At the Supreme Court **HCJ 19-**

Sitting as the High Court of Justice

In the matter of:

1. ____ Rajabi, I.D. No. _____
2. HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger
   Registered Association No. 580163517

   Represented by counsel Adv. Benjamin Agsteribbe (Lic. No. 58088) and/or Daniel Shenhar (Lic. No. 41065) and/or Tehila Meir (Lic. No. 71836) and/or Naser Odeh (Lic. No. 68398) and/or Nadia Daqqa (Lic. No. 66713) and/or Aaron Miles Kurman (Lic. No. 78484).

   Of HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger

   4 Abu' Obeidah St., Jerusalem, 97200

   Tel: 02-6283555; Fax: 02-6276317

The Petitioners

-- Versus --

1. Israel Knesset

   represented by counsel from the Legal Department

   Knesset

   Kiryat Ben Gurion, Jerusalem

   Tel: 02-6408479; Fax: 02-6753495
2. Minister of Interior

   represented by counsel from the State Attorney's Office

   29 Salah a-Din St., Jerusalem

   Tel: 02-6466590; Fax: 02-6467011

The Respondents

Petition for Order Nisi

A Petition is hereby filed for an Order Nisi directed against the Respondents and ordering them to appear and show cause:

- Respondent 1: Why it should not repeal the amendment to Section 11 (a) of the Entry into Israel Law 5712-1952, passed by the Knesset Plenum on March 7, 2018 (hereinafter: the Law), seeing as it is immoral, unconstitutional and incongruent with international law and international humanitarian law;

- Respondent 2: Why he should not rescind his decision (hereinafter: the Decision) dated August 22, 2019, to revoke the permanent residency permit held by Petitioner 1 for reasons of breach of allegiance, based on the Law. The Decision should be reversed both on the grounds that it was made pursuant to unconstitutional legislation which fails to meet the conditions set out in Section 8 of Basic Law: Human Dignity and Liberty (hereinafter: the limitations clause), defies international and humanitarian law, and completely contradicts the principle of the rule of law and the duty of government fairness, and on the grounds that the Decision applies to Petitioner 1 a statute that creates a penalty carrying offense retroactively and for no proper purpose.

Introduction

On March 7, 2018, the Knesset passed the amendment to the above law, which empowers the Minister of Interior to revoke permanent residency permits granted to indigenous residents of East Jerusalem on grounds of breach of allegiance. The amendment was promoted and passed following the ruling of this Honorable Court in HCJ 7803/06 **Abu 'Arafeh et al. v. Minister of Interior** (reported in Nevo) (hereinafter: **Abu 'Arafeh**).

As detailed in the legal chapter of this petition, the amendment and the Decision in the matter of Petitioner 1, as well as other residents of East Jerusalem in whose matter similar decisions were reached based on the Law, are fundamentally flawed. The

amendment fails to meet the conditions set out in the limitations clause of Basic Law: Human Dignity and Liberty, and is therefore, unconstitutional. Moreover, the Law was passed with full, prior awareness that it completely contravenes Israel's obligations under international law and international humanitarian law. Aside from the lack of constitutionality at the foundation of the Decision, the Petitioners will also show that on an individual basis as well, the Decision is entirely wrongful as it is unconstitutional, unreasonable and disproportionate. It has been applied to Petitioner 1 retroactively, using a contaminated process and relying in part on extraneous considerations, and therefore, should be revoked. We shall address matters in order.

The Relevant Jurisdiction and the Respondents

Whereas this petition impugns the Law, and given that in two other individual actions brought by Petitioner 2 to the Court for Administrative Affairs against decisions made by the Minister of Interior pursuant to the Law, which impugned the Law itself, the lower court deferred the cases to this Honorable Court for deliberation - HCJ 369/19 **Dwayat v. Minister of Interior et al.** and HCJ 405/19 **Abu Ghanem v. Minister of Interior et al.** - the Honorable Court has jurisdiction over the matter herein.

Factual Background

The Parties

1. **Petitioner 1** (hereinafter: also the Petitioner) was born in Jerusalem in 1971. Being a member of a family that is native to East Jerusalem, until the date of the Decision impugned herein, he held a permanent residency permit. Aside from this permanent residency permit, the Petitioner has no other status in the world.

2. **Petitioner 2** is a registered association that has taken upon itself, among others, to assist residents of East Jerusalem who belong to the city's native population who had fallen victim to abuse or discrimination by state authorities. As part of this mandate, Petitioner 2 defends their rights in court, whether as a public Petitioner or as counsel to victims of rights abuses.

3. **Respondent 1**, jointly and severally with Respondent 2, promoted the enactment of the law pursuant to which the Decision impugned herein was issued. It passed the Law by vote in its plenum on March 7, 2018.

4. **Respondent 2** (hereinafter: also Minister of Interior) is the minister who gave the Decision and promoted the enactment of the law impugned herein.

Factual Background and Exhaustion of Remedies

5. Because of the role he played in a serious terrorist attack on a bus operating on route 37 in Haifa in 2003, in which 17 people lost their lives and many others were injured, the Petitioner was given a life sentence, which was subsequently commuted to a 20-year prison sentence. The Petitioner will complete serving his sentence in full in 2023.

6. We note that the prison sentence the Petitioner received for his involvement in the aforesaid attack was part of a plea bargain reached by the parties at the time. More on this follows.

7. Sixteen years thereafter, on April 10, 2019, or sometime around that date, the Petitioner, who has been serving his sentence at Ketziot Prison received a message from Respondent 2, bearing the date April 3, 2019, informing him of his intention to strip him of the permanent residency permit he has carried his entire life.

8. It should be noted at this early point that simple monitoring of reports in media outlets associated with the right wing and social media posts about the procedure Respondent 2 launched against the Petitioner, of which the public is not informed, reveals that throughout this process, and prior to the delivery of the notice to the Petitioner, Respondent 2 made sure to communicate with certain publics, notifying them that a procedure had been launched and keeping them apprised of its progress. In the Petitioners' view, which will be specified in greater detail below, the conduct of Petitioner 2, who did not even bother to give the procedure the appearance of a proper, pertinent procedure devoid of any extraneous considerations, shows that in addition to the other flaws in the process leading up to the enactment of the Law and the process by which the Decision denying Petitioner's status was given, the actions of Respondent 2 are not motivated by breach of allegiance in any way, but by a desire to appease certain publics, particularly families of the victims of the terrorist attack in

question. Unlike criminal proceedings, where victims have standing, in administrative proceedings regarding the status of an individual, the position of the victim's relatives is entirely extraneous to the matter. This is the procedure Respondent 2 elected to launch years after the incident, years after the Petitioner was tried for his involvement, years after the State signed a plea agreement with him and just a few years before he was set to complete his full sentence. These grounds are clearly completely different from the grounds of breach of allegiance on which Respondent 2 seeks to rely.

To clarify, below are links to two publications in the websites of Makor Rison and Israel National News, indicating that Respondent 2 made sure to announce the procedure before its subject was notified.

https://www.makorrishon.co.il/news/127285/

https://www.inn.co.il/News/News.aspx/398048

9. Given the importance of the notice sent to the Petitioner, as stated, 16 years after the incident in which he was involved, for the matter at hand, the Petitioners hereby quote its key points:

> I hereby inform you that I am considering revoking your permanent residency permit in Israel according to my powers under Section 11a of the Entry into Israel Law 5712-1952 (hereinafter: the Entry Law).
>
> The revocation of the permanent residency permit is considered due to your involvement in the planning and execution of a murderous suicide attack at Moria Avenue in Haifa in 2003, in which 17 individuals were murdered, including many young victims. You planned the attack along with others, and you were responsible for transporting the suicide attacker to Haifa and for choosing the location for the deadly attack.

> Following these actions, you were convicted, upon your admission, of conspiracy to aid the enemy during war and for providing cover and you were sentenced to life. An appeal you filed against the conviction and the severity of the penalty was dismissed, with the Supreme Court noting the gravity of the acts.
>
> The heinous act you committed, exploiting the fact that you are a resident of Israel and abusing the freedom of movement given to you as you are a permanent resident of Israel, is a brazen breach of allegiance against the State of Israel under Section 11a of the Entry Law.
>
> You are hereby given the right, prior to a decision in your matter, to present me with any written argument you may have relating to this matter within 30 days, after which I will review your arguments prior to making a decision.
>
> Emphasis added (B.A.)

