At the Jerusalem District Court **AP 32869-10-14**
Sitting as a Court for Administrative Affairs

In the matter of:

1. **_____ Hamadah, ID No. _____**
2. **_____ Hamadah, Jordanian Passport _____**
3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA 580163517**

all represented by counsel, Adv. Benjamin Agsteribbe (Lic. No. 58088) and/or Noa Diamond (Lic. No. 54665) and/or Sigi Ben Ari (Lic. No. 37566) and/or Abir Jubran-Dakawar (Lic. No. 44346) and/or Hava Matras-Irron (Lic. No. 35174) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. No. 41065) and/or Bilal Sbihat (Lic. No. 49838)

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

The Petitioners

v.

Population Immigration and Border Authority

represented by the Jerusalem District Attorney's Office,
7 Machal Street, Jerusalem
Tel: 02-5419555; Fax: 02-5419581

The Respondent

Administrative Petition

A petition is hereby filed which is directed at the respondent ordering it to retract its decision to deny the family unification application submitted by petitioners 1-2, and enable petitioner 2 to proceed with the family unification graduated procedure underwent by her until her application was denied, in a manner which would enable her to upgrade her status and eventually receive a permanent residency status in Israel.

The Petition

1. This petition concerns the decision of respondent's appellate committee to deny the family unification application which was submitted by the petitioners for petitioner 2, a Jordanian citizen, mother and wife of permanent residents of Israel. Respondent's decision to deny the application is based on the allegation that the petitioners do not maintain a center of life in the Sur Bahir neighborhood which is located within the boundaries of Jerusalem, as they argue, but rather in the Wadi Hummus neighborhood, an extension of Sur Bahir which is adjacent thereto, in which the petitioners own property. It should already be noted that due to its physical location, Wadi Hummus is viewed as being in the West Bank. Nevertheless, there is no dispute that due to the fact that Wadi Hummus is located on the "Israeli" side of the separation fence, adjacent to the Sur Bahir neighborhood which is located within the municipal boundaries of Jerusalem, Wadi Hummus is disconnected from all other parts of the West Bank and therefore, its inhabitants maintain their ties and connections in Israel.

2. The petitioners will argue that respondent's offensive decision to revoke petitioner's stay permit without having thoroughly examined their arguments beforehand, as well as the existing judgments in their matter, violated the constitutional right to family life of the petitioners' family and severely injured them and their children. It is a disproportionate and unreasonable decision which should be revoked. Following a concise description of the factual background of the petition, the petitioners will present their factual and legal arguments against the decision.

The Parties

3. Petitioner 1 (hereinafter: **petitioner 1** and together with petitioner 2 the **petitioners**), a permanent resident of Israel, married to petitioner 2 and a father of five children, all of whom, like their father, are permanent residents of Israel.

4. Petitioner 2 is a Jordanian citizen. She is married to petitioner 1 (hereinafter: **petitioner 2** and together with petitioner 1 the **petitioners**), and lives with him and their five children in an apartment in Sur Bahir, Jerusalem.

5. Petitioner 3 is a registered not-for-profit association which has taken upon itself to assist, *inter alia*, residents of East Jerusalem *vis-a-vis* 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.

6. The **respondent** is the Population Immigration and Border Authority.

Petitioners' Matter

7. Petitioner 1 is a permanent resident of Israel. In 1993 he married petitioner 2, a Jordanian citizen. It should be noted that the petitioners have five children, who are, like their father, permanent residents of Israel.

   Petitioners' marriage contract is attached and marked **P/1**.

8. On August 30, 1994, petitioner 1 submitted, for the first time, a family unification application with his wife, petitioner 2. Said application was approved only four years later, when petitioner 2 was granted, in 1998, an A/5 visa for twelve months.

   Copies of the application of 1994, and the visa which was granted to petitioner 2 in September 17, 1998, are attached and marked **P/2-3**, respectively.

9. On December 26, 1999, petitioner 1 submitted an application for the extension of petitioner 2's visa.

10. On June 21, 2001, the respondent notified the petitioners that their application was denied in view of the fact that the petitioners were residing in the Wadi Hummus neighborhood which was adjacent to the Jerusalemite neighborhood Sur Bahir, but was located outside the municipal boundaries of Jerusalem.

    A copy of the application's denial dated June 21, 2001, is attached and marked **P/4**.

11. In the years which followed, legal changes occurred. In view of their importance for the purpose of understanding the backdrop against which this petition is filed, a concise description of said changes is set forth below.

12. It should be firstly emphasized that in the beginning of the 2000s, when the residents of Wadi Hummus – including the petitioners – realized that the separation fence was about to be erected near their homes and disconnect their neighborhood from the other parts of Sur Bahir in which their center of life was maintained, leaving it on the east side of the fence, they hurried and filed a petition regarding this matter – HCJ 9156/03 **Da'ud v. The Seamline Administration**. And indeed, following the filing of the petition, the State notified the court that it decided to change the route of the separation fence such that it would not be erected within the municipal boundaries of the city, leaving the Sur Bahir neighborhood and the Wadi Hummus neighborhood which constituted a section thereof, as one homogenous unit on the Israeli side of the fence.

