At the Jerusalem District Court **Adm. Pet. 527/07**
Sitting as the Court for Administrative Affairs

In the matter of:

1. _____ **Ja'abri, Identity No._____**
2. _____ **Al-Ja'abri, Identity No._____**
3. _____ **Ja'abri, Identity No._____**
4. _____ **Ja'abri, Identity No._____**
5. _____ **Ja'abri, Identity No._____**
6. _____ **Ja'abri, Identity No._____**
7. _____ **Ja'abri, Identity No._____**
8. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Saltzberger (R.A**.)

Represented by attorneys Yotam Ben Hillel (Lic. No. 35418) and/or Yossi Wolfson (Lic. No. 26174) and/or Hava Matras-Irron (Lic. No. 35174) and/or Sigi Ben-Ari (Lic. No. 37566) and/or Anat Kidron (Lic. No. 37665) and/or Abeer Jubran (Lic. No. 44346) and/or Ido Blum (Lic. No. 44538)

of HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger
4 Abu Ovadiah St., Jerusalem 97200
Tel: 02-6283555; fax: 02-6276317

The Petitioners

- Versus -

1. **Minister of the Interior**
2. **The Director of the Population Administration**
3. **The Director of the Population Administration Office, eastern Jerusalem**

Represented by the Jerusalem District Attorney's Office
7 Mahal St., Jerusalem
Tel: 02-5419555; Fax: 02-6223140

The Respondents

Petition for *Order Nisi*

A petition is hereby filed for an Order Nisi directed at the Respondents and ordering them to give reason:

A. Why they do not reverse their decision to deny Petitioner 1's (hereinafter: **Petitioner 1**) application for family unification with her spouse, Petitioner 2 (hereinafter: **Petitioner 2**), and approve the application.

B. With respect to the family unification applications which are denied due to a security threat attributed to the invitee's family member (in accordance with Section 3d of The Citizenship and Entry into Israel Law (Temporary Provision)):

   1. Why they do not meet the provisions of the law which enable them to deny these applications only due to a security threat attributed to family members which are defined in the section.

   2. Why they do not determine that these applications may be denied only in cases in which there is a present substantial link between the invitee and the relative to which the risk is attributed.

   3. Why they do not determine that these applications may be denied only at the presence of a present security threat posed by the invitee's relative.

C. Why they do not determine clear criteria for cases in which family unification applications may be denied for security grounds.

D. Why they do not determine clear procedures with respect to a notice of a denial of an application due to security grounds – procedures which will include the way in which the notice is to be given and the information which shall be delivered to the applicants.

E. Why they do not make the procedures and criteria aforesaid in Sections B-D known to the public.

Introduction

1. This petition is in the matter of the Respondents' denial of the family unification application filed by an Israeli resident for her spouse, a resident of the Territories, who is living with her and with her children in Jerusalem. The cause of the application denial is "security grounds". The reasoning used by the Respondents: "the invitee's family member carried out a suicide attack". When the Petitioners requested that the Respondents explain this reasoning – they received no reply.

2. This decision by the Respondents is contrary to the law and to common sense.

3. Section 3D of The Citizenship and Entry into Israel Law (Temporary Provision) enables, indeed, to deny family unification applications based on a security threat attributed to the invitee's family member, and not only based on a threat attributed to the invitee himself. However, the law limits the Respondents so that they will only be able to deny applications based on a security threat attributed **to the family members defined in the section.** Petitioner 2's relative who carried out the suicide attack is **Petitioner 2's nephew**. Nephews are not listed among the family members due to whom the Respondent is entitled to deny a family unification application on a security basis. Therefore, the decision was made without authority, and should be regarded as null and void.

   Moreover, it is possible to deny an application only when the family member "may constitute a security threat" – thus, in a forward-looking approach. A person who is no longer alive, by definition can no longer "constitute a security threat". For this reason too, the denial of the application was unauthorized.

4. The purpose which is allegedly at the base of Section 3D is the prevention of a future relationship, which poses a threat, of the invitee with the family member who constitutes a security threat. The concern is that the relative will take advantage of the invitee, knowingly or unknowingly. In our case, the moment of the suicide attack disconnected any possibility of a relationship between the invitee and his nephew – the person who committed the abominable crime – who at that moment committed suicide. The Respondents do not argue that Petitioner 2 himself presents a danger, and for a good reason. This is a normative person, without a criminal or security record, who built, together with this wife and children, a beautiful home in Jerusalem. Indeed, the Respondents are also not arguing that the gene which causes a man to one day go and carry out a suicide attack is in the blood of Petitioner 2 or any of his family members.

   Therefore, the Respondents' decision is also contrary to any common sense.

5. The way in which the Respondents conducted themselves in the case at bar raises serious questions with respect to the manner in which decisions are made in regards to denials of family unification applications due to security reasons. It seems as though **decisions are made automatically –** based only on the recommendation of the security agencies – and without use of discretion on the part of the Respondents. The use of this discretion is required by law and by the procedures of the Respondents themselves. In addition, it is apparent from the case before us, as well as from other cases which are handled these days by Petitioner 8, that the Respondents deny applications also due to security information deriving from the family member's **past**, and which is not relevant at all in the present.

6. From the description in the Petition it is apparent that there are no clear criteria with respect to denial of applications due to security reasons, and in particular with respect to denials which address family members of the invitee. At least not criteria which are known to the general public. A severe possible consequence of the absence of clear guidelines is the weighing of

considerations that are unrelated to the law and to the family unification procedure. A concern arises that in this case as well, in which there is no apparent logical reason to deny the application, irrelevant considerations were taken into account. This may be a punitive act, with the case serving as "an example" to others. This may be strictly a vindictive act.

7. The consequences of the decision to the Petitioners' family unit are unbearable. The Petitioners have been living in Jerusalem with their children for more than five consecutive years. Israel is the life center of the family in every possible sense. The Respondent does not deny this, and based on this fact he registered the couple's children in the Population Registry. As a result of the Respondents' decision, Petitioner 2 will be forced to be displaced from Israel, while his family members will remain in the country. Alternatively – his whole family will be exiled with him, against its will, outside of Israel – their country.

