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Date: April 20, 2016
In your response please note: 92673

To:
Mr. David Amsalem
Chair of the Internal Affairs
and Environment Committee
Israeli Knesset

By Fax: 02-6753198
And by Registered Mail

URGENT!

Dear Sir,

Re: **Operations of the Appeals Tribunal established according to the Entry into Israel Law**

The establishment of the Appeals Tribunal is truly good news in connection with the legal handling of immigration matters, a step which was taken in addition to other steps taken by the Ministry of Justice to improve the service given to the public. The Ministry of Justice attaches great importance to meeting the goals…

(From the words of the director general of the Ministry of Justice Mrs. Emi Palmor, Adv. on the opening day of the Appeals Tribunal. Published on the website of the Ministry of Justice at: http://www.justice.gov.il/Publications/Articles/Pages/AppealsTribunal.aspx).

I hereby write to you on behalf of HaMoked: Center for the Defence of the Individual (hereinafter: **HaMoked**), a human rights organization located in Jerusalem which has been engaged, for many years, among other things, in the arrangement of the status of residents of East Jerusalem and their family members in Israel and to draw your attention to the following.

Background

1. In 2011 the Entry into Israel Law, 5712-1952, was amended (Amendment No. 22) according to which the Appeals Tribunal (hereinafter: the **Appeals Tribunal**) was established substituting, in the matters under its jurisdiction, both the district court sitting as a court for administrative affairs as well as

the appeal committees for foreigners which acted until the establishment of the Appeals Tribunal under the auspices of the Ministry of Interior.

2. In the framework of HaMoked's engagement in the above specified areas, HaMoked has naturally accumulated ample experience in working *vis-à-vis* the different instances – both administrative and legal. Among other things, HaMoked handled many cases which were heard by the appeal committee for foreigners and over the two years which passed from the establishment of the Appeals Tribunal, which operates under the responsibility of the Ministry of Justice, HaMoked had the chance to handle before the Appeals Tribunal in Jerusalem dozens of cases.

3. It should also be noted that HaMoked's representatives attended the meetings of the Internal Affairs and Environment Committee of the Knesset (hereinafter: the **committee**), which were held in connection with the amendment of the Entry into Israel Law according to which the Appeals Tribunal was established, and submitted position papers and letters of principle on different issues related both to the responsibilities and manner of operation of the appeal committee as well as to the establishment of the Appeals Tribunal.

4. It should be emphasized that following arguments which were raised by HaMoked and additional human rights organizations before the committee prior to the establishment of the Appeals Tribunal, and the concern that the Appeals Tribunal would not be able to carry the load and would thus severely harm the individuals who seek its services, the committee decided in a meeting held by it on May 27, 2014 that the validity of the order and regulations required for the operation of the Appeals Tribunal (Entry into Israel Order (Amendment of the Addendum to the Law), 5774-2014 and the Entry into Israel Regulations (Appeals Tribunal Fees), 5774-2014) (hereinafter: the **order and regulations**) **would be limited to two years**.

5. In addition, the committee decided to supervise the manner of operation of the Appeals Tribunal and instructed the representatives of the Ministry of Interior and Ministry of Justice who attended the committee's meeting to present to it not later than by June 1, 2015, data regarding the number of proceedings filed with the Appeals Tribunal.

6. However, regardless of the good intentions based on which the Appeals Tribunal was established, it seems that at least currently, the Appeals Tribunal is far from realizing the objectives for which it was established and the goals which the individuals who established it wished to realize.

7. Hence, over the two years during which the Appeals Tribunal has been operating, HaMoked was exposed to problems and flaws in the manner of operation of the Appeals Tribunal which severely and directly violate the fundamental rights and human rights of those who need its services. In addition, as far as we know, the representatives of the Ministry of Interior

and Ministry of Justice did not present to the committee, to date, the data which they were required to present to it.

8. In view of the above said, and in view of the fact that the validity of the order and regulations is about to expire within the next few months and since the manner of operation of the Appeals Tribunal will be discussed and voted on again by the committee, we are of the opinion that prior to that a thorough and extensive review of the manner of operation of the Appeals Tribunal is required, which will include, *inter alia*, an examination of the problems pointed at by us herein-below.

