At the Supreme Court **HCJ 5/15**
Sitting as the High Court of Justice

In the Matter of:

1. **_____a-'Abido, ID _____**
2. **_____ Shaludi, ID_____, a minor, born on October 9, 1998**
3. **_____ Shaludi, ID _____, a minor, born on March 27, 2000**
4. **_____ Shaludi, ID _____, a minor born on March 14, 2002**
5. **_____ Shaludi, ID _____, a minor, born on August 22, 2007**
6. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA No. 580163515**

All represented by counsel, Benjamin Agsteribbe (Lic. No. 58088) and/or Noa Diamond (Lic. No. 54665) and/or Sigi Ben Ari (Lic. No. 37566) and/or Abeer Jubran-Daqwar (Lic. No. 44346) and/or Hava Matras-Irron (Lic. No 35174) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. 41065) or and/or Bilal Sbihat (Lic. No. 49838) and/or Nasser Odeh (Lic. No. 68398).

of HaMoked: Center for the Defence of the Individual,
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The Petitioners

V.

The Minister of the Interior
Represented by the State Attorney's Office, Ministry of Justice
29 Salah aDin Street, Jerusalem
Tel: 02-6466590; Fax: 02-6467011

The Respondent

Petition for Order Nisi

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause:

1. Why he should not resolve the Israeli status of Petitioner 1, resident of the Occupied

Palestinian Territories (OPT) and mother of minors who are permanent residents of Israel – who took part with her husband in the graduated procedure until he married a second wife – and approve her application for status in Israel on humanitarian grounds pursuant to Section 3A1 of the Citizenship and Entry into Israel Law (Temporary Order) 5763 – 2003 (hereinafter: **the Temporary Order**).

2. Alternately, why he should not resolve the Israeli status of Petitioner 1 pursuant to Section 3C of the Temporary Order, which allows grant of status in Israel when it is in the special interests of the state.

3. Why it should not be determined that any resident of the Area who has held a stay permit, or temporary residency visa in Israel for a period of time that is equal to that of the graduated procedureprocedure for family unification of individuals to whom the Temporary Order does not apply, is entitled, , to have the stay permit or residency visa extended without further consideration, subject to the absence of security or criminal preclusions.

The Parties to the Petition

4. Petitioner 1 (hereinafter: **the Petitioner**) is originally from the OPT and the mother of Petitioners 2-5. She resided in Israel legally under family unification procedure in which she took part along with her children's father after her marriage to him in 1997. The Petitioner's husband married another woman in 2005, after the Petitioner lawfully resided in Israel for more than five years, a period of time that would have entitled her to a permanent status in Israel, had the Temporary Order not been enacted. Following this marriage, the Petitioner's husband abandoned her and her children and moved to another house with his second wife.

5. **Petitioners 2-5** are the Petitioner's minor children and she is the only parent who is attending to all their needs and raising them.

6. **Petitioner 6** is a registered association dedicated, *inter alia*, to help residents of East Jerusalem and members of their families in their dealings with state authorities, including defending their rights in court, whether in its own name as a public petitioner or as the representative of individuals whose rights had been violated.

7. **The Respondent** is the minister authorized to accept or deny the recommendations submitted to him by his humanitarian committee.

Factual Background and Exhaustion of Remedies

8. In 1997, the Petitioner, originally a resident of the OPT, married her cousin, Mr. _____Shaludi, ID _____. Mr. Shaludi is a permanent resident of Israel.

A copy of the confirmation of the Petitioner's marriage to her husband dated January 27, 1997 is appended and marked **P/1**.

9. The Petitioner and her husband had four children, Petitioners 2-5 herein, all permanent residents of Israel. The family resides in Jerusalem

A copy of the birth certificates of the Petitioner's children is appended and marked **P/2**.

10. In 1997, the Petitioner's husband submitted an application for family unification on her behalf. The application was approved in 1998, and the Petitioner entered the graduated procedure. Under the graduated family unification procedure, the Petitioner would have been entitled to **permanent** status in 2003, five and a quarter years after she entered the graduated procedure. However as the Temporary Order went into effect before this date, the Petitioner was unable to conclude the procedure and she continued to renew her stay permit annually, even after the five-and-a-quarter-year period after which she would have been entitled to a permanent status in Israel had she not been a resident of the Area. It must be noted that in the humanitarian application submitted in the Petitioner's matter, which is the basis of this petition, it was claimed that were it not for the Ministry of the Interior's delays in processing her application, the Petitioner would have ostensibly been entitled at the very least to have her status upgraded to temporary residency long before the Temporary Order entered into force.