A copy of the notice of Respondent 2 to the Petitioner is attached hereto and marked **P/1.**

10. On May 5, 2019, the Petitioners submitted written arguments against the Decision to Respondent 2. In addition to listing their arguments against the content of the notice, the Petitioners voiced their grievance that no right to present arguments orally had been extended, as would be the norm in cases in which Respondent 2 is considering revoking status for criminal or security reasons.

    A copy of the written arguments dated May 5, 2019 is attached hereto and marked **P/2**.

11. Following Respondents' arguments regarding being denied the right to put forward oral arguments against the notice, Respondent 2 informed them on June

6, 2019 that an oral hearing would be held for the Petitioner at Ketziot Prison on June 27, 2019.

A copy of the notice of Respondent 2 dated June 6, 2019 regarding the timing of the oral hearing is attached hereto and marked **P/3**.

12. As occurred before the original notice was sent to the Petitioner, at this stage too, media outlets associated with the right wing reported that relatives of the victims of the attack in relation to which the Petitioner received the notice had demanded to participate in the hearing.

Below are links to two such reports on the websites of Israel National News and Hakol Hayehudi.

https://www.inn.co.il/News/News.aspx/404254

https://www.hakolhayehudi.co.il/item/%D7%91%D7%90%D7%A8%D7%A5_%D7%95%D7%91%D7%A2%D7%95%D7%9C%D7%9D/_%D7%9E%D7%91%D7%99%D7%A2%D7%99%D7%9D_%D7%A9%D7%90%D7%98_%D7%A0%D7%A4%D7%A9_%D7%9E%D7%94%D7%AA%D7%9E%D7%99%D7%9B%D7%94_%D7%A9%D7%9C__%D7%94%D7%9E%D7%95%D7%A7%D7%93__%D7%91%D7%9E%D7%97%D7%91%D7%9C_

13. On June 27, 2019, the Petitioner was given an oral hearing at Ketziot Prison. During the hearing, the Petitioner raised several arguments before the representatives of Respondent 2 who were present. Among other things, the Petitioner argued that had he been convicted of murdering 17 individuals, he would have been given 17 life sentences rather than one. He further argued that the sentence he had been given, which was later commuted to twenty years, was the result of a plea bargain signed by the parties at the time. The Petitioner also argued that since he is a member of East Jerusalem's native population, the Decision to strip him of the only status he has in the world, in his homeland, and the homeland of his ancestors, is wrongful and a breach of Israeli law, international law and international humanitarian law, all of which is compounded by the fact that the Decision is based on a law enacted 16 years

after the act that prompted the notice. The Decision, which relies on a law that produced an administrative offense out of thin air, enacted many years after the act that prompted the notice sent to the Petitioner, constitutes retroactive application of a statute in his matter, and effectively constitutes double jeopardy. This is the case since, as stated, years ago, the State signed a settlement with the Petitioner, which set out the parameters for the charges against him and the penalty he would receive. The arrangement did not include undermining his residency status. Finally, the Petitioner argued, as part of the hearing, that he sensed the notice was another part of the personal vendetta against him that had been waged for years.

A copy of the transcript of the oral hearing held on June 27, 2019 is attached hereto and marked **P/4**.

14. And again, at this stage of the process as well, media outlets and social media platforms were not forgotten. This time, Respondent 2 was joined by the Minister of Justice, who, on August 22, 2019, uploaded a video to his official Facebook page in which he is seen signing his consent to the Decision in the Petitioner's matter. The clip was posted with a transcript, the key points of which are repeated below:

> I have just signed, in my capacity as Minister of Justice, the revocation of the permanent residency of two terrorists who were involved in murderous terrorist attacks in which dozens of Israelis were murdered.
>
> For me, this represents coming full circle as this signature is made possible as a result of a law I passed in the 20th Knesset.
>
> The law unfortunately came into being due to the decision of the High Court of Justice to accept petitions brought by Hamas members against decisions made by five interior ministers...

> For those of you who do not know, permanent residency comes with many privileges: unemployment benefits, child benefits, disability benefits, national insurance...
>
> (Emphasis added, B.A.)

15. At the same time the video and text were uploaded to Facebook, on August 22, 2019, Petitioner 2 received the decision of Respondent 2, which is based on the Law and against which the petition herein is directed. At this point too, it emerges that the decision of the Minister had been made, at least partly, due to external public pressure and in consideration of it. Both the language of the Decision and reports in certain media outlets after it was made indicate that this was no pertinent, "sterile" administrative proceeding, as would be required in such a draconian decision, but rather a process contaminated from beginning to end by attempts to please certain segments of the Israeli public and directed mainly at these segments of the public and the families of the victims rather than the Petitioner.

    A copy of a report published on Israel National News some four days after the Decision was rendered, confirming there was interaction between Respondent 2 and certain publics throughout the process and indicating involvement by civilians in it is attached hereto and marked **P/5**.

    https://www.inn.co.il/News/News.aspx/411106

16. In the Decision itself, Respondent 2 writes to the Petitioner:

> Based on the arguments enumerated in my aforesaid notice, I have decided to revoke your permanent residency permit in Israel. My decision was made after I reviewed the material in your case and your arguments as submitted. I have reviewed the recommendations of the advisory committee and **having been persuaded that you have been given a fair chance to make your arguments both orally and in writing, with respect to the horrifying terrorist attack that was**

committed, which has left behind many bereaved families who still bear the cost of the attack <u>as described in their letter, which was also presented to me.</u>

(Emphasis added, B.A.).

A copy of the decision sent to the Petitioner which, along with the law on which it is based, is impugned in this petition, is attached hereto and marked **P/6**.

17. Thus, as we see, the Decision, as well as the various media reports and social media posts, which are addressed to very particular audiences, evince that the Decision challenged in this petition is not the result of a pure, clean administrative procedure free of extraneous, external influences, wherein only pertinent considerations were thoroughly weighed, but the opposite. It appears that both the process preceding the Decision and the Decision itself were contaminated by and originated partly, if not only, from external pressure and the Respondents' desire to please certain publics. This does explain the perplexing decision made by Respondent 2 to address, today, an act carried out sixteen years ago.

<u>The Legal Argument</u>

18. It is argued below that the Law, as well as the specific decision made by Respondent 2 to revoke the residency permit Petitioner has had his entire life by virtue of his belonging to the indigenous population of East Jerusalem, and the only residency permit he has ever had, are flawed both in principle and in the circumstances of the case. We shall discuss matters in order.

<u>The Law violates fundamental rights, fails to satisfy the conditions of the limitations clause and is, therefore, unconstitutional</u>

19. As is known, fundamental rights may be violated if the conditions set out in section 8 of Basic Law: Human Dignity and Liberty (hereinafter: the **limitations clause**) are satisfied, in other words, – by law fitting the values of the State of Israel, enacted for a legitimate purpose, and to an extent no greater than is required. It is argued below that the Law fails to satisfy said conditions and

therefore, both the Law and the decision given by virtue thereof are null and void.

20. There can be no dispute that the Law violates fundamental rights. In the judgment given in HCJ 7803/06 (hereinafter: **Abu 'Arafeh**), following which the Law was enacted, it was long ago held that:

> There is almost no right which is not violated when a person, a native residing in the country for a considerable period of time is deported from his home following the revocation of his permanent residency permit; the right to dignity, the right to freedom and the right to family life (paragraph 68 of the judgment of the Honorable Justice Vogelman in Abu 'Arafeh) (emphasis added, B.A.).

And further:

> Residency permit revocations expose permit holders to the risk of deportation from Israel (see section 13(a) of the Entry Law), with all ensuing consequences – and entails the loss of different socioeconomic, employment and political benefits. It therefore violates their dignity and freedoms. While it is true that residency permit holders are not citizens, Basic Law: Human Dignity and Liberty has taught us that, "The life, person or dignity of any human being, whoever they may be, must not be violated" – all the more so in the case of a permanent resident who has a substantial connection to the land (paragraph 16 of the judgment of Honorable Justice Hendel in Abu 'Arafeh)

And also:

> Under the circumstances of the petition at hand, there is no dispute that the decision of the Minister of Interior violates fundamental rights requiring special protection (compare:

> paragraphs 46-49 of the opinion of my colleague Justice U. Vogelman; paragraph 16 of the opinion of my colleague Justice N. Hendel). (Paragraph 5 of the judgment of the Honorable Deputy President as then titled, Justice Joubran, in Abu ‘Arafeh).

