At the Jerusalem District Court **AP 41294-05-11**
Sitting as the Court for Administrative Affairs

In the matter of:

1. **_____ Radwan, ID No. _____**
2. **_____ Radwan, ID No. _____**
3. **_____ Radwan, ID No. _____**
   (born in Israel, September 9, 1992)
4. **_____ Radwan, ID No. _____,**
   (born in Israel, July 18, 1994)
5. **_____ Radwan, ID No. _____**
   (born in Israel, December 9, 1996)
6. **_____ Radwan, ID No. _____,**
   (born in Al-Bireh, July 20, 1999)
7. **_____ Radwan, ID No. _____,**
   (born in Al-Bireh, January 5, 2005)
8. **_____ Radwan, ID No. _____,**
   (born in Israel, July 1, 2009)
9. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

all represented by counsel, Adv. Adi Lustigman (Lic. No. 29189) et al.
27 Shmuel Hanagid St., Jerusalem, 94269
Tel: 02-6222808; Fax: 03-5214947

The Petitioners

v.

State of Israel - Minister of the Interior

represented by counsel from the Jerusalem District Attorney (Civil)
7 Mahal St., Maalot Daphna, P.O.Box 49333 Jerusalem 91493
Tel: 02-5419555; Fax: 02-5419582

The Respondent

Administrative Petition

The honorable court is hereby requested to order the respondent:

1) To approve the application of petitioner 1 for the arrangement of the status and residency in Israel of her children, petitioners 3-7.

2) To determine that the effective date for the arrangement of the status of the children is their age on the **submission date of the application** for the arrangement of their status from 2006.

3) To approve petitioner 1's family unification application for petitioner 2, her spouse and the father of her children.

A. Preface

1. A resident of the State of Israel, returned to live with her family in Jerusalem. When will she be able to **apply** for the arrangement of the status of her minor children? Can she do it immediately, upon her relocation to the city? Or only two years thereafter, during which the children will have to unlawfully stay in their home?

2. This petition concerns respondent's policy – the policy of **reduction and procrastination**. Based on this policy, a mother who is an Israeli resident will have to postpone by two years the **submission of the application** for the arrangement of the status of her children in Israel. Following the submission of the application, another long period will pass until respondent's decision is given, and only then shall the children commence to take part in a probationary review process for the arrangement of their status, which in many cases, is doomed to last forever – and the status shall never be arranged.

3. This policy is extremely unreasonable and was rejected a few times in AP (District-Jerusalem) 8340/08 **Abu Gheit v. Minister of the Interior** (December 10, 2008) and in AP (District-Jerusalem) 1140/06 **Za'atra v. Minister of the Interior** (November 30, 2007), judgments which were recently approved in AAA 5718/09 **State of Israel v. Srur** (April 27, 2011), judgments which follow the route outlined in HCJ 3648/97 **Stamka v. Minister of the Interior**, IsrSC 53(2) 728 (May 4, 1999), judgments which held that the application submission date should be regarded as the commencement of the status arrangement process and that the establishment of a center of life before the application submission date should not be required.

4. The general principles which were established in the above cases constitute an integral part of the applicable law on this issue – but nevertheless, the respondent completely disregards them.

5. The fundamental importance of having a child's status entrenched in a simple, efficient and prompt procedure, received a crucial meaning upon the enactment of the Citizenship and Entry into Israel (Temporary Order) Law, 5763-2003. According to this law, the decision of whether a child will have the same status as his parents or will remain without status, an eternal stranger, is based on the child's age on the date the application was submitted on his behalf. Therefore, respondent's determination that a parent, a resident of the state, who returned to live in his country, Israel, will not be able to submit an application for the arrangement of the status of his child for two years, creates a horrible anomaly.

6. The State compels children of Israeli residents to live here unlawfully as a condition for the submission of an application and a probationary review process under which their status may be

arranged in the future. Furthermore, the state materially injures the children and their parents, by the establishment of a built-in procedure according to which many children will never be able to arrange their status in Israel. Thus, for instance, a child who was born in Israel, but was twelve years and one month old when his parents returned to live in Jerusalem, will not receive status in Israel – in view of the fact that his parents will be allowed to submit an application on his behalf him only when he reaches the age of fourteen and one month, at which time, under the law, he will no longer be entitled to status but rather, at the most, to military stay permits. A child who was sixteen years and one month old when he returned with his family members to live in Jerusalem, is not entitled to any status or permit at all, in view of the fact that after the elapse of two years from the family's return to Israel he is no longer a minor.

7. Respondent's decision to base the reduction policy specifically on the procrastination motive is a brazen and senseless decision particularly in view of respondent's substantial foot-dragging in the approval of the applications – as, in any event, the family's application is held by the respondent for a long time which, more than once, amounts to years, and in any event, once the review is concluded an examination procedure commences and a permanent status is not granted – why should a condition on a condition on a condition be established? A conditional period without status; a conditional period with a temporary status or permit, which lasts forever, and during which, in most cases, only a temporary permit is granted. The establishment of a built-in procrastination mechanism, beyond the known delay, emits a foul odor of extraneous considerations.

8. In the case at hand for instance, the respondent denied petitioner 1's application for the arrangement of the status of her family members, which was submitted in 2006, a few months after petitioner 1's relocation to Israel. The respondent informed petitioner 1 that she would be allowed to apply again only within a two year period. Petitioner 1 submitted an application for her husband and minor children in 2008, two years after her relocation to Israel – but until this day, 2011, no decision was made. With respect to the elder children however a decision was made, according to which the children's age would be calculated from the submission date of the second application, rather than from the submission date of the first application, in 2006. Why? Because petitioner 1 was not allowed to submit an application a few months after her relocation to Israel. She should have waited. Procrastinate. Respondent's procrastination, which constitutes a deliberate part of the reduction and delay policy – causes the two year waiting requirement to lose its meaning – if the respondent wishes to ascertain the sincerity of the family's settlement, this may be done during the process. The process, as we have seen and we are currently in 2011, is long enough.

9. This is the reduction and procrastination policy. As shown above, this policy is a very sharp and efficient tool to limit the number of children to parents, Israeli residents from East Jerusalem, who will obtain permanent status in Israel, to limit the number of children who will obtain an eternal temporary status, and to limit the number of children who will obtain a permit to live together with the rest of their family members in Israel, with no rights whatsoever.

10. The respondent applies an extreme and offensive policy concerning the arrangement of the status of children. In so doing the respondent violates the child's best interest and the best interest of the family unit. This policy does not reconcile with the security purpose of the Temporary Order Law and certainly does not constitute a proportionate measure for the examination of the family's center of life in Israel, against the backdrop of the restrictions imposed by said law.

B. The Parties to the Petition

11. Petitioner 1, is an Israeli resident, who lives in Jerusalem. She is a mother of six children.

12. Petitioner 2 is the husband of petitioner 1 and the father of her six children. The spouses married in 1991. Petitioner 2 has been communicating with the respondent since 2006 for the approval of his application for family unification with his wife. The application has not yet been approved.

13. Petitioners 3-5, are the children of petitioner 1. The eldest daughter, Kifah was born in Israel on September 9, 1992. Currently she is eighteen and-a-half years old, she has no status in Israel, in which she resides by virtue of military stay permits. The son _____, was born in Israel on July 18, 1994 and is currently sixteen and-a-half years old. He also has no status, but has a military stay permit. The son _____, was born in Israel on December 9, 1996, and is currently fifteen years old. He is a temporary resident.

