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At the Supreme Court **HCJ 5875/07**
Sitting as the Hugh Court of Justice

In the matter of:

1. **_________ Kassem , ID Number _________**
2. **_________ Kassem, Jordanian Passport Number _________**
3. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger**

Represented by attorneys Ido Blum (Lic. No. 44538)
and/or Yossi Wolfson (Lic. No. 26174)
and/or Abeer Jubran (Lic. No. 443464)
and/or Yotam Ben-Hillel (Lic. No. 35418)
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and/or Anat Kidron (Lic. No. 37665)

from HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger whose address for service of process is:
4 Abu Obeidah Street, Jerusalem 97200
Tel. 02-6283555; Fax 02-6283555

The Petitioners

v.

1. **The State of Israel**
2. **Commanders of the Army Forces in the Occupied Territories**

The Respondents

Petition for an Order Nisi

A petition is hereby filed for an order nisi, which is directed at the respondents, and orders them to appear and to show cause:

A. Why they do not allow petitioner 2 to settle in the Territories as a permanent resident.

B. Why it is not determined that residents of the Territories are entitled to bring their non-resident spouses into the territories, and are also entitled to have such spouses

legally settle in the territories – all this where no individual security risk emanating from the foreign spouse exists which overrides these rights;

C. Why the right of residents of the territories to a shared family life with their spouses who are not registered in the territories is not fulfilled in practice – whether by an immediate willingness by the respondents to accept applications transferred by the Palestinian Authority for visitor permits, for extension of visitor permits and for family unification regarding spouses of residents of the Territories, without limitation, and to approve these application within reasonable time, where no overriding individual security risk emanating from the foreign spouse exists and whether by any other means .

In conjunction with this petition an application for a temporary injunction is hereby filed

<u>And these are the arguments for the petition</u> :

The Matter of the Petition in a Nutshell:

1. The petition concerns a couple who seek to lead a normal human life: a life of intimacy, of earning a livelihood and of child rearing. One of the spouses is a resident of the territories where he is registered. The other is a foreign subject.

2. For the past number of years, the respondents have been preventing couples such as the petitioners from leading a family life, as prescribed by law, in the territories. The respondents' policy is that the spousal bond is not, in and of itself, considered a criterion for approving visitor permits to the territories, for the extension of such permits or for the approval of family unification applications in the territories. Accordingly, the respondents refuse to receive applications for visitor permits or for family unification made on these grounds from factors from the Palestinian Authority - with the exception of a few isolated cases which are not necessarily different from the petitioners’ case, save for that fact that a petition in the matter has been filed with the honorable court. The respondents have also failed to create an alternative channel for the fulfillment of the basic right to family life .

3. The background of this petition is the ever extending period of time in which the processing of visitor permits and family unification for spouses of residents of the territories has been frozen. The prolonging of the freeze exacerbates its harmful effects.

4. Additionally against the backdrop of this petition is the judgment of the Honorable Court in HCJ 7052/03, *Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of the Interior* (hereinafter: the "**Adalah case**"). As we shall argue, in detail, below, following this judgment, it is no longer possible to claim that the petitioners do not have a right to arrange their status in the territories in order to fulfill their basic right to family life within them .

The parties and the facts

5. Petitioner 1, born in 1974 is a resident of Akaba, in the vicinity of Jenin. Petitioner 1[1] works as a policeman in Tubas . Petitioner 2 (hereinafter "the petitioner"), born in 1975, is a Jordanian citizen. The petitioner holds a degree in education, but today works as a homemaker.

6. The petitioners got to know each other through their families. The petitioner is from a Palestinian family that originally comes from Akaba, and is related through family ties to the family of petitioner 1. On 16 July 1994 the couple entered into the covenant of marriage in Jordan.

   The marriage document is attached hereto as **appendix** p/1.

7. The petitioners have three children. All three were born in the territories and were registered in the population registry of the territories.

   ___- ______ was born in 1997. Today he is ten years old and studies in fifth grade at the elementary school in Akaba.

   _____ was born in 2000. Today he is seven years old and studies in second grade at the elementary school in Akaba.

   ______ is a one month old infant, who is cared for at home by her mother.

   Copies of the birth certificates of the children are attached hereto as **appendices** p/2 – p/4.

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[1] In the original Hebrew both Petitioner 1 and Petitioner 2 are referred to as the petitioner, with male and female suffixes respectively. Since English does not distinguish between the genders in this matter, and since petitioner 2 gets more coverage I have decided to leave petitioner 1 standing and only refer to petitioner 2 as the petitioner- DF

8. On 22 April, 1996 the petitioner entered the territories on a visitor's permit that was issued by the Palestinian Authority with the approval of the respondents. The permit was extended until 21 September, 1992

   A copy of the visitor's permit is attached hereto as **appendix** p/5 .

9. In March 1998 petitioner 1 filed an application for family unification with the petitioner.

   A copy of the confirmation of filing the application is attached as **appendix** p/6.

10. The petitioner together with her husband built her family nest in the territories. She has integrated into life here where she has laid down her roots. Nonetheless the petitioner has elderly parents and many family members in Jordan ,including eight brothers and sisters. In light of the respondents' freeze policy, the petitioner fears leaving the territories. She knows that if she does so, she will not be able to return to her home, her spouse and her children. The experience gained by HaMoked – Center for the Defence of the Individual supports this fear. Faced with the inhuman dilemma of choosing between her own family life and a visit to her parents and relatives in Jordan, the petitioner has been forced to pay the price of separation from her parents .

11. Petitioner 3 is a human rights organization.

12. Respondent 1 holds the Territories in belligerent occupation and bears the duties and powers that flow therefrom. Respondent 2 administers the territories on behalf of respondent 1 and also serves as the administrative authorities therein .

Exhaustion of remedies

13. As detailed below, as of October 2000; the Respondents have frozen those (incomplete) arrangements which, until that point, allowed a measure of shared family life for residents of the territories with their foreign spouses. The freeze ,which was initially conceived of as temporary, has, with time, become permanent and has turned into the respondents' long term policy .
14. Petitioner 3 appealed to the Respondents on more than one occasion, through different channels, demanding the cancellation of the freeze policy.
15. As far back as 29 October 2000, the petitioners' counsel wrote to the Director of the High Court of Justice Department in the State Attorney's Office, demanding that the handling of matters related to residency in the territories be resumed. At that time, the

respondents argued that the delay in handling was due to the severing of a working relationship with the Palestinian side following the violent events which often took place in the vicinity of the coordination offices. The petitioners' counsel wrote that if there were specific cases which required coordination with the Palestinian Authority but such coordination did not take place despite sincere efforts by the Israeli authority, HaMoked would be willing to accept such lack of coordination as an interim response to its request. However, there was no room for a sweeping freeze of processing applications.

A copy of the letter from 29 October 2000 is attached hereto as p/7.

Following this letter, processing of certain requests, mostly for the purposes of information, was renewed, while the main area of residency remained frozen.

16. On 25 December 2002, the petitioners' counsel wrote to the State Attorney's Office requesting the cancellation of the freeze policy, at least in such cases where harm was being done to children or had affected any other specific groups within the population .

A copy of the letter from 25 December 2002 is attached hereto as P/8. The letter remains unanswered.

17. On 14 December 2003, the petitioners' counsel once again applied with a similar letter to the State Attorney's Office – which also remained unanswered.

A copy of the letter from 14 December 2003 is attached hereto as p/9.

18. On 21 February 2005, the petitioners' counsel again applied to the Director of the High Court of Justice Department in the State Attorney's Office, while at the same time dispatching copies of the letter to the Coordinator of Government Activities in the Territories, to the legal advisors of the military commanders in the Territories and to the Head of the International Law Division in the Military Advocate General's Office.

In the letter, the petitioners' counsel enumerated the constitutional rights of residents of the territories which were harmed as a result of the freeze policy. The petitioners' counsel noted that the freeze policy constituted an illegal freeze of life in the territories, contrary to the Respondents' obligations under customary international law as reflected in the judgments of the Honorable Court. It also constituted an improper

shirking of responsibility by an administrative authority. In the letter, the petitioners' counsel demanded the renewed handling of residency related issues, including applications for visitor permits and for family unification.

A copy of the letter from 21 February 2005 is attached hereto as P/10.

