At the Jerusalem District Court sitting as the Court for Administrative Affairs
Before Honorable Judge Y. Noam

AP 389/10 Skafi v. Minister of Interior

The Petitioners	**1. J. Skafi et 6 al.** **8. HaMoked: Center for the Defence of the Individual** Represented by counsel Adv. Leora Bechor et al.
	v.
The Respondents	**1. Minister of Interior** **2. Director of the Population Administration** **3. Director of the Population Administration East Jerusalem Bureau** Represented by counsel from the Jerusalem District Attorney's Office (civilian).

Judgment

Introduction - the petition and the scope of the dispute.

1. The original petition contested the decision of the Ministry of Interior's Foreign Nationals Appeals Board of November 29, 2009 to reject the appeal filed by the Petitioners against the decision of the Ministry of Interior (hereinafter: the Respondent) to refer Petitioners 3-5 for an Israeli stay permit issued by the Commander of the Judea and Samaria Area in order to prevent their separation from their father, Petitioner 2, who resides in Israel pursuant to a similar permit as part of a family unification process with Petitioner 1 and to reject the application made by Petitioners 3-5 for residency status in Israel for the time in which the father is undergoing family unification. Following developments during the hearing of the petition, on March 15, 2012, the Ministry of Interior issued a new decision in the matter of Petitioners 3-5. The minister rejected their application for temporary residency status in Israel and revoked his earlier decision to refer them to receive an Israeli stay permit issued by the Commander of the Area due to lack of competence to issue such a decision. The petition herein revolves around this latter decision from March 2012.

2. Petitioner 1 is a permanent resident of Israel, born in 1972. Petitioner 2 is her husband, a resident of the Judea and Samaria Area (hereinafter: also the Area), also born in 1972. The two married on August 27, 2005. Petitioner 2 had previously been married to a resident of the Area whom he divorced on May 17, 2005. Petitioners 3-5 are the children of Petitioner 2 from his first marriage. They are young and have not yet turned

14 years of age. Petitioner 3 was born in Israel and was registered in the Area. Petitioners 4 and 5 were born in the Area and are registered in the population registry of the Area. Petitioners 6 and 7 are the children of Petitioners 1 and 2. They are registered in the Israeli population registry as permanent residents pursuant to Regulation No. 12 of the Entry into Israel Regulations 1974 (hereinafter: Entry into Israel Regulations). Petitioner 1 filed an application for family unification with Petitioner 2, including therein his children from his first marriage, Petitioners 3-5, who reside with her and Petitioner 2 in Jerusalem. Given the provisions of the Citizenship and Entry into Israel Law (Temporary Order) 2003 (hereinafter: the Temporary Order), which currently blocks the possibility of granting Israeli status to persons considered a "resident of the Area" as defined in the law, including grant of status pursuant to Regulation 12 of the Entry into Israel Regulations, barring exceptions enumerated in that law, the Respondent had referred Petitioner 2 and his three children, Petitioners 3-5, to receive an Israeli stay permit from the Commander of the Area (a permit from the District Coordination Office, hereinafter also DCO permit).

3. The dispute raised in the original submissions revolved mainly around the interpretation of Section 3a(1) of the Temporary Order and its connection to the Procedure for Processing the Grant of Status to a Foreign Spouse Married to a Permanent Resident (hereinafter: the Procedure). Section 3a(1) of the Temporary Order instructs that notwithstanding the prohibition set forth in Section 2 of the Law on granting residents of the Area a license for residency in Israel, according to the Entry into Israel Law 1965 (hereinafter: the Entry into Israel Law), or Israeli stay permits issued by the Commander of the Area under security legislation, the Minister of Interior may "grant a permit to stay in Israel by the region commander to a minor resident of the region up to the age of 14 for the purpose of preventing his separation from his guardian parents who lawfully reside in Israel." The Procedure stipulates that "a minor under age 15 accompanying a foreign national shall receive status identical to that of the sponsored parent." In the original petition, the Petitioners argued that despite the fact that Petitioner 2 has been and still is receiving DCO-issued Israeli stay permits, the Respondent must grant his minor children, Petitioners 3-5, a residency permit in Israel given the provisions of Section 3a(1) of the law, and petitioned to receive a temporary residency license in their matter. Petitioner 8, HaMoked - Center for the Defence of the Individual, joined the petition. In the original response, the Respondent argued that according to the aforesaid Procedure, the minor child of a spouse sponsored under the family unification procedure should be granted status identical to the status of the parent and no more, and as such, Petitioners 3-5 are not entitled to a license for residency in Israel, but rather an Israeli stay permit issued by the Commander of the Area, as their father received.

