Administrative Appeal

AAA:
10-22

Date: October 18, 2022 **Court of Administrative Affairs, District of Jerusalem**

The Appellants	
Name:	**ID/RA**
_____ Qunbar	**_____**
_____ Qunbar	**_____**
HoMoked Center for the Defence of the Individual	**RA 580163517**
Telephone:	Additional Telephone:
_____	**_____**
Address:	Email:
_____	**_____** **(The Appellants do not have an e-mail address)**

Appellants' Attorneys		
Name:	License Number:	Address:
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v.

The Respondent	**Ministry of Interior – Population and Immigration Authority**	
Name:	ID Number:	Address:
By Jerusalem District Attorney's Office Civil Division	**Unknown**	**7 Mahal Street, Jerusalem 9149301 P.O.Box 49333**
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073-3920000	**02-6468053**	**Min-jer@justice.gov.il**

Type of proceeding:	Appeal
Name of lower court:	Appeals Tribunal according to the Entry into Israel Law

Type and No. of case in the lower court:	Appeal (Jerusalem) 4464-20
Date of lower court's decision:	September 20, 2022
Last submission date of appeal:	November 28, 2022

Jurisdiction:	Subject matter jurisdiction - according to Section 13 (31)(a) of the Entry into Israel Law, 5712-1952, the Court for Administrative Affairs is authorized to hear an appeal on a conclusive decision of the Appeals Tribunal according to the Entry into Israel Law. Local jurisdiction according to Section 22(a) of the Court for Administrative Affairs (Procedures) Regulations, 5761-2000 is vested with the District Court in Jerusalem sitting as a Court for Administrative Affairs, since the Tribunal which gave the decision is located in the district of Jerusalem. The decision of the authority against which the appeal is filed has ostensibly been given by virtue of Section 11(a)(2) of the Entry into Israel Law, 5712-1952. According to item 10 of the Second Addendum to the Court for Administrative Affairs Law, 5760-2000, the Court for Administrative Affairs is vested with the authority to hear this case.
Court Fees:	1431 (item 21 of the Addendum to the Courts (Fees) Regulations, 5767-2007
Guarantee:	2000 NIS according to item 73 of the Third Addendum to the Civil Procedure Regulations, 5779-2018
Additional proceedings:	No additional proceeding is pending in another court or tribunal in connection with similar facts that the Appellants are parties of.

The Appeal

Notice of administrative appeal is hereby submitted against the judgment of the Appeals Tribunal according to the Entry into Israel Law, 5712-1952 (hereinafter: the **Judgment** and the **tribunal** respectively), dated September 20, 2022 in Appeal (Jerusalem) 4464-20.

A copy of the judgment of the court is attached hereto and marked **AP/1**; A copy of the appeal with respect of which the judgment was given, including its exhibits, is attached and marked **AP/2**.

The grounds for the appeal are as follows:

The subject matter of the appeal in brief:

1. On December 21, 2020, an appeal was submitted to the Appeals Tribunal against Respondent's decision to revoke the family unification procedure in which the Appellants have taken part for more than a decade. It was Respondent's third decision in the matter, following a "first round" in which the tribunal of first instance has returned the matter to the Respondent having found the decision to be flawed, and following a "second round" in which the decision was quashed due to severe flaws in the proceeding which had been identified by the tribunal. And now again this time, the Respondent has shamelessly revoked the family unification procedure, for "deterrence reasons". Nothing has changed in the regular course of life of the Appellants, normative people, parents of eight Israeli permanent residents, other than one tragic incident – the fact that in January 2017 Appellant 2's half-brother, Fadi, committed an attack at the Armon Hanatziv promenade in Jerusalem. After the attack, as had happened to other families whose sons were involved in deadly attacks, the Respondent has launched attempts (somewhat clumsy) to harm innocent family members of the perpetrators, whose life in Jerusalem depends on the Respondent.

2. Appellants' case concerns Appellant 1 (hereinafter: **Appellant 1**), originally from the West Bank, to whom the Citizenship and Entry into Israel (Temporary Order) Law, 5782-2022 (hereinafter: the **Temporary Order**) applies. Since she depends on the Respondent for the purpose of the graduated procedure aimed at receiving status in Israel with her husband who is a permanent resident (hereinafter the **Appellant**, and collectively the **Appellants** or the **Spouses**), she is "easy prey" for bureaucratic abuse, well hidden in Respondent's procedures. Commencing from 2017 the Respondent has started encumbering the renewal of Appellant 1's permit based on general claims of "contacts with ISIS", "terror-supporting neighborhood" and now "deterrence" – never any reason arising from Appellant 1 herself! Regretfully, after three rounds, the tribunal of first instance gave in and accepted Respondent's position. Hence the appeal.

