At the Jerusalem District Court **AP 28253-11-11**
Sitting as the Court for Administrative Affairs

In the matter of:

1. **V. Shanaytah, ID No. _____**
2. **S. Shanaytah, ID No. _____**
3. **B. Shanaytah, ID No. _____**
4. **M. Shanaytah, ID No. _____**
5. **H. Shanaytah, ID No. _____**
6. **H. Shanaytah, ID No. _____**
   Minor, by her parents, petitioners 1 and 2
7. **H. Shanaytah, ID No. _____**
   Minor, by her parents, petitioners 1 and 2
8. **M. Shanaytah, ID No. _____**
   Minor, by his parents, petitioners 1 and 2
9. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**

all represented by counsel, Adv. Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Elad Cahana (Lic. No. 49009) and/or Ido Bloom (Lic. No. 44538) and/or Hava Matras-Irron (Lic. No. 35174) and/or Sigi Ben Ari (Lic. No. 37566) and/or Daniel Shenhar (Lic. No. 41065) and/or Nimrod Avigal (Lic. No. 51583)

Of HaMoked Center for the Defence of the Individual, founded by Dr. Lotte Salzberger
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Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **Minister of the Interior**
2. **Chair of the Appellate Committee for Foreigners**

Represented by Jerusalem District Attorney
7 Mahal Street, Jerusalem
Tel: 02-5419555; Fax: 02-5419581

The Respondents

Administrative Petition

The honorable court is hereby requested to order the respondents to transfer to the petitioners the entire open evidentiary material underlying the recommendation of the security agencies to deny petitioners' family unification application – a recommendation which served as a basis for respondents' decision to inform of an "intention to deny" the application.

Preface

1. This petition concerns the severe implications of delay and procrastination by the respondent, and an entire family, the rights of which are being downtrodden by the disrespect with which the respondent treats the people who apply to him. In particular, the petition shows how respondent's outrageouse slow conduct, both in the population authority bureau as in the appellate committee, causes a severe violation of basic rights. In this case, respondent's failure to respond to petitioners' repeated requests, severely violates petitioners' right to be heard, and does not enable them to properly challenge respondents' notice regarding their "intention to deny" the family unification application submitted by petitioners 1 and 2, the parents of the family. Thus, an entire family is put on hold for years, and the respondent, on his part, acts slowly and fails to assist them.

2. A threatening sword is hanging above petitioners' heads in the shape of the intent to deny their family unification application for "security" reasons. In order to properly cope with the above intent of the respondent, the petitioners demanded to secure their basic right: a real and sincere opportunity to respond to the arguments raised against them in respondent's notice of his intention to deny the family unification application, on their merits, and defend against them.

3. In order to properly refer to the arguments raised against them on their merits, the petitioners demanded the entire evidentiary material, which served as the basis for the security agencies' recommendation to deny petitioners' family unification application. **It should be emphasized that, in any event, this is open information**: administrative detention orders, indictments, confirmations of incarceration periods, judgments, protocols of hearings, documentations of plea bargains etc.

4. It should be emphasized that due to Petitioners' inability to realize their right of inspection – of the open information – they could not properly realize their right to be heard by the authority. Therefore, they have referred to respondent's arguments only partially, and emphasized their demand to postpone the deliberations on the hearing until after the entire evidentiary material was delivered to them, and they were afforded a proper opportunity to respond thereto.

5. After the passage of more than three months from the date of the demand for the transfer of the material, and in view of the fact that the respondent has completely failed to respond to petitioners' demand for the transfer of the material to their possession, the petitioners applied, in their distress, to respondent's Appellate Committee for Foreigners. However, it did not provide the petitioners any solution, in view of respondent's failure to act according to the procedure he himself has established, his failure to respond to appeals within the prescribed time frames, and his severe procrastination.

6. To date, after the passage of more than eight months from the date of the demand for the transfer of the evidentiary material, the passage of more than four months from the appeal's submission date, and after the passage of more than three whole years from the date the family unification application was submitted, there is still no response or answer from the respondent. It should be

noted that the failure to respond is especially peculiar, since the requested material should have been before the respondent when he informed the petitioners of the intention to deny their application.

7. It should be emphasized, that it is not the first time that the respondents procrastinate on petitioners' matter. The petitioners have already submitted two appeals, due to respondent's failure to respond to their requests. In their first appeal, appeal 817/09, over ten months passed before respondent's response to their matter was received.

   How long will the petitioners have to wait?

The Parties

8. **Petitioner 1** (hereinafter: **petitioner 1**), a resident of the state of Israel, married her husband, **petitioner 2** (hereinafter: **petitioner 2**), originally a resident of the Occupied Palestinian Territories (OPT), in 1988. Over the years their children were born, **petitioners 3-8**. Petitioners 1-8 live in Jerusalem.

9. **Petitioner 9** is a registered not-for-profit association which has taken upon itself to assist victims of cruelty or deprivation by state authorities, including by protecting their rights before the authorities, either in its own name as a public petitioner or as counsel for persons whose rights have been violated.

10. **Respondent 1** is the minister who has the authority under the Entry into Israel Law, 5712-1952, to handle all matters associated with this law, including family unification applications and applications for the arrangement of the status of children, submitted by permanent residents of the state who live in East Jerusalem.

11. **Respondent 2** (hereinafter also: the **commissioner**) reviews applications for the grant of status in Israel to spouses of persons who have permanent residency status in Israel as well as applications for the grant of status in Israel in accordance with regulation 12 of the Entry into Israel Regulations. By virtue of his authority in accordance with section 16(a) of the Entry into Israel Law, respondent 1 has delegated to respondent 2 his powers under sections 2(a) and (b), 3, 3a(a), (b) and (c), 4, 5, 6 – regarding specific cases, and in accordance with section 11 of said law. The power of respondent 4 *[sic]* to grant an interim or temporary relief is established in an internal procedure of the Ministry of the Interior, procedure No. 1.5.0001, "Procedure of the Appellate Committee for Foreigners". During the relevant period, two chairpersons presided over the committee: Commissioner Advocate Sara Ben Shaul Weiss, and Commissioner Advocate Zvi Gal.