13. In addition, at the same time, a judgment was given by the Jerusalem Labor Court (the Honorable Judge Sara Sdeor) in NI 10177/05 **The Sur Bahir Village Council v. The National Insurance Institute** which held that the permanent residents of Wadi Hummus were entitled to national insurance. Moreover, the unique nature of Wadi Hummus, as a neighborhood which constitutes an integral part of Jerusalem and is disconnected from all other parts of the West Bank, was clarified again several years later, in a notice which was given by the legal advisor for the National Insurance Institute according to the directive of the Attorney General in NI 12500/12/2010 **'Atallah v. The National Insurance Institute**, to the Labor Court.

    A copy of the notice to the Labor Court in NI 12500/12/2010 is attached and marked **P/5**.

14. Following the above developments, petitioner 1 submitted again, on August 7, 2006, a family unification application for petitioner 2. The application was numbered 1411/06.

15. On December 3, 2007, the respondent notified the petitioners that their application was denied in view of the fact that the house in which they were living in Wadi Hummus, was located outside the territory of Israel, despite the fact that Wadi Hummus, as stated in the beginning of the petition, constituted an integral part of the Sur Bahir village which naturally has also expanded eastward, such that its residents built their homes beyond the boundaries of the village which is located within the municipal boundaries of Jerusalem and the State of Israel.

    A copy of respondent's denial of application number 1411/06 is attached and marked **P/6**.

16. Following respondent's denial of the application, the petitioners filed on July 3, 2008 a petition in this matter – AP 8568/08.

17. On January 26, 2009, judgment was given in the petition in which the honorable court held that in view of the special circumstances which were created in Wadi Hummus, the center of life of the

petitioners should be viewed as being in Israel, and petitioners' family unification application should be approved.

18. On March 1, 2009, the respondent submitted an administrative appeal against the judgment in AP 8568/08 to the Supreme Court, AAA1895/09. Within the framework of the hearings in said appeal the parties to the proceeding reached an agreement according to which, should the petitioners move to Sur Bahir, their family unification application would be processed according to the graduated procedure for foreigners at the Ministry of Interior, upon the termination of which petitioner 2 would be entitled to receive permanent status in Israel. On August 15, 2010, judgment was given in 1895/09 which gave the parties' understandings the effect of a judgment and revoked the judgment of the court for administrative affairs.

    A copy of the judgment in AAA 1895/09 which gave effect to the parties' understandings is attached and marked **P/7**.

19. And indeed, following the understandings in AAA 1895/09, on July 1, 2009, the petitioners moved to the house of petitioner 1's father in Sur Bahir, and on December 17, 2009, the petitioners submitted to the respondent a new family unification application.

20. It should already be emphasized that the size of the residential unit in Sur Bahir to which the petitioners moved is about 30 square meters only, whereas the size of their home in the adjacent Wadi Hummus neighborhood is 120 square meters. Therefore, the petitioners left most of their assets and belongings in the Wadi Hummus house which they also use from time to time, although not as a residential home.

21. On February 20, 2011, the application was approved and on February 23, 2011, petitioner 2 received a B/1 tourist visa for one year, a visa which was renewed for an additional year until April 24, 2013.

22. On April 4, 2013, one month before the elapse of a 27 month period during which Mrs. Hamadah had a B/1 tourist status, an application for the upgrade of petitioner 2's status to an A/5 temporary status in Israel was submitted to the respondent.

    A copy of the application for the upgrade of petitioner 2's status is attached and marked **P/8.**

23. On May 30, 2013, respondent's representatives conducted a surprise visit in the Wadi Hummus house owned by the petitioners. It should be noted that upon their arrival to the house, the house was locked and neither one of the petitioners' family members was present on scene. Respondent's representatives called petitioners' family to come from their home in the adjacent Sur Bahir neighborhood to open for them the door of the Wadi Hummus house. In addition, and following the visit of the Wadi Hummus house owned by the petitioners, the respondent summoned the petitioners for a hearing in its bureau which was scheduled for June 24, 2013.

24. In the hearing which was held by the respondent to the petitioners in its bureau, following the visit which was conducted by its representatives in the Wadi Hummus property owned by them, the petitioners reiterated their position that they did not reside in the house and that the furniture and other belongings were left there in view of the fact that there was no room for them in the small and congested Sur Bahir apartment. In response to respondent's claim that the house was furnished and maintained in a manner which gave the impression that it was actively used as a residential home, the petitioners said that they were not living there but rather in the adjacent Sur Bahir neighborhood, an argument which was supported by the fact that respondent's

representatives had to call petitioners' family members and ask them to come from the adjacent Sur Bahir neighborhood to open for them the door of the Wadi Hummus property. The petitioners also explained that the house was actively used by their teenage children who were studying there for their exams in view of the fact that the Sur Bahir apartment in which they lived and slept, was small and congested. When asked who was cleaning and maintaining the property, petitioner 1 explained that his nieces who were living there were responsible for that matter, and that he came over to the house on weekends to visit his relatives who were living there.

Copies of the protocol of the visit of the Wadi Hummus property owned by the petitioners and of the hearing which was held for them at respondent's bureau, are attached and marked **P/9A-B**, respectively.

25. On July 31, 2013, respondent's decision which denied petitioners' family unification application was received at the offices of petitioner 3. The respondent based its decision on the findings of the visit of petitioners' Wadi Hummus house which was conducted by its representatives on May 30, 2013, and on the hearing which was held for them thereafter.