4. Subsequent to oral arguments in accordance with the original submissions, parties were asked, on my initiative, to provide supplementary arguments on the question of whether the decision of the Minister of Interior to refer Petitioners 3-5 to receive DCO permits from the Commander of the Area was made with lawful authority given that the Temporary Order empowers only the Minister of Interior to grant a license for residency in Israel to minors up to age 14 in order to prevent their separation from a parent, and no power was granted to the Commander of the Area to issue DCO permits to minors of this age for this purpose. In the interim, subsequent to the judgment delivered by the Supreme Court in AAA 5718/09, State of Israel v. Srur (April 27, 2011), after parties made their arguments in keeping with the original submissions, it became clear that Petitioners 3-5 are not entitled to permanent residency status during their father's, Petitioner 2, family unification process.

5. Parties provided oral and written supplementary arguments with respect to the aforesaid questions. Initially, on September 11, 2011, the State announced it would review the issue of competency. Subsequently, on January 22, 2012, the Ministry of Interior announced that the decision to grant Petitioners 3-5 DCO permits was revoked as it had been given without legal authority and a new decision would be issued. Finally, on March 18, 2012, the Respondent announced he had reviewed the Petitioners' application and decided not to grant Petitioners 3-5 a license for temporary residency and that following the rejection of their application for status under the Entry into Israel Law, their matter would be forwarded to the Professional Committee for Humanitarian Affairs for review under Section 3a1 of the Temporary Order. The final notice was based on a detailed, written decision dated March 15, 2012, by Ms. Liat Melamed, Status and Visa Coordinator at the East Jerusalem Population and Immigration Authority Bureau, noting, inter alia, that Petitioners 3-5 were in possession of DCO permits at the time and that the Ministry of Interior would take no action to have these revoked.

Owing to these developments, the petition is currently directed against the new decision of the Ministry of Interior dated March 15, 2012. The Petitioners maintain that given the Temporary Order, the Minister of Interior must grant Petitioners 3-5 visas for residency in Israel, while their father is undergoing the graduated procedure for family unification; and given the judgment in *Srur*, they are petitioning for visas for temporary residency.

Legal background

6. Section 1 of the Entry into Israel Law instructs that the power to grant licenses for residency in Israel to "a person who is not a citizen of Israel, in possession of an oleh visa or oleh certificate" is vested with the Minister of Interior or anyone appointed by the Minister of Interior. Discretion as to the grant of residency licenses is broad and stems from the nature of the authority and the State's sovereignty to decide who may enter its territory (HCJ 482/71 Clark v. Minister of Interior, Israel 27 (1) 113, 117 (1972) and HCJ 431/89 Kendal v. Ministry of Interior Israel 46 (4) 505, 520 (1992)). The policy the Respondent has been employing for many years has been to withhold residency visas from foreign nationals barring special humanitarian considerations, which have been outlined through various procedures issued by the Respondent.

7. One of the relevant procedures for the matter at hand is the family unification procedure. The grant of residency status in Israel to a foreign national rests on the Israeli spouse's right to family life (HCJ 2028/05 'Amara v. Minister of Interior (July 10, 2006)). It is granted via a process known as the graduated procedure, outlined in procedures issued by the Ministry of Interior. This procedure institutes a staggered, monitored and controlled period of residency in Israel pursuant to permits and visas lasting five years and three months. The procedures sets criteria requiring, inter alia, a review of the authenticity of the spousal relationship between the sponsoring spouse and the sponsored spouse, a review of the sponsoring spouse's center-of-life (and after the process commences, the sponsored spouse's center-of-life as well), as well as security and criminal clearance. The aforesaid criteria are examined upon application submission and continue to be assessed throughout the graduated procedure, both at the time of transition from one stage to the next and during each stage (3648/97 Stamka et al. v. Minister of Interior, IsrSC 53 (2) 728, 787-788 (1999)).

According to the graduated procedure, once a family unification application is approved, the sponsored family members are issued permits and visas for residency in Israel for interim periods. At the end of a cumulative residency of five years and three months under permits and visas, the graduated procedure is due to terminate with the grant of permanent residency in Israel for the sponsored spouse. With respect to sponsored individuals who are residents of the Area, until 2002, the procedure stipulated three interim periods for permits. During the first period, sponsored individuals were issued a referral to receive permits issued by the military commander, under the law of the Area, to remain in Israel. This referral was given for one year initially. During the second period, sponsored individuals were given another referral for permits issued by the military commander for an additional 15 months. During the third period, after 27 months of residency in Israel pursuant to permits, the sponsored individuals would have been eligible for an A/5 visa and license for temporary residency for a three-year period pursuant to Regulation 6(e) of the Entry into Israel Regulations. At the end of a cumulative residency of five years and three months under said permits and visas, the graduated procedure was due to terminate with the grant of permanent residency in Israel to the sponsored spouse, i.e., with the grant of a visa and license for permanent residency pursuant to Section 2(a)(4) of the Entry into Israel Law (for more on the stages of the graduated procedure see: HCJ 2208/02 Salameh et al. v. Minister of Interior, IsrSC (5) 950, 954 (2002)). As detailed below, beginning in 2002, restrictions have been imposed on status upgrades at the various stages, initially by government resolution and subsequently under the Temporary Order.