19. On 24 March 2005, the Director of the High Court of Justice Department in the State Attorney's Office forwarded the letter to the other addressees mentioned therein and requested their **urgent** attention.

A copy of the letter from 24 March 2005 is attached hereto as appendix p/11.

20. On 10 April 2005, the International Law Division in the Military Advocate General's Office replied that "currently inter-office staff work is underway for the examination of the continuing handling of the issue, against the backdrop of appeals by the Palestinian side. It is our intention to continue updating you on the developments in this matter and on decisions reached."

A copy of the letter from 10 April 2005 is attached hereto as p/12.

21. On 15 August 2005, within the framework of HCJ 7425/05, the State Attorney's Office relayed that: "Recently, decisions were taken regarding a relaxation of the policy regarding the population registry in the Judea and Samaria Region and the Gaza Strip, including all matters regarding the issuing of visitor permits to the area…which are likely to lead to changes in the policy of the Respondent in all matters regarding the issuing of visitor permits in the region "…

A copy of the notice from 15 August 2005 is attached hereto as **appendix** p/13.

22. On 20 December 2005, a meeting was held between representatives of HaMoked – Center for the Defence of the Individual and the coordinator of government activities in the territories. In this meeting, the coordinator said that the freeze on visitor permits had been removed and that criteria for the issuing of such permits, which included foreign spouses of residents of the territories, had been established. The coordinator further relayed that ahead of "disengagement", 5,000 foreign nationals staying in the Gaza Strip as visitors had been approved for permanent status.

A copy of the minutes of the meeting, signed by the aide to the Coordinator of Government Activities in the territories, from 27 December 2005, is attached hereto as appendix p/14.

In practice, HaMoked is unaware of any renewal in the processing of applications for visitor permits for spouses of residents of the territories. What was mentioned in the letter sent by the Coordinator did not materialize on the ground.

23. On 23 October 2006, the petitioners' counsel sent a detailed letter to the Minister of Defense regarding the criteria for family unification and for visitor permits in the territories. In the letter, the petitioners' counsel pointed to the illegality of the respondents' freeze policy and requested that the Minister of Defense urgently implement a policy according to which a spousal relationship is considered sufficient grounds for family unification and for visitor permits, subject (exclusively) to the absence of a high probability security risk emanating from the foreign spouse and from him or her alone.

Copies of the letter were sent to the Attorney General, the Director of the High Court of Justice Department at the State Attorney's Office, the Head of the International Law Division at the Military Advocate General's Office, the legal advisors of the Military Commanders in the Territories and the Head of the Civil Administration in the West Bank.

A copy of the letter from 23 October 2006 is attached hereto as p/15.

24. On 16 November 2006, the response by the aide to the Minister of Defense was received. The response places in doubt the Ministry staff's level of familiarity with the issue. According to the letter: "Permits for visits for humanitarian needs such as the death of parents, or, at the opposite end of the spectrum, attendance at weddings, have been given and will continue to be given" (the undersigned is unaware of any such permits and it seems that the term refers to permits to enter the Gaza Strip or to move between the Gaza Strip and the West Bank). On the issue of family unification, the letter refers HaMoked to the Israeli Ministry of the Interior (!), despite the fact that its letter dealt with entry into the territories and not into Israel. On the matter of visitor permits, it was claimed on the one hand that "dozens of visitor permits in the area were approved for the purpose of registering children" and on the other hand that "there is currently no contact between the State of Israel and Hamas," allegedly claiming that this is the reason it is impossible to approve applications for visitor

permits. If this is so, how have visitor permits for the purpose of registering children been and continue to be approved (as indeed they are)?

An embarrassing response indeed, in any case, it does not begin to answer the claims presented in the letter sent by the petitioners' counsel.

A copy of the response from 16 November 2006 is attached hereto as P/16.

25. To complete the picture, we shall note that according to the interim agreement which was enshrined in the military legislation in the territories and in Israeli law; visitors may enter the territories via visitor permits issued by the Palestinian Authority with Israel's approval or via visas issued by the Israeli Ministry of the Interior. In 2006, the respondents closed the second avenue - that of visas issued by the Ministry of the Interior, an avenue which primarily served visitors from western countries.

A copy of the letter from 29 November 2006 is attached hereto as **appendix** p/17.

Following international pressure, the respondents withdrew this policy and implemented a procedure regulating the issuing of such visas and their extension. According to the procedure, the visas may be extended either by submitting an application directly to the delegation of the Ministry of the Interior in Beit-El or by transferring such application to this delegation via the relevant Palestinian Authority office.

Among other things, the procedure declares that spouses of residents of the territories shall be entitled to visas and to their extension.

To the best knowledge of the petitioners, the implementation of this procedure on the ground has been, at best, partial. In any case, it provides a solution only for those whose entry into the territories was arranged trough the Ministry of the Interior. The freeze Israel has been imposing on visitor permits and family unification applications since 2000 remains in place.

The processing procedure published by the Coordinator of Government Activities in the territories is attached hereto as **appendix p**/18.

<u>Applications in the matter of the petitioning spouses</u>

26. On 4 April 2007, HaMoked- The Center for the Defense of the Individual wrote to the Legal Advisor of the Military Forces in the West Bank regarding the petitioners. The letter included a summary of the legal arguments that are in this petition and mentioned that the general issues relevant to the matter of the petitioners had already been raised in the many appeals made to the authorities over the last few years. In light of this, an urgent response to the letter was requested to prevent having to turn to the court.

Until the day of filing this petition no answer to the application has been given.

A copy of the letter of 4 April 2007 is attached hereto as appendix p/18.

27. Hamoked- Center for the Defense of the Individual has been in contact with the Palestinian Authority to explore the possibility of transferring the application in the matter of the petitioners via the Palestinian Authority to the Israeli authorities. Officials at the Palestinian Authority have informed HaMoked that it is pointless to make such an attempt and it is a wasted effort: The Israelis will refuse to receive such an application; they will not even bother refusing the application on the merits or to note in writing that it is being returned. Palestinian officials have even raised fears that an attempt to transfer applications that one knows in advance that the Israeli side will refuse to receive will lead to retaliatory steps from the Israeli side which will refuse to receive other unrelated applications.

The Palestinian Officials' fears have indeed materialized. On 4 February, 2007 the Palestinian Authority transferred an application in the matter of five couples, in the same situation as the present petitioners, to the Israeli side as a type of test-case. The application was transferred by Mr. Ayman Qandil, the relevant Palestinian official, to an official named Izik in Beit-El, along with other applications, through a messenger named Malek. There and then this Itzik differentiated between those transferred applications that would be handled and those that would be returned. The five applications in the matter of the couples who were in the same situation as the present petitioners were immediately returned to the messenger since they were not "humanitarian". They were returned without being stamped with a confirmation of their receipt and without any written refusal being submitted. This situation reflects the respondents' *modus operandi*: They do not process the applications and, as such, do not deny them – they simply refuse to receive them.

Historical background

28. Before delving into the legal issues, it is appropriate to briefly summarize the Respondents' policy regarding the right of residents of the Territories to family life with spouses who are not registered in the Territories.

Historical background – to October 2000

29. The story of the right to family life held by residents of the Occupied Territories married to persons who do not hold Occupied Territories identification is as old as the occupation itself.

30. In the years following the seizure of the territories, Israel approved applications submitted by residents of the territories for family unification with their spouses. This policy was surely based on article 26 of the Fourth Geneva Convention, as well as on recognition of the acute humanitarian need for family unification for many residents who had been torn apart from their families as a result of the war and the new border created between the two banks of the Jordan River.

31. This policy was gradually restricted beginning in 1973 in light of the approach that had developed, according to which family unification was not a right to be enjoyed by residents, but rather a courtesy extended to them. Rulings from that era did not interfere with the approach taken by the authorities, but did impose two obligations on them:

   a. An individual examination of each and every application (HCJ 13/86, *Shahin v. IDF Commander in the Judea and Samaria Region*, *Piskei Din* 41(1), 216).

   b. The lawful application of discretion, in accordance with the principles of Administrative Law – otherwise the Court would intervene in the decision itself (HCJ 802/79, *Samara v. Commander of the Judea and Samaria Region*, *Piskei Din* 34(4) 1).

32. As we shall demonstrate, today, it is no longer disputed that the right to family unification is a fundamental right, that it is an essential element of human dignity, and that it is not a courtesy. However, the policy employed by the authorities today is yet more restrictive than it was in the 1970's and 1980's, and in fact, there is no individual examination of applications.