A copy of respondent's decision is attached and marked **P/10**.

26. On September 8, 2013, the petitioners submitted an objection to the decision to deny their application and challenged, one by one, the arguments upon which respondent's decision to deny their application was based.

A copy of the objection sent by the petitioners to the respondent is attached and marked **P/11**.

27. On October 22, 2013, the respondent rejected the objection. In its decision, the respondent reiterated its conclusion that in view of the findings of the visit of petitioners' Wadi Hummus house and several phone calls allegedly made by it to petitioners' home in Sur Bahir, it did not need to visit the family home in Sur Bahir to determine that petitioners' center of life was not in Israel.

A copy of respondent's decision in the objection is attached and marked **P/12**.

28. On November 19, 2013, the petitioners appealed to Respondent's Appellate Committee for Foreigners which operated until May 2014.

A copy of the appeal which was numbered 752/13 without its exhibits is attached and marked **P/13**.

29. In the appeal the petitioners challenged the decision and argued, *inter alia*, that the respondent did not satisfy the burden imposed on it according to case law when the revocation of a license which has already been granted was concerned, especially in view of the fact that the decision was made based on a partial examination only, and without any attempt, on respondent's part, to examine petitioners' arguments concerning their residence in Sur Bahir. In addition, the petitioners emphasized in the appeal that they have never concealed from the respondent the fact that they owned a house in Wadi Hummus and the fact that they used it for their needs – other than for residential purposes. In addition, the petitioners argued that there could be no dispute concerning the fact that they maintained a center of life in Israel in view of the case law in this matter. For these and other reasons, the decision was unreasonable and disproportionate and severely violated the fundamental rights of their family members.

30. After more than six months the respondent submitted, on May 29, 2014, a response to the appeal. In its response to the appeal, the respondent reiterated its arguments according to which the findings of the visit and the hearing which was held to the petitioners in its bureau, indicated that they lied concerning the relocation to Sur Bahir and that according to its understanding, they were still maintaining a complete center of life in Wadi Hummus, outside Israel.

A copy of respondent's response to the appeal without its exhibits is attached and marked **P/14**.

The Decision

31. On September 9, 2014, the decision of respondent's appellate committee was given which denied the appeal.

32. In the beginning of the decision, the committee describes the factual background of the appeal and concisely reviews the parties' arguments. Thereafter the committee discusses and resolves the parties' arguments and denies the appeal. The committee's decision is based on the fact that petitioners' matter was thoroughly examined despite the fact that no examination of petitioners' center of life was conducted in their Israeli apartment. The committee stipulates that a review of the findings of the investigation, which was conducted in petitioners' matter in the Wadi Hummus property, indicates that prior to the upgrade of petitioner 2's status **three new significant details** were added to petitioners' file. Said new details justified, according to the committee, the change of respondent's position concerning petitioner 2's status.

33. **The first detail** which according to respondent's appellate committee raised doubt and suspicion and caused the respondent to change its position concerning petitioner 2's status in Israel, was the fact that the electricity consumption data for the Wadi Hummus house for the periods which preceded the family's relocation to Sur Bahir and for the periods which followed their above relocation, remained unchanged.

34. **The second detail** on which respondent's appellate committee relies, is the telephone conversation which respondent's bureau had with petitioners' apartment in Sur Bahir, in which the speaker did not answer the questions posed to her by respondent's representatives in a simple and direct manner.

35. **The third detail** which according to respondent's appellate committee caused the respondent to change its position concerning petitioner 2's status in Israel, was the surprise visit which was conducted by respondent's representatives in petitioners' Wadi Hummus house. Respondent's appellate committee stipulates that the condition of the house on the one hand – maintained and operable – and the various versions of petitioners' family members who were not themselves present on scene, indicate that petitioners' center of life was in Wadi Hummus rather than in Sur Bahir.

A copy of the decision of respondent's appellate committee is attached and marked **P/15**.

The Legal Argument

36. The petitioners will argue below that respondent's decision to deny their application and revoke a permit which has already been given to petitioner 2, is an unreasonable decision which is based on problematic administrative evidence, errors, partial information and false conclusions; a decision which severely violates the fundamental rights of the petitioners and their children to family life and runs contrary to the principle of the child's best interest. It is therefore an in

appropriate decision which should not have been made, and since it was made it should be revoked.

The failure to meet to tests of the administrative evidence and the reasonableness of the administrative decision

37. The scope of reasonableness given to the administrative authority in making a decision changes from one decision to another and is determined, *inter alia*, based on the effect that such decision has on human rights.

