State of Israel

Ministry of the Interior

Appellate Committee for Foreigners

Appeal 281/11

Before: Chair of the Appellate Committee for Foreigners, Jerusalem

In the matter of:

The Appellant:	1. _____ **Shanaytah** 2. _____ **Shanaytah**
	v.
The Respondent:	**Ministry of the Interior, Population and Immigration Authority** Represented by the legal department, Adv. Ilanit Mendel

Decision

This appeal concerns the challenge of respondent's conduct in a family unification application (hereinafter: the "**family unification application**") which was submitted by the appellants. The appellants demand to receive the background evidentiary material which underlies respondent's intention to deny their application. The respondent, on its part, is of the opinion, that the information which has been transferred to the appellants thus far suffices, and enables them to cope with the security arguments, based on which the respondent intends to deny their family unification application.

Summary of the relevant facts

1. Appellant 1 was born in 1968 and is a permanent Israeli resident. Appellant 2 was born in 1969, and is a resident of Judea and Samaria (hereinafter: the "**Area**"). The appellants were married in 1988. They have six children.

2. In 2008, appellant 1 submitted a family unification application with appellant 2 and an application for the registration of her children. The application was denied by the respondent, on the grounds that information existed against the appellant and his family member concerning activity in a terrorist organization which was acting against the state of Israel, which information was provided to the respondent by the security agencies.

3. In March 2009, an appeal was submitted by the appellants, in which the respondent was requested to clarify the grounds for its decision and to provide the appellants with a list of items (evidence) which they needed in order to respond to the arguments which were raised against appellant 2, the sponsored spouse in the family unification application.

4. Respondent's response to the appeal was given by the respondent on May 26, 2009. In its letter, the respondent specifies the grounds for the denial as follows: **"The sponsored spouse 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 Sa'id Shanayth's brothers were also arrested several times due to their activity with the 'Islamic Jihad'. His brother Muhammad Shanayta was an administrative detainee and his brother Ra'id Shanaytah was formerly an 'Islamic Jihad prisoner' who admitted of having been a member of a military cell of the organization, in an attempt to recruit another young man to the organization and of his involvement with firearms."**

5. On June 3, 2009 a first appeal against the respondent was submitted to the Appellate Committee. The appeal concerned a security preclusion, status upgrade of appellants' children and an application for the registration of an adult pursuant to regulation 12 of the Entry into Israel Regulations. The Committee rendered its decision on January 27, 2011. With respect to the security preclusion for the approval of the family unification application, the Committee decided that the appellants would submit to the respondent a "written hearing" within 21 days. In addition, decisions were made with respect to matters which pertained to appellants' children (which are not relevant to the case at hand).

6. Appellants' written hearing was held on February 21, 2011. In their written arguments the appellants raised their demand to receive the entire evidentiary material on which the security agencies based their recommendation to deny the family unification application.

7. On December 8, 2010, the respondent transferred to appellants' counsel the requested material including an amended indictment, protocols and decisions of the Judea military court, judgment and sentence.

8. On March 9, 2011, a temporary relief was granted by the Appellate Committee which ordered not to expel appellant 2 from Israel until the elapse of 45 days from the date on which respondent's decision in appellant's appeal would be rendered, following their written hearing.

9. Respondent's response following the written hearing, was given on April 13, 2011, which stated that the position of the security agencies has not yet been given.

10. In view of the protracted proceeding, the appellants submitted this appeal on June 22, 2011. Respondent's response to the appeal was given on March 29, 2011. Appellants' reply to respondent's response was given on April 18, 2012.

11. While waiting for the Committee's decision, the appellants petitioned to the District Court sitting as a court for administrative affairs, in AP 28253-11-11. The judgment in the petition was rendered on April 17, 2012, according to which the issue of the provision of the evidentiary material which was requested by the appellants would be discussed by the Appellate Committee. With respect to the

argument concerning respondent's procrastination which was raised by the appellants against the respondent, the court held that the filing of the petition with the court would have been avoided, had the respondent complied with the schedule for the provision of the requested evidence. Therefore, the respondent was directed to pay appellants' costs in the sum of NIS 2,000.