Factual Background

The Parties

3. The Appellant is a permanent resident of Israel. His wife, Appellant 1, who was born in the West Bank, resides with him in Jerusalem since 1996; Appellant 3 (hereinafter: **HaMoked** or **HaMoked: Center for the Defence of the Individual**) is a registered not-for-profit association which assists individuals who fell victim to abuse or deprivation

by state authorities, including, among other things, to defend their rights in court, acting either in its name as a public petitioner or as an attorney representing individuals whose rights were violated. The **Respondent** is the Population, Immigration and Border Control Authority.

Factual Background and Exhaustion of Remedies

4. To receive the full factual picture necessary, the honorable court is referred to Sections 5-17 of the statement of appeal, which is attached, including its exhibits, to this Appeal as Exhibit **AP/2**.

5. Briefly stated, we are concerned with Spouses in their fifties, who have been married since 1996 and who have been living in Jerusalem since then. The Spouses have eight children, all of whom are permanent Israeli residents. A family unification application was approved in 2006, and since then Appellant 1 received DCO permits in the framework of the procedure. Throughout the years, no problem arose with respect to Appellant 1's status, until January 2017 when Appellant's half-brother committed an attack. It is clear that the Appellants had no knowledge or involvement in the attack, but since then their life has changed dramatically. The decision which is challenged in the appeal at hand, which was approved by the tribunal, is the third decision which was given by the Respondent in Appellants' matter over the last five years. Although it has been obvious for a long time that the Appellants themselves are innocent and that no direct or indirect security argument is pending against them, the Respondent has been granted over the last five years opportunities to justify the draconian measure taken by it. However, despite the opportunities given to it, the Respondent did not right the wrong and once again failed to act according to the law, brazenly disregarding in its decision the decisive judgment of the Court for Administrative Affairs in Jerusalem in AAA 11930-07-18 **State of Israel v. Khatib** (Nevo, January 3, 2019) (hereinafter: **Khatib Judgment**), and the instructions given by the tribunal in the second judgment in Appeal 3289/18 dated August 2, 2020, instructing to give a new decision referring, *inter alia*, to Khatib. A review of the judgment of the tribunal of first instance also raises questions as to what happened to said rules and the decisions of the tribunal itself in the previous proceedings.

6. A review of the current decision shows that other than mentioning the **Khatib** Judgment at the beginning of the decision, there is no other reference in the decision to the determinations of the judgment in Appeal 3289/18 and to the conclusive rule established in **Khatib**. In view of Respondent's conduct, it is clear that the decision cannot stand, and therefore, after almost six years of bureaucratic abuse - during which Appellants' life has been hanging by a thread – appeal 4464-20 was filed, on the judgment in which this appeal is filed. Two hearings were held in the appeal, on July 6, 2021 and on July 19, 2022. In both hearings, political bodies were present who interfered with the course of the hearing and threatened the Appellants and their attorneys. It emerges from a review of the judgment dated September 20, 2022 that the tribunal of first instance has finally succumbed to such threats and to the political pressure. Hence the appeal.

   A copy of the minutes of the hearing dated July 19, 2022 is attached and marked **AP/3**.

The errors in the judgment of the tribunal of first instance

7. There is no dispute that the decision underlying the appeal submitted by the Appellants to the honorable tribunal of first instance, concerned human rights. It is also clear that it is an extremely crucial decision, deciding a family's fate, after more than a decade in which their application has been approved. Hence, the Respondent must rely on extremely solid administrative evidence at a probability level close to certainty, since suspicions alone are insufficient. In addition, proper balancing between the different interests should be made by the Respondent, giving each one of the details relevant to the decision its proper weight. If any one of the above-mentioned conditions is not met, the decision is unreasonable and should be revoked. Hence, it is Appellants' position that the decision does not meet the required conditions to render it valid.