8. Government Resolution No. 1813 of May 12, 2002 (hereinafter: Government Resolution) stated that the Ministry of Interior, in collaboration with other relevant ministries, would draft a new policy for the processing of family unification applications and that until such time as such policy was set in procedures or new legislation if needed, no new applications from residents of the Palestinian Authority for residency or any other status would be admitted, nor would applications submitted prior to the Government Resolution be approved. The resolution, as noted therein, was made: "In view of the security situation and due to the ramifications of the processes of immigration and settlement in Israel of foreigners of Palestinian origin." The Resolution stipulates transitional provisions for applications that had already entered the graduated procedure, stating the status of sponsored individuals would be suspended with no option for upgrades.

9. The Temporary Order, which entered into effect in August 2003 and has been extended periodically, prohibited the grant of status under the Citizenship Law, the grant of a license under the Entry into Israel Law and the issuance of Israeli stay permits by the Commander of the Area as regards residents of the Area. Section 2 of the Law stipulates:

> "During the period when the Law is in force, notwithstanding that which was stated in any other law including section 7 of the Citizenship Law, the Minister of the Interior shall not grant citizenship to a resident of the region or to a citizen or resident of a state listed in the schedule in accordance with the Citizenship Law and he shall not grant him a license to reside in Israel in accordance with the Entry into Israel Law, and the region commander shall not grant a resident of the region a permit to stay in Israel in accordance with security legislation in the region." Petitions filed against the Government Resolution and the Temporary Order were dismissed by the High Court of Justice (HCJ 7052/03

> Adalah - The Legal Center for Arab Minority Rights v. Minister of Interior (May 14, 2006).

Section 3 of the Temporary Order, as amended periodically with the introduction of Sections 3a to 3b, contains certain exclusions to the provisions of Section 2 and allows for the grant of Israeli stay permits or visas in special, listed circumstances, including: preventing separation between a sponsored family member and their families subject to the age restrictions - children up to age 18, men over age 35 and women over age 25; for special humanitarian reasons subject to the recommendation of a professional committee; and in circumstances linked to the state's interests.

10. With respect to the exclusions relating to preventing separation between children and parents, the original text of the Temporary Order from 2003, Section 3(1) states that the Minister of Interior and the Commander of the Area "may grant a resident of the Area ... a license for residency in Israel or a stay permit in Israel in order to prevent separation between a child under the age of 12 from a parent lawfully residing in Israel." This exception limited minors' options for receiving status in Israel or a permit to remain in the country, whether for the purpose of implementing Regulation 12 of the Entry into Israel Regulations, as part of an application for status for a minor with one parent registered as a permanent resident of Israel, or as part of an application for status for a minor who is a family unification sponsored spouse's child from a previous marriage (as in the case herein).

11. As part of the amendment made to the Temporary Order in 2005, which expanded the list of exclusions to Section 2 of the Law, the legal arrangement was changed with respect to exclusions for the purpose of granting a license for residency in Israel or a stay permit in Israel for minors who are residents of the Area for the purpose of preventing separation from a parent who has custody and lawfully resides in Israel. The cut off age, which, as stated, stood at 12 prior to the amendment, was raised and a distinction was made between minors up to age 14, whom the **Minister of Interior** could grant a license for residency in Israel and minors over age 14 whom the **Commander of the Area** could issue a stay permit only (DCO permit). The following is provided for in Section 3A of the Law as amended in 2005:

> "3A. Notwithstanding the provisions of section 2, the Minister of the Interior, using his discretion, may –
>
> (1) grant a minor resident of the region who has not reached 14 years of age, a license to reside in Israel for the purpose of preventing his separation from his guardian parents who lawfully reside in Israel;
>
> (2) approve the application to grant a permit to stay in Israel by the region commander to a minor resident of the region who is over the age of 14 for the purpose of preventing his separation from his guardian parents who lawfully reside in Israel, and provided that the said permit is not extended if the minor does not permanently reside in Israel.

In relation to the interpretation of the term "a license to reside in Israel" in Section 3a(1) of the Temporary Order, the ruling in *Srur* held that given the language employed in the section and its legislative purpose, which was designed to balance the security purpose of

the Temporary Order against the need to preserve the integrity of the family unit and uphold the child's best interest, the Minister of Interior has power to grant a license for temporary residency rather than a license for permanent residency.