14. Petitioners 6 and 7 are the siblings of petitioners 2 and 3 *[sic]*, and are the younger children of petitioner 1. Petitioner 6 was born in Al-Bireh on July 20, 1999 and is currently twelve years old. Petitioner 7 was born in Al-Bireh on January 5, 2005 and is currently six and-a-half years old. The application for the arrangement of their status has not been conclusively decided until this day. They neither have any status in Israel nor do they have stay permits therein. The children were registered with the Palestinian Registry on April 10, 2007, following respondent's demand of November 2006, in which their registration was required for the handling of their application for status arrangement in Israel.

15. Petitioner 8 was born in Jerusalem on July 1, 2009, and was registered as a permanent Israeli resident on November 2, 2009 shortly after his birth, based on evidence attesting to the family's center of life in Israel during the two years which preceded his registration.

16. Petitioner 9, a registered not-for-profit association, has taken upon itself to assist victims of cruelty or deprivation by state authorities, including by defending their rights in court, either in its own name as a public petitioner or as counsel to persons whose rights had been violated.

17. The respondent is the minister authorized by the Entry into Israel Law, 5712-1952, to handle all matters arising from this law, including status applications in Israel, family unification applications and applications for the registration of children.

C. Petitioners' Matter

18. Petitioner 1 and her husband, a West Bank resident, married in 1991, when according to respondent's discriminating policy, women were prohibited from submitting family unification applications for their spouses. Having no other alternative, the spouses lived in the West Bank and wandered between Jerusalem and the home of petitioner 2's parents in Ramallah.

19. In June 2006 the spouses moved to Jerusalem, to live on a continuous, full and exclusive basis, in the Shu'fat Camp, where they have been living with their children until this day in rented apartments. The children live with their parents, with the exclusion of the daughter Kifah who has recently married a resident of Jerusalem and lives near her parents in the camp.

20. The National Insurance Institute recognized petitioner 1 as a resident as of June 2006, and from that date she receives child and guaranteed minimal income allowances.

- A confirmation of the National Insurance Institute is attached and marked **P/1**.

D. The communications with the respondent

21. Petitioner 1 wanted to arrange the status of her children shortly after the family's relocation to the Shu'fat Camp and before her eldest daughter, petitioner 3, turned fourteen years of age. In July and

August 2006, after the relocation to Jerusalem, she attempted to submit to the respondent an application for the arrangement of the status of her children and for the arrangement of the status of her husband. The respondent refused to receive the application from petitioner 1. Following a few attempts to contact the respondent in his bureau and by phone, petitioner 1 was informed that she should submit a family unification application for her children rather than an application for registration of children, as was customarily done in previous years with respect to children who were born in Israel. The respondent informed petitioner 1 that he would not accept her application, and that a family unification application should be submitted only by a prior written request. Hence, petitioner 1 turned to Advocate Shalabi, who submitted, on her behalf, a written request only eleven days after her eldest daughter turned fourteen years of age. Had respondent's policy been properly published in public as is currently done according to the court's ruling in HCJ 530/07 **Association for Civil Rights in Israel v. Ministry of the Interior**, said request would have certainly been submitted a few days earlier, before petitioner 3's fourteenth birthday, upon petitioner 1's initial application to the respondent in July 2006.

● Advocate Shalabi's letter dated September 20, 2006 is attached and marked **P/2**.

22. On the date designated by the respondent for this purpose, petitioner 1 submitted on November 28, 2006, a comprehensive application for the arrangement of the status of her children, which was numbered 1768/06. On the application submission date the daughter _____, was fourteen years and two months old, the son _____, who was born on July 18, 1994 was twelve years and four months old, and the son Muhammad, who was born on December 9, 1996, was ten years old. On that date petitioner 1 also submitted a family unification application for her husband and an application for the arrangement of the status of her two younger children, petitioner 6, the son _____, who was born on July 20, 1999 and was seven years old, and petitioner 7, the daughter _____, who was born on January 5, 2005, and who was less than two years old (petitioner 8 has not yet been born at that time).

● The application forms dated November 28, 2006 are attached and marked **P/3**.

23. In a letter dated November 28, 2006, the date on which the application was submitted, petitioner 1 was directed by the respondent to arrange the status of her minor children in the Occupied Palestinian Territories (OPT), as a condition for the processing of the application by the respondent.

● Respondent's letter dated November 28, 2006 is attached and marked **P/4**.

24. According to the **Abu Gheit** ruling, notwithstanding the fact that an application for family unification and for the arrangement of the status of children is not finally approved in the absence of a two year center of life, respondent's bureau must accept the application and commence the graduated procedure. A final approval of the application, and the arrangement of a permanent status, will be granted two years later. Otherwise, how would the family members be able to establish their center of life in Israel, while their presence here is unlawful? Nevertheless, in a letter dated October 28, 2007, the respondent denied the application in the absence of "a permanent and continuous center of life of at least two years within the territory of Israel."

● The denial letter dated October 28, 2007 is attached and marked **P/5.**

25. On July 10, 2008 after the elapse of two years from petitioner 1's relocation to Israel, she submitted an application for the arrangement of the status of her husband and younger children, petitioners 6 and 7. Petitioner 1 did not submit at that time an application for her three older children, as she

understood from respondent's letter that two years should pass from the date her application was denied.

● The application form dated July 10, 2008 for petitioners 6 and 7 is attached and marked **P/6.**

26. On June 24, 2009, after the elapse of about two years from the denial date, petitioner 1, with the assistance of HaMoked for the Defence of the Individual, submitted an additional application for the registration of petitioners 2-4 - _____, _____ and _____, with the Israeli Population Registry. When the application was submitted, the family members have been residing in Israel for about three years. As aforesaid, according to **Abu Gheit**, in the first place, petitioner 1 should not have been required to submit a new application and respondent's bureau should have examined her initial application which was submitted after her relocation to Israel. However, petitioner 1 acted as instructed by the respondent.

● The letter ancillary to the application dated June 24, 2009 is attached and marked **P/7**.

27. On July 28, 2007 an application was submitted for the registration of petitioner 9 *[sic]*, who was born on July 1, 2009, with the Population Registry.

28. On February 4, 2009, the application for the arrangement of the status in Israel of petitioners 6 and 7 and of their father, petitioner 2, was denied. The application was denied notwithstanding the fact that the respondent did not dispute their presence in Israel for two years (the application was submitted in July 2008 and the petitioners relocated to Israel in June 2006) and their compliance with all other conditions for the approval of the application. The application was denied due to an irrelevant inaccuracy concerning the specific month in which the family moved to Israel, despite the fact that an explanation for the provision of the wrong month was given and despite the fact that even according to the later date the family has been living in Israel for a duration of two years prior to the application.

● Respondent's denial dated February 4, 2009 is attached and marked **P/8**.

29. On June 23, 2009 an appeal was filed against the denial of petitioners' application. The appeal was filed after its due date, due to petitioner 1's economic distress, which did not enable her to be represented by a lawyer and obligated her to replace her private attorney with the representation of HaMoked for the Defence of the Individual. The appeal was filed despite respondent's denial of the request for extension. It was argued that there was no justification for respondent's denial due to an inaccuracy which pertained to a period which exceeded to the two year term and was therefore irrelevant even as far as the respondent was concerned.

