The Courts

At the Jerusalem District Court **Adm. Pet. 530/07**
Sitting as a Court for Administrative Affairs

Before: The Honorable Judge Yehudit Zur, 5 December, 2007
Deputy Chief Justice

In the matter of:

1. **The Association for Civil Rights in Israel**
2. **The Israel Religious Action Center - the Israel Movement for Progressive Judaism)**
3. **Hotline for Migrant Workers**
4. **Kav LaOved - Worker's Hotline**
5. **HaMoked: Center for the Defence of the Individual founded by Dr. Lute Salzberger - registered non profit organization**

All of whom are represented by Adv. Oded Feller and/or Adv. Dan Yakir and others from the Association for Civil Rights in Israel

The Petitioners

- Versus -

The Ministry of the Interior
Represented by Adv. Yosefa Margolin
From the State Attorney's Office of the District of Jerusalem

The Respondent

Judgment

1. Before me is a petition filed by the Association for Civil Rights in Israel, The Israel Religious Action Center**,** Hotline for Migrant Workers, Kav LaOved - Worker's Hotline and HaMoked: Center for the Defence of the Individual (hereinafter the "**petitioners')** all of whom are represented by the Association for Civil Rights (hereinafter- the "**Association"** or "**Association for Civil Rights).**

2. The petition was filed against the Ministry of the Interior (hereinafter – the "**respondent"**) and it is concerned with the Freedom of Information Law, 5758 – 1998 (hereinafter – the "**Freedom of Information Law"** or the "**Law").** The requested relief in this petition is the right to study the respondent's procedures and provisions in all matters related to Population Administration and to the requirement of publishing them.

   This is a petition which deals with a fundamentally important matter of the first degree to the public in general and to the community that requires the services of the respondent in particular, and it was no coincidence that all the organizations dealing with human rights answered the call and came together to file it. It is commendable that the human rights organizations saw it fit to unite and to act decisively for a matter that is so important and sensitive to the general public.

<u>The factual chain of events that stood at the background of the filing of the petition</u>

3. For a number of years (beginning with 2004), the Association for Civil Rights has repeatedly requested the respondent to deliver to it for its perusal the files of the provisions and procedures according to which it operates. Until today the respondent has not acceded to these requests.
   In the petition the petitioners lay out the many applications they have made in this matter over the course of the years to the respondent which as stated above has thus far yielded no response.

   A. On 27 June, 2004 counsel for the petitioners applied to the then supervisor of freedom of information at the respondent with the request to study the respondent's file of procedures and provisions (appendix p/1 to the petition). The supervisor's response was (on 4 July, 2007) that all the procedures of the population registry were to be found on the respondent's website (appendix p/2 to the petition).

   B. On 8 July, 2004 counsel for the petitioners once again applied to the respondent and pointed out that not all the procedures were published on the respondent's website and repeated their request to study them (appendix p/3). In his reply the supervisor responded this time that:

      "Since there has been no fee paid as required pursuant to the provisions of the Law, and since it is your intention that I locate procedures to see if they do or do not exist and thus to make me act in terms of the provisions of the Law, I hereby inform you that so long as no fee has been paid I am unable to relate to your request" (appendix p/4 to the petition).

   C. On 21 July, 2004 counsel for the petitioners applied to the then adviser to the Minister of the Interior and repeated his request to study the procedures. When he was not answered he applied to him once more

on 7 September, 2004 sending him a memorandum (appendices p/5 and p/6 of the petition).

On 26 September, 2004 the adviser to the Minister responded that the application had been transferred and was being handled by the legal adviser of the respondent (appendix p/7 to the petition).

D. On 1 March, 2005 counsel for the petitioners applied to the then Minister of the Interior, Ophir Paz-Pines and repeated his request to study the complete file of the procedures and guidelines of the Respondent. (appendix p/8 to the petition).

E. On 20 March, 2005 the adviser to the Minister replied that the application had been transferred for further handling by the legal office of the respondent (appendix p/9 to the petition).

F. On 19 June, 2005 a meeting took place between the then Minister of the Interior and representatives from the Association for Civil Rights which discussed the application by the Association to study the procedures. The Minister of the Interior instructed that the representatives of the Association be allowed to study the procedures and referred them in this matter to the legal office of the respondent.

G. On 17 August, 2005 counsel for the petitioners again applied to the legal office of the respondent and requested to study the procedures but his application was not answered (appendix p/10 to the petition).

H. On 14 November, 2005, counsel for the petitioners applied to the then director of the Population Administration, Shishay Katzir, and informed him of the fact that the internet website of the Ministry of the Interior only published part of the procedures and even the material that was published was partial and misleading. Counsel for the petitioners once again repeated his request to study the respondent's file of procedures and guidelines and demanded the publication on the respondent's internet website of the complete procedures (appendix p/11 to the petition).
A copy of this application was sent to the then Minister of the Interior who already by 17 November, 2005 requested the director of the administration's response to the claims of counsel for the Association and noted that this involved allegations of the "most serious" nature (appendix p/12 to the petition). The then director of the administration did not reply to this application.

I. On 19 March, 2006 counsel for the petitioners once again applied to the then director of the Population Administration with a request to publish the respondent's file of procedures and provisions and requested to study them (appendix p/14 to the petition). This letter was also not answered.