12. At this juncture, reference should be made to Section 3a1(a) of the Temporary Order, which addresses the grant of licenses for temporary residency in Israel or the issuance of DCO permits in special humanitarian cases. This Section instructs:

> Notwithstanding the provisions of section 2, the Minister of Interior, for special humanitarian reasons, and upon the recommendation of a professional committee appointed for this purpose (in this section – the "committee") may – (1) grant temporary residence in Israel to a resident of the region or to a citizen or to a resident of a country listed in the schedule, whose family member lawfully resides in Israel; (2) approve the application to grant a permit to stay in Israel under the custody of the region commander to a resident of the region whose family member lawfully resides in Israel.

It is noted that the Section addresses the grant of a license for temporary residency in Israel or approval for an application for DCO permits to remain in Israel in special humanitarian cases that fall outside the criteria established in Sections 3 and 3A of the Temporary Order.

13. As noted, the applicable protocol in the matter at hand is the Procedure for Processing the Grant of Status to a Foreign Spouse Married to a Permanent Resident No. 5.2.0011. This procedure governs the grant of status to the foreign spouse of a permanent resident, stipulating that inasmuch as the application for status includes children from the sponsored spouse's previous marriage who are under the age of 15 there is no requirement for "proof that the minor has been in the custody (legally and in practice) of the sponsored spouse for at least two years prior to application submission" and the children should be given the same status as the parent." As noted above, as part of a process of family unification between a permanent resident and a foreign national, the sponsored spouse is granted permanent residency status at the end of the graduated procedure. As stated, the procedure refers to a minor included in the application of a sponsored parent and stipulates that said minor is to receive the same status as the parent. Inasmuch as the family unification process applies to residents of the Area, the general reservation stipulated in Section 2 of the Temporary Order applies, subject to the exclusions thereto. These exclusions cover a scenario, as in the case herein, of family unification with a foreign national who is older than 35. According to Section 3(1) of the Temporary Order, the Minister of Interior may approve an application for an Israeli stay permit for a foreign spouse who is older than 35, as distinct from a license for residency in Israel; albeit, in special humanitarian cases, the spouse may be granted a temporary residency permit according to Section 3a1(a) of the Law. It is noted that the procedure applicable to family unification between an Israeli citizen and a foreign spouse also states that a child of the foreign spouse who is under age 15 should be granted "the same status as the sponsored parent" (Procedure for Grant of Status to a Foreign Spouse Married to an Israeli Citizen, No. 5.2.0008). The petition at hand focuses on the relation between the provisions of the Temporary Order and the provisions of this procedure.

It is parenthetically noted that there is another procedure in place, which does not apply in the matter herein - Procedure for Registration of and Grant of Status to a Child

with only One Parent Registered as a Permanent Resident of Israel (Procedure No. 2.2.0010). This procedure requires an examination of the minor's center of life, followed by the grant of an A/5 temporary stay visa in Israel for two years, which is followed by a license for permanent residency, or a DCO permit, according to the restrictions stipulated in the Temporary Order. As noted, this procedure addresses minors with one parent who is a permanent resident of Israel and, therefore, does not apply to Petitioners 3-5.

Factual background and the chain of proceedings in this petition

14. On February 22, 2007, Petitioner 1 filed an application for family unification for Petitioner 2. The application included Petitioner 2's children from a previous marriage, Petitioners 3-5, born in 1998, 2000 and 2003, and registered in the population registry of the Area. As noted, Petitioners 4 and 5 were born in the Area, and Petitioners 6-7 were born in Israel. Upon submission of the application, the Respondent required Petitioner 2 to furnish additional documents in support of their application. The application was meanwhile referred for screening by the Israel Police and the security services. On October 29, 2007, the Petitioners provided the Respondent with a writ from the Sharia Court stating Petitioner 1 had custody of the children and they were under the guardianship of herself and their father, Petitioner 2.

The family unification application was approved on February 12, 2008, after the documents were evaluated, and the police and security services submitted their positions. This is the backdrop for the referral given to Petitioners 2-5 on February 20, 2008, to the DCO to obtain an Israeli entry permit for 12 months, until February 20, 2009.

15. On September 23, 2008, Petitioner 8, HaMoked: Center for the Defence of the Individual, asked the Respondent to replace the permit given to Petitioners 3-5 and grant them a license for permanent residency in Israel, in accordance with Section 3a(1) of the Temporary Order. Petitioner 8 was informed, on October 28, 2008, that since these were the sponsored spouse's children from a previous marriage, according to the procedures in place, they will remain in Israel with the same visa given to their father, meaning they would be able to remain in Israel with DCO permits from the Military Commander.

The Petitioners filed an administrative petition against this decision on January 15, 2009, AP 1062/09. The petition was dismissed on April 1, 2009, due to failure to exhaust remedies and the fact that the Petitioners had not contacted the Foreign Nationals Appeal Board within the Ministry of Interior (hereinafter: the Appeal Board). In the meantime, the Petitioners filed an application to extend the DCO permits issued to Petitioners 2-5, and on February 1, 2009, they received a referral for DCO permits for another year, until February 1, 2010.