8. It seems as though these facts were not placed before the Respondents when they had to make a decision so fateful to the family's life. This disregard strengthens the concern that the places in which the final decisions are made with respect to the fate of families in Israel are the hallways of the General Security Services and the police stations. The Petitioners are not alleging that approaching the security agencies is inappropriate. However, their position is required to be balanced with other considerations, such as preventing the dismantling of the family unit and the best interest for children. Certainly it is required to examine whether the recommendations of the "agencies" match the law and common sense.

   That is precisely the duty of the Respondents.

The Parties to the Petition

9. Petitioner 1 is a resident of The State of Israel, who is living in the A-Tur neighborhood in Jerusalem with her spouse, Petitioner 2, a resident of the West Bank, and with their children. On February 2, 2006, Petitioner 1 filed an application for family unification with Petitioner 2. The application was recently denied. The couple (hereinafter: the **Petitioners**) has five children, Petitioners 3-7, all born in Israel, and residents thereof. There is no disagreement with respect to the family's life center being in Jerusalem.

10. Petitioners 3-7 (hereinafter also**:** the **Children** or the **Petitioners' Children**) are Petitioner 1 and Petitioner 2's children, who are living with them in Jerusalem. Petitioners 3-7 were all born in Israel. On March 7, 2005, Petitioners 4-6 were registered in the Israeli Population Registry as permanent residents. With respect to Petitioner 3, the Respondent at first decided to only grant a DCO permit. However, following a petition filed in her matter (Adm. Pet.366/05) the Respondent decided to grant her status in Israel, and on May 28, 2007, she was registered as a permanent resident. On the same day, Petitioner 7, who was born on August 29, 2006, was also registered as a permanent resident in Israel.

11. Petitioner 8 is a registered association with the objective of assisting people who have been the victims of abuse or deprivation by the state authorities, including protecting their rights before the courts, whether under its name as a public petitioner or as a representative of people whose rights have been prejudiced.

12. Respondent 1 is the minister authorized by the Entry into Israel Law, 5712-1952, to handle all matters deriving from this law, including applications for family unification and for arrangement of children's status, filed by the State's permanent residents living in East Jerusalem.

13. Respondent 2 is the director of the Israel Population Administration. In accordance with the Entry into Israel Regulations, 5734-1974, Respondent 1 delegated his powers to Respondents 2 and 3, with respect to handling and approving applications for family unification and for arrangement of children's status, filed by the State's permanent residents living in East Jerusalem. Furthermore, Respondent 2 participates in the policy determination procedures with respect to applications for receiving status in Israel by virtue of the Entry into Israel Law and the Regulations issued by its virtue.

14. Respondent 3 (hereinafter: the **Respondent**) manages the regional bureau of the Population Administration in East Jerusalem. In accordance with the Entry into Israel Regulations 5734-1974, Respondent 1 delegated his powers to Respondents 2 and 3 with respect to handling and approving applications for family unification and for arrangement of children's status, filed by the State's permanent residents living in East Jerusalem.

The Case of Petitioners 1-7

15. The Petitioners got married in 1993. In that same year, shortly after the wedding, Petitioner 1 filed an application for family unification with Petitioner 2. The application was denied without reasoning. It shall be noted that up until 1994, women, who are Israeli residents, were not permitted to file applications for family unification with their spouses, and it seems that that was the reason for the denial of the application.

16. After the application was denied, the Petitioners moved to the West Bank. During those years, Petitioner 1 continued to frequently visit her family, which lives in A-Tur. Petitioner 1 even gave birth to all her children in Israel. In 2002, the couple returned to Jerusalem, and made their home in the A-Tur neighborhood, in which they are living till this very day.

17. On July 19, 2004, Petitioner 1 filed an application for the registration of Petitioners 4-6 in the Population Registry. Concurrently, on the same day, in accordance with the Respondent’s procedures, Petitioner 1 filed an application for family unification with Petitioner 3, who was registered in Petitioner 2’s Identification Certificate.

    The receipts for the filing of the applications are attached hereto, marked **p/1** and **p/2**.

18. On March 1, 2005, Petitioner 8 received the Respondent's letter dated February 23, 2005, according to which the registration of Petitioners 4-6 in the Population Registry as permanent residents had been approved.

The Respondent's letter is attached hereto and marked **p/3**.

19. On the same day Petitioner 8 received an additional letter on behalf of the Respondent, also bearing the date February 23, 2005, according to which it was decided to approve Petitioner 3 with only a stay permit in Israel.

The Respondent's letter is attached hereto and marked **p/4**.

20. In light of the Respondent's denial to grant Petitioner 3 permanent status in Israel, on April 7, 2005 a petition was filed to the Court of Administrative Matters (Adm. Pet. 366/05). On May 15, 2005, a little over a month after filing the petition, Petitioner 8 received the Respondent's letter, according to which it was decided to grant Petitioner 3 temporary resident status for two years.

The Respondent's letter is attached hereto and marked **p/5**.

21. It shall be noted that recently, on May 28, 2007, Petitioner 3's status was upgraded to a permanent resident status.

22. On August 1, 2005 The Citizenship and Entry into Israel Law (Temporary Provision) (hereinafter: the **Temporary Provision**) was amended so that from that day on it will be possible to file a family unification application for an invitee, a resident of the Territories, who is older than 35. Subsequently, during September 2005, the Petitioners approached the Respondent with respect to the matter of Petitioner 2, who at the time was 41. Petitioner 2 was scheduled a date for filing a complete family unification application, for February 2, 2006, and so he did.

A receipt for the filing of the application for family unification with Petitioner 2 (hereinafter: the **Application**) is attached hereto, marked **p/6**.

23. On April 3, 2006 and on May 15, 2006, two reminder letters were sent to the Respondent with respect to the Application.

The letters are attached hereto, marked **p7** and **p8** respectively.

24. On May 30, 2006, Petitioner 8 received a letter on behalf of the Respondent, according to which Petitioner 8's letter dated May 15, 2006 did not include a power of attorney. Even though a power of attorney had already been enclosed with the complete application, a power of attorney was again attached to the next reminder letter sent to the Respondent on May 31, 2006.

The Respondent's letter and Petitioner 1's letter are attached hereto, marked **p9** and **p10** respectively.