J. On 15 October, 2006 counsel for the Association applied to the Deputy Attorney General and detailed before him the chain of events that applied to this matter and requested that he order the respondent to publish the procedures and provisions and to allow the study of them (appendix p/15).

In a letter dated 26 October, 2006 counsel for the Association was informed that his letter was forwarded for the respondent's comments and upon receipt of its remarks an answer would be sent to him (appendix p/16 to the petition). When no answer was received, counsel for the Association sent on 3 December, 2006 a letter of memorandum to the office of the Deputy Attorney General (appendix p/17 to the petition).

In a letter dated 12 December, 2006 the Association was told that the matter was being handled by the office of the deputy attorney general together with the respondent, that the inquiry had not yet been completed and upon its completion an answer would be sent to him (appendix p/18 to the petition). No reply was received.

a. On 12 February, 2007 a meeting was arranged between the then Minister of the Interior Mr. Ronnie Bar-On and representatives of the Association and once again the subject of studying and publishing the procedures and guidelines was raised. At the summary of that meeting in the part relating to our matter it was stated:

> "**The procedures of the Population Administration are fully published on the website of the respondent except for a portion of the procedure that is termed the "handling process". The handling process itself is an internal matter that does not reflect the rights and obligations of the citizen, but deals with the manner of carrying out work in the Ministry and therefore it is not a matter for publication. Subject to the aforesaid, the Minister of the Interior has made it clear that the Population Administration procedures shall be published for the general public" (**appendix p/19 to the petition**).**

4. This was the background to the filing of the petition which, as aforesaid, witnessed the unification of a number of organizations whose main interest is individual help and assistance in realizing one's rights.

No one disputes the fact that until today the procedures or guidelines – all of them or even their complete form – are not being published and are not being delivered for perusal by the Association for Civil Rights. It was not in vain that I detailed the chain of events that spanned many years and the constant and repeated applications of the Association which were to no avail and it was difficult for me to believe that this indeed was the correct situation. However-

and this is the important thing – there is something in this multi year chain of events to predict the stance of the respondent as was presented before the court in the petition before me, as will be detailed below.

5. This petition was filed in May 2007. In a decision dated 4 June 2007 I ordered the filing of the respondent's reply up until 2 September, 2007 and a hearing on the petition was set for 8 October, 2007. The respondent requested an extension for filing a reply and also requested that the date set for the hearing be postponed. I acceded to the respondent's request for an extension of the time period and for a postponement of the date of the hearing and in a decision dated 3 September, 2007 I ordered the respondent to file the reply until 25 October, 2007. The hearing in the petition was postponed to 14 November, 2007.

6. The respondent did not file a reply, not during the allotted time and not at all, it placed the court with the a *fait accompli* and only on 6 November, 2007 did it file a short notice with the court that stated:

> **The respondent is honored to announce to the court that after the matter which forms the subject of this petition was examined by the professional and legal echelons of the Ministry of the Interior, the respondent decided to re-examine the procedures of the Population Administration and to publish all these procedures on the internet website of the Ministry of the Interior, including the section that deals with the "handling process", which until today has not been published, but this excludes information that is privileged by law**.
> **It should be clarified that guidelines that are carried out by employees of the Population Administration that are not of a temporary or local nature shall be considered a procedure.**
> **The work process is bound to take a period of time that approximates six months. Attached please find the affidavit of the director of the Population Administration in this matter.**
> **Under the circumstances of the matter, and in light of this notice the respondent is of the opinion that the petition has been rendered redundant, and the court is requested to order that it be dismissed and that the date set for the hearing be removed.**

7. The petitioners opposed this request. They argued that their request was to receive the files of procedures and provisions that serve the Population Administration today. They claim that it is clear that if the guidelines are updated in the future, the respondent will also have to publish the updated procedures. The petitioners claim further that in their capacity as human rights organizations they have special interest in the procedures that currently serve the Population Administration and from their perspective there is importance

in learning the policies of the respondent and the procedure that has been determined, to examine the amendments that have been inserted over the course of time and to decipher the trends in the policy of the respondent. According to their claim an understanding of the changes in policy, in the procedures, and in the provisions can have a decisive impact on the design of a system of rights for those requiring the services of the Population Administration.

In a decision dated 12 November, 2007 I determined that the hearing in the petition would take place on the determined date.

The main claims of the petitioners

8. The petitioners claim that the respondent's files of procedures and guidelines have direct ramifications upon all those residing in Israel and in practice determine the possibility of realizing the basic rights, the scope of these rights and the degree and extent to which these rights have been harmed. In their opinion, the fact that the procedures and provisions have not yet been enshrined in legislation or in general rules is not reason enough to allow the respondent to conceal them. They argue that according to court rulings and according to section 6 of the Freedom of Information Law, the respondent has an obligation to publish the guidelines in a manner that was determined in Regulation 3 of the Regulations to the Freedom of Information Law, 5759 – 1999.

9. The petitioners claim that publication of the procedures on the respondent's internet website is only partial and this is misleading and that there are many procedures, which are central and fundamental that pertain to the workings of the Population Administration which are not detailed at all. According to their claims, the provisions of the legal office in matters relating to the Population Administration and the guidelines for the senior clerkship are procedures for all intents and purposes and nonetheless these are not published.