Petitioners' Case

12. On July 13, 2006 petitioner 1 submitted a family unification application with petitioner 2 and applications for the registration of her children. The family unification application was numbered 1315/06.

13. The family unification application was denied after a few days, due to lack of center of life.

14. On September 4, 2008 petitioner 1 submitted a new family unification application which was numbered 558/08.

15. On March 31, 2009, notice was received of respondent 1's denial of the family unification application. However, the denial letter specified the name M., petitioner 4, as the sponsored spouse

in the application. It seemed that the refusal related to him. In the letter the following reason was specified:

> He was formerly an administrative detainee due to his activity with the "Islamic Jihad". His name was mentioned in an interrogation as a member of a military cell of the Islamic Jihad.

A copy of the denial letter dated March 31, 2009 is attached hereto and marked **P/1**.

16. On May 18, 2009, the petitioners submitted an appeal against respondent 1's above decision, in which they referred to the security arguments and to the lack of explanation as to against whom said arguments were directed. In addition, a questionnaire was attached to the appeal, which respondent 1 was requested to transfer to the Israel Security Agency (ISA) and to the population administration official that denied the application. Respondent 1 was also requested to specify, in a clear manner, the grounds for the denial and to whom it pertained.

    Copies of the appeal dated May 18, 2009, and the questionnaire attached thereto, are attached hereto and marked **P/2**.

17. On June 1, 2009, respondent 1's response dated May 26, 2009, was received which concerned both petitioner 5, H., and petitioner 2, the father of the family. The response stated as follows:

> The sponsored spouse [namely, petitioner 2, N.D,] in the application is a former administrative detainee due to his activity with the "Islamic Jihad". His name was mentioned in an interrogation as a member of a military cell of the "Islamic Jihad". Some of S. Shanaytah's brothers were also arrested a few times due to their activity with the "Islamic Jihad". His brother M.S. Shanaytah was an administrative detainee, whereas his brother R.S. Shanaytah is a former "Islamic Jihad prisoner" who admitted of being a member of a military cell of the organization, of an attempt to recruit another young man to the organization and of his involvement with firearms.

    A copy of respondent's response dated May 26, 2009 is attached hereto and marked **P/3**.

18. On June 3, 2009 a supplement to the appeal was submitted concerning the girl H. and petitioner 2.

    The supplement to the appeal is attached hereto and marked **P/4**.

19. Reminders concerning the appeal were sent on July 5, 2009, August 12, 2009, September 29, 2009 and October 20, 2009.

    Copies of the reminders concerning the appeal are attached hereto and marked **P/5** A-D.

20. As no response has been received to the appeal, an appeal concerning the failure to respond was submitted on December 20, 2009, which was numbered 817/09 (hereinafter: the **first appeal**).

    The first appeal, without its exhibits, is attached hereto and marked **P/6.**

21. On January 25, 2010 the respondent requested an extension in the appeal for the submission of his response.

The request for extension is attached hereto and marked **P/7**.

22. On January 28, 2010 a decision was rendered, according to which the respondent was granted a 60 day extension.

The decision for the grant of extension is attached hereto and marked **P/8**.

23. On March 23, 2010 respondent's counsel requested an extension for additional 60 days in the appeal for the submission of a response.

Respondent's request is attached hereto and marked **P/9**.

24. On March 25, 2010 a 45 day extension was granted to the respondent.

The decision for the grant of extension is attached hereto and marked **P/10**.

25. On June 16, 2010 respondent's counsel requested an additional extension, for two months.

The request for extension is attached hereto and marked **P/11**.

26. On June 21, 2010 respondent 2's decision was rendered as follows: "I have reviewed the appeal and its exhibits. Respondent's counsel will submit her response not later than July 8, 2010. In the event that no response is obtained by said date, I will consider to accept the appeal in the sense that appellants 3-5 would be summoned for an oral hearing with the respondent, and appellant 2 (namely, petitioner 2 – N.D.) would have a hearing according to the acceptable comments of agencies procedure – and a time schedule will be established."

The decision dated June 21, 2010 is attached hereto and marked **P/12**.

27. On July 4, 2010 respondent's counsel requested an additional two month extension.

Respondent's request is attached hereto and marked **P/13**.

28. On July 8, 2010 the requested extension was granted, with complete disregard of the decision dated June 21, 2010.

Respondent 2's decision is attached hereto and marked **P/14**.

29. On September 15, 2010 an additional extension was requested by respondent's counsel.

The request for extension is attached hereto and marked **P/15**.

30. On September 21, 2010 respondent 2's decision was rendered, according to which a decision in the appeal cannot be made based on the appeal only, and therefore the requested extension was granted.

The commissioner's decision is attached hereto and marked **P/16**.

31. Only on October 27, 2010, ten months after the submission of the first appeal, respondent's response to the appeal was received in the form of a "Notice on behalf of the Respondent and Request to Dismiss". The notice stated, in the part which pertained to my client, as follows: "In the matter of Mr. S. Shanaytah, the husband of Mrs. Shanaytah, according to the amended 'Comments of Agencies Procedure in Family Unification Applications", the Shanaytah spouses are given the opportunity to have a written hearing within 30 days, before a decision is made in the application."

Respondent's response, and letters of the Ministry of the Interior which were attached thereto, are attached hereto and marked **P/17**.

32. On November 17, 2010 the petitioners submitted a response to the notice which was submitted on behalf of the respondent. In their response, the petitioners requested respondent 2 to direct the respondent to refer to the arguments specified in the response and in the appeal, as if they were a written hearing.

Petitioners' response is attached hereto and marked **P/18**.

33. Following several additional responses which were submitted by the parties, respondent 2's decision was received on January 27, 2011. According to the decision, the petitioners should have submitted to the respondent a written hearing in petitioner 2's matter, within 21 days from the receipt of the decision.

Commissioner's decision dated January 27, 2011 is attached hereto and marked **P/19**.

34. Following petitioners' request on January 30, 2011, in which they have requested an extension which would enable them to submit their written hearing within 30 days, according to respondent's procedure, respondent 2 gave an extension for the submission of the hearing statement.