● The appeal dated June 23, 2009 is attached and marked **P/9**.

30. On August 9, 2009, September 14, 2009, November 4, 2009 and December 27, 2009, the petitioner sent the respondent reminders concerning the appeal, which remained unanswered.

● The reminders dated August 9, 2009, September 14, 2009, November 4, 2009 and December 27, 2009, are attached and marked **P/10**.

31. On October 20, 2009, respondent's response was received in the offices of HaMoked for the Defence of the Individual according to which: *"The children 92 _____ + 94 _____ will receive DCO referrals for one year. 96 _____ will receive A/5 for two years.*" It is not clear why the respondent did not make a decision, at that time, in the application of the two younger siblings of the children, who live with them in the same household. It is also not clear why a decision was not made in the application which was submitted for the father of family.

● Respondent's letter dated October 20, 2009 is attached and marked **P/11**.

32. The respondent approved the application of petitioner 8, the youngest brother, who was registered on November 2, 2009 as a permanent resident in Israel.

33. On January 7, 2010, the petitioners appealed the decision to grant them permits and temporary status, *in lieu* of permanent status. The petitioners noted that the effective date in their matter should be the submission date of the first application from 2006 (see for instance paragraph 4 and paragraph 17 of the appeal).

● A copy of the appeal dated January 7, 2010, is attached and marked **P/12**.

34. In a response dated January 20, 2010, the respondent notified that he regarded the children as residents of the OPT, who were therefore entitled to receive only the temporary permits which were granted to them.

● Respondent's response dated January 20, 2010 is attached and marked **P/13**.

E. The appeal concerning petitioners 3-5

35. On March 3, 2010 an appeal concerning petitioners 3-5 was filed, in which the respondent was requested to arrange their permanent status. This appeal was numbered 99/10.

● The appeal is attached and marked **P/14**.

36. According to procedure No. 1.5.0001 the respondent should have responded to the appeal within 30 days, namely, until April 3, 2010. And indeed, a decision to that effect was given by the committee on March 3, 2010. The respondent disregarded, as it does in many cases, its own procedure, and treated the committee's decisions with contempt, time and time again. The committee on its part did not find it necessary to act promptly or to make a decision in the appeal within reasonable time, despite respondent's delays.

● The committee's decisions dated March 3, 2010 and April 22, 2010 are attached and marked **P/15**.

● Respondent's request for extension dated June 16, 2010, with petitioners' objection and the committee's decision to grant the extension scrawled thereon, is attached and marked **P/18**.

37. In a laconic letter dated October 31, 2010 the respondent notified that his refusal to arrange the status of petitioners 3 and 4 remained unchanged.

● Respondent's letter dated October 31, 2010 is attached and marked **P/19**.

38. After the elapse of the last date which was scheduled for respondent's response, following many extensions, with no response on his part, the petitioners requested the committee, on November 10, 2010, again, to make a decision in the appeal.

● Petitioners' letter dated November 10, 2010 is attached and marked **P/20**.

39. On November 11, 2010, a day after petitioners' letter, the respondent requested an additional two month extension. On that same day the committee decided that it would not be able to make a decision in the appeal without respondent's position, and that "under these circumstances the requested extension is granted for the last time".

- Respondent's request dated November 11, 2010 with the committee's decision scrawled thereon is attached and marked **P/21**.

40. Only on December 27, 2010, namely, almost ten months after the appeal was filed, a period ten times longer than the term prescribed by the procedure, did the respondent submit his response. The respondent reiterated his position that the children were OPT residents and therefore petitioners 3 and 4 should not be granted permanent status or any status whatsoever. With respect to the obligation to regard the submission date of petitioners' application from 2006 as the effective date, the respondent notified that in view of the fact that the **Abu Gheit** judgment was rendered after his decision in petitioners' matter, he was not obligated to act according to said judgment.

- Respondent's response is attached and marked **P/22**.

41. On January 27, 2011 the petitioners submitted their response to respondent's response, in which they have reiterated their position that the respondent should act according the **Abu Gheit** judgment and the general principle established therein, and should not hide behind technical arguments.

- Appellants' response is attached and marked **P/23**.

42. **The decision of the appellate committee in petitioners' 3-5 matter** – On March 31, 2011 the committee's decision was rendered. The committee states in its decision that the petitioners are OPT residents and that the **Abu Gheit** judgment should not be applied to their matter in view of the fact that the judgment was given after the decision in their matter was made, and that they have not appealed said decision.

43. The appellate committee stipulated that the fact that the petitioners acted according to respondent's instructions and applied again to the respondent after he had denied, for instance, their application being the subject matter of this appeal, did not mean that the matter was pending, in view of the fact that in the past the application had been duly denied and no appeal was filed. Therefore, the legal change which occurred upon the rendering of the **Abu Gheit** judgment was not applicable to this matter. The committee further determined that in **Abu Gheit**, it was not ruled that the child should be given status although the issue in question did not concern the nature of the status but rather the mere acceptance of the application or the recognition that the application submission date should be regarded as the legitimate reference date as far as the application to the respondent was concerned. Therefore the appeal was denied.

- The committee's decision is attached and marked **P/24**.

44. It should be noted that in view of the judgment in AAA 1621/08 **State of Israel v. Hatib** (January 30, 2011), this petition does not concern the mere definition of the children as residents of the Area, a matter being currently discussed in the constitutional petitions which were filed against the Temporary Order Law.

F. The appeal concerning petitioners 2, 6 and 7

45. On January 21, 2010, as petitioners' applications remained unanswered, an appeal concerning petitioners 2, 6 and 7 was filed.

- The appeal is attached and marked **P/25**.

46. In a decision dated January 25, 2010 and according to procedure 1.5.0001 on this issue, the respondent was requested to respond to the appeal, on its merits, within 30 days.

- The committee's decision dated January 25, 2010 is attached and marked **P/26**.

47. In a decision dated February 8, 2010, in the absence of respondent's response to the request for an interim relief, an order was granted which prohibited the deportation of the petitioners, the appellants therein.

- The decision dated February 8, 2010 is attached and marked **P/27**.

48. The respondent did not follow the procedure in this appeal too, and extensions were repeatedly requested by him.

- Respondent's request for extension dated April 27, 2010, with petitioners' objection and the committee's decision to approve the request scrawled by hand thereon, is attached and marked **P/28**.

- The request for extension dated June 29, 2010, with petitioners' objection and the committee's decision scrawled thereon, is attached and marked **P/29**.

- Respondent's request dated September 13, 2010, with petitioners' objection and the committee's decision to approve the request scrawled thereon, is attached and marked **P/30**.

49. On November 24, 2010 the respondent requested an additional two month extension. The petitioners objected and requested that a decision be made in the appeal, but an extension was granted again – at this time for 30 days – with the committee's comment that in the absence of response the appeal would be accepted *"in the sense that the respondent will have to review the appeal which was submitted to it after its due date*." And note, it turns out that after so many delays, petitioners' delay in the filing of the appeal still has a decisive relevancy, to the extent that the only thing which the committee proposes is to obligate the respondent to review the appeal, and not necessarily to make a decision therein.