16. The Petitioners filed an appeal with the Foreign Nationals Appeal Board on April 7, 2009. They argued that Respondent's decision to grant Petitioners 3-5 DCO permits as given to their father, Petitioner 2, was unreasonable and that they should be granted a visa for permanent residency. The Respondent argued before the Appeal Board that the appeal must be rejected given the provisions of the law and given the Procedure, according to which a minor who is in the custody of the sponsored spouse should be given the same status as the sponsored spouse. The Respondent further argued that the provision set forth in Section 3a of the Temporary Order, which allows the grant of a license for residency in

Israel to a minor resident of the Area no older than 14 - is implemented subject to the procedures issued by the Respondent. In its decision dated November 29, 2009, Chair of the Foreign Nationals Appeal Board (Adv. Sarah Ben Shaul Weiss) dismissed the appeal. The decision notes, inter alia, that the right to family life is not the foreign national's, but the Israeli citizen or resident's and that Petitioners 3-5 are not entitled to status by their own right, independently of the status of their father, who is their natural guardian, thanks to an independent right they have as minors living in Israel. The Committee chair also noted in her decision that Petitioners 3-5 are not status-less in Israel, but rather, have a permit to remain within the country's territory, along with their father, pursuant to DCO permits issued periodically. Since that decision, the Petitioners have been submitting applications to the DCO for DCO permits for one year at a time.

The original petition was submitted against this decision by the Chair of the Foreign Nationals Appeal Board.

17. We now turn to the chain of proceedings in this petition. The dispute raised in the original submissions revolved mainly around the interpretation of Section 3a(1) of the Temporary Order, which, as noted, instructs that notwithstanding the prohibition set forth in Section 2 of the Law on the Ministry of Interior's granting residents of the Area a license for residency in Israel or Israeli stay permits issued by the Commander of the Area under security legislation, the Minister of Interior may "grant a permit to stay in Israel by the region commander to a minor resident of the region who is over the age of 14 for the purpose of preventing his separation from his guardian parents who lawfully reside in Israel." Another point of contention was the connection between Section 12 and the Procedure for the Grant of Status to a Foreign Spouse Married to a Permanent Resident, which stipulates that a minor under the age of 15 accompanying a foreign national should receive the same status as the sponsored parent. In the original petition, the Petitioners argued that despite the fact that Petitioner 2 has been and still is receiving Israeli stay permits from the Commander of the Area, the Respondent must grant Petitioners 3-5, a residency permit in Israel given the provisions of Section 3a(1) of the law. In the original response, the Respondent argued that according to the aforesaid Procedure, the minor child of a spouse sponsored under the family unification procedure should be granted status identical to the status of the parent and no more, and as such, Petitioners 3-5 are not entitled to a license for residency in Israel, but rather an Israeli stay permit issued by the Commander of the Area, as their father received.

18. With the parties having made their arguments in the original submissions and the case having been referred for review and ruling, I have reached the conclusion that issuing Petitioners 3-5 DCO permits does not conform with the provisions of the Temporary Order and appears to have been made without authority. This is so as, in the matter of minors up to age 14, the legislator has empowered only the Minister of Interior to grant a license for residency in Israel in order to prevent their separation from their parents and did not empower the Commander of the Area to issue DCO permits to minors as aforesaid. In addition, it has come to light that according to the Supreme Court ruling in AAA 5718/09, *Srur* (see above), delivered after parties to the petition made their arguments, the Petitioners cannot petition to receive permanent residency status. In light of the above, as per my decision dated September 11, 2011, parties were invited to provide supplementary arguments on the aforesaid power, addressing the ruling issued in *Srur*.

19. In a supplementary hearing in the petition held on September 11, 2011, the Petitioners notified that following the judgment issued in *Srur*, they were amending the remedy sought in the petition and requesting Petitioners 3-5 be issued an A/5 temporary residency visa rather than a permanent residency license - the remedy sought in the original petition. Counsel for the Petitioners asked the hearing be postponed to allow for consideration of the competency to grant DCO permits to Petitioners 3-5. At his request, the hearing has been postponed, for this purpose, several times. In a hearing held on January 22, 2012, counsel for the Respondents notified that Section 3a(1) of the Temporary Order does not grant power to issue DCO permits to minors under the age of 14 and that for that reason, on the morning of the hearing, the competent officials at the Ministry of Interior made a verbal decision whereby the previous decision, which was the subject of the petition, was revoked and a new decision would be issued in the matter of Petitioners 3-5. In the circumstances, whereby the decision impugned in the petition had been canceled, and a new decision was expected, counsel for the Respondents maintained the petition should be dismissed without prejudice.