> … the width of the scope is affected by the nature of the matter. There is a distinction between decisions of a technical nature and material decisions, such a decision which limits human rights… decisions which concern human rights… narrow down the scope of reasonableness.
>
> (Eliad Shraga and Roi Shahar, **Administrative Law (Intervention Causes)** (Shesh publishing house, 2008, page 242).
>
> The nature of the required administrative evidence, the quantity and quality thereof, derive from the nature of the matter at hand, and from the significance of the administrative decision. The strength of the evidence required for a decision which directly affects fundamental human rights, is not the same as that which is required for a decision which has a marginal effect on private and public interest.
>
> PPA 426/06 **Hawa v. Israel Prison Service**, TakSC 2006(1) 3425, paragraph 14 of the judgment).
>
> The administrative decision is subject to judicial review, *inter alia*, in terms of its reasonableness, and said reasonableness is examined, *inter alia*, according to the question of whether the factual infrastructure underlying the decision is based on administrative evidence which provide, under the circumstances, reasonable basis for said decision…
>
> (*ibid*., page 3429)

38. The decision to deny petitioners' application in the case at hand, is a decision which clearly and directly concerns human rights, and therefore the scope of reasonableness granted to the respondent is relatively narrow: the purpose of the enactment is clear (maintaining the family unit) and its effect on human rights is significant. Hence, in the absence of an opposing interest, the reasonable decision was - and still is – to enable petitioner 2 to proceed with the family unification procedure in which she was engaged until respondent's decision, and obtain a permanent status in Israel upon the termination of the procedure.

39. However, as will be proved below, the evidence underlying respondent's decision was not only partial but also selective. Thus, the decision is flawed by lack of reasonableness.

40. The above should be coupled by the inherent errors of respondent's decision, which will also be specified below. Accordingly, and for clarification purposes only, it should already be noted that the respondent erred in its decision that the petitioners did not maintain a center of life in Israel, while the Supreme Court and even the respondent itself have long acknowledged the

complexity of the life of the Wadi Hummus' residents and the fact that its residents maintained their center of life in Israel.

41. Said mistake lead to another greater mistake, according to which there was no need to examine where the petitioners were sleeping and where they effectively maintained their center of life, and that a partial examination of an asset which was owned by them and which was found locked, was sufficient. Eventually, the conclusions which were drawn by the respondent from the partial investigation which was conducted by it in Wadi Hummus and from the hearing which was thereafter held by it to the petitioners in its bureau, on May 30, 2013, were also erroneous.

42. For these reasons respondent's decision undoubtedly exceeds the scope of reasonableness granted to the authority and should be revoked.

Petitioners' center of life is in Jerusalem

43. Firstly, the petitioners will reiterate and emphasize that they maintain their center of life is entirely maintained in Israel. They live and sleep in their Sur Bahir apartment which is located within the boundaries of Israel, the family's children attend schools within the territory of Israel, the family earns its living in Israel, it receives medical services in Israel, and all household shopping are made in Israel. Hence, the family maintains its entire center of life in Israel.

44. One of the conditions for the approval of a family unification application is that the sponsoring spouse maintained a center of life in Israel during the two years which preceded the submission of the application, and will continue to stay therein throughout the graduated procedure.

45. The use of the term "center of life" to describe a person's connection to a certain place, appears in a number of statutes. Thus, for instance, section 1 of the **Income Tax Ordinance** provides (after the 2002 amendment) that an "**Israeli resident**" or a "**resident**" – in respect of individuals – a person whose center of life is in Israel." Along the general definition, the amendment specifies the following sub-tests for the determination of a person's center of life:

> In order to determine the center of a person's life, his entire family, economic and social ties shall be taken into account, including, *inter alia*:
>
> (a) the place of his permanent home;
>
> (b) his and his family's place of residence;
>
> (c) his regular or permanent place of business or the place of his permanent employment;
>
> (d) the place of his active and substantive economic interests;
>
> (e) the place of his activity in organizations, societies and various institutions.

46. Thereafter, the ordinance sets a presumption, which may be refuted, according to which a person who spent in Israel a certain minimal number of days during a defined period will be considered as having his center of life in Israel.

47. Additional examples may be found in the **Disengagement Plan** (**Implementation**) **Law, 5765-2005** and the amendment of July 2005 to the **Rabbinical Courts Jurisdiction** (**Marriage and Divorce**) **Law, 5713-1953.**

48. The rule concerning the burden of proof in these matters was established in HCJ 394/99 **Maximov v. Ministry of Interior**, TakSC 2003(4), 497)(hereinafter: **Maximov**) where it was held (in that case in connection with the right of return and the right to citizenship, but the same applies to our case as well):

> There is no dispute… that the initial burden to bring sufficient administrative evidence to ostensibly base the right of return and the right to citizenship of a person who wishes to come to Israel (make *Aliyah*), is imposed on him. The nature of the evidence required to meet the initial burden by the applicant may vary from case to case and from time to time. For this matter it is neither possible – nor desirable – to establish rigid rules. **However, it may be assumed that the applicant will be deemed to have ostensibly proved his right, if the evidence presented by him is of the type that the Ministry of Interior, according to its regular procedures, usually accepts as sufficient to prove the alleged right**… The fact that the applicant met the initial burden which is required to prove his ostensible right of return does not mean that the Ministry of Interior must accept his application. Nevertheless, the fact that the applicant met the initial burden which is required to prove his ostensible right of return establishes a "presumption of entitlement". In the absence of administrative evidence, which at least raises a substantiated doubt as to applicant's entitlement, the, as a general rule, the presumption of entitlement will materialize into an operative entitlement (**Maximov**, page 502).
>
> (Emphases added, B.A.)

49. Therefore, the respondent erred in determining that the petitioners, who have never concealed the fact that they owned property in Wadi Hummus, which was used by them for various purposes other than for residential purposes, and who clarified time and time again that they were sleeping and residing in Sur Bahir, acted as required and furnished the respondent with the entire documents which were required of them to prove a center of life in Israel.