11. In 2005, the Petitioner's husband married a second wife. The Petitioner learned about these upcoming marriage plans without having had any possibility of influencing the events. Following this discovery, the Petitioner fled to her uncle's home and remained there for several weeks. During this time, her husband married his second wife and moved the Petitioner's children out of her home, first to his sister's house and later to a house he rented for his second wife in the neighborhood of Jabal al-Mukabber. At the same time, the Petitioner's husband pressured her into returning to her home, promising that if she did as he said, her children would be returned to her custody. After the Petitioner spoke with her children and understood that they were not being treated well by the second wife, and following the pressure exerted on her by her husband – and particularly the threat that custody of her children would be transferred to the husband's family and that they would be taken from her – the Petitioner returned to live with her husband for a short period of time. During this time the Petitioner's husband again submitted an application on her behalf for the renewal of the family unification procedure which was denied by the Respondents outright. It also became apparent, in retrospect, that after she returned to her home and her husband returned to live with her, the Petitioner conceived Petitioner 5.

12. In light of the impossible situation the Petitioner and her children found themselves in after the head of the family left home and the fact that, in practice, there had been no marital relationship between the Petitioner and her husband after he abandoned her and their children for his other wife, on March 5, 2013, an application for status on

humanitarian grounds was submitted to the humanitarian committee, established pursuant to Section 3A1 of the Temporary Order. This committee is authorized to recommend that the Respondent accept or deny applications for status in Israel on humanitarian grounds filed pursuant to Section 3A1 of the Temporary Order (hereinafter: **the humanitarian committee**). In the application it was asserted that the family had fully maintained a center-of-life in Israel for over fifteen years. It was further contended in the application that the Petitioner has, in practice, been a single parent to her four children since her husband left home. It was also claimed that beyond abandoning the Petitioner, who was her husband's only wife for many years and resided in Israel lawfully for many years prior to his marriage to a second wife, the husband, who is caring for a daughter born from his second marriage and has cancer, has also abandoned their four children. Apart from visits to his mother's home during which he sees his children, he does not support them financially and does not take responsibility for their education, health and welfare. In the application it was explained that in view of the father's abandonment of the family, the children are in a poor state. Petitioner 3, for example, suffers from borderline intellectual functioning, attention and concentration disorders, behavioral and emotional problems, and environmental deprivation brought about by the family's difficulties. Petitioner 2, the Petitioner's eldest son, also suffers from emotional difficulties due to his father's abandonment and the family's grave financial situation. Finally, it was specified in the application that, in any case, the Petitioner and her children have nowhere to go given that fact that after living in Israel for many years, all the Petitioner has left in the West Bank is an elderly, impoverished mother and a brother who is ill and has a family of his own and has not worked nor earned a living for over a decade. It was argued that for all these reasons, there are humanitarian grounds for awarding the Petitioner status in Israel.

A copy of the humanitarian application in the matter of the Petitioner and the affidavit attached to it are appended and marked **P/3**.

13. On November 26, 2013, a hearing was held for the Petitioner at the Respondent's office in East Jerusalem, in which she was asked many questions. She was asked, *inter alia*, about her relationship with her husband and his second wife and why she did not divorce him. The Petitioner was also asked to provide details regarding the building and the apartment she resides in with her children including the location, maintenance and the identity of the person who paid their bills. The Petitioner replied in detail to the questions. She explained, *inter alia*, why she could not possibly divorce her husband despite the fact that they were living apart and that she had not had a marital relationship with him for years. The Petitioner explained in detail that she had no choice in view of her husband's threats to transfer custody of her young children from her to his family and take her children away from her if she divorced him. The Petitioner, furthermore, at the hearing held in her case, that both the building and the apartment she resided in were owned by her husband's family and that, therefore, her husband, his mother and brothers paid the bills for the property, that one of the brothers and her husband renovated the apartment she lives in, and that the mother, who is the Petitioner's mother- in- law and her aunt, paid for the renovation.

A copy of the protocol of the Petitioner's hearing at the Respondent's office is appended and marked **P/4**.