21. Having clarified that the Law violates human rights, and in addition, contrary to the state of affairs prior to its enactment, the validity of laws clause in section 10 of Basic Law: Human Dignity and Liberty does not apply to the case at hand, it should be examined whether the Law satisfies the conditions of the limitations clause established in section 8 of Basic Law: Human Dignity and Liberty (hereinafter: the **limitations clause**).

22. The limitations clause provides that fundamental rights may be violated by law **consistent with the values of the State of Israel**, which was enacted for a **proper purpose**, **and to an extent no greater than required**. It shall be hereinafter argued that the Law fails to satisfy these conditions and is therefore null and void.

The Law has no legitimate purpose

23. The purpose of the amendment to the Law emerges from its explanatory notes, stating as follows:

> The proposed amendment draws a distinction between immigrants who arrive in Israel and are granted status therein and persons whose circumstances are much more complicated, such as East Jerusalem residents, who have been residing in the city for many years with a permanent residency permit. **With respect to immigrants** who receive a permanent residency permit, **it is proposed that the Minister of Interior would be able to revoke their permit if it was obtained on the basis of false information, if there is a threat to public order or safety (…) and due to breach of allegiance to the State of Israel**. **With respect to**

> **permanent residents** whose circumstances are more complex, **such as East Jerusalem residents**, it is proposed that **the Minister of Interior would have the power to revoke the permit <u>solely</u> due to breach of allegiance** or if the permit was given on the basis of false information (excerpt from the explanatory notes to the Law) (emphases added, B.A.)

A copy of the relevant part from the explanatory notes to the Law is attached hereto and marked **P/7**.

24. Hence, contrary to Abu 'Arafeh, where the majority justices were of the opinion that the purpose of the Law in its previous version was to protect public order and safety (see *inter alia* Abu 'Arafeh, paragraph 28 of the judgment of Honorable Justice Hendel; paragraph 4 of the judgment of Deputy President, as then titled, Honorable Justice Rubinstein; paragraph 13 of the judgment of Honorable Justice Melcer; and paragraphs 45, 66 and 68 of the judgment of Honorable Justice Vogelman), the explanatory notes of the Law unequivocally clarify that the purpose of the Law is not to protect public order and safety. In fact, the legislator emphasizes that **it does not** authorize the Respondent to revoke the permanent residency permits of permanent residents belonging to the indigenous population of East Jerusalem for these reasons. The sole declared purpose of the legislator in enacting the Law was to entrench in law Respondent's power to revoke the residency of persons belonging to the indigenous population of East Jerusalem **as a sanction**.

25. It should be noted that according to the Petitioners, media reports about the enactment of the Law and the specific decision in Petitioner's matter suggest an unofficial, different and improper purpose, namely vengeance and a desire to appease certain publics. However, since it is clear that revenge and creating a positive image in the eyes of certain publics do not constitute a legitimate purpose, and in addition, since it is clear that such a purpose is inconsistent with the values of the state, the Petitioners will not dwell on this unofficial purpose.

26. The Petitioners shall hereinafter clarify why they hold the position that the Law, the sole declared purpose of which is to impose a sanction and nothing more, as has just been proven, not only lacks any legitimate purpose, but rather, in addition, effectively serves no purpose other than revenge. We shall explain.

27. There is no dispute that state authorities are entitled, even obligated to take action against any person who undermines national security as well as the safety and security of its residents. However, a penalty in the form of revoking the permanent residency permits of East Jerusalem residents, who are also entitled to protections under international law and humanitarian law, is not a legitimate purpose under **immigration and status laws**. The authorities have criminal proceedings and many other means of enforcement available to them. Authorizing the Respondent, who is a political figure, to impose such a draconian sanction of revocation of residency status, with its critical consequences, has no legitimate purpose, all the more so when the matter concerns indigenous people whose status was given to them as a result of annexation.

28. The above notwithstanding, the Petitioners maintain that the Law serves no purpose whatsoever. Section 11A(b) provides, *inter alia*, that:

> Whereas the Minister of Interior decides to revoke a permit pursuant to the provisions of this section and sees that subsequent to said revocation, the person would remain without a permanent residency permit outside Israel, without the ability to acquire permanent residency outside Israel or without citizenship, **the Minister shall give that person a permit for residency in Israel shortly after the status revocation decision**…
>
> (emphasis added, B.A.)

29. Hence, inasmuch as the Law applies to permanent residents of East Jerusalem – such as the Petitioner herein – who have no status other than the residency permit they have by virtue of being the indigenous people of this land, the

Respondent is obligated to give them a temporary residency permit *in lieu* of the permanent residency permit he took from them.

30. However, it is clear that other than certain matters, including the inconvenience associated with the need to renew a temporary residency permit and the option of state employment or holding public positions, a temporary residency permit gives holders all socioeconomic benefits and most additional rights to which permanent residents and citizens are entitled– including freedom of movement, which was mentioned in the specific decision in Petitioner's matter. As such, and since, presumably, a person whose permanent residency permit is denied over breach of allegiance does not have their heart set on state employment, and the temporary residency permit given to them *in lieu* of the permit of which they were revoked still entitles them to all socioeconomic benefits and the vast majority of all remaining rights, Petitioners' conclusion is clear. Inasmuch as the purpose of the Law is to impose a sanction, rather than take vengeance, punishing a person by downgrading their status based on breach of allegiance makes no difference and serves no purpose.

31. Having clarified the Law serves no legitimate purpose, and in fact, serves no purpose whatsoever, the Petitioners maintain that the Law fails to satisfy the conditions of the limitations clause.

The Law is inconsistent with the values of the state

32. A further reason why Petitioners maintain that the Law does not comply with the limitations clause touches on the second part of Petitioners' argument concerning the invalidity of the Law.

33. As is known, the Court's position is that in case of conflict between domestic Israeli law and international law, domestic law prevails. Nevertheless, the approach taken in Israeli jurisprudence is to strive, as much as possible, for congruency between domestic and international law, based on the presumption that the legislator strives to enact domestic legislation that is consistent with international law, and that statutes should be interpreted accordingly:

> The legislator is presumed to be striving to enact legislation consistent with international law (see for instance: HCJ 279/51 Amsterdam v. Minister of Finance, IsrSC 6 945, 966 (1952); CrimApp 131/67 Kamiar v. State of Israel, IsrSC 22(2) 85, 112 (1968); CrimFH 7048/97 A v. Minister of Defense, IsrSC 54(1) 721, 742-743 (2000); CrimApp 6659/06 A v. State of Israel, IsrSC 62(4) 329, 353 (2008)) (paragraphs15-17 of the judgment of Honorable Justice Barak Erez in Abu 'Arafeh).
>
> Beyond the hearing focusing on Israeli law as such, I am of the opinion that this is one of the cases where weight should be given to the interpretation of the Law in a manner consistent with international law.
>
> I am of the opinion that where a provision of a general and comprehensive nature is under review, and its interpretation is the subject of genuine debate, **special weight should be given to the norms of international law**.
>
> Therefore, several norms recognized by international law, as well as their underlying principles, should be considered, **to the extent that these norms do not directly obligate the State of Israel** (paragraphs15-17 of the judgment of Honorable Justice Barak Erez in Abu 'Arafeh).
>
> (emphases added, B.A.)

34. The Petitioners' position is that the law impugned in this petition is in conflict with the State's obligations under customary international law and conventions, some of which it signed and some of which it ratified, along with an undertaking to act in their spirit.

35. Article 14 of the International Covenant on Civil and Political Rights, 1966 (signed by Israel on December 19, 1966 and ratified by it on October 3, 1991) provides as follows:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

36. The Law, which empowers the Respondent to impose a criminal sanction – not for public order and safety reasons as specified above – constitutes additional punishment for offenses committed by permanent residents for which they were tried and penalized pursuant to the criminal law.

37. The Law is also in conflict with Article 31 of the Convention relating to the Status of Stateless Persons (signed by Israel on October 1, 1954 and ratified on December 23, 1958). Said Article also imposes limitations on the deportation of persons who are not citizens. There is no doubt that the limitations set out in the Convention apply to the indigenous residents of East Jerusalem. The fact that the Law disregards the limitations of which the Respondents were aware before the enactment of the Law renders it inconsistent with the values of the State of Israel and therefore unconstitutional.