- Respondent's request dated November 24, 2010, with petitioners' objection and the committee's decision scrawled thereon, is attached and marked **P/31**.

50. It seems that in view of the committee's above comment, the respondent notified on December 22, 2010, about one whole year after the submission date of the appeal, that he was willing to continue to process the appeal. For that purpose and in view of the passage of time during which he did not make a decision, updated documents concerning the family's center of life were requested. In a decision dated December 23, 2010, the committee requested to receive petitioners' response within 21 days, and notified that if a response is not received "the appeal will be deleted". To witness, the respondent receives extensions over a period of one year, but his notice that the appeal will be processed, rather than decided on, is sufficient to have the appeal deleted. And the petitioners were naïve enough to believe that during the passing year the appeal was processed.

- Respondent's notice dated December 22, 2010 with the committee's decision scrawled on it is attached and marked **P/32**.

51. On January 16, 2011, the petitioners notified the committee that they objected to the deletion of the appeal after a year and a year and-a-half after the date of its submission, only because of respondent's notice that he was willing to process the appeal. The petitioners explained how respondent's procrastination created a situation in which, according to him, petitioner 6 would not be able to receive permanent status.

- Petitioners' response is attached and marked **P/33**.

52. In an interim decision dated February 1, 2011, the committee notified that after petitioners' submission of the documents, the respondent would have to make a decision in the application not later than by March 24, 2011, and that in the absence of the position of the security agencies, respondent's general position should be provided and the appeal would be deleted.

- The committee's decision scrawled by hand on the first page of petitioners' response dated January 16, 2011, is attached and marked **P/34**.

53. On February 20, 2011, the petitioners submitted the documents which were requested by the respondent.

- Petitioners' letter dated February 20, 2011 is attached and marked **P/35**.

54. As respondent's substantial or general decision in the application has not been received by the date scheduled for that purpose by the committee – March 24, 2011, the petitioners requested, on March 27, 2011, that a decision in the application be made forthwith. On March 31, 2011 the committee requested the respondent to make a decision in the application forthwith.

- Petitioners' request dated March 27, 2011, with the committee's decision scrawled thereon, is attached and marked **P/36**.

55. No decision was made and therefore, the petitioners requested the committee again, on April 12, 2011, to make a decision in the appeal forthwith.

- Petitioners' request dated April 12, 2011, bearing a received stamp is attached and marked **P/36**.

56. On May 9, 2011 the petitioners contacted the respondent with respect to several files which could have been affected by the judgment in AAA 5718/09 **State of Israel v. Srur**, including the case at hand. At the committee's request, the petitioners explained in an additional application on their behalf, the reason for their request in said context and reminded that the respondent should have given an immediate decision in the appeal. On May 15, 2011 the committee repeated its decision, for the third time, according to which the respondent should respond to the **appeal forthwith**. With respect to **Srur**, the respondent was given 14 days to respond.

- Petitioners' application dated May 9, 2011, with the committee's request for clarification scrawled by hand thereon is attached and marked **P/38**.

- Petitioners' explanation dated May 12, 2011, and an additional application for an immediate decision, with the committee's decision scrawled thereon, is attached and marked **P/39**.

57. To date, **<u>one year and four months</u>** after the appeal was submitted, no decision has been made. The children have no status. Their father has no status.

G. Summary of the events until this day

58. In September 2006, petitioner 1 applied to the respondent in writing for the submission of a family unification application with her husband and all of her children. Petitioner 1's initial application was made about two months earlier, shortly after her relocation to Israel. However, the refusal to receive petitioner 1's application for the arrangement of the status of her family members, and the absence of a written, let alone published protocol, consisting of procedures for the submission and handling of applications concerning the manner she should have submitted her application, postponed the orderly application.

59. The application was denied according to the policy of the Ministry of the Interior, according to which an application for family members may be submitted only after a presence of two years in Israel. Petitioner 1 submitted an additional application for her children and husband in 2008 and 2009, respectively, according to respondent's instructions.

60. Meanwhile, on December 10, 2008 the judgment given in **Abu Gheit** clarified that the two year waiting period pertained to the mere approval of the application for the arrangement of a child's status, rather than to the submission of the status application – otherwise the state would incriminate family members including minors as unlawful residents. This ruling reconciles with earlier rulings in **Stamka** and **Za'atra**. This ruling also reconciles with the general obligation to give a child, to the maximum extent possible, the same status as his parent, and to apply lenient policy and construction to matters concerning children and spouses. In view of these rulings, the respondent was requested to consider the earlier date on which the application was submitted, as the relevant date. The request is denied by the respondent. It is also denied by the appellate committee.

61. Following the above denial, the respondent arranged the presence of the three older children of the family according to their age on the date on which the 2009 application was submitted – so that only petitioner 5 received a temporary status, and his two siblings were not entitled to any status whatsoever – only to stay permits. The respondent, who attaches great importance to the periods for the examination of the settlement, failed to decide, until the day of this petition, in the matter of the father and two of the younger children of the family, petitioners 6 and 7, who submitted their additional application in 2008. They currently have no status in Israel.

H. The Legal framework

62. Respondent's decision to disregard the date on which petitioners' application was submitted – is extremely unreasonable. Respondent's position contradicts the Basic Law: Human Dignity and Liberty, applicable law concerning the child's best interest and the importance of the family unit and judgments rendered by the competent courts.

The arrangement of the status of children – the general principle concerning the arrangement of the status of residents' children

63. As a matter of social and legal policy, Israel adopted the principle according to which the status of the child should be the same as the status of his custodial parent who is a resident of Israel, provided that the child lives with his parent within state limits. This principle is derived from fundamental rules, which virtually constitute a rule of nature, concerning the rights of obligations of the custodial parent towards his minor child, and concerning the protection society must provide to their relations.

64. Accordingly, it was held that:

> **As a general rule, our legal system, recognizes and respects the value of the integrity of the family unit and the interest of protecting the best interest of the child, and therefore one must avoid creating a chasm between the status of a minor child and the status of his custodial parent or the parent who holds the right of custody over him… As far as I am concerned, I am of the opinion that there is no place to distinguish between the status of the minor child and the status of his custodial parent in Israel, either within the framework of the interpretation of**

> **Regulation 12 or by establishing a suitable criterion to guide the discretion granted to the Minister of the Interior in the Entry to Israel Law**. (emphasis added – A.L.) HCJ 979/99 **Pabaloya Carlo (minor) *et. al.*. v. Minister of the Interior**, TakSC 99(3), 108.

65. As also indicated by the above quote of the words of the Honorable Justice, current President Beinisch, the legal infrastructure within which this policy should be implemented, is made out of patches. However, each and every legal provision should be applied according to the same general principle. It is therefore clear that a fair and reasonable treatment by the authority would give preference to the measure which complies with the above principles and violates the child's best interest to the minimum extent possible. It is correct. A law may limit the respondent in a manner which would violate the child's best interest. This is the case as far as the Temporary Order Law is concerned. However, to the extent that the violation may be reduced by narrow construction, review of data and exercise of discretion, the authority must take the measures which would facilitate same.