Petitioners' request with commissioner's decision scrawled thereon is attached hereto and marked **P/20**.

35. On February 21, 2011, petitioners' partial arguments concerning respondent's intention to deny their family unification application were submitted. In the beginning of the written arguments, it was emphasized that the petitioners demanded the entire evidentiary material which served as the basis for the security agencies' recommendation to deny the family unification application. In addition, **it was requested to postpone the deliberations on the hearing until the entire open material shall have been transferred to my clients, and they would have been given the opportunity to properly respond to the material** (hereinafter: the **request for the transfer of the open material**). At the outset it was noted that in a similar case which was considered by the Appellate Committee for Foreigners, within the framework of appeal No. 84/09, petitioners' counsel of HaMoked for the Defence of the Individual demanded to receive the **entire open material** upon which the paraphrase was based. **And indeed, on December 8, 2010 Advocate Mor of the legal department of respondent's Population, Immigration and Borders Authority transferred the relevant material**: indictment, amended indictment, protocols and decisions of the Judea military court, judgment and sentence.

A copy of the partial written hearing is attached hereto and marked **P/21**.

36. In addition, within the framework of petitioners' partial written hearing, arguments concerning the paraphrase which was transferred to them were raised, and several questions were asked concerning respondent's determinations in petitioner 2's matter (see paragraphs 20-26 of the partial written hearing). It was emphasized, that **the petitioner has never been a member of the "Islamic Jihad" movement as was argued, or of any other similar organization. He devoted his entire time and efforts to his family and for the provision of livelihood to his children. Therefore, the "direct denial", namely, the denial which pertained to petitioner 2's alleged membership of the "Islamic Jihad" movement, had no merit**.

37. **In addition, the petitioners requested to receive copies of the administrative detention orders, and of any other document which pertained to petitioner 2's detention – appeals, protocols, decisions, petitions etc. – documents which were open from the outset**.

38. With respect to petitioner 2's brother, M., it was argued that he was put under administrative detention in 2006 for a period of two months only and he received permits to travel abroad. **With respect to the detention, the petitioners requested to receive copies of the administrative detention orders, and of any other document which pertained to M's detention – appeals, protocols, decisions, petitions etc. – documents which were open from the outset**.

39. With respect to the brother Ra'ad, it was argued that the paraphrase in his matter also failed to provide the entire information which could have been provided. It did not specify, for instance, when the brother was incarcerated; for how long he has been incarcerated; which charges were brought against him and what was he convicted of; what was his sentence, etc. Therefore, also in Ra'ad's matter, **the petitioners requested to receive the entire material which in any event was open: interrogations, including police interrogation records; memoranda of ISA interrogations, if any; as well as all documents which pertained to the trial that was conducted against him, which were also open by their nature, including the indictment against him, the incarceration period which he, in fact, served out of said period, the judgment against him (conviction and sentence), protocols of all hearings in his matter, documentation of plea bargains, if any, etc.**

40. It was also emphasized, that according to Ra'ad, he was imprisoned during the years 2002-2004. According to the information provided by Ra'ad to petitioners' counsel, his attorney made a plea bargain in his case, within the framework of which he was sentenced to three years in prison instead of the five years which the state requested. Furthermore. Ra'ad should have been released on March 6, 2005, but was released **more than a year earlier**, within the framework of a prisoners' release transaction, in January 2004. Therefore, the petitioners requested that **any additional open material concerning the release of Ra'ad Shanaytah within the framework of said transaction, if any,** would be transferred by the respondent to petitioners' counsel.

41. The petitioners argued that apparently Ra'ad Shanaytah did not pose a great risk, in view of the fact that he was not severely punished and was not sentenced for a long imprisonment. Furthermore, he was released before he has completed his entire sentence. **This applies even more forcefully in view of the fact that the data concerning Ra'ad were presented only as grounds for the existence of an "indirect threat".** The petitioners mentioned HCJ 7444/03 **Dakah v. Minister of the Interior** (not reported, February 22, 2010), according to which "the indirect threat should be carefully assessed, and attributed its proper relative weight only, nothing more than that."

42. On March 9, 2011, following requests submitted by petitioners' counsel, a temporary remedy was granted which prohibited the expulsion of petitioner 2, until 45 days after respondent's decision in the partial written hearing which was submitted on February 21, 2011.

    A copy of respondent 2's decision dated March 9, 2011 concerning the temporary remedy is attached hereto and marked **P/22**.

43. On March 24, 2011 a reminder was sent concerning the partial written hearing. The reminder emphasized the fact that within their written arguments, the petitioners demanded to receive the entire evidentiary material in their matter, and to postpone the deliberations on the hearing until after they had the opportunity to review the material and properly respond to it.

    A copy of the reminder dated March 24, 2011 is attached hereto and marked **P/23**.

44. On April 13, 2011 respondent's response was received, according to which in petitioner 2's matter "the position of the security agencies to your written arguments has not yet been transferred." **The**

respondent has completely ignored petitioners' demand, to transfer to them the evidentiary material.

A copy of respondent's response dated April 13, 2011 is attached hereto and marked **P/24**.

45. In a reminder dated April 27, 2011 it was emphasized once again, that the respondent was requested to transfer the entire evidentiary material concerning said matter, and to postpone the deliberations on the partial written hearing until the material shall have been reviewed by the petitioners.

A copy of the reminder dated April 27, 2011 is attached hereto and marked **P/25**.

46. On May 24, 2011 an additional reminder was sent.

A copy of the reminder dated May 24, 2011 is attached hereto and marked **P/26**.

47. Hence, in view of the prolonged proceedings in their matter, the petitioners had no alternative but to submit an additional appeal (hereinafter: the **second appeal**).

The current proceeding before the Appellate Committee for Foreigners

48. On June 21, 2011 the second appeal was submitted as a result of respondent's failure to respond to the demand to transfer the evidentiary material within the framework of the "intention to deny" the family unification application.

A copy of the second appeal dated June 21, 2011, without its exhibits, is attached hereto and marked **P/27**.