The Appeals Tribunal's work load and its ramifications

9. As specified above, before the Appeals Tribunal has commenced operations, HaMoked and additional human rights organizations have already warned the committee and the representatives of the Ministry of Interior and Ministry of Justice that the Appeals Tribunal would not be able to cope with the number of cases which would be referred to it. As will be immediately clarified, these were not mere warnings, but rather based warnings that the authorities preferred to deliberately ignore.

10. We shall commence with a reminder that the Appeals Tribunal was established following a "pilot" which had been carried out for a number of years by the Ministry of Interior and which was known as the "appeal committee for foreigners" (hereinafter: the **appeal committee**). The appeal committee which in fact was a one man committee had four appointed chairpersons – two in the Jerusalem district and two in the Tel Aviv district. During the years of its existence, the committee had an enormous work load which caused a severe backlog in the handling of the cases which were heard by it, thus causing a virtual delay of justice to the individuals who applied to it. It should be noted that the chairpersons of the committee themselves commented on this issue in their decisions, and the court for administrative affairs which reviewed decisions made by the committee's chairpersons, had scathingly criticized said conduct quite often.

11. A meeting which was held by the Knesset on May 27, 2014, and which was mentioned above was attended by representatives of the Ministry of Interior and Ministry of Justice. In the above meeting said representatives estimated that the annual number of cases which would be heard by the Appeals Tribunal – in the Jerusalem and Tel Aviv districts – would amount to about 2,000 cases. Said estimate was based on 1,200 cases which were heard in 2013 by the appeal committees coupled by about 700 cases which were heard by the courts for administrative affairs until the establishment of the Appeals Tribunal. However, the response of the chair of the Appeals Tribunal dated February 25, 2016, to the Minister of Justice – in the context of a parliamentary question which was submitted by MK Michal Rozin – indicated that more than 5,000 appeals had been submitted to the Appeals Tribunals in Jerusalem and Tel Aviv over a period of about a year and a half, namely, much more than the annual estimate.

12. It should also be noted that while within the framework of the meeting dated May 27, 2014, the representatives of the Ministry of Interior and of the Ministry of Justice informed the committee that five judges had been appointed to the Appeals Tribunal, the chair of the Appeals Tribunal and four judges, the chair of the Appeals Tribunal had strictly clarified already prior to the committee's said meeting that at that time, and at least in the beginning of the Appeals Tribunal's operations, cases would be adjudicated only by the four additional judges while she herself would engage in the establishment and management of the Appeals Tribunal. And indeed, until the date of this letter the chair of the Appeals Tribunal has not actually heard appeals. In short, upon its establishment in the Jerusalem and Tel Aviv districts, the Appeals Tribunal started to act with four judges only – two in each district – while recently an additional judge joined the Appeals Tribunal in the district of Tel Aviv. In addition it should be noted that by the end of 2015 an additional Appeals Tribunal started to act in the district of Beer Sheva, which according to the answer of the chair of the Appeals Tribunal dated February 25, 2016, handled, as of the end of February, about 884 cases.

13. Regretfully, despite the fact that the Ministries of Interior and Justice were aware of the unfortunate data which stemmed from the "pilot" conducted by the appeal committee – data which had clearly indicated that the four chair persons were unable to cope with 1,200 cases per annum – the authorities preferred to disregard the data presented to them and decided that the Appeals Tribunal would start to operate with four judges only, who would not only replace the four chair persons of the appeal committees but would also replace the judges of the courts for administrative affairs in the Jerusalem and Tel Aviv districts who, until the establishment of the Appeals Tribunal, heard cases in matters which were transferred to the jurisdiction of the Appeals Tribunal.

14. Hence, already prior to its establishment, it was foreseeable that the Appeals Tribunal would not be able to operate properly in view of its expected heavy work load, and that the flawed *modus operandi* of the appeal committees, would be repeated by the Appeals Tribunal.

15. As aforesaid, as a direct result of the heavy work load of the Appeals Tribunal – a load which arises as specified above from an inherent absence of positions of which the authorities were well aware – the fundamental rights and human rights of the individual who apply to the Appeals Tribunal are severely and directly violated. It is important to understand that many of the applicants to the Appeals Tribunal are members of weak populations to begin with, which desperately need its decisions and judgments. Accordingly, among others, the applicants represented by HaMoked before the Appeals Tribunal, are Israeli citizens and their family members, some of whom are stateless persons having no status in the world including young children. These applicants, who are entitled to and need a quick and efficient decision and resolution of their matter, are exposed to the risk of

expropriation and detentions by the security forces while their matter is pending.