10. The petitioners aver that the "handling process" which is to say - the respondent's policy and the way in which it is implemented in all areas of its fields of activities, are not published, despite the ramifications upon the rights and duties of those under the care of the respondent. The petitioners claim that without a "handling process" the procedures are devoid of any content. Furthermore, they allege that the Population Administration does not update the procedures that are published on the internet website, does not add new procedures and does not take off procedures that have become obsolete. The petitioners detail in the petition the procedures and guidelines that were not published and were not updated. The petitioners claim that in contrast to other government ministries (such as the Ministry of Welfare and the Ministry of Education) which publish in an orderly file all their procedures and even see to it that these are updated, the respondent does not act according to the law for many years, and it does not respect the law or court rulings.

The main claims of the respondent

11. The respondent felt that it was free not to file a reply and in practice left the court with a *fait accompli.* In a short document which it filed the respondent announced that it had decided to undertake a re-examination of the procedures with the aim of publishing all the procedures, including that section that deals with the handling process, but excluding information that has been privileged by law. The respondent clarified that the guidelines that are carried out by the Population Administration which "are not of a temporary or local nature would be regarded as a procedure". The respondent announced that the work process for examining the procedures would take a period of time that approximated 6 months and therefore, according to its claim, the petition had been rendered redundant and there should be an order for its dismissal.

12. In the hearing on the petition counsel for the respondent added the claim that generally speaking the respondent agrees that the procedures need to be published on the internet. Nonetheless the respondent has requested to deal with a number of matters related to the procedures: First on the technical plane, a comparison between the procedures as they appear in the procedures file and as they appear via their publication on the internet. Secondly, a through examination of the procedures that have been divided into two parts: First, complete procedures which are currently not published and where there is no impediment to their publication. Secondly, internal chapters within the procedures that have already been published and which relate to the "handling process" and which have currently not been published. Nonetheless the respondent requests to examine what may be published from these procedures and what according to its claim is an internal work procedure that is not of public interest and where therefore there is no place for its publication. Counsel for the respondent argued that the respondent requests that it do its required filtering and deleting work, and after it has completed its examination the petitioners will be able to file a new petition if they have reservations in the matter of procedures that have not been published.

13. The respondent claims further that the petitioners cannot obligate it to view something as a procedure which it regards as not being a procedure within the framework of the petition according to the Freedom of Information Law. It argues that the moment it agreed to carry out the work of examining its procedures and committed itself to a limited time period for completing it, the need for granting a court order in the matter had become redundant. The respondent agrees that every procedure that shall be entered into the procedures file needs to be updated on the internet website within a reasonable time and in addition it is in agreement that the public needs to have access to the procedures file that shall be published on the internet and shall be available at various offices and open to review by members of the public who so request it.

The Normative Framework

14. The administrative guidelines are normative rules that a public administration establishes in order to guide itself toward the fulfillment of its role. These guidelines have various names, for example: procedure, guidelines, policy, working guidelines, provisions, et al. There is no inherent importance to these

names and they must be examined for their core and essence – these are flexible rules which lay out the activities of a public authority in the fulfillment of its duties under the Law.

In his book *The Administrative Authority* Professor Yitzhak Zamir classifies administrative guidelines into three main categories: supervisory guidelines, independent guidelines and external guidelines (pp. 773-777).

15. As a general rule "internal guidelines" going by that or some other name need to be published or at least should be readily available for review (if they do not have inherent or public importance).

The Supreme Court (per the honorable Judge Heshin) declared in HCJ 5537/ 91 **Efrati v. Ostfeld:**

> **'An essential precondition to the determination and designation of internal guidelines is in bringing these guidelines to the attention of the interested parties, whether through publishing it for the public or by other means. We are speaking, obviously about guidelines which contain something that affects the right of the individual… guidelines by the state attorneys' office need to be published for the public, so that the public will direct their acts accordingly and they will be informed of the limits of an administrative offence…the concealment of these guidelines from the citizen, apart from contravening the basic ideas of a democratic regime – and adding and enabling arbitrary conduct – has no reasonableness or logic… we are speaking now of the duty of publication which is required from the very essence of the matter and derived from the principle of the rule of law, and not from a fixed obligation engrave in law"**
> (*Piskei Din* 46(3) 501, 513, 515).

Also Professor Yoav Dotan in his essay "Publication of Administrative Guidelines" stressed the great importance of publishing administrative guidelines:

> **Because of the great importance of administrative guidelines and their ramifications upon the modus operandi of the public administration and upon the interest of the citizen, it would be difficult to dispute the benefit and reason for determining arrangements that would ensure their exposure to the public. If indeed in many fields the guidelines are in practice the "law" by which the matter is initiated– logic would dictate that the citizen whose matters are determined in accordance with these**