49. In the second appeal it was argued that petitioners' case was delayed for a long period of time, and meanwhile, they were living in severe uncertainty which did not enable them to live their lives peacefully and with a sense of stability. The failure to transfer the requested evidentiary material – open material, which is not subject to privilege rules – severely violates the right of the petitioners-appellants to be heard. This, in view of the fact that the petitioners-appellants wish to properly challenge respondent's intention to deny their family unification application.

50. In addition, it was argued that respondent's protracted failure to respond was even more outrageous, in view of the fact that it was not the first time that the petitioners were waiting and waiting for respondent's decision in their matter. In the first appeal, it was mentioned, over ten months passed before any response was received from the respondent in their matter.

51. On June 22, 2011, respondent 2 held that respondent's response in the appeal would be given within 30 days.

A copy of respondent 2's decision is attached hereto and marked **P/28**.

52. On August 1, 2011, after the date set for respondent's response elapsed, the petitioners submitted a request to respondent 2, in which she was requested to order the respondent to submit his response forthwith.

A copy of petitioners' request dated August 1, 2011 is attached hereto and marked **P/29**.

53. On August 2, 2011 respondent 2 ordered the respondent to submit his response forthwith.

A copy of respondent 2's decision dated August 2, 2011 is attached hereto and marked **P/30**.

54. On August 28, 2011, in view of the fact that the respondent continued to engulf himself in silence, the petitioners-appellants requested respondent 2 again to order the respondent to accept their simple request: to transfer open evidentiary material which would enable them to properly challenge the arguments raised against them.

A copy of petitioners' request dated August 28, 2011 is attached hereto and marked **P/31**.

55. On August 30, 2011 the commissioner held that respondent's response should be given within seven days.

A copy of the commissioner's decision dated August 30, 2011 is attached hereto and marked **P/32**.

56. On September 18, 2011, in the absence of respondent's response, the petitioners-appellants requested respondent 2 again, to order the respondent to act as requested in the appeal.

A copy of petitioners' request dated September 18, 2011 is attached hereto and marked **P/33**.

57. On September 20, 2011 commissioner's decision dated September 19, 2011 was received, according to which: "There is no room for lack of response by the respondent. If the respondent is unable, due to heavy load or any other reason, to produce the documents, he should give notice of same and of the date on which he would be able to produce the documents. To be responded to by respondent's counsel within seven days."

A copy of the commissioner's decision dated September 20, 2011 is attached hereto and marked **P/34**.

58. On October 4, 2011, and again after the prescribed date, the respondent submitted a request for a **60 day** extension to submit a response to the appeal. On that same day, respondent 2's decision was made, as follows: "To be responded to by petitioners' counsel within 14 days, considering the fact that respondent's counsel does not have full control over the security agencies who delay their response for their own reasons."

The request for extension, with respondent 2's decision dated October 4, 2011 scrawled thereon, is attached hereto and marked **P/35**.

59. On October 6, 2011 the petitioners-appellants submitted their response to respondent's request for extension. The response noted that **the "response" which the appellants requested in the appeal was very limited: the transfer of raw <u>open</u> evidentiary material to the appellants**: administrative detention orders, indictments, confirmations of incarceration periods, judgments, protocols of hearings, documentation of plea bargains etc. It was emphasized that said material was in the possession of the security agencies (and hopefully also in the possession of the respondent, in view of the fact that it was open material) when they have submitted their recommendation to the respondent. Therefore, there was no justification for any delay in the proceedings in this matter. In conclusion it was noted, that appellants' sole request was to receive said material, so as to enable them to raise their arguments against it.

60. With respect to the delay in providing a response to the appeal, which derived from the security agencies' failure to respond, and with respect to "the fact that respondent's counsel does not have full control over the security agencies" (as stated in the commissioner's decision dated October 4, 2011), the petitioners-appellants pointed at the words of the court in AP 8436/08 '**Aweisat Sabah v. Minister of the Interior** (reported in Nevo):

> From petitioners' stand point, a decision was expected in the application which was submitted by them to the Ministry of the Interior only, rather than to the Israel Police, to which they have submitted no application. **From this stand point, the fact that the procrastination was caused by the police rather than by the Ministry of the Interior does not make it more justified.** This is so at least, in as much as the Ministry of the Interior refrained from contacting the police and urge them to give their delayed response, as things are in the case at hand.
>
> (emphasis added, N.D.)

61. Finally, the petitioners-appellants noted, that the respondent did not meet the time frames which were outlined for him in the procedure which governed the work of the Appellate Committee. On the other hand, the appellants were required to meet a short time frame for the submission of an appeal, a time frame which has even been recently curtailed.

62. In view of all of the above, the petitioners-appellants objected to the request for extension.

    A copy of petitioners' response dated October 6, 2011 to the request for extension is attached hereto and marked **P/36**.

63. On October 10, 2011 respondent 2's decision of the same day was received, according to which "respondent's counsel shall submit to the Committee the open material which may be submitted, not later than November 6, 2011."

    Respondent 2's decision dated October 10, 2011 is attached hereto and marked **P/37**.

64. **To date, notwithstanding the fact that the date on which the respondent should have submitted the material, has already passed – the material has not yet been delivered to the petitioners**. This additional procrastination, in the chain of excessive delays by the respondent – in the first appeal, in the handling of the request for the transfer of the open material as well as in the second appeal, conduct which has finally went beyond all limits – brought the petitioners to the gates of this Honorable Court.

The Legal Framework

65. As broadly described in the factual part, the petitioners fell victims of substantial delays in the handling of the applications which were submitted by them to the respondent, delays which left an entire family in a state of severe uncertainty and tension concerning their future. Firstly, the handling of the first appeal was infected by severe procrastination. Thereafter, the respondent ignored petitioners' request to receive the open evidentiary material which served as the basis for the decision concerning "intent to deny" the family unification application. Finally, the second appeal which was submitted, due to respondent's failure to respond to the application for the transfer of the open material, was not handled according to prevailing law and procedure, and has not yet been responded to by the respondent.

