At the Supreme Court **Adm. A 6160/05**

1. **Minister of the Interior**
2. **Director of the East Jerusalem District Population Administration**

Represented by the State Attorneys
Ministry of Justice, Jerusalem

The Appellants

- Versus -

1. **_____ Hajazi**
2. **_____ Hajazi (minor)**
3. **_____ Hajazi (minor)**
4. **_____ Hajazi (minor)**
5. **_____ Hajazi (minor)**
6. **_____ Hajazi (minor)**
7. **HaMoked: Center for the Defence of the Individual founded by Dr. Lute Salzberger - registered non profit organization**

Represented by attorney Osama Halabi
Of 14 A-Zahara Street, P.O. Box 51596, Jerusalem 91514
Tel: 02-6261051 Fax: 02-6261375

The Respondents

Detailed Notice of Appeal

Further to the shortened Notice of Appeal that was filed by the State, and in accordance with the time extension that was granted in order to complete the grounds for appeal, the State is honored to file with the honorable court this detailed Notice of Appeal.

General

1. This appeal is one of seven similar appeals that were filed by the State over the course of the month of June 2005 against judgments given by the Court for Administrative Affairs in Jerusalem by various judges.

2. Below is a detailed list of the appeals and judgments:

   A. Adm.A 5569/05 **Ministry of the Interior v. ____ Awisat** – appeal against the judgment in Adm.Pet 387/04 that was given by the honorable Justice Yoram Noam on 5 May, 2005 and attached as **appendix a** to the shortened Notice of Appeal.

   B. Adm.A 5805/05 **Minister of the Interior v. ____ Mishara** – appeal against the judgment in Adm.Pet 227/05 that was given by the honorable Deputy Chief Justice David Heshin on 17 May, 2005 and attached as **appendix b** to the shortened Notice of Appeal.

   C. Adm.A 6162/05 **Minister of the Interior v. ____ Jith** – appeal against the judgment in Adm.Pet 1277/04 that was given by the honorable Justice Yehudit Zur on 24 May, 2005 and attached as **appendix c** to the shortened Notice of Appeal.

   D. Adm.A 6160/05 **Minister of the Interior v. ____ Hajazi** – appeal against the judgment in Adm.Pet 283/05 that was given by the honorable Justice Yehudit Zur on 25 May, 2005 and attached as **appendix d** to the shortened Notice of Appeal

   E. Adm.A 6168/05 **Ministry of the Interior v. ____ Mansour** – appeal against the judgment in Adm.Pet 379/04 that was given by the honorable Justice Yoram Noam on 3 June, 2005 and attached as **appendix e** to the shortened Notice of Appeal.

   F. Adm.A 6172/05 **Minister of the Interior v. ____ Odeh** – appeal against the judgment in Adm.Pet 1085/04 that was given by the honorable Deputy Chief Justice David Heshin on 19 June, 2005 and attached as **appendix f** to the shortened Notice of Appeal (and to the State applications dated 26 June, 2005 for a time extension)

   G. Adm.A 6174/05 **Minister of the Interior v. ____ Hanini** – appeal against the judgment in Adm.Pet 982/04 that was given by the honorable Deputy Chief Justice David Heshin on 20 June, 2005 and attached as **appendix g** to the shortened Notice of Appeal (and to the State applications dated 26 June, 2005 for a time extension).

3. The judgments under these appeals are based, in the main, on two earlier judgments that were handed down by the Court for Administrative Matters in Jerusalem: Adm.A. 822/02 **Lina Gusha v. Director of the**

District Population Administration (the honorable Justice Yehonatan Adiel) which was given on 1 September, 2003; and Adm.Pet 577/04 **Tahani Alqurd v. Minister of the Interior** (the honorable Deputy Chief Justice Musaya Arad) which was given on 25 October, 2004.

The judgment in the **Gusha** case is attached and marked **appendix h**.

The judgment in the **Alqurd** case is attached and marked **appendix i**.

4. In some of the judgments criticism was raised against the State for cleaving to its position that had been rejected in the judgments in the **Gusha** and **Alqurd** cases, even though it did not deem it appropriate to take these cases on appeal in the Supreme Court. See for example the dicta of the honorable Justice Zur in paragraph 8 and paragraph 10 of the judgment in the **Zachariah Jith** case and the dicta of the honorable Justice Noam in paragraph 17 of the second part of the judgment in the **Mansour** case.

5. In light of this, and since it is the State's opinion – with all due respect – that the normative rulings that were made in the judgments raises great difficulties and have very sweeping ramifications, the State Attorneys decided to appeal all of the aforesaid judgments.

6. Since the judgments, as stated are similar, and since they were given over a very short time span and even refer to each other, the state hereby lodges its appeals against them as one unit, in the sense that the detailed Notices of Appeal that are being filed against each one of them are chiefly identical to each other.

7. As will become clearer later on, it is the State's position that in light of the essential change to the normative situation that has applied since the giving of the judgments under these appeals, al the cases should be returned to the Ministry of the Interior for his re-examination. In light of this, the detailed Notices of Appeal do not include separate chapters which relate to the specific concrete circumstances of each of the cases.

8. **In order to make the hearing more efficient, the State recommends that the court select one "leading case" and confine the main hearing to this case, while at the same time freezing the other cases until a decision is made in the main one.**

A summary of the rulings in the relevant judgments under appeal, and a summary of the State's position with respect to them.

9. The main concern of the judgments under appeal is the interpretation of **Regulation 12** of the Entry into Israel Regulations, 5734-1974 (hereinafter: the **"Entry into Israel Regulations")** This regulation deals with the status that shall be granted under the Entry into Israel Law, 5712-1952 (hereinafter: the "**Entry into Israel Law"**) and with the compliance of certain conditions, for a child who was born in Israel.

10. In seven of the judgments – as in the aforementioned **Gusha** and **Alqurd** cases – the question was raised as to the status of children, who, years before then were born in Israel, to a mother who was a permanent resident in Israel and to a father who was a resident of the area. In all these cases, the parents did not resolve the status of their child in Israel after their birth, but chose to register them as residents of the area in the Population Registry of the Area. Years later – over the course of which **it is quite possible that the center of life of the family was not at all in Israel, or possibly was in Israel but illegally so** (since the father and the children were residents of the area and were registered as such in the Population Registry of the Area) – the parents decided to apply, by virtue of the abovementioned Regulation 12, and by virtue of the status of the mother, for their minor children to be granted permanent residence in Israel. The Ministry of the Interior refused their applications. Therefore petitions were filed with the Court for Administrative Affairs.

11. All the petitions were accepted with the understanding that the Ministry of the Interior was obligated to carry out a detailed investigation into the current center of life of the minors. Likewise, by virtue of Regulation 12, the Ministry of the Interior is obligated – sometimes explicitly, sometimes implicitly – to grant minors permanent residence if it is discovered that the current center of their lives is indeed in Israel. In some of the judgments it was also held that permanent residence shall be granted to the minors immediately, while at the same time denying the authority of the Ministry of the Interior to exercise its discretion in this case through applying the quasi "graduated summary procedure" (i.e. granting a temporary resident permit, which in turn vests the minor with basic social rights), whose aim it is to be satisfied that the minor indeed resides in Israel permanently before granting him a permanent residence permit.

12. The underlying principle of the normative rulings that emerge from the judgments establishes therefore that if the center of the minors' lives **at the time of filing the applications** is in Israel (apparently illegally so), then Regulation 12 **obligates** the Ministry of the Interior – **without any discretion** – to grant them (sometimes **immediately)** permanent residence, like the status of their mothers. This, as stated, **even if the application is filed many years after the birth of the minor in Israel, even if the minor is on the threshold of adulthood, even if the minor departed Israel with his parents and lived outside the country for a long period after his birth or alternately stayed with them for a long period within Israel but illegally so, and even if the minor (whatever his age may be) was registered as a "resident of the area" in the Population Registry of the Area for his entire life, until the time of the filing of the application.**

13. The State respectfully submits that these **normative rulings are very difficult to sustain, since they undermine the chief purpose of the Entry into Israel Law.** The purpose is to enable the Executive Authority to determine – through exercising broad discretion that is given over to

the Minister of the Interior, and pursuant to the public interest as this is determined from time to time – who will be allowed to enter and reside in Israel and under which status. **These normative rulings are made on the basis of an interpretation of the secondary legislation, which, as is well known derives its validity and right to exist from the Law, and is therefore supposed to be subject to it and not undermine it.**

14. Therefore the State is of the opinion that the judgments under appeal should be overturned, in everything relating to the interpretation of Regulation 12, and it should be held that Regulation 12 did not intend – and in any event could not have intended – to cancel out the discretion of the Minister of the Interior, that is given to him in the Entry into Israel Law as an essential part of the purpose of this Law. Therefore **we must interpret Regulation 12 in a way that leaves the discretion in the hands of the Minister of the Interior so that he may consider the overall circumstances of the case,** before granting the minor status – especially permanent status – by virtue of the Entry into Israel Law, which is identical to the status of his parent.

