At the Supreme Court **AAA 8630/11**

In the matter of:

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

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 Appelants

v.

State of Israel - Minister of the Interior

represented by counsel from the State Attorney's Office
29 Salah a-Din St., Jerusalem
Tel: 02-6466590; Fax: 02-6466655

The Respondent

Notice of Appeal

Notice of Appeal is hereby filed against the judgment of the Jerusalem District Court sitting as a Court for Administrative Affairs (the Honorable Judge Y. Marzel) in AP 41294-05-11, which was given on October 23, 2011.

The honorable court is hereby requested to revoke judgment of the honorable court of first instance, which denied the Administrative Petition and hold the effective date for the arrangement of the children's status, appellants 3 and 4, will be their age **on the submission date of their initial application to the respondent for the arrangement of their status in 2006.**

An order for the upgrade of the status of appellant 4 to a temporary status should at least be given, in view of the fact that he was under the age of fourteen, on the second anniversary of the family's relocation to Israel.

A. The Appeal

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 appeal concerns respondent's policy – a policy the purpose of which is to reduce the number of children from East Jerusalem who will obtain status in Israel. The means to achieve this purpose is to postpone, to the maximum extent possible, the submission date of the applications for the children and procrastinate the decision therein (hereinafter: 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, in this case, for instance, which is not an exceptional case as far as respondent's handling procedures are concerned, **about three additional years**, 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 appeal also concerns the decision to deny the petition of appellants 3 and 4, who were both under the age of fourteen when the family relocated to Israel. Appellant 4 was even under the age of fourteen, on the second anniversary of the family's relocation to Israel, when an application was submitted for his younger siblings (in which he was not included, due to respondent's directive, as it was understood by appellant 1, that she would be allowed to submit an application for appellant 4 and his sister, appellant 3 – only two years after the denial of their initial application).

B. <u>The grounds of the appeal are as follows:</u>

4. The honorable court of first instance erred in its determination that, ostensibly, there was no fault in respondent's policy according to which the children's age for the purpose of the nature of their status should not be examined on the date on which the initial application was submitted for them by their parents when the family relocated to Israel, but that it would rather be reasonable to base their status on their age on the date of the later application, which was submitted two years after their relocation to Israel.

5. The Temporary Order Law provides that there is no justification to sweepingly prevent a child until fourteen years of age from receiving the same status as his parents. However, according to respondent's policy only children until twelve years of age are entitled to status and only children

until sixteen years of age will receive a military permit to stay in Israel with their family members. The honorable court of first instance erred in its failure to find any fault in the above.

6. The honorable court of first instance erred in its failure to interfere with respondent's decision to determine the status of appellant 4, according to the later application submission date despite the fact that appellant 4 was less than fourteen years old even two years after the family moved to live exclusively in Israel.

7. The honorable court of first instance erred in denying the petition based on procedural arguments in view of the fact that the respondent did not inform appellant 1 what was the required procedure (for instance her right to file an appeal). During the relevant period the procedures for the arrangement of the status of children were not published and have undergone dramatic and extreme changes as a result of changes in the Citizenship and Entry into Israel (Temporary Order) Law, 5763-2003 (hereinafter: the **Temporary Order Law** or the **Law**) and the case law which interpreted it. Although the appellants agree that procedures are extremely important when the best interests of children and their rights are concerned, the substance of the matter cannot be ignored and the decision in their matter cannot be based solely on obscure bureaucracy. The case should be examined in its entirety, *vis-à-vis* the restrictions imposed by the Temporary Order Law, and the children's entitlement to status should be examined.

C. Preface

8. The Temporary Order Law and the restrictions imposed there-under has severely violated the constitutional right to family life (HCJ 7052/03 **Adalah v. Minister of the Interior**). However, in view of the court's comments concerning the proportionality test, it was informed by the respondent and accordingly enacted, that any child until the age of eighteen will be entitled to live with his parents in Israel and that any child until the age of fourteen will be entitled to receive a residency visa.

9. In fact, according to respondent's policy, the parent should postpone by two years the submission of the application for the arrangement of the status of his child. A child who was twelve years and one month old when his parents returned to live in Jerusalem on a full time basis, will not receive status in Israel – in view of the fact that his parents will be allowed to submit an application on his behalf only when he turns fourteen years and one month old, when, under the Law he will no longer be entitled to status but rather, at the utmost, to a military stay permit. A child who was sixteen years and one month old when he returned to live with his family members in Jerusalem, is not entitled to any status or permit altogether, in view of the fact that after the elapse of two years from the date of the family's return to Israel, he is no longer a minor.