AAA 1966/09

50. The respondent erred further when it ignored the judgment of the Supreme Court in AAA 1966/09 '**Attoun v. Minister of Interior** (reported in Nevo), which addressed, *inter alia*, the issue of the center of life of the Wadi Hummus' inhabitants within the framework of an appeal concerning an application for the registration of children pursuant to regulation 12 of the Entry into Israel Regulations, 5734-1974, which was filed by an Israeli resident who lives with his children in Wadi Hummus.

> The Appellant is a permanent resident of Israel whose children were born in the country and study within its territory. The family members lead their routine daily lives – their family life, social and commercial life, in a manner in which the locale in which they reside cannot be separated from Israeli territory. Additionally, at the present time, and following the erection of the fence, there is also a physical divide between them and the

territory of the Area which greatly impedes their free travel thereto. Therefore, **it seems almost self-evident that the connection of the Appellant's family to the village of Sur Bahir, within Jerusalem territory, is extremely close and in fact, they have had no substantial connection to the Area for many years, with the exception of the physical location of their home within the Sur Bahir extension.**

… **there is no dispute that most of the children's ties are to the village of Sur Bahir, which is inside Israel. As noted, this is where Appellants 2 and 3 study, maintain the center of their family and social lives and receive medical services, welfare services etc. We also note that there is a physical divide between the Appellants' home and the Area – the security fence, which makes their travel to the Area difficult and prevents any real connection to this area.**

(from the judgment of the Honorable President Beinisch, (as then titled)).

51. The late Honorable Justice Edmond Levy also joined, in the beginning of his judgment in AAA 1966/09, the above determination of the President by stating that:

> One can presume that the fact that the Appellants live in Wadi Hummus created a reality wherein they use many services that are given inside the territory of the State of Israel. As noted by my colleague, "the Israeli part of the village is the center of the entire community. It is where the schools and health and social services are located. It is where most of the commercial and social life of the village residents takes place, many Israeli residents among them." (§17 of the judgment of the President). **In this state of affairs, it seems that even the Respondents do not dispute the fact that Appellants 2 and 3, like the rest of the family, have characteristics that may indicate that their center-of-life is inside Israel**.
>
> (Emphases added, B.A.).

52. Hence, the reality of petitioners' life as well as the statements made by the Supreme Court in its judgment in AAA 1966/09 indicate that the center of petitioners' life – which contrary to the appellants in AAA 1966/09 go back by the end of the day to sleep in their home in Israel – is unequivocally maintained in Israel. For this reason it is also clear that without an examination of petitioners' actual sleeping place, the question where they actually reside cannot be truly answered. Therefore, had the respondent truly wanted to re-examine petitioners position – which is anyway doubtful in view of the fact that they have satisfied the requirement to maintain a center of life in Israel - it should have examined **where the petitioners, in fact, slept and resided**. However, at this specific point its representatives failed, when they decided that it would be sufficient to examine the Wadi Hummus' property, which was found locked and the petitioners were not there, and consequently they did not examine petitioners' matter properly.

53. Respondent's decision in petitioners' matter is therefore extremely problematic, and at least raises serious doubts as to respondent's conclusions. In addition and as will be clarified below, it is inconceivable that such a partial examination, as the one which took place in petitioners' case, would serve as a basis for an extremely severe and offensive decision which revokes a permit that has already been given to petitioner 2, and it should therefore be voided.

The revocation of an existing license according to case law

54. Beyond the argument that *ab initio* there was no justification for the revocation of the family unification procedure undertaken by petitioner 2 for several years – in addition, rules were developed in a host of judgments concerning the burden which is imposed on the authority which seeks to revoke a license that has already been granted by it, a burden which the respondent in this case failed to satisfy.

55. In HCJ 7444/03 **Belal Mas'ud Dakah v. Minister of Interior,** TakSC 2010(1), 9361 (hereinafter: **Dakah**) it was held that the respondent had a heightened obligation to base its intention to violate the right to family life on especially powerful and weighty reasons. Indeed, the **Dakah** judgment concerned the right to family life of spouses who were in the midst of a family unification procedure, within the framework of which a security preclusion was raised against the sponsored spouse – whereas the case at hand concerns a denial due to doubts as to a center of life only – however, it is clear that the court's comments in **Dakah** are all the more so relevant to the petitioners in this case:

> **The weightier the violated human right, and the more severe the violation thereof, the stronger the conflicting public interest must be to justify the violation**, otherwise, the violation may be considered disproportionate.
>
> **A person's right to have a family is one of the foundations of human existence; its realization is a condition for making the most out of life and it is the essence of life; it is a condition for self realization and for a person's ability to share his life and fate with his spouse and children. It reflects the essence of a person's being and the embodiment of his desires. The right to have a family is situated at the highest level of human rights. An infringement on this right is possible only when it is balanced against a conflicting value of special power and importance**.
>
> (Emphases added, B.A.).