The Amendment to the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 and its Impact upon the Appeals

15. On account of having to deal with Regulation 12 some of the judgments were forced to deal with the interpretation of the term "**resident of the area'** in the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 (hereinafter : the "**Temporary Order Law**") as this term was defined at the time of handing down the judgment. Their ruling was that the registration of a person (for our purposes – a minor) as a "resident of the area" in the Population Registry of the Area is not determinative, but only constitutes prima facie proof of him being a "resident of the area" for the purposes of the Temporary Order Law. The important point, according to their ruling, is that the current center of life of the person must be determined according to the "majority of links" test. Thus the judgments relied on the rules of the court, which dealt with the interpretation of the term "resident" (as in resident of Israel) in other contexts.

16. The State respectfully disagrees with this ruling and with the analogy that was made with these laws. In a nutshell, the State's position is that the term "resident of the area" – in the limited context of the Temporary Order Law – is at variance with the term "resident of Israel" (or resident of any other country) which appears in other Laws, and whose very existence is generally determined according to the majority of links test. As a rule, when this involves a State, the term implies a legal connection between **nationality** and **citizenship**. As such, when it comes to a State the term **residency** is generally neutral with respect to this legal aspect, and refers primarily to factual aspects of de facto residence and of other physical connections (we shall disregard for the moment hybrid terms, which also carry with them unique legal baggage, such as "permanent residence" or "temporary residence"). In contradistinction when it involves territories of the Palestinian Authority, which is not a State, the

term **residency** inseparably contains within it – in the limited context before us – also the legal aspect of **nationality** (in practice this is a "**quasi nationality",** since real nationality refers uniquely to States).

In the Population Registry of the Area there is no registration for "Palestinian citizens" but rather "residents". The legal status of a "resident of the area" bestows various rights that are typical of the legal status of citizenship, such as the right to vote and to be elected to the Palestinian Authority. **The term "resident of the area" contains within it, therefore, a <u>nationality link</u> to the Palestinian Authority, and as such an obligation of loyalty towards it.** Because of this the question of a person being a "resident of the area" for the purposes of the Temporary Order Law will be examined, first and foremost, in the legal plane – namely the question whether a person is a **quasi-subject** of the Palestinian Authority, i.e. **registered** as a "resident of the area" in the Population Registry of the area. This is the default and for these purposes there is no importance to the question of a physical connection (current or in the past) of the person to the area.

It is this legal criterion that the legislator of the Temporary Order sought to add <u>in addition</u> to the factual connection of physical residence in the area. Therefore the (old) definition determined that the term "resident of the area" in section 1 of the Temporary Order Law: "Resident of the Area" – **includes** someone who lives in the area but is not registered as a "resident of the area" in the Population Registry of the area, excluding a resident of an Israeli settlement within the Area"[1].

17. Nonetheless, **it appears that this question has already become obsolete, in the limited framework of the appeals before us, and the honorable court is no longer required to settle it.** On 27 May, 2005 – after filing the shortened Notices of Appeal in these appeals – the Knesset passed, after the second and third reading, the Citizenship and Entry into Israel Law (Temporary Order) (Amendment), 5765-2005 (hereinafter: the "**Amendment to the Temporary Order Law").** The Law was published in the *Reshumot* and came into force on 1 August, 2005. **This Law amends the Temporary Order Law, and *inter alia* changes the definition of the term "resident of the area"** in section 1 of the Law. The new definition establishes:

> "Resident of the area" – **someone registered in the Population Registry of the Area,** as well as someone who resides in the area even if he is not registered in the Population Registry of the Area, and excluding a resident of an Israeli settlement in the area"**.**

It has now been explicitly established – what the State had already claimed was implicit from the previous definition – that anyone who is registered in the Population Registry as a "resident of the area", falls

[1] The emphasis is not in the original; and this applies to the rest of the emphases that appear in quotes that will be cited below, unless it explicitly states otherwise

under the definition of "resident of the area" for the purposes of the Temporary Order Law. **In the draft bill of the Amendment to the Temporary Order Law it was also explained that the amendment is made in order to remove any doubt, and in order to explicitly clarify that which is implicitly obvious.** (*Hatzaot Hok* 173, 16 May, 2005, 624)

18. An additional amendment that pertains to our case, and which was made to the Amendment to the Temporary Order Law is one which relates to minor residents of the area. The previous version of the Law established in section 3(1) that "the Minister of the Interior or the Area Commander, as the case may be, **may** give a resident of the area …a residence permit in Israel or a temporary stay permit for the sake of preventing the separation of a child **up to the age of 12** from his parent who lawfully resides in Israel'. However with regard to minors **over the age of 12,** according to the old version of the Law the regular rule that was established in section 2 applies, in terms of which "during the period of validity of this Law… the Minister of the Interior shall grant a resident of the area citizenship according to the Citizenship Law **and he shall not be given** an Israeli residence permit according to the Entry into Israel Law, and the Area Commander shall not give the aforesaid resident a temporary residence permit in Israel according to Security Legislation in the Area".

It turns out then, that under the old version of the Law, the Minister of the Interior was permitted to arrange for a comprehensive examination in the cases of those minors **under the age of 12** and to grant them, according to his discretion, a residence permit for the purpose of avoiding a separation from their parents who lawfully reside in Israel. In contradistinction, **the Minister of the Interior under the old version was completely barred from giving a residence permit to a minor over the age of 12**, and as such he had to summarily dismiss applications from minors such as these, without arranging any comprehensive investigation. Likewise, according to the old version, the **Regional Commander** was also disallowed from giving minors above the age of 12, a temporary residence permit**.**

19. In the judgments under appeal it was established, as stated, that by virtue of Regulation 12 of the Entry into Israel Regulations – and despite the fact that the status of this regulation is inferior to the Temporary Order Law – that **even when the minor is over the age of 12** the Minister of the Interior is required to arrange for a comprehensive examination in his case; and should it be discovered that the current center of his life is in Israel (presumably unlawfully), then the Minister of the Interior is not only permitted, but is **obligated** to grant him a permanent residence permit, like the status of his mother, in the Israeli Registry.

20. The State respectfully submits that these rulings are erroneous, because they do not conform to the Temporary Order Law, under the old version, and to its purposive interpretation.

21. In any event as has already been pointed out, **this issue was also amended in the Temporary Order Law, and in the opinion of the State it also renders a determination within the framework of our appeals obsolete**. Within the framework of the Amendment, the old version of section 3 of the Temporary Order Law is deleted and replaced with a new section 3a, which establishes:

> **A permit with respect to children**
>
> 3a. Notwithstanding the provisions of section 2 [that remain unchanged within the framework of the Amendment] the Minister of the Interior, using his discretion, may –
>
> (1) give a minor resident of the area below the age of **14 years a residence permit** in Israel for the purpose of avoiding his separation from his **custodian** parent who lawfully resides in Israel;
>
> (2) approve an application to give **temporary residence permit** in Israel by the regional commander to a minor resident of the area whose age is **over 14** years of age for the purpose of avoiding his separation from his **custodian** parent who lawfully resides in Israel, **and provided** that the aforesaid permit shall not be extended if the minor **does not permanently live** in Israel.

