At the Court of Appeals
Jerusalem District

Appeal 1398/17

In the matter of:

1. **_____ Qunbar, ID No. _____**
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

all represented by counsel, Benjamin Agsteribbe (Lic. No. 58088) and/or Adv. Sigi Ben Ari (Lic. No. 37566) and/or Hava Matras-Irron (Lic. No. 35174) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. No. 41065) and/or Abir Joubran-Dakwar (Lic. No. 44346) and/or Nasser Odeh (Lic. No. 68398) and/or Nadia Dakka (Lic. No. 66713) and/or Eliran Baleli (Lic. No. 73940).

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 Appellants

v.

1. **Minister of Interior**
2. **Population and Immigration Authority**

represented by counsel from the legal department
15 Kanfei Nesharim St., Jerusalem
Tel: 02-5489888, Fax: 02-5489886

The Respondents

Supplementary Arguments on behalf of the Appellants

Following the urgent appeal filed with the Honorable Court by the Appellants on January 26, 2017 in the proceeding in title, which included a request to submit supplementary arguments, the Appellants hereby respectfully submit their full arguments against the Respondents' decision in the matter.

The Facts

Factual background and exhaustion of remedies

1. The Appellant was born to a traditional Muslim family in 1954. At age 13, she was married off to her first husband, _____ Hasin, a resident of the West Bank. In 1980, the Appellant's husband divorced her, and in 1981, she married Mr. _____ _____ al-Qunbar, a permanent resident of Israel. However, at the time of their marriage, Mr. al-Qunbar was married to another woman, a resident of Israel, whom he married in 1956.

   A copy of the Appellant's Jordanian marriage certificate to her current husband, Mr. _____ _____ al-Qunbar is attached hereto and marked **C**.

2. On March 24, 1987, Mr. al-Qunbar divorced his first wife.

   A copy of Mr. al-Qunbar's divorce from his first wife is attached hereto and marked **D**.

3. On August 2, 1987, some 5 months after his divorce from his first wife, the Appellant's husband filed an application for family unification with her. The application was approved on December 1, 1988, and subsequent thereto, the Appellant received permanent residency status in Israel, which she has kept until the decision appealed herein.

4. In the afternoon of January 10, 2017, following the attack in the neighborhood of Armon Hanatziv on January 8, 2017, committed by Fadi Qunbar, the Appellant's son, she received notice from Respondents (hereinafter: **the notice**) that Respondent 1 had launched proceedings to have her Israeli status revoked, and informing her she must present herself for a hearing at the offices of Respondent 2 at 9:00 A.M. the next morning.

5. After an exchange between Appellant 2 and the Respondents, and following a complaint to the Attorney General regarding the Respondents' unacceptable conduct and the violation of Appellant 1's due process rights, the hearing was rescheduled for January 18, 2017.

   A copy of the Respondents' notice was attached to the written hearing, and marked A therein.

   A copy of the complaint to the Attorney General is attached hereto and marked **E**.

6. During a telephone conversation held upon receipt of the notice (January 10, 2017), the office director for Respondent 2 refused to clarify the evidentiary basis for the bigamy claim to the Appellants, and noted that the documents would be presented at the hearing. A written request to receive information regarding the Appellant's family unification proceedings (which, as stated, concluded some thirty years ago), including the date on which the family unification application was filed, the date on which it was approved and any other documents pertaining to the bigamy claim received no response.

   A copy of the letter requesting the documents is attached hereto and marked **F**.

7. On January 18, 2017, a hearing was held for the Appellant at the officers of Respondent 2. Note that in addition to making oral arguments against the decision, during the hearing, the Appellants also filed written arguments. Note that both in their oral and written submissions to the Respondents, the Appellants made serious arguments against the planned revocation of the Appellant's status, and, prima facie, refuted the claims of false statements regarding the bigamous marriage.

8. However, in the early afternoon of January 25, 2017, Appellant 2 received the Respondents' decision (hereinafter: **the decision**), according to which the arguments made against the Appellant in the notice regarding the planned revocation of her status had not been refuted. In light thereof, the director of the East Jerusalem office of Respondent 2, Ms. Hagit Tzur, indicated her decision to revoke the Appellant's status in Israel.

   A copy of the decision made by the director of the East Jerusalem office of Respondent 2 was attached to the written hearing, and marked A therein.

9. Given the outrageous and unacceptable conduct of the Respondents toward the Appellant and her family – described in detail in the written submission attached to the appeal; concerns that the Respondents might attempt to remove her from her home in the small hours of the night, and being unable to file a motion for an interim order, the Appellants filed an urgent appeal with the Honorable Court on the next day, together with a motion for an interim order in the matter of the Appellant and her family members. The Honorable Court issued the requested orders that same day. The Appellants now wish to provide supplementary arguments against the decision made in the Appellant's matter.