66. It shall be hereinafter argued, that respondent's failure to respond, is contrary to his administrative duties. It shall be further argued that respondent's failure to respond to petitioners' requests has severe implications, in the form of a severe violation of the right of petitioner 2 to be heard. We shall specify each and every one of our arguments in detail below.

The authority's failure to respond is contrary to its duty to act promptly

67. The respondent, like any other administrative authority, is obligated to respond to applications submitted to him fairly, reasonably and promptly. It was so ruled by the Honorable Justice D. Levin in HCJ 6300/93 **Institute for the Training of Women Rabbinical Advocates v. Minister of Religious Affairs**, IsrSC 48(4) 441, 451:

> A competent authority must act reasonably. Reasonableness also means upholding a reasonable schedule.

On this issue see also:

HCJ 758/88 **Kandel v. Minister of the Interior**, IsrSC 46(4) 505; HCJ 4174/93 **Wialeb v. Minister of the Interior** (not reported), paragraph 4 of the judgment; HCJ 1689/94 **Harari v. Minister of the Interior**, IsrSC 51(1) 15.

68. Respondent's duty to promptly handle applications submitted to him, is also entrenched in section 11 of the Interpretation Law, 5741-1981, which provides as follows:

> Any empowerment and the imposition of any duty, to do something shall, where no time for doing it is prescribed, mean that it shall or may be done expeditiously and be done again from time to time as required by the circumstances.

69. The obligation to act within a reasonable time, and not to neglect and delay applications which are pending before the authority, is one of the foundations of good governance.

See on this issue CA 4809/91 **Local Planning and Building Committee, Jerusalem v. Kahati**, IsrSC 48(2) 190, 219.

70. With respect to the receipt of agencies comments in family unification applications, the agencies' duty to transfer their response to a written hearing within 30 days from receipt of the response, is entrenched in procedure No. 5.2.0015 "agencies comments in family unification applications." Furthermore, section 2.5 of the procedure provides that "If additional examination is required (beyond the 30 days set forth in the procedure, N.D.) by the agencies, the agencies will update the relevant desk, which will issue an interim response to the spouses informing them that the issue is under examination by agencies."

"Procedure of agencies comments in family unification applications" is attached hereto and marked **P/38.**

71. In addition, respondent's procedure 1.5.0001, "Procedure the Appellate Committee for Foreigners" provides that respondent's response to the appeal shall be given within 30 days from the date of its receipt by the respondent. In this case, and as specified above, the respondent has brazenly deviated from the provisions of the procedure. Respondent's brazen disregard of the procedure is intensified by the fact that the requested remedy in the appeal is neither complex nor general, but rather consists of a simple request: the inspection of **open** evidentiary material which served as a basis for respondent's decision, for the purpose of properly exercising petitioner's right to be heard.

"Procedure of the Appellate Committee for Foreigners" is attached and marked **P/39**.

72. However, in this case, contrary to the law, case law and procedure, the respondent fails to respond and does not transfer to the petitioners the material which, in any event, should be in his possession. Respondent's said conduct does not only fail to be prompt or efficient, but it also

extremely exceeds the conduct expected of a reasonable administrative authority, which is responsible for significant aspects of the lives of those who need its services.

The authority's failure to respond: violation of the right to family life being a constitutional right

73. Respondent's conduct as specified above, violates petitioners' right to live together and maintain a family unit at their choice. The right of every person to marry and establish a family unit is a fundamental right in our legal system, which should not be violated, and which derives from the right of every person to dignity.

74. International law also provides that every person has the freedom to marry and establish a family. Thus, for instance, Article 10(1) of the International Covenant on Economic, social and cultural Rights, which was ratified by Israel on October 3, 1991, provides that:

> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group 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 General Assembly of the United Nations on December 10, 1948, Article 8(1); Article 17(1) and Article 16(3) of the International Covenant on Civil and Political Rights, which entered into effect with respect to Israel on January 3, 1992.

75. By its conduct, the Ministry of the Interior destroys petitioners' family life. It belittles the family unit and the importance of its stability. It does not enable the petitioners to conduct their lives properly, leaving them in shameful un-certainty.

Respondent's failure to respond: violation of the rights of the children – the impingement on B., M., H., H., H., and M.

76. By its failure to make a decision in appellants' family unification application, the Ministry of the Interior impinges on the children. The refusal to enable the arrangement of their father's status, breaks all normative aspects of family life and causes huge stress, instability, and lack of certainty and safety in the life of the family, elements which are so important for the normal development of children.

77. The principle of the child's best interest is a fundamental and well rooted principle in Israeli jurisprudence. In CA 2266/93 **A. v. A**., IsrSC 49(1) 221, it was held by Justice Shamgar that the state should intervene for the protection of the child from a violation of his rights.

78. The right of minor children to live together with their parents was recognized as a fundamental and constitutional right by the Supreme Court. See: the words of Justice Goldberg in HCJ 1689/94 **Harari et al., v. Minister of the Interior**, IsrSC 51(1) 15, page 20, opposite the letter B.

79. The Convention on the Rights of the Child contains a number of provisions imposing an obligation to protect the child's family unit.

The Convention's preamble states as follows:

> [The States Parties to this convention] are convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community […]
>
> […] the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding […].

Article 3(1) of the Convention provides:

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

Article 9(1) provides:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

80. The provisions of the Convention on the Rights of the Child are increasingly recognized as a supplementary source on the rights of the child and as a guide for the interpretation of the "best interest of the child" as a governing consideration in Israeli jurisprudence: see CA 3077/90 **A. et al. v. B.**, IsrSC 49(2) 578, 593 (Honorable Justice Cheshin); CA 2266/93 **A., minor et al. v. A.**, IsrSC 49(1) 221, at pages 232-233, 249,251-252 (Honorable President *emeritus* Shamgar); CFH 7015/94 **Attorney General v. A.**, IsrSC 50(1) 48, 66 (Honorable Justice Dorner); HCJ 5227/97 **David v. Supreme Rabbinical Court** (TakSC 98(3) 443) in paragraph 10 of the judgment rendered by Honorable Justice Cheshin.