> **rules should be able to know of their existence and of their content. Exposure to the guidelines complies with the requirements that are found at the core of the principle of the rule of law: equality, predictability of the law and its consequences. It assists the citizen in planning his steps and foreseeing the impact of government activity upon his matters. It is also essential for ensuring that the guidelines serve as an effective brake against negative phenomena that are bound to be interwoven with the application of sporadic discretion: discrimination, arbitrariness, and even corruption. This exposure is also likely to make public administrative action more efficient and to save the public authority time and resources that are dedicated to dealing with hopeless applications or with requests for information and clarifications. Therefore, there is no doubt that the exposure of these guidelines will also assist in the improvement of relations between the citizen and the administration and will increase the trust of the public in its emissaries."**
> (*Law and Administration* [in Hebrew] vol. 3475, 484-485**)**

16. The obligation to publish the guidelines and procedures of a public authority arises from the principle of publicity and is based upon two primary reasons: Fist, the recognition of the right of the individual to know what the general and political norms are that impinge upon his rights. Lack of knowledge of the content of the procedures and guidelines has direct ramifications upon the ability of the individual to act towards the realization of his rights and deprives him of the ability to contend with them and to protect his rights.

    The second reason applies to the public authority and to the propriety of its activities. Publication and transparency constitute a vital barrier for ensuring the correct behavior of the administration and for protecting against discrimination, acts of arbitrariness and disregard toward the citizen. Moreover, the publication and granting of the right to study the matter facilitates the court's and the public's critical review of the administrative decisions and conduct of the public authority, which is an essential contributor towards the improvement, repair and streamlining of the public services.

17. The rule which the court has repeatedly referred to for many years with regard to the obligation imposed upon the public authority to publish administrative guidelines has been enshrined by the legislator in section 6 of the Freedom of Information Law, which determines the following:

> "**(A) A public authority shall make available for public examination the written administrative guidelines by which it operates and which pertains, or is of importance to the public"**

In HCJ 7139/02 **Abbas Baza v. Minister of the Interior** it was declared that the provisions of section 6 of the Freedom of Information Law:

> "**Places the obligation of publication onto administrative guidelines in the same way as there is an obligation that is applicable to the publication of Regulations, which are the offshoots of legislative acts. Thus the legislator has requested that administrative guidelines according to which the public authority operates be brought to the attention of the public, so that it would not fall under the definition of "concealed law" (see the explanatory words of Freedom of Information Bill, 5757-1997, Bills 5757, 400)".**
> **(***Piskei Din* 57(3) 481, 491; hereinafter HCJ Priel **Abbas-Baza)**

In his book *The Right to Know in Light of the Freedom of Information Law* Professor Ze'ev Segal reiterates the special importance of publishing administrative guidelines:

> **"Generally one may say that the obligation to publish guidelines serves at one and the same time, two masters: first, it is concerned with the preservation of the rights of the individual; secondly it is concerned with the preservation of administrative order and the prevention of arbitrariness by the government. The publication of administrative guidelines can protect the government from itself, so that it will not rush to reject the application of the individual to it if only for the reason that the publication will oblige it to provide a reason why it did not provide John Doe with what it provided Jane Doe. It is possible that we may infer from HCJ rulings, prior to the enactment of the Freedom of Information Law, the legal obligation of a public authority to publish internal administrative guidelines'** (p. 155).

In conclusion of this normative section – the publication and granting of the right to study the procedures, guidelines and internal provisions of the authority is one of the most important provisions of administrative law, which constitutes a central plank in the preservation of the rights of the individual and the orderly activities of the public authority.

<u>From the general to the particular</u>

18. In our case, from the respondent's notice it emerges apparently that it agrees to publish its procedures and to give the public the right to peruse them and all

it really desires is confined to the technical request to be granted an extension to become organized, categorized and updated. In light of this notice the respondent has clamed that the petition has become redundant and should be dismissed.

These claims should be rejected.

19. It suffices to study the year long "history" of the non publication of procedures and guidelines on the part of the respondent to understand the gravity of the situation. In practice, today – perhaps for the first time – the respondent has confirmed that the procedures, according to which it acts, have not been published as required by law. A study of the partial publications of the procedures that have been published on the internet website of the respondent shows that this is not merely a technical or marginal issue since it is clear that that the partial publication of the published procedures on the website is so partial and incomplete that it completely negates the main thrust and prevents knowledge and understanding of the essential issues in procedures where there is an indisputable obligation upon the respondent to bring them to the attention of the public and to publish them. The examples for this abound, the petitioner has meticulously presented them and the respondent did not dispute them.

20. Thus, for example the important procedure which is concerned with granting status to the spouses of Israeli citizens and permanent residents whose marriages do not include spouses of the same sex (hereinafter the "common law spouse" procedure) The publication of this procedure on the respondent's internet website (appendices p/30 and p/34 to the petition) is only partial and *prima facie* it is clear that there are important provisions that are missing which constitute the core essence of the procedure. It goes without say that this involves a procedure which is "pertinent and important to the public", per section 6 of the Freedom of Information Law and the provisions that were removed from publication were matters of the highest degree of importance to the public in need of this procedure in particular and to the broader public in general.

21. In a similar vein there has only been partial publication of the procedure for dealing with refugees who have been recognized by the High Commissioner as refugees (appendices p/31 and p/35 to the petition), or of the procedure for dealing with the rescission of the status of Israeli citizen (appendices p/32 and p/36). This matter too does not involve a technical and unimportant oversight but rather deals with provisions that are of the first degree of importance for the rights of the individual and they are not reflected in the procedure. As mentioned, the petition provides details of many more procedures, all of which are important to the public, but which have been published in a deficient and partial manner which is virtually the same as if they had not been published at all.