The amendment to the Temporary Order Law, therefore created, with regard to anything related to minors who are residents of the area, **a normative reality that is qualitatively different** from that which applied under the old version of the Law. Firstly, the maximum age was raised for the person to whom an Israeli Residence Permit could be given from 12 to 14. Secondly a **special arrangement was instituted for minors above the age of 14**, which distinguishes them from adult residents of the area. While it is true that according to this arrangement, these minors still do not receive an Israeli residence permit from the Minister of the Interior (as in the old version of the Law) they are able to receive an Israeli **temporary residence permit** (with the approval of the Minister of the Interior), which may be extended so long as they still permanently reside in Israel. The implications of this arrangement are that **the Minister of the Interior is now obligated to arrange a comprehensive examination into the cases of all minors**, even if they are above the age of 14. Thirdly a condition has been added, with respect to minors of any age, and it is now incumbent upon their parent who lawfully resides in Israel and who seeks to avoid separation from them, to be their **guardian** parent.

22. **The State submits, as stated, that the amendments that were done to the Temporary Order Law makes it obsolete to settle, within the framework of the se appeals, the question of the correctness of the rulings of the judgment in everything relating to the Temporary Order Law:**

As to the definition of "resident of the area" it is now explicitly stated that it includes, first and foremost, those who have been registered in the Population Registry of the area. All the minors who are the subjects of these appeals have been registered in the Population Registry of the area. As such the definition – at least the new one – applies to them, and they are subject to the provisions of the Temporary Order Law. Therefore the Minister of the Interior is also not permitted to grant them status in Israel since it does not accord with the (amended) provisions of the Law.

As to the normative arrangement that applies to the minor residents of the area according to the Temporary Order Law, this has, as stated, changed qualitatively. The cases of the minors who are respondents in these appeals should be examined in light of the new arrangement, since it is the only one in which Minister of the Interior is permitted to act at this present moment in time. According to this arrangement, it is incumbent upon the Minister of the Interior, in every case to conduct a comprehensive examination of each one of the respondent minors. So long as the minors' age is under 14, he will be able to grant them, using his discretion (and subject to the decision that will be rendered in the appeals with respect to the interpretation of Regulation 12 of the Entry into Israel Regulations), an Israeli residence permit. In the case where the minors' age is above 14, the Minister of the Interior will be able, using his discretion, to approve an application for them to receive a temporary residence permit in Israel from the regional commander. In each one of these cases, the Minister of the Interior must be convinced that granting a permit or license to the minor is vital for the sake of avoiding his separation from his custodian parent who lawfully resides in Israel.

23. Please note: **applying the amended version of the Temporary Order Law on the respondent minors does not turn it into retroactive application**, since these minors did not acquire any prior right **to receive status** according to the old version of the Law. At most were we to accept the position of the Court for Administrative Affairs with respect to the term "resident of the area" in the Temporary Order Law, the rights of the respondent minors are confined to the fact that the Minister of the Interior **could not summarily dismiss their applications,** but would have to carry out a comprehensive examination as to the center of their lives, and thereafter would **exercise his discretion,** in accordance with the Entry into Israel Law, in deciding whether to grant them a residence permit..

While it is true that the Court for Administrative Affairs also held that the Minister of the Interior **is obligated** to give the respondent minors a permanent residence permit if it is discovered that the center of their lives is in Israel, but **this ruling – which is being attacked in the current**

appeals – was made by virtue of Regulation 12 of the Entry into Israel Regulations, and not by virtue of the old version of the Temporary Order Law (as has been noted, the State's submission is that this ruling also contradicts the Temporary Order Law, but as stated there is no need to settle the issue).

24. **If the State's position with regard to the interpretation of Regulation 12 is accepted** and it be held that in every case discretion is still vested in the Minister of the Interior (not to approve immediately, or to approve conditionally, or not to approve at al) in an application by an Israeli born minor to receive status that is identical to that of his mother, **then there will be a need to return all the cases of all the respondent minors for reexamination by the Minister of the Interior,** in order that he may exercise his discretion with respect to their applications. Obviously when **exercising this discretion the Minister of the interior will have to take into account the latest legal situation,** which determines the limits of his discretion, namely the Temporary Order Law in its amended version. This is especially so when the purpose of the act of legislation (both before and after the amendment) is a security purpose, which is designed to limit the risks to State security and to the public welfare that is liable to arise, at this moment in time, from a "resident of the area" (the State's position with respect to the security purpose of the Temporary Order Law is described in detail within the framework of its replies in HCJ 7052/03 **Adalah v. Minister of the Interior**, which was concerned with the constitutionality of the Temporary Order Law under its older version. This case – together with other related cases – is still pending a decision). In the opinion of the State, it is anomalous to suggest that the Minister of the Interior exercise his discretion today under the older legal situation, which in the opinion of the legislator endangers public security.

    Nonetheless, even if we were to assume that from a formal perspective the Minister of the Interior is required to consider the respondent minors' applications pursuant to the older version of the Temporary Order Law, he would certainly be allowed – and even obligated – to receive **interpretive inspiration** from the new version of the law, which expresses the latest position of the legislator.

25. **In the alternative**, if the honorable court is of the opinion that the application of the amended version of the Temporary Order Law upon the respondent minors is indeed a retroactive application, the state will argue that **there is justification for a retroactive application** such as this, and this is, as stated, because of the security purpose of the Law, which certainly qualifies it as an exceptional Law that justifies an exceptional approach.

26. **If this alternate argument is also dismissed,** there will be no escape from discussing the Sate's arguments against the rulings of the judgments under appeal with respect to the interpretation of the term "resident of the area" in the Temporary Order Law, under the older version. **In such an eventuality the State will be able, if the honorable court deems it**

proper, to supplement its claims and broaden its position on this issue, which was only briefly referred to above.

27. **To summarize the discussion on the Temporary Order Law:** The State submits that there is no need to rely upon the Temporary Order Law, and to the amendment that was recently made to it, within the framework of the present appeals. In its opinion, in light of the amendment to the Law, one may disregard the rulings of the judgments under appeal as it relates to anything to do with the older version of the Law, and to focus on the question of the interpretation of Regulation 12 of the Entry into Israel Regulations.

The situation of other cases that are pending a decision on the same subject

28. The Jerusalem district attorneys informed the Jerusalem Court for Administrative Affairs, that with respect to all the pending cases that involved the same subject, they were filing the present appeal with the Supreme Court, and they asked to freeze a continuation of their handling until judgment is passed in the appeals. This application was accepted by the honorable justice Boaz Okun within the framework of Adm. Pet. 949/04 **Rejaa Hamuda v. Minister of the Interior** In its decision as of 30 June, 2005 the court held:

> Counsel for the Respondent did the right thing when it asked the court to freeze this proceeding…
>
> The respondent is allowed to raise a question of principle that is to be examined by the appeal courts, and in order to save the appeal court from becoming over burdened, to freeze proceedings in this court, provided that the situation of the petitioners will not take a turn for the worse. The alternative way of turning all the discussions into an appeal to the Supreme Court is not appropriate. One should not overburden the Supreme Court with appeals, and it is sufficient that the question of principle be presented to it, in a way that after it is settled, the court will be able to rule pursuant to the guidelines of the Supreme Court.

The decision by the honorable Justice Okun in Adm.Pet 949/04 dated 30 June is attached and marked **appendix j.**

29. And indeed ever since the decision by the honorable Justice Okun no similar judgments have been given by the Court for Administrative Affairs in Jerusalem, which are concerned with the granting of status to minors in Israel, whom have been registered as residents of the area in the Population Registry of the Area and who claim that they should not be viewed as "residents of the area".

30. On the other hand lately (on 19 July, 2005) the Jerusalem Court for Administrative Affairs in Adm.Pet. 355/05 **Abir Sho`ibi v. Minister of**

the Interior (the honorable Justice Yehudit Zur) handed down a judgment which was concerned with granting status to an adult who was registered as a resident of the area in the Population Registry of the Area and who argued that he should not be viewed as a "resident of the area" for the purposes of the Temporary Order Law. This judgment follows the same path as the judgments under this current appeal, in everything related to the Temporary Order Law, and establishes that registration in the Population Registry of the Area is not decisive for the purposes of applying this law. Since this judgment dealt with an adult, it is a good paradigm for showing us the difficulty that the judgments under appeal (which themselves dealt with minors) introduce with respect to their interpretation of the term "resident of the area" in the Temporary Order Law. Nonetheless this judgment also dealt with the Temporary Order law under its older version.