Summary of the parties' arguments

12. The caption of this appeal concerns appellants' demand to receive evidentiary material, based on which the respondent and the security agencies advising it, decided to deny appellants' family unification application.

13. In the appeal itself, appellants' arguments are divided into two categories: the first, is their right to receive the information which was presented before the bodies which decided to deny appellants' family unification application (as stated in the caption of the appeal). The other, concerns respondent's obligation to approve appellants' family unification application, due to their right to a family. The appellants argue that the direct – negative security information concerning appellant 2, which ties appellant 2 with the Islamic Jihad organization – has no basis. Therefore, the appellants argue, that it may be assumed that no direct material concerning the appellant exists. With respect to appellant's family members, his brothers, who, according to the respondent, are involved in terrorist activity, case law provides that in the examination of "indirect information", weight should be given to appellant's long stay in Israel and the fact that the sponsored spouse is not personally involved in terrorism.

14. The following are the main arguments of this appeal, which consists of many pages and to which many exhibits are attached. The appeal discusses the manner by which the decision is made by state authorities, to the extent it pertains to the denial of a family unification application against a security backdrop. The appellants discuss the right to be heard, the right to inspect substantial material and data against the appellant, respondent's failure to specify the grounds for its decision to deny the application, and the considerable delay in respondent's responses to appellants' requests submitted to it.

15. The respondent requests the Committee to reject the appeal on both claims. The respondent is obligated to conduct examinations before it approves an application to grant a foreign national the right to settle down within the boundaries of the state of Israel. Among the required examinations, an examination is also conducted by the security agencies. The respondent argues that the information which was made available to the appellants is sufficiently detailed and that it enables the appellants to make their arguments in the written hearing.

16. Therefore, according to the respondent, the information which is at appellants' disposal enables them to exhaust their rights and there is neither room nor need to obligate the respond to embark on "an expedition for the location of materials which are already found in the possession of the appellant."

17. The respondent terminates its response to the appeal by giving the appellants another opportunity to respond to the security preclusion by having another written hearing, within 30 days.

18. In their reply to the response, the appellants discuss their right to receive relevant evidentiary material, material which was before the authority which made the decision. The appellants also mention the decision of the District Court in AP 28253-11-11 which left with the Committee the decision on the issue of providing the material which was demanded by the appellants, noting that the appellants have the right to appeal said decision of the Committee with the District Court, if and to the extent required and should they wish to do so.

Discussion and Decision

19. It is a rule that the Minister of the Interior has broad discretion in the exercise of his powers under the Entry into Israel Law (HCJ 758/88 **Kendall v. Minister of Interior**, IsrSC 46(4) 505, 520)(hereinafter: **Kendall**); HCJ 3648/97 **Stamka v. Minister of the Interior** IsrSC 53(2) 728 (hereinafter: **Stamka**); HCJ 4156/01 Dimitrov v. Ministry of the Interior, IsrSC 56(6) 289, 293; **Hamdan,** paragraph 9; AAA 4614/05 State of Israel v. Oren (published in the Nevo website, given on March 16, 2009, paragraph 5).

This, according to the principle of sovereignty, under which the state is entitled to decide who is and who is not entitled to enter its gates and by virtue of which the state has broad discretion to prevent foreign nationals from entering its territory (see and compare: HCJ 482/71 **Clark v. Minister of the Interior**, IsrSC 27(1) 113, 117; **Kendall**, page 520; HCJ 1031/93 **Pesaro (Goldstein) v. Minister of the Interior**, IsrSC 49(4) 661, 705; HCJ 4370/01 **Lipka v. Minister of the Interior,** IsrSC 57(4) 920, 930).