Supplementary arguments for arguments made in the written submission

10. As stated, on January 18, 2017, the Appellants served the Respondents with a written brief containing many arguments against the wrongful procedure Respondents are conducting against the Appellant. These arguments were never addressed by the Respondents in the decision. Therefore, the fact that the Appellants attached the brief to the urgent appeal, and asked for it to be considered as part and parcel to the appeal notwithstanding, for the sake of order, they will now repeat their arguments on the matter in brief.

Unreasonable decision

11. The Appellants indicated the decision was unreasonable. Decisions made by administrative authorities must meet the test of reasonableness. In order to meet said test, decisions must include correct balance of all relevant factors that must be taken into account and their order of importance. In HCJ 341/81 **Beit Oved Moshav Community v. Traffic Commissioner** (IsrSC 36(3) 349, 354 (1982)), the Court ruled:

> In determining the scope of what may be considered reasonable, one must take into consideration, *inter alia*, the question of whether the public authority has given proper weight to the various relevant factors it must take into account. A decision made by an administrative authority shall be disqualified as unreasonable if the weight given to the various factors was improper in the circumstances of the matter. Indeed, this balancing and recognition of the relative importance of the factors are some of the major tasks of a public authority and scrutiny thereof is the purview of the Court.

12. The Appellants also clarified in their written submission that the scope of reasonableness available to an administrative authority varies from one decision to another, and it is determined partly by the impact the decision would have on human rights:

> The scope of this area is influenced by the substance of the matter. A distinction is drawn between decisions that are technical in nature, and ones that are substantive, such as a decision that restricts human rights… in decisions affecting human rights … the scope of reasonableness is narrower.

(Eliad Shraga and Roi Shachar, **Administrative Law (Causes for Interventionn)** (Shes, 2008, p. 242).

13. However, regrettably, like the notice, the decision is also based on vague information at best, or wrong information at worst, information that Respondents have had in their possession for many years and have refrained from acting on. The decision spells serious harm to the fundamental rights of a woman who is no longer young, and who is also a wife, mother and grandmother to permanent residents, and herself a permanent resident for decades. Additionally, she has been her husband's sole spouse for decades. In light thereof, it is clearly unreasonable and disproportionate to claim now – decades after the Appellant has been granted status and, for entirely irrelevant reasons – that she had received her status in Israel unlawfully. For this reason, the Respondents' decision is wrongful.

Abuse of power

14. An administrative authority is prohibited from using powers granted to it by the legislature for purposes other than for which the powers had been granted. This prohibition, which forms one of the tenets of administrative law, is known and accepted in all legal systems, and its origins can be found in both common law and continental law:

> In this family of disqualified powers there is room also for a particular branch relating to use of a power granted to the entity that is the subject of review for a purpose other than for which it was intended. Quashing decisions handed down unlawfully in said manner is a foundational principle of English administrative law, see:
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> S.A. de Smith, Judicial Review of Administrative Action (London, 4th ed., by J.M. Evans, 1980) 325 ff.; P.P. Craig, Administrative Law (London, 1983) 354 ff.
>
> French law also provides for the disqualification of a decision due to abuse of power, or, detournement de pouvoir. See: A. de Laubadere, Droit Administratif; pouvoir. (Paris: 8eme ed.) 570-575.
>
> (HCJ 620/85 **Miari v. Knesset Speaker**, reported in Nevo).

15. In HCJ 491/86 **Tel Aviv Yaffo Municipality v. Minister of Interior** (reported in Nevo), too, the court addressed use of power by an administrative authority for an extraneous purpose:

> This Court has jurisdiction to examine and review the actions of the authorities not just as they appear in terms of the formal legal authority, but also, on the merits of the matter, in terms of whether the power was used lawfully, including, *inter alia*, whether it was used in good faith, based on valid considerations and for the purpose for which it was granted… It shall not sanction acts that are wrapped in an external appearance of validity but are not as they appear…

16. As can be seen, there are situations in which the administrative authority may formally have the power, but a more thorough investigation of the decision-making process reveals that the power was used for a purpose other than for which it was granted.

17. The Respondents' conduct in the matter of the Appellant, as indicated by the language of the notice and the decision in the matter, attests to the fact that, in this case, the Respondents used such alleged power for a purpose that is entirely different from that for which it was granted. Both the decision and the notice begin with a clear reference to the attack as the basis for their issuance:

> Following the serious terrorist attack committed two days ago in the neighborhood of Armon Hanatziv in Jerusalem, in which four Israeli citizens were murdered, the Minister of Interior held a consultation with security agency officials.

It is only subsequently that the Respondents provide more detail:

> During this consultation, details from your Population Administration file were presented, indicating you had received your status pursuant to your marriage to an Israeli resident, while, despite an affirmation that the marriage was not bigamous, there was, in fact, a bigamous marriage in place.

Thus, the purpose pursued by the Respondents when the procedure was commenced, when the notice was issued, and at present, in the decision, was a response to the attack committed by the Appellant's son. However, the power and the grounds used by the Respondents to revoke the Appellant's status are that she had been granted status while in a bigamous marriage. The alleged information regarding effective bigamy had been in Respondents' possession, contained in the Appellant's file. However, for decades, they chose to do nothing. It is only now, many years after the Appellant was granted permanent residency and had established her family in Jerusalem, that the Respondents are suddenly compelled to eradicate bigamy and decide that the time has come to punish the Appellant for allegedly giving them false information, thirty years ago.