The application to children who were registered with the Palestinian Registry

66. Regulation 12 of the Entry into Israel Regulations, 5734-1974 (hereinafter: the **Regulations**) applies directly to a child who was born in Israel, and provides that a child who was born in Israel will receive the status of his custodial parent. The status of a child who was born outside Israel is arranged according to section 2 of the Entry into Israel Law, 5712-1952 and respondent's procedures, as will be specified below. The guiding principle in both situations is to grant the child, to the maximum extent possible, the same status as his parent.

67. On May 12, 2002 government resolution 1813 was adopted concerning the cessation of family unification processes with OPT residents. The respondent decided that the resolution would also apply to the arrangement of the status of children of Israeli residents from East Jerusalem, who were registered with the Palestinian Registry or resided in the OPT, despite the fact that this issue is not mentioned at all in the resolution as drafted.

- A copy of the government resolution is attached and marked **P/40**.

68. In 2003 the resolution was incorporated and entrenched in the Citizenship and Entry into Israel (Temporary Order) Law, 5763-2003. In this law children were mentioned for the first time and it was stipulated that only children up to twelve years of age would be able to receive status. In September 2005 the law was amended, and among other things, the age of the children entitled to receive status was increased to fourteen. It was also stipulated that between the ages of fourteen-eighteen a stay permit may be received. In addition, the definition of the term "Resident of the Area" in the law was amended, in a manner which consists of any person who is registered with OPT Registries even if he does not reside the West Bank and Gaza. It should be noted that according to this legal infrastructure, the respondent instructed the parents to register their children in the OPT – see for instance respondent's explicit instruction to petitioner 1 to arrange the status of her children in the OPT as a condition for the handling of the arrangement of their status in Israel – in Exhibit **P/4** above**.**

69. Meanwhile, the respondent applies to the children procedure 2.2.0010 concerning the arrangement of the status of children only one of whose parents is a resident, in which various limitations were established which restrict the arrangement of the status of children beyond the provisions of the law. Among these limitations, the respondent entrenched in the procedure its policy according to

which an application may be submitted only after two years of residency in Israel (see for instance sections B.7 and B.14 of the procedure). However, these limitations do not constitute part of procedure 1.13.0001 "Examination and Determination of a Center of Life".

- Procedure 2.2.0010 is attached and marked **P/41**.

- Procedure 1.13.0001 is attached and marked **P/42**.

70. To date, as far as applications which were submitted after the amendment of the law in September 2005, such as the application at hand, children who were registered with an OPT Registry are OPT residents and are therefore subject to the age limitations specified above. See AAA 1621/08 **State of Israel v. Hatib**. An application which was submitted for a child under the age of fourteen, either before or after the amendment of the law, is entitled to receive a permanent status. See AAA 5718/09 **State of Israel v. Srur**, in which the section in the procedure that imposed restrictions on this matter, was disqualified.

Preventing the mere submission of an application for a child until the requirement for a two year center-of-life is satisfied is contrary to the law

71. A determination according to which the applicant must prove a two year center of life merely for the submission of the application requires the Israeli resident to live in Israel with his family members unlawfully – when the spouse and the children, in many cases minors, are in fact incriminated as a result of the state's requirement. This is a bureaucratic labyrinth, which has already been disqualified back in 1999 in HCJ **Stamka**. This condition is undoubtedly inappropriate when applied to the arrangement of the status of children, whose best interest should be protected by the state and whose rights are, anyway, severely restricted and violated by the provisions of the Citizenship and Entry into Israel (Temporary Order), Law 5763-2003.

72. AP (District-Jerusalem) 3840/08 **Abu Gheit v. Minister of the Interior** (December 10, 2008), concerned respondent's refusal to handle an application for the registration of children which had been submitted before the elapse of two years from the settlement date in Jerusalem. The court held that although respondent's position, according to which for the approval of an application for the registration of children a two year center of life should be proved, was reasonable, the requirement for a two year center of life merely for the submission of an application was not reasonable. The words of the Honorable Justice Cheshin, concerning a case in which the children were born in Israel, are also relevant, as far as their rational is concerned, to our case.

73. In **Abu Gheit** it was held for instance, with respect to AP (District-Jerusalem) 742/06 **Abu Qweidar v. Minister of the Interior**, that the requirement for a two year center of life pertained to the approval of a permanent status rather than to the submission of the application. Until such two years of center of life shall have passed, the submission of the application should be allowed, within the framework of which the child will be given the type of temporary status as shall be determined (in that case the court held that there was no need to decide on the nature of the status, in view of the fact that the stay permits which were given solved the children's school problem as well as the spouse's distress. And it was so held:

> **I am of the opinion that respondent's general position, according to which the children are not entitled to any status until the demand for a center of life of two years is fulfilled, exceeds reasonableness, as it may expose them to an improper reality of unlawful presence in Israel for a considerable period of time (about two years), without schooling (despite the fact that they are**

> **of a compulsory school age). It is not compatible with the recognition that the 'interest of protecting the child's best interest' (Carlo, paragraph 2) should be respected as with the special nature of regulation 12, as a regulation the purpose of which is to promote human rights in the two central aspects which were pointed out by President Beinisch: "the first, is the aspect which concerns the constitutional right of the parent who has status in Israel to raise his child, namely, the constitutional right of the parent to family life. The other aspect concerns the independent and autonomous rights of the minor to live his life with his parent." ('Aweisat, paragraph 20). And indeed, as we have seen, the respondent himself, after having considered the children's matter once again, decided *"ex gratia"* and in order to enable the children to enroll in schools in Israel in an orderly manner, that DCO stay permits in Israel would be issued to them, without however retracting his general position, according to which the children were not entitled, at this stage, to any lawful status in Israel. However, respondent's said general position does not reconcile with the purpose of regulation 12 and the grounds thereof. Therefore, I am of the opinion, that as a general rule, and in the absence of special reasons not to act accordingly, the respondent must grant the child, during the interim period, until the demand for maintaining a center of life is fulfilled, a temporary stay permit in Israel which will enable the child to lawfully live here with his parent, and to enroll in school in Israel**. (paragraph 12 of the judgment).

74. Furthermore. In **Abu Gheit** it was also held that the spouse should also be given temporary status, until the final approval of the application, based on the **Stamka** rational, which applies even more forcefully to children:

> **The policy of the Ministry of the Interior concerning foreigners who married Israelis while they (the foreigners) stay in Israel without a permit, is a policy which does not satisfy the proportionality test and is therefore inappropriate and void. The demand posed by the Ministry of the Interior – as a general policy – that the foreign spouse leaves Israel for a few months until the sincerity of the marriage is examined, is a policy which does not reconcile with fundamental principles of a democratic regime which promotes human rights." The above is relevant, mutatis mutandis, to the case at bar. Respondent's policy not to give the sponsored spouse (resident of the Area) a temporary stay permit in Israel – be it only a DCO permit – for as long as the sponsoring spouse (the permanent resident) has not satisfied the requirement of a center of life in Israel, may divide the family unit in a manner that one of the spouses will live in Israel (with or without the children) apart from the other spouse, who will have to choose between one of the following evils – to live with his wife and children in Israel, and to commit the offence of an unlawful stay in Israel, being exposed to the risk that criminal proceedings will**

> **be initiated against him, or to continue to live in the Area apart from his family for about two years.**
>
> **It is an unreasonable result which is hard to accept. Thirdly, in one of the petitions which were heard by my colleague, the Honorable Judge M. Sobel, in which the family unification application was also denied due to the failure to prove a center of life for two years, the respondent was requested to clarify, during the hearing of the petition, "whether his argument was that, in view of her intention to submit a family unification application for her husband, an OPT resident, the petitioner should have continued to live in Jerusalem apart from her husband even after she married him (in view of the fact that the husband's entry into Israel was prohibited for as long as the application has not been approved)"(AP 1140/06 Za'atra v. Minister of the Interior, given on November 30, 2007). A few days later the respondent in that case notified the court that he was willing to approve the family unification application, without giving an answer to the question posed to him "concerning the conduct expected of an Israeli resident who marries a resident of the Area whose entry into Israel is prohibited**." (**Abu Gheit**, paragraph 13).