10. Thus, the number of children who obtain status in Israel together with the rest of their family members is significantly reduced. Only children who were twelve years old or less on the date of their return to live in Israel on a full time basis will receive permanent status. Many families are required to be torn from their children who returned to live with them in Israel when they were over the age of sixteen. Consequently, an Israeli parent who relocated to Israel with his family and minor children will only be able to arrange the status of some of them – **despite the fact that the Law allows the grant of a permit or status to all of the children**.

11. 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. Firstly, the State compels children of Israeli residents to live here unlawfully as a condition for the submission of an application and the initiation of an examination under which their status may be arranged in the future. Furthermore,

the State substantially injures the children and their parents, by the establishment of a built-in procedure, which is not provided by the Law, according to which many children will never be able to arrange their status in Israel.

12. The provisions of the Temporary Order Law according to which any child of a resident who lives with his parent in Israel is entitled to receive status or a residency visa are not arbitrary. They are intended to serve a certain purpose. A humane purpose which exists from times immemorial to enable a parent to live together with his child, when the child has rights in the place of his residence.

13. 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 Temporary Order Law. According to this law, not any minor child of an Israeli resident will receive status in his parent's country. Instead, 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 for him. As if the restrictions and injury imposed by the Temporary Order Law were not enough, respondent's policy adds to the Law additional restrictions which are not included therein: children who under the Law are entitled to receive status will not obtain it. Minors who are entitled under the Law to receive at least residency visa to prevent their separation from their nuclear family, will also be prevented from lawfully staying with their parents and siblings, and will be demanded to leave.

14. This policy is extremely unreasonable and was rejected in AP (Jerusalem District) 8340/08 **Abu Gheit v. Minister of the Interior** (December 10, 2008) (hereinafter: **Abu Gheit**) which was later affirmed in AP (Jerusalem District) 727/06 **Nofal v. Minister of the Interior** (May 22, 2011) (hereinafter: **Nofal**), and also AP (Jerusalem District) 1140/06 **Za'atra v. Minister of the Interior** (November 30, 2007) (hereinafter: **Za'atra**), 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 a person whose center of life is in Israel should be allowed to submit an application, although the final approval for the arrangement of the status will not be given before two years of residency in Israel have passed. The general principles which were established in the above cases constitute an integral part of the applicable law on this issue – are disregarded by the respondent. The honorable court of first instance did not find in that any fault.

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15. Respondent's decision to base the reduction policy specifically on the procrastination motive is a brazen and senseless decision particularly in view of the respondent's substantial foot-dragging in the approval of the applications. The respondent is most certainly aware of the fact that an application which was submitted will be approved many months, and quite often, years after its submission. That being the case, why shouldn't the family be permitted to submit the application upon its relocation to Israel, rather than demand the family to postpone the submission of the application by two years. The establishment of a built-in procrastination mechanism, beyond the known delay, emits a foul odor of extraneous considerations. This is demonstrated by the case at hand, in which the status of the minor children of appellant 1 was arranged three years after the application was re-submitted, two years after the family's relocation to Israel – namely**, they had to live in Israel unlawfully for five years**. Respondent's procrastination in the processing of applications, as a deliberate part of the reduction and procrastination policy – causes the two year waiting rule to lose its meaning – if respondent's concern pertains to the sincerity of the family's settlement, his concern will be satisfied during the process. The process is long enough. In most cases, once the examination is concluded a probationary review process commences and a permanent status is not granted – why should a condition on a condition on a condition be

established? A period of two years of residency **without status** until an application may be submitted, an additional period of about two years and even longer **without status** until the respondent makes a decision in the application, a conditional period without permanent status, sometimes only with a stay permit, after the application was approved; which provides for an everlasting period, during which, in most cases, only a temporary permit is granted.

The policy of reduction and procrastination – the purpose: reduction; the means: procrastination

16. Respondent's policy, to postpone, to the maximum extent possible, the submission of applications by parents for their children, 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.

17. 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. In fact it has no purpose and it 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 the Law. The honorable court of first instance did not find any fault in respondent's policy.

D. Factual Background

18. Appellant 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 appellant 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 appellant 3, who has recently married a resident of Jerusalem, is a mother of a child who is an Israeli resident, and lives near her parents in the camp.