33. At the end of the 1980's, in the context of the first intifada, Israel launched a deportation campaign to expel spouses and children of residents of the Territories who were not registered in the population registry and did not have a valid visitor permit. News of military jeeps patrolling villages around Ramallah at night, forcibly

removing women and children from their homes and sending them to the border at dawn began to make waves. When tales of this cruelty reached the Washington Post in January 1990, then Defense Minister, Yitzhak Rabin RIP, decided to suspend the deportation campaign. The status of these families was later "laundered".

34. Shortly thereafter, in the context of HCJ 1979/90, *'Awashra v. IDF Commander in the Judea and Samaria Region*, the policies employed by the authorities concerning family unification came under scrutiny once more. The petitioners in that case – residents of the Territories, the National Council for the Child and the Association for Civil Rights in Israel – claimed, *inter alia*, that there was a right to family unification in the Territories – arising both from the spouses' right to live together and from the children's right to live with their parents and the parents' duty to care for their children. The Petitioners further claimed that the Respondents' policy contravened Jordanian legislation, which had not been amended; that it was based on invalid demographic considerations and that it had no basis in the relevant considerations which must guide a military commander, i.e. – security considerations on the one hand and diligent care for the good of the population on the other.

35. Following submission of the petition, the authorities announced a change of policy. Shared family life in the Territories no longer depended on exceptional humanitarian circumstances or on government interests in granting it – the existence of a family and security clearance were sufficient.

> **"…in the context of the policy implemented today, no obstacle impedes the Petitioners' filing applications on behalf of their wives and children who are outside the Region, and, if no specific security grounds are found for rejection, the women and children will be allowed to enter the Region and remain therein with the Petitioners."**[2]

36. In view of this policy change, the Court rejected the petitions:

> **Without stating an opinion as to whether it is necessary for us to re-examine case law on this matter, and even if we assume, without ruling, that it is so, we are of the opinion that the matter is not yet ready for an *order nisi* and that the new policy as well as the developments that are to follow should be put to the test.**

[2] Notice by the Attorney General in HCJ 1979/90 mentioned above.

HCJ 1979/90, *'Awashra v. IDF Commander in Judea and Samaria*, *Takdin Elyon* 90(2), 358.

37. These events took place at the height of the first intifada.

38. Other petitions followed the 'Awashra case. The Respondents' policy regarding family unification developed, via the handling of these petitions, during the first half of the 1990's. This policy reflected recognition that marriage to a resident of the Territories was a criterion for settling in them – whether through long term visitor permits or residency status ("family unification").

The new policy was formulated via HCJ 4491/91, *Abu Sirhan v. Commander of the IDF Forces in the Judea and Samaria Region* and 63 additional petitions and via HCJ 4465/92, *Hadra v. Commander of the IDF Forces in the Judea and Samaria Region* and 20 additional petitions. The petitions were submitted by HaMoked – Center for the Defence of the Individual, the Association for Civil Rights in Israel and the National Council for the Child.

All these petitions were erased following the State's pledges which are outlined below.

39. Following is the outline of the policy as it was eventually formalized:

Regarding families which were separated at the time the petitions were filed – arrangements were established which entitled the foreign spouses to remain in the Territories permanently. The arrangements applied to spouses of residents of the Territories who were physically present in the Territories at some time during the period beginning with the deportation campaign (which ceased in 1990) and ending at the end of the 1993 summer visits. The eligibility was for long term visitor permits (which were extended every six months). These permits were designed to create a status which is, in many ways, similar to that of residency. Those who were present in the area in the first part of this period (ending at the end of the 1992 summer visits) are eligible for full residency ("family unification"), subject to individual security clearance.

As for the future, it was established that the criteria for granting status (family unification) would be amended. While in the past the only criteria were government or humanitarian considerations, it was established that marriage to a resident of the Territories in itself would be a criterion for the approval of a family unification application. At the same time, it was determined that applications for family

unification would be approved subject to a quota of 2,000 applications per year. The quota was later increased to 4,000 applications per year.

40. The recognition of marriage as grounds for family unification was incorporated into the Oslo Accords and extended beyond the nuclear family. The sides to the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Washington D.C., September 28, 1995) agreed as follows:

> **…[T]he Palestinian side has the right, with the prior approval of Israel, to grant permanent residency in the West Bank and the Gaza Strip to:**
>
> **a. […]**
>
> **b. spouses and children of Palestinian residents; and**
>
> **c. other persons, for humanitarian reasons, in order to promote and upgrade family reunification.**
>
> (article 28(11) of Appendix 1 of the Protocol Concerning Civil Affairs, Annex III of the agreement).

41. The provisions of the Interim Agreements were incorporated into the Region's legislation in Minshar Zeva'i [military proclamation] (No. 7), issued by the Military Commander on November 23, 1995.

42. In practice, the policy to which the Respondents pledged before the High Court of Justice continued, with only the processing procedures changing: the Palestinian Authority now served as an intermediary between the Respondents and the population.

Family unification was granted to those who belonged to and have since come to be known as the "first HCJ population" (outside the quota) and to other spouses (within the quota). A large group of spouses lived in the Territories with visitor permits which were periodically extended.

In addition, residency status was granted to a large group of functionaries and their families who arrived in the Territories with the establishment of the Palestinian Authority. Residency status was also given to family members of individuals expelled from the Territories in the early years of the occupation and whose return was approved at that time.

As for visitor permits: under the criteria applied in the end of the 1990's, tens of thousands of visitors entered the Territories each year. According to data provided by the State, more than 66,000 visitors entered the Territories with visitor permits in 1998 alone.[3] In the first eleven months of 1999, some 64,000 visitors entered.[4]

43. For a comprehensive review of family unification until the end of the 1990's see: HaMoked – Center for the Defence of the Individual and B'Tselem, **Families Torn Apart: Separation of Palestinian Families in the Occupied Territories** (Jerusalem, July 1999).

The report is available on the internet at
http://www.hamoked.org.il/items/10700_eng.pdf

The policy since October 2000: deep freeze

44. Following the outbreak of the intifada in late September 2000, the Respondents froze all processing of visitor permits and family unification applications.

Processing of applications received by the Israeli Military Administration previously was halted. These applications have remained abandoned ever since. **They have not been rejected. They are not being considered**.

Concurrently, the Military Commander has severed his ties with the Palestinian Authority on these issues and has refused to receive new applications for visitor permits and family unification for processing.

Under the existing arrangements, residents must file their applications with the offices of the Palestinian Authority, which transfer them to the Israeli authorities. On one hand, the Military Commander refuses to accept applications from the Palestinian Authority. On the other hand, he insists on the honor of the Authority and refuses to open a direct line of communication (bypassing the Palestinian Authority) for receiving application from residents. The result is a blanket refusal to receive applications, consider them and decide their fate. **The applications are not rejected – they are not considered**.

45. On September 6, 2005, following a number of petitions filed by HaMoked – Center for the Defence of the Individual on the matter, the Respondents announced that they

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[3] Response given by the Minister of Defense to MK Zehava Galon's parliamentary query, September 9, 1999.

[4] This information was presented by Lieut-Col Orly Malka in a Knesset Committee on the Rights of the Child session on December 6, 1999.

would renew the processing of visitor permit applications for children of residents under sixteen years of age. These are children who are entitled to be registered in the population registry. The authority to register them lies with the Palestinian Authority and is not subject to Israeli approval. However, due to Israeli imposed procedures, registration is conditional upon the physical presence of the child in the Territories at the time of registration. Children over the age of five who are abroad require an Israeli approved visitor permit to enter the Territories. From October 2000 until the change in policy, no such permits were issued. In one case known to HaMoked, a visitor permit was issued on condition that the child in question not register in the population registry.

46. For a short period of time in the autumn of 2005, the Respondents agreed, to the best knowledge of Petitioner 3, to receive and approve applications for visitor permits for spouses of the Territories, so long as the foreign spouse was not a national of an Arab country and so long as the couple had children. Petitioner 3 has no knowledge of how many such requests, if any, were approved. In any case, this policy was later cancelled.