56. Furthermore. It was held in **Dakah** that to the extent the denial of the application concerned a person who had already been granted a stay permit, the respondent was obligated to exercise special care and prudence in the denial of the application:

> **The specific expectation for the realization of the right to a family where a family unification permit had been granted in the past and its renewal is requested, is not similar in force to the expectation for a permit when such permit has not been granted in the past**.
>
> **It is obvious that the expectation of spouses for the renewal of a residency permit, <u>where they had been granted a family unification permit in the past</u>** in Israel, is very powerful. This power is greater than

> the power of the expectation of spouses who have not yet been granted a unification permit in the past, and whose family unification application has not yet been decided prior to the effective date. **In addition, with respect to a family the unification of which had been permitted in the past, a difference may exist between the power of the expectation of a family which has been residing in Israel for many years and laid down roots in Israel, which has a number of children who are raised and educated in Israel, and a young couple who has just received a unification permit, who has been living in Israel for a short period of time, who has not yet established a complete family unit and who has not yet integrated into the Israeli labor market and society**. *Ibid*, paragraphs 23-24.
>
> (Emphases added, B.A.)

57. As specified above, the clear distinction between the refusal to grant a license and the revocation or refusal to renew a license is not a new rule which was established for the first time in **Dakah**, but it has rather been a well rooted rule in case law for many years. Thus, for instance, it was held in HCJ 113/52 **Zaks v. Minister of Trade and Industry**, IsrSC 6(1) 696, 700, by the Honorable Justice Vitkon as follows:

> The revocation of a permit which has already been granted is different from the grant of a new license. With respect to a new license, case law provides that a substantiated suspicion may – usually – constitute a sufficient reason for a refusal to grant the license. However, with respect to a revocation of a license which has already been granted, we are of the opinion that once a license was granted, it should not be revoked based on a mere suspicion without a hearing, to which the concerned party should be summoned to present his arguments.

On this issue see also HCJ 799/80 **Shlalam v. Licensing Officer Pursuant to the Firearms Law**, IsrSC 36(1) 317, 327 and also Daphna Erez-Barak, Protection of expectation in Administrative Law, **Iyunei Mishpat** 17 209, 242.

> **When the Ministry of Education wishes to use its power to revoke an existing license, it must base its decision on solid evidence** and do it with special care. Relevant to this matter are the words of the Honorable Justice Rivlin in HCJ 1712/00 **Orbanevitch v. Ministry of Interior**, IsrSC 58(2) 951, 957:
>
> In the context at hand, the authority is required to exercise special care, in view of the significant effect that the decision has on the petitioners. Indeed, visas which were issued or citizenship which was granted cannot be revoked based on mere evidence.
>
> (HCJ 3615/98 **Nimushin v. Ministry of Interior**, TakSC 2000(3) 2916)

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

58. The decision in petitioners matter is based on a visit conducted by respondent's representatives in the Wadi Hummus property, and on the findings of a hearing which was held to the

petitioners following the visit of the property in their ownership. The petitioners have never denied or concealed from the respondent the fact that they owned said property or that it was used, in view of the fact that their Sur Bahir apartment was small and congested. As indicated by the transcript of the hearing which was held to the petitioners following the inspection of the property, the position which was presented by the petitioners to the respondent was cohesive, and consisted of a detailed explanation concerning the property and the use thereof, despite the fact that they were living and sleeping in the adjacent Sur Bahir.

59. Hence, it is clear that for as long as petitioners' arguments and their actual center of life were not examined, we are not concerned with a "**convincing proof, beyond reasonable doubt**" and respondent's decision to revoke a permit which has already been granted, in its current format, is a decision which is based on partial information and therefore, flawed.

60. Therefore, respondent's decision, in its current form, does not satisfy the heightened burden of proof imposed on it in the revocation of a stay permit which has already been granted.

The new data in petitioners' matter

61. As specified above, the respondent relies on three ostensible new details which came up in petitioners' matter to justify its decision to deny the application. The **first detail** concerns the allegation that the electricity consumption data which pertain to petitioners' Wadi Hummus property for the period which preceded their relocation to Sur Bahir and for the period which followed their above relocation, remained unchanged; the **second detail** concerns a telephone conversation which was held between respondent's representatives and a woman in petitioners' Sur Bahir apartment, in which the former did not receive simple and direct answers; and the **third detail** concerns the visit of respondent's representatives in the Wadi Hummus' property and the hearing which was held to the petitioners thereafter. The petitioners will address these allegations herein-below and will prove that they are incorrect.

The electricity bills

62. As indicated by the decision of the appellate committee, the electricity consumption data which pertain to petitioners Wadi Hummus property for the period which preceded their relocation to Sur Bahir and for the period which followed their above relocation, remained unchanged. However, respondent's transcript of the hearing which was held to the petitioners shows that this allegation is patently incorrect. We shall specify.

63. The last paragraph in page 2 of the transcript – which was attached to the petition as Exhibit P/10 – indicates that **respondent's allegation concerning petitioners' electricity bills pertained to petitioners' Sur Bahir apartment rather than to their Wadi Hummus property, as was stated in the decision of the appellate committee**. As indicated by the transcript, the allegation is that the amount payable which appears on the electricity bills for the Sur Bahir apartment, which is registered under the name of petitioner 1's father, is low and unreasonable in view of the fact that petitioners' family consists of fourteen members. Moreover. The transcript further indicates that **with respect to the amount payable which appears on the electricity bills for the Wadi Hummus property** - which pointed at an increase in the period which followed petitioners' relocation to Sur Bahir – **the respondent argued that it had no meaning and that it was registered under the name of petitioner 1's brother**. Hence, the new detail concerning the unchanged electricity consumption data of the

Wadi Hummus property never existed, and therefore a decision which is premised on a non-existing datum cannot stand and should be immediately revoked.