E. The communications with the respondent

20. Appellant 1 wanted to arrange the status of her children shortly after the family's relocation to the Shu'fat Camp and before her children, including her eldest daughter, appellant 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 appellant 1. Following a few attempts to contact the respondent in his bureau and by phone, appellant 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 appellant 1 that he would not accept her application, and that a family unification application should be submitted only by a prior written request. Hence, appellant 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**

(December 5, 2007), said request would have certainly been submitted a few days earlier, before appellant 3's fourteenth birthday, upon appellant 1's initial application to the respondent in July 2006. Advocate Shalabi's letter dated September 20, 2006 was attached to the petition and marked **P/2**.

21. On the date designated by the respondent for this purpose, appellant 1 submitted on November 28, 2006, a comprehensive application for the arrangement of the status of her children, which was numbered 1768/06. The application was also submitted for appellant 1's additional children, whose matter has already been solved. The application forms were attached to the petition and marked **P/3**.

22. In a letter dated November 28, 2006, the date on which the application was submitted, appellant 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. As is known, the respondent will later argue that any child who is registered in the OPT is an OPT residence, regardless of where his center of life is. Respondent's letter attesting to his directive to register the children in the OPT which was presented as a condition for the processing of the registration applications in Israel, was attached to the petition and marked **P/4**.

23. 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." According to the respondent, for the purpose of obtaining status, the children will have to live in Israel unlawfully for two years. Two years during which minors, the children of an Israeli resident, have no status and rights. Two years after the elapse of which they will also be prevented from receiving any status, since according to the respondent, at that time they will be too old to receive it.

24. According to the **Za'atra** and **Abu Gheit** judgments, 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 process it , in the sense of the arrangement of residency/status. A final approval of the application, and the arrangement of a permanent status, will be granted two years later. (Paragraphs 10-12 of the **Abu Gheit** judgment). What is then the purpose of referring to the age of the children on the later date? How would the family members be able to establish their center of life in Israel, while their presence here is unlawful? Appellant 1 was not advised of her right to appeal the decision. Later on, it will be argued by the respondent and the court of first instance that because she did not file an appeal, appellant 1 could not raise arguments concerning the date of her first application. The denial letter dated October 28, 2007 was attached to the petition and marked **P/5.**

25. On July 10, 2008 after the elapse of two years from appellant 1's relocation to Israel, she submitted an application for the arrangement of the status of her husband and younger children, appellants 6 and 7. Appellant 1 did not submit at that time an application for her three older children appellants 3 and 4 being the subject matter of this appeal and appellant 5 whose status has meanwhile been arranged), as she understood from the respondent that she should wait two years from the date her application was denied, before she can submit a new application. Were it not for said erroneous directive or misunderstanding, the appellant would have obviously submitted for all of her family members (as she did in the past). The application form dated July 10, 2008 for appellants 6 and 7 was attached to the petition and marked **P/6.** It should be noted, that eventually the status of the siblings was arranged after the appeal, the second appeal and the petition being the subject matter of this appeal, which included the siblings and the father, on July 4, 2011 – more than three years after the submission of the second application. The father's family unification application was also

approved. The respondent approved the application of appellant 8, the youngest brother, shortly after his birth, and he is a permanent Israeli resident.

26. On June 24, 2009, after the elapse of about two years from the denial date, appellant 1, with the assistance of HaMoked for the Defence of the Individual (HaMoked), submitted an additional application for the registration of appellants 3-5 - _____, _____ and _____, with the Israeli Population Registry. When the application was submitted, the family members have been residing in Israel for about three years. The letter ancillary to the application dated June 24, 2009 was attached to the petition and marked **P/7**.

27. On October 20, 2009, respondent's response was received in the offices of HaMoked according to which: *"The children 92 _____ + 94 _____ will receive DCO referrals for one year. 96 _____ will receive A/5 for two years.*" Respondent's letter dated October 20, 2009 was attached to the petition and marked **P/12** *[sic]*.

28. On January 7, 2010, the appellants appealed the decision to grant them permits and temporary status, *in lieu* of a permanent status. The appellants noted that the effective date in their matter should be the submission date of the first application of 2006 (see for instance paragraph 4 and paragraph 17 of the appeal). A copy of the appeal dated January 7, 2010, was attached to the appeal and marked **P/13** *[sic]*.