81. A severe damage is caused to petitioners 3-8 as a result of respondent's failure to arrange the status of their father, petitioner 2, for such a long time. The mental stress at home due to the absence of a stay permit in Israel, the impingement on the family and lack of certainty concerning the ability of all family members to continue to live together in their home in Jerusalem – may all cause irreversible damage to the children. By disregarding petitioners' application and failing to properly handle the application for the arrangement of the status of the father of the family, the respondent breaches international and Israeli law as well as the provisions of the Convention on the Rights of the Child, and disregards the consideration of the best interests of the children of petitioner 1, a resident of the state of Israel, which should guide him as a primary consideration.

The appellate committee acts contrary to law and procedure

82. The appellate committee was established, as stated by the respondent, to promote the efficiency of the processing of applications submitted to the population bureau and alleviate the load imposed on

the district courts sitting as courts for administrative affairs[1]. However, in fact, it turns out, that respondent's deviation from the administrative directives concerning prompt response, as specified above, is not unique to this case. The courts have long ago extensively criticized the appellate committee, which, from its establishment (in the beginning of 2009), became notorious for its protracted and delayed proceedings.

83. Accordingly, for instance, the court commented in its decision dated September 12, 2010, in AP (Jerusalem) 294-10 **Salem v. Minister of the Interior** (hereinafter: **Salem**):

> The committees [namely, the appellate committee, N.D.] were established, *inter alia*, to serve as a filter for petitions on the above issues. **Regretfully, the protracted proceedings before these committees result in double and triple proceedings, since eventually petitions are also filed against the lengthy proceedings in the committees themselves as well as against the decisions on their merits**.
>
> (emphases added, N.D.)

And also:

> With all the understanding we have for the budgeting and regulations' difficulties which encumber the committee's work, they cannot justify such a long procrastination in its decision making. Furthermore, it should be noted, that a major part of the delay stems from the procrastination in obtaining the responses of the Ministry of the Interior to the appeals, rather than from a delay in the committees' decision making. On this matter, **it is difficult to accept a situation whereby a very significant gap exists between the time period during which the Ministry of the Interior responds to petitions concerning citizenship and residency issues which are filed with the courts, as opposed to the time period during which it responds to appeals on the same issues which are submitted to the appellate committee. It should be noted on this matter, that it seems, that the conduct of the Ministry of the Interior in the appeal proceedings before the committees, as opposed to its conduct, when an administrative petition is filed on the same issue, and when the attorney's office enters the picture as an intermediary, constitutes, to a large extent, an incentive for petitioners to file petitions with the court**.
>
> (the above **Salem**, decision dated July 14, 2011, emphasis added, N.D.)

84. In AP (Jerusalem) 38244-03-10 **Aramin v. Ministry of the Interior** (reported in Nevo) the court referred to the claim made by the Ministry of the Interior, according to which the load imposed on

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[1] On this issue see notice dated January 14, 2009 in the website of the Ministry of Justice "A commissioner for the appeals of foreigners was appointed in the Ministry of the Interior" at http://www.justice.gov.il/MOJHeb/News/News_84132009_01_14.htm

the legal department did not enable them to provide the response of the Ministry of the Interior on time and according to the procedure:

> **The load of hearings imposed on the appellate committee does not justify respondents' omission**, and the period of time which was required to receive their response, after repeated notices of the chair of the appellate committee, **is unacceptable**.
>
> (*ibid*, emphases added, N.D.)

85. The need to file petitions with the district court, sitting as a court for administrative affairs, due to the unreasonable delay in the proceedings before the appellate committee, was also expressed in the awarding of costs in favor of the petitioners in such petitions:

> **Indeed, the duration of the proceedings before the committee in petitioner 2's matter was unreasonable, to say the least, even when all of respondents' explanations are taken into account […]. The correct solution is found in expediting the hearings before the committee and in striving to meet the schedule established by the procedure itself for the receipt of respondent's responses and for making a decision…**
>
> AP (Jerusalem) 39303-03-10 **Faraun v. Ministry of the Interior** (reported in Nevo, emphasis added, N.D.)

86. So we see: the scandalous conduct of the respondent in this case is only one of many examples of the excessive delays in the handling of appeals which are submitted to the appellate committee. The petitioners are regretful that the declared objectives underlying the establishment of the appellate committee were not attained, and like many others, they too did not get the benefit of an efficient proceeding, which shall have prevented them from applying to this honorable court.

Disregarding the duty to give reasons and violating the right to be heard

87. We shall reiterate: this petition concerns respondent 1's failure to respond to an appeal, which was submitted due to respondent 1's failure to respond to petitioners' request to receive the open evidentiary material, which served as the basis for respondent 1's notice of his intention to deny petitioners' family unification application.

88. Hence, in addition to the severe impingement on the petitioners, in the form of the scandalous protraction of the proceedings by the respondent, his conduct constitutes a severe violation of petitioner 2's right to be heard, and a disavowal of the duty to give grounds which is incumbent on the respondent.

89. It is clear that for as long as the respondent does not disclose to the petitioners the reasons which served as a basis for his decision to consider the denial of petitioners' application, he actually deprives them of the only way to prove that petitioner 2 poses no threat. **Petitioners' position is, that prior to the decision of the respondent in their matter, they have the right to inspect the documents upon which the intention to deny their application is based**. This is a fundamental right, embedded in the right to be heard, which constitutes an integral part of the rules of natural justice and has long been recognized by the law.

90. It has been recently held by the Supreme Court that "**the key for conducting a meaningful hearing, is that the applicants are given substantive information**, to the maximum extent

possible, subject to inherent limitations, so that they are afforded the opportunity to properly prepare for the proceeding." (AAA 1038/08 **State of Israel v. Ghabis**, reported in Nevo).