20. The moral basis for the grant of a residency permit in Israel to the foreign spouse of an Israeli citizen derives from the fact that: "**The State of Israel recognizes the right of the citizen to choose for himself a spouse and to establish with that spouse a family in Israel. Israel is committed to protect the family unit in accordance with international conventions… and although these conventions do not stipulate one policy or another with regard to family unification, Israel has recognized — and continues to recognize — its duty to provide protection to the family unit also by giving permits for family unification. Thus Israel has joined the most enlightened nations that recognize — subject to qualifications of national security, public safety and public welfare — the right of family members to live together in the place of their choice**" (HCJ 3648/97 **Stamka v. Minister of the Interior** IsrSC 53(2) 728, 790 (1999) (hereinafter: **Stamka**).

This should be coupled with the court's statement according to which, the grant of an automatic immigration right to any person who marries one of the state's citizens or residents means, that every citizen holds the right to allow immigration into the state. "**Indeed, although international law recognizes the right of the individual to marriage and family life, it does not recognize the right of the individual to realize this right specifically in his country of citizenship. In other words, the right of the individual to marriage and to family life does not necessarily imply a constitutional right to 'family unification' in the state. The prevailing legal position in this sphere was recently considered by Rubinstein and Orgad, in their article, *supra*, p. 340; and in their words:**

'The rules of international law also do not give rise to a right to immigrate for the purposes of marriage. International law admittedly recognizes the importance of the right to establish a family, as well as the importance of the right of a family not to separated by deportation, but *there is no express and concrete right in international law that creates a positive duty that a state should allow immigration into its territory for the purpose of marriage, even in times of peace*' (emphasis in the original – M.C).

In other words: <u>the grant of an automatic immigration right to any person who marries one of the state's citizens or residents means, that every citizen holds the right to allow immigration into the state</u>, without the supervision of the state, and it is clear that no government in the world will allow to harm not only the way it functions but rather, the sovereignty of the state itself in this manner." (HCJ 7052/03 **Adalah Legal Centre for Arab Minority Rights in Israel and others** v. Minister of the Interior, paragraph 53)(emphasis added).

21. It is important to note that in this case we are concerned with the right of appellant 1 to family life in Israel, and specifically in Israel. It is her right, the right of appellant 1, which needs to be balanced against public interest, and it is not the right of the foreign national, appellant 2. "**The legal analytic discussion will focus on the rights of the Israeli spouse. Obviously, the effect that the decisions of the Minister of the Interior also have on the life of the non-Israeli spouse must not be disregarded. Nevertheless, in the analytic examination we did not see any reason to discuss the rights of the non-Israeli spouse, either under international law concerning human rights or under the humanitarian international law which applies to residents of an area which is under belligerent occupation. This, in view of the determination concerning the constitutional right of the Israeli spouse, a right which from the internal Israeli perspective, has a much higher normative status than the rights granted under international law.** (HCJ 2028/05 **Hassan Amara v. Minister of the Interior** (reported in Nevo)).

Security preclusion

22. In the case at hand, there is a significant meaning to the provisions of Section 3D of the Entry into Israel Law (Temporary Order), 5763-2003 (hereinafter: the Temporary Order Law") entitled "Security Preclusion", which provides as follows:

> "**3D. A permit to stay in Israel or a license to reside in Israel shall not be granted to a resident of the region, in accordance with sections 3, 3A1, 3A(2),3B(2) and (3) and 4(2) and license to reside in Israel shall not be granted to any other applicant who is not a resident of the region, if the Minister of the Interior or region commander, as the case may be, has determined, pursuant to the opinion of authorized security personnel that the resident of the region or other applicant or family member are liable to constitute a security risk to the State of Israel; in this section, "family member" – spouse, parent, child, brother and sister and their spouses. For this purpose, the Minister of the Interior may determine that a resident of the region or any other applicant is liable to constitute a security risk to the State of Israel, among other things on the basis of an opinion of the security personnel according to which, within the domiciled state or residential region of the resident of the region or of any other applicant, activity was carried out which is liable to endanger the security of the State of Israel or of its citizens."**