8. There is no dispute that the problems encountered by the Spouses commenced after Appellant's half-brother had committed an attack. Beforehand, Appellant 1's visas were extended without any problem. There is also no dispute that we are concerned with normative spouses, parents of eight permanent residents, residing in Jerusalem and earning their living therein, who did not commit any offense, and who in particular, have no connection whatsoever to the attack committed by Fadi Qunbar. Nevertheless, the political echelon in charge of the Respondent decided to make an improper and distorted use of the authority vested in it by virtue of the law, and began abusing the Spouses for almost six years. Although there has never been any security or criminal preclusion against them, the Respondent relied on general allegations, which first turned out to be false (connection to ISIS) and thereafter as devoid of any basis (the neighborhood's support of terrorism). It now relies on an even more problematic allegation, "deterrence"; namely, the Respondent fully admits that it does not have any information against Appellant 1 herself, and that it uses her to convey a message to others, through the Entry into Israel laws. Shamefully, the tribunal of first instance, in the third round, suddenly justifies this position, erring several times.

9. First, how can it be explained that in the first two rounds, in the framework of appeals 1401/17 and 3289/18, the tribunal accepted Appellants' position and remanded the case to the Respondent for the purpose of making new decisions. After all, it could have just as easily dismissed the appeals earlier. Precisely now, when the Respondent expressly uses a reason which is completely outside the scope of its authority, the tribunal rejects all of Appellants' arguments, one by one, without any hesitation.

10. Second, the tribunal held that the Minister of Interior is vested with the authority to revoke a family unification procedure for deterrence reasons, although such authority cannot be found in any authorizing statute. The tribunal of first instance disregards the fact that according to the Temporary Order which is the specific law that applies to the issue at hand, revocation of a family unification procedure is not permitted for general deterrence reasons, unrelated to the sponsor or the sponsored spouse. In addition, the honorable tribunal reads into the general clause of the Entry into Israel Law, 5712-1951 (hereinafter: the **Entry Law**) things that are not included therein: an implied authority to revoke a family unification procedure for deterrence reasons, interpreting the law in an outrageous manner, totally and brazenly disregarding consistent case law of many years holding that human rights cannot be violated without an explicit and detailed statutory

authorization. The tribunal explains that there are additional reasons to revoke a family unification procedure, listed in Respondent's procedures, such as "absence of center of life" or "insincere relationship" which do not explicitly appear in the Entry Law. However, these reasons are inherent to the family unification procedure and were approved by the courts over the years. The above examples are therefore irrelevant and cannot substantiate the holding.

11. Third, the manner by which the tribunal has applied the proportionality test is, in the absence of any other word, shameful; the judgment was jointly given in the matter of the Appellants at hand and in the matter of 17 additional members of the perpetrator's extended family. Accordingly, an analysis of the proportionality of the administrative decision should necessarily take into consideration the specific circumstances of each and every case. However, the tribunal did not act in this manner but has rather briefly reviewed the three proportionality tests with respect to all 19 family members, and without any explanation decided that the decision in Appellants' matter met these tests. The judgment makes no reference to the specific circumstances of the case, to the fact that we are concerned with normative spouses, that the mother, Appellant 1, who is the subject matter of the deportation decision, is a mother of eight children, permanent residents of Israel. How can a test be conducted without taking into consideration the specific circumstances of the case? It can therefore be said that the proportionality of the decision in the case at hand has not been examined at all.

12. Fourth, despite the fact that the title of the chapter in the judgment is "reasonableness and proportionality", the judgment does not include any analysis of the decision according to the test of reasonableness. What were the considerations which were taken into account by the Respondent while making the decision in Appellants' matter? Other than a privileged opinion of the ISA, were any additional factors taken into account? Was the ISA opinion indeed given absolute weight – namely, has the Respondent renounced any discretion whatsoever? The judgment is silent on this issue.

13. Fifth, the judgment ends with the following incomprehensible and senseless sentence: "Last but not least. I am of the opinion that the Respondent should conduct from time to time an examination concerning the measure of discontinuing a family unification and child registration procedure for deterrence purposes and its benefits, and on the basis of the findings re-visit Appellants' matter." Does the tribunal mean that the decision is actually not final? That the permits were only suspended, and were not revoked? Assuming that in a decade, the Respondent suddenly realizes that it has erred will the Appellants be able to resume the family reunification procedure without submitting a new application? The judgment, evidently, raises more questions than answers.

14. In view of the aforesaid and the arguments specified in the legal chapter below - in which the Appellants will specify in detail the case law underlying their arguments against the judgment of the tribunal of first instance - the Appellants request the honorable court to interfere with the judgment of the honorable tribunal of first instance and annul it.