91. With respect to the importance of the right of inspection, as part of the exhaustion of the right to be heard of the person who may be injured by the decision of the administrative authority, it was held that:

> **Preventing the injured party from receiving all evidentiary material, violates his right to be heard, and in such an event he is no longer required to show that under the special circumstances of the case miscarriage of justice was also caused**. The concern (even if not substantiated) that the authority erred in making its injurious decision is built in the mere fact that the right to be heard and challenge the evidence which were received was not fully granted to the injured party. The protected value of human dignity, in the Basic Law: Human Dignity and Liberty, also leads to the inevitable conclusion that even an impingement of human dignity for a proper purpose, should not be made unless the person whose dignity may be impinged, has been given the right to be heard, namely, the right to **receive the evidentiary material in its entirety and an opportunity to respond thereto,** a right which constitutes a "safety belt" against an "excessive" injury.
>
> (HCJ 4914/94 **Terner v. State Comptroller et al**., IsrSC 49(3) 771, page 791; emphasis added, N.D.)

92. When "indirect" security denials are concerned – which are attributed to family members rather than to the person himself – the disclosure of the material which is held by the authority is afforded special importance. In such cases the person has no access to the evidentiary material on which the security agencies relied in making their recommendation to deny his application. He has no independent right to disclose the material and he cannot contact the relevant agencies directly and request, for instance, detention orders, police interrogation records and convictions of other people. **Therefore, in order to establish his right to be heard, the respondent must transfer to him the relevant material.**

93. It has already been argued in the past by HaMoked for the Defence of the Individual, that the right to a fair hearing was meaningless unless the applicant was afforded the opportunity to inspect the entire materials relevant to the decision, including, *inter alia*, in a general letter which was sent to the Ministry of the Interior on March 1, 2011 concerning the "comments of agencies procedure in family unification applications".

    A copy of the letter dated March 1, 2011 concerning the comments of agencies procedure is attached hereto and marked **P/40**.

94. As specified above, respondent's deafening silence and his failure to transfer the requested material to the petitioners, is extremely peculiar in view of the fact that this is an **open** material, which should have anyway been before the authority, while making the decision to inform the petitioners of an "intent to deny" the family unification application.

95. Therefore, respondent's failure to respond severely violates petitioner 2's basic right to present his arguments properly before the authority.

96. *Vis-a-vis* petitioners' right of inspection and the right to be heard, stands respondent's duty in this case to **give the grounds** for his decision, which also constitutes, like the former rights, an integral part of petitioner 2's right to a fair hearing and due process, which was also recognized as a right by English common law and thereafter by Israeli jurisprudence, which acknowledged the existence of the rules of natural justice.

97. The importance of having the authority's reasons disclosed for the purpose of securing a due process is demonstrated, most of all, by those cases in which the authorities agreed to specify, to a certain extent, the reasons for the refusal to make a disclosure, following which, the "refused" succeeded to prove, relatively easily, that the arguments raised against them were not grounded, thus causing the withdrawal of the preclusion. This was the case, for instance, in HCJ 8857/08 **'Asfour v. Military Commander of West Bank**; HCJ 25/09 **Ghanem v. Military Commander of West Bank** ; HCJ 4819/09 **Dr. al-Hor v. Military Commander of West Bank; HCJ 10104/09 Abu-Salameh v. Military Commander of West Bank.** A review of these files shows that a thorough inspection, with the assistance of counsel, of documents, which are submitted by authorities and various agencies in cases in which the authorities claim that a security preclusion exists, may disclose things and sometimes even errors, which can tip the scale and change the decision.

98. As described in detail above, the petitioners reiterate their demand to receive the evidentiary material underlying respondent's notice of his intention to deny the family unification application, whereas the respondent, for some reason, does not accede to this legitimate demand.

99. Respondent's conduct described above is very peculiar. Firstly, it is not clear why the material is not transferred to the petitioners, as it should be in respondent's possession. It is assumed that an administrative authority which acts reasonably and properly, reviews the relevant evidentiary material before an administrative decision is made by it:

> … by the mere fact of having the power – **he should have acted out of his own initiative, to obtain all relevant material, based on which a decision may be made either this way or the other. He is the authority which was appointed by the legislator to handle the matter and he is the one who had to take action and gather information on this issue, which would assist him in making his decision…**
>
> **In view of all of the above, the inevitable conclusion is that the decision making process in this case by the competent authority was flawed and consequently invalid: in fact, a proper examination process did not take place, as required**. If the minister did not have enough data, including professional opinions of a proper level, which could refute petitioners' position or put its weight and persuasive power in doubt, then **he should have acted to obtain an opinion in order to carry out the data gathering process, and have available to him enough material, based on which he would be able to make a decision…**
>
> If he did not take any action to gather information, he could not have moved on to the next stage of review and consideration – which must precede the decision making, namely, the stage in

> which the expert opinions are compared and weighed one against the other. This is done, *inter alia*, by the examination of the pros and cons of each position. Therefore, **the essential basis which is required to establish a decision is missing, a decision which could have been regarded by the court as a decision of the competent authority which was made after an open minded examination free of rigid prejudices,** a decision which could have been regarded by the court as a choice between various reasonable alternatives, with which the court usually does not intervene…
>
> **The court's meticulous insistence that a proper decision making process be carried out before a decision is made by the party which was granted the authority by law, may be the most efficient means to secure that the discretion granted by the legislator to this branch or another of the executive authority, is not exercised in a defective manner, which may render the law and its objective meaningless**. The obligation to consider all data methodically, fairly and in a pertinent manner, and to conduct a complete and orderly process in which contradicting opinions are weighed **may reduce, to a large extent, the danger that relevant aspects be disregarded and that flawed or arbitrary acts be taken, which may injure the individual and the public at large**.
>
> (HCJ 297/82 **Berger v. Minister of the Interior**, IsrSC 37(3), 29, paragraphs 8-10; emphasis added, N.D.).

100. Indeed, the party having the authority to notify of an "intention to deny" in this case, is the respondent. The respondent – and not the ISA. The security agencies **are an advisory body only**:

> The recommendation of the ISA and other security agencies is not a decisive *'sine qua non*' factor. **The ISA does not have a "veto right" on the approval of family unification applications**. Indeed, the ISA's opinion plays a central role in respondent's considerations, and indeed, the ISA's position has been rightfully afforded said position. However, while making his decision in a family unification application, the respondent must take into consideration a host of other considerations as well.
>
> (AP (Haifa) 1551-06-09 **Nasser v. Ministry of the Interior** (reported in Nevo); emphasis added, N.D.)

