country with no status. It is clearly the best interest of minors that their parents will not live with them throughout the years as in fact residents with no rights. These blessed rationales should also be applied to petitioner 1's case.

50. And note well. Similar to respondent's failures pertaining to the integration of migrant workers in Israel while drawing a sharp distinction between the different rights and ties – the fact that petitioner 1's matter has been pending for so many years results, at least partially, from the conditions and conduct of the East Jerusalem bureau throughout the years and the absence of clear published policy on the arrangement of the status of children (the first procedure on this issue was established only in 2007 (procedure 2.2.010) which was published at a later stage).

    On the failure to publish respondent's policy which is entrenched in its procedures see AP (Jerusalem) 530/07 **Association for Civil Rights in Israel v. Ministry of Interior** (December 5, 2007).

    On the difficult conditions in the Ministry of Interior see for instance, HCJ 2783/03 **Raful Rofe Jabara v. Miniter of Interior et al.** (October 6, 2005); AP (Jerusalem) 754/04 **Badawi v. Director of Population Administration Office**.

51. As part of the authority's duties towards petitioner 1's children, nationals of the state of Israel, it must enable her to realize the best interests of her children according to her right to parenthood and according to the Convention on the Right of the Child which was ratified by the state of Israel. The provisions of the Convention on the Rights of the Child are increasingly recognized as a supplementary source for the rights of the child and as a guide for the interpretation of the "child's

best interest" as a supreme consideration in our legal system: see CA 3077/90 **A et al., v. A,** IsrSC 49(2) 578, 593 (the Honorable Justice Cheshin); CA 2266/93 **A, minor et al., v. A,** IsrSC 49(1) 221, 232-233, 249, 251-252 (then Honorable President Shamgar); CFH 7015/94 **Attorney General v. A.,** IsrSC 50(1) 48, 66 (Honorable Justice Dorner); HCJ 5227/97 **David v. High Rabbinical Court** (TakSC 98(3) 443) paragraph 10 of the judgment of the Honorable Justice Cheshin.

The respondent must examine humanitarian considerations

52. Petitioner 1 is the daughter of an Israeli resident who has been residing in Israel since her early childhood. Petitioner 1 is the daughter of an incapacitated Israeli resident and a mother of two children, Israeli residents – who also suffer from medical conditions.

53. Petitioner 1 has been living in Israel since she was two years old, **for 26 years**, without any rights. She went to kindergarten and school in Israel and has no ties to the OPT.

54. Petitioner 1 had the constitutional right to receive status in Israel by virtue of her mother's status while she was still a minor and also after she was married to an Israeli, before the Citizenship and Entry into Israel Law (Temporary Order), 5763-3003 was enacted. However, due to circumstances over which she had no control, the status was not arranged.

55. Petitioner 1 is the wife of an Israeli resident and the mother of Israeli residents who must provide for her family by herself. Due to the difficult situation encountered by the family as a result of the tragic accident of the father, petitioner 1 must take care of her children alone. The circumstances of petitioner 1 and her two children require maximum stability, with respect to the future as well as with respect to the present. Such a long stay of petitioner 1 in Israel with no status and with no rights severely encumbers the family and condemns it to a life full of anxiety and humiliation, without elementary rights which make living in a dignified manner possible, without any ability to drive and work, dependent on quotas and permits. And note well. Petitioner 1 was only given a temporary permit to live in Israel until her children are adults.

56. Petitioner 1 has no place in which she can reside in the area in which she was born, in the OPT. Petitioner 1 left Nablus for good when she was two years old and ever since has been living in Israel where her mother, her incapacitated husband and two children live. The absence of ties to the OPT narrows down the security concern which constitutes the only reason for the limitations imposed by law on the grant of status. The respondent does not argue that petitioner 1 should return to the OPT either, but as far as he is concerned she should only be given permits.