The judgment in Adm.Pet 355/05 is attached and marked **appendix k**

31. It should be noted further that in this court, sitting as the High Court of Justice there is a case pending in HCJ 4992/05 **Maslama Paras v. Minister of the Interior** - which raises a similar question with regard to an adult who is registered as a resident of the area and argues that she should not be viewed as a "resident of the area" for the purposes of the Temporary Order Law under its older version. On 18 July, 2005 the honorable Justice Jubran accepted the State's application by consent and granted a 60-day extension to file the State's reply to the petition.

The Normative Framework

32. Section 1 of the Entry into Israel Law establishes that the entry of a person, other than an Israeli national or an *oleh* under the Law of the Return shall be by visa, and his residence in Israel shall be by permit of residence, under the Entry into Israel Law. This section also applies to someone who was born in Israel to a resident (see HCJ 48/89 **Reinhold Issa v. Director of the East Jerusalem District Population Administration** *Piskei Din* 43(4) 573). Section 2(a) of the Entry into Israel law establishes that the person vested with the authority to grant the visa and residence permit is the Minister of the interior. Section 6 of the Entry into Israel Law establishes further that the Minister of the Interior may prescribe conditions for the grant and validity of a visa and permit of residence.

33. The preface to section 14 of the Entry into Israel Law empowers the Minister of the Interior "to make regulations as to any matter relating to the implementation of this Law". By virtue of this section the Entry into Israel Regulations were instituted. These regulations are therefore "performance" regulations that are designed to **implement** the norms that have been established in the empowering law.

34. At the center of these appeals is Regulation 12 of the Entry into Israel Regulations. This Regulation – that has not been changed since these Regulations were instituted in 1974 – establishes:

The Status of a child who was born in Israel

12. A child who was born in Israel, but to whom section 4 of the Law of Return 5710-1950 does not apply, his Israeli status shall be the same as the status of his parents; should the parents not share one status the child shall receive the status of his father or of his guardian unless the second parent objects to this in writing; should the second parent object, the child shall receive the status of one of the parents, as shall be determined by the Minister.

35. The Regulation deals with three alternate situations, within the framework of which the statuses of children who were born in Israel, and to whom section 4 of the Law of Return does not apply, shall be established:

1. If both parents of the child have the same status, this status shall also be the status of the child.

2. Otherwise "the child shall receive the status of his father or of his guardian unless the second parent objects to this in writing". It shall be noted that since a literal reading of this alternate situation *prima facie* discriminates between the sexes, the State submits – and this is how it acts in practice – that it would be appropriate to read this alternate situation in a manner where the child shall receive the status of one of his parents (even if this is the mother) with whom he maintains the center of his life, pursuant to an application by one of the parents, and provided that the second parent does not object to this in writing. This therefore, is the alternate situation of **consent** between the parents.

3. In a case where there is a dispute between the parents, the Minister shall settle the matter.

36. The first two options – the second of which is relevant to these appeals – are *prima facie* understood, according to their simple language, to fall under those cases, which require the immediate granting of status, without leaving the Minister of the Interior with any of the discretion, which is granted to him under the Entry into Israel Law, with regard to if and how to grant the status. Only the third option explicitly establishes that the Minister is required to exercise his discretion. However, as we shall explain below, the **State's position is that one should also interpret the first two options as those which leave the minister of the interior with broad discretion, pursuant to the Entry into Israel Law,** for if this were not so the Regulation would be outside the authority of the very person who instituted the regulations.

37. The Regulation uses the general term "**status in Israel**". Nonetheless since it belongs to the Entry into Israel Regulations, it is clear that the

Regulation applies only to the status that is given **by virtue of the Entry into Israel Law;** namely the status of **permanent resident, temporary resident** and the like (see section 2(a) above of the Entry into Israel Law). It should be noted that the term "status", in this context, does not appear in the Entry into Israel Law.

38. As to the status of **citizenship,** in the Citizenship Law 5712-1952 (hereinafter: the "**Citizenship Law**") there is an explicit arrangement for the case of a child who was born in Israel to an Israeli citizen. Section 4(a)(1) of the Citizenship Law establishes:

> **Citizenship by virtue of birth**
>
> 4(a). The following shall be, from the day of their birth, Israeli citizens by virtue of their birth:
>
> (1)Persons who were born in Israel to a mother or father who are Israeli citizens;

It should be noted parenthetically that section 2 of the Temporary Order Law, which establishes *inter alia* that "in the period of validity of this Law... the Minister of the Interior shall not grant a resident of the area citizenship according to the Citizenship Law, does not apply to a case like ours. This is because a child who was born to an Israeli citizen is not a "resident of the area" upon his birth (even if the second parent is a resident of the area) but rather according to the provisions of section 4 (a) (1) of the Citizenship Law above, he is an Israeli citizen from the day of his birth.

The Carlo Judgment

39. The central judgment of the Supreme Court in which Regulation 12 of the Entry into Israel Regulations is discussed is HCJ 979/99 **Pabaloya Carlo v. Minister of the Interior** *Takdin Elyon* 99(3) 108, before the honorable Justice Beinisch.

The **Carlo** judgment is attached and marked **appendix l**

40. This judgment did not deal directly with the main question that arises in these appeals – the question of the Regulation's subjection to the discretion of the Minister of the Interior according to the Entry into Israel Law. Nonetheless, the judgment's rulings may be used as a starting point for our discussion. In the second paragraph of the judgment it is established:

> **Regulation 12 should be interpreted in a way which most conforms to the chief act of legislation** by virtue of which it was instituted and that falls in line with the underlying purpose.
>
> The Entry into Israel Law, 5712-1952 (hereinafter – the Entry into Israel Law) authorizes the

minister of the Interior to grant an Israeli residence permit to someone who is not an Israeli citizen nor does he have a visa or an *Oleh* certificate. The classes of residence permits are enumerated in the Law. **From a study of the various provisions of the Entry into Israel Law it emerges that it does not establish a right of permanent residence by "virtue of birth"** in a similar way to the arrangement that is established in the provisions of the Citizenship Law, 5712-1952 with respect to citizenship "by virtue of birth". **In the absence of a provision of the Law which establishes a right to permanent residence "by virtue of birth", to someone who was born in Israel, but is not an Israeli citizen according to the provisions of the Citizenship Law, his residence in Israel will be according to one of the classes of permits listed in the Entry into Israel Law <u>which are given pursuant to the discretion of the Minister of the Interior.</u> The starting point for our discussion is the ruling that the legislator does not recognize the right of residence in the country "by virtue of birth" (subject to the provisions of the Citizenship Law); bearing this in mind we need to interpret Regulation 12, which was instituted against the backdrop of the authority of the Minister of the Interior to institute regulations to implement the Entry into Israel Law.** According to the interpretation offered by the petitioners, a child who was born in Israel, will be entitled to the same status to which any one of his parents is entitled, without any relation to the developments that had occurred in the course of the life of the child, for example – his leaving Israel or him not being with the parent who was entitled to Israeli status. **This interpretation places the emphasis upon the mere fact of his birth in Israel, and derives from there substantive rights that extend over the timeline. This does not conform to the idea that the legislator does not view the mere birth in Israel as a basis for receiving a right to permanent residence in the country.**

Since we have said that the purpose of Regulation 12 was not to grant Israeli status "by virtue of birth", the question that arises is what exactly is the purpose underlying Regulation 12? **It appears that the situation that the secondary legislator saw before him, and which he tried to avoid,**

> **was the creation of a detachment or chasm between the parent's status whose residence is in Israel by virtue of the Entry into Israel Law, and the status of the child who was born in Israel, and whose mere birth in this country does not grant him legal status.** As a rule, our legal theory recognizes and respects the value of the integrity of the family unit and of the interest of safeguarding the welfare of the child, and therefore one must avoid the creation of a chasm between the status of the minor child and the status of his parent who has custody over him or who is entitled to that custody. **Even from the viewpoint of granting Israeli residence permits it appears that there is no justification for creating a chasm such as this, since the justifications that underlay the granting of the residence permit to the parent will as a general rule apply also to his child who was born in Israel and lives together with him.**

41. **Later on (in paragraph 3 of the judgment) the honorable Justice Beinisch added a few *obiter dicta*:**

> A separate question, that is not raised in the case before us relates to the law of a child who was born in Israel, but in the course of his life a change occurred to the status of his parents – who have custody over him – in Israel; will Regulation 12 apply to him, in such a way that his Israeli status will "be equated" with the status of his parents? --- if it were up to me I would think that there is no place to distinguish between the status of a minor child and the status of his custodian parent in Israel, and this is true **whether within the framework of Regulation 12 or whether through establishing a suitable criterion for exercising discretion that is vested with the Minister of the Interior in the Entry into Israel Law.** Nonetheless, since this question is not directly raised in our case, since at the time that the father of the first petitioner received an Israeli permanent resident permit the petitioner was not under his custody, **we may leave this question with the comment that it should be studied further.**

42. The honorable Justice Beinisch also found it necessary to comment (in paragraph 3) that the present version of Regulation 12 is deficient and requires amendment. Firstly because it does not clearly and explicitly

articulate for how long after the birth of the child it is still applicable. And secondly, because it discriminates between the sexes.