47. As mentioned above, visitors may enter the Territories via visitor permits issued by the Palestinian Authority with Israel's authorization, or via visas issued by the Israeli Ministry of the Interior. The former avenue was frozen in 2000. Over the course of 2006, the Respondents also froze the latter avenue, visas by the Israeli Ministry of the Interior, which was mostly used by visitors from western countries. Following international pressure, the Respondents retracted this policy and implemented a procedure regulating the issuance of such visas and their extension. Among other things, the procedure states that spouses of residents of the Territories will be entitled to visas and their extension.

48. What is relevant to the matter before us is that the prevention of forced separation between spouses and between parents and their children is still not considered sufficient grounds for issuing a visitor permit or approving an application for family unification.

<u>The policy of the Respondent and petitions before this Honorable Court</u>

49. In isolated cases, usually following petitions filed before this Honorable Court, the Respondents have agreed to receive and approve applications for visitor permits where exceptional humanitarian circumstances existed. In these cases, the Palestinian Authority succeeded in forwarding the applications to the Israeli side: Where a

document indicating that approval of the application had already been assured existed, the Israeli officials agreed to receive and later approve the applications. This was the case, for example, in HCJ 9926/02 *'Adam v. Commander of the IDF Forces in the West Bank*; HCJ 6105/03 *'Amaira v. Commander of the IDF Forces in the West Bank*; HCJ 9736/03 *Massimi v. Commander of the IDF Forces in the West Bank*; HCJ 10004/03 *Drawish v. Commander of the IDF Forces in the West Bank* and HCJ 11191/03 *Mafarjeh v. Commander of the IDF Forces in the West Bank*. In these (and other) petitions, the Respondents agreed, following submission of the petition, to receive and approve applications for visitor permits by wives of residents of the Territories. Following the consent given within the context of the petitions, the appropriate applications were filed with the Palestinian Authority, forwarded to the Respondent and approved; and the wives entered the Territories.

50. Such was the case regarding family unification applications. When they so wished, the Respondents notified the Court that they would be willing to examine an application for family unification if such were transferred to them by the Palestinian Authority. On the basis of such agreement and only on its basis did the Palestinian side succeed in transferring the application to the Respondents, who then approved it (HCJ 5203/05, *Muhammad v. The State of Israel*).

51. In other cases, petitions to this Honorable Court did not succeed. These were petitions by persons the Respondents wished to expel from the Territories because their visitor permits had expired. In support of the request to prevent their expulsion, the Petitioners claimed that they had submitted applications for family unification at the offices of the Palestinian Authority. In these cases, the Respondents did not deviate from their policy and did not agree, following the petitions, to receive the relevant applications.

These petitions were rejected after the State claimed that the Palestinian Authority had not forwarded the applications to the Israeli side. The Court ruled that the Israeli side was not the appropriate litigant in those petitions: The applications for family unification never reached the stage necessitating the Respondents exercise their discretion.

In light of this reasoning, it was unnecessary to review the Respondents' general policy within the context of those petitions.

52. Thus, for example, it was stated that –

> **This Court has ruled, on several occasions, that so long as the Palestinian Authority had not finished the processing of applications of the sort filed by the Respondent and so long as such applications had not been forwarded for approval by Israel – the State of Israel is not the addressee of the Petitioner and any complaint in this matter should be addressed to the Palestinian Authority.** HCJ 6788/02 *Qinana v. Commander of the IDF Forces in the Judea and Samaria Region, Takdin Elyon 2003(2)* 1865, emphasis added.

And in another matter:

> **The Court has repeatedly ruled that there is no cause to interfere with the decision of the Respondents so long as the applications had not been forwarded to Israel by the Palestinian Authority. The addressee for those who complain of not being given leave to enter the Territories is not Israel but the Palestinian Authority …** HCJ 2497/04 *Yassin v. The Civil Administration in the Judea and Samaria Region (unpublished)*, emphasis added.

In a number of cases, the Court has mentioned the Respondents' policy of not handling applications for family unification and visitor permits. However, the Court chose not to rule on the legality of this policy. Thus, for example, it was stated that:

> **In the absence of an appeal to Israel, we cannot provide a remedy for the Petitioners. In this state of affairs, we did not find cause to consider the claims made against the Respondents' policy of ceasing to handle applications for family unification in the Region since the beginning of the violence in September 2005** [thus in the original text, it should read 2000, Y.W.] HCJ 5919/05 *AlSalam v. Commander of the IDF Forces, Menasheh Division Commander, Takdin Elyon 2005(4)* 2671, p. 2672.

The veil must be lifted: The Respondents determine which applications will be processed

53. Within the context of the current petition, we seek to lift the veil off the reason why family unification applications did not reach the Israeli side and were not processed by it. **The general policy employed by the State of Israel is not to accept**

applications for visitor permits and family unification – in any case not ones the grounds for which are marriage and shared parenting. This policy dictates which applications reach (or do not reach) the Respondents for processing.

The Respondents are the ones who screen the applications that reach them. They determine which applications Palestinian Authority officials may or may not transfer to them.

Thus, so long as they did not wish to receive applications for visitor permits for the population registry, the Respondents refused to receive such applications. Was the Palestinian Authority indeed the only addressee for these children's complaints? Was it not the case that **as soon as the Military Commander wished it, the obstacle to transferring and approving such applications was removed?**

Thus, so long as they do not wish to do so, the Respondents refuse to receive applications for visitor permits and family unification while, before this Honorable Court, they point their finger at the Palestinian Authority. **But if he is so inclined, and the Military Commander chooses to consider the application, his word is like a magic code which unlocks the gate that has thus far barred the transferring of the application from the Palestinian side to him – and its approval – as was the case in the above mentioned and other petitions.**

The Respondents have determined that applications concerning the shared life of couples do not match the criteria – neither those for approving the application nor indeed those for receiving it for processing. In doing so, the Respondents deviate even from the rules established in the 1980's, when family unification was considered a courtesy, rules according to which a resident is entitled to have his application considered on its merits and have the proper administrative discretion applied thereto.

54. The freeze policy is an Israeli policy. The key to allowing the family life of the petitioners and of others who share their circumstances is in Israel's hands. On this matter, an affidavit by Brigadier General (reserves) Ilan Paz ho was the head of the Civil Administration in the West Bank between 2002 and 2005 is attached hereto. In his affidavit, Brigadier General (reserves) Paz surveys the issue and states that:

> **The claim which has been put forward lately, that the problem stems from the rift with the Hamas government is unacceptable to me, since the restrictions existed (albeit in a more restricted manner) even before the Hamas took power, and even now,**

> **Israel fully controls the external borders (Ben Gurion airport/Allenby and, to some extent, Rafah). This is an entirely Israeli decision which does not really necessitate cooperation with the authorities of the other side. It is a decision guided by political considerations of the State of Israel, which I have already mentioned.**

A copy of the affidavit is attached hereto as **P/22.**

A legitimate response to illegal aliens?

55. We shall address the purpose of the freeze policy in detail in the legal section of this petition.

However, it is appropriate to do away with one of the justifications presented for this policy at this early stage. This justification was presented, in our opinion, merely as lip service. It is not and cannot be the reason for the policy.

We refer to the claim that the policy is a response to the Palestinian Authority's failure to remove persons whose visitor permits expired from the Territories. This claim was presented in the State's responses to petitions brought before this Honorable Court.

This claim is not in keeping with the fact that the policy was explicitly implemented **following the outbreak of the intifida** and with no relation to the time when the phenomenon of illegal aliens was ostensibly discovered.

The claim is not in keeping with the fact that since the outbreak of the intifada the Palestinian Police was, for all intents and purposes, paralyzed (as a result, *inter alia*, of deliberate actions by Israel) to the point where it became difficult for it to handle criminal offenses *per-se*. One cannot assume that in this particular situation, Israel expects the Palestinian Police to devote its efforts to removing persons whose visitor permits have expired. In order to effectively carry out such a project inside Israel, an entire police branch was established – the Immigration Police.

Moreover, we have already seen that Israel halted the campaign it undertook in 1989 and 1990 to expel spouses of residents who had remained in the Territories after their visitor permits had expired as a result of international pressure. Does Israel truly expect the Palestinian Authority to do what it did not wish to do itself?