29. In a response dated January 20, 2010, the respondent notified that his decision according to which the children were entitled to receive only the temporary permits which were granted to them remained in force. Respondent's response dated January 20, 2010 was attached to the petition and marked **P/14** *[sic]*.

F. Appeal 99/10

30. On March 3, 2010 an appeal concerning appellants 3-5 was filed, in which the respondent was requested to arrange their permanent status. This appeal was numbered 99/10. The appeal was attached to the petition and marked **P/15** *[sic]*.

31. 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 accordingly given by the committee on March 3, 2010. The respondent disregarded, as it does in many cases, its own procedure. Only on December 27, 2010, 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 to the appeal. The respondent reiterated his position that the children should not be granted permanent status or any status whatsoever. With respect to the obligation to regard the submission date of appellants' 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 was made, he was not obligated to act according to said judgment. Respondent's response was attached to the petition and marked **P/23** *[sic]*.

32. On January 27, 2011 the appellants 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 substantial principle established therein, and should not exonerate themselves by using technical arguments. Appellants' response was attached to the petition and marked **P/24** *[sic]*.

33. In a decision dated June 16, 2010, the committee holds that the appellants 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, which was no longer pending. The committee further stipulated that **Abu Gheit** did not hold that the child should be given status but

only a permit, despite the fact that the issue in question did not concern the nature of the interim status but rather the mere recognition of the submission date of the first application as the leGheitimate date which should be used the reference point for the children's age. The committee's decision was attached to the petition and marked **P/25** *[sic]*.

G. The Petition

34. On May 16, 2011 the petition being the subject matter of the appeal was filed. In view of the judgment in AAA 1621/08 **State of Israel v. Hatib** (January 30, 2011), the petition did not concern the mere definition of the children as residents of the Area, a matter being currently discussed in HCJ 5030/07 which was filed against the constitutionality of the Temporary Order Law.

35. The petition argued that the respondent should have regarded the date on which the first application for the arrangement of the status of the children was submitted, as the relevant date for the determination of the children's age, even if his final decision in the applications would have been given after the existence of a center of life of two years. The appellants have indeed submitted a new application, as a result of respondent's failure to publish his procedures at that time, and his failure to advise them of their right to submit an appeal. However, after the representation was transferred to HaMoked, the appellants raised their arguments on this issue. In view of the extreme changes in the applicable law during the period in which appellants' applications were submitted and denied, which changes were not properly published, appellant's helplessness and lack of knowledge should not be regarded as a factor which would decide the fate of the children, if it is found that they are entitled to status under the law. The appellants argued that the judgments which were given before **Abu Gheit** have already held that families should not be torn or condemned to unlawful residency before the application in their matter is reviewed and that in any event, the underlying rational of **Abu Gheit**, for construction purposes, applies to appellants' matter.

36. The petition also concerned the matter of the younger siblings. On the date the petition was filed one year and four months passed from the date the appeal was submitted without any response on respondent's behalf. The petition stated that whereas the respondent, who attached great importance to the periods for the examination of the settlement, failed to decide, until the date of the petition, in the matter of the father and two of the younger children of the family, appellants 6 and 7, leaving them without status in Israel. As aforesaid, eventually, the application of the father and the younger siblings was approved **three years** after its submission.

H. The Judgment being the subject matter of the Appeal

37. The honorable court of first instance erred in its decision according to which there was no dispute that "the denial of the 2006 application for the registration of petitioners 3 and 4 was lawful, as it was not preceded by two years of center of life in Israel". (*ibid*, paragraph 10). The appellants do dispute this decision. According to them, the 2006 denial was not lawful. The appellants argue that the requirement for a center of life of two years for the mere submission of the an application by a parent for his minor children is an unreasonable demand which destroys families and particularly children, in view of the fact that a condition for the arrangement of their status is an unlawful residency for years, and in view of the fact that the postponement of the application is used for the frustration of the grant of status to children. The inappropriateness of the denial of the application and the demand for an unlawful residency were discussed in case law which preceded appellants' application (**Stamka** and **Za'atra**) as well as in judgments which were given after the decision in appellants' matter (**Abu Gheit**), unlike the demand that upon the final approval of the application the family shall have maintained a center of life of two years, as specified above.