43. A petition that was filed with the Supreme Court for a further hearing in the Carlo judgment was dismissed (FHHCJ 8710/99).

The subordination of Regulation 12 to the discretion of the Minister of the Interior

44. It has already been noted above that in the opinion of the State since Regulation 12 of the Entry into Israel Regulations were instituted by virtue of the Entry into Israel Law and it is therefore subordinate to it, also the first two options that are established in the Regulation must be subordinate to the discretion of the Minister of the Interior. Below we shall explain this.

45. The Entry into Israel Law is characterized by the very broad discretion it grants to the Minister of the Interior (as well as to someone whom the Minister delegated his authority – see section 16(a) of the Law). Thus, for example in section 2(a) of the Law it is established that the Minister of the Interior may grant visas and transit permits, visitors' permits, temporary resident permits and permanent resident permits in Israel. In section 3 it is established that the Minister of the Interior may extend the transit, visitors' and temporary resident permits. In section 4 it is established that the Minister of the Interior may exchange a short term residents' permit with a long term residents' permit or with a permanent residence permit. In section 6 it is established that the Minister of the Interior may prescribe conditions for the granting and validity of the aforesaid visas and permits. The same applies with regard to the revoking of a visa or residence permit that was already given. Section 11(a) establishes that the "Minister of the Interior may, using his discretion – (1) revoke a visa that has been given under this Law, whether before the arrival of the visa bearer or whether at the time of his arrival; (2) to revoke a residence permit that was given under this Law".

46. All of these sections do not establish any type of qualitative criteria with which to define the discretion of the Minister of the Interior. They leave the discretion "open". And if that was not enough, section 9(b) of the Amendment to the Administrative Law (Decisions and Reasons) 5719-1958 comes and establishes that this Law – with respect to the obligation to give reasons that is established therein – does not apply to decisions by the Minister of the Interior with respect to the Entry into Israel Law (except for a decision to revoke a residence permit of someone who lawfully resides in Israel).

47. Against this background, court rulings have on many occasions repeatedly defended the breadth of discretion given to the Minister of the Interior under the Entry into Israel Law. "It has already become practiced law that that the Minister of the Interior acquired the broadest discretion in the matter of permitting or prohibiting the entry of those who are not Israeli citizens into Israel" (HCJ **Maskanai v. Minister of the Interior**

Takdin Elyon 96(2) 441). "As is well known the Minister of the Interior has been vested with broad discretion whether to recognize the status of someone who is not a citizen but who is lawfully situated in Israel and who seeks to be granted the status of a permanent resident ---. Thus the principle – accepted in modern democratic countries – that the State has broad discretion to prevent aliens from settling in it, is given full expression' (HCJ 4156/01 **Dimitrov v. Ministry of the Interior** *Piskei Din* 56(6) 289, 293).

48. The Entry into Israel Law, and the broad discretion that it gives the Authority, are based on the idea, that as a general rule, someone who is not a citizen and is not entitled under the Law of Return **does not have a vested right to enter Israel and to settle there** but must rather fall in line with the public interest (in the broad sense) as this is defined from time to time by the Authority. There is a good reason that the title of the first chapter of the Entry into Israel Law is "**Permission** of Entry and Residence": "The position of the legislator is clear: someone other than an Israel national or an *oleh* under the Law of the Return, only has the right of entry or residence in the country if given permission" (HCJ 758/88 **Kendell v. Minister of the Interior**, *Piskei Din* 46(4) 505, 520). "In anything related to matters of entry of aliens into Israel and their residence therein, there is nothing unique or unusual. Generally speaking every country reserves for itself the right to prevent alien persons entering its territory or deports them from their territory when they are no longer desired, for one reason or other, or even for no reason at all. --- No person who is not an Israeli citizen or *oleh* under the Law of Return has any right to come to the country or to reside in it, as a tourist or as a resident, without the consent of the official authorities". (HCJ 482/71 **Clark v. Minister of the Interior** *Piskei Din* 27(1) 113, 116-118). And see also, for example HCJ 3648/97 **Stemka v. Minister of the Interior**, *Piskei Din* 53(2) 728, 770; the **Dimitrov** case above, *ibid.;* Adm.A 1644/05 **Frieda v. Minister of the Interior** (given on 29 June, 2005, located on the Supreme Court website), in paragraph 6(6).

49. **The main purpose of the Entry into Israel Law is therefore to enable the Authority to determine by means of broad discretion given to the Minister of the Interior, and pursuant to the public interest as this is determined from time to time – whom to permit entry to and residence in Israel, and at which status.** This purpose reflects the principle of the State's **sovereignty** over its territory borders in everything concerning aliens. Since the public interest, in this context is dynamic and difficult to detect in advance through strict definitions, and since on the opposite side of the spectrum of the public interest there is the vested right of the individual, the legislator established, as stated, that even the discretion that is given to the Minister of the interior should be open and flexible.

It transpires then that the Minister of the Interior's broad discretion is a means that was established by the legislator to realize the main purpose of the Entry into Israel Law. The place of discretion in the

Law is so central so that, in practice, it constitutes an essential part of the definition of the purpose of the Law.

50. The situation is completely different when it comes to the Citizenship Law (see the **Carlo** case above). It should be noted that the Entry into Israel Law and the Citizenship Law were enacted in the same year. As such it is clear that the fundamental differences between them are not by chance. The Citizenship Law is based on the idea that in certain defined circumstances a person does have a vested right to receive citizenship. Therefore, in those cases, the legislator sees importance in **limiting** the power of the regime – and as such restricts the discretion of the Minister of the Interior – to prevent the granting of a right or to deny the right after it has been given.

So for example, sections 2-4 of the Citizenship Act lists a host of situations in which a person is entitled to receive citizenship without dependence upon the discretion of the Minister of the Interior (Citizenship by virtue of Return, by virtue of residence in Israel, by virtue of birth, by virtue of birth and residence in Israel, and by virtue of adoption). In the same way, section 11 of the Law establishes an extremely limited number of causes for revoking citizenship that has already been given (for unlawfully visiting an enemy State, acting disloyally towards the State of Israel and acquiring citizenship on the basis of false particulars).

This restriction on governmental discretion in defined categories of cases is one of the important purposes of the Citizenship Law.

51. Against this background it is possible to understand the obligatory coercive language of section 4 (a) (1) of the Citizenship Law, that was quoted above and which was concerned with the acquisition of Citizenship by virtue of the birth of someone, one of whose parents is an Israeli citizen. This decisive wording does not leave much place for the Minister of the Interior's discretion, accomplishes the purpose of the Citizenship Law and conforms to the other sections in it.

52. **This is not so when it comes to Regulation 12 of the Entry into Israel Regulations.** Let us go back and look at the language of the first two options which were established in this Regulation: A child who was born in Israel, but to whom section 4 of the Law of Return, 5710-1950 does not apply, his status shall be the same status as his parents; should the parents not share one status, the child shall receive the status of his father or guardian unless the second parent objects to this in writing". **The simple language of these options, which** professes to create hard and fast rules (**"shall be", "shall receive"), which are not subject to the discretion of the Minister of the Interior does not fall in line with the purpose of the Entry into Israel Law and does not conform to even one of its sections.**

53. We have steadfastly claimed that the chief purpose of the Entry into Israel Law is to allow the Authority to establish – by means of the broad

discretion given to the Minister of the Interior and pursuant to the public interest as shall be established from time to time – whom to allow entry to, and residence in Israel, and at which status. The literal interpretation of Regulation 12, according to the simple language of the Regulation, therefore undermines this purpose and frustrates it. **The interpretation of the Regulation according to its simple language will bring about a situation where in those cases where Israeli status that has been given under Regulation 12 the public interest will be harmed, and the Minister of the Interior will be denied the statutory vehicle that was given to him – as an essential element of the Law's purpose – to neutralize the harm.**

54. Thus, for example it is clear that giving status according to Regulation 12 will harm the public interest in a case where there are security or criminal reasons for avoiding doing so. Take for example a 16-year old minor who was born in Israel to a mother who is a resident of Israel and to a father who is a resident of the area, but for all practical purposes grew up (until close to the time of filing the application) in the area, and who was involved there with guerilla or criminal activity.