14. On February 24, 2014, the Respondent's decision, dated February 12, 2014, was received in the office of Petitioner 6. The Respondent's decision, made at the recommendation of the humanitarian committee, denies the Petitioner's application for status in Israel due to the fact that she is in a bigamous marriage with her husband, who has recently renovated the apartment she lives in with her children.

A copy of the decision is appended and marked **P/5**.

15. On February 24, 2014, March 23, 2014, May 29, 2014, June 30, 2014, July 27, 2014, August 28, 2014, September 28, 2014, and October 10, 2014, the Petitioners repeatedly contacted the humanitarian committee with requests to receive the transcripts of the hearing held in the Petitioner's matter, in order to enable them to decide whether legal action was viable in this matter.

Copies of the requests to receive the transcripts of the hearing held by the humanitarian committee are appended chronologically and marked **P/6**.

16. On October 27, 2014, the transcripts of the hearing in the matter of the Petitioner were received from the humanitarian committee.

17. The transcripts reveal that the humanitarian committee believed that this was an ordinary family unification application and that the Petitioner's case did not raise any exceptional humanitarian grounds for granting a stay permit or a residency visa in Israel. The committee further determined that this case concerned an individual whose status in Israel was revoked after it became apparent that this was a matter of a bigamous marriage, and that neither it nor the Respondent were authorized by the Temporary Order to act as an appeals committee with respect to the decision to revoke the Petitioner's status in Israel. The Respondent's humanitarian committee also referred to the application and determined that naming the Petitioner's son as the sponsoring applicant did not alter the fact that she is married to a bigamist. The committee also determined that the condition of the Petitioner's son, and the fact that her husband has a daughter who is ill by his second wife, did not constitute humanitarian grounds that justify accepting the application. Lastly, it is stated that the hearing revealed that the Petitioner's husband renovated her apartment for the family and took care of various payments.

A copy of the transcripts of the hearing held by the humanitarian committee in the Petitioner's case is appended and marked **P/7**.

The Legal Argument

18. In the Petitioners' view, the Respondent's decision to deny the application of the Petitioner, who is a mother to children who are minors, and had resided in Israel in the framework of the family unification procedure for seven years prior to the marriage of her husband to a second wife, is an unreasonable decision that causes the Petitioner and her minor children a grave injustice dismisses the humanitarian grounds on which the application is based in a single stroke. The Petitioners will also argue that in light of the purpose of the Temporary Order, the Respondent should have accepted the application of the Petitioner, and others like her, yet instead the Respondent exploited the Temporary Order for an extraneous purpose thus exceeding his authority.

The Reasonableness of the Administrative Decision

19. A decision of an administrative authority must lie in the realm of reasonableness. In order for the decision to lie within the borders of reasonable bounds it must be rendered with attention to and proper balance between the various relevant factors that must be considered. In HCJ 341/81 **Moshav Beit Oved v. the Traffic Controller** (IsrSC 36(3) 349, 354 (1982)), the Court determined that:

> In determining the confines of "reasonable bounds" consideration must be given, *inter alia*, to the question of whether the public authority gave proper weight to the various relevant factors it should consider. The decision of an administrative authority will be disqualified for of lack of reasonableness if the weight given to various factors is not appropriate under the circumstances of the matter. Indeed this weighing and balancing are among the principal functions of a public authority and the monitoring the manner in which they were implemented is at the hands of the court.

20. in AP 2430/04 **Korliyanko v. the Ministry of the Interior** (published in Nevo), the Court for Administrative Affairs determined the following regarding the importance of creating a proper balance between universal administrative norms and consideration of exceptional humanitarian grounds that relate to an individual as seen in the present case:

> In a legal system anchored in an open humanitarian approach that is able to show empathy towards exceptional, difficult situations, it is correct to recognize that every general norm must also allow for consideration of exceptional circumstances, in which the application of the norm would cause severe harm. Our ability to apply general administrative norms must be interwoven, with proper balancing, with the ability to consider circumstances that do not warrant the formal, automatic, implementation of rules the results of which would be particularly harsh. The moral content that allows the formulation of general norms must also leave

> room for consideration of situations regarding which the conclusion must be different. Excessive automatism in the implementation of rules is similar to formalistically implementing legal procedures, both justify consideration of exceptional circumstances.