38. The honorable court of first instance reinforces its above argument with the explanation that no appeal was filed against the denial, but that instead, a new application was submitted in 2009. However, the respondent failed to inform appellant 1 of her right to file an appeal. Furthermore. After the handling of the case was transferred to HaMoked, it turned out that there was no justification for the instructions which were given to appellant 1 to submit a new application two years later (from the date of the denial as she understood it), in a manner which condemned two of appellant 1's children to remain without status. The appellants agree with the court of first instance that as a general rule, a new application is processed according to the date of its submission, but it is unreasonable to act in this manner in the case at hand. The appellants argue that in this case the application was unlawfully denied in the first place, in a period of extreme changes in the law, which were not brought to the attention of the public. Moreover, while balancing between the argument of the delay and the injury caused to the children, much weight should be attributed to the injury caused to the best interest of the latter.

39. The court of first instance continued to erroneously hold that the **Abu Gheit** judgment did not apply retrospectively to denials which preceded it. The court of first instance erred in its decision not to cope with appellants' arguments concerning the applicability of the **Abu Gheit** interpretation to applications which preceded it (*ibid*, paragraph 11).

40. The honorable court of first instance based its decision, *inter alia*, on the fact that **Abu Gheit** did not refer to the issue of whether or not a new application should be submitted after the elapse of two years. The honorable court of first instance argued that in view of the fact that this issue was not decided on, it was reasonable to demand that a new application would be submitted and to refer to the age of the children on the date of its submission as the age which would determine their status or the lack thereof. The honorable court of first instance erred in having disregarded the common practice according to which new applications for stay permits are anyway submitted to the respondent on an annual basis. Namely, there was no need to explicitly determine that status applicants should submit new applications, because such applications are submitted in any event, each year, until permanent status is granted. A person who is prohibited from receiving permanent status under the Temporary Order Law, is required to submit an application, on an annual basis, perpetually or until such time as the Law is revoked. Yet, the submission date of the original application is the effective date for the determination of the child's status. Hence, the submission of an additional annual application has no bearing on the discussion concerning the effective date, and there is no reason to regard the date of the later application as the effective date. See for instance **Za'atra** in which the application was approved and the applicants were not required to submit a new application. See also paragraph 8 to **Abu Gheit**, in which the court referred to the age of the children on the date of the initial application.

41. The appellants based their position on a host of judgments, and not on **Abu Gheit** alone. The honorable court of first instance erred in having based its judgment on the circumstances of **Abu Gheit** alone, and in its disregard of appellants' arguments concerning the applicable law as it arises from a wide array of judgments concerning the child's best interest, lenient interpretation of the Temporary Order Law and the date on which the application should be submitted.

42. The honorable court of first instance also erred in having relied on respondent's oral argument, according to which the respondent habitually grants temporary permits to children who are waiting for the approval of their applications without a center of life of two years, but requires the submission of a new application and refers only to the date of the later submission as the relevant date. This mere statement has no basis in common practice or in writing, other than respondent's statement. In fact, the respondent disregards the **Abu Gheit** judgment and has failed to accordingly revise procedure 2.2.0010 concerning the arrangement of the status of children as it was requested to do in **Nofal**. HaMoked handles the matters of dozens of children whose applications for

arrangement of status are not responded to even after two years of center of life, and in no event temporary permits are granted. Procedure 2.2.0010 has not been revised. Respondent's position, according to which the later date on which the application was submitted after the elapse of two years should be referred to, is not entrenched therein.

43. In view of the above, the honorable court of first instance also erred in its determination according to which there was no fault of unreasonableness in deciding the fate of the appellants according to the submission date of the second application in their matter, in 2009 "all in accordance with the provisions of the Citizenship and Entry into Israel (Temporary Order) Law." Said determination does not reconcile with the Temporary Order Law which enables the arrangement of status of of children under the age of fourteen. Even if according to respondent's directives and the failure to publish the relevant procedures concerning this issue and their rights, the appellants submitted a new application as directed, their rights, if any, under the proper construction of the law, should not be revoked.

I. The Normative Framework

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

44. 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. 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.

45. 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. A law which was enacted for a short period of time will shortly be in force for a decade and is still expected to remain in force in the future. 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 implementation concerning children who are defined as OPT residents

46. 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.

47. 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 which pertains to family unification between spouses. A copy of the government resolution was attached to the petition and marked **P/39** *[sic]*.

48. In 2003 the Temporary Order Law was enacted which entrenched the government resolution. At this stage, children were mentioned for the first time and it was stipulated that children who were deemed to be OPT residents up to twelve years of age would be able to receive status; children beyond twelve years of age were condemned for deportation. 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. The State explained to the honorable court in the hearing in HCJ 7052/03 that currently no minor, at any age, would be separated from his parents.