25. On June 25, 2006 Petitioner 8 received a letter from the Respondent, according to which a decision with respect to the Application had yet to be made.

The Respondent's letter is attached hereto and marked **p11**.

26. On July 4, 2006, on August 31, 2006 and on November 20, 2006 additional reminder letters were sent to the Respondent.

The letters are attached hereto and marked **p12**, **p13**, **and p14**.

27. In the meantime, on August 29, 2006, the Petitioners had a girl – Petitioner 7. Petitioner 1 filed an application to register her in the Population Registry (Serial Number 131/06). The application was accepted, and on May 28, 2007, Petitioner 7 was registered as a permanent resident in Israel.

28. On November 21, 2006, Petitioner 8 received a letter from the Respondent, dated November 16, 2006, and notifying Petitioner 1 that her application for a family unification with Petitioner 2 is denied (hereinafter: the **Decision**). The wording of the Decision:

> **I hereby notify you that your application for family unification has been examined, and the following decision was given with respect to the application:**
>
> **The application is denied for security grounds.**
>
> **The invitee's family member carried out a suicide attack.**

The Decision is attached hereto and marked **p15**.

29. An enquiry with the Petitioners revealed that the family member who carried out the attack was Petitioner 2's nephew.

30. It shall already be stated that the cause for denying the Application is not based in the law. **A nephew is not listed among the family members for whom the Respondent is entitled to deny an application for family unification on a security basis. In addition, a dead man, who no longer constitutes a threat, cannot be a cause of denial, even if he were included in the closed list of those family members.** Thus, already after one reading of the Decision, its lack of logic cries out to the sky. On the one hand, it was not argued that Petitioner 2 himself constitutes a security threat. On the other, the same family member, for which the Application is denied, was killed while carrying out the abominable crime, and is no longer alive.

31. Accordingly, on December 26, 2006 an appeal on the Decision was sent to the Respondent. In the appeal, Petitioner 8 pointed the Respondent's attention to the fact that the denial of the Application lacks a legal basis. In addition, Petitioner 8 requested to receive the answer of the security agencies to questions which relate to the cause of denial and to the period of time in which the security restriction against Petitioner 2 will be in effect.

The letter of appeal on behalf of Petitioner 8 is attached hereto and marked **p16.**

32. After no response to the appeal was received, Petitioner 8 sent a reminder letter to the Respondent on January 28, 2007.

The reminder letter is attached hereto and marked **p17**.

33. On February 8, 2007, Petitioner 8 received a letter from the Respondent, approving that the enquiry was transferred for the agencies' examination. "However", the Respondent wrote, "our decision to deny the application still stands".

The Respondent's letter is attached hereto and marked **p18**.

34. On April 15, 2007, Petitioner 8 sent a reminder letter to the Respondent, in which it noted that it hasn't received any response from his office since February 8, 2007.

The reminder letter is attached hereto and marked **P/19**.

35. In light of the above, and in light of the fact that more than half a year has already passed since the denial decision, and after the passage of five months from the day of filing the appeal, and since the Respondent is insisting upon his decision to deny the Application, this Petition is filed.

The Legal Argumentation

36. The Petitioners will argue as follows:

A. The Respondent's denial to approve the Application, only due to the fact that Petitioner 2's **nephew** carried out a suicide attack, is contrary to the provisions of The Citizenship and Entry into Israel Law (Temporary Provision). A nephew is not listed among the family members for whom the Respondent is entitled to deny an application for family unification on a security basis. Therefore, the Decision was adopted without authority.

In addition, the possibility of denying an application is fulfilled only when the family member "may constitute a security threat" – meaning, by a forward-looking approach. A person who is no longer alive cannot meet the definition "may constitute a security threat". For this reason too, the denial of the Application was carried out without authority.

B. The death of the person who perpetrated the terror attack – in horrible and monstrous circumstances as they may be – eliminates the foundation of the rationale which is, allegedly, at the basis of the possibility of denying the application for family unification due to a security threat attributed to the invitee's family member. The absence of feasibility for a **current relationship** between the invitee and that family member – who as aforesaid is no longer alive – does not enable a denial of the Application only due to the family relation.

C. The Petitioners will also argue that this case illustrates the way in which the Respondent cynically uses the provisions of the Entry into Israel Law (Temporary Provision). The law enables, as aforesaid, to deny an

application for family unification on the basis of security information, attributed to a family member. The Respondent interprets this provision very broadly, and denies applications also due to security information derived from the family member's **past**, and which is not relevant in the present. In our case, the security threat posed from that nephew has already been realized, to our great regret, however today the matter is no longer relevant.

D. The actions of the Respondent in the case at bar raises serious questions with respect to the manner in which decisions are received in regards to denials of applications for family unification on a security basis. The Petitioners will argue that the decisions are made automatically – based on the recommendation of the security agencies – and without use of discretion on the part of the Respondent, as required by law and by the Respondent's procedures. It is apparent from the actions of the Respondent that there are no clear criteria with respect to denials due to a security background, and in particular in regards to denials attributed to the invitee's relatives (and not to the invitee himself). One of the results of this situation is weighing considerations which are irrelevant to the law and to the family unification procedure.

The Respondent's Discretion with respect to the Question of Security Restriction

37. Section 3D of the Entry into Israel Law (Temporary Provision) (hereinafter: **the Law**) determines:

> A permit to stay in Israel shall not be granted to a resident of the region under Article , 3A(2), 3B(2) to (3) and 4(2) if the Interior Minister or the regional commander, as applicable, determines, based on an opinion of the authorized security agencies, that the said resident or his family member is liable to constitute a security threat to the State of Israel; in this paragraph, "family member" means spouse, parent, child, brother, sister, or their spouses.

38. The case law determined standards for operating the Interior Minister's discretion with respect to a decision of whether a resident of the region constitutes a security threat:

> The Minister of the Interior is required to use this authority of his in accordance with the basic principles of the Israeli administrative law. He is required to operate authorities which enable to prejudice constitutional basic rights in accordance with standards determined in the restriction clause in the basic laws with respect to human rights. The determination of the Interior Minister by virtue of Section 3D of the Law must therefore meet the proportionality requirement. (HCJ 2028/05 **Hassan Amara et al. v. the Interior Minister et al.**, *Takdin-Elyon* 2006(3), 154, p. 158).