57. A similar matter was discussed by the honorable court in HCJ 1905/03 '**Aqel v. State of Israel-Minister of Interior et al.** (December 5, 2010) which concerned the matter of a status application of parents who were OPT residents, and their two children. In that case the parents have been living in Israel unlawfully for many years with their children. The daughter was born and registered in the OPT and the son was born in Israel but has not been registered anywhere. The respondent adopted the recommendation of the humanitarian committee and decided to grant the parents renewable military permits, Said decision was affirmed by the court. With respect to the son, it was agreed that he would be granted a temporary residency status. However, with respect to the daughter the parties failed to reach an agreement. The respondent insisted that the daughter who has been raised in Israel her entire life should not be given status, but rather military permits only, like the permits given to petitioner 1 in the case at hand who has also been living in Israel her entire life and who knows no other place. The court did not accept respondent's position and held as follows:

> **It therefore seems that although the professional committee was aware of the exceptional circumstances of petitioner 3's integration in Israeli society since infancy, and of the fact that the petitioner was not only the mother of a minor who is an Israeli national and son of an Israeli national, but has also been living in Israel her entire life and is in fact unfamiliar with any other human environment; the recommendation itself completely disregards said data. As is known, judicial criticism examines, *inter alia*, the internal balancing between the considerations exercised by the administrative authority. Administrative discretion "which does not give proper weight to the different interests which should be considered by the administrative authority in its decision" will be revoked as unreasonable (HCJ 389/80 Dapei Zahav Ltd. v. Broadcasting Authority, IsrSC 35(1) 421, 437 (1980). See also: the above Dakah, paragraph 32; Administrative Law, page 724-725)). An administrative decision shall be therefore regarded as a reasonable decision "if it is the product of balancing between different relevant considerations, and if proper weight was given to said considerations under the circumstances of the matter. The decision of the authority may also be flawed when only pertinent considerations were considered by it, if the internal balancing between the considerations was distorted" (AAA 8284/08 Lime & Stone Production Company Limited v. Israel Land Administration (not reported, September 13, 2010) paragraph 30). The above is also relevant to the case at hand. As we have seen, the recommendation of the professional committee – and consequently, the decision of the Minister of Interior as well – failed to take into account relevant and significant considerations pertaining to the personal circumstances of petitioner 3 and at least, failed to give said considerations the weight which should have been properly given to them. In view of the above the inevitable conclusion is that the decision which was made in petitioner 3's matter exceeded the realm of reasonableness and should be revoked**. (Paragraph 17 of the judgment of the Honorable Justice Vogelman which was fully consented to by all members of the panel).

And it was further added by the court:

> **I shall add and emphasize before we close the hearing that respondent's argument according to which the grant of the requested status actually gives a "reward" to someone who has succeeded to persistently breach the immigration laws of Israel, did not escape me. Although, as a general rule, the validity of this argument should not be denied, it is my opinion that under the exceptional circumstances of the case at hand, and particularly in view of petitioner 3's undisputed ties to Israel from her infancy due to which even the respondent himself was of the opinion that humanitarian reasons justified her continued presence in Israel, it should not be given any substantial weight**. (*Ibid.,* paragraph 17).

58. Similar to **'Aqel,** in the case at hand too petitioner 1 has been living her entire life in Israel, she is a single mother of Israeli children whose father in an Israeli and is also the daughter of an Israeli resident and has been living here ever since she was an infant. Petitioner 1 has also integrated into the Israeli community in Jerusalem and is not familiar with any other place. In **'Aqel** the honorable court held that respondent's decision was extremely unreasonable. Likewise, the decision in the case at hand fails to satisfy the test of reasonableness.

59. Indeed, the circumstances of petitioner 1 which were described above are exceptional and humanitarian. The respondent through the committee for humanitarian affairs must consider humanitarian considerations for the arrangement of petitioner 1's status and particularly in the absence of a security preclusion which may prevent it. With respect to the humanitarian consideration in a state of law it was held:

> **The state of Israel is a state of law; The state of Israel is a democracy which respects human rights and which seriously considers humanitarian considerations** (HCJ 794/98 Obeid et al., v. Minister of Defense, IsrSC 55(5) 769, 774).

60. The importance of the humanitarian consideration while a decision in status applications is made by the respondent, also arises from the judgment in AP 1037/03 (Haifa) **Feldman et al., v. Minister of Interior** (February 1, 2004):

> **Respondent's main reason according to which "change of status is not approved to adult sons who are not eligible under the Law of Return" (see paragraphs 7 and 14 of respondent's statement of response and exhibits C, E and F) only shows that the respondent failed to examine the humanitarian issue, or else, he would have based his arguments on petitioner's failure to meet the requirements of said exception.**
>
> **Where a "humanitarian" exception exists the authority must take into consideration the personal circumstances of each case. The failure to weigh such circumstances is like the failure to give them proper weight, and in each such case the discretion is flawed by unreasonableness** (see and compare HCJ 935/89 Ganor v. State of Israel, IsrSC 44(2) 485, 513-515; and also Izhak Zamir, The Administrative Authority (Volume B, Nevo, 5756)763-771).