The telephone call to petitiners' Sur Bahir apartment

64. The petitioners also wish to address the second detail raised by the committee as a basis for its decision, which concerns petitioner 2's failure to provide direct response to questions posed to her by the respondent in a conversation to her Sur Bahir apartment. The mere fact that respondent's telephone call to the Sur Bahir apartment was answered by petitioner 2 refutes respondent's argument that petitioner 2 does not live in Israel. In addition, it should be emphasized that according to petitioner 2, who was very upset and called petitioner 3 immediately after said conversation, an anonymous person, allegedly from respondent's office, called her, started yelling at her, and told her that he knew that she was lying. Petitioner 2, who was naturally frightened by said violent phone call, did not want to continue the conversation with the person who was on the other side of the line and wished to terminate the conversation as soon as possible. Therefore, in view of the situation in which petitioner 2 found herself in said conversation, as well as the concern of the unknown identity of the speaker on the other side of the line, it was only natural that petitioner 2 avoided a sincere conversation and did not provide direct answers to the questions which were posed to her. Hence, the second detail on which the respondent wishes to base its harsh decision, has no merit either, as it turns out that the only conclusion which may be drawn from it, if any, is the fact that petitioner 2 was in her Sur Bahir home in which she maintained her center of life during the last few years.

Respondent's representatives' visit of the Wadi Hummus property and the hearing which was held to the petitioners thereafter

65. As specified above, the petitioners have never denied or concealed from the respondent the fact that they owned the property in Wadi Hummus, maintained it and used it. The transcript of the hearing which was held to the petitioners in respondent's bureau indicates that when respondent's representatives visited the Wadi Hummus property, no one was there. Therefore, the entry of respondent's representatives into the house was made possible only after petitioner 1's brother and one of his sons were requested to urgently arrive from Sur Bahir to Wadi Hummus, to open the door for respondent's representatives. In addition, the hearing transcript further indicates that the petitioners made it explicitly clear why they continued to hold and maintain the property – the Wadi Hummus property owned by them was four times larger than the small apartment in which they were living since 2009 in Sur Bahir. Hence, despite respondent's attempts to argue that the petitioners keep changing their position, claiming on one occasion that the Wadi Hummus property is used by them as a storage house, and on another, that it is used as an apartment, it is important to emphasize that the petitioners have never changed their position, as it was clarified to the respondent more than once that the Wadi Hummus house was used as a storage house in the sense that after their relocation to Israel, most petitioners' furniture and other belongings were left in Wadi Hummus, and the house was also used by them for their needs although not for residential purposes.

66. In addition, the petitioners made it clear to the respondent in the hearing which was held to them, that they were not sleeping in the Wadi Hummus property which was owned by them. The petitioners also made it clear to the respondent that in view of the fact that their Sur Bahir apartment was so crowded, the Wadi Hummus property was used, *inter alia*, by their children

who could not calmly study in the small Sur Bahir apartment. Therefore, and for all of the above reasons, the property was maintained by the petitioners and was not neglected, as the respondent may have expected them to do.

The Wadi Hummus property was emptied and the Sur Bahir apartment was expanded

67. Moreover. Meanwhile, and only because of respondent's incessant persecution of the petitioners, the latter decided to expand their Sur Bahir apartment, add to it two additional rooms and transfer to it all of their belongings which were stored in the Wadi Hummus property. Consequently, the Sur Bahir apartment is more spacious. At the same time, the petitioners emptied the Wadi Hummus property which is owned by them and even the kitchen cabinets were removed from the property's walls. Following these drastic steps which were taken by the petitioners, the Wadi Hummus property is currently locked and empty.

    A copy of photographs of the Wadi Hummus property after it was emptied is attached and marked **P/17**.

    A copy of photographs of the Sur Bahir property after the renovation and the transfer of the belongings from the Wadi Hummus property thereto, is attached and marked **P/18**.

68. In addition, the transcript of the hearing indicates that despite respondent's attempts to find contradictions between petitioners' versions, their versions were found highly compatible with respect to the description of their Sur Bahir apartment – which the respondent did not deign to visit and examine altogether – with respect to the manner by which the furnished and equipped Wadi Hummus property was used, and with respect to questions concerning their children's use of the property – including clothing, food and wet toothbrushes which were found in the house. A single and immaterial discrepancy may be found between petitioners' version and the version of their family members which concerns the cleaning of the house – whereas, according to the respondent, petitioner 1's brother ostensibly argued that his wife was responsible for the cleaning of the house, petitioner 1 argued that the daughters of his brother were responsible for the cleaning of the property. In addition, petitioner 2 stated that her sons who studied in the property, also cleaned it. Hence, the discrepancy is not material and, in fact, there is no contradiction between the versions. Along the brother's wife and/or daughters who were responsible for the cleaning of the house, petitioners' children were also required to keep it clean and tidy after they use it.