101. Thus, the administrative authority must independently consider the relevant considerations, within the framework of the family unification application. It is clear that it must, **at least**, review the open material, before it gives notice of an intention to deny a family unification application, for two main reasons: to prevent a situation in which it relinquishes its discretion and assigns it to a body which is not authorized to make a final decision but only to consult (in this case – the ISA), and to ensure that it upholds the duty to give reasons which is incumbent upon it.

102. An administrative authority, by its nature, has great power and influence, much greater than those of the single citizen confronting it. In view of this balance of power, it is imperative that the citizen understands the nature of the decision and its underlying considerations. He should not contest a laconic answer, the reasons and considerations of which are unknown to him.

103. Beyond the rationale underlying the duty to give grounds, which is, *inter alia*, to enable a person who was injured by the administrative decision to consider whether the decision complies with the law, and whether there is basis and reason to bring it up for judicial scrutiny, then, in view of the crucial impact that the decision to deny the application has on the life of the applying family, special importance is attributed to the reasoning of the denial. **Therefore, it is incumbent upon the respondent to precisely specify in his notice to which indictment and detentions the notice refers to, and the contents of the relevant documents.**

The duty to give grounds as reflected in the Ghabis Judgment – pre-conditions for the exercise of the right to a fair hearing

104. The judgment in AAA 1038/08 **State of Israel v. Ghabis** (hereinafter: **Ghabis**) concerned the duties imposed on the respondent while denying family unification applications. In addition to the obligation to establish a procedure which governs applicants' right to be heard before their fate is decided by the respondents, the court has also discussed in the judgment additional conditions which derive from the grant of the right to a fair hearing. The main obligation of which is the obligation to give grounds.

105. Thus, it was held in paragraph 31 of the judgment, that in order to exercise the preliminary right to be heard, the hearing should be conducted "**following a detailed notice which specifies, to the maximum extent possible, the basis for the intent to deny the application, so that the applicants will be able to adequately prepare themselves therefore**." (emphasis added, N.D.).

106. The Supreme Court added that in cases in which the opinion of the security agencies was based on privileged intelligence information:

> An effort should be made to prepare a paraphrase of the material, with as many details as possible, with an attempt not to provide only laconic statements. In the confrontation between the individual and the authority the balance of power is never even, **and the above applies even more forcefully in cases in which the material concerning the applicant is unknown to him. An effort should be made to limit this restriction to the required minimum.**
>
> (emphasis added, N.D.).

107. In paragraph 34 the court warned that:

> The grant of the right to be heard is important; but it is important to ensure that the hearing is substantive and that it does not turn into a formal and meaningless proceeding. **The key for turning the hearing into a meaningful proceeding is, that the applicants are provided with substantial information, to the maximum extent possible, even if subject to inherent restrictions, so that they would be able to adequately prepare for the proceeding."** (emphasis added, N.D.)

108. It was also held in paragraph 7 of the judgment of President Beinisch in **Ghabis** as follows:

> "In conclusion, I would like to point out, that substantial importance is attributed to a meticulous adherence to the procedures of the Ministry of the Interior which pertain to the manner of presentation of a concise description of the material which may be disclosed to the individual whose application for status is examined, in view of the nature and objective of these procedures. As is recalled, the premise underlying the establishment of the "procedure for comments of [security] officials" was that the Ministry of the Interior should use its best efforts – subject to the limitations of the privileged information - to provide the individual details concerning the information underlying the decision not to grant him status in Israel for security or other reasons. **Within the framework of the procedure, an outline was established according to which the individual who applies for status would be provided with a concise description of the information attributed to him, upon which the decision to reject his application was made, in the broadest manner possible. This would enable the individual to deal – in a better way – although not in the best way - with what is attributed to him**. An examination of some of the rejections being the subject matter of the appeals before us, raised our concern that the disclosed summaries of the information (paraphrases) mentioned in the rejections were not detailed enough and did not enable the individual to adequately respond to the allegations raised against him. In our opinion, **the authority should consider this aspect and examine whether the current state of affairs gives a true and adequate solution to this aspect of disclosure of the material to individual who applies for status, as is mandated by the nature of the procedure and the nature of the violated rights when a decision to reject the application is made, all subject to security constraints**."
>
> (emphasis added – N.D.)

109. In our case, **the information which was provided does not comply with the requirements set forth in Ghabis**, as it is clear that the respondent has neither provided information "in the broadest manner possible" nor "substantial information, to the maximum extent possible". The respondent did not comply with his obligation to reduce, to the required minimum, the fog which engulfs the petitioners.

110. Accordingly: the petitioners wish to exercise their basic right to a fair hearing, concerning respondent's intention to deny their family unification application. The right to a fair hearing is meaningless unless grounds are given and the right of inspection is exercised.

Conclusion

111. The petitioners encountered severe foot-dragging by the respondent in each and every request which was submitted to him: in the family unification application, in the request for the transfer of open evidentiary material, in the two appeals which were submitted. This petition is filed due to respondent's "double" failure to respond: since no response was received from the population authority bureau to the request for the open material underlying the intent to deny the family unification application, an appeal was submitted with the hope that a solution will be provided by appellate committee. However, the respondent continues to treat the persons who apply to him disrespectfully before the appellate committee too, and does not transfer to the petitioners the open material which would enable them to materialize their right to be heard after they are provided with the detailed grounds of the authority's decision.

112. This conduct is inacceptable. The court is requested to order the respondent to put an end to the protracted saga of petitioners' applications to the respondent, and direct him to transfer to the petitioners, forthwith, the requested open evidentiary material. This is the only way which will enable the petitioners to raise their comprehensive arguments against the intention to deny their family unification application. Finally, the court is hereby requested to obligate the respondent to pay legal fees and costs of trial.

Jerusalem, November 15, 2011.

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Noa Diamond, Advocate

Counsel to the petitioners

(File No. 57819)