22. However the respondent's obfuscation does not end here. Already for many years there have been procedures according to which the respondent operates that have never been published. In this matter too the petitioners have raised

many examples, which have not been denied by the respondent. So, for example there has been no publication of the procedure for the resolution of the status of children of permanent residents who are not citizens. So too there is no publication of the procedure dealing with the return of a permanent residency permit to a permanent resident whose permit has been expropriated. There has also been no publication of the procedure prohibiting the resolution of the status of work immigrants who have spouses in Israel and the procedure dealing with the granting of an exemption from the processing fee for receiving status in Israel. There is also no publication of the procedure dealing with the collection of bond guarantees from someone whose matters are only being handled on condition that he deposit a bond, etc.

I readily acknowledge that I am totally unfamiliar with many of the procedures mentioned in the petition despite having served as a judge in the Jerusalem Court for Administrative Matters which deals with dozens of administrative petitions, many of which deal with subjects that are discussed in procedures mentioned in the petition. Only now it appears that some of them have not been presented to court, even not by the state attorney's office which by all appearances is also not constantly aware of the relevant procedures to that petition.

23. Furthermore, there are many procedures which were consolidated as a result of proceedings that were presided over by the courts over the past years. These procedures have also not been published despite the indisputable fact that they involve matters of critical importance to human rights. So, for example the respondent's policy with regard to those "**precluded from handling**". That is to say the list of persons, who are suspected of having fraudulently obtained their Israeli status, where some of them do not even know that they appear on the list. The Association for Civil Rights filed a petition with respect to this procedure (HCJ 6847/02 **Zarini v. Minister of the Interior)** and within the framework of the proceedings that were held at the Supreme Court amendments and improvements were made to the old procedure and the respondent released a new and detailed procedure which significantly improves the rights of the individual and the service to the public in this matter. Despite this until this day the respondent has **not** published the new procedure and according to the Association did not even distribute it to the Population Administration office, which still operates pursuant to the old procedure (the new procedure as it was filed with the Supreme Court within the framework of HCJ 6847/02 is attached as appendix p/45 to the petition and the "old" procedure is attached as appendix p/44 to the petition).

A *prima facie* perusal of the "new procedure" shows that its importance to the public is great and its non publication constitutes a serious deficiency in the work of the respondent who is duty bound to amend it without delay.

24. Another procedure that has not merited any publication is the "**factors' remarks in applications for family unification procedure**". In light of the fact that the procedure has not been published – and according to the Association has also not been fulfilled – the Association filed a petition in the matter with the Supreme Court (HCJ 4944/06 **Hamuda v. Minister of the**

Interior). In its response to the petition the respondent explained to the Supreme Court (on 6 August, 2006) that the procedure had not been published up until that time "**in light of the recommendation of the security officer at the Ministry**. They also informed the court that: "**After a reexamination of the matter it was decided to publish the procedure on the Ministry's internet website. In accordance with what has been reported, the Ministry of the Interior will act to include the aforementioned procedure on the Ministry's internet website within a short period of time. Thus, even the opening heading of the petition has become redundant" (**section 4**,** appendix p/49 to the petition**.)** The petition was indeed dismissed by the Supreme Court but the procedures have **not** been published until today.

Other examples of procedures that were consolidated as a result of hearings at the various courts but which have never been published are detailed in the petition, and here too there is no disagreement (see sections 54-56 of the petition).

Other provisions and guidelines that have not been published

25. There are other various provisions that the respondent uses, going by this and that name, which **essentially** constitute procedures in which the public has an interest and of which it has a right to know and therefore by law they should be published. Among these, for example is the document titled "Criteria for Granting a Visa and Permit for Permanent Residence in Israel".

A perusal of this document (appendix p/52 to the petition) reveals that it involves criteria according to which the respondent grants a visa and permit for permanent residence in Israel under exceptional circumstances. There can be no doubt that this document is supremely important to those of the public who apply to the respondent, but despite this the respondent has not been concerned with publishing it.

26. So too the procedure that allows the transfer of migrant labor who work in Israel from one employment sector to another employment sector (appendices p/53 - p/55 to the petition). Here too it is clear that this involves centrally important procedures for foreign workers in particular and for the broader public in general, and despite this the respondent has not been bothered to publish them in public until this very day (appendix p/57 to the petition). In the petition the petitioners provide details of many more examples of publicly important procedures which until today have not been published (see appendices p/59 - p/61).