Similarly it is probable that there will be harm to the public interest in other situations, even in the absence of security or criminal reasons, where there too there will be no justification for granting automatic status for the mere reason of being born in Israel. Take for example a minor (at any age, even immediately after birth) who was born in Israel to a parent who is an Israeli resident, and whom the Ministry of the Interior has a well grounded suspicion that his family intends leaving Israel immediately after the child will be granted the sought-after status. More general examples of these apparently problematic situations, in which, in the opinion of the State, there is likely to be harm to the public interest even in the absence of security or criminal reasons, include those cases in which the person seeking status is a minor on the threshold of adulthood, who left Israel with his parents after his birth and spent a long time outside the country, or alternately stayed with them for a long period in Israel but unlawfully so, and has held foreign nationality – or was registered as a "resident of the area" in the Palestinian Population Registry – for many years.

In the State's opinion, because of cases such as these – and as stated these are only examples – it is essential to vest the Minister of the Interior with that discretion that was given to him in the Entry into Israel Law, in order that he should be able to consider whether to accede to an application – wholly or partially – or to refuse it.

55. As mentioned, Regulation 12 is a "**performance**" regulation, that is designed **to implement** the norms that were established in the Entry into Israel Law, since it was instituted by virtue of the authority of the Minister of the Interior "to institute regulations with anything to do with implementing this Law" (see the dicta of the honorable Justice Beinisch in the **Carlo** case). We see from here that the **regulation was not designed – and the Minister of the Interior who instituted them was**

not authorized to design them as such – to establish an independent normative rule, in the sense of a primary arrangement that is detached from the provisions of the Entry into Israel Law. Even more so the regulation was not designed, and neither was there any authority to design it as such, to establish a rule that contradicts the purpose of the Entry into Israel law or to undermine it. In the words of the honorable Chief Justice Barak:

> When secondary legislative authority is given to the executive Authority, the assumption has to be that this authority is designed for implementing arrangements that have been established in primary legislation. The presumption therefore is that secondary legislative authority (secundam legem) is authority to institute executive regulations. One cannot assume that the purpose of granting authority for secondary legislation is to authorize the director to enact secondary legislation "outside the purview of the law" ("praeter legem") or secondary legislation "contrary to the law" ("contra legem"). Indeed if the Knesset is the 'legislative authority' then the only authorization for secondary legislation which falls in line with this principle is one which implements the basic principles and criteria (the primary arrangements) that were established in the primary act of legislation, (A. Barak, *Purposive Interpretation in Law; Volume 2 – Legislative Interpretation* (1994) 528).

56. It turns out then that **if Regulation 12 is interpreted literally, pursuant to its simple language – in disregard of the purpose of the Entry into Israel Law that it is meant to implement – there will be no escape from holding that the Regulation deviates from the authority given to the institutor of the Regulations.** This kind of result is not desirous. It does not fall in line with the general rules of interpretation, according to which every effort must be made to interpret a norm in a way that one would be able to fulfill it and not bring about its revocation. Interpreting the Regulation in this vein will also not conform to the general rule, in terms of which one must interpret secondary legislation in light of the purpose of the authorizing Law by virtue of which it is legislated.

> The interpreter of legislation should avoid an interpretation that leads to the revocation of the regulation. Indeed, if according to the generally accepted rules of interpretation it is possible to interpret a regulation in two ways, one which leads us to a situation where the regulator has not deviated from his authority, and the other which leads us to conclude that the regulator has deviated

> from his authority, one must give preference to the interpretation that sustains the regulation over the interpretation which leads to its revocation. This interpretative approach is enshrined in the idea that there is a presumption that the purpose of secondary legislation was to act within the framework of the authority that is located in the primary legislation, and not to deviate from it (dicta of the honorable Justice Barak in HCJ 333/85 **Aviel v. Minister of Labor and Welfare**, *Piskei Din* 45(4) 581, 596-597).

And see also Barak, *Ibid.* 337-339.

57. **The proper interpretation of Regulation 12 in the context of our cases is therefore, one that does not support the ordinary language of the Regulation, but rather the purpose and language of the authorizing Law. This is the interpretation that reads into the Regulation the principle of the Minister of the Interior's broad discretion** – the fundamental principle that is established in the Entry into Israel Law, as an essential element of the purpose of this Law – and to which everything stated in the regulation is subject. According to this interpretation one must read Regulation 12 as if it had said : **Subject to the discretion of the Minister of the Interior according to the Entry into Israel Law** a child who was born in Israel, but to whom section 4 of the Law of Return 5710-1950 does not apply, his status in Israel shall be the same as the status of his parents; should the parents not share one status the child shall receive the status of his father or of his guardian unless the second parent objects to this in writing; should the second parent object, the child shall receive the status of one of the parents, as shall be determined by the Minister.

58. This interpretation falls in line with the dicta of the honorable Justice Beinisch in the **Carlo** case which was quoted above: "**Regulation 12 should be interpreted in a way that most conforms to the chief act of legislation by virtue of which it was instituted ---. In the absence of provision of the Law which establishes a right to permanent residence "by virtue of birth", to someone who was born in Israel, but is not an Israeli citizen according to the provisions of the Citizenship Law, his residence in Israel will be according to one of the classes of permits listed in the Entry into Israel Law which are given in accordance with the discretion of the Minister of the Interior".**

59. These dicta also conform to the rest of the dicta of the honorable Justice Beinisch in the Carlo case. As the honorable Justice Beinisch pointed out "It appears that the situation that the secondary legislator saw before him, and which he tried to avoid, was the creation of a detachment or chasm between the parent's status whose residence in Israel by virtue of the Entry into Israel Law, and the status of the child who was born in Israel, and whose mere birth in this country does not grant him legal status".

Therefore, as she said: "Even from the viewpoint of granting Israeli residence permits it appears that there is no justification for creating a chasm such as this, since the justifications that underlay the granting of the residence permit to the parent will as a general rule apply also to his child who was born in Israel and lives together with him".

Indeed the State also respectfully submits that as a rule it is incumbent upon the Minister of the Interior, within the framework of exercising his discretion according to the Entry into Israel Law, to grant a child who is born in Israel, the status that was given to his custodian parent. This is because, in the words of the honorable Justice Beinisch "as a rule, our legal theory recognizes and respects the value of the integrity of the family unit and of the interest of safeguarding the welfare of the child. **Thus the Minister of the Interior will act according to this guiding executive principle that the secondary legislator established in Regulation 12.** Nonetheless – as one may also derive from the **Carlo** judgment –this guiding principle allows the Minister of the Interior to deviate from it. In certain cases there are bound to be other considerations that will tip the scales in favor of the public interest and against the granting of status to the minor, or at least, against granting it to him immediately. The way of dealing with these cases, as stated, is by interpreting Regulation 12 in light of the authorizing Law, in a way that will in every case preserve the discretion of the Minister of the Interior to refuse an application, or to conditionally accept the application.

60. It appears that these things also conform to the *obiter dicta* made by the honorable Justice Beinisch in the Carlo case. In her own words: "were it up to me, I would think that there is no place to distinguish between the status of a minor child and the status of his custodian parent in Israel, and this is true whether within the framework of Regulation 12 or whether through establishing a suitable criterion for exercising discretion that is vested with the Minister of the Interior in the Entry into Israel Law**.** Nonetheless, since this question is not directly raised in our case ---, we may leave this question with the comment that it should be studied further**."**

In the opinion of the State, reading this *obiter dictum* against the backdrop of its context and against the backdrop of the things that were said before it compels us to conclude that **this dictum is exclusively concerned with the guiding principle –** which, as stated, the State does not dispute. **The dictum does not profess to declare that one may not deviate from this principle –** a question that was not raised before the court in that case. Quite the contrary: this dictum explicitly left for further review the possibility that the aforesaid guiding principle should be implemented through "establishing a suitable criterion for exercising discretion that is vested with the Minister of the Interior in the Entry into Israel Law. And it goes without say that the "criterion for exercising discretion" always allows for a deviation in cases that justify it.