And indeed, see also AP 1140/06 **Za'atra v. Minister of the Interior**, in which the application was approved on its merits, despite an absence of a center of life of two years during the period which preceded the submission of the application.

75. To witness. Notwithstanding the fact that the demand for a center of life of two years is relevant for the final approval of the application, it is not relevant for the mere submission of the application and the grant of a temporary status during the examination process until its approval.

76. Furthermore, the date on which the application was submitted to the authority is the effective date, as the relevant point of reference, rather than the date of its approval. Hence, according to the court's ruling, the respondent should have accepted petitioner 1's 2006 application, and regard the application submission date as the effective date. And it was so held in AP (Jerusalem) 8295/08 **Mashahara v. Minister of the Interior** (November 24, 2008) and in AP (Jerusalem) 8336/08 **Zahaika v. Minster of the Interior** (December 2, 2008):

> **The effective date is the application submission date, rather than the A/5 visa two year period expiration date. It was also so held by the Deputy President Adiel in AP (Jerusalem) 8295/08 Meyasar Ibrahim v. Minister of the Interior (given on November 24, 2008) who stated that otherwise the purpose of the amendment which intended to broaden the scope of the beneficiaries would be frustrated (ibid, paragraphs 12-15).** (Emphasis added –A.L.)

And see also AP 1238/04 **Joubran v. Minister of the Interior**, judgment of the Honorable President, Judge M. Arad dated August 19, 2009, the judgment in AP 8386/08 **'Arab al-Sawahreh v. State of Israel – Ministry of the Interior**, judgment of the Honorable Judge Deputy President dated December 14, 2009.

77. This position, according to which the effective date for the examination of applicant's age, is the application submission date, was recently approved in AAA 5718/09 **State of Israel v. Srur** (April 27, 2011) which was filed against AP 8890/08 **Srur v. Ministry of the Interior** (June 8, 2009). In AAA **Srur** it was so held in paragraph 46 and onwards:

> **46. …Against this backdrop the District Courts have repeatedly held that, for the purpose of granting a residency permit under Section 3a(1), the Ministry of Interior must examine the age of the minor at the time the initial application for status in Israel was submitted rather than at the end of the two years during which the minor had a temporary residency visa. The District Courts were of the opinion that only in this manner would the provisions of the Temporary Order Law and Regulation 12 and the purposes underlying them be fulfilled (see the statements made in AP (Jerusalem District) 8295/08 Mashahara v. Minister of Interior (not reported, November 24, 2008), §§12-14 of the judgment of Judge Y. Adiel; and AP (Jerusalem District) 8336/08 Zahaika v. Minister of Interior (not reported, December 2, 2008)).**
>
> **47. I too accept this position. In my opinion, the proper manner for the implementation of the procedure is that where the Ministry of Interior decided that a certain minor, who is under 14 years of age, meets the criteria stipulated for receiving status in Israel, the effective date concerning the minor's age under Section 3a(1) of the Temporary Order Law shall be the date on which the initial application was submitted**.

The Stamka, Za'atra and Abu Gheit's rulings apply to petitioners' application

78. According to the respondent, in view of the fact that the **Abu Gheit** judgment was given in 2008, after petitioners' above application was denied, it does not apply to the case at hand. This position should be totally rejected.

79. Firstly, the principles which were established in HCJ **Stamka** and in **Za'atra** preceded **Abu Gheit**.

80. Secondly, and most importantly, in view of the fact that petitioners' application continued to be pending before the respondent, the normative law as determined by the Honorable Court should be applied to it and one should not hide behind technical arguments. In the same manner, applications for the upgrade of the status of spouses were submitted following the **Dufish** judgment (AAA 8849/03 **Dufish v. Head of Population Administration**) and it was not argued that in view of the fact that the judgment was given after a decision was made, it could not be applied to relevant cases (see for instance, AP 8436/08 **'Aweisat Sabah et al. v. Ministry of the Interior**, AP 422-05-10 **Nassrin Abu Qalabin v. Ministry of the Interior – Population, Immigration and Border Authority**). Accordingly, cases which were examined before the '**Aweisat** judgment (AAA 5569/05 **State of Israel v. 'Aweisat**) are also resolved according to this judgment. The court did not determine that the state of affairs has changed, but rather stated its general position – which certainly binds the respondent. Said position should apply to the application to arrange the status of petitioner 1's children.

81. Even if this case concerns a retroactive application, the rule is that judge made law is retrospective, unless special circumstances exist. And it was so stated explicitly in HCJ 221/86 **Kanfi v. National Labor Court** et al. IsrSC 41(1) 469, 480:

> **When a ruling is established by a judicial instance, it usually applies retrospectively: Prof. A. Barak "Judicial Legislation", Mishpatim 13 (5743-44) 25, 51. In other words, the decision which interprets the provisions of the law is by and of its nature declarative. It applies not only prospectively, but it is rather a declaration concerning the meaning of the law as it has always been**.

82. Respondents' decision in petitioners' matter, the children of an Israeli resident, does not stem from a correct interpretation of the Temporary Order Law. It cannot be reconciled with applicable law concerning the child's best interest. It contradicts the updated version of the law and the judgments given in HCJ 4022/02 **Association for Civil Rights in Israel v. Minister of the Interior** (January 11, 2007) and in HCJ 7052/03 **Adalah v. Minister of the Interior** (May 14, 2006). Respondent's decision in petitioners' matter also contradicts the Basic Law: Human Dignity and Liberty and fundamental human principles:

> **The approach that a law which impinges on human rights must be interpreted narrowly runs like a golden thread through case law: "It is a known rule that a law that denies or restricts a citizen's rights should be interpreted literally." Justice Etzioni addressed this issue, and noted: "When the power at issue causes a substantive impingement upon the fundamental right of a citizen in a free society, we will not hesitate to rule in favor of an interpretation that limits the impingement on civil rights. The presumption is that the legislature respects these rights." Justice Elon reverberated a similar approach in stating: "Any provision which seeks to violate a person's individual rights and liberties must be interpreted literally and narrowly." (Aharon Barak, judicial Construction, Second Volume: Statutory Construction, page 555-556).** (*Ibid*. paragraphs 20 and 21).

83. Our case concerns respondent's policy, which causes an unnecessary harm and inappropriately reduces the number of children who will be entitled to live with their resident parents in Israel with a secured status.

<u>Violation of fundamental human rights</u>

84. Respondent's decision violates petitioners' fundamental right to dignity, which consists of the constitutional right to family life and protection of the child's best interest. Despite the fact that the Supreme Court held that the Temporary Order Law was proportionate only <u>after</u> it was amended in a manner which enables every child under the age of 18 to receive status in Israel, and beyond need it should be noted that the relevant age of the child is his age on the application submission date rather than on the date the handling of his application was terminated – the respondent continues to violate petitioners' rights who were sixteen years old minors when the application in their matter was submitted, and who were living with their mother, an Israeli resident, in Jerusalem.