49. At the same time, the definition of the term "Resident of the Area" in the Law was amended, in a manner which encompasses any person who is registered with the OPT Registry even if he does not reside in 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 appellant 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 – Exhibit **P/4** of the petition**.**

50. In **AAA 5569/05 State of Israel v. 'Aweisat** (August 10, 2008) it was held that a child who was not registered in the OPT and submitted his before the Law was amended, would be defined as OPT resident, only if he has connections thereto. In AAA 5718/09 **State of Israel v. Srur** (April 27, 2011), it was held that residency in the OPT for a few years in the past is deemed as a sufficient connection to the OPT in order to be defined as a resident for the purpose of the Law, even if prior to the submission of the application and in the years which preceded it the child had no connection to the OPT.

51. 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 the procedure, various limitations were established by the respondent, 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 and Procedure 1.13.0001 were attached to the petition and marked **P/40** *[sic]* and **P/41** *[sic]* respectively. As aforesaid, in **Nofal** the court ordered the respondent to amend the procedure and incorporate therein the **Abu Gheit** determinations (which

include the determinations made in **Za'atra**). Notwithstanding the court's order, the procedure was not amended, and it does not reflect the determinations made in said judgment, according to which the applications should be examined before the elapse of two years from the relocation of the family to Israel.

52. 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 which do not allow to arrange a permanent status for a child who was beyond the age of fourteen when the application in his matter was submitted. See AAA 1621/08 **State of Israel v. Hatib**; AAA **Srur** above. On the other hand, a child who was under the age of fourteen when his application was submitted is entitled to receive permanent status.

The importance of the first application submission date

53. As shown above, according to the court's judgments the respondent should have accepted appellant's 2006 application, and according to **Za'atra**, the date of this application shall constitute the relevant date for the examination of the children's age.

This position, according to which the effective date for the examination of applicant's age, is the application submission date, was recently approved in **Srur**:

> **…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)).**
>
> **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** (*ibid.*, paragraphs 46 and 47).

And see also AP 1238/04 Joubran v. Ministrey of the Interior (August 19, 2009), the judgment in AP 8386/08 '**Arab al-Sawahreh v. the State of Israel – Ministry of the Interior (**December 14 2009).

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

54. The 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 bureaucratic labyrinth, has already been disqualified back in 1999 in HCJ **Stamka**. This condition is undoubtedly inappropriate when the case concerns 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 Temporary Order Law.

55. In **Abu Gheit** it was held, with respect to AP (Jerusalem District) 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 (who, in any event, was entitled to a permit only). 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. <u>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</u>**.
> (Emphasis added – A.L. Paragraph 12 of the judgment).

56. 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 appellant 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).

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.

57. 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 until its final approval.

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

58. According to the respondent, and as accepted by the honorable court of first instance, in view of the fact that the **Abu Gheit** judgment was given in 2008, after appellants' above application was denied, it does not apply to the case at hand. This position should be totally rejected.

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

60. Secondly, even if this case concerns a retroactive application, the rule is that judge made law usually applies retrospectively, 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**.

61. It is clear, that when an application is concerned, and particularly an application which pertains to minor children, the normative law as established by the honorable court should be applied and technical arguments should not be used as a cover-up. 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**). Following the manner by which the Temporary Order Law was interpreted in said judgment concerning status upgrade, spouses, whose application wase denied in the past, **including spouses who did not appeal the denial**, applied and requested to have their matter re-examined. It was not argued that in view of the fact that the judgment was given after a decision was made in a specific application, 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, and it has not been argued that said judgment did not apply to decisions which were previously made. The court did not setermine 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 appellant 1's children. And it should be reminded, that in this case the appellants were not advised of their right to file an appeal.

62. Respondents' decision, which was adopted by the honorable court of first instance, 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 appellants' 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).

63. Respondent's policy, in which the honorable court of first instance found no fault, inflicts an unnecessary impingement and inappropriately reduces the number of children who will be entitled to live with their resident parents in Israel with a secured status.

Violation of fundamental human rights

64. Respondent's decision violates appellants' fundamental right to dignity, which consists of the constitutional right to family life and protection of the child's best interest. This honorable court held that the Temporary Order Law was proportionate only after it was amended in a manner which enables every child under the age of 18 to receive status in Israel. Nevertheless, the respondent continues to violate appellants' rights who were minors under the ages of thirteen and fourteen when the application in their matter was submitted, when they were living with their mother, an Israeli resident, in Jerusalem.