69. In addition, the respondent argued that according to petitioner 1's brother, petitioner 1 ostensibly slept in the Wadi Hummus house on the weekends. To this effect, the petitioners wish to reiterate their total denial of the allegation which pertains to their sleeping in the property. Said total denial is also clearly reflected in the transcript of petitioners' hearing, as each one of the petitioners, in his/her turn, reiterated separately and in an orderly manner their argument that there said allegations had no merit. Moreover. The petitioners wish to emphasize that even if they had been sleeping in the property on the weekends, an allegation which is totally denied by them as aforesaid, it could not have been determined that their center of life was not in Israel, especially in view of the fact that petitioners' Sur Bahir apartment, which constitutes the center of the family's life in Israel, has not been at all examined by the respondent.

70. Hence, the new data on which the appellate committee based its decision to deny the application have no merit. The respondent erred in its arguments concerning the unchanged electricity consumption data – as it turned out that the allegation did not concern unchanged consumption data of the Wadi Hummus house but rather the low amounts payable which appeared on the electricity bills of the Sur Bahir apartment. The respondent also erred in its allegations concerning the telephone conversation to the Sur Bahir apartment – which substantiates the allegation that petitioner 2 lives in that apartment – as well as in its allegations concerning the visit of the Wadi Hummus house and the hearing which was held to the petitioners thereafter. In view of the above, it is clear that respondent's decision which is based on the above incorrect data cannot stand and should be revoked. In addition to all of the flaws which have thus far been detected in the decision of the appellate committee in petitioners' matter, it is important to remind once again that the above decision violates the right of petitioners' family members to family life and infringes on the principle of the child's best interest. Such infringement cannot be made offhandedly and based on such severe errors, as was done in petitioners' case.

The right to family life and the principle of the child's best interest

71. International law accords great importance to the family, and imposes on the states the duty to protect it. Thus, for instance, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, Treaty Series 1037, 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 UN Assembly on December 10, 1948, Article 8(1); Article 17(1) and Article 16(3) of the International Covenant on Civil and Political Rights, Treaty Series 1040, which entered into effect with respect of Israel on January 3, 1992.

72. In HCJ 7052/03 **Adalah v. Minister of Interior**, TakSC 2006(2), 1754 (hereinafter: **Adalah**) it was held that **the right to family life was a fundamental constitutional right in Israel which formed part of the right to human dignity**. Said position received in that judgment the sweeping support of eight of the eleven Justices of the panel.

73. The status of the right to family life as a constitutional right, directly affects the possibility to violate said right and to deny a family unification application submitted by an Israeli resident for his/her spouse. The classification of the right to family life as a constitutional right entails the determination that any violation of this right must be made according to the Basic Law: Human Dignity and Liberty – and for weighty considerations only.

74. With respect to the principle of the child's best interest, it should be emphasized that the right of parents to hold and raise their children, and everything involved therewith, is a natural and primary constitutional right, which expresses the natural connection between the parents and their children (CA 577/83 **Attorney General v. A**., IsrSC 38(1) 461). This right is manifested in the family's privacy and autonomy: the parents have autonomy to make decision in all matters which concern their children – education, way of life, place of residence, etc. and the intervention of the state and society in these decisions is an exception that should be justified

(see the above CA 577/83, pages 468, 485). This approach is rooted in the recognition that the family is "the most basic and ancient social unit in human history, which was, is and will be the foundation which maintains and ensures the existence of human society (Justice Elon (as then titled) in CA 488/77 **A v. Attorney General**, IsrSC 32(3) 421, page 434).

75. Furthermore. It should be emphasized that the principle of the child's best interest was recognized in many judgments as a guiding principle whenever rights should be balanced, as stated in CA 549/75 **A. v. Attorney General**, IsrSC 30(1), 459, pages 465-466 "There is no judicial matter which pertains to minors, in which the minors' best interest is not the primary and most important consideration."

76. International law also grants the principle of the child's best interest the status of a superior-principle. This is manifested, inter alia, in the establishment of the Convention on the Rights of the Child (31 Treaty Series, 221). The convention, which was ratified by the state of Israel on August 4, 1991, includes a host of provisions which impose an obligation to protect the child's family unit (see: Convention's preamble and Articles 3(1) and 9(1) of the Convention). Particularly, Article 3 of the Convention stipulates that in any action taken by any governmental authority the best interests of the child shall be a primary consideration. Accordingly, any enactment or policy should be construed in a manner which provides for the protection of the child's rights.

77. However, respondent's decision in petitioners' matter was based only on a partial examination which was conducted by the respondent and which did not focus on the property in which the petitioners maintain a center of life in Israel. In addition, the respondent disregarded the fact that the house owned by the petitioners was found locked with no one in it. The respondent has also disregarded petitioners' arguments, who have never concealed the fact that they owned the house and were using it – though, not as a residential home. On the other hand, the decision severely injures the petitioners and their children: it severely violates the right to family life, a violation which did not take into consideration the best interests of the petitioners and their children, whose custodial mother may be deported from Israel. Such a decision cannot stand and should be revoked.

Conclusion

78. The above indicates that respondent's decision to deny petitioners' family unification application is an erroneous decision which was made based on a partial examination, erroneous conclusions and false data. Therefore, the honorable court is requested to order as requested in the beginning of the petition. The honorable court is also requested to order the respondent to pay petitioners' cost of trial and attorneys fees.

Jerusalem, October 22, 2014.

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Benjamin Agsteribbe
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(File No. 61824)