The Legal Chapter

A decision to revoke a pending proceeding should be based on a particularly solid evidentiary basis

15. Before we dive into the specific matter of the appeal at hand – the manner of examination of a pending family unification application – some fundamental principles should be emphasized. When dealing with violation of human rights, the violation satisfies the requirements of the law only if it meets the test of reasonableness and the proper balance test between the violation and other interests for which the authority is responsible. The more substantial and important the violated right, the greater the weight given to it in the balancing between said right and the other opposing interests of the authority (PPA 4463/94, LHCJA 4409/94 **Golan v. Israel Prison Service**, IsrSC 50(4) 136, 156). The weight of the evidence should reflect the importance of the right or interest which were harmed by the decision and the magnitude of the harm (see EA 2/84 **Neiman v. The Central Election Committee**, IsrSC 39(2) 225, 249-250).

16. Moreover. The matter is even more complex when it concerns revocation of a proceeding and a permit granted as a result thereof for over a decade, as the quality of the required proof to validate a decision revoking the proceeding and the magnitude thereof grow: "**There is a direct connection between the magnitude of the administrative evidence which is required and its persuasion level and the type of administrative decision relying on said piece of evidence, as well as the question who bears the burden to substantiate the decision. In the case at hand, we are concerned with a decision revoking an existing license rather than with a refusal to issue a new license. According to the rules of the administrative law**, **when a license is revoked, the administrative authority needs a "convincing proof leaving no room for reasonable doubts**" (HCJ 799/80 **Shlalam v. The Licensing Officer according to the Firearms Law**, IsrSC 36(1) 317, 328). **In addition, it is a substantive right the revocation of which severely affects the Appellants**. While it was held that the revocation of residency is not as severe as the revocation of citizenship or New Immigrant (*Oleh*) status, for which a particularly weighty evidentiary infrastructure is required, but **it was held that due to the offensive results of this action "the respondent should act reasonably, examine the pieces of evidence before it and give them proper weight**" (AAA 8844/04 **Muhanad Sha'aban et al. v. Ministry of Interior**)". (Emphases were added, D.S.).

The decision required explicit statutory authorization

17. Appellants' position – was and still is – that the law which applies to their matter is the Temporary Order and that the Entry Law on which the Respondent and the Tribunal rely, does not apply to them. Section 3 of the Temporary Order states that "During the period in which this Law shall remain in force, notwithstanding any other provision of law, including Section 7 of the Citizenship Law, the Minister of Interior shall not grant a resident of the area, or a citizen or a resident of a state listed in the Appendix, citizenship according to the Citizenship Law, **and shall not give them residency status in Israel according to the Entry into Israel Law**, and the Area Commander shall not grant a resident of the area a permit to stay in Israel according to the security legislation in the area". Accordingly, the above Section 3 expressly states that so long as the Temporary

Order is in force, **the Minister of Interior has no authority to give a person defined as a resident of the area, residency status or a stay permit by virtue of any other law, <u>including the Entry Law</u>**. The legislator clarifies in the following sections of the Temporary Order the conditions pursuant to which stay permits and residency visas shall be granted to residents of the area, and the conditions which should be satisfied for the revocation of said permits and visas or for denying applications in connection therewith.

18. On the other hand the older, general legislation exists. Section 11(a)(2) of the Entry Law provides that "The Minister of Interior may, at his discretion – **<u>revoke a residency visa given according to this law</u>** (emphases added, D.S.). Hence, since the Appellant is a resident of the area as this term is defined in the Temporary Order, which is a specific law which was enacted after the Entry Law, who was holding a stay permit which had been issued to her by virtue of the Temporary Order rather than by virtue of the Entry Law, then the discretion vested in the Minister of Interior to revoke residency visas according to Section 11(a)(2) of the Entry into Israel Law, cannot apply to her matter. Section 11(a)(2) states clearly and unequivocally that the authority vested in the Minister of Interior is to revoke residency visas issued by virtue of "**this**" law, namely, by virtue of the Entry into Israel Law, and not to revoke status given by virtue of any other law. On this issue see the Khatib Judgment, paragraph 6.

19. In conclusion. According to Appellants' position as presented to the Respondent and the tribunal of first instance, the law which applies to their matter is the Temporary Order rather than the Entry Law. The Respondent did not point to any other specific statute authorizing it to revoke the proceeding in Appellants' matter on the grounds of "deterrence", new grounds the contents of which are unclear and are made out of thin air. Therefore, according to the Appellants, the Respondent acted in their matter without authority and alternatively, exceeded its authority.