Over and above all this: does anyone seriously believe that a general phenomenon of illegal aliens can justify a blanket denial of the personal rights of residents to a shared life with their spouses? It cannot be. Is it possible to imagine the phenomenon of illegal aliens in Israel serving as grounds for the complete cessation of family unification proceedings for the citizens of Israel? Indeed, it has been ruled that even if the spouse himself was an illegal alien in Israel, he must not be removed from it, even for a limited time while the family unification application was being considered (HCJ 3648/97 *Stemka v. Minister of the Interior, Piskei Din* 53(2), 728; AdmA 4614/05, *The State of Israel v. Oren, Takdin Elyon* 2006(1), 3756). Let us remember: the demand made of an illegal alien to leave the country for a limited time while his application for family unification was being considered was justified by the need to confront a wide phenomenon of illegal aliens. The demand was found to be disproportionate due to its infringement on the shared life of the couple – despite the fact that it was temporary and that the right to unite in Israel itself was not denied. It is all the clearer that a flat refusal to consider applications for family unification, if intended to deal with the phenomenon of illegal alients, could not stand the test of proportionality.

This suffices.

Legal argument

56. The matter of this petition can be conveniently decided in accordance with the rules established in HCJ 7052/03, *Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of the Interior* (hereinafter: **the case of Adalah**).

57. In that case, the issue was a legal provision which placed a flat ban on granting status in Israel to residents of the Territories married to residents and citizens of Israel.

The Court was requested to determine the scope of the right to family life. Does it encompass the right of a person who marries a foreign national to establish the family unit in his place of residency when it is possible for him to unite with his relative in a different country?

The Court was further requested to determine whether a blanket restriction of this right, as set in the Law at issue in that case, was proportional.

58. First and foremost, we must note the differences between the present case and the case of Adalah. Then, we shall analyze the rules established in the case of Adalah and apply them to our matter.

The case of Adalah and the freeze on visitor permits to the Territories – the differences

59. There are a number of manifest differences between the present case and the case of Adalah.

    a. First and foremost, **the scope of the prohibition in the case before us is much wider**. In the case of Adalah, the Law at issue prohibited entry into Israel only for residents of the Territories. The Temporary Order reviewed therein did not prevent Israeli residents from uniting with spouses from Jordan, Egypt, other Arab countries or any other country. In this case – <u>the same people Israel is prepared to admit into its own territory and to whom it is even willing to award citizenship, if they are married to Israelis, are absolutely barred from entering the Territories</u>!

    b. The Temporary Order was justified on security grounds, which a majority of the Justices presiding accepted. According to the State's claim, awarding status to residents of the Territories is inherently dangerous. **Grounds such as these are not presented in the present case and indeed cannot be presented**. What inherent danger can be claimed in the case of visitors from countries whose subjects are allowed to enter Israel and receive citizenship in it even under the Temporary Order?

    c. In the case of Adalah, the Petitioners challenged a **legal provision** with strong standing, one in which the Court intervenes only after applying great caution. In the case before us, it is a **policy** implemented by the Military Commander. It has not been grounded in a proper order and may be subjected to much more rigorous judicial review.

    d. In the case of Adalah, the policy was formulated by the Knesset, **the sovereign**, which enjoys wide discretion in establishing legal and social arrangements. At issue before us is a decision by **a military commander** in an occupied territory, who has not a shred of sovereignty. The Military Commander acts only as a trustee who controls the territory temporarily and is limited to a narrow range of considerations which revolve around the

> tension between security needs and the good of the population – and nothing further.

The Adalah rule – the right to family unification in the country of citizenship

60. The most important rule established in the Adalah case, by a majority of Justices of this Honourable Court, is that a person has a right to family life. This right includes, in cases of a spousal relationship with a foreign national, the right to establish the family home in the country of citizenship. It was further established that this right, in this scope, is a constitutional right.

61. Eight Justices maintained this position.

Thus President Barak in article 27 of his opinion:

> **The right to family life is not limited to the right to marry and have children. The right to family life is also the right to a shared family life. It is the right of the Israeli spouse to maintain his family life in Israel. If the Israeli spouse is not allowed to lead a family life in Israel with the foreign spouse, this right is infringed. He is thus forced to choose between immigration outside Israel and separation from his spouse. Justice M. Cheshin observed this in the case of Stemka. Justice M. Cheshin recognizes the "fundamental right gained by the individual – any individual – to marry and establish a family" (p. 782). In his opinion, Justice Cheshin notes:**
>
> > **The State of Israel recognizes the right of the citizen to choose a partner as he wishes and establish, with him, a family in Israel. Israel is committed to protecting the family unit under international conventions … despite the fact that these conventions do not require one policy or another regarding family unification - Israel has recognized and still recognizes - its duty to provide protection for the family unit including by means of issuing permits for family unification. Thus, Israel has attached itself to the most enlightened of states, those states which recognize - subject to limitations of national security, public peace and public welfare – the right of family**

> **members to live together in the territory of their choice" (HCJ 3648/97, *Stamka et al. v. Minister of the Interior et al.*, Piskei Din 53(2) 728, 787).**

And the president reemphasizes in article 34 of his opinion:

> **Indeed, the constitutional right of the Israeli spouse – a right which stems from the core of human dignity as a constitutional right – is "to live together in the territory of their choice".**

The right to family unification also stems from the parents' right to raise their children and the children's right to develop under the guardianship of both their parents. In that regard –

> **Respect for the family unit includes, therefore, two aspects. The first aspect is the right of the Israeli parent to raise his child in his country. This is the right of the Israeli parent to fully realize his parenthood, the right to enjoy the connection with his child and not to part with him. It is his right to raise his child in his house, in his country. It is the right of the parent not to be forced to leave Israel as a condition for realizing his parenthood. It is based on the autonomy and privacy of the family unit. This right is also violated if the minor child of the parent is not allowed to live with him in Israel. The other aspect is the child's right to family life. It is based on the independent recognition of the human rights of the child. These rights are, in principal, bestowed upon any person as such, adults and minors alike. The child "is a human with rights and needs of his own" (FamAR 377/05, Jane and John Doe, the Parents Designated to Adopt the Minor v. The Birth Parents et al. (unpublished)). The child has a right to grow up in a complete, stable family unit. His welfare requires that he not be separated from his parents and that he be raised by both of them. Indeed, it is difficult to overstate the importance of the connection between a child and each of his parents. The continuity and constancy of the relationship with the parents are important elements of a child's proper development. From the child's viewpoint, separation from one parent might even be conceived as abandonment and have an**

> **affect on his emotional development. Indeed "the welfare of the children requires that they be raised by their mother and father in a stable, loving family unit. The separation of the parents involves a degree of separation between one parent and his children" (CAP 4575/00, Jane Doe v. John Doe, Piskei Din 55(2) 321, 331).**

(article 28 of the opinion).

And thus Justice (as her title was then) Dorit Beinish in article 7 of her opinion:

> **A person's fundamental right to choose his spouse and establish a family unit with him in his country is part and parcel to his dignity and the essence of his personality.**

Justice Jubran explains, in article 7 of his opinion that –

> **It seems that, in our day and age, there are but few choices in which a person realizes his free will such as the choice of the person with whom to share his life, establish his family and raise his children. In choosing a spouse, in marrying him, a person expresses his personality and realizes one of the central elements of his personal autonomy. In creating a family, a person shapes the way in which he lives his life and builds his private world. Therefore, in protecting the right to family life, the Law protects the citizen's most basic freedom to live his life as an autonomous person, free to make his own choices.**

And in article 10 of his opinion, Justice Jubran concludes:

> **A shared life is not a characteristic which lies at the margins of the right to family life, but is one of its most significant components, if not the most significant of them. Thus, an infringement on a person's ability to lead a shared life along with his spouse is, in fact, an infringement of the very essence of his family life; denying a person the ability to maintain a shared life with his spouse in Israel is tantamount to denying his right to a family life in Israel. This infringement strikes at the core of the person as a free citizen. Note: it is not just infringement of one of**

the aspects of the constitutional right to maintain family life but the complete denial of this right, and must be reviewed as such.