85. The sweeping determination that an Israeli resident, whose family has been living in Jerusalem for ages, and who was forced, in the first place, to leave the city due to respondent's discriminating policy which did not enable her to unite with her husband, will not be able to arrange the status of her minor children who live with her, without a specific examination, based

on a statutory situation which existed in the past and which was amended, specifically for the purpose of preventing cases such as the case at hand – is inhumane.

The right to family life - a constitutional right

86. Respondent's conduct violates petitioners' right to live together and maintain a family unit at their choice. The right of every person to establish a family unit is a fundamental constitutional right in our legal system, which should not be violated, and which is derived from the right of every person to dignity. The State of Israel tells petitioner 1 that she is an Israeli resident, but her children who are supported by her may not live here – this actually constitutes a deportation order.

87. In the above **Adalah,** which concerned the constitutionality of the Temporary Order Law, the status of the right to family life in Israel was elevated and given the status of a constitutional right, which was entrenched in the Basic Law: Human Dignity and Liberty. President Barak, who held a minority opinion with respect to the end result of the judgment, summarized, with the consent of eight out of the eleven justices of the panel, the rule which was established in said judgment concerning the status of the right to family life in Israel:

> **From human dignity, which is based on the autonomy of the individual to shape his life, we derive the derivative right of establishing the family unit and continuing to live together as one unit. Does this lead to the conclusion that the realization of the constitutional right to live together also entails the constitutional right to realize it in Israel? My answer to this question is that the constitutional right to establish a family unit means the right to establish the family unit in Israel. Indeed, the Israeli spouse has a constitutional right, which is derived from human dignity, to live with his foreign spouse in Israel and to raise his children in Israel. The constitutional right of a spouse to realize his family unit is, first and foremost, his right to do so in his own country. The right of an Israeli to family life means his right to realize it in Israel**. HCJ 7052/03 **Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior,** given on May 14, 2006, paragraph 34 of President Barak's judgment.

On this issue see also: HCJ 693/91 **Efrat v. Director of Population Registry with the Ministry of the Interior et al.,** IsrSC 47(1) 749, 783; CA 238/53 **Cohen and Bulik v. Attorney General**, IsrSC 8(4), 35; HCJ 488/77 **A et al. v. Attorney General**, IsrSC 32(3) 421, 434; CA 451/88 **A v. State of Israel**, IsrSC 49(1) 330, 337; FH 2401/95 **Nachmani v. Nachmani et al**., IsrSC 50(4) 661, 683; HCJ 979/99 **Pabaloya Carlo v. Minister of the Interior**, TakSC 99(3), 108; HCJ 3648/97 **Bijalbahan Fatel v. Minister of the Interior**, IsrSC 53(2), 728, pages 784-785.

88. International law provides that every person has the liberty to marry and establish a family. Thus, for instance, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights which was ratified by Israel on October 3, 1991 provides that:

> **The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of**

society, particularly for its establishment and while it is responsible for the care and education of dependent children…

And see also: The Universal Declaration on Human Rights, which was adopted by the un Assembly on December 10, 1948, Article 18(1); Article 17(1) and Article 16(3) of the International Covenant on Civil and Political Rights, which entered into effect in Israel on January 3, 1992.

89. The establishment of the right to family life as a constitutional right entails the determination that any violation of this right must be made according to the Basic Law: Human Dignity and Liberty – based only on weighty considerations and a solid evidentiary infrastructure attesting to such considerations. This determination imposes on the respondent a heightened obligation to strictly maintain an administrative system which would ensure that his authority in family unification applications which are brought before him, an authority which impinges a protected constitutional right, is exercised efficiently, according to established procedures, and without delays.

The right of children to be protected by society

90. Petitioner 1, an Israeli resident, has the right to live safely with her children in Israel, and to have their legal status arranged. This right is derived from the right of petitioner 1 as a permanent resident of the State of Israel, and from her fundamental right as a mother, not be prevented by her country from protecting her children and giving them the best she can. The clear and natural obligation which is imposed on the state is not only to prevent such impingement, but also to actively protect a person against a violation of his ability to grant his children the protection they need.

91. The respondents disregard the principle of the child's best interest, a fundamental principle in the exercise of any administrative or judicial discretion concerning minors. For as long as he is a minor and for as long as his parent functions properly, the child's best interest requires to enable him to grow up in the family unit which supports him. The refusal to register a child as an Israeli resident, despite the fact that his parent is an Israeli resident who resides in Israel – exposes the child to the risk of separation from his parent (the permits are temporary, they do not always overlap and are not granted in periods of closure and other periods), may damage his development and interfere with the family unit contrary to his best interest. Alternatively, the child will remain, in the absence of any other choice, with his parent in Israel, but without a solid and clear status, for as long as the hardships of life without status do not cause the family to give up.

92. The principle of the child's best interest in Israeli jurisprudence is a fundamental and well rooted principle. Of the importance of the family unit and the constitutional limits imposed on state intervention therein, see the words of the Honorable Justice Shamgar in CA 2266/93 **A v. B,** IsrSC 49(1) 221, 235-236:

The right of parents to keep their own children and raise them, with anything which this may entail, is a natural and primary constitutional right which expresses the natural connection between parents and their children (CA 577/83 Attorney General v. A, IsrSC 38(1) 461). This right finds expression in the privacy and autonomy of the family: the parents are autonomous in making decisions which concern their children – education, way of life, place of residence, etc., and the intervention of the state in these decisions is an exception which should be justified (see the above CA 577/83, page 468, 485). This position is rooted in the recognition that the family is 'the most basic and ancient unit in the history of mankind, which was, is and will be the element which nurtures

> **and secures the existence of a human society'** (Justice Elon (as then titled) in CA 488/77 **A et al. v. Attorney General**, IsrSC 32(3) 421, in page 434).

93. The right of minor children to live with their parents was recognized as an elementary constitutional right by the Supreme Court. See the words of Justice Goldberg in HCJ 1689/94 **Harari et al. v. Minister of the Interior**, IsrSC 51(1) 15, page 20 across the letter B.

94. The International Convention on the Rights of the Child, which was ratified by the State of Israel as well as by almost of all the nations around the globe, establishes a host of provisions according to which protection must be afforded to the family unit of the child. It was stated in the preamble to the Convention:

> **[The state parties to the present convention] are convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community […].**

See also Articles 1, 3(1), 4, 5, 7, 9(1) Article 10(1) of the convention. The provisions of the Convention on the Rights of the Child receive increasing recognition as a complementary source for the rights of the child and as a guide for the interpretation of the "child's best interest" as a superior consideration in our jurisprudence: see CA 3077/90 **A *et al*. v. A,** IsrSC 49(2) 578' 593 (Honorable Justice Cheshin); CA 2266/93 **A, minor *et al*. v. A,** IsrSC 49(1) 221, pages 232-233, 249, 251-252 (Honorable President Shamgar); FH 7015/94 **Attorney General v. A**, IsrSC 50(1) 48,66 (Honorable Justice Dorner). The respondents should exercise their authority according to the child's best interest as interpreted by the provisions of the Convention. See also Articles 24(1) and (2), 17, 23, 26 of the International Covenant on Civil and Political Rights.