16. On July 2, 2015, HaMoked wrote to the chair of the Appeals Tribunal and complained before her of the unbearable load and improper delay in the decisions of the Jerusalem Appeals Tribunal. In response the chair of the Appeals Tribunal advised on July 5, 2015 that she was aware of the delayed decisions of the Jerusalem Appeals Tribunal and that she was deeply troubled by that matter. In addition, the chair of the Appeals Tribunal reconfirmed the above-said according to which the Jerusalem Appeals Tribunal was understaffed and employed only two judges, while the deficiency in manpower on the one hand and the large number of appeals on the other led to the undesirable situation which was created.

17. Hence, even if the judges of the Appeals Tribunal wanted to adequately carry out their responsibilities, they were prevented from doing so consciously and knowingly, while the rights of the applicants to the Appeals Tribunal, who are waiting for many long months for hearings and for the decision of the Appeals Tribunal in their matter, are severely violated. To demonstrate the heavy load of the Appeals Tribunal it should be noted that hearings are currently scheduled by the Appeals Tribunal for April 2017 and even for later dates.

Repeated propositions to waive oral hearings

18. Another major problem which also derives directly from the heavy load of the Appeals Tribunal, are the propositions made by the latter to applicants to waive the oral hearing before it, so as to expedite the proceeding pending before it. We shall specify.

19. It should be noted that in the framework of the committee's meeting held on May 24, 2014, section 13(26) which pertains to the hearing before the Appeals Tribunal was also discussed. It should be emphasized that the position of the Ministry of Justice was that as a general rule the Appeals Tribunal should deliberate and make its decision in an appeal based on arguments and evidence which would be submitted in writing, unless it was of the opinion that the arguments raised in the appeal could not be sufficiently clarified in the above manner so as to make justice in applicant's matter. However, eventually, the committee accepted the proposition of its legal advisor according to which, as a general rule, the Appeals Tribunal would hold an oral hearing, unless it was of the opinion that the clarifications could be made in writing only. And indeed, section 13(26) of the amendment to the Law stipulates that as a general rule an oral hearing would be held by the Appeals Tribunal, while a proceeding held based on written arguments only is the exception to the rule.

20. However, recently HaMoked comes across more and more cases in which the Appeals Tribunal proposes to individuals applying to it to waive the oral hearing before it. It ostensibly seems that the only reason for these propositions which are made more and more frequently is the load referred

to above. In fact, the above also arises from the response of the chair of the Appeals Tribunal to HaMoked dated July 5, 2014, which has already been mentioned above. In her above response the chair of the Appeals Tribunal states that in view of the load imposed on the Appeals Tribunal she took a series of steps to narrow down the gaps including, *inter alia*, that in cases in which the judge is of the opinion that a decision may be made without a hearing, a letter should be sent to the parties to inquire whether they would be willing to accept a decision without a hearing (provided no harm is caused to the appellants, in her words), a step which would give the judges time to write decisions.

21. However, holding a hearing before the Appeals Tribunal is of a great significance in view of the fact that in the adversarial proceedings which take place in the Israeli legal system, a litigant should be given "his day in court" including an oral hearing. As is known, an oral hearing has its own dynamics and is completely different from a written proceeding. Accordingly, among other things, when a hearing is held frontally before the Appeals Tribunal, the latter may see the parties, hear them and formulate its own opinion of the parties. In addition, following an oral hearing the parties may decide to delete the appeal and the Appeals Tribunal can exert its influence on the parties and push them to find a practical solution to their disputes and to even assist them to reach a settlement. Needless to point out that when the entire proceeding is made in writing and from a-far, the above described dynamics is totally non-existent.

22. In view of the above, there is no doubt that the increasing number of cases in which the Appeals Tribunal proposes that the hearing before it be waived by the appellants, only due to the fact that it sinks under the load imposed on it, is nothing but another layer in the protracted harm inflicted upon the applicants to the court.