Decision tainted with clearly extraneous considerations, including wrongful collective punishment

18. There is no dispute, nor can there be, that the Appellant is being punished for the actions of another – her son Fadi. This is clearly apparent from the language of the notice, the language of the decision and interviews and reports by and about the Respondents in various media outlets after the attack. These reports indicate that the measures taken against the Qunbar family are vindictive and punitive, or, alternatively, meant as a deterrent for future potential attackers, to strike fear into their hearts.

19. So, for instance, on January 10, 2017, even before the Qunbar family was given notice regarding the planned revocation of their status and summoned to a hearing, the office of Respondent 1 (Barak Seri, Respondent 1 media advisor), issued a press release which included quotes from statements made by respondent 1:

> **Following his decision, Minister of Interior Arye Deri said: "This is a decision that marks a new era in counterterrorism and action against terrorists who have status and who have abused it in order to commit serious attacks against civilians. From this point forward, we will show zero tolerance for people involved in terrorism against Israel and for their families. From this point on, anyone conspiring, planning or considering a terrorist attack will know that his family will pay dearly for his actions. The ramifications will be serious and far reaching, as in**

the decision I have made with respect to the mother and relatives of the terrorist who perpetrated the attack in Armon Hanatziv in Jerusalem".

A copy of the media advisor's release is attached hereto and marked **G**.

20. In a radio interview held on January 11, 2017 with Respondent 1, he expressly spoke about why had decided to act as he did in the matter of the extended Qunbar family, referring to another incident that took place a year before (the revocation of the residency of persons involved in the attack that resulted in the death of Alexander Levlovich):

> **Youths who've said, wait a minute, they've gone off the deep end, they're starting to revoke citizenships. Folks, if I can prevent terrorist attacks and save the lives of our children's, I'm ready to take an op-ed in Haaretz any day.**

And,

> **Now they'll get it. You know what you have here. You know that if you commit such an act, you're taking things away from your mother, your brothers. It's national insurance. It's a driver's license. It's an Israeli work permit. It's a lot of things. People will think twice.**

And,

> **I'm also preventing. <u>It's not just deterrence. I'm also preventing suspected persons, until it is made absolutely clear over the next few months, that they really have no connection, I won't let them roam free in the country with a blue [Israeli] ID card.</u>**

Link for interview with Respondent 1: https://soundcloud.com/glz-radio/2rmnapoiupgp

21. On January 25, 2017, before the decision on status revocation was delivered to the Appellant and her family members, the Respondents quickly put up notice of the decision on the website of Respondent 2, stating, *inter alia*:

> Minister of Interior Arye Deri has recently revoked the status of terrorist Fadi Qunbar's relatives. As recalled, immediately following the terrorist attack that took place in Jerusalem some two weeks ago, in which four soldiers were killed, Minister Deri announced he would take immediate action to have the status of the terrorist's relatives, living in Israel pursuant to family unification, revoked…
>
> **Minister Deri clarified: "<u>Only immediate, practical steps will deter terrorists</u>. <u>I am confident that revoking the status of family members will serve as a warning sign for others contemplating terrorist attacks and the killing of Israeli citizens</u>".**
>
> (Emphasis added, B.A.)

22. The Supreme Court has also addressed the fact that a decision that impinges on a person's fundamental right solely to effect deterrence among future potential terrorists. In a case concerning

assigning the residence of a person in an occupied territory, President A. Barak ruled that the residence of a person who does not personally pose danger cannot be assigned only because the measure would deter others:

> It follows that the basis for exercising the discretion for assigning residence is the consideration of preventing a danger presented by a person whose place of residence is being assigned. **The place of residence of an innocent person who does not himself present a danger may not be assigned, merely because assigning his place of residence will deter others.** Likewise, one may not assign the place of residence of a person who is not innocent and did carry out acts that harmed security, when in the circumstances of the case he no longer presents any danger. Therefore, if someone carried out terrorist acts, and assigning his residence will reduce the danger that he presents, it is possible to assign his place of residence. **One may not assign the place of residence of an innocent family member who did not collaborate with anyone, or of a family member who is not innocent but does not present a danger to the area. This is the case even if assigning the place of residence of a family member may deter other terrorists from carrying out acts of terror.**
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> HCJ 7015/02 **Ajuri et al. v. IDF Commander in the West Bank et al.,** TakSC 2002(3), 1021, p. 1026 [official Supreme Court translation], Emphasis added).

23. It is also highlighted that the decision to revoke the Appellant's status in the circumstances detailed above is nothing short of punishment, which runs contrary to one of the most fundamental rules of justice – **the prohibition on punishing one person for the actions of another**. This rule underlies every legal and it is deeply rooted in Jewish law as well. The book of Deuteronomy expresses this concept most explicitly:

> Parents are not to be put to death for their children, nor children put to death for their parents; each will die for their own sin. (Deuteronomy 24:16).