Justice Hayut states in article 4 of her opinion that –

> **A person's right to choose the partner with whom he wishes to establish a family and his right to establish his home in the country where he lives, are, in my view, human rights of the first degree. They embody the essence of a person's being and dignity as a human being and his liberty as an individual in its deepest sense.**

Whereas Justice Procaccia agrees (in article 1 of her opinion) that the right to family life is part and parcel to human dignity and that this right is violated when an Israeli is barred from exercising it in the country. And thus writes the Honorable Justice in article 6 of her opinion:

> **Alongside a person's right for protection of his life and its sanctity, there is constitutional protection of a person's right to realize the meaning and the essence of life. The right to a family is the essence of life, without which a person's ability to arrive at self realization and actualization is impaired. Without protection of the right to a family, a person's self dignity is injured, his right to personal autonomy is diminished, and his ability to tie his fate with that of his spouse and children, and maintain his life as part of a shared fate with them are prevented. Among human rights, the right of the individual to a family is of the highest grade. It is greater in import than the right to property, the freedom to choose one's occupation and even the right to privacy and individual privacy. It reflects the essence of a person's being and the manifestation of his selfness.**

Justice Adiel states in article 3 of his opinion:

As for the right to family life, in view of its proximity to the core of the right to dignity, its central role in realizing the individual's autonomy and shaping his life, as well as former rulings by this Court mentioned in the President's opinion, I accept that the right of the Israeli spouse to family life in Israel together with his

foreign spouse, does indeed come within the scope of the right to human dignity in its meaning under Basic Law: Human Dignity and Freedom.

Justice Rivlin establishes in article 8 of his opinion:

> **The right to realize family life is a fundamental right. Its denial violates human dignity. Its denial impairs the individual's autonomy to marry according to his wishes and to establish a family – in any case, it impairs freedom. This violation of freedom is no less severe than the violation of human dignity (on the restriction of the right to marry as a violation of freedom see the words of Justice Warren in the instructive judgment in the matter of Loving v. Virginia, 355 U.S. 1 (1967). It severely impairs the basic ability of an individual to shape the story of his life. Israeli law recognizes the Israeli citizen's right to family life. The right to family life means also the right to a shared family life, under the same roof. The right to family life is not just the right of the parents. It is also the right of the child born to his parents. The right to family life is, therefore, protected today in the decrees of the Basic Law as part of the fundamental right to freedom and as part of the fundamental right to dignity.**

Justice Rivlin proceeds to denounce the attempt to separate the right to family life into a "nucleus" and a "periphery" where the right to realize family life without emigrating is at the "periphery" of the right.

Whereas Justice Levy states (in article 7 of his opinion):

> **Two constitutional rights of the Israeli spouse wishing to unite with his Palestinian spouse are infringed by the legislative arrangements at issue in the petitions before us, and both derive from the right to human dignity included in Basic Law: Human Dignity and Liberty. One is a person's right to family life, which contains two secondary rights without which it seems to lack substance – the basic right of a person to marry whomever he chooses in accordance with his wishes and worldview, and his and his family's right to be given leave to conduct their lives**

together, including in terms of the geographic location of the family unit, which they have chosen for themselves."

The rule concerning flat bans

62. In the Adalah case, the Court repeats the known rule that a flat ban on rights which is not based on individual examination of each case is (at least ostensibly) invalid and suspected as disproportional.

63. A comprehensive review of the Law concerning flat bans can be found in articles 69 to 73 of the President's opinion. The President notes, *inter alia*:

> **The necessity to choose the least restrictive measure often prevents the use of a flat ban. The reasoning for this is that in many cases, the employment of specific individual considerations achieves the proper purpose whilst using the measures which are least restrictive of the human right. This principal is accepted in the judgments of the Supreme Court (see the Ben Atiya case, p. 15; the Stemka case, p. 779). One of the cases involved a flat ban which prevented candidates over the age of 35 from joining the Police Forces. It was ruled that the ban does not uphold the requirement to choose the least restrictive measure according to the test of proportionality. In my opinion I noted that:**
>
> **The employer would be hard pressed to live up to the 'test of the least restrictive measure' if he does not have strong arguments to persuade that an individual test would prevent the realization of the proper purpose which he seeks to achieve" (HCJ 6778/97, *The Association of Civil Rights in Israel v. The Minister of Public Security*, Piskei Din 358(2) 358, p. 367).**
>
> **In another case, a regulation prohibiting the issuance of press cards to Palestinian journalists was cancelled. In her opinion, Justice Dorner noted:**
>
> **Refusal to award a press card with no individual examination, due to an inherent danger posed by all Palestinian journalists and residents of the Region, including those entitled to enter Israel and work in it – is**

the most restrictive measure possible. This measure strongly injures the interest of free press. It could have been prevented through individual, justified, security examinations in order to dispel the personal danger emanating from residents of the Region, inasmuch as such danger does emanate from residents who have successfully withstood the examinations required for receiving permits to enter Israel and work there." (the Saif case, p. 77).

64. The President proceeds and presents comparative law:

A flat ban on a right which is not based on individual examination is suspect as a disproportional measure. So it is in our own Law. So it is in comparative law (see N. Emiliou, <u>The Principle of Proportionality in European Law: A Comparative Study</u>, 30, 99 (1996); hereinafter Emiloiu). This is also the accepted approach of the European Court of Human Rights. Thus, for example, in the <u>Campbell v. United Kingdom</u> case (15 EHRR 137 (1993)) it was ruled that a British law which indiscriminately allowed the examination of correspondence prisoners received from their advocates violated the right to privacy enshrined in article 8 of the European Convention. It was ruled that examinations based on individual suspicions would suffice in order to achieve the security purpose at the root of the law. This is so also in European Community Law. The European directive which establishes the right of the citizens of member states to family unification does, in some cases, allow deviation from its provisions, but this only on condition that the interference with the right is proportional and based on a real, tangible, individual threat (article 27(2)):

Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. … The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are

isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

65. And so also in American constitutional law:

> **American constitutional law recognizes proportionality, in the sense of the least restrictive measure, as a condition for the constitutionality of interference with a fundamental right. Interference with fundamental rights (such as freedom of expression, religious freedom, freedom of movement and the prohibition on discrimination) may be constitutional so long as it withstands strict scrutiny. Among the elements of this scrutiny is the requirement for the State to choose the least restrictive of the possible measures for realizing the public purpose (see L. Tribe, American Constitutional Law (2nd ed. 1988) 1037-8, 1451-1482; E. Chemerinsky, Constitutional Law (1997), 532). In interpreting this requirement, the Supreme Court determined that a condition for compliance with the least restrictive measure requirement is that the interference with the fundamental right be carried out on the basis of individualized considerations and not on the basis of a flat ban.**

66. Similar matters were established, with the agreement of nine Justices in the matter of the amendment to the Civil Wrongs (Liability of State) Law.[5] Also in the matter of Adalah, this was undisputed among the Justices of the Supreme Court.

Thus, for example, the Deputy President Cheshin (retired) states that –

> **The results of collective infringement are severe and harmful and a democratic state must shun it.** (article 115 of his opinion).

Whereas Justice Naor writes in article 20 of her opinion:

> **I do not dispute the words of my colleague the President, according to which: "a sweeping restriction of a right which is not based on individual examination is a measure suspect of disproportionality" (article 70 of the President's opinion). As a rule, I accept that infringement of a fundamental right is suspect**

[5] HCJ 8276/05, *Adalah v. The Minister of Defense*, article 37 of the judgment.

as disproportionate if it is carried out on a sweeping basis and not on the basis of individual examination.

An exception to this rule, according to Justice Naor, is when the reasoning for the flat ban is the impossibility to conduct individual examinations – yet this exception is irrelevant here since the matter of this petition is the entry into the Territories of the same group of people whose entry into Israel, under similar circumstances, is allowed, and in relation to which no claim of difficulty to conduct individual examinations has been made.

67. There is an inherently de-humanizing aspect to sweeping measures which are not based on individualized examination. The Honorable Justice Procaccia alludes to this in the matter of Adalah, when mentioning the imprisonment of American citizens of Japanese descent in camps:

> **The American Supreme Court majority opinion in the matter of Korematsu is considered by many to be one of the darkest chapters in the history of constitutionalism in western countries…**
>
> **The circumstances of that case are entirely different from the ones before us, but the spirit running through the constitutional perception applied in the majority opinion there is not foreign to the arguments presented by the State in the matter before us. We shall keep from committing similar errors. We shall refrain from causing harm to an entire public living among us which is entitled to constitutional protection of its rights; we shall safeguard our lives by means of individualized controls, even if this increases the load with which we are burdened, and even if it requires leaving some margin of probable danger. Thus we shall protect not only our lives, but the values by which we lead them. (HCJ 5627/05, Saif v. Government Press Office, Piksei Din 58(5) 70, 77).** (article 21 of her opinion).