The practice of holding privileged hearings before the Appeals Tribunal

23. Another harm inflicted on the appellants which was encountered by HaMoked during the two years that passed from the establishment of the Appeals Tribunal involves the practice used by the Appeals Tribunal when a privileged hearing is required in the absence of the parties. As specified in the beginning of our letter, HaMoked handles East Jerusalem residents and their family members. Frequently security or criminal issues arise in the proceedings pending before the Appeals Tribunal with respect of which the state requests a hearing *ex-parte*, namely, a hearing which is held in the absence of the appellant and his counsel.

24. Despite the fact that privileged hearings are also held by other judicial instances in Israel, the practice adopted by the Appeals Tribunal essentially differs from the practice adopted by the other courts with respect to *ex-parte* hearings involving privileged material. The Appeals Tribunal schedules to a specific day hearings in different files in which a review of privileged material is required, to which the appellants and their counsels are not summoned and which are not attended by them. The above practice which

is applied by the Appeals Tribunal is extremely injurious as we shall describe below.

25. Over the years the courts have developed a delicate balancing system in the framework of which a hearing in the presence of both parties takes place both before and after an *ex-parte* hearing is held with respect to the privileged material. The underlying rational upon which this balancing system is based is clear. Only when both parties are physically present on scene the optimal opportunity can be given to discuss the open aspects of the matter. In such hearings, the security agencies are also occasionally required to clarify things and provide explanations to the maximum extent possible in the presence of the parties. Both the Supreme Court and the courts for administrative affairs apply this practice.

26. The fact that the privileged material is **reviewed** and an *ex-parte* **hearing** is held in the absence of the appellants and their counsels frustrates the possibility to minimize the harm which already forms an integral part of this proceeding. Hence, by having created the above mechanism for its review of privileged material the Appeals Tribunal deprives its applicants of the ability to reduce the injury arising from the mere holding of a privileged hearing. The ability to maneuver between privileged and non-privileged aspects and the ability to separate between them and clarify to the maximum extent possible the arguments raised against them in real time is extremely important and is impossible after the fact and separate from the review of the privileged material and the discussion conducted in connection therewith.

Inability to appeal against interim decisions

27. Another severe injury which is not related to the manner of operation of the Appeals Tribunal but rather to the current format of the law by virtue of which it operates, arises from the fact that pursuant to the law and with the exception of a single issue, the applicants to the Appeals Tribunal are completely barred from filing an appeal against decisions given while the proceeding is still pending and for as long as no judgment has been given by the Appeals Tribunal. Accordingly, *inter alia*, the applicants have no ability whatsoever to appeal against decisions of the Appeals Tribunal pertaining to the failure to issue interim injunctions or interim orders. It is needless to point out that such orders are requested, *inter alia*, to prevent the separation of children from their parents and the distancing of the latter from Israel for as long as the legal proceedings in their matter are still pending. There is no doubt that the heavy load and the Appeals Tribunal's procrastination in giving judgments only aggravates the condition of these applicants, who await judgments even if for the purpose of applying to higher instances and filing appeals against the decisions of the Appeals Tribunal.

Conclusion

28. Hence, not only that the manner of operation of the Appeals Tribunal is far from being satisfactory, but it has already been clear prior to its establishment that said body would not achieve its objectives and would not meet the goals set for it. The above is even much more severe in view of the fact that the manner of operation of the Appeals Tribunal harms severely and over a prolonged period of time the individuals applying to it.

29. It seems that this is the best of all times, prior to the committee's deliberation and vote on the order and regulations, to revisit and re-examine the manner of operation of the Appeals Tribunal with all ensuing consequences.

30. In conclusion it should be noted that the draft which was circulated by the Internal Affairs and Environment Committee for the purpose of receiving comments from the public pertains solely to the regulations establishing the Appeals Tribunal's fees. **No draft was presented of the Entry into Israel Order (Amendment of the Addendum to the Law), the validity of which had also been limited, as has already been explained above, as a temporary order for a two year period only.**

31. In addition, we request to receive an invitation to the hearing which would be held by the committee on this issue so that we will be able to present our position and comments to the proposed draft regulations, in light of the above said.

Very truly yours,

Benjamin Agsteribbe, Advocate

CC:
Adv. Tomer Rozner, legal advisor of the Internal Affairs and Environment Committee