The judgment further established:

> When we confront a decision which is based on individualistic examinations, the question of the proportionality of the Interior Minister's decision is conditioned on the specific circumstances of every application. In the context of the proportionality examination the entirety of the circumstances must be taken into consideration. The individualistic examination, according to the specific circumstances of the case, must examine the presence of an actual or potential threat on the part of the foreign spouse. The examination of the force of the security consideration is carried out on the basis of the examination of specific material related to the people connected to the matter. (Id., id.).

39. As shall be described below, the Respondent's discretion in the Petitioners' matter was flawed, from almost every possible perspective. Certainly the use of discretion did not correspond with the principles stated above. We shall first review the flaws in the Respondent's decision on the merits, proceeding thereafter to system-wide failures with respect to the denial of the application for family unification for a cause of 'security restriction'.

The Denial of the Application – Without the Presence of a Link between the Invitee and his Family Member

40. When the alleged security threat does not derive from the invitee himself, but from his family member, the individualistic examination must include an examination of the nature of the invitee's relationship with that family member, and the degree of the family relation between them. Thus, for example, in Adm. Pet. 796/03 the court concluded that the invitee poses a security threat only after confidential information was presented to the court with respect to the nature of the relationship between the invitee and his brother, who was claimed to be a senior Hammas member, and with respect to the frequency of their meetings (see Adm. Pet. 796/03 **Mimi et al. v. the Minister of the Interior**, *Takdin – District Courts* 2005(1) 7716, Section 18 of the judgment).

41. In the Petition before us, the specific examination with respect to the nature of the relationship between Petitioner 2 and his relative – is simple. In this case no confidential information is required. In this case there is no need to examine the frequency of their meetings. The relative, Petitioner 2's nephew, is _____ Ja'abri, who carried out a suicide attack in Beer Sheva in August 2004. It is clear that from the moment that the abominable crime was carried out, there could be no relationship – physical, or of another kind – between Petitioner 2 and that nephew, who is no longer alive.

Therefore, the moment of the attack disconnected any possible link (if one existed) between Petitioner 2 and his nephew. Since the argument with respect to a security threat is entirely based on that relationship – and not, for

example, on security information attributed to Petitioner 2 – indeed no cause exists for a denial of an application for family unification on security grounds.

42. Superfluously, we shall mention that Petitioner 2 himself has no criminal or security background. Moreover, Petitioner 2 has been issued, starting the 1990's, a magnetic card which enables him to work in Israel. At the time he also received – during the period in which he found work in Israel – work permits, which allow for the entrance into the country's boundaries. The issuance of the magnetic card and the receipt of the work permits involve strict security check ups. Those certifications would not have been given to the Petitioner 2 had it been claimed that he poses any security threat.

The Denial of the Application – Without Explicit Authorization of the Law

43. Section 3D of the Law determines that an application for family unification shall be denied if a security threat is attributed to the invitee or to his family member. The definition "family member" in that section includes: spouse, parent, child, brother, sister, or their spouses. In other words, **a nephew is not listed among the family members for whom the Respondent is entitled to deny an application for family unification on security grounds**. It shall also be noted that on March 28, 2007 the amendment of the Citizenship and Entry into Israel Law (Temporary Provision) was enacted. The amendment left the "family member" definition as it was.

44. The discretion awarded to the authority is never absolute. Its exercise is always subject to the confinements of the authorizing law. In our case, therefore, the decision was made without authority, and in violation of the principle of the legality of government. This principle determines no administrative authority has any authority, but the one given to it by law. In his book *The Administrative Authority*, Professor Y. Zamir establishes:

> If the authority cannot point out a law from which the authority to carry out that act derives, the act is not within the boundary of authority, and therefore it is illegal. (Y. Zamir, *The Administrative Authority* (5756) (I), 50).

45. Therefore, and for this reason alone, the Respondent's decision should be deemed as null and void.

46. As aforesaid in Section 30, the Petitioners drew the Respondent's attention to his error, in the context of the appeal they filed on his decision (see Exhibit **p/16**). However, the Respondent is not changing his denial.

47. The Respondent deviated from his authority not only by relying on a person who is not part of the closed list of family members determined in the Law.

The Law explicitly determines that the condition for dismissing an application due to information pertaining to a family member is that the family member "may constitute a security threat". In other words, it is a forward-looking approach. A dead man, even if he was extremely dangerous when he was alive

– upon his death can no longer pose any danger on any level whatsoever. In any event there is no authorization to reject an application due to information pertaining to him.

The above statements are considered to be obvious, since the security denial is always forward-looking, expecting a future threat, and it is not related to things which are part of the past and have no impact on the future.

Appropriate for this matter, *mutatis mutandis*, are the statements made by the Honorable Former President A. Barak with respect to another matter:

> The military commander may not, for example, through the use of Article 78 of the Fourth Geneva Convention, order assigned residence for an innocent person who is not involved in any activity that harms the security of the State and who does not present any danger, even if the military commander is of the opinion that this is essential for decisive reasons of security. He also may not do so for a person involved in activity that harms the security of the State, if that person no longer presents any danger that assigned residence is designed to prevent. (HCJ 7015/02 **Kipah Mahmad Ahmed Ajuri v. The Commander of IDF Force**, *Takdin-Elyon* 2002(3), 1021, p. 1032).

48. Section 3D of the Law was explained by the fact that the invitee may be under pressure on the part of his dangerous family member, or may even be unknowingly taken advantage of by him, out of trust and innocence. It was never argued that the choices of the dangerous family member are an indication of the invitee's opinions, in the sense of a "terrorist gene" which runs in the family. However, when an application is denied due to the actions of a dead family member it expresses a generalized and stereotypical approach, which eliminates the legal acknowledgment of any man's dignity, his autonomy and his right to be judged according to his own actions and choices, and not based on the actions of his fellow-man.

This is a severe and unbearable harm to the essence of the human dignity.