If this is so when the flat ban is justified on security grounds, on the grounds of protecting national security and civilian life, then all the more so when such considerations are not even placed on the balance.

<u>The Adalah rule through the norms obligating the Military Commander</u>

68. Three normative systems obligate the Military Commander.

As an Israeli public authority, the Military Commander carries with him the norms of Israeli Pubic Law, including the commitment to human rights and the prohibition on infringing on them in a disproportionate manner. See for example, HCJ 393/82 *Jam'iat Ascan Almaalamon v. The Commander of the IDF Forces in the Judea and Samaria Region, Piskei Din* 37 (4) 785; HCJ 10356/02 *Hess v. Commander of the IDF Forces in the West Bank, Piskei Din* 58(3), 443; HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel, Piskei Din* 58(5), 807.

The Respondent is also obligated to act in accordance with international human rights law and first and foremost with the UN Covenants on Civil and Political Rights and Social, Economic and Cultural Rights. This was established in the advisory opinion of the International Court of Justice regarding the separation wall. This Honorable Court has also scrutinized the actions of the Military Commander on the basis of these norms. The Court has occasionally noted that such examinations were carried out without deciding on the applicability of human rights conventions in an occupied territory (thus for example in HCJ 7957/04, *Mar'aba v. Prime Minister of Israel, Takdin Elyon* 2005(3), 3333, article 24). At times, these conventions were applied without reservation (thus for example in HCJ 3239/02 *Mar'ab v. IDF Commander, Takdin Elyon* 2003(1), 937; HCJ 3278/02 *HaMoked – Center for the Defence of the Individual v. Military Commander in the West Bank, Piskei Din* 57(1) 385).

Finally, the Military Commander is obligated to act in accordance with international humanitarian law and the laws of occupation included therein. We shall turn to this matter now.

The duties of the Respondent under the laws of occupation

69. As the representative of the occupying power, the Respondent is under obligation to secure public life in the area under his control (article 43 of the Annex to the Hague Convention, 1907).

> **The article is not confined to a certain aspect of public order and life. It spans all aspects of public order and life. Therefore, this power – in addition to security and military matters - also applies to circumstances of economy, society, education, welfare, sanitation, health, traffic and other such matters, with which human life in modern society is associated.** The words of Justice

(as his title was then) Barak in HCJ 393/82 *Jam'iat Askan Almaalamon v. The Commander of the IDF Forces in the Judea and Samaria Region, Piskei* Din 37 (4) 785, 798). Hereinafter: **The matter of Jam'iat Ascan**

70. A military government must be attentive to the changing needs of the residents of the territories with which it is charged:

> **The life of the population, as the life of the individual, does not remain still, but is in constant movement involving development, growth and change. A military government cannot ignore all this. <u>It is not permitted to freeze life</u>.** The matter of Jam'iat Ascan, p. 804 (emphasis added)

71. In all his duties, the Respondent must -

> **Respect the family and its rights…** Article 46 of the Hague Regulations.

This fundamental rule is repeated in article 27 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) (hereinafter: **the Geneva Convention**):

> **Protected persons are entitled, in all circumstances, to respect for their … family rights…**

<u>Paralysis of normal life</u>

72. Normal social life in the modern world necessitates movement of people into and out of the territory. A society and an economic market cannot exist without visitor traffic from outside: relatives (both close and distant) arriving for family visits; tourists and pilgrims; laborers and professionals who drive the market and fill missing functions; experts arriving to advise; academics arriving for conferences or remaining as guest lecturers; businessmen arriving to make transactions, invest and build trade relations; artists and artisans who enrich the culture; athletes who participate in competitions and training and many more…

73. Data from previous years indicates the normal scope of such movement, which reflects the needs of the Territories. It must be noted that in the past, too, there were severe limitations on entry into the Territories and, therefore, data from those years does not reflect the full extent of the needs of the population.

In 1998, 46,887 visitors entered the West Bank with visitor permits. 19,352 entered the Gaza Strip.[6]

In the first eleven months of 1999, some 64,000 visitors entered the Territories (both the Gaza Strip and West Bank) with visitor permits.[7]

These numbers average at 4,000 visitors entering the Territories through the Allenby Bridge every month.

On the other hand, according to data provided by the Respondent, the number of visitors permitted to enter the West Bank in the eleven months between November 2000 and the end of September 2001 was only 192. According to the Respondent's data between October 1, 2001 and October 1, 2002, 255 visitors entered.[8] This data includes, it seems, residents of the Territories who have had deportation orders against them revoked and whose entry into the Territories had been arranged via visitor permits in the absence of other documentation. These are not visitors to the Territories in the proper sense of the word. The Petitioners have no further data.

The Respondent decreased the number of visitors permitted to enter the Territories from some 4,000 a month to some 20 a month, a 95 percent decrease!

These figures do not include entry into the Territories with visas issued by the Ministry of the Interior, which were the main method of entering the Territories for residents of countries with which Israel has diplomatic relations. This, in accordance with the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of September 28, 1995 (article 28(14) of Appendix 1 of the Protocol Concerning Civil Affairs, Annex III of the agreement). Israel, through the Ministry of the Interior has recently blocked this path of entering the Territories also (see for example, Adm. Pet. (Jerusalem) 294/06, *Ibrahim v. The Minister of the Interior*, and Adm. Pet. (Tel Aviv) 294/06, *PLANET FINANCE v. The Minister of the Interior,* published on the Courts' website). This block has been removed of late, as we have mentioned above.

This decrease in entry to the Territories was not limited to a short or confined period of time. It has been going on for over six years. This decrease is, for all intents and

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[6] Response given by the Minister of Defense to MK Zehava Galon's parliamentary query, September 9, 1999. see supra note

[7] This information was presented by Lieut-Col Orly Malka in a Knesset Committee on the Rights of the Child session on December 6, 1999.

[8] Response on behalf of the respondent, HCJ 1146/05, Zam'ari v. Military Commander in the West Bank.

purposes, the separation and isolation of the Palestinian society in the occupied territory from the rest of the world.

The expropriation of the right to family life

74. The consequences of the Respondent's policy are particularly detrimental as regards the family life of residents of the Territories.

75. As we have seen, the right to family life is one of the rights the Respondent is obligated to respect in accordance with international humanitarian law. At the same time, he is obligated to respect the family rights of residents of the Territories and assist the family unit under Israeli law as well as international human rights law. An essential part of the core of the right to family life is the right of the individual to maintain his family unit in his place of residence. In the words of the Hon. Justice Levy in the matter of Adalah, **there is no real substance to the right to family life if it does not include a person's right that he and his family be given leave to conduct their lives together, including in terms of the geographic location of the family unit, which they have chosen for themselves**.

76. The Respondent, rather than assisting the family, being the basic unit of society, splits families and tears them apart.

Residents of the Territories whose chosen partners are not residents, cannot marry and establish the family unit in the Territories.

Residents of the Territories who had been married before the implementation of the freeze policy cannot legally live in the Territories with their spouses. They must choose between emigrating, living separately from their spouses or (if the foreign spouse was in the Territories in October 2000) living their lives in hiding, with no rights, as criminals destined for deportation.

Children of such families will experience suffering and their development will be hampered, no matter the decision their parents make. In many cases, they will live with one parent only, and contact with the other parent will be limited to – in a best case scenario – short visits (when the resident parent goes abroad) and long distance telephone calls. In other cases they will live with the constant threat of one of their parents being apprehended and deported. In some cases, the family will be forced emigrate in order to live together, and the children will then be uprooted from the environment into which they had been integrated, where their childhood friends are and where the social circles in which they have established themselves are.

77. The family rights of protected persons are awarded special and increasing weight during a period of prolonged occupation. As occupation continues, people living under it continue weaving the stories of their lives. The story of a person's life is also the story of his family life. This life goes on. It does not stand still: People marry and divorce. They are born, grow and die. They bear children and raise them. They face family traumas together and apart. They wish to share the joys of their relatives. They fall out with them and make peace with them. Movement from country to country (and back) is part and parcel to these chapters of the story of a person's life.

The Respondent ignores this dynamic of human life. He freezes the possibility of visiting the Territories. He is attempting to freeze life. He disregards his duties.