Prophets Jeremiah and Ezekiel repeat the rule that family members shall not pay for the sins of other family members:

> The one who sins is the one who will die. The child will not share the guilt of the parent, nor will the parent share the guilt of the child. The righteousness of the righteous will be credited to them, and the wickedness of the wicked will be charged against them. (Ezekiel 18:20).

24. Thus, neither the unacceptable practice of bigamy, nor the need to deter against providing false information are the reason for the decision in the Appellant's matter. The reports described above make no mention of the allegations regarding false statements on the issue of the bigamous marriage, made in the 1980s, which the Appellants deny as elucidated below. The main consideration behind the decision was the attack committed by the Appellant's son, which, no one disputes, she had no connection to nor knowledge of. The statements reportedly made by Respondent 1 attest to the fact that the considerations that guided his decision were deterrence and vengeance. As such, the decision is clearly based on extraneous considerations. It is fundamentally unacceptable and must be revoked.

Impingement on right to family life for serious considerations only

25. As detailed in the written arguments, the following has been ruled with respect to the right to family life and its importance:

> A person's right to have a family is one of the foundations of human existence; its realization is a condition for making the most out of life and it is the essence of life; it is a condition for self-realization and for a person's ability to share their life and fate with their spouse and children. It reflects the essence of a person's being and the embodiment of their desires. The right to have a family is situated at the highest level of human rights. An infringement on this right is possible only when it is balanced against a conflicting value of special power and importance.
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> (Judgment in HCJ 7444/03 **Dakka v. Minister of Interior**, para. 15 of the opinion of Honorable Justice Proccacia, published in Nevo, February 22, 2010, hereinafter: **Dakka**).

26. The brief also states that the establishment of the right to family life as a constitutional right brings with it the finding that any impingement on this right must comply with Basic Law: Human Dignity and Liberty, and can only be made for serious reasons. There must be a strong factual basis attesting to such reasons. This finding puts an increased onus on the Respondents to assiduously ensure there is an administrative system in place that guarantees the power to deny family unification, a power which impinges on a protected constitutional right, is exercised only in cases that fully justify same.

27. In addition, as is the case with any infringement on a fundamental right, a decision to deny a family unification application must meet the rules of reasonableness and proportionality with due weight given to the importance of the fundamental right that is being curtailed.

28. An infringement on human rights, and, in the case at hand, an infringement on the right to family life, is lawful only if it meets the test of reasonableness and due balance between it and the other interests the authority is entrusted with upholding. The more important and central the right being violated, the larger the weight it is should be given in the balance between it and the authority's opposing interests (PPA 4463/94 LAHCJ 4409/94 **Golan v. Israel Prison Service**, IsrSC 50(4) 136, 156).

29. The required weight of the evidence on which an administrative decision is based depends on the substance of the decision. The weight of the evidence must reflect the importance of the right or interest that is compromised by the decision and the degree of harm done. The infringement on a fundamental right, which would be the direct result of the Respondent's decision, requires the Respondent to predicate his decision on serious assessments and information (see, Election Appeal 2/84 **Neiman v. Central Election Committee**, IsrSC 39(2) 225, 249-250).

30. Thus, the revocation of the Appellant's status would result in a maximal infringement of her right to continue living in what has been her permanent place of residence for decades, the place where she established her home and family, and as such, a grievous impingement on the right to family life of the Appellant, her spouse, their children and their grandchildren.

31. Given the rulings referenced above, the decision to deny the Appellant's status in Israel due to a bigamous marriage from decades ago, despite the fact that the information was known to the Respondents and contained in the Appellant's file for many years, without them bothering to take

action on the issue either administratively or criminally, fails to meet the required administrative standards. This is, therefore, a flaw that strikes at the core of the matter and the decision is unacceptable.

32. Let as state the matter frankly, as Respondent 1 did when he ordered the procedure, publicly declaring his motives and goals. It was the will to severely impinge on the right to family life of the Appellant and her family that underlay the decision, not the bigamy. The cynical, wrongful, use of this information, which the Respondent had had for years and never used against the Appellant and her spouse, either in real time or in the decades that followed that renders the entire process fundamentally unacceptable.

The Respondents caused the Appellant evidentiary damage

33. Moreover, the unacceptable, and, to understate, unfair, use the Respondents now make of allegations regarding false statements on the issue of bigamy, decades after the fact, as a pretext for revoking the Appellant's status has caused her considerable, irreparable, evidentiary damage. Aside from the Respondents' improper refusal to grant the Appellants' request for disclosure of the documents that form the evidentiary basis for the bigamy charge prior to the hearings, it is plain to see that after so many years, the Appellant and her counsel cannot reproduce the exact chain of events as it occurred at the time, including, what the Appellant and her spouse argued at the time; what they represented or declared during the family unification procedure; what the Respondents' policy was in the 1980s regarding bigamy, or, regarding a bigamous marriage that ended either during the family unification process or immediately thereafter. On the other hand, it is well known that family unification procedures practiced by the Respondent's office in those years were nothing like the stringent, strict and lengthy procedure of the present day.