95. Respondent's conduct towards a resident of Israel is particularly irritating while, at the same time, the status of children of illegal labor immigrants is arranged. The latter are granted permanent status whereas petitioner 1's children are doomed to a constant dependency on military permits. It should be stated that the petitioners congratulate the respondent for his decision concerning labor immigrants which is a justified and humane decision – however, this policy all the more so illustrates the outrageous unreasonableness in petitioner 1's matter.

<u>The principle of proportionality – the obligation to narrowly apply a law which violates fundamental rights</u>

96. Respondent's policy which prevents the submission of an application until the demand for a two year residency is fulfilled, and the fact that once the application is submitted after two years, the processing thereof by the respondent continues for an additional period of about two years, impinges on the family unit excessively and does not comply with the purpose for which the examination of the family's settlement was established. We have seen that this examination may be conducted while the application is being processed, a procedure which takes many years.

97. The purpose of the settlement verification may be achieved by proportionate means within a probationary review process, which will not only demand the family's settlement in Israel, but will also make it legally possible:

> … **weight should be given to the general assumption according to which the purpose of each statutory provision is to realize the basic principles of the system rather than to oppose them (see HCJ 953/87 Poraz v. Mayor of Tel Aviv Jaffa, IsrSC 42(2) 309, 329-331 (1988)). The position which is derived from this underlying premise is that "a narrow and strict interpretation of a statutory provision which denies or restricts human rights should be applied" (see Barak – Interpretation of Statutes, page 558). In the case before us, the interpretation according to which the term "resident of the Area" does not necessarily apply to everyone who is registered in the registry of the Area, but only to those who live in it in practice, is the interpretation that leads to a lesser infringement on the right of Israeli residents to live in Israel with their minor children. This right was recognized by a majority of the Adalah panel as a fundamental constitutional right, derived from human dignity.** ('**Aweisat**, paragraph 14. Emphasis added – A. L.)

98. And if this is the case when an interpretation of a statutory provision is concerned, a similar approach must certainly be applied to the policy which was established by the respondent.

99. In HCJ 7444/04 **Dakah v. Minister of the Interior** (February 22, 2010) which concerned an adult spouse, against whom security preclusion was raised, it was held:

> **The interpretation and implementation of the provisions of the above Law derive from the constitutional obligation to protect to the right to a family as a superior right to the extent permitted by the Law, giving a proper and proportionate weight to security interest to the extent required by the circumstances, and only to the necessary extent. The proper balancing between a fundamental human right and the security value is required not only for the examination of the constitutionality of the Temporary Order Law. It is also required, to the same extent, for the actual interpretation of the Law and the implementation of its provisions.**
>
> **Indeed, a violation of a human right will be recognized only where it is essential for the realization of a public interest of such strength that it justifies, from a constitutional viewpoint, a proportionate infringement on the right (Adalah, my judgment, paragraph 4).(**Paragraph 13 of the **Dakah** judgment**).**

100. The above determinations are even more so relevant when children with no security background are concerned, and when it is clear that the purpose underlying the examination of the family's center of life, may be achieved by means which would "broaden the circle of beneficiaries", who are impinged by the severe restrictions imposed by the Temporary Order Law.

101. Hence, the words of the Honorable Justice A. Procaccia in **Dakah** are relevant to our case:

> **In view of this reality, in which a fundamental right of spouses, Israeli citizens and residents, to unite with their spouses from the Area, is violated, a purposive interpretation of the Temporary Order Law is required, which restricts the scope of said violation only to such extent which is required for the realization of the security**

> **interest. In view of the strength of the fundamental right to family, which is a person's constitutional right of the first degree, only a security interest of a substantial strength can justify a violation thereof. A remote and vague security interest cannot justify such violation.** (*Ibid.*, paragraph 20).

102. In this case, respondent's decision and its approval by the appellate committee certainly do not constitute the least injurious means. Furthermore, this is not a situation in which there is no alternative which can reduce the impingement inflicted on the child and the resident parent. An authority which acts fairly and reasonably will always choose the means which complies with the above quoted principles and violates the child's best interest to the least extent possible. To the extent a narrow interpretation of the law which impinges on children may be applied and to the extent that by the examination of data and exercise of discretion the impingement may be reduced, the authority, like the court, must prefer the child's best interest over the violation of his rights.

Lack of reasonableness and fairness

103. The administrative authority's obligation to act reasonably, proportionately and fairly in order to attain a proper purpose is a superior principle which governs the scope of respondents' discretion. Respondent's decision to disregard the submission date of petitioner 1's application, notwithstanding the case law on this issue, constitutes an extremely unreasonable conduct. On this issue see: HCJ 1689/94 **Harari *et al*. v. Minister of the Interior**, IsrSC 51(1), 15 and HCJ 840/79 **Contractors and Builders Center in Israel v. Government of Israel,** IsrSC 34(3) 729, particularly in pages 745-746 (1980), the words of the Honorable President Barak as follows:

> **The state, through those who act on its behalf, is the trustee of the public, and the public interest and properties were entrusted to it to be used for the benefit of the public at large… this special status imposes on the state the obligation to act reasonably, honestly, based on pure motives and in good faith. The state must not discriminate against, act arbitrarily or in bad faith, or be in a conflict of interests situation.**

104. The words of the Honorable Court in AP (District – Jerusalem) 411/05 **Khaldeh *et al*. v. Ministry of the Interior** (December 15, 2005) are relevant and precise:

> **Not many years will pass before we rub our eyes with amazement on the question of how we have accepted what is already obvious at this present time. The piling up of bureaucratic obstacles is another way of saying the obvious, which is, that the respondent does not wish to approve these applications. We cannot refrain from wondering with how many "supposedly" bureaucratic and with how many legal "arguments" we are willing to cover ourselves and which administrative maneuvers may be carried out – to prevent a pertinent handling of applications of this sort – commencing with the actual line before the bureaus and ending with the piles of documents which should be submitted to the respondent. A proper law requires a reasonable mechanism, which would make its realization possible. A proper law with inappropriate means is not less troublesome than a sweeping**

prohibition. To avoid a situation in which we handle licensing issues like peddlers in the market, the law should be better adhered to, and arguments concerning lack of a substantial and valid marital connection between spouses, parents of seven children, the youngest one of whom is three years old, should better be based on real arguments, rather than on a telephone conversation which has not been answered and on separate dwellings for livelihood purposes.

I. Conclusion

105. All of the above indicate that the respondent must approve petitioner 1's application for the arrangement of the status of her husband and children according to the submission date of the original application which was rejected based on an erroneous and narrow interpretation which was disqualified.

106. The court is hereby requested to obligate the respondents to abide by the rule of law, to apply standards of reasonableness and fairness and to secure the best interests and rights of the residents of Israel and their children.

For all of the above reasons, the honorable court is hereby requested to issue an O*rder Nisi* as requested in the beginning of this petition and after receipt of respondents' response thereto, to make it absolute. The court is further requested to obligate the respondents to pay petitioners' legal fees and costs of trial.

_____

Adi Lustigman, Advocate
Counsel to the petitioners

Jerusalem, May 16 2011