65. The family unit and family relations constitute a central part of a person's identity, of his self and social definition. It is the building block of society and a back rest of intimacy and belonging for the individual. The family and the protection provided by it – is a source of social, economic and psychological security. The impingement inflicted on children who live for an extended period of time without status in their home, distinct from their young siblings and mother, is so fundamental, which under both Israeli and international law should be avoided to the maximum extent possible. Although impingement is caused by the Temporary Order Law, it should not be extended beyond what is required by the Law and its security purpose. The judgment of the honorable court of first instance ratifies a violation of the child's best interest and an impingement on the family unit over and above what is needed. Without any purpose.

The right to family life - a constitutional right

66. The State of Israel tells appellant 1 that despite the fact that she is an Israeli resident, her children who are supported by her, may live here without any rights whatsoever. They are not allowed to work, they are not allowed to drive, they are not entitled to minimum social protection including health insurance in their mother's homeland, where they were born and in which they have been living since childhood, before they turned fourteen, together with the rest of their family members.

67. 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**. **Adalah**, 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.

68. 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

69. Appellant 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 appellant 1 as a permanent resident of the State of Israel, and from her fundamental right as a mother, not to 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.

70. 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 appellant 1's children are doomed to a constant dependency on military permits. It should be emphasized: the appellants 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 appellants' matter.

71. 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 arrange the status of a child as an Israeli resident, despite the fact that his parent is an Israeli resident who resides in Israel, and despite the fact that the Law provides that there is no security preclusion for the arrangement of his status as far as his age is concerned – 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.

72. 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).

73. 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.

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

74. 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.

75. The purpose of the settlement verification may be achieved by proportionate means within an examination process, which will not only require 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.)

76. 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.

77. In HCJ 7444/04 **Dakah v. Minister of the Interior** (February 22, 2010) which concerned an adult spouse, against whom a 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) **(**Emphasis added – A.L.)

78. 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 harmed by the severe restrictions imposed by the Temporary Order Law. (See for instance the words of the court in AP 8386/08 **'Arab al-Sawahreh v. State of Israel – Ministry of the Interior**).

79. 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).

80. In our case, it was decided that the grant of a permanent status to a child up to the age of fourteen posed no security risk. The appellants lived in Israel and applied to the respondent for the arrangement of their status before they turned fourteen. Is respondent's decision which was approved by the honorable court of first instance to leave them without status based on purposive interpretation? The respondent did not point at any proper purpose for the reduction of the number of the children beyond the ages that under the Law are entitled to receive status. Neither have the honorable court of first instance. In the absence of a known objective, there is certainly no rational connection between the means and the mysterious objective. If the objective is to protect state security and public safety, then section 3A of the Temporary Order Law specifically permits to give children under the age of fourteen status upon the submission of the application on their behalf, as it was found that there was no security preclusion which justified to sweepingly prevent the grant of status to a child under the age of fourteen. There is no doubt that respondent's decision and its approval by the honorable court of first instance do not constitute the least injurious means. Furthermore, this is also not a situation in which there is no alternative that may reduce the injury to the child and the resident parent.

81. An authority which acts fairly and reasonably will always choose the means which complies with the above principles which were quoted from the **Dakah** judgment, and which 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

82. 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 the 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.**

83. The words of the Honorable Court in AP (Jerusalem District) 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.**

J. Conclusion

84. The security purpose of the Temporary Order Law will not be thwarted if the relevant age of children of residents for the purpose of the type of status or permit granted to them, is their age on the date of the first application, when they relocated to Israel. The Law explicitly enabled the respondent to give status to a child up to age of fourteen and there is no rational, purpose,

reasonableness or proportionality in the reduction of the number children who will receive the same status as their parents', in the sense that only children up to the age of twelve will be able to receive status and only children up to the age of sixteen will be able to live with their Israeli family in Jerusalem.

85. Based on all of the reasons specified above, the court is hereby requested to revoke the judgment of the court of first instance, and order the respondent to arrange the status of appellants 3 and 4 as residents according to their age when the family relocated to Israel. In addition, the court is further requested to obligate the respondent to pay costs of trial and legal fees.

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Adi Lustigman, Advocate
Counsel to the appellants

Jerusalem, November 23, 2011