34. Furthermore, had the Respondent acted in real time to revoke the Appellant's family unification at the time the bigamous marriage was in place, that is, during the 1980s, the Appellant and her spouse would still have had enough time to launch a new family unification application once the husband's bigamous marriage came to an end. In fact, they could have done so several times over, and have the procedures end with permanent residency for the Appellant. As is known, the Citizenship and Entry into Israel Law (Temporary Order) entered into effect only in 2003, whilst the Appellant's husband's marriage to his first wife ended in the 1980s.

35. At this juncture, the Appellants wish to make another point. Given the judgment handed down in AAA 8849/03 **Dufash v. Ministry of Interior** (published in Nevo) (hereinafter: **Dufash**), and the consequent judgment in **AAA 6407/11 Dejani et al. v. Ministry of the Interior – Population Authority** (judgment dated May 20, 2013) (hereinafter: **Dejani**), Appellant 2 launched a campaign for upgrades to the status of other OPT residents who have long been married to Israeli residents, and whose status had not been arranged prior to the entry into force of the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 (hereinafter: **the Temporary Order**), due to delays or errors on the part of the Respondents. However, the Respondents herein issued retroactive notice that any application for status upgrade due to delayed processing filed subsequent to January 1, 2010 will be dismissed **given the significant evidentiary damage** the Respondents sustained due to the delay in filing.

A copy of a sample decision made by the Respondents is attached hereto and marked **I**.

36. Thus, the Respondents' allegations of substantive evidentiary damage they sustained in applications for status upgrades filed following the **Dufash** judgment are all the more applicable to the matter herein. If an administrative authority that has an archive, and other documentation means at its disposal can, several years after the fact, claim evidentiary damage due to a late application by

residents, it is all truer of an "ordinary citizen" against whom an administrative authority makes allegations decades after the fact, and where said citizen, unlike the authority, has no means of ascertaining what really transpired at the time. The damage the Respondents cause the Appellant with this conduct is irreversible. As detailed below, the Appellants are not at all certain that the Respondents' allegations are true, and it appears that the Respondents themselves have no exact records of what transpired around the procedures held for the approval of the Appellant's status in Israel.

37. In conclusion, relying on allegations concerning bigamy, decades after the family unification process was completed, is unfair, and, therefore, for this reason also, the decision is fundamentally wrong.

The decision brazenly ignores the written argument brief

38. As stated, the arguments presented in detail above were submitted as a written brief at the time of the hearing, and were available to the Respondents prior to making their decision to revoke the Appellant's status in Israel. However, the decision makes no reference to these arguments. We hereby present further arguments against the decision following the hearing held for the Appellant.

Decision made ultra vires

39. The decision made by the director of the East Jerusalem office of the Population Administration to revoke the Appellant's permanent residency status in Israel was patently ultra vires. We shall clarify:

40. Section 11(a) of the Entry into Israel Law 5712-1952 (hereinafter: **the Law**), on which the decision purportedly relies states as follows:

> The Minister of Interior, may, according at his discretion –
>
> … (2) revoke a residency permit granted pursuant to this Law.

41. As is known, the revocation of a permanent residency permit severely impinges on an array of fundamental rights, including the right to residency, the right to liberty, the right to dignity, the right to freedom of movement, the right to autonomy and the right to family life.

42. The language of Section 11(a)(2) of the Law grants the Minister of Interior broad powers to deny any type of residency permit without specifying any criteria or conditions for employing these powers and discretion.

43. When powers granted in primary legislation impinge on liberty and fundamental rights, the primary legislation must be direct and explicit. It must set out how the power is to be exercised, in what areas and under what circumstances. It must not leave the matter to the broad discretion of the administrative authority. The remarks of Honorable President of the Supreme Court (emeritus) Shamgar, who addressed this important issue even prior to the enactment of Basic Law: Human Dignity and Liberty:

> Restricting liberties, the right to run for office included, requires direct, explicit legislation that sets clear lines and does not leave the matter up to the unfettered discretion of an administrative or other authority. **It has been highlighted, however, that in order to respect and uphold liberties, formal powers vested by the legislature are insufficient, but rather, the law must set forth moral criteria for using said powers. In other words,**

> **the law must include two substantive elements: one expressing that powers are granted, and the other defining the circumstances under which they can be exercised.**
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> Election Appeal 1/88 **Neiman v. Central Committee for the Election for the 12th Knesset**, IsrSC 42(4) 186 (1989) (Emphasis added, B.A.).

See also HCJ 693/91 **Dr. Michal Efrat v. Population Registry Officer, Ministry of Interior**, IsrSC 47(1) 749, 768 (1993).