20. In a supplementary hearing held on February 5, 2012, counsel for the Respondents again said that the decision regarding the issuance of DCO permits for Petitioners 3-5 had been canceled as it had been given without authority. Counsel also notified that after the previous hearing, the Ministry of Interior decided to refer the Petitioners' matter to the Professional Committee for Humanitarian Matters under Section 3a1(a) of the Temporary Order for a recommendation on whether to grant the children status in Israel and if so what status was recommended. Counsel for the Respondents again argued that as the decision impugned in the original petition had been withdrawn, and a new decision was given, the need to hear the original petition had been obviated, and it should be dismissed without prejudice. Counsel added that the petitioners would be able to file a new petition against the new decision announced during the hearing. He added, as well, that the decision he announced during the hearing had been made verbally by Respondents' officials, and a written decision would be provided within several days. Following the aforesaid notice from counsel for the Respondents, I gave a decision whereby the Ministry of Interior would submit the written decision in the matter of the Petitioners, and after the decision is submitted to the court, parties would be able to submit supplementary arguments in writing. In keeping with the aforesaid decision, the Petitioners submitted a supplementary brief on March 11, 2012.

21. On March 15, 2012, the new decision in the Petitioners' matter was received in writing. The decision, issued by Ms. Liat Melamed, Status and Visa Coordinator at the East Jerusalem Population and Immigration Authority Bureau, listed the relevant considerations for the application of Petitioners 3-5 to receive status in Israel during their father's family unification graduated procedure. The decision's operative portion read as follows: "Given all the above, balancing all the considerations relevant to the matter at hand, and, among other things, given considerations related to the minors' best interest, given that the minors are accompanying their father, who did not receive an A/5 permit, and given the nature of the graduated procedure, the conclusion is reached that there is no room to grant the children an A/5 visa. At the same time, for reasons of the minors' best interest, and in order to consider how, if at all, the children's remainder in Israel with their father should be enabled, their matter is referred for the recommendation of the humanitarian committee under Section 3a1 of the Temporary Order. Once the committee has given its recommendation, a new decision in the children's matter will be issued. Given the fact that the children are presently in possession of DCO permits, and beyond

legal requirement, we will not seek the cancellation of the DCO permit at this time" (Paragraphs 8 and 9 of the decision).

Deliberation - Application of Section 3a(1) of the Law in the matter of Petitioners 3-5

22. The Petitioners impugn the new and final decision rendered by the Respondent rejecting their request to issue Petitioners 3-5 licenses for temporary residency in Israel under Section 3(a)1 of the Temporary Order and referring their matter for consideration by the Professional Committee for Humanitarian Matters under Section 3a1 of the Law.

The Respondents argue that the latter decision contains no flaw warranting judicial intervention, as the Minister of Interior may but is not obliged to grant a minor up to age 14 a license for temporary residency in Israel in order to prevent their separation from their custodial parent. The Respondents stress that the situation envisioned by the legislator on which the provision in this section is predicated was the typical case of a custodial parent who is a resident of Israel. However, the case at hand is exceptional as the custodial parent is a resident of the Area who resides in Israel under a DCO permit and pursuant to a family unification procedure with his new wife. In these circumstances, the Respondents maintain that conceding the argument put forward by the Petitioners produces an absurd result, whereby the children would receive a higher status than their father, which is contrary to the "Accompanying Children" procedure. As such, the Respondents maintain that the most recent decision rendered by the Respondent contains no flaw, and there is no reason for intervention therein.

23. The Respondent's new decision is a fundamental departure from his previous position. As stated, in the past, the Respondent treated the application made by Respondents 3-5 as a "criteria-based" application under Section 3a of the Temporary Order and decided to refer them to the Commander of the Area to receive a DCO permit in accordance with Section 3a(2) of the aforesaid law. When the Respondent realized, during the hearing of the petition, that Section 3a does not grant powers to the Commander of the Area to give minors up to age 14 DCO-issued Israeli stay permits, he withdrew his previous decision. In his new decision, the Respondent denied the request to give Petitioners 3-5 Israeli temporary residency licenses pursuant to Section 3a(1) of the Temporary Order, in order to avoid a situation where they receive status of a higher order than their father, who remains in Israel pursuant to DCO permits given as part of the family unification procedure. This is commensurate with the procedure establishing that the child of the foreign spouse who is under age 15 should be granted the same status as the sponsored parent. In so doing, the Respondent gave the procedure preferred status over the provisions of Section 3a(1) of the Temporary Order, which enables granting Petitioners 3-5 a license for temporary residency in Israel in order to prevent their separation from their father who lawfully resides in Israel. At the same time, the Respondent believed, for reasons of the children's best interest, that there is room to consider the possibility of granting them status for special humanitarian reasons and subject to the recommendation of the Professional Committee for Humanitarian Matters - all under Section 3a1(a) of the Temporary Order which enables – as stated in the legal background review above – granting a resident of the Area a license for temporary residency in Israel or referring said residents to the Military Commander of the Area to receive a DCO permit. It is apparent that the Respondent chose to focus solely on the option of granting the minors DCO permits (so that they do not receive higher status than

their father's) and to ignore the option of granting a license for temporary residency, which he has the power to grant under Section 3a(1) of the Law without referring them to the advisory committee.