49. With respect to this matter, it was said in a similar context that:

> The harm caused by an administrative detention to the liberty and dignity of a man who himself poses a threat to the State's security is severe. The harm is severe since it prejudices the liberty of a man – a liberty which is protected in Israel at a constitutional-super-statutory level – without a trial and without a judgment (see HCJ 2320/98 **Al-Amla v. Commander of IDF Forces in Judea and Samaria**, *PDI* 52(346 (3). [sic] **However, it is bearable. It is the best of a bad lot. On the other hand, the harm to liberty and dignity, in an administrative detention of a man who himself does**

> **not present a threat to the State's security, is extremely severe, to the point that the interpreter may not assume that the law was intended to achieve such severe harm.** Indeed, the transition from the administrative detention of a man who presents a threat to the State's security to the administrative detention of a man who does not present a threat to the State's security is not a "quantitative" transition. It is a "qualitative" transition. The State detains, through the executive authority, a man who committed no offense, and who does not present any threat, and his only "sin" is being a "bargaining chip". The harm to the liberty and dignity is so material and deep that it is unbearable in a state which is a supporter of liberty and dignity, even if reasons of the State's security lead to taking this measure. My colleague, Justice M. Heshin has already addressed the matter and stated that with respect to Regulation 119 of the Defence (Emergency) Regulations, 1945, the basic concept is that "each man will bear his own misdemeanor and be put to death for his own sin… you shall not punish unless you shall warn, and only the criminal shall receive a beating" (HCJ 2006/97 **Ghanimat v. Officer Commanding Central – Uzi Dayan**, *PDI* 51(2) 651, 654). A similar approach should be taken with respect to an administrative detention. Each man will be arrested according to his own misdemeanor and each man shall be held in administrative detention according to his own sin. A man should not be held in administrative detention, unless he himself, by his own actions, constitutes a threat to the State's security. **That is how it was before the legislation of the Basic Law: Human Dignity and Liberty. That is certainly the case after this basic law was legislated, and raised the human dignity and liberty to a constitutional-super-statutory level.** (Crim FH 7048/97 **John Doe v. Minister of Defense**, *PDI* 54(1), 721, pp. 742-743). (Emphasis Added – Y.B.).

The Denial of the Application – Based on Information which was not Up To Date

50. As aforesaid, the Law enables to deny an application for family unification on the basis of security information attributed to a family member. The Respondent interprets this provision very broadly, and denies the applications also due to security information which derives from the family member's **past**, and which is no longer relevant in the present.

51. From cases which are piling up with Petitioner 8, it is apparent that the Respondent denies applications for family unification even when, for instance, the invitee's family member was convicted in the distant past and has been

imprisoned since in a life sentence, or when the family member had been imprisoned in the past, even for only a few months, and has been released long ago.

52. Basing a decision on information which is not up to date is a breach of the duty applicable to an administrative authority to weigh the relevant considerations – and only them – while exercising the discretion.

> The relevant considerations are also based on relevant factual data which are to be taken into consideration. The obligation to weigh all the relevant considerations applies to relevant factual data as well as to relevant considerations. Non-consideration of a relevant datum or consideration may prejudice the authority's decision (see Har Zahav, *The Israeli Administrative Law*, (5757) 440).

53. With respect to our case, we shall repeat and state that the security threat presented from that nephew has already been realized, to our great regret, but the matter has no relevance today. Even if there had been any relationship between Petitioner 2 and his nephew, indeed it is a thing of the past, and cannot indicate a threat presented from Petitioner 2 **today**.

54. With respect to this matter, Justice Y. Tzur established in Adm. Pet. (Jerusalem) 286/07 **Abasi v. the Regional Bureau of the Population Administration** (unpublished) that it is required not to intervene with the Respondent's decision to deny an application for family unification during the "graded process". This is the case in light of an **up to date and founded** security threat attributed to the invitee's brother:

> During the hearing which was held on April 30, 2007, I reviewed the confidential material and heard the representatives of the Security Service *ex parte*. The representatives of the Security Service described their position and presented before me the confidential material which was at the foundation of their objection with respect to approving the petitioner's application. I was convinced that the material presented before me, related to the petitioner's brother, appropriately bases the respondent's decision with respect to the existence of a "security restriction" for approving the application. Indeed, the fact that the petitioners were not presented with the information possessed by the Security Service makes it difficult for them to respond or to refute the information. However, the confidential nature of the intelligence presented before me, clearly indicates that in this mater preference should be given to the security interest which requires that this type of information will not be displayed at the presence of the petitioners. In such a case, when the petitioner is prevented from confronting the administrative evidence against him, it

> naturally requires extra caution in the examination of the material. This is what was done in the case at bar. I have reviewed the confidential material. This is information which is **up to date and founded**, which was not in the respondent's possession during the years in which the petitioner's stay permits were extended. (Emphasis in the original document – Y.B.).

Weighing of Irrelevant Considerations

55. In a case such as the one before us, in which the contradiction between the provisions of the Law and between the Respondent's decision is so clear, suspicions immediately arise as to whether it is a case of consideration of irrelevant considerations.

56. The Respondent's decision can be viewed as an act of punishment without trial against a man for which it had not even been alleged that he committed a crime. It can even be viewed as an act of vengeance for carrying out the suicide attack. Either way, this is a decision which is against the alleged purpose of the section – prevention of a future relationship, which poses a threat, between the invitee and the family member who constitutes a security threat. The decision causes unbearable harm to Petitioner 2, to Petitioner 1 and to their children, when it was not even alleged that any of them had any connection to the attack. Furthermore, many of Petitioner 2's family members, who live in Hebron, were detained after the attack. They were interrogated, and it was found that they had no involvement in the abominable act. Petitioner 2 himself was not detained or interrogated on the matter at all.

57. The case law with respect to the weighing of irrelevant considerations – is clear.

> **A consideration which deviates from the purposes of the authorizing law is an irrelevant consideration, and therefore it is improper, and the governmental authority may not take it into consideration.** Furthermore: the governmental authority does not have the freedom to shape the purposes for which it is entitled to exercise its discretion. Discretion which is activated by virtue of the law must be used in the framework of the purposes which the law has established and in this framework alone. Even if an act of legislation explicitly states that the discretion is absolute, the discretion is still interpreted as requiring the authority holder to act for the realization of the legislative purposes from which his authority derives (HCJ 953/87 **Poraz v. Mayor of Tel Aviv-Yaffo et al.**, *PDI* 42(2) 309, 324). (Emphasis Added – Y.B.).