61. It seems that the respondent disregards the exception to the law according to which discretion should be exercised in special humanitarian cases such as the case of petitioner 1, her husband and minor children.

<u>Extreme lack of reasonableness</u>

62. It is incumbent upon the administrative authority to act reasonably, proportionately, fairly and in a bid to achieve a proper purpose. These are supreme principles which govern the realm of respondent's discretion:

> **The state through those acting on its behalf is the trustee of the public. Public interest and public assets were deposited in its hands to be used for the best interests of the public at large… Said special status imposes on the state the obligation to act reasonably, honestly, sincerely and in good faith. The state must not discriminate against, act arbitrarily or in bad faith and to be in a conflict of interests situation. Shortly, it must act fairly** (the words of the Honorable Justice (as then titled) Barak, HCJ 840/79, **Israeli Contractors and Builders Center v. Government of Israel**, IsrSC 34 (3) 729 and particularly in page 756-746).

63. In the absence of reasoning, in the absence of the transcript of the meeting and in view of the fact that respondent's procedure has not been fulfilled in any manner whatsoever, not even for the sake of appearance, how would the court be able to examine the reasonableness of the decision, the considerations which were taken into account and the balancing which was made, if any.

64. The impingement inflicted on petitioner 1 and her family is severe and unquestionable. It encompasses all areas of life. It deprives petitioner 1 and her children of minimal stability in their difficult life. The purpose of respondent's decision, the transcript of the committee in which said decision was made still remains in the dark, on the other hand, is at the utmost vague and mysterious.

The requested remedy – about the power to grant temporary status and the duty to exercise it

65. Section 3A1 of the Temporary Order empowers the respondent to grant temporary status in Israel. In the power granted is also embedded, *inter alia*, "the obligation to consider the need to exercise it and the proper measures which should be taken in that regard" (HCJ 297/82 **Berger et al., v. Minister of Interior**, IsrSC 37(3) 29, 45). The law stipulated that a special committee should be established for the examination of humanitarian affairs which committee would be vested with the authority to recommend to the Minister to grant a temporary status (Section 3A(1)) or a military permit (Section 3A(2)). Clearly, the power of the committee was vested in it by law so that the grant of status including the nature of the status granted would be seriously considered.

66. The data which was furnished in a meeting held in the Knesset on October 25, 2010, regarding the committee for humanitarian affairs indicate that until the date of said meeting about 770 applications had been submitted to the committee, out of which 290 were handled of which only 45 applications were approved. Out of the approved applications in four cases only an approval for the grant of temporary status was given – a negligible number of cases out of the total number of cases which were handled. The data indicate that despite the fact that the respondent is vested with the power to grant within the framework of the committee temporary status in Israel, the respondent hardly ever exercises said power.

    The transcript of the meeting of the Internal Affairs and Environment Committee regarding the functioning of the humanitarian committee is attached and marked **P/19**.

67. The practice according to which the committee grants in humanitarian cases DCO permits and only in the most exceptional cases status, is peculiar and inconsistent with other practices pertaining to status in Israel. (Accordingly, for instance, children of migrant workers who satisfied the criteria which were established received permanent status and their parents received temporary status, persons recognized as refugees receive temporary status, widows or divorcees of Israeli receive temporary status according to criteria which were established).

68. The 'status' of a military permit is not a status. It does not grant social rights, it does not provide any prospects for settling down in Israel. It is all about temporariness and alienation from the state. Not without reason had the Entry into Israel Law limited the power of the minister to extend tourist and work visas which are comparable with the permits given to OPT residents, for 27 months only (subject to special exceptions for nursing personnel). The rational underlying said limitation is humane – a person cannot reside in a state for a long period of time without rights. From a certain point residency is established which must be reflected in the nature of the status. It is true that the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 – limited, **for security reasons only**, the grant of status – however, precisely due to the severe violation of rights as a result of the sweeping limitation on the grant of status which runs contrary to the fundamental principles of lawful residency in Israel – it is incumbent upon the minister - in humanitarian cases in which the respondent is empowered to grant status and while no specific security preclusion exists – to use his power and at least explain his decision to abandon said route.