44. This stance was validated with the enactment of Basic Law: Human Dignity and Liberty. According to case law, one of the conditions for impinging on fundamental individual rights is having the powers to do so entrenched in primary legislation:

> This sensitivity to human rights leads to the conclusion that **impingement on human rights**, even if it promotes the country's values, even if it is done for a proper purpose, and even if it is not excessive – **must be regulated by law that sets in place the primary arrangements, and formal legislative powers given to the executive authority cannot suffice.**
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> (HCJ 3267/97 **Amnon Rubinstein v. Minister of Defense**, IsrSC 55(2), 255, para. 3 of then President Barak (2000); emphasis added).

On the question of what constitutes primary arrangements and how they differ from secondary arrangements, it has been ruled:

> The law is designed to institute criteria for making decisions that are fateful and fundamental to people's lives. Indeed, **a primary arrangement is present where the law itself**, through interpretation conducted through accepted interpretation methods – **circumscribes the executive authority's scope of action, and outlines the main direction or purpose that should guide said action.** Inasmuch as the regulation of a certain field requires fundamental decisions that could set substantive patterns for the life of an individual or of society, the decisions ought to be made in the primary legislation itself. Indeed, **a primary arrangement is present where the law itself sets principles or standards at a higher level, which are to be realized at the lower level.** The degree of abstraction of a primary arrangement changes from one issue to another. **The worse the impingement on an individual liberty, the more unacceptable a high level of abstraction would be. The primary legislation arrangement that is required must state, even if generally, the nature or scope of the impingement on liberty. When the object of the arrangement is a complex matter which requires a high level of expertise, a high level of abstraction can often be accepted.**
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> (HCJ 3267/97, para. 24 of the opinion of President Barak; emphasis added, B.A.).

45. Granting an administrative authority sweeping powers, without regulation through primary legislation constitutes an impingement on the rule of law and the separation of powers:

> The more sweeping the authority, the less restrained the authority is by the legislature's arrangements, the greater the toll on the rule of law. A law that, for instance, gives the Minister of Health sweeping powers to regulate care for mental health patients would practically put the minister in place of the legislature. **In such a case, the rule of law over the minister would be replaced with the rule of the minister over the law**.
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> (Yitzhak Zamir, **Administrative Authority**, 235 (1996); emphasis added. B.A.).

46. Honorable President (emeritus) Barak's comments on the broad powers granted to the police district commissioner for placing conditions on the issuance of a protest permit, under Section 85 of the Police Ordinance, are also relevant to the matter at hand. President (emeritus) Barak ruled that granting powers without setting general conditions or guidelines for how the police district commissioner should exercise his administrative discretion impinges on the rule of law and the separation of powers. Most importantly, grating general powers without specifying the relevant considerations and conditions for exercising them renders the legislation from which said powers flow unclear, or "vague" law.

> A review of the language of Section 85 of the Police Ordinance reveals that the power it grants the police commissioner to place conditions on the issuance of a protest permit is vague and general. The section does not specify, not even generally, what conditions the police commissioner may stipulate and according to what considerations he may stipulate said conditions. It contains no guidance of administrative discretion. It is vague law. Vague law is undesirable. It may infringe on the principle of the separation of powers and the rule of law […] How does it impinge on the principle of separation of powers? This principle warrants that the Knesset, not the executive branch, set the general criteria for use of administrative powers. Broad, vague powers, undermine the Knesset's legislative powers. How does it impinge on the principle of the rule of law? Substantive rule of law requires the law to be clear, certain and comprehensible in a manner allowing the public to manage their affairs in its light. General, vague powers undermine the ability of the public to know their rights and obligations with certainty.
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> (HCJ 2557/05 **Majority Headquarters v. Israel Police**, IsrSC 72(1), 200, para. 9 (2002)).

47. In the matter herein, despite the fact that it involves extreme, grievous impingement on the Appellant's right to status and on the attendant rights, the decision is based on Section 11(a)(2) o f the Law, whereby "The Minister of Interior, may, according at his discretion [..] revoke a residency permit granted pursuant to this Law". However, this section of the law is a "catchall" section, that is phrased vaguely and provides for sweeping, broad discretion to deny fundamental rights. The section does not stipulate principles, does not set the direction, main points or purpose for use of the power. Given the case law cited above, such a severe impingement on the right to status – in fact, the denial of this right – cannot be accepted based solely on the general formal power granted to Respondent 1 to revoke residency permits, absent explicit primary enactment.

Violation of natural justice

The right to a hearing and the right of review

48. The Appellants shall argue that no real hearing took place in the Appellant's matter. The Respondents breached their obligation to give the Appellant the opportunity to argue against the evidence that supplied the basis for the decision made against her – given that these were never disclosed to her, despite the Appellants' request for disclosure of the documents used as the evidentiary basis for the bigamy allegation prior to the hearing. Instead, the hearing in the Appellant's case was a mere formality with a foregone conclusion.

49. The right to argue before an administrative authority that is considering or planning an action that violates an individual's right or interest has been recognized as a supreme right that forms part of the rules of natural justice (see, e.g.: HCJ 3/58 **Berman v. Minister of Interior**, IsrSC 12 1493, 1508; HCJ 3379/03 **Mutasky v. Attorney General's Office**, IsrSC 58(3) 865, 899; HCJ 5627/02 **Seif v. Government Press Office**, IsrSC 58(5) 70, 75).