58. Therefore, it seems as though it is not possible to give any reasonable explanation to the Respondent's actions, except for the suspicion with respect to the desire to punish or take vengeance on Petitioner 2's family for the

performance of the attack. Justice Y. Cohen established in the past that when examining the act of the authority it is required to examine "whether the improper consideration or improper purpose had a significant impact on the authority's act, and if that was the case, then the authority's act must be disqualified." (HCJ 392/72 **Emma Berger v. The District Planning and Building Committee**, *PDI* 27 (2) 764, 773).

59. Hence, for this reason too, the fate of the Respondent's decision – null and void.

System-Wide Failures in the Actions of the Respondent

60. The actions of the Respondent raise a number of serious questions: Is the Respondent not familiar with the provisions of the Law, including who is included in the definition of "family member" in Section 3D? Does the Respondent not know that there must be some link between that "family member" and the invitee – a prerequisite for this link is that the family member is among the living? Could it be that the Respondent is over-zealous in his implementation of the 2005 amendment to the Law, which defined who is a "family member" for purposes of a 'security impediment'?

61. A possible reply to these questions may be found in the Respondents response to Adm. Pet. 187/07 **Fasfus et al. v. the Minister of the Interior et al.**. There it was stated in Section 36 that:

> Here is the place to mention that following the legislative change, the General Security Service's policy was modified to the new normative status. Among other things, since August 2005, the question of the threat inherent in negative security material about family members of applicants for status in Israel has been examined in further detail (information which was examined also in the past, but in lesser detail).

(The State's response to this petition can be viewed in the website of HaMoked Center for the Defence of the Individual at the link:

http://www.hamoked.org.il/items/8741.pdf (in Hebrew).

From this section of the response it is possible to understand – at least, *prima facie* – that the requirement to enable a denial of the application for a family unification on the basis of intelligence attributed to the invitee's **family member**, did not originate from the General Security Service. From this version it is apparent that the formulators of the amendment – in other words, the Respondents – are the ones who initiated the change to the "family member" definition, whereas the General Security Service had to 'accommodate itself' to the change. Could the Respondents, and with them the General Security Service, have jumped at the amendment to the law as though they found a great treasure, and are now "implementing" it also in the cases in which it has no application, neither legal nor logical?

62. As aforesaid, these are questions which should be considered by the Respondent. The Petitioners, as far as they are concerned, should not be prejudiced by such or another unlawful "broadening" by the Respondent of the provisions of the Law. Certainly they should not be prejudiced by an impossible link between Petitioner 2 and his nephew, who carried out the suicide attack.

The Identity of the Agency which Decides whether to Deny an Application on the Basis of Security Information

63. The fact that in the case at bar a decision was made so openly contradictory to the provisions of the Law, raises an additional alternative, no less severe than the previous ones. It is possible that the decision was made by the security agencies, and approved, automatically, by the Respondent.

64. The provisions of the Law in this matter – are clear. Section 3D of the Law explicitly determines that the security agencies constitute only a recommending source. **The decision, whether to approve or reject the application, in light of the information received from the security agencies, must be the Ministry of the Interior's decision, and his decision alone.** The recommendation of the "agencies" cannot by itself decide the fate of the application for family unification. **The Respondent** is the agency which must examine that the agencies' recommendation corresponds with the provisions of the Law. **The Respondent** is the one who must reason – first and for most, to himself, and later to the applicants – the decision. **The Respondent** is the agency whose decision will be examined by the court under standards of reasonability and fairness.

65. This fact, with respect to the identity of the agency which has the duty to make the decision is also apparent from the procedure which the Respondent received following HCJ 7016/01 **Almadani et al. v. The Minister of the Interior** – "A procedure with respect to agencies' comments on applications for family unification" (hereinafter: the **Agencies' Comments Procedure** or the **Procedure**).

The Procedure is attached hereto and marked **p/20**.

66. Even from the aforesaid in this Procedure it is apparent that the security agencies' position is strictly a recommendation, whereas it is the Respondent who has the obligation to make the decision (see Sections 1.2 and 1.5 of the Procedure).

67. From the actions of the Respondent in this case, as well as in many other cases, a concern arises that this Procedure remains as a dead letter in the Respondent's bureau, and the clerks, if they even know of its existence, disregard its provisions (an example of the Respondent's disregard of the Procedure's provisions, this time in the context of the reasoning for the denial of the application for family unification, see, for example, Hamoked's petition – Adm. Pet. 187/07 **Fasfus et al. v. the Minister of the Interior et al**. This petition may be viewed on the website of HaMoked Center for the Defence of the Individual at the link:

http://www.hamoked.org.il/items/8740.pdf (in Hebrew).

68. It should be noted that following the Respondent's failure to implement this Procedure, with respect to which he undertook before the HCJ, an additional petition has been recently filed – HCJ 4944/06 **Shirin Hammuda et al. v. the Ministry of the Interior**. The Petition is still pending before the HCJ.

69. The question with respect to the identity of the agency which decides in these procedures is not strictly a procedural question. Firstly, there is a material decision at its foundation with respect to the considerations which must be considered, and with respect to how the opposing considerations must be balanced. Unlike the security agencies, the Respondent is required to also consider considerations such as prevention of the dismantling of the family unit and the interest of the couple's children. The Respondent is obligated, in the framework of his final decision, to balance these considerations with the position of the security agencies.

70. In the case at bar, it is clearly apparent that the Petitioners' unique circumstances were not taken into consideration. At the least, these circumstances were not given the proper weight. No proper weight was given to the fact that Petitioner 2 is a law abiding citizen, who has been living together with his wife and children in Jerusalem, for more than five consecutive years. No proper weight was given to the fact that the couple's children are registered in the Israeli Population Registry, and that Jerusalem is their life center for all intents and purposes. And first and foremost – no proper weight was given to the destructive impact the decision will have on the family unit.