23. The explanatory notes of the proposed government bill to the Temporary Order Law (Amendment No. 2), 273 27 Kislev 5767, December 18, 2006 state on this issue as follows:

> "**Section 3D was added to the Temporary Order within the 5767 amendment and established the principle which has already been recognized by the courts' judgments, according to which security risk posed by first degree relatives of an applicant for family unification in Israel or of an applicant of another stay permit, may prevent the grant of a permit to said resident, in view of the professional estimate of the security personnel, that the relations between the resident of the region and said family member who**

constitutes a security risk, may be abused, as has occurred on more than one occasion in the past. It is proposed to broaden this principle and apply it to any other applicant of a stay permit in Israel, who is not a resident of the region, and to enable the Minister of the Interior to determine that person who applies for a residency or stay permit in Israel may constitute a security risk, *inter alia*, based on an opinion of the authorized security personnel according to which, within the domiciled state or residential region, activity is carried out which is liable to endanger the security of the State of Israel or of its citizens. Said determination will be for a period which will be determined by the Minister according to the security situation and the security considerations which underlie the Temporary Order. It is further proposed to broaden the definition of a "family member" for the purpose of Section 3D to include - spouse, parent, child, brother and sister and the spouse and child of any one of them."

24. Section 3D is significant for the purpose of this appeal, in view of the fact that the respondent intends to deny the family unification application based on information provided by security agencies, under the Temporary Order Law. A challenge of a decision which is based on the recommendation of security agencies is subject to a hearing, to the opportunity to defend against the arguments raised by the security agencies and is entrenched in case law (AAA 1038/08 **State of Israel v. Hassin Ghabis** (reported in Nevo)), and consequently in respondent's procedures.

From the General to the Particular

25. As specified above, appellants' arguments are divided into two categories. The first, concerns the approval of the family unification application notwithstanding the recommendation of the security agencies to deny the application, and the other, concerns review of the evidence which were before the respondent in making its decision.

At the very outset I would like to clarify that I do not find any room to discuss respondent's denial of appellants' family unification application, it being premature. In paragraph 5 of respondent's position (the last part of the response), respondent's counsel states as follows: "**In view of the above said and before a decision is made in the application, the appellants are given an additional opportunity to respond to the security preclusion… by a written hearing, within 30 days**." Hence, the respondent has not yet rendered its decision, and as aforesaid appellants' case has not yet been resolved. How can I now step into respondent's shoes and decide in his stead? This constitutes a reversal of roles, and therefore, I should not express my opinion on this issue of whether the family unification application should be approved or denied.

26. As to respondent's demand to review the evidence underlying respondent's consideration to deny the family unification application, I will say this: this is an information summary (paraphrase), which integrates several levels of information concerning appellant 2, with which he must cope. The first level, is the information which pertains directly to appellant 2, information which ties him to activity against the state of Israel. This information is based, in part, on judgments and decisions before the martial court, and in other part, on intelligence information provided by security agencies. Another level of information, ties family members of appellant 2, his two brothers, to activity against the state of Israel.

Without taking a stance concerning the decision which would be finally made by the respondent by the end of the proceeding, I will just say that the negative security information attributed to appellant 2, is severe both on the direct level which concerns him, as on the indirect level, which is based on his family members. These two levels of information are very relevant and are compatible with the provisions of the Temporary Order Law. Hence, said opinion of the security agencies, may prevent the appellants from obtaining the right to enter and stay in Israel and may cause the denial of their family unification application, unless an appropriate argument against the recommendation of the security agencies is presented.

27. Hence, the appellants must raise a defence and make their arguments. Otherwise, the application is expected to be denied. The obligation to enable the appellants to make their arguments applies also to the respondent, as clarified above and broadly discussed by the parties to the appeal. It should be further noted that respondent's response indicates that it intends to act according to case law and the directives set forth in the procedure.