38. In addition, while it is true that East Jerusalem was annexed to Israel and that Israeli law was applied to the city and its residents, under international humanitarian law, the original population of East Jerusalem, the indigenous people of the city and the land, are "protected residents" entitled to protections afforded by international humanitarian law, including the Hague Regulations respecting the Laws and Customs of War on Land and its Annexes (1907) and the Fourth Geneva Convention of 1949.

39. Article 45 of the Hague Regulations respecting the Laws and Customs of War on Land of 1907, which is binding on Israel by virtue of its status as customary law, provides that:

> It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.
>
> (emphasis added, B.A.)

40. Article 47 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) provides that:

> Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention **by any change introduced, as the result of the occupation of a territory,** into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, **nor by any annexation by the latter of the whole or part of the occupied territory**.
>
> (emphases added, B.A.)

41. Article 78 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) provides that:

> **If the Occupying Power considers it necessary, for imperative reasons of security**, to take safety measures concerning protected persons, it may, at the most, subject them to **assigned residence** or to internment.
>
> (emphases added, B.A.)

42. With respect to the violation of the above Article, the Petitioners wish to emphasize that in paragraph 13 of his judgment in Abu 'Arafeh, the Honorable Justice holds as follows:

> The Petitioners argue that the above result is ostensibly in conflict with the provisions of international law. The above argument is not quite accurate, since **"assigned residence" is**

> **permitted for imperative reasons of security** according to Article 78 of the Fourth Geneva Convention. See: HCJ 7015/02 **Ajuri v. Commander of IDF Forces in the West Bank**, IsrSC 56(6) 352 (2002). See also: Yoram Dinstein, International Law of Belligerent Occupation 176-178 (2009), The 1949 Geneva Convention – A Commentary, "chapter 64: Admissibility of and Procedures for Interment" pp. 1327-1349 (ed. Andrew Clapham, Paola Gaeta & Marco Sassoli, 2015)
>
> (emphasis added, B.A.)

43. However, the Law, as specified above, does not concern the possibility of deportation or assigned residence for reasons of security at all. On the contrary, its explanatory notes emphasize that unlike permanent residency permit holders who immigrated, whose status may be revoked by the Respondent for reasons of public order and safety, the status of permanent residents belonging to the indigenous population of East Jerusalem may be revoked solely for reasons of breach of allegiance. Hence, the assignment of residence facilitated by the Law is in complete contrast with the provisions of Article 78 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949).

44. The Law is also in conflict with Article 31 of the Convention relating to the Status of Stateless Persons (signed by Israel on October 1, 1954 and ratified on December 23, 1958). Said Article also imposes limitations on the deportation of persons who are not citizens. There is no doubt that the limitations set out in the Convention apply to the indigenous residents of East Jerusalem. The fact that the Law disregards the limitations of which the Respondents were aware before they promoted and enacted a law that allows stripping indigenous people of their status and right to enter their native city is extremely grievous and renders the Law unconstitutional.

45. Thus, although ordinarily, the legislator is presumed to be striving for internal legislation consistent with international law, with respect to the Law at hand, it is clear that said presumption is refuted not only because the State was aware of the provisions of international customary law and conventions by which it is bound whether because it ratified them or because it signed them and undertook to act according to their spirit, but also because human rights organizations – Petitioner 2 herein, the Association for Civil Rights in Israel and Adalah – warned ahead of time that the draft bill that was released was in conflict with human rights law and international humanitarian law. Regretfully, however, the Respondents preferred to disregard these warnings and continued advancing the improper law. The statute in question was, therefore, enacted **with full awareness** that it completely contravenes Israel's international obligations.

Link to the organizations' warning notices to the Respondent dated February 7, 2018: http://www.hamoked,org.il/files/2018/1162700.pdf.

46. Hence, in their conduct, the Respondents knowingly enacted a law conceived and born in sin, inconsistent with the values of the State of Israel as a Jewish and **democratic** state, a member of the family of nations, bound by international customary law and international conventions for the protection of human rights which it ratified, conventions the spirit of which it undertook to follow and the provisions of which it undertook to uphold. The Petitioners' position is that the Respondent cannot knowingly enact a law that conflicts with international and humanitarian law and argue, after the fact, that domestic law trumps international law and international humanitarian law.

The harm caused by the Law is greater than is required

47. The harm inflicted by the Law is severe and disproportionate. Firstly, as specified above, the Law, the declared purpose of which is to authorize the Respondent to impose sanctions on the population of East Jerusalem, has no purpose, let alone a legitimate purpose. Criminal law, as aforesaid, is the main avenue for penalizing offenders, and once penalized under criminal law, there is no room to penalize them further for the same acts for which they were

penalized in the criminal proceeding. Secondly, considering that the official purpose of the Law is precisely and solely to impose an additional sanction on any person considered by the Respondent for revocation of permanent residency, and assuming that it is not merely an act of revenge, as the Petitioners fear, it is clear that the harm inflicted by the Law outweighs the benefit gained by using the draconian powers it seeks to grant the Respondent. The severe, blatant impingement on fundamental human rights is undisputed, as has held in Abu 'Arafeh. On the other hand, the Law under discussion seeks to empower the Respondent to punish permanent residents outside of the criminal justice process, which is the natural and proper venue for such matters, using administrative proceedings while brazenly disregarding both the conditions set out in the limitations clause and the State's obligations under international law and international humanitarian law.

48. The fact that the harm inflicted by the Law is greater than necessary is also evinced by the State's position in Abu 'Arafeh:

> It should be emphasized that the material before us shows that the State does not deny its obligation to invoke the power of revocation in "a very limited manner," being aware of the severe ramifications that such a step has on permanent residents. On the substantive level, it was clarified that the authority will be exercised only when the duty of allegiance to the state, at its most basic level, is breached or following "extreme harm" to national security and state sovereignty. The State further noted that the Minister is bound by procedural rules which require him to make a decision to revoke a permanent residency permit personally following a thorough examination and with approval from the Attorney General, and <u>to exercise his power only as a last resort</u> (paragraph 19 of the judgment of Honorable Justice Hendel in Abu 'Arafeh).

(emphases added, B.A.)

49. Notwithstanding the State's undertaking before the Honorable Court in Abu 'Arafeh, whereby the purpose of the Law is to authorize the Respondent to use the sanction of status revocation in "a very limited manner", only when "the duty of allegiance, at its most basic level, is breached" and only as a "**last resort**", it has already become clear that the Law violates said undertaking. The above arises both from the language of the Law and from decisions the Respondents made after it came into effect in the matters of permanent residents represented by the Petitioner. We explain.

50. According to the Law, Respondent's authority to impose the sanction of permanent residency permit revocation is exercised, by default, only after the resident in question is found to have committed an act of terrorism, as defined in the Anti-Terrorism Law, 5776-2016, in a criminal proceeding. Consequently, the power to revoke residency status will never be exercised as a last resort. For instance, the permanent residents whose permanent residency permits were revoked by the Respondent after the Law entered into effect and who are represented in the residency status revocation proceedings by the Petitioner are all serving long prison sentences, several life sentences in some cases. In these circumstances, the harm caused by the Law clearly far outweighs its benefit, which is, in any event, doubtful, since while the benefit of imposing an additional sanction on a person who has already been tried and severely punished in criminal proceedings is not at all clear, there is no doubt that the harm the Law causes the resident who is the subject of the Decision and to the State's most fundamental values, is extremely severe.

51. The Law in question, therefore, empowers the Respondent to impose additional sanctions on a person who committed actions the sanction for which are primarily imposed by criminal law, while it has not been at all clarified which lawful purpose, if any, the Law seeks to promote.

52. The above indicates that the Law does not satisfy any of the three proportionality tests.

53. The Law fails to satisfy the required rational connection test, since the **measure** the legislator chose to promote – **a sanction** – does not promote any purpose or objective it purports to promote, particularly in view of the fact that the person who is the subject of Decision has already been penalized under criminal law.