61. It appears that we may learn something about our case, by virtue of applying the device of a fortiori from the way in which a previous ruling

read the requirement of the Minister of Interior's discretion into section 7 of the Citizenship Law – which is concerned with the naturalization of a husband and wife – despite the fact that discretion is not given any explicit mention (see HCJ 754/83 **Renkin v. Minister of the Interior** *Takdin Elyon* 84(3)1114), as well as from the way in which court precedent poured into this discretion the authority of the Minister of the Interior not to grant the requested status immediately, but rather over a graduated process which facilitates an examination into the circumstances over an extended period (**Stemka** judgment above).

62. This is now the place to note that in the past when the honorable court was asked to deliberate upon the subject of the interpretation of Regulation 12 of the Entry into Israel Regulations, in a context that was divorced from the provisions of the temporary Order Law, the State's position was that in situations in which the application is filed and heard **close to the time of the birth** of the minor in Israel, the minor would immediately be granted, by virtue of Regulation 12, the requested status, if the Ministry of the Interior was satisfied that the center of his life was with his custodian parent in Israel.

Thus the State's position was described in the **Carlo** case: "The respondents' position is that Regulation 12 above is limited to cases in which the Minister of the Interior is required to establish the status of a minor who a short time before then was born in Israel. In other cases, in which it is required to determine the status of a minor in Israel during the course of his life, the State claims that here a Ministry of the Interior guideline (which is subject to discretion) with respect to "criteria for granting a permanent residence visa of aliens in Israel' is applicable.

This claim by the State, which the **Carlo** judgment did not settle, was later on dismissed, after the enactment of the Temporary Order Law, by the Court for Administrative Affairs in the **Gusha** and **Alqurd** cases. In these judgments it was held that Regulation 12 also applies to a minor who applies for status in Israel, at a time that is not close to his birth. It should be pointed out that this ruling was made against the backdrop of the provisions of the temporary order Law, which prevented granting status in Israel to a resident of the area" above the age of 12. The State decided not to appeal these judgments, since it anyway intended to amend the provisions of the Temporary Order Law; and against the background of their assessment that the interpretive position of the Court for Administrative Affairs with relation to Regulation 12 was derived from the difficulty created by the old version of the Temporary Order Law with relation to minors.

Under these circumstances, after the delivery of the judgment in the Alqurd case, the State deemed it proper to update its position with respect to Regulation 12, in a way that the Regulation would also apply to those cases in which the application was filed at a time not close to the birth. Nonetheless, the State stood by its position that also within the framework of Regulation 12 the Minister of the Interior has discretion by virtue of the Entry into Israel Law. This discretion expressed itself – as it

had in the past – in the fact that the Minister was permitted not to grant the status immediately but within the framework of a graduated summary process, that would allow him to examine the circumstances of the life of the applicant for an extended period.

The State's interpretive position, as has been detailed above, is that the authority of the Minister of the Interior to exercise discretion in the circumstances discussed in Regulation 12 is always present. While it is true that in many cases the Minister will not refuse an application, the question will always be one of reasonable discretion in any given case or category of cases. Thus, for example when an application for granting status according to Regulation 12 is filed close to the time of the minor's birth, it will generally be unreasonable if the Minister refuses the application (subject, of course to the provisions of the Amended Temporary Order Law).

The judgments in the case of Gusha and Alqurd and the judgments under appeal

63. As has already been noted, the judgments under appeal relied, in the main, on two previous judgments that were given after the enactment of the Temporary Order Law in the Jerusalem Court for Administrative Affairs – in the **Gusha** case (in September, 2003) and in the **Alqurd** case (in October 2004). The **Gusha** and **Alqurd** judgments were based, in turn, on interpretation that was given to the rulings and obiter dicta of the honorable Justice Beinisch in the **Carlo** case. In the opinion of the State, with all due respect, this interpretation was erroneous.

64. Because of the similarity between them and for reasons of convenience, below we shall discuss all the judgments that were delivered in the Jerusalem Court for Administrative Affairs–in the **Gusha** case, in the **Alqurd** case, and in the seven cases under appeal – as one block, while disregarding the differences in certain nuances that divide them.

65. The basic facts in all the cases – both in the **Gusha** and **Alqurd** cases, and in the cases under appeal – are similar: the petitioner minors were born years ago in Israel, to a mother who is an Israeli permanent resident and to a father who is a resident of the area. The parents did not resolve the status of their children in Israel after their birth, but chose to register them as residents of the area in the Population Registry of the Area. Years later – over the course of which it is quite possible that the center of the life of the family was not at all in Israel and it is also possible that if it was in Israel it was unlawful (since the father and children were residents of the area and were registered as such in the Population Registry of the Area) – the parents decided to apply, by virtue of regulation 12 of the Entry into Israel Regulations, and by virtue of the status of the mother, for their minor children to be granted permanent residence in Israel.

66. The Ministry of the Interior refused the appeals. At first, before the enactment of the Temporary Order Law (in its older version) the refusal

was based on Government Decision No. 1813 as of 12 May, 2002, which prevented handling new applications by residents of the area for Israeli status. After the enactment of the Temporary Order Law, the refusal was based on this Law, as shall be detailed below.

With regard to minors above the age of 12 – since the older version of the Temporary Order Law prohibited the Minister of the Interior from awarding a "resident of the area" above the age of 12 with an Israeli residence permit, the Ministry of the Interior summarily dismissed the applications and refused to conduct a detailed examination into their cases.

With regard to minors under the age of 12 – the refusal arose from the exercise of discretion with respect to the applications. The primary thinking of the Ministry of the Interior was, as mentioned, that Regulation 12 only requires it to accept applications to grant status that were filed soon after the birth of the minor in Israel. In contradistinction, with regard to applications which were filed years after the birth, the Ministry of the interior viewed itself as free from the chains of the Regulation, and therefore in those cases it exercised the discretion that it is authorized, and obligated to exercise under the Entry into Israel Law. The policy, which acted as a guide for the Ministry of the Interior to exercise its discretion with respect to minors who are "residents of the area" under the age of 12, under the Temporary Order Law in its older version, was the fact that since no application to receive Israeli status was filed soon after their births, but their parents chose rather to register them as residents of the area, and since these minors could - under the Temporary Order Law – receive a temporary stay permit from the Regional Commander for the purpose of avoiding their separation from the parent who lawfully resides in Israel, they would not be granted status by virtue of the Entry into Israel Law.

67. Later on (in the wake of the **Alqurd** judgment) as has been detailed above, the Ministry saw Regulation 12 as also applying to applications that were filed years after the birth. Nonetheless the Ministry still deems it correct to accept the applications in such manner that permanent status will not be immediately granted to minors but will be granted within the framework of a graduated summary process (and all this applies to those minors who are registered as residents of the area, only if their age is under 12).

68. It shall be noted that a section of the applicants claimed before the Ministry of the Interior, that the application in terms of Regulation 12 of the Entry into Israel Regulations is an application that is exclusively for "registration", in contradistinction to an application to grant status in terms of the Entry into Israel Law. The Ministry of the Interior dismissed this claim pursuant to previous court rulings (see the **Reinhold Issa** judgment above); and in light of this it has held that the applicants should lodge a regular application for the granting of status in Israel (which, as stated, was blocked from those amongst the applicant minors who were registered as residents of the area and who were above the age of 12).

69. Objecting to the Ministry of the Interior's refusal to accept the applications, various petitions were filed with the Court for Administrative Affairs.

70. All the petitions were accepted on the understanding that the Ministry of the Interior has an obligation to investigate the center of the current lives of the minors, while ignoring the fact that these minors are registered on the Palestinian Population Registry as "residents of the area".

With regards to minors above the age of 12 it was held that even though they are registered as "residents of the area" in the Population Registry of the area, it is only after the current center of their lives have been investigated that is it possible to establish that they are indeed "residents of the area", as this term is defined in the Temporary Order Law (per the court's interpretation). Therefore the Ministry of the Interior is barred from summarily dismissing their applications (let us recall that the State disputes this ruling, but in light of the Amendment to the Temporary Order Law, the determination with respect thereto is not required in the framework of these appeals).