28. The appellants request to receive the background material which underlies the decision of the security agencies. Although they do not explicitly say so, there is no other way to regard the application, and the inevitable conclusion which arises from the application and the list of the requested documents is that the purpose of the application is to examine the basis for the decision of the security agencies, which was delivered as a recommendation to the respondent before it makes its decision in the application.

29. Respondent's conduct is guided by common practice and internal logic. According to common practice, which is entrenched in case law and respondent's procedures (comments of agencies procedure 5.2.0015), the open paraphrase should be broad enough to enable the appellants to challenge the information brought against them. Thereafter, appellants' response ("written hearing") is transmitted to the security agencies. If, even after appellants' response to the negative information against them, the recommendation of the security agencies remains as is, the respondent is required to independently consider – whether or not to approve the application.

    As specified above, the appellants do not wish to examine respondent's discretion, but rather, to examine, once again, the reasons for and the arguments which were raised in the administrative detention proceedings, in appellant 2's indictment proceedings or the quality of the intelligence information which was in the possession of the ISA. This is not the appropriate arena to discuss these questions, which have already been resolved by the court – either in the administrative detention proceeding for very long periods of time, in which the judicial instance was presented with intelligence information which indicated that appellant 2 and his brothers posed great risk, which justified to take an extreme measure such as an administrative detention; either in view of past convictions of appellant 2 and his brothers which were scrutinized by the court; or based on intelligence information held by the security agencies. Logic dictates that this is not the appropriate place to discuss the manner by which the security agencies establish their recommendation. Rather, it is respondent's decision which should be discussed – and which, as aforesaid, has not yet been made.

30. It should also be noted that the position of the security agencies, which must be considered by the respondent according to the Temporary Order Law, constitutes an administrative evidence, as this term is defined in case law. See for instance the judgment of the Honorable President Judge Mussia Arad in AP 782/06 **Rima Mahmoud 'Urabi al-Salimeh et al. v. Minister of the Interior et al**.:

> "**The administrative evidence test is a flexible test, which enables the administrative authority to take into**

consideration also evidence which are inadmissible in court, provided that these are evidence that any reasonable person would have regarded as having evidential value and would have relied on for the purpose of making the required decision (see HCJ 987/94 Euronet Golden Line (1992) Ltd. v. Minister of Communications Mrs. Shulamit Aloni, IsrSC 48(4) 412, 424-425 (1994))."

31. Although it was not said so by the respondent – it would be appropriate to determine and this is also the common practice, that after receipt of the position of the security personnel, the latter will be required to support their recommendation by privileged information which would be disclosed solely to the respondent, which substantiates their recommendation in the open paraphrase.

32. In conclusion, firstly, the respondent requests that the application remains before it, to be resolved by it only after a written hearing is held for the appellants. Therefore, I find no reason to intervene with its said decision and I even welcome it. Secondly, I find that the open paraphrase is broad enough and that under the circumstances of this appeal, it enables the appellants to respond to its contents in a detailed manner. Furthermore, Respondent's response to the appeal elaborates on said paraphrase by analysing and presenting the information of the Israel Security Agency which pertains to appellant 2. This Committee is not the place to discuss the status and contents of the security agencies' recommendation, and the respondent is not required, not now and not at all, to examine each and every item and information brought to its attention by any of the state authorities. For as long as a reasonable person can assume that this is a reliable information, then the ISA position will be accepted as an administrative evidence based on which, among its other considerations, the respondent will make its decision.

33. In conclusion, the appellants will have a written hearing within 30 days from the date of this decision. The respondent will render its decision in appellants' family unification application, within 45 additional days.

34. Accordingly, the above appeal is hereby deleted.

Given today, July 19, 2012, 29 Tamuz 5772 and will be delivered to the counsels of the parties by the Committee's secretariat.

(signed)

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Zvi Gal, Advocate

Chair of the Appellate Committee for Foreigners