54. The Law also fails to satisfy the second proportionality test, according to which the least harmful measure among several possible alternatives that could attain the goal. The fact that the Law concerns individuals who are subjected to severe sanctions in the framework of criminal proceedings inherently negates the possibility that the legislator chose the least harmful measure in order to realize the purpose of the Law –which, as aforesaid, is entirely unclear. Moreover, the power granted to the Respondent by the Law is necessarily a power to impose an additional sanction on a person – on top of the sanction imposed on them in the criminal proceeding – and it is therefore clear that it is not the single or first sanction imposed on the person who is the subject of the Decision. The above is inconsistent and even stands in conflict with the State's undertaking before the Court in Abu 'Arafeh to the effect that the Respondent would exercise this power as a "last resort", particularly in view of the fact that the purpose of the Law is to impose a sanction, that and nothing more.

55. Finally, the Law also fails to satisfy the third proportionality test also known as the proportionality test in its narrow sense. This test requires proof that the benefit in attaining the purpose sought by the injurious law is greater than the damage caused by using the injurious measure set out therein. However, as clarified above, the Petitioners maintain that the fact that the case herein concerns the imposition of further sanctions on persons who are already subjected to severe sanctions in the framework of criminal proceedings proves that the Law has no purpose or benefit, let alone a legitimate purpose. On the other hand, the harm caused by the Law, which is knowingly inconsistent with international law and international humanitarian law, to the values of the state as a democratic state, and to the person who is the subject of the Decision, is unbearable.

56. Moreover. According to section 11A(a)(1) of the Law, the Respondent is also authorized, at his discretion, to revoke the permanent residency permit of a minor. The only condition is that the offense was committed more than 15 years after the person received the residency permit. In other words: even a 15-year-old minor, who, for instance, threw stones, may find themselves stateless in their homeland as a result of the wrongful power placed in the hands of the Respondent by the Law. The Petitioners maintain that such matters are inconsistent with the child's best interest, a principle which the State of Israel is committed to uphold as a primary consideration both under Israeli and international law and that they fail to even barely satisfy the conditions of the limitations clause.

57. And so, for reasons cited above, the Petitioners are of the opinion that the law discussed herein, in conjunction with other numerous flaws leading to the conclusion that it fails to comply with the limitations clause, is disproportionately injurious and causes greater harm than is required

The Law does not include an explicit and detailed authorization, consisting of standards and criteria

58. The Law is unconstitutional also due to the fact that it does not meet the requirement for an explicit, detailed authorization and for an arrangement consisting of standards and criteria for the proper exercise of the authority, particularly given that the law in question directly and critically violates fundamental rights.

59. In Abu 'Arafeh, the court referred to the requirement that a legislative act that authorizes a violation of fundamental rights contain a clear, unequivocal, explicit and detailed authorization, that the standards for the parameters permitting the violation encapsulated in the power be established by primary legislation and that the criteria for exercising this power be established by secondary legislation:

> These difficulties require, at least, that the issue be regulated by legislation in an explicit and detailed manner. Presumably,

should the Knesset decide to regulate the matter, it will take into account the specified considerations and produce a detailed arrangement consisting of principles, causes and standards designed to determine in what cases and under what circumstances the authority to revoke permanent residency should be exercised. Needless to point out, if such legislation is passed – similar to other countries – each and every decision made thereunder will have to independently meet the lawful tests under administrative and constitutional law – on its merits, and I obviously express no position on this issue (paragraph 38 of the judgment of Honorable Justice Barak-Erez in Abu 'Arafeh). (emphasis added, B.A.)

And also:

Alongside the requirement for explicit authorization, our jurisprudence has expressed the view that when an act that violates fundamental rights is in question, the presence of an explicit, yet vague, general and sweeping legal power is insufficient, **and a clear authorization "establishing general standards for the material parameters of the permitted violation in secondary legislation" should be demonstrated**. In this context, it was held that "**the level of detail the authorization requires will be derived from the magnitude of the violation of the protected right, from the nature of the matter and the context of things**" (emphasis added - U.V.; *Ibid*, paragraph 12). According to this position – which was subsequently adopted by this court as a binding rule – **the more important the right and the greater its violation, the stricter scrutiny the court will apply in examining the authorization requirement and the narrower its interpretation …** (*Ibid*., paragraph 52 of the

judgment of Honorable Justice Vogelman). (emphases added, B.A.)

And also:

In the case at hand, not only do the provisions of the Entry into Israel Law fail to include standards for exercising the authority to revoke a permanent residency permit – but the regulations enacted pursuant to the law also fail to define the criteria for exercising said authority (paragraph 54 of the judgment of Honorable Justice Vogelman in Abu 'Arafeh) (emphases added, B.A.)

And also:

The importance of regulating an administrative power to violate fundamental rights and the criteria for exercising it in legislation also derive from the principle of the rule of law, which demands that any legislative act be "clear, definite and comprehensible such that members of the public are able to manage their affairs accordingly" (HCJ 2740/96 Shansi v. Diamond Supervisor, Ministry of Trade and Industry, IsrSC 51(4) 481, 520 (1997)); and from the duty of governmental fairness, which includes the obligation to warn individuals prior to any governmental act involving a violation of their rights, and give them the opportunity to direct their conduct so as to protect their rights (Barak, pages 548-549; Barak-Erez, pages 346-347). Inexplicit authorization or authorization which is drafted broadly and vaguely impedes members of the public from clearly knowing their rights and obligations (Mate Haruv, page 213). The absence of an explicit authorization to violate fundamental rights – one consisting of clear and uniform standards for formulating administrative discretion – may also increase the risk of

> errors, lead to selective enforcement, and, as a result to a degree of arbitrary application of the law. In addition, naturally, this state of affairs – where the actions of the administrative body are not regulated in detail by law – encumbers the ability to exercise judicial review over the specific acts of the administrative body (compare HCJ 11163/03 Supreme Monitoring Committee for Arab Affairs in Israel v. The Prime Minister of Israel, IsrSC 61(1), 42 (2006)).
>
> (emphases added, B.A.)

60. However, neither the Law nor the Entry into Israel Regulations have been amended accordingly, and until the time of writing, no clear criteria have been put in place for exercising this draconian authority, which Respondent 1wishes to grant to the Respondent 2.

61. It should be emphasized that a review of currently pending proceedings taken to revoke the permanent residency status of East Jerusalem residents handled by Petitioner 2 thus far illustrate the need to establish clear standards and criteria. Among the residents whose status the Respondent decided to revoke are three young men, one of whom threw stones which unfortunately caused a person's death and two of his friends who assisted him – one in handing him the stones and the other in keeping watch in the area where the young men were standing. According to the Petitioners, and without detracting from the severity of these young men's actions and their unfortunate, difficult outcome, it is, nevertheless, clear, even according to the Respondents, that these are not extreme cases in which the resident's conduct attests to their renunciation of their status, and, in any event, there is no uniformity in the cases in which said authority has been exercised by the Respondent.

62. Therefore – and although the Petitioners are of the opinion that the Law is patently unconstitutional and therefore cannot empower the Respondent – even according to the Respondents, who enacted the Law and contend it is

constitutional, there is no alternative but to determine that the Law is flawed in terms of the requirement for an explicit and detailed authorization and clear standards and criteria for exercising the draconian authority granted to the Minister of Interior by the Law. The Law in its current form provides only a vague definition which the Respondent has used as a tool for exercising his authority in what reality has also shown is an arbitrary manner in order to critically impinge on fundamental rights in numerous situations and for different motives, without any established clear criteria and limits. The absence of clear and unequivocal criteria in legislation – primary or secondary –precisely defining the extraordinary and extreme cases in which the Respondent may exercise this draconian authority is a material flaw that goes to the core of legality, defies the principle of the rule of law and the government's duty to act fairly and even impedes the ability to exercise judicial scrutiny over decisions made pursuant to the Law.

63. Hence, for this reason also, the Petitioners are of the opinion that the Law is unconstitutional and therefore request the Honorable Court to revoke it.