24. In his latest decision, the Respondent, in fact, made an about-face (as the Petitioners put it), and, for the first time, saw the matter of Respondents [sic] 3-5 as a case to be reviewed under Section 3a1(a) of the Law, according to humanitarian considerations and subject to the recommendation of a professional committee. However, this section mostly relates to cases that do not fall within the criteria, i.e., cases regarding which Sections 3 and 3a of the Temporary Order make no exceptions to the provisions of Section 2. The fact that Section 3a1(a) of the law addresses cases that fall outside the criteria can be gleaned from the language of the law and from the logical progression of things. The section appears after Sections 3 and 3a, which lay out the criteria for receipt of Israeli residency licenses or stay permits in certain situations notwithstanding the provisions of Section 2 of the Temporary Order and for the purpose of avoiding separation between spouses (Section 3) or between a minor and their custodial parent lawfully residing in Israel (Section 3a). This interpretation is supported by the clear language used in the Public Committee Working Protocols for Processing Applications for Stay/Residency Permit on Special Humanitarian Grounds (Procedure No. 5.2.0039). According to this procedure, "The Committee, per its powers, addresses only special humanitarian cases that are ineligible for stay permits or applications for temporary residency applications under Section 3 and 3a of the Law (Paragraph 1.3 of the Procedure). This interpretation is supported by statements made during the deliberations of the Knesset Internal Affairs and Environment Committee on March 20, 2007 (Exhibit P/24 attached to the petition and filed with Petitioners' supplementary arguments) ahead of an amendment to the Temporary Order which added Section 3a1(a) to the Law. Statements made by Adv. Yochi Genesin of the State Attorney's Office High Court Department and Adv. Daniel Salomon, Legal Advisor to the Population Administration, indicate that the clause was meant to allow for the grant of licenses and permits on humanitarian gronds to persons who would not have been eligible for status under other provisions in the Temporary Order. It was also designed to allow granting a license for temporary residency in exceptional cases, which, unlike DCO permits, also confers socio-economic rights. It follows that the first step is to consider whether it is a case involving an individual who is not eligible for an Israeli stay permit or residency license under Sections 3 or 3a of the Law. Only after a determination on this, is it possible to consider whether it is a case that does not meet the criteria which justifies the grant of an Israeli temporary residency license or stay permit or a case that does fall within the criteria with special circumstances justifying favoring the applicant and granting them a higher status (such as granting a temporary residency license to a spouse undergoing family unification who would be eligible for no more than a DCO permit according to the criteria set out in Section 3 of the Law).

25. I believe that the Petitioners' matter comes under Section 3a(1) of the Temporary Order, given the clear and explicit language used in the section and its legislative purpose - to allow minors under the age of 14 who are residents of the area to lawfully remain in Israel in order to avoid separating them from a custodian parent lawfully residing in Israel. Petitioners 3-5 meet the conditions set out in the section: they are residents of the Area; they were younger than 14 at the time the application was made, and their custodian parent, Petitioner 2, lawfully resides in Israel pursuant to the family unification procedure. The Respondent's denial of the Petitioners' application and their referral to the professional humanitarian committee ignores the unequivocal language of the section, which gives him

broad powers to grant them a license for temporary residency. It also ignores the purpose of the statute, which is designed to uphold the system's fundamental values and reduce any violation or infringement of human rights. Moreover, the Respondent's position whereby young children should not be given a true residency license which also confers social security, and in particular, health insurance, fails to uphold the system's fundamental values, and particularly, the principle of the child's best interest. Not only is the Respondent's position incongruent with the language and purpose of the law, it is also inconsistent with his previous position, as held at the time, that the matter of Petitioners 3-5 does fall within the scope of Section 3a of the Temporary Order and decided, *ultra vires*, as it later turned out, to refer them to receive DCO permits pursuant to said section. It is apparent that only when the Respondent realized, during the hearing of the petition, that the DCO permits were provided to Petitioners 3-5 without authority to do so, did he decree that the relevant section for processing the Petitioners' matter was Section 3a1. When he realized he could not give the minors DCO permits only pursuant to the section, but temporary residency license, he changed his position entirely and decreed, for the first time, that the Petitioners' matter does not fall within the scope of Section 3a(1) and that this is an "exceptional", "humanitarian" case governed by Section 3a1(a) of the Temporary Order. As noted, Section 3a1(a) of the Law, which enabled the grant of permits and licenses for special humanitarian reasons, was designed to expand the circle of beneficiaries and reduce the number of individuals adversely affected by the restrictions put in place in Section 2 of the Temporary Order. It appears that in the Petitioners' matter, the Respondent is making use of this section for reasons antithetical to those underlying it. The Respondent is attempting to reduce the number of persons eligible for true status pursuant to Section 3a(1) by referring them to the professional humanitarian committee under Section 3a1(a), in order to give them a DCO permit only.