<u>There is no explicit and detailed authorization in the Entry into Israel Law as required by law</u>

20. A fundamental principle is that in order to violate basic rights **<u>an explicit statutory source of authority by virtue of which the violation is made should be identified</u>**. In Appellants' matter, we are concerned with innocent people who did not commit any offense and against whom neither a direct nor indirect security preclusion is pending, and the **third attempt** to revoke the proceeding in which they took part is based on the allegation of pure deterrence reasons. **The requirement for an explicit source of authority justifying a violation of fundamental rights is at present an undeniable necessity according to the Basic Law: Human Dignity and Liberty**. However, in fact, it is not a novelty. In the first years of the state the courts have already clearly avoided recognizing auxiliary powers associated with violation of human rights (see for instance: CrimApp 40/58 **Attorney General v. Ziad**, IsrSC 12 1358 (1958)). Needless to say that this requirement has been repeatedly adopted since then in many other contexts, including in the context of law enforcement (see, for instance, HCJ 6824/07 **Manae v. The Tax Authority**, IsrSC 54(2) 479 (2010); HCJ 5887/17 **Ahmed Jabarin et al. v. Israel Police et al**). In addition, in HCJ 7803/06 **Abu Arafe v. Minister of Interior** (Nevo, September 13, 2017) which has specifically discussed the powers under the Entry Law, it was clearly held that **a decision violating fundamental rights requires an**

explicit and detailed legal authorization and that a general authorization does not suffice: and that "in order to implement an administrative decision such as the decision at hand, **detailed and explicit legislative regulation in primary legislation of the Knesset is required** (which is obviously subject to constitutional review) (paragraph 69 of the judgment of the Honorable Justice Vogelman) (emphasis added, D.S.).

21. Therefore, even if we follow the path taken by the tribunal, which we believe is erroneous, it has already been held by case law that the Entry Law is not sufficiently detailed and cannot constitute a source of authority for the purpose of violating human rights, and that human rights cannot be violated only on the basis of a general and non-specific section. The tribunal has completely deviated in its judgment from these rulings, and read into the Entry Law things which are not included therein, an authority to revoke a family unification procedure for "reasons of deterrence".

Administrative discretion is not unlimited

22. The Minister of Interior is indeed vested with broad discretion in connection with the granting of visas and stay permits in Israel. However, similar to any other case in which administrative discretion is exercised, it is also clear that in the case at hand the discretion is not unlimited. While exercising its discretion the administrative authority must first and foremost comply with the principle of administrative legality. This principle obligates the Respondent as an administrative authority to act within the boundaries of the law and not to deviate therefrom, and it is incumbent on it to point at a specific, explicit and detailed statutory source authorizing it to carry out the actions taken by it. "The administrative authority may exercise the power vested in it by law only for the realization of the purposes for which said power was given to it or on the basis of the considerations deriving from the purposes of said law. This limitation arises from the rule of law subjecting the administrative authority to the purposes of the legislation… using extraneous considerations or promoting extraneous purposes constitutes a deviation from the legislator's intent concerning the exercise of the power…" (Daphna Barak-Erez **Administrative Law** Vol. B 635 (2010). Taking into account considerations that the authority was not authorized to consider is prohibited, whether these considerations are proper or not: "At times, the motives of the authority are good and pure, in the sense that it strives to act for the public's best interest. However, it acts on the basis of considerations that it has no authority to consider. A distinction should therefore be drawn between an inappropriate motive and an extraneous consideration, and it is important to emphasize that at times an appropriate and worthy consideration, in and of itself, may be disqualified as an extraneous consideration of an authority which was not authorized to consider it" (*Ibid*., page 637).

23. The Respondent should act within the boundaries of the law. The tribunal of first instance cannot read into the law things which do not exist therein, thus granting the Respondent discretion which in its nature is not unlimited.