East Jerusalem residents and duty of allegiance

> **Respondent's position whereby he is entitled to revoke the permanent residency permit of East Jerusalem residents on the basis of breach of the duty of allegiance, raises complex**, sensitive and controversial questions, **both in terms of the cause underlying the status revocation decision and in terms of the persons bearing the duty of allegiance** (given the unique predicament of East Jerusalem residents). In terms of cause, **the question arises whether the individual owes a duty of allegiance to the state; and to the extent the answer is positive – what is the scope of said duty, what actions will be regarded as breaches thereof and what sanction should be imposed for any such breach**. Further, **any sanctions for the breach of said duty must be verified as complying with the requirement for**

> **proportionality. In terms of the persons bearing the duty, the question arises whether permanent residents** – as opposed to citizens – **owe a duty of allegiance to the state; the matter should be examined specifically with respect to residents of East Jerusalem with consideration for their special circumstances** (paragraph 57 of the judgment of Honorable Justice Vogelman in Abu 'Arafeh) (emphases added, B.A.)

64. As is known, the indigenous population of East Jerusalem resided in the city before Israel annexed it in 1967 and made it part of the territory of the State of Israel. These residents were subjects of the Kingdom of Jordan, preceded by Mandatory Palestine, preceded by the Ottoman Empire. East Jerusalem has been their home and native land for generations. The residents of East Jerusalem received their permanent residency status in Israel by virtue of being an indigenous population and as a direct result of the annexation of their city to Israel.

65. After the annexation of East Jerusalem, including its indigenous residents, Israel conducted a census. Any person registered in the census received a permanent residency permit. Subsequently, permanent residency permits were also given to persons who demonstrated they had lived in the annexed territory prior to 1967 and continuously since, even if not registered in the census (AAA 10811/04 **Surahi v. Ministry of Interior**, IsrSC 59(6) 411 (2005)).

66. The circumstances by which East Jerusalem residents were granted permanent residency status are described in a study published by the Jerusalem Institute for Policy Research and its primary sources, particularly in the transcripts of government meetings held before the annexation of Jerusalem in June 1967 (Amnon Ramon, "From Grave Concerns to Enthusiastic and Widespread Annexation: The Israeli Regime's Moves toward the 'Unification of Jerusalem' (June 1967)", **Material and Opinion: Exploring Jerusalem through the Generations** 365 (2015) (hereinafter: "**Ramon**")).

67. The population of East Jerusalem was registered in the Israeli population registry and given permanent residency permits with full knowledge that these were **enemy subjects**, who at the end of a fierce war and as a result thereof, found themselves under Israeli rule. No one expected the individuals forming part of this population to swear allegiance to the State of Israel.

68. In this sense, the conferment of permanent residency was effectively a declaration of an existing situation and its formalization within the new territorial framework (given that any other alternative would have meant mass deportation of tens of thousands of residents from the territory of East Jerusalem which had been occupied and annexed).

69. On June 12, 1967, the "Ministerial Committee for the Regulation of the Status of Unified Jerusalem" held a meeting on the nature of the legislation giving effect to the "Unification of Jerusalem", in which the ministers argued about the number of Arab residents living in the territories annexed to the city (**Ramon**, page 385).

70. Furthermore, during the government meeting held on June 18, 1967, Minister of Police, Sasson, emphasized:

> If we take Jerusalem with its Arab residents, it means that we annex to Israel another 60,000-70,000 Arabs that we add to Israel… we cannot deport the Arabs from Jerusalem.

Minutes of government meeting dated June 18, 1967, page 13

http://www.archives.gov.il/NR/rdonlyres/0D02EAA5-A65A-(49EA-BA85-D288F8C910E1/0/YeshivatMemshala02.pdf

71. Ultimately, the fate of the indigenous population of East Jerusalem was decided by the Ministerial Committee on Jerusalem Affairs which convened on June 21, 1967. During the session, GOC Central Command Uzi Narkis raised the question of who will be a citizen in East Jerusalem. Justice Minister Shapira answered that "**services should be given to all residents**", but "**according to existing law, there is no automatic citizenship**." Attorney General Ben-Zeev

stated that "**we will work on the premise that those who stay [in East Jerusalem] will be residents.** They will have active and passive voting rights to the municipality" (**Ramon**, page 392).

72. To illustrate the fact that the Government of Israel was aware of the question of allegiance of the indigenous population of East Jerusalem, we note that in the meeting of the Ministerial Committee on Jerusalem Affairs held on June 21, 1967, in which the fate of this population was decided, the mayor of Jerusalem at the time, Teddy Kollek, argued *inter alia* that including Arab residents in the City Council would impact the ability to conduct meetings on sensitive issues such as looting in East Jerusalem, **and that there was concern that "foreign hostile entities" would be informed.** The Minister of Justice emphasized that "problematic" council members would be replaced by the Minister of Interior. In addition, the Head of the Jerusalem District at the Israel Security Agency sent Mayor Kollek detailed biographies of members of the city council under Jordanian rule. These included detailed character profiles and disqualified some council members from holding office in the united city's council for security reasons (Ramon, pages-394-5).

73. Minister of Defense at the time, Moshe Dayan, also made it clear that the annexation of East Jerusalem with its residents was made <u>over the objection</u> of the residents to the Israeli regime:

> With respect to the first signs of decent in the West Bank and East Jerusalem […] the Arabs do not want the unification of Jerusalem […] but we are not there because they want it […] we are not there if or because they do or do not want it, but because it is critical for our security. Jerusalem is not Eden and the administration of it is not conditioned on the Arabs' cooperation […] If the Arabs do not cooperate, we shall be regret it, but it will have no effect whatsoever on the unification of Jerusalem" (M. Meizels "Dayan: We have a

Historical Responsibility to establish Israel's Permanent Borders", **Maariv** (August 10, 1967)).

74. According to the above, members of East Jerusalem's indigenous population, including the Petitioner at hand, were given their permanent residency permits under special historical circumstances, because they are natives of the country and despite the fact that their allegiance clearly did not lie with the State of Israel which had annexed their territory. It is for good reason that the State of Israel did not expect loyalty form this population, knowing that its members opposed Israel's control over their territory.

75. The fact that the indigenous population of East Jerusalem was given permanent residency status without being required to pledge allegiance to the State of Israel is also consistent with the principles of international law and international humanitarian law, some of which are discussed below, according to which East Jerusalem is occupied territory and its residents, the natives of the country, are "protected persons" entitled to protections under international humanitarian law, including the Hague Convention respecting the Laws and Customs of War on Land of 1907 (hereinafter: the **Hague Regulations**) and the regulations annexed thereto and the Fourth Geneva Convention of 1949. According to Article 45 of the Hague Regulations, which form part of international humanitarian law and constitute "customary law", protected residents have no duty of allegiance to the occupying power and it is forbidden to force the population residing in the occupied territory to swear allegiance to the occupying power. The unique status of the residents of East Jerusalem as an indigenous population was discussed by this Honorable Court in two judgments: AAA 3268/14 **al-Haq v. Minister of Interior** (judgment dated March 14, 2017) and AAA 5037/08 **Khalil v. Minister of Interior** (judgment dated December 19, 2017) (reported in Nevo).

76. To conclude the section on the invalidity of the Law, the Petitioners wish to highlight another point. While this Honorable Court did conduct a comparative review of the issue of status revocation of citizens versus non-citizens in the judgment rendered in Abu 'Arafeh, the Petitioners respectfully submit that said

review avoided discussing the real issue at stake, which is not whether the status of permanent residents and citizens may be revoked due to breach of allegiance, but rather, whether the status of a permanent resident living under a foreign power which had occupied their natural territory and annexed it can be revoked for alleged breach of allegiance to that power. The answer to this question should be different, particularly in the case of permanent residents who are recognized under international law as protected persons who cannot be compelled to swear allegiance and when it is clear that they did not agree – either objectively or subjectively – to assume such allegiance. The comparative review conducted by the Honorable Court in Abu 'Arafeh contains no reference to legislation that is similar to the case at hand involving stripping a hostile indigenous population of status given to it by a power that forcibly occupied and annexed its territory over breach of allegiance to said power.

77. Hence, given that the population in question has a unique status, that it has never been required to swear allegiance nor can it be forced to do so, Petitioners' position is clear. A law designed to revoke residency for reasons of breach of allegiance from persons who cannot be obligated to owe allegiance to the state against their will, is an unconstitutional law which should be repealed.

78. Furthermore, even on the assumption that the Respondents are correct and the indigenous population of East Jerusalem does owe allegiance to the country that forcibly occupied and annexed its natural territory to its own territory – by virtue of an unwritten contract imposing upon the indigenous population the kernel of a duty of allegiance in its negative and narrow sense as stated by Vice President, as was his title at the time, Honorable Justice Rubinstein in paragraph 6 of his judgment in Abu 'Arafeh – this is clearly a contract which has not been properly entered into by way of offer and acceptance, but rather, a contract imposed upon this population against its will. It is clear that the population did not agree to enter into such contract, and even the State was of the opinion, in real time, that it was a hostile population.