With regards to minors under the age of 12, as well as minors above the age of 12, whom we have established – after a detailed examination – that they are not residents of the area", as this term is defined in the Temporary Order Law (per the aforesaid interpretation given to it by the Court for Administrative Affairs), there is an obligation upon Ministry of the Interior, by virtue of Regulation 12 – at times explicitly and at times implicitly – to grant them permanent residence if it is discovered that the current center of their lives is indeed in Israel. In some of the judgments it was even held that permanent residence should be granted to the minors immediately, while denying the authority of the Ministry of the Interior to institute a graduated summary proceeding.

71. The principle of these normative rulings that therefore arise from these judgments –whether explicitly or implicitly – is that if the center of the lives of the minors at the time of filing the applications is in Israel (most probably unlawfully) – then **Regulation 12 obligates the Ministry of the Interior – without any discretion – to grant them (sometimes immediately) permanent residence like the status of their mothers.**

This, as stated, is even if the application is filed many years after the birth of the minor in Israel, even if the minor is already on the threshold of adulthood, even if the minor left Israel with his parents after his birth and resided outside of it for a long time or alternately stayed with his parents in Israel over the course of a long period but unlawfully so, and even if the minor is registered as a "resident of the area" in the Population Registry of the Area throughout his life. Therefore, in the opinion of the Minister of the Interior – who, under the Law, is the authorized person in this case – the aforesaid normative rulings harm the public interest.

Moreover- and even though the issue was not discussed by the court – it is possible to conclude from the judgments that even when there are considerations of security or criminal impediments – the Minister of the Interior is disallowed from considering them when dealing with applications that are filed under Regulation 12; since apparently according to the judgments the Minister has no discretion with respect to the first two options in the Regulation. It goes without say that this ruling severely harms the public interest.

72. We should note that one cannot escape the impression that the aforesaid rulings of these judgments flowed from the difficulty that the court saw in applying the Temporary Order Law (in its older version) to minors, and it wishes to solve the difficulty in any which way it can, even if involves conferring far reaching interpretation upon Regulation 12 and the Temporary Order Law, in a way that contravenes the purpose of the Entry into Israel Law and the Temporary Order Law. There is good reason why this rule was not passed in the many other petitions, which dealt with adults.

73. As has already been noted, amongst the various judgments that were given by the Court for Administrative Affairs – in the case of **Gusha** and in the case of **Alqurd**, and in the seven cases under appeal – there are differences in nuance. So for example in parts of the judgment in the **Gusha** case there is nonetheless, to all appearances, a certain recognition in the existence of the Minister of Interior's discretion, even in cases where Regulation 12 applied. There it was said – as a result of the dicta of the honorable justice Beinisch in the **Carlo** case – that "when it involves a child who was born in Israel and one of his parents is an Israeli resident the child is vested with the right (subject to the discretion of the Minister of the Interior) to be registered in the Population Registry as an Israeli resident" (paragraph 9 and see also paragraph 6 of the judgment). In contradistinction, in the judgment in the case of **Alqurd** – that relied upon the **Gusha** case – as well as in other judgments that came later on, it appears that no discretion exists at all.

However, as stated, for the purpose of convenience we shall ignore these differences in nuance for the purpose of our discussion. **Let us assume, for the benefit of the respondents in these appeals, that all the aforesaid judgments have indeed found that the Minister of the Interior is <u>obligated</u> to grant permanent residence to those minors who were born in Israel, and who have proved that the current center of their lives is in Israel.**

74. Let us also remember, as has already been noted, that a change has occurred to the position previously presented by the State in the various cases brought before the Court for Administrative Affairs; and it appears that this also contributed to the differences in nuance that exist amongst the judgments (see the surveys into these changes in the judgments in the **Awisat** and **Mansour** case). The recent changes to the State's position reflected amendments that the Ministry of the Interior effected to their working guidelines in relation to the handling of applications under

Regulation 12, in the wake of the judgments and *obiter dicta* of the Court for Administrative Affairs. On 31 October, 2004, after the Alqurd judgment was delivered, the Ministry of the Interior prepared the first written guideline on this issue. This guideline was amended a short while after that, on 20 March, 2005, in the wake of the comments that were made by the Court for Administrative Affairs in the cases that were pending before it.

The working guideline issued by the Ministry of the Interior dated 31 October, 2004 and in relation to Regulation 12 is attached and marked **appendix m.**

The working guideline issued by the Ministry of the Interior dated 20 March, 2005, and in relation to Regulation 12 is attached and marked **appendix n.**

It should be noted that these guidelines expressed, *inter alia*, the position of the Ministry of the Interior, that also in a case where Regulation 12 applies there is no urgency to grant the minor the requested status **immediately**, but this could be done within the framework of a **graduated summary procedure** in the course of which the question of the center of life shall be examined in more depth (a position that, as is known, was approved by this court in other contexts. See for example the **Stemka** judgment above).

Nonetheless, in light of the amendment to the Temporary Order Law, and in light of the Sate's position which holds that Regulation 12 left the Minister of the Interior's discretion intact for him to exercise, there is no reason to elaborate upon these guidelines and to show the differences between them, since in these circumstances there is anyway a need to prepare new and updated guidelines for handling applications such as these under appeal, and indeed the Ministry of the Interior intends to do so.

75. The State respectfully submits that the normative rulings that arise from the judgments are severe, in that they undermine the chief purpose of the Entry into Israel Law. As we have seen, this purpose was to allow the Authority to establish, through the broad discretion that was given to the Minister of the Interior, and pursuant to the public interest which would be determined from time to time, whom to allow entry to and residence in Israel and at which level of status. The aforesaid normative rulings frustrate the realization of this purpose.

76. These rulings were made on the basis of an interpretation of secondary legislation, which derives, as is known, all its validity and right to exist from the authorizing law, and it is therefore supposed to be subject to it and not to undermine it. To present the situation even more strongly we would say that in a place where the authorization to make these regulations was, at the outset, exclusively "executive" authorization, it did not include authorization to establish primary independent

arrangements, which are detached from the norms that have been established in the authorizing Law.

77. The State respectfully disagrees with the manner in which these judgments interpreted the dicta of the honorable Justice Beinisch in the **Carlo** case. In the opinion of the State, as has already been explained, there does not arise from the dicta of the honorable Justice Beinisch that were quoted at length, any rule that denies the Minister of the Interior his discretion in relation to any applications to grant status by virtue of Regulation 12. This includes there being no rule denying the Minister of the Interior his discretion in circumstances where the **current** center of life of the minor is in Israel. In fact the honorable Justice Beinisch, in her dicta, allowed for the possibility of the Minister of the Interior exercising his discretion in every case; even if it is true that she attached much importance to the guiding principle that underlay Regulation 12 – a view that even the State accepts.

78. The State submits that if the interpretation that was given by the Court for Administrative Affairs to Regulation 12 in the various judgments remains intact, then it must be established that the Regulation has exceeded the authority of the institutor of the Regulations. Such a result is not desirous and is also in contravention of the accepted rules of interpretation.

Conclusion

79. Therefore it is the position of the State that the judgments under appeal, insofar as they relate to the interpretation of Regulation 12 of the Entry into Israel Regulations be overturned. It should be held that Regulation 12 does not intend – and in any event could not have intended – to annul the discretion of the Minister of the Interior, that was given to him in the Entry into Israel law as an essential part of the purpose f this Law. The Regulation should be interpreted in such a way that it leaves the discretion in the hands of the Minister of the Interior to weigh up the overall circumstances of the case, before granting a minor status, by virtue of the Entry into Israel Law, which is identical to that of his parent.

80. **In light of the amendment to the Temporary Order Law, the State submits that all the cases under appeal should be recalled for examination by the Ministry of the Interior, in order that it will exercise its discretion concerning them, pursuant to the new criteria that were established in the Amended Temporary Order Law, and pursuant to the updated guideline formulated by the Ministry.** Should the new decisions by the Ministry of the Interior not find favor with the respondents they will, of course, have a right once again to take them on judicial review, so long as they shall have a cause of action to do so.

Today, 26 Av 5765
31 August, 2005

(signed)

Ra’anan Giladi **Office of the State Attorney**	**Yochi Gnesin** **Director of Administrative Affairs at the Office of the State Attorney**