The courts' ruling – partial publication of procedures

27. Over the course of the years the court has frequently cautioned the respondent about its non publication of procedures which the law requires or about the need to publish procedures in their entirety, however nothing was done. So for example the important procedure dealing with the granting of status to a common law couple, that has had many important amendments added to it but which was never updated or published in its entirety. In a judgment dated 29

December 2004 the Tel Aviv Court for Administrative Affairs (the honorable Judge Fogelman) dedicated a full chapter on the non publication of a procedure by the respondent in addition to its non presentation before the court. The court discussed the serious problem that arose as a result of this and directed the respondent to amend this situation:

> **The Ministry of the Interior did not publish, as it was required to so, the procedure related to non married spouses. As a consequence the individual has been denied the right to know the norms and the practices that will influence the course of his life. One may assume that as a consequence at least some of the couples to whom the procedure applied did not apply to court with a request to resolve their status [compare: Adm. Pet. TA 2492/04 Yuri Koschov v. Ministry of the Interior (not yet published) - page 5 of the judgment]. This problem contained another very serious aspect to it. Over the course of four years the respondent did not even present the procedures before the court that was dealing with petitions of unmarried spouses. It need not be mentioned that the non revelation of the entire facts for their approval directly undermines the ability of the court to conduct an effective judicial review of the public administration.**
> **The Supreme Court, following the rules that we mentioned, was insistent that the duty of publication is designed to prevent a violation of the individual and to ensure the orderliness of the government. The problem that arose in our case constitutes a clear and unfortunate illustration of harm that arose because of a breach of duty, in both its aspects.**
> **This entails a serious failure. My speculation is that the responsible factors will conduct an in-depth investigation and will draw the necessary conclusions on the system-wide level."**
> **(**Adm. Pet 2790/04 **Fred Dieter Rosenberg et al. v. Minster of the Interior,** paragraph 26 of the judgment).

Despite what was said in the judgment the procedure the respondent eventually published was only partial and did not include centrally important provisions for the public in need. So for example there was no publication of the requirement that the spouse of an Israeli citizen unlawfully residing in Israel should leave the country as a condition for investigating his request to resolve his status. It goes without say that the Supreme Court determined that this involves a harmful and disproportionate requirement and should be rescinded. In AA 4614/05 and 6626/5 the Supreme Court (the honorable Chief Justice Beinisch) discussed the unlawful non publication of the common law spouse procedure:

This court has oftentimes maintained that there is a duty to publish internal guidelines which may affect the right of the individual…
The question of publishing the Ministry of the Interior's policy with regard to the requirement of a foreign spouse exiting the country also arose in the abovementioned Stemka case, where the state was satisfied with a one-off publication of the relevant procedure in a notice by a spokesperson for the Ministry of the Interior. This attracted the bitter criticism of this court:
"The situation, as it is, does not only fail to satisfy the requirements but in fact dangerously borders on the illegal… the source for this duty to publish [the duty of publication of internal guidelines- D. B.], so we have held "is required by the very essence of the matter and is derived from the principle of the rule of law..." (Efrati case, *ibid.,* at 515). And where this involves such a gross violation of the right of the individual – the right of his Israeli spouse to continue living in the country with the person she has chosen to be her partner in matrimony – there is no doubt in my heart that there is an obligation upon the Ministry of the Interior to publish its policies and to make it accessible to anyone who requests to read it and to study it."
(*Ibid.* at 768)
And behold – despite the fact that in the interim the rules pertaining to the publication of administrative guidelines have been enshrined in the Law (see section 6 of the Freedom of Information Law, 5758-1998) - it would appear that not enough has been done to fulfill this obligation. As things stand today there has been an improvement to the situation, and it appears that the procedure has indeed been published on the internet website of the Ministry of the Interior. Nonetheless, it is only a very sketchy publication, which does not include the complete essential information, and does not even mention the requirement of leaving the country. In light of the great importance of this procedure and its impact upon the status of many people, a more comprehensive and complete publication is required, and all this in order to ensure reasonable access to the procedure for those who shall need it. The state must be very scrupulous in upholding this obligation".
(The State of Israel v. Avner Oren et al.)

Even these clear words did not succeed in changing the situation.

28. Another example is concerned with the procedures that deal with establishing the paternity of a child born to one parent who is not Israeli. These procedures include very important provisions which relate to the methods for determining parenthood, the measure of the burden imposed upon parents to prove their parenthood, those cases in which the child shall acquire status upon his birth and those cases in which the parents shall be required to produce further evidence to prove their parenthood. A perusal of the procedures as they have been published by the respondent (appendices p/63 and p/65 to the petition) in contrast to the complete versions of the procedures (appendices p/61 and p/64 to the petition) clearly shows that the "heart" and core essence of the procedures have been removed from publication and nowhere is it expressed or reflected.

29. A further example may be found in the important procedure dealing with "status nullification" according to which the respondent may rescind the citizenship of immigrants it suspects acquired their status in Israel on the basis of false details (appendix p/36 to the petition). The petitioners' applications to receive the complete procedures in this matter were answered in the negative with the reason that "**all the procedures that are known to us appear on the internet website of our Ministry"** (see appendix p/69 to the petition). In a letter sent on behalf of the respondent dated 26 December, 2004 it was stated:

> 1. **Our Ministry has processed all the procedures of the population registry that have thus far been published in the internet file.**
> 2. **This processing has been handed over for editing to an external company which upon completion of their job will upload these guidelines on the internet (**appendix p/72 to the petition**).**

Despite this, three years (!) have passed since this reply and until today the complete procedure has not been published.

<u>Updated publication and methods of publication</u>

30. It is not sufficient that the procedure be made available for study by the applicant. The duty of the public authority is to publish the procedure as it becomes updated from time to time and in addition there is a duty to publish it in a fitting manner especially in a way that reaches the knowledge of the public for whom the procedure is relevant. These obligations were also not met by the respondent.