79. Moreover, the Petitioners are of the opinion that the approval of the Law is an absurdity. The same Respondents that renounce, by approving this Law, the State's obligations under existing and valid treaties, some of which it is full party to, others of which it had signed and undertaken to follow, – the Hague Regulations, the International Covenant on Civil and Political Rights of 1966 and provisions include in the Fourth Geneva Convention – directing against forcing the indigenous population to swear allegiance to the State, against deporting it, and against assigning its residence, those same Respondents claim there is another, unwritten, agreement, denied by the other party, which can be breached.

80. In the next section, concerning Respondent's decision in Petitioner's matter, the Petitioners show that alongside the severe material flaws in the Decision, international conventions are not the only written agreements broken in the case at hand.

Unlawful and unconstitutional decision

81. It is hereinafter argued that the Decision in Petitioner's matter applies a legislative act retroactively, constitutes a breach of contract and breach of governmental promise given both to the Petitioner and to this Honorable Court, stands in conflict with the double jeopardy principle and relies on extraneous considerations.

Double and retroactive application of a legislative act

82. Israeli jurisprudence has an interpretive presumption against retroactive application of legislative acts. The meaning of this is clear. In the absence of an explicit provision by the legislator, legislation applies only from the time of commencement onwards. A law, by its nature, is directed at future acts. The reason for future application is that retroactive application of a legislative act impedes legal certainty and infringes upon fundamental constitutional principles of justice and fairness. It should be emphasized that there are indeed exceptions to the above presumption – *inter alia*, benefitting legislation or retrospective legislation on the legal level, but these do not apply in the case at hand.

83. In the court's judgment in CA 1013/15 **State of Israel – Ministry of Interior v. Rachamim Malul** (reported in Nevo) the court clarified in no uncertain terms when legislative acts may apply retroactively:

> **A law is retroactive when it alters the legal status or outcome of an act carried out prior to its entry into force in relation to the past as well** (see HCJ 6971/11 **Eitanit Building Products Ltd. v. State of Israel** (April 2, 2013)). In other words, it may be said that retroactive application means that an obligation (right) imposed (granted) by a new law on an individual under certain conditions, **is imposed (granted) both with respect to actions taken before the new law entered into force, and thereafter; and the obligation (right) created as a result thereof also materializes in the period which preceded the effective date of the law… under these circumstances the harm caused to the individual is the most severe**. Firstly, harm is caused as a result of future changes to the legal outcome of the acquisition made in the past, such that the owner will henceforth have to pay an annual tax for the property, or sell it for a lower price, reflecting the burden of the new tax. Further harm is inflicted as a result of the fact that the liability imposed by the new law has a broader scope, since it applies to a time preceding the law's entry into force, in our example, 2015. It should be noted that in addition to broadening the scope of the overall liability imposed on the individual (as opposed to a situation in which tax liability applies only going forward), sometimes the affected person is also denied the possibility of choosing to avoid the liability by changing the status that produces it, in our example, by selling the property.

> … [T]he unavoidable conclusion, is, therefore, that the distinction between the two applicability types is not only conceptual, but rather, the different types of temporal applicability have different consequences with respect to the potential harm to the individual's reliance on existing law when they perform legal actions. Hence, it is of great importance to accurately distinguish between the alleged temporal applicability types in every case on its merits, alongside additional **features such as whether the norm in question is a benefitting norm; whether it is a procedural or substantive law; or a law applying to a continuing situation** which if applied solely prospectively would cause discrimination with negative effects contrary to the purpose of the law.
> (emphases added, B.A.)

84. In the case of the Petitioner at hand, the matter is simple. The incident that prompted the Decision in Petitioner's matter took place in 2003, namely, **fifteen years** prior to the enactment of the Law and the Decision. There is no doubt that the purpose of the Decision is to harm the Petitioner and impose on him an unbearable sanction, rather than to benefit him. The Petitioner could not have known or expected that in addition to the heavy criminal penalty imposed on him as part of a plea bargain he entered into with the State, according to which he received the maximum sentence possible, his actions would also lead to such draconian measures. Therefore, Petitioners' position is that upholding the Decision in Petitioner's matter constitutes a direct violation of fundamental constitutional principles of justice and fairness, the rule of law, the certainty of the law and public trust therein.

85. We reiterate - the event with respect to which the Decision was made took place in 2003. On the other hand, the Law by virtue of which the Respondent decided to revoke the Petitioner's residency permit, a law which produced a new unique penalty-bearing offence out of thin air, both directed against permanent residents

belonging to the indigenous population of East Jerusalem, did not pass third reading until March 7, 2018. **In addition, Petitioners maintain that this represents <u>double</u> retroactive legislation**. We explain.

86. The Law provides that:

> (d) In this section, "**breach of allegiance to the State of Israel**" – is one of the following :
>
> (1) **An act of terror as defined in the Anti-Terrorism Law, 5776-2016**, aiding or soliciting such an act, or taking an active part in a terrorist organization or a designated terrorist organization as defined in said law …
>
> (emphases added, B.A.)

87. Hence, not only was the Law itself enacted fifteen years after the incident, but also, the law on the basis of which the Law defines the "breach of allegiance" offense, namely, the Anti-Terrorism Law, 5776-2016, was enacted thirteen years after the incident with respect to which the Decision was made in Petitioner's case.

88. Therefore, and regardless of Petitioners' position concerning the unconstitutionality of the Law, there is no doubt that the Decision retroactively applies the alleged breach of allegiance offense to the Petitioner **twice**, severely violating the principles of justice and fairness, and should therefore be revoked.

<u>Breach of contract and breach of governmental undertaking</u>

89. Furthermore, in addition to the fact that the Decision applies to the Petitioner a new legislative act that produced, out of thin air, a new, unique offense of breach of allegiance for members of the indigenous population of East Jerusalem, whose natural territory was occupied and annexed to the state, the Decision also constitutes a breach of contract with the Petitioner as well as a breach of administrative undertaking. As noted above, the State entered into a plea bargain with the Petitioner as part of the criminal proceedings against him.

The deal was, naturally, signed after each side carefully considered its steps and after all the risks and benefits of carrying on with the proceedings were explained to the Petitioner.

90. Therefore, and despite the fact that the plea bargain signed with the Petitioner was part of the criminal proceedings, whereas the case at hand concerns administrative proceedings, the state authority that entered into the plea bargain and the state authority that made the Decision discussed herein are two arms of the executive branch of the same state, and should therefore be regarded as one and the same.

91. Neither the Petitioner nor the executive branch, being parties to the plea bargain, could have anticipated the Law and the Decision. Moreover, the Petitioners put forward that it is quite possible that had the Petitioner thought there was a chance the transaction proposed to him was not conclusive, and that one day the State might take additional measures against him, as part of which it would retroactively apply a legislative act that enables it to continue harming him, even denying him his fundamental rights and that it would try deporting him from his and his ancestors' homeland, he might not have entered into the transaction proposed to him altogether.

92. In view of the plea bargain between the State and the Petitioner signed so many years ago, as part of which the Honorable Court imposed on the Petitioner the maximum penalty possible under the law, the Decision made in Petitioner's matter constitutes a breach of contract. The Petitioners maintain that whether this contract is governed by civil contract laws or administrative law is immaterial, and alternatively, it is a brazen breach of a governmental promise (see HCJ 218/85 **Tikva Arbiv v. Tel Aviv District Attorney's Office et al**. and CrimC (Tel Aviv) 40244/04 **State of Israel v. Hadad** (reported in Nevo)). Aside from the fact that the Petitioners hold that the Decision constitutes a breach of the contract that set the limits of the sanctions taken against the Petitioner and a breach of a governmental promise, the Decision also undermines Petitioner's interests – the interest of reliance and the interest of

expectation – as well as the principles of justice and fairness and public trust in governmental authorities.

93. In addition, the Decision runs contrary to an explicit undertaking given to the Honorable Court in the proceeding in Abu 'Arafeh.