The Military Commander's scope of discretion and the purpose of the freeze

78. The scope of legitimate considerations the Knesset may take into account when legislating immigration laws is extremely wide. This is not so as regards the Respondent. The Military Commander's discretion is unlike that of a sovereign. He is subject to two "polar opposites" only: the good of the population under occupation and the security considerations of the occupying force:

> **The Military Commander is not entitled to weigh the national, economic or social interests of his own country, so far as they do not project on his security interests in the region or on the interests of the local population. And indeed, those military needs are his own military needs and not security needs in their broad sense.** The matter of Jam'iat Ascan, pp. 794-795.

79. The reasons for the freeze are not within the confines of these two magnetic opposites

80. In the matter of Adalah, the State claimed that the sweeping prohibition was designed to meet essential security needs, in fact, to save lives. In our matter, no arguments of security were ever raised. Indeed, our case revolves around the entry of foreign nationals who would be allowed to enter Israel and even receive citizenship were their spouses residents of Israel. There should certainly be no impediment to their entering the Territories.

81. The issue of the freeze lies in the realm of the political relationship between the Respondent and the Palestinian Authority, with families – parents and children – serving as bargaining chips in this relationship. The freeze appears to be designed to punish the population for the uprising; decrease the quality of life enjoyed by the

resident's; make their lives unbearable and indirectly put pressure on the Palestinian Authority and Palestinian organizations to succumb to Israel's political demands.

The State describes this strategy (in a different context) as a strategy of "limited conflict". A document issued by the Doctrine and Training Division of the Military's Operations Directorate notes that "the state of limited conflict has a political purpose. Its resolution is achieved by means of creating cognitive change in the society and among its fighters through prolonged "fatiguing" rather than by means of suppression and deterrence by the militarily powerful side (as in a war)". The document further states: "The strategy implemented during limited conflict is "fatiguing" (physical and mental attrition). Fatiguing gradually wears out the determination of the society and its fighters through a continual process of physical, economic and mental damage."[9]

It is a patently illegal strategy. The entire aim of the laws of war is to create a distinction between combatants and civilians and to protect civilians from the destructive effects of war. Civilians are not legitimate targets for military forces. Indirect harm to civilians is sometimes unavoidable, but direct harm to civilians is prohibited. Harm to civilians is prohibited even if only as a side effect, if the balance between the harm inflicted and the expected military advantage exceeds the scope of proportionality.

82. Moreover, it appears that demographic considerations are to be found among the Military Commander's considerations – these are not legitimate demographic considerations regarding the capacity of the occupied territory based on available resources, but improper demographic considerations relating to the "demographic balance" between Jews and Arabs in the territories of mandatory Palestine-Eretz Yisrael.

One might wonder how such considerations continue to be a powerful driving force in an era when Israel's official policy is a policy of separation, and when it is not expected to have any interest in the size of the population of the Palestinian political entity.

In any case, such considerations are improper in our matter inasmuch as they are racist in essence. Even if these considerations were recognized as falling within the scope of the national interest of the occupying power (it must be stressed: such

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[9] "The Model for Declaring Conflict Areas in the Judea and Samaria and Gaza Strip Regions", February 2006, pp. 15-16. Annexed to the State's Response in HCJ 8267/05, Adalah v. The Minister of Defense.

considerations are not legitimate anywhere!), as a Military Commander, the Respondent would still not be entitled to give them weight.

Administrative propriety and renouncement of authority

83. The Respondent is not simply in charge of seeing to the proper function of the administration in the occupied territory – he is an administrative authority of its own. Military legislation has incorporated the distribution of administrative powers established by the Oslo Accords (article 4 of the, Minshar Zeva'i [military proclamation], Regarding the Application of the Interim Agreement, Judea and Samaria (No. 7) -1995.) Under this distribution of duties, the Respondent is charged with, *inter alia*, approving applications for visitor permits and granting residency status in the Territories. The Respondent shares this authority with the Palestinian Authority in a manner by which approval of the application requires agreement by both authorities and cooperation between them as administrative authorities exercising powers pursuant to the law.

84. The Respondent may not renounce his duty, ignore applications awaiting processing or block access to him and refuse to accept applications:

> **It is understood and accepted that vesting powers in a certain functionary requires him to consider requests and applications which are designed to cause the person vested with the authority to exercise his power in one way or another… inasmuch as the matter relates to considering and reviewing applications regarding the exercise of power, there is an obligation to review and consider the applications in a manner governed in form and essence by the basic criteria shaped in the Law of this Court and where failure to adopt these occurred , it may affect the validity of the decision.** HCJ 279/82, Berger et al. v. The Minister of the Interior, Piskei Din 37(3), 29, 45.

85. Indeed, the State of Israel has political differences with the Palestinian Authority. These differences concern the array of international relationships between Israel as a sovereign state and the Palestinian Authority as an organ among international organs.

This particular disagreement must not infiltrate the relationship between the Respondent as an administrative authority and the Petitioners who need his services.

In effect, the Respondent is conducting a "strike" against the Palestinian Authority (or against Palestinian resistance organizations) at the expense of the Petitioners. To what is this similar? It is similar to a local authority, which, during negotiations with the central authorities, uses a shutdown of its public services as a means of putting pressure on the latter. About cases such as this, the following comments were made:

> **The Municipality was not permitted to breach its duty to operate the school system in the city, even if some fall into some differences of opinion or others occurred between it and the Ministry of Education… The reason presented before us by Mr. Lahyani – concerning the existence of differences which appeared between him and the authorities of the Ministry of Education – this reason is not a legitimate reason for the cessation of studies in the city and the denial of the city's students' right to education. In ordering the cessation of studies for this reason, Mr. Lahyani acted *ultra vires* and his decision was null and void.** HCJ 8046/04, *Ben Attiya v. Mayor of Bat Yam et al, Takdin Elyon* 2005(1), 978, p. 982.

86. In his capacity as administrative authority, as in his other capacities, the Respondent's discretion is limited to relevant considerations only. He must consider the fundamental right to family life. He must be guided by the rulings of this Honourable Court, according to which the right to family life includes the individual's right to maintain a shared family life with his chosen foreign spouse <u>in his country</u>. He is permitted to weigh the threats a certain person might pose to the security of the area, were he to enter it, against these considerations. However, he is not permitted to implement sweeping prohibitions.

87. And what is the reason for the Respondent's refusal to exercise discretion? This reason is unacceptable. It is a reason which bears more than a passing resemblance to collective punishment; a reason designated to turn people's family lives into a bargaining chip for political negotiations; a reason which is in breach of the Respondent's duties under international humanitarian law and under both Israeli and international human rights law.

88. We must remember this: human rights must not become hostages in political manoeuvres.

> **[T]here is no application of the institutional non-justiciability doctrine where recognition of it might prevent the examination of impingement upon human rights.** HCJ 769/02, *The Public Committee against Torture in Israel v. The Government of Israel,* p. 982.

The Respondents bear responsibility toward the residents of the Territories – toward their men and women, parents and children. These people, flesh and blood, must not be treated as pawns on an imaginary chess board played by diplomats in the wood paneled halls of Washington or Oslo.

The Respondents must not treat the family life of residents of the Territories as a fortified military target, or an explosives factory, legitimate objects at which to strike. They must look upon the applicants for family unification through the perspective of law and conscience, not through the sight of a gun.

The words uttered by the author David Grossman on the last anniversary of the assassination of the late Prime Minister Yitzhak Rabin are relevant to our matter. Rabin, as Minister of Defense, suspended the deportation of spouses of residents of the Territories to Jordan:

> **Go to the Palestinians Mr. Olmert. Go to them over the head of Hamas […] Go to the Palestinian people, speak to their deep wounds and sorrow, recognize their ongoing suffering. You will have lost nothing by it, nor will have Israel's position in future negotiations. Only the hearts will slightly open to each other, and this openness has tremendous force, the force of nature, the force of simple human compassion, precisely in this state of stagnation and animosity. For once, see them not through the sight of a gun and not through the closed gate of a checkpoint. You will see there a nation as tortured as we are, an oppressed, conquered and hopeless nation.**

For all these reasons, the Court is requested to issue and Order Nisi and Temporary Injunction as requested and after having received the Respondents' response, make it absolute. Also, the Court is requested to order the Respondents to pay the Petitioner's costs and attorney fees.

4 July 2007

[signed]

Yossi Wolfson, Attorney

Counsel for the Petitioners