21. Regarding the importance of attention to humanitarian considerations in a law abiding state, it has been ruled:

> The State of Israel is a state of law; the State of Israel is a democracy that respects human rights, and gives serious attention to humanitarian considerations (HCJ 794/98 Obeid et al. v. the Minister of Defense, IsrSC 58(5) 769, 774).

22. We can also learn about the importance of humanitarian considerations that must be taken into account when the Respondent rules on requests for status from the judgment delivered in AP 1037/03 **Feldman et al v. the Minister of the Interior** (published in Nevo):

> The Respondent's main argument, whereby "changes in status are not approved for adult sons to whom the Law of Return does not apply (and see paragraphs 7 and 14 of the respondent's response and Appendixes C, E, and F), only demonstrates that the Respondent did not examine the humanitarian aspect. For if this were not the case, he would have argued that the petitioner had not met the conditions of this exception.
>
> Where a "humanitarian" exception exists, the authority must consider the personal background of each case. Failing to take into account these circumstances is akin to failing to give them proper consideration, in which case the discretion is also deemed unreasonable (see and compare HCJ 935/89, Ganor v. State of Israel, Piskei Din 44 (2) 485, 513-515; Yizhaq Zamir, *Administrative Authority,* Vol. 2 (Nevo Publishing, 5756 – 1996) 763-771).
>
> (Emphasis added, B.A.).

23. Hence, the Petitioners' position, as further detailed below, is that in the case of the Petitioner, the Respondent must weigh and balance universal administrative norms against consideration of the exceptional and harsh humanitarian circumstances in which the Petitioner found herself and the decision that has been made is, therefore, unreasonable and unlawful. Rather than giving appropriate weight to the facts relevant to the Petitioner's case, as presented to him in her humanitarian application, the Respondent chose to absolutely disregard them or did not give them proper weight. Thus, as revealed by the transcripts of the hearing held by the humanitarian committee, it appears, *inter alia*, that in the decision-making process in the Petitioner's matter, no weight whatsoever was given to the fact that this is a case of someone who had been her husband's one and only wife for many years. In addition, it appears that no weight was given to the fact that

prior to the husband's marriage to a second wife, the Petitioner dwelled in Israel for seven years under the graduated procedure. This period of time, would have undoubtedly allowed the Petitioner to complete the graduated procedure and receive permanent status in Israel long before her husband's marriage to another wife, had she not been a resident of the Area as defined by the Temporary Order. Another important fact relating to the Petitioner's humanitarian situation, which did not receive any weight in the the decision, concerns the fact that this is an application of someone who was forced into a bigamous marriage against her will and who had no possibility of preventing it or of being released from her husband's hold without risk of losing her four children permanently. Lastly, it appears that, when making the decision, the Respondent did not give any weight to the most important fact of all, and that is that the matter concerns an application by the custodial mother of four minors, permanent residents of Israel who have lived in the country ever since they were born. The Respondent did not make an effort to deliberate on the grave implications his decision regarding the mother has on the fate and future of her children.

24. For all of the above reasons, the Petitioners believe that the Respondent, who had a duty to give the aforementioned factors their proper weight in the decision making process, chose to disregard these relevant and cardinal factors, failed in his duty decisively, undermining, in this conduct, the reasonableness of the decision, which cannot but be dismissed. Each of these points will be specified in detail below.

Harm to the First Wife

25. As aforesaid, in the decision making process, the Respondent disregarded, *inter alia*, the fact that the Petitioner had been her husband's first and only wife for many years and was forced into a bigamous marriage. The Petitioners request to emphasize that this claim does not dispute the obligation of the authorities to address the painful issue of polygamy. However, their position is that it is wrong and inappropriate for the women and children, who are the principal and only victims of this practice – in our case it is the Petitioner and her children – to be the ones who are punished by the authorities for the actions of men of their families, actions they have no control over and which are often committed without their knowledge or against their will. We will explain.

26. In a traditional society such as the Petitioner's, women often do not enter polygamous relationships of their own accord, and sometimes they do not even know of the existence of a polygamous family unit prior to their marriage and discover it only in retrospect. In addition, it must be emphasized that this practice does not occur in a vacuum. It is only one of the symptoms that characterize life in a traditional society where women are habitually disempowered and excluded. Women are expected to accept this practice as if it were an integral part of their lives, and are required to cooperate with the mechanisms of oppression and exclusion. (Regarding this matter see, *inter alia*, transcripts of the session held by the Subcommittee on the Advancement of the Status of the Woman in the Arab sector of March 20, 2001, and the article written by Adv. Sawsan Zaher titled "When the

Right to Family Life Clashes with the Right to a United Family" Adalah Electronic Newsletter No. 20, 2005).