Reliance on a general opinion of the security services

24. The Appellants objected to the tribunal's review of a privileged security opinion, and for good reason, since they were and are still of the opinion that a decision to revoke a family unification procedure cannot be made on the basis of general ISA statements. There is

no dispute that Appellant 1 poses no security or criminal threat, either directly or indirectly. Therefore, Appellants' position was and still is that since Appellant 1's matter does not meet the required conditions for revoking or rejecting an application as specified in Section 11 of the Temporary Order, there was no room for reviewing a general opinion of the security bodies. Resorting to a general opinion which does not concern Appellant 1, stating that there is a need to deter the public, is not possible according to the provisions of the Temporary Order. It is important to bear in mind that the legislator of the Temporary Order decided to limit Respondent's power to violate the fundamental right to family life on the basis of indirect preclusion arising from others – a severe and exceptional violation inflicted only on the residents of the territories, only to an indirect preclusion arising from first degree family members. Using a general opinion, making no reference to Appellant 1's specific matter, is nothing but an improper and dangerous attempt on behalf of the Respondent to expand its authority beyond the authority vested in it within the boundaries of the law, using extraneous considerations and punishing an innocent person who did not commit any offense.

25. Moreover, the tribunal of first instance has blatantly ignored a number of important holdings relevant to the case at hand appearing in the judgment of the Supreme Court recently given in AAA 8277/17 **Alaa Ziwad v. Minister of Interior** (Nevo, July 21, 2011) (hereinafter: **Ziwad**). With respect to a confidential opinion of the ISA, it is stated in paragraph 110 of the judgment that such an opinion does not properly substantiate the need to revoke citizenship for breach of allegiance. If this applies to a legislative measure which existed years before the hearing of the petition, what can be said about an innovative administrative measure which has never been taken before, revoking a family unification procedure for reasons of deterrence? It seems that the fact that the tribunal of first instance has so easily accepted the privileged opinion, without any question, raises considerable difficulties.

Deterrence is a completely invalid cause

26. The tribunal of first instance probably knew very well why it had completely disregarded the Ziwad judgment. In said case, the Supreme Court rejected the other reasons which were previously raised by the state to justify the revocation of citizenship due to breach of allegiance. On the purpose of deterrence it was stated as follows: "In the framework of the proceedings which took place in this court it was clarified that this was not the main purpose of the arrangement and that its main purpose, **which can be viewed as a proper purpose**, is the declarative purpose" (paragraph 109 of the judgment of the honorable Hayut). It was further noted that the opinion of the ISA did not substantiate the deterring benefit arising from the revocation of citizenship (*Ibid*., paragraph 110.) In his opinion, Deputy President (retired) Handel wrote as follows: "The purpose of deterrence... raises a difficulty in and of itself as well as in view of the measure chosen to achieve it, since it is not clear that said measure does indeed promote it, certainly not to the extent justifying its use" (paragraph 5).

27. The tribunal of first instance relies on the holding of the Supreme Court in the matter of punitive house demolition. It is known that on this issue the majority of the Justices are of the opinion that the military commander is vested with the authority to demolish the houses of the families of perpetrators for deterrence reasons. However, we must not

forget that it is a totally different situation in which there is a legislative authorization, in Regulation 119 of the Defence (Emergency) Regulations, 1945. An explicit legislative authorization to revoke a family unification procedure based on general deterrence reasons which do not arise from the spouses, is not mentioned in any legislation, as we showed above. Moreover, the mere legitimacy of the deterring purpose, even in the context of punitive demolition of family homes, raises a deep controversy between the Supreme Court Justices, as reflected in the words of the Honorable Justice (retired) Mazuz in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (Nevo, December 22, 2015), paragraph 7: "The conscious and deliberate infliction of harm on innocent people, and even more so, a severe violation of their constitutional rights, only for other potential perpetrators "to see and beware", **is inconceivable conduct in any other context** (emphasis added – D.S.). The consideration of "deterring others" is indeed recognized as one of the punitive principles in criminal law **but it is applied only against a convicted perpetrator** rather than against an innocent third party (section 40G of the Penal Law, 5737-1977). This difficulty ("collective punishment") underlies, *inter alia*, the question of the lawfulness and constitutionality of the mere use of Regulation 119. However, even according to the approach that the possibility to use Regulation 119 should not be denied altogether, the fundamental principles of our judicial system, as well as universal moral principles require that the exercise of said power be prohibited, or at least, extremely limited, where it causes harm to innocent people".