> **It should be emphasized that the material before us shows that the State does not deny its obligation to invoke the power of revocation in "a very limited manner," being aware of the severe ramifications that such a step has on permanent residents.** On the substantive level, **it was clarified that the authority will be exercised only when the duty of allegiance to the state, at its most basic level, is breached or following "extreme harm" to national security and state sovereignty**. The State further noted that the Minister is bound by procedural rules which require him to make a decision to revoke a permanent residency permit personally following a thorough examination and with approval from the Attorney General, and **to exercise his power only as a last resort**
>
> (paragraph 19 of the judgment of the Honorable Justice Hendel in Abu 'Arafeh). (emphases added, B.A.)

94. The Petitioners maintain that the Decision completely contravenes the State's undertaking before this Honorable Court to exercise the authority only as a last resort. The Petitioners fail to understand how it can be argued that the Decision to exercise the authority was made as a last resort in the case of the Petitioner, with whom the State had entered into a plea bargain, who had served most of the severe sentence he had been given based on legislative acts which created a new offense many years after the original offense was committed. On the contrary, it seems that the Respondent decided to harm the Petitioner brazenly breaching the basic rules expected of a proper administrative authority.

95. Hence, for these reasons too, the Petitioners are of the opinion that it is a flawed decision which should not be upheld.

Double penalty

96. Section 3(a) of the Penal Law (Amendment 39) 5754-1994, provides that:

> **An enactment that creates an offense shall not apply to an act committed before the day on which it was lawfully published, or the day on which it went into effect, whichever is later**.

Section 3(b) of the Penal Law (Amendment 39) 5754-1994, provides that:

> **If an enactment sets a more severe penalty for an offense, than was set for it on the day on which it was committed, then it shall not apply to any act committed before the day on which it was lawfully published, or before the day on which it went into effect, whichever is later**…
>
> (emphases added, B.A.)

97. As noted, the Law produced, out of thin air, a new and unique offense for permanent residents belonging to the indigenous population of East Jerusalem entailing a punitive sanction. The Law concerns a breach of a purported obligation, based on a theoretical-philosophical argument concerning residents who have never sworn allegiance to the state that occupied and annexed their natural territory it to its own. While it is true that this law does not form part of criminal law, it is still clearly based entirely on criminal law since the new offense it creates is based on offenses set out in the Anti-Terrorism Law, 5776-2016.

98. In addition, it is clear that the Law sets out a more severe penalty for the offenses committed by the Petitioner than was set for them on the day on which they were committed – revocation of residency status. Therefore, and since it is clear that it is a punitive sanction, as also arises from the Law's explanation notes, the declared purpose of which is to infringe on the very core of

Petitioner's fundamental rights, the Decision discussed herein not only sets out a more severe penalty than was imposed on the Petitioner as part of the plea bargain many years ago, but Petitioners believe it also defies the prohibition on double jeopardy and should be revoked.

Unreasonable and disproportionate decision

99. The Petitioners maintain that all of the above necessarily leads to the conclusion that the Decision is unreasonable and disproportionate. Without detracting from the severity of the matter, it is inconceivable that so many years after the incident, after a plea bargain was entered into with the Petitioner in which the maximum penalty possible under the law was imposed on him, the core of Petitioner's fundamental rights is being violated by the Respondent on the basis of two laws that were enacted many years after the incident and created a new ostensible offense which did not exist previously. All of the above while brazenly breaching an undertaking given to this Honorable Court in Abu 'Arafeh whereby the Respondent would exercise this authority only as a last resort. As aforesaid, regardless of the severity of Petitioner's actions, an administrative authority must always act within the boundaries of the law rather than outside them, otherwise, there is no telling where we might end up.

Decision made on the basis of extraneous considerations

100. The brazen breach of an explicit undertaking given to this Honorable Court in Abu 'Arafeh according to which the authority to revoke the permanent residency status of the indigenous population of East Jerusalem would be exercised by the Respondent only as a last resort, compounds Respondent's conduct in making the Decision and in the proceeding which preceded it. All of the above prove, jointly and severally, that the considerations underlying the proceedings and the Decision are entirely foreign to the process and have nothing to do with a breach of the duty of allegiance, but rather derive from vindictiveness and the desire to appease certain publics, that and nothing more than that. Moreover, according to the Petitioners, Respondent's conduct in making the Decision and in the proceeding that preceded it indicates that the proceeding was unfortunately tainted from the beginning.

101. Completely contrary to the State's undertaking before the Honorable Court, throughout the administrative proceeding for the revocation of Petitioner's status and even earlier, the Respondent consistently issued statements to the media about his intent to harm the Petitioner and about his progress in doing so. In addition, the media reports, some of which were cited above, suggest, in some cases, that the media was informed before the Petitioner and his counsel. Additionally, the press releases were not targeted at all media outlets, but rather at those associated with very specific camps in Israel's political scenery, providing a podium for calls for revenge, collective punishment and various deterrence measures. In addition, the Decision implies that relatives of the victims of the incident that prompted it took part in Petitioner's hearing.

102. According to the Petitioners, and with due respect for the victims' families, who have, indisputably, suffered terribly, their participation in the administrative proceeding held in Petitioner's matter clearly taints said proceeding. Unlike criminal proceedings, in which crime victims have standing vis-à-vis the defendant who harmed them, in an administrative residency revocation proceeding, there is no room to provide the family members with updates, hear their wishes and consider their arguments. However, from the moment the Respondent initiated the proceeding and until a decision was given in Petitioner's matter and beyond, the Respondent contacted the families, accepted their demands and included them in the actual proceeding.

103. The Petitioners maintain Respondent's conduct proves that instead of an administrative proceeding chosen as a last resort in the absence of any other alternative, the proceeding discussed herein has been tainted, from its foundation, by foreign considerations. The ostensible cause cited in the proceeding may have been "breach of allegiance," but the true cause is vengeance and public appeasement. There is no place for these considerations in such an extraordinary and draconian proceeding and hence, for this reason also, the Decision is flawed and should be revoked.

104. Considerations such as public opinion and the feelings of the bereaved families affected Respondent's ability to examine the relevant considerations and give them their proper weight, including the question whether the Petitioner owes a duty of allegiance to the State of Israel which can be breached (without making light of the gravity of his actions on the criminal level), and the extent to which his fundamental rights were violated, particularly as a member of the indigenous population of Jerusalem.

The Decision has no legitimate purpose whatsoever

105. Section 11A(b) of the Law provides as follows:

> Whereas the Minister of Interior decides to revoke a permit pursuant to the provisions of this section **and sees that subsequent to said revocation, the person would remain without a permanent residency permit outside Israel**, without the ability to acquire permanent residency outside Israel or without citizenship, **the Minister shall give that person a permit for residency in Israel shortly after the status revocation decision**. For purposes of this subsection, it is presumed that anyone residing permanently outside Israel would not remain without a permit for permanent residency outside Israel, without the ability to acquire permanent residency outside Israel or without citizenship.
> (emphases added, B.A.)

106. The Petitioner at hand has a permanent residency permit by virtue of his belonging to the indigenous population of East Jerusalem and has no other status in the world. According to the Law, the Respondent must grant the Petitioner a temporary residency permit in lieu of the permanent residency permit he took from him.

107. Temporary residency permit holders, like permanent residency permit holders, are entitled to all socioeconomic rights and all other rights, including the right to freedom of movement and more.

108. Thus, even according to the Respondents, who are of the opinion that the Law is constitutional, it is still unclear what purpose is sought by decisions in the matter of permanent residents of East Jerusalem, such as the Petitioner at hand, who have no status other than their permanent residency status. The Petitioners submit that beyond the complete absence of purpose arising from the decision to subject the Petitioner to the sanction of residency permit revocation, the Decision further evinces its vindictive, crowd pleasing motivations, which are entirely foreign to the ostensible breach of allegiance cause raised by the Respondents against the Petitioner.

Conclusion

109. The above indicates that the Law and the Decision given pursuant to it, impugned in the petition herein, are fundamentally flawed, tainted by unconstitutionality and unlawfulness and that they irreconcilably contravene international law and international humanitarian law.

110. In view of all of the aforesaid, the Honorable Court is requested to issue an *Order Nisi* as requested in the beginning of the petition and after receiving Respondents' response, to render it absolute, accept the petition and order the Respondents to pay trail costs and legal fees to the Petitioners.

Jerusalem, September 15, 2019

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