50. **The right to argue has long since been recognized as inclusive of the right to review** the material used by the administrative authority to make its decision:

> Indeed, the right a person has to make their case before an administrative authority poised to make a decision in their matter does reasonably give rise to the **right to review the documents used by the authority to make its decision**, subject to restrictions and limitations required to ensure the proper functioning of the administrative authority. **Without the right of review, the right to argue is never complete**. Without the right to argue, the decision made by the administrative authority may be incomplete and flawed. This conception, of a right of review vested in an individual facing potential harm from the decision of the authorities, is congruent with the current, increasing general trend toward reducing confidentiality of information held by the authorities and limiting it only to needs essential for safeguarding a significant public interest.
>
> (HCJ 7805/00 **Aloni v. Jerusalem Municipality Comptroller**, TakSC 2003(2) 1121, p. 1131; emphasis added, B.A.).

51. Elsewhere, it has been ruled that the right to argue does not mean simply that the authority should hear the arguments made by the individual, but, that it obliges a **fair hearing**, which includes disclosure of information received about the individual in a manner that would allow them to disprove it:

> This right is not simply a formality of a summons and a hearing. The right to a hearing is the right to a fair hearing (HCJ 598/77, p. 168). This right means providing a proper opportunity to respond to information that has been provided and that may impact the decision in the matter of the petitioner (see HCJ 361/76).
>
> **Therefore, the right to a hearing is not properly upheld if the applicant is not made aware of information received in their matter and if they are not given the opportunity to respond properly.**
>
> (HCJ 656/80 **Saleb Abu Romi v. Minister of Health**, IsrSC 35(3) 185, 190; emphasis added, B.A.)

52. With respect to the importance of the right of review, as part of the exhaustion of the right to argue granted to a person who stands to be harmed as a result of the decision of an administrative authority, it has been held that:

> **Once the injured party is prevented from receiving the full evidentiary material, their right to argue is curtailed and they are no longer required to demonstrate that in the specific case this has also resulted in the miscarriage of justice**. Concern (even if unfounded) that the administrative authority had erred in its injurious decision is built into the fact that the right to argue against the evidence was not fully available to the injured party. The value of human dignity protected in Basic Law: Human Dignity and Liberty also compels the conclusion that **even if a person's dignity had been violated in pursuit of a proper purpose, such violation should not occur without the person whose dignity stands to be violated having exhausted the right to plead their case, in the sense of receiving the full evidence and having the opportunity to respond**. This right is a "security belt" against "excessive" harm.
>
> (HCJ 4914/94 **Turner v. State Comptroller et al.**, IsrSC 49(3) 771, p. 791; emphasis added, B.A.).

53. In the judgment handed down in AAA 1038/08 **State of Israel v. Ja'abis** (published in Nevo, hereinafter: **Ja'abis**), which concerned the right to argue and the duty to hold a hearing incumbent on the Ministry of Interior when it decides to deny a family unification application for security reasons, the Court ruled:

> **Upholding the right to argue is important, but as part thereof, it is important to ensure that the <u>hearing is substantive and does not become an empty formality</u>.**
>
> (Section 34 of the opinion of Honorable Justice Rubinstein; emphasis added, B.A.

And,

> A review of some of the refusals that are the subject of the appeals before us has raised concern that the non-confidential brief summaries of the information contained in the refusal decisions are not sufficiently detailed and prevent the individuals from adequately responding to the allegations made against them. We believe that the authority should address this issue and consider whether the current state of affairs truly provides an adequate response to this aspect of disclosing the material to the applicant, as required by the nature of the process and the nature of the rights that are impinged where the decision is refusal, all considering security constraints.
>
> (Para. 7 of the opinion of Honorable President (emeritus) Beinisch).

54. Given the rule in **Ja'abis**, one of the conditions that render a hearing genuine is that the person whose rights the authority is seeking to infringe upon be given concrete information in a manner that allows them to properly prepare for the proceeding. As stated, the Respondents refused to provide the Appellants with the documents that served as the evidentiary basis for the decision. It is

also noted that during the hearing itself, the Appellants were not presented with any evidence to corroborate the allegation that bigamy occurred at the time of the Appellant's family unification procedure. In fact, no such evidence has been presented to the Appellant to date. However, while in **Ja'abis**, divulging the information was subjected to security restrictions, seeing as the information discussed there was classified intelligence information, this is clearly not the case in the matter at hand. The allegations made against the Appellant are not security related but rather relate to her personal status (a bigamous marriage) at the time the family unification application was made. Therefore, there is no justification for the Respondents' refusal to provide the Appellants with the information they requested. The Respondents' insistence on withholding the information before and even during the hearing, raises suspicions as to the quality of this evidence, and perhaps, even its existence.