28. If this is the case in that context, it is certainly the case in other contexts in which the Supreme Court has completely rejected the possibility of using humans to achieve a purpose which is extraneous to them – as the Respondent wishes to do in the case at hand. Accordingly, the Supreme Court invalidated the policy of using "security" prisoners as "bargaining chips" (see CrimFH 7048/97 **A v. Minister of Defense**, Nevo April 14, 2000); the Supreme Court has also invalidated, three times, a policy in the framework of which the Minister of Interior wanted to use the incarceration of innocent asylum seekers as means to deter other asylum seekers from coming to Israel (see HCJ 7146/12 **Adam v. The Knesset**, Nevo September 16, 2013). And in the case at hand? A completely cynical use of distant, innocent family members should have been altogether rejected by the tribunal, in view of the long-standing Supreme Court precedent on this matter. However, regretfully, the tribunal approved completely arbitrary conduct.

The crucial violation of the right to family life

29. In addition, the violated rights are constitutional rights. Accepting Respondent's position violates the right of the Spouses to live together and maintain a family unit of their choice. Unfortunately, while making its decision in the appeal, the honorable tribunal of first instance did not give this basic human right any weight. The right of every person to marry and establish a family unit is a fundamental right in our legal system, which should not be violated, and which derives from the right of every person to dignity. This right was recognized as a constitutional right in HCJ 7052/03 **Adalah - the Legal Center for Arab Minority Rights in Israel v. Minister of Interior** (May 14, 2006). And see also HCJ 466/07 **Galon et al. v. Minister of Interior** (January 11, 2012). Appropriate for this matter are the words of President (retired) A. Barak in his judgment in **Adalah**: "The right to family life is not limited to the right to marry and have children. The right to family life also includes the right to live together as a family. It is the right of the

Israeli spouse to maintain their family life in Israel. This right is violated if the Israeli spouse is not allowed to maintain family life in Israel together with the foreign spouse. Hence, they are forced to choose between emigrating from Israel or being separated from their spouse...".

30. Recognizing the right to family life as a constitutional right entails the determination that any violation of this right should be made according to the Basic Law: Human Dignity and Liberty – **only on the basis of weighty considerations and solid evidentiary infrastructure substantiating said considerations**. However, in the matter of the Qunbar Spouses, it seems that the Respondent and the tribunal did not give any weight to the constitutional right to family life. The tribunal even proclaimed, on the basis of an *obiter dictum* in a judgment which ruled the opposite, that the right to family life can be maintained outside Israel – namely, that a family of two parents and eight children can be uprooted and relocated from its home to a territory outside the state, for "public deterrence" reasons. This holding cannot stand.

The decision is disproportionate

31. The Supreme Court in HCJ 2056/04 **Beit Sourik Village Council v. Government of Israel** (Nevo, June 30, 2004) ruled years ago that according to the principle of proportionality in administrative law: "a decision of an administrative body is lawful only if the governmental means used to realize the governmental objective is of proper proportion".

As noted in paragraph 11 above, the tribunal has altogether failed to properly examine the proportionality of the decisions on the individual level. Particularly, according to the **second sub-test**, the authority must use the least injurious measure. It emerges from Respondent's decision that the possibility to cause lesser harm to individuals who have been living in Jerusalem so many years and belong to the indigenous population of the city has not at all been considered. Respondent's decision also fails to satisfy the **third sub-test** – the proportionality test in the narrow sense, in the absence of proper proportion between the great damage caused to the Spouses as a result of Respondent's decision, violating their right to family life, and the benefit arising therefrom to the Respondent.

Respondent's decision is premised on extraneous considerations

32. In view of Respondent's decision and its refusal to amend it despite the opportunity to do so which was given to it by the honorable tribunal of first instance, and in view of Respondent's conduct during the last five years, it seems that the Qunbar family is being punished for the deeds of others, purely for the purpose of revenge and for all to see and beware. As to the effect of extraneous considerations which were considered, the position of case law is clear. It has already been held by Justice Y. Kahan more than three decades ago that while examining the authority's act, one should examine "whether the improper consideration or the improper purpose had an actual impact on the authority's act, and if so, the authority's act should be invalidated" (HCJ 392/72 **Emma Berger v. The District Planning and Building Committee** IsrSC 27(2), 764, 773). In view of the above, and since it seems, *prima facie*, that the considerations underlying the decision denying the family unification application of the Spouses, are considerations of revenge, punishment

and deterrence, we are concerned with extraneous considerations which were unlawfully weighed.

33. Therefore, the honorable court is requested to cancel the judgment and award costs in favor of the Appellants.

Jerusalem, October 18, 2022.

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Daniel Shenhar, Adv.
Appellants' attorney