31. For example the procedure for foreign workers moving from one employer to another which determines the procedures which the employee must fulfill in order to enable him to go to his new employer. It goes without say that this procedure is gravely important to the foreign workers' community and lack of knowledge of the details of this procedure would have significantly disastrous effects upon the former and upon the public in general. Despite all this, only a partial version of this important procedure is published on the internet where

prima facie it is clear that core and important elements have been removed (the complete procedure is attached as appendix p/74 to the petition, the deficiently published procedure that appears on the internet is attached as appendix p/73 to the petition). In this matter the consequences for failure to bring these procedures to the attention of the eligible public or of those who have been harmed by it and to whom the guidelines have been directed, were referred to by me in the judgment dated 17 February, 2003 (Adm. Pet. 398/03) which dealt with the status of a foreign worker who became entangled in a situation in which he was forced – for various reasons – to leave his place of work:

> **The question as to what qualifies as adequate and fitting publication of administrative guidelines, is of course dependent on the circumstances of each and every case and primarily the question of the community at which the guidelines are aimed. In our case it is indisputable that the eligible public or those harmed by it and to which the guidelines are directed is the community of foreign workers. It ought to be borne in mind that this involves a unique community whose ability to know and understand their rights and obligations is especially limited. Thus everything that may reasonably be done must be done in order to assist them in this matter.**
>
> **In our case, from the respondent's response it transpires that <u>no</u> publishing was done with the specific aim of bringing these guidelines to the attention of the foreign workers' community. Thus, in the respondent's response it was mentioned that the procedure was distributed amongst the employees of the Population Administration offices and the human resources companies, and "at the same time the procedure was translated into 15 languages which are commonly spoken by the foreign workers and it is now in the final stages of printing in order that it may be distributed in the various languages" (paragraph 39 of the respondent's respondents). It therefore involves a plan for the future which has not yet been realized. Furthermore, from a perusal of the procedure that was attached to the respondent's response it emerges that also an 'explanatory note for the worker for the method of transferring from one employer to the other' was prepared. It appears that a way must be found to bring this note to the attention of the foreign worker, whether through the employer who requires the worker to sign confirmation that he was indeed provided with the explanation and procedures or whether through some other means. One way or another it clearly transpires that the**

> **procedures at this stage are unfathomable and are unknown to the foreign workers. There is thus no justification to impose upon them the duty to act according to these procedures and especially here one cannot make them liable for the consequences of not acting according to the procedures"**
> **(**AdmP 398/03 **Bernie Carr v. Minister of the Interior et al.,** paragraphs 15-16 of the judgment)**.**

32. Another example is the procedure that the respondent released with regard to the treatment of foreign wives whose status resolution process was interrupted because of the violence of their Israeli spouses. The Association discovered this procedure from a notice by the spokesperson of the respondent (appendix p/82 to the petition). An orderly and complete publication of this procedure has not been done.

33. Yet another example is concerned with the status of elderly and single parents of Israeli citizens. The procedure in this matter has only been partially published (appendix p/84 to the petition), despite the indisputable fact that it has been updated over the years. It goes without say that here too it involves a procedure that is of prime importance to the rights of the needy community addressed by this procedure.

A summary of the current situation

34. A factual description of the current situation clearly shows that for a number of years the respondent, acting in contravention of the law, has shown no concern for publishing procedures and guidelines according to which it exercises its general powers. As may be noticed this means that it is engaged in unauthorized activities that have continued for a number of years throughout which the respondent has not abided by the Law and by the guidelines and has not respected the ruling of the court.

35. The courts have repeatedly declared that ever since the enactment of section 6 of the Freedom of Information Law, a public authority is obligated to make its guidelines available to the public and to publish them, and in practice this provision places upon administrative guidelines the obligation of publication in the same way as there is an obligation of publishing the Regulations which flow from legislation. In this way the legislator has required that the administrative guidelines according to which the public authority operates be brought to the attention of the public so that they do not become "concealed law". In our case the respondent did not publish, as it was required to do, the procedures and guidelines according to which it operates. Some were not published at all; some were published in such manner that what was absent from them was greater than that which was published to the extent that one could hardly call it a "publication" as that term has been understood by Law and through court rulings. Procedure updates have not been published and also even in a place where there was a publication it was not done in a manner that reached the needy community addresses by that procedure and at times they did not even inform the offices of the Population Administration of the

respondent itself, who were meant to act in accordance with, and implement the updated procedure.

The requested relief in the petition

36. The respondent claims in the "notice" that it filed with the court, that it is currently seeking to undertake a re-examination of the procedures which it will publish together with the section relating to the "handling process" which as yet has not been published. But it "excludes information that is privileged by law". It claims that this entails work that takes a period approximating half a year. This request must be dismissed. The petitioners are justified in claiming that a general commitment of this kind, to publish the procedures in the "near future" has repeatedly been given over the course of the years. As we have seen these commitments until today have not been fulfilled. Furthermore even within the framework of the petition before me I acceded to the respondent's request and it was granted an extension of time which entailed the postponement of the hearing date. However even this did not help and in practice the respondent was even unable to comply with its duty to the court and to the provisions of the Courts for Administrative Matters Law, 5760-2000. Under these circumstances which involve activities that contravene the law and the court's rulings, there is no justification to wait a further period.