69. The military permit does not provide a humanitarian solution for a person who wishes to and has the right to live in Israel. Precisely in such humanitarian cases in which people need the state's

support the committee denies them of support and tells them that they can stay rather than be expelled, on a temporary and unstable basis, this and nothing more.

70. Once humanitarian grounds were established the committee should show cause, a convincing cause, why temporary status should not be granted. Only when such cause exists which may usually derive from security reasons, uncertainty with respect to a temporary situation or other extraordinary reasons, a 'military permit' shall be given. In any other humanitarian case temporary status should be granted.

The need to have criteria and directives

71. The power to grant temporary status requires that criteria for status eligibility be established. Such criteria guarantee that the power is exercised properly. The need to put them in writing obligates the authority to take into account all relevant considerations and to establish its policy. Directives and criteria also guarantee that the power is exercised equally. They prevent sporadic or arbitrary exercise of power as a result of which similar cases are treated differently.

72. It seems that nothing was done to ensure that respondent's power will be exercised in proper cases and on an orderly and equal basis to the maximum extent possible. Accordingly, for instance, respondent's procedure does not include any criteria on how the power should be exercised and indeed the general data which were furnished indicate, as aforesaid, that over the course of about three years from the date on which the committee had been established – only in four cases, the circumstances of which are unknown to the petitioners, temporary status was given.

73. On the authority's obligation to establish directives see Y. Dotan **Administrative Directives** (Jerusalem: The Harry and Michael Sacher Institute for Legislative and Comparative Law, Faculty of Law, The Hebrew University of Jerusalem, 5766-1996) page 120-124 and the authorities there.

74. On the importance of criteria and directives see also: HCJ 4146/95 **Dankner Estate et al., v. Israel Antiquities Authority**, IsrSC 52(4) 774, 790-792 regarding criteria for having an area declared as an antiquity site; HCJ 6396/96 **Zakin v. Mayor of Beer Sheva**, TakSC 99(2), 793 (not yet reported): "It is natural and proper… that the state and other authorities establish their own policy, and to the extent necessary and possible written directives…" (paragraph 16 of the judgment); HCJ 2159/97 **Hof Ashkelon Regional Council v. Minister of Interior et al**., TakSC 98(1), 626 (not yet reported): "It would be appropriate for the Ministry of Interior to have a procedure which would operate as an internal directive with respect to the proceeding for changing the jurisdiction of a local authority" (paragraph 11 of the judgment); HCJ 3638/99 **Blumenthal et al., v. Rechovot Municipality et al**., TakSC 2000(3), 882 (not yet reported): "Allocation of land must be made according to fair, equal, clear, pertinent and open criteria…" (paragraph 8 of the judgment).

The obligation to publish the criteria

75. From the need to have criteria also derives the obligation to have them published to the extent they exist or upon their establishment. The publication will also ensure that those who are entitled to temporary status according to the criteria will indeed apply to receive it, since should they fail to apply the implementation of the directives would be sporadic, many eligible individuals will not receive status, and the objective of the power vested in the respondent would not be fully realized.

76. On the obligation to publish criteria see also HCJ 5537/91 **Efrati v. Austfeld et al**., IsrSC 46(3) 501; HCJ 3648/97 **Stamka et al. v. Minister of Interior et al**., IsrSC 53(2) 728, 767-768; AP (Jerusalem) 530/07 **Association for Civil Rights in Israel v. Ministry of Interior**.

77. The need to publish the criteria intensifies when a weak and low income population is concerned, which in view of the nature of social reality is distanced from sources of information, is less aware of its rights and has relatively low access to means which can help it understand its rights (such as consultation with legal counsel, internet search).

In conclusion

78. The committee was established for the purpose of handling exceptional cases following the judgment of the High Court of Justice. Reasonable handling of humanitarian cases requires that all circumstances specified in the application be considered, and obviously that all elements pertaining to the manner of examination of applications which constitute part of the procedure be upheld.

79. Without status petitioner 1 lives in Israel as a transparent person having no rights. The life of petitioner 1 and her children are severely harmed.

80. In view of all of the above respondent's decision is unreasonable. The honorable court is requested to accept the petition and order the respondent to grant petitioner 1 temporary status in Israel.

    Therefore, the honorable court is requested to accept the petition and to obligate the respondent to pay petitioners' costs and expenses and legal fees.

Jerusalem, July 4, 2011

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Adi Lustigman, Advocate
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