The Absence of Clear Criterions

71. It appears from the aforesaid that there are probably no clear guidelines and criteria with respect to the denial of applications for family unification on the basis of security information, and in particular on the basis of security information attributed to the invitee's relative, and not to the invitee himself. At least, these are not guidelines known to the general public.

72. The Agencies' Comments Procedure does indeed regulate the procedure of consulting with the security agencies, and the provision of the reply to the applicant, however it seems that it is not enough. First, as aforesaid, it seems that the Procedure was not appropriately internalized in the Respondent's bureau, and it is even doubtful whether the Respondent's clerks know it. Second, the Procedure does not explicitly mention the identity of the deciding agency in the Respondent's bureau. Third, the Procedure was formulated before the Citizenship Law was amended in the summer of 2005. It does not address the considerations which are to be considered by the Respondent when the security information is attributed to **the invitee's relative**, and not to the invitee himself. Evidence for this can be found in the case at bar. It seems that the agency which eventually made the decision in the Petitioners' matter was not aware of the provisions of the Law, and did not even attempt to find a possible link between the relative and Petitioner 2.

73. Guidelines and procedures have many advantages. Whether it is from the perspective of the citizen or the resident who needs the authority's services, for which the procedures enable him to calculate his steps in a reasonable extent of certainty. Whether it is from the perspective of the public administration and its relationship with the general public – the procedures make a contribution to equality and reduce the arbitrariness in the authority's decisions. And whether it is from the perspective of the authority itself.

> As far as the administrative authority is concerned, formulation of guidelines in a conscious and planned manner enables it to carry out a thorough clarification of the data and of the considerations related to the matter, while consulting with its superiors, experts on the matter and additional agencies as required. After formulating the guidelines, the authority can activate its power in accordance with guidelines in each and every case easily and with relative swiftness. **Activating the power in accordance with the guidelines assists the authority in maintaining a great extent of uniformity, consistency and adherence to the purpose of the law**. This activation makes it easier for the authority to explain its decisions and to withstand review, judicial or otherwise. (Y. Zamir, *The Administrative Authority* (5756) (II) 778). (Emphasis Added – Y.B.).

74. Even with respect to the Respondent's obligation to publish the procedures and criteria according to which his decisions are made – there is no need to go into detail. The public's right to know and to receive information from the governmental authorities with respect to their actions, is a right which received explicit recognition in the Israeli legislation and case law. The public's right to know is an essential means to the existence of public review of the governmental authorities' actions; it is important to ensure the public's trust in the authorities' actions, because the public's trust cannot be fulfilled based on what is concealed. The public's right to know is also the right of anyone in the public to have direct access to information stored by the governmental authorities by virtue of their duty. Against the public's right to know there is "the duty of public functionaries to inform the public". (HCJ *1604 – 1601/90* **Shalit et al. v. Paras et al.**, *PDI* 41(3) 365).

With respect to the obligation to publish criteria and procedures see HCJ 5537/91 **Efrati v. Ostfeld et al.**, *PDI* 46(3) 501; HCJ 3648/97 **Stemkeh et al. v. Minister of the Interior et al.**, *PDI* 53(2) 728, 767-768.

75. The existence of clear procedures, known to the Respondent's clerks as well as to the public which approach him, may have prevented the situation in which the Petitioners found themselves in the case at bar. An organized decision making process, which includes considering the proper considerations and giving a decision by an authorized agency in the

Respondent's bureau, who knows the provisions of the law in their entirety, may have prevented the result of a decision which is contradictory to the Law.

The Breach of the Right to a Family Life

76. Each man's right to get married and form a family unit is a basic right in our legal system, which may not be prejudiced, and which is derived from every man's right to dignity. The Israeli law acknowledges the value of a functional family life as a central and basic value which is worthy of society's protection:

> […] Preserving the integrity of the family constitutes part of the public policy in Israel. The family unit is 'the primary unit… of human society' (Justice Heshin in C.A. 238/53 **Cohen et al. v. The Attorney General**); It is an 'institution recognized by society as one of the foundations in society's life' (President Olshen in C.A. 337/62 **Reisfeld v. Yaacobson et al.**) Preserving the family institution is part of the public policy in Israel. Moreover: in the framework of the family unit, preserving the marriage institution is a central social value, which constitutes part of the public policy in Israel. (The Honorable Justice Barak, as was his title then, in HCJ 693/91 **Efrat v. The Population Registry Commissioner in the Ministry of the. Interior et al.**, *PDI* 47(1) 749, 783).

For this matter also see:
C.A. 238/53 **Cohen and Bolek v. the Attorney General**, *PDI* 8(4) 35; HCJ 488/77 **John Doe et al. v. the Attorney General,** *PDI* 32(3) 421, 434; C.A. 451/88 **Anonymous Persons v. the State of Israel,** *PDI* 49(1) 330, 337; Civil FH 2401/95 **Nahmani v. Nahmani et al.,** *PDI* 50(4) 661, 683; HCJ 979/99 **Pavalaviya Karlo v. Minister of the Interior,** *Takdin- Elyon* 99(3) 108.

77. The right to a family life is considered a natural constitutional right. In **Stemkeh**, the Honorable Justice Heshin discussed the importance of the family unit, an importance that reaches the status of a basic right, and the commitment of Israel to this right, in part pursuant to its participation in international conventions that recognize the importance of the right to a family life:

> Our case, it should be recalled, revolves around the basic right that entitles the individual – every individual – to marriage and to the establishment of a family. It goes without saying that this right is recognized in universally accepted international conventions … (HCJ 3648/97 **Bijelbohen Petel et al. v. Ministry of the Interior**, *PDI* 53 (2) 728, 784).

78. International law states that every person is free to get married and to establish a family.

For example, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, Treaties 1037, which Israel ratified on October 3, 1991, states:

> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children…

See, also, the Universal Declaration on Human Rights, which was adopted by the UN General Assembly on December 10, 1948, Article 8(1); Article 17(1) and Article 16(3) of the International Covenant on Civil and Political Rights, Treaties 1040, which took effect with respect to Israel on January 3, 1992.