Furthermore – and this is the crux of the matter – the respondent's notice in this case was of a general nature, vague and not sufficiently clear. On the one hand the respondent agreed that the guidelines and procedures which by law were required to be published did not receive sufficient publication if at all, but on the other hand it claimed, for the first time, that within the framework of examining the procedures it would not publish "information privileged by law". It was unclear what information amongst the procedures according to which the respondent operates and exercises its jurisdiction was privileged and it is thus no coincidence that counsel for the respondent could not point to privileged information of this nature that are found in the procedures and that justify their concealment from the eyes of the public. It goes without say that the claim with regard to a "privileged" procedure has no mention in all previous and ongoing correspondence that the petitioners conducted with the respondent, who did not raise this far reaching claim as to the confidential nature of the procedures.

Quite the contrary, *prima facie* it appears that the respondent's procedures, practically all of which deal with granting status, with the registry and with foreign workers provides the public with the right to know them and does not comply with the definition of "privileged information" pursuant to the Freedom of Information Law. Nonetheless, the authority making such a claim bears the heavy onus of proving the "privilege" of the information. As mentioned, the respondent's notice in this matter was of a general and vague nature and it is impossible to understand what nature of privilege it enjoys. Even if it refers to matters that pertain to the orderly functioning of the respondent (section 9 (B) (1) of the Freedom of Information Law) one cannot in this way condone the non publication of the procedures. On the contrary,

court rulings have repeatedly determined that one must narrowly interpret any exception that pertains to harming the functioning of the authority and also here it the authority who bears the very heavy burden of proving concrete harm to its regular functioning, and if indeed there is some harm did this harm to the authority outweigh the need for publication and most importantly – what is the damage that is likely to be caused to the population in need of the relevant services and the rights that flow from there. A broad interpretation of this exception is bound to frustrate the aims of the Freedom of Information Law and "opens the gates to the disruption of the right to receive the actual information" (see Professor Segal's book, at 199).

Another argument raised by the respondent in its notice *viz.* that a procedure which is of a "temporary or local nature" need not be published, should also be dismissed. Exactly the opposite is the case and even arrangements and guidelines that were established for *ad hoc* solutions for certain matters and for certain defined population groups are of great public importance and there is no justification for not publishing them by law, for example – the resolution of the status of children of foreign workers, amendments to the policy for withdrawing the residency of Jerusalem residents, and the like.

37. From what has been said until now there emerges a clear and binding conclusion from the provisions of the law and of court rulings and that is that the obligation upon the respondent to publish **all** the procedures and guidelines according to which it exercise its authority, and better earlier than later. The immediate and required need to publish the guidelines in their entirety is clear. The respondent exercises wide ranging jurisdiction which has a fateful impact upon the various sectors of the population. The need for immediate publication flows from the type of authority exercised by the respondent which at times affects the first degree Basic Rights such as a right to a family life, the rights of minors, the rights of residency, the rights to liberty etc. It is important to note that the obligation of immediate publication, of updating, and of access to information flows also from the population sector with which one is involved. Frequently we must deal with a weak population, which lacks means, which only has partial knowledge and which is often foreign to the land, who is unfamiliar with the language and which even lacks basic information. For these population sectors which daily require the services of the respondent, the information pertaining to the procedures the policy and guidelines is no less than the "air that they breathe", and without which it is difficult for them to fully understand their status and to defend their rights and to receive – in the appropriate cases – the rights which they deserve by law and by the rules of an orderly administration. Under these circumstances one cannot wait any longer until the respondent sees it fit to consolidate and to examine the procedures. The respondent continues every day to exercise its wide jurisdiction over a host of important matters which it oversees and those needing its services cannot wait any longer. They have the elementary right to know how to resolve their status and their rights in accordance with the guidelines that are adopted by the respondent.

As stated the obligation to publish and to make the information available for public consumption is a general rule, and under this general rule there already

was an obligation to comply with it. The respondent has until today not done so and this needs to be corrected without delay. It goes without saying that if it is discovered that if any specific provision or guideline indeed complies with one of the eight exceptions enumerated in the Freedom of Information Law, the respondent may refuse to publish it but it must inform the petitioners of this, while providing reasons for doing so.

38. In light of the above, I hereby decide to uphold the petition and grant the three forms of relief requested in it and order the respondent as follows:

a. To allow the petitioners to study the complete and updated file of all the procedures, provisions, and guidelines of the respondent in matters relating to the Population Administration.
b. To make available at every office of the Population Administration all the procedures and provisions, in their complete and updated form for public view.
c. To publish on the respondent's internet website all the full and complete procedures and guidelines, and to publish updates on the website whenever the procedures are updated by the respondent.

The respondent must carry out the above within 30 days from issuing this judgment.
The respondent shall bear the costs and attorneys fees in the amount of NIS 15,000.

The secretariat shall deliver the judgment to the parties.

Given today the 25th of Kislev, 5768 (5 December, 2007) in the absence of the parties

Yehudut Tzur – Deputy Chief Justice.