26. Having reviewed the Petitioners' matter, I have reached the conclusion that the decision of the Respondent not to grant Petitioners 3-5 a license for temporary residency in Israel according to Section 3a(1) of the Temporary Order merits intervention and that he should be ordered to issue to the three the aforesaid license for a number of reasons. First, the Minister of Interior may, as stated, grant minors up to 14 years of age a license for temporary residency in order to prevent their separation from their custodial parent lawfully residing in Israel. While the Minister of Interior has broad discretion when exercising said powers, powers must be exercised reasonably and proportionately given the fact that failure to grant them a license for residency in Israel would leave them without status and deny them, at this young age, basic rights to health and other social services. Second, the grant of a license for temporary residency is congruent with the purpose of the statute. The purpose of the Temporary Order is security-related, and yet, the legislator explicitly provides in Section 3a(1) of the Law that an argument with respect to a security threat, direct or indirect, does not apply to granting status in Israel to children up to 14 years of age for the purpose of preventing their separation from a custodial parent lawfully residing in Israel. The security rationale for the Temporary Order does not apply to children at this young age, both given the section itself and given Section 3d of the Temporary Order. The final section addresses security impediments to the grant of Israeli stay permits to residents of the Area who may pose a security threat, per the opinion of security officials. It excludes Section 3a(1) which relates to children up to age 14. Third, the relevant procedure, the "Accompanying Minors Procedure," is intended to guarantee the child's best interest and preserve family unit. The Respondent's position, whereby the minor's status in Israel is to be regulated by way of DCO permits solely because their father is also eligible for DCO permits given the limitations placed by the Temporary Order in his case, is disproportionate and unreasonable. Therefore, although the

"Accompanying Minors Procedure" stipulates minors up to age 15 are to receive the same status as the sponsored parent, when the minors are no older than 14 and the sponsored parent receives a DCO permit, the provision of the Law, Section 3a(1) of the Temporary Order trumps the provisions of the Procedure. To that, it should be added that according to the original version of the Temporary Order from 2003, a child up to age 12 could have been granted a license for temporary residency or a DCO permit for stay in Israel for the purpose of preventing his separation from a parent lawfully residing in Israel. The 2005 bill (Citizenship and Entry into Israel Bill (Temporary Order) (Amendment) 2005 (Bills 173, 7 Iyar 5765, May 16, 2005)) contained identical language. Following a discussion in the Knesset Internal Affairs and Environment Committee held on July 11, 2005 ahead of the amendment to the Temporary Order, an opinion that children at this young age should be given a license for temporary residency rather than a DCO permit was voiced (Transcripts No. 466, Exhibit P/18 of the petition). Following this, the provisions of the law were changed such that for children younger than 14 the only available option was the grant of residency licenses in Israel and the option of giving them DCO permits was revoked. Furthermore, the predicament in which the Respondent left Petitioners 3-5 with no status at all is unreasonable. This is particularly so, given that the notice contained in his most recent written decision, whereby he "would not take action for the revocation of the DCO permits at this time" (Paragraph 9 of the decision dated March 15, 2012) is unclear and entirely unreasonable after he had notified in the past that the decision to give the petitioners DCO permits had been made without authority and was therefore void. Counsel for the Respondent confirmed that the Respondent's decision dated March 15, 2012, to leave intact DCO permits given without authority was unreasonable and stated, during the hearing held on March 18, 2012, that the DCO permits were void, thus leaving the children in Israel without status.

27. Given the aforesaid and the circumstances of the case herein, the course for arranging the presence of Petitioners 3-5 in Israel is by way of granting a license for temporary residency pursuant to Section 3a(1) of the Temporary Order. This solution fulfils the principle of the child's best interest and befits the purpose of the Temporary Order. The decision made by the Respondent to reject the application made by Petitioners 3-5 for a license for temporary residency in Israel pursuant to Section 3a(1) of the Temporary Order, in the circumstances, is unreasonable and therefore void. Petitioners 3-5, who are younger than 14, will be issued licenses for temporary residency in Israel, at this stage, for a limited one-year period beginning today, for the purpose of preventing their separation from their custodial father, provided that the father is lawfully present in Israel.

Outcome

28. Therefore, the petition is accepted and the Respondent will furnish Petitioners 3-5 with licenses for temporary residency in Israel, as stated above.

The Respondent will pay Petitioners 1-7 costs in the order of 6,000 ILS.

The secretariat will provide parties with copies of the judgment.

Delivered today, 21 Tevet 5773, January 3, 2013, in parties' absence.