55. Respondents' refusal to divulge the information requested by the Appellants means one thing only. The Respondents effectively denied the Appellant the sole opportunity to refute the allegations they are making against her and failed to uphold their obligations as required by the rules of natural justice. Add to that the fact that a review of the documents on which the decision is based may reveal facts, and sometimes errors, that may tip the balance in favor of the applicant in whose matter the administrative decision is given.

The duty to provide reasoning

56. In addition to the violation of the right to argue, the Respondents also breached the duty to provide reasoning. Substantive reasoning, that allows the individual to understand the authority's reasons and is part and parcel to a culture of democracy. It is the very soul of open government that treats the "ordinary citizen" with administrative fairness.

> The right to be provided with reasoning is more than just a right to governmental fairness. It also provides a "security belt" and guarantees respect for the substantive rights that are the subject of the authority's decision. The logic behind the duty to provide reasoning is partly to allow a person harmed by the administrative decision to assess whether the decision meets the test of legality, and whether there are grounds, and a point, to putting it to judicial scrutiny. In addition, reasoning contributes to proper relations between the administrative authority and the citizen, which is meant to blunt the sense of governmental arbitrariness. (See Yitzhak Zamir, **Administrative Authority**, (5756) (b); 897-898).

And,

> Reasoning is one of the tenets and foundations of the administrative decision. In a reasoned decision, the authority presents the citizen, its interlocutor, with its reasons and considerations. **In this manner, what is revealed alleviates concern over what is not revealed and over irrelevant considerations. It produces the transparency and fairness required in the actions of the authority and its decisions.** Moreover, without reasoning, the decision is exposed and ill-equipped against judicial scrutiny of the decision and its legality.
>
> (PP 146/01 **Abu Awad v. Amasa**, TakNLC 2002(2) 588, 589; emphasis added, B.A.).

57. Reasoning must provide the person who is harmed by the decision of the authority with tools they can use to put the decision to the scrutiny of appellant and review instances, and allow these instances to properly perform their duties. Reasoning must also reflect the central parameters of the authority's decision-making process, rather than merely supply the titles of the reasons for the decision. The Respondents impinged on the Appellant's right to receive a thoroughly reasoned decision, and as such, the decision is literally nothing short of an impingement of the Appellant's right to due process.

The allegation of bigamy made during the oral hearing – disproved

58. During the oral hearing, counsel for the Appellants asked the officials holding the hearing, Ms. Liat Melamed and Mr. Tal Zahavi, of the Respondents' East Jerusalem office, for the exact dates of submission and approval of the Appellant's application for status in Israel. The request came after the Respondents, as mentioned, refused to provide the Appellants with this information prior to the hearing. In response, counsel for the Appellants was told that the Appellant's application for status was submitted on **August 2, 1987** and approved on **December 1, 1988**.

59. Upon receipt of the information, counsel for the Appellants presented the officials with Mr. al-Qunbar's certificate of divorce from his first wife. The divorce is dated **March 24, 1987**, or six months prior to submission of the Appellant's application for status. It follows that although the Appellant wed her husband as a second wife, there was no overlap between the bigamous marriage and the time at which the procedure toward arrangement of her status began. Therefore, inasmuch as the decision is based on an allegation of formal bigamy simultaneously with the family unification procedure, the allegation was refuted using the marriage and divorce documents presented to the Respondents during the hearing. With respect to the possibility of an effective bigamous relationship, despite the official divorce from the first wife, and simultaneously with the submission of the family unification application, the Respondents presented the Appellants with no evidence to support such a claim. As indicated by the hearing transcripts, the Appellants were presented with no information on this subject, and the questions asked by the Respondents related to the current living quarters of the first wife, a matter that has no relevance for proving or disproving the reason for the revocation of the Appellant's status.

    A copy of the transcripts of the hearing held for the Appellant, ending with the arguments made by counsel for the Appellant regarding the allegations of bigamy is attached hereto and marked **J**.

60. The aforesaid put together indicates that the Appellant was denied the ability to exhaust her right to argue, perhaps even denied the right altogether. To this day, the Respondents have failed to clarify the basis for their contention that a bigamous marriage was in place concomitantly with the family unification procedure. As stated, no evidence of bigamy was presented to the Appellants either before or during the hearing. As a result, they were never given the opportunity to respond and present evidence to counter these allegations.

Conclusion

61. The Respondents' decision to revoke the status of the Appellant, who herself committed no crime or offense, for the actions of her son and based on allegations of false representations regarding bigamy made decades ago is an outrageous decision and entirely wrongful. It is a decision made ultra vires based on obviously extraneous considerations of collective punishment, deterrence and simple vengeance. Such a woefully unacceptable decision that grievously violates the Appellant's fundamental rights cannot remain in place.

62. Given the above, the Honorable Court is moved to accept the appeal, inclusive of all arguments made by the Appellants both in the written submission to the hearing, the appeal itself and the supplementary argument brief filed herein – and order the Respondents to immediately retract their wrongful decision in the Appellant's matter, and reinstate her status.

Jerusalem, February 2, 2017.

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Benjamin Agsteribbe
Counsel for the Appellants

(File No. 96755)