79. In the judgment given with respect to the matter of the constitutionality of the Citizenship and Entry into Israel Law (HCJ 7052/03 **Adalah – The legal Center for Arab Minority Rights in Israel et al. v. The Minister of the Interior et al.**, *Takdin-Elyon* 2006(2), 1754, it was established that the right to a family life is a constitutional basic right in Israel, which is included in the right to human dignity. Chief Justice (ret.) A. Barak summarized, in Section 34 of his judgment, the case law which was established in the judgment with respect to the status of the right to a family life in Israel:

> From the human dignity which is based on the individual's autonomy to shape his life, derives the sub-right of establishment of the family unit and the joint continuance of life as one unit. Does this also lead to the conclusion that the realization of the constitutional right to live together also means the constitutional right of its realization in Israel? My answer to that question is that the constitutional right to establish a family unit means the right to establish the family unit in Israel. Indeed, the Israeli spouse has the constitutional right, which derives from the human dignity right, to live with his foreign spouse in Israel and to raise his children in Israel. The spouse's constitutional right to realize his family unit is, first and foremost, his right to do so in his own country. The right of an Israel to a family life means his right to realize it in Israel.

80. Establishing the right to a family life as a constitutional right is followed by the determination that any harm to this right must be carried out in accordance with the Basis Law: Human Dignity and Liberty – and only for considerations of great importance. This shall be done based on a solid evidentiary infrastructure which indicates such considerations. This determination imposes an increased duty on the Respondent, to be extra meticulous as to the existence of an administrative system, which shall ensure that the operation of his authority to deny applications for family unification brought before him, an authority which prejudices a protected constitutional right, shall only be carried out in cases in which there is full justification to do so.

81. There is no disagreement that the Respondent's actions critically and immediately prejudice the Petitioners' right to live together and to fulfill a family unit as they have chosen. Note well: this is not a family unit at the beginning of its journey, whose roots are still not planted deep in the State of Israel. The couple has been living together in Israel for approximately five years. Their children, who were born in Israel, are registered in the Israeli Population Registry. The life center of the family, from every possible perspective – is Israel. The immediate consequence of the Decision is the extraction of Petitioner 2 from Israel, and tearing him from his family members. Alternatively – his entire family will, unwillingly, be exiled together with him outside of Israel.

82. When these are the consequences of the authority's decision, special attention must be given to the entirety of the circumstances in each and every case. The procedural guarantees for the prevention of arbitrary, disproportionate or procedurally unfair decisions should be strictly observed. Proper procedures must be kept, through which the appropriate considerations will be taken into consideration. It is required to maintain that the deciding agency will be authorized to do so, will be aware of the relevant provisions of the law, and will make the decision based on up to date information. Finally, it is required to maintain that the decision is not based on irrelevant considerations.

The Harm to the Rights of the Petitioners' Children

83. The uncertainty with respect to Petitioner 2's status is accompanied with severe mental stress. It is unnecessary to mention that this uncertainty is affecting the couple's five children in the most severe way, whether by undermining their self-confidence or by undermining the entire family unit, in the presence of the everyday fear of the deportation of the father of the family from their home, and subsequently – from their life.

84. The right of children to live alongside their parents has been acknowledged as an elementary and constitutional right by the Supreme Court. See the statements made by Justice Goldberg in HCJ 1689/94 **Harari et al. v. the Minister of the Interior***, PDI* 51 (1) 15, on page 20 opposite the letter (b).

85. The International Convention on the Rights of the Child – which was ratified by Israel, and which receives increasing recognition as a complementary source for the rights of the child and as a guide for the interpretation of the "child's best interest" as a super-consideration in our legal system – sets forth a series of provisions which call for protection of the child's family unit. Thus, for example, Article 3(1) of the Convention states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, and whether by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration…

Accordingly, it is only appropriate for the Respondents, when they are about to make decisions the significance of which is crucial to the family's life, to

activate their authority in accordance with the best interests of the child as interpreted in the provisions of the Convention.

Conclusion

86. The family of an Israeli resident makes its home in Jerusalem. The couple manages its life in it for all intents and purposes. The children, who were born in the city, are registered in the Israel Population Registry. They are also studying in Jerusalem. This is where they are making their first social ties. When it is legally possible, the mother files an application for family unification with her spouse, a citizen of the West Bank. After nine months a reply is received from the Ministry of the Interior: the application is denied for security reasons.

87. In August 2004, a horrendous suicide attack is carried out in two buses in the city of Beer Sheva. After a short while it becomes clear that one of the suicide attackers is Petitioner 2's nephew. Petitioner 2's family in Hebron is devastated, by the death of one of its sons, and by the horrendous circumstances of the death. Petitioner 2 and his family members in Jerusalem are also shocked. Petitioner 2, a law abiding citizen, with no criminal or security record, is having a hard time understanding how this happened in his family. What Petitioner 2 does not know at this point, is that the horrendous attack will continue to haunt him for years later, through no fault of his own.

88. A denial of Petitioner 2's application solely based on the fact that his nephew carried out an attack – is illegal. It is also in contradiction to the purpose which is, at least allegedly, at the foundation of Section 3D of the Temporary Provision – prevention of a future relationship, which entails a threat, between the invitee and the family member which constitutes a security threat. Indeed how can such a relationship be present with a person who has been dead for over two years?

89. The object of clear procedures and criteria is to prevent, *inter alia*, decisions which are made arbitrarily, illogically, and in contradiction to provisions of the law, and while considering irrelevant considerations. An authority's decision, which is infected with so many flaws, is a direct result of flawed procedures and criteria, or even of the absence thereof.

90. Further to the contradiction of the provisions of the law, to the lack of using common sense and further to the consideration of irrelevant considerations – the decision in the case at bar is one which tears apart, in practice, a family unit in Israel. And this, without it being argued that any of the family members had any involvement in committing the abominable attack. Covered with the Respondent's cynical and vengeful decision, Petitioner 2's family member returns to haunt Petitioner 2 and the members of his household even to this very day.

91. **For all of these reasons, the Honorable Court is moved to issue an Order Nisi as requested in the outset of the petition, and after receiving the Respondents' reply to the Order Nisi, to make it absolute and to order the Respondents to pay the Petitioners' costs and legal fees.**

Jerusalem, May 30, 2007

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Adv. Yotam Ben-Hillel
Counsel for the Petitioners

[T.S. 37114]