27. Hence, the Petitioners believe that while polygamy should, as a matter of principle, be battled, denying an application by a person who had been a first and only wife to her husband for many years, has done nothing wrong, was not a party to an offense, and was literally forced into a bigamous marriage constitutes punishment of the victim for the actions of the person who harmed her.

28. The ruling made by the Beer Sheva Court for Administrative Affaris on July 10, 2010 in AP 27908-04-10 **al-Atrash et al. v. the Ministry of the Interior** (published in Nevo) (hereinafter: **al-Atrash**) which concerned the Respondent's decision to expel a woman who had been a first wife to her husband for many years because of her husband's marriage to a second wife:

> In the case in question the circumstances are different, as this is not a foreign national who is marrying an Israeli man thus perpetuating the man's bigamous life. **There is no dispute that the Petitioner [female] married the Petitioner [male] legally and was his first and only wife for 10 years, in the course of which they had 7 children…** Indeed, the Petitioners did not exhaust their rights in time but, today, when the State of Israel is the center of her life and all of her children are here**, she should not be "punished" simply because her husband married another woman after a ten year period of time during which she was his only wife**, and sent away from the world that she built here. (Emphasis added B.A.).

29. Hence, there is no doubt that the Respondent ought to have given proper, and even decisive weight to the fact that the Petitioner is her husband's first wife and was forced into a bigamous marriage without the possibility of preventing it or being released from this relationship without losing her children. The Respondent impaired the reasonableness of the decision through his blatant disregard of this fact.

<u>The Harm to an Individual who Took Part in the Graduated procedure for Seven Consecutive Years</u>

30. The Respondent, in his decision, also disregarded the fact that the Petitioner lived in Israel in the framework of the graduated procedure for family unification for seven years.

31. It must be emphasized that according to Section D.8.C. of the Respondent's procedure no. 5.2.0011 titled "**Procedure for Processing the Grant of Status to a Foreign Spouse Married to a Permanent Resident**" (last updated on December 1, 2014), the spouse of a permanent resident residing in Israel in the framework of the graduated procedure for

family unification is usually entitled to complete the procedure five and a quarter years after entering it, and to then apply for permanent resident status in Israel.

A copy of the Respondent's procedure is appended and marked **P/8.**

32. Thus, the Petitioner, who resided in Israel in the framework of the graduated procedure from 1998 until 2005, the year her husband married a second wife, would have been entitled to an upgrade of her status in 2003 had it not been for the entry into force of the Temporary Order, which preventing her from same because she is resident of the Area. Therefore, and as the sole purpose of the Temporary Order is security, it is clear that the only reason the Petitioner's graduated procedure extended beyond the five and a quarter years allotted to it is the security considerations underlying the Temporary Order. Therefore, the Petitioners believe that as the Petitioner had completed the five and a quarter years allotted for the graduated procedure in 2003 - two years prior to her husband's marriage to a second wife – and as no security claim of any kind was ever made against her, she must not be expelled from Israel on grounds that are unrelated to security.

33. The Court also referred to this issue in the aforementioned al-Atrash case:

> **It must be assumed**, and the Respondents did not argue differently **in this regard, that had the Petitioner claimed her rights she would have received permanent status and even Israeli citizenship at the end of her six-year stay in Israel and certainly before the Petitioner married his second wife** in 2005".
>
> (Emphasis added, B.A.).

34. Hence, the Respondent should have given proper and even decisive weight to the fact that the Petitioner completed the full period of the graduated procedure and had lived in Israel for five and a quarter years, two years prior to her husband's marriage to an additional wife. The fact that the Respondent did not consider this in any way whatsoever also renders the decision in the matter of the Petitioner unreasonable and unlawful.

The Respondent's Exercise of Power for an Extraneous Purpose

35. An administrative authority is forbidden from exercising a power granted it by the legislator for a purpose that is extraneous to the one for which it was designated. This prohibition which constitutes one of the foundations of administrative law is known and accepted in all legal systems and has its origins in both common law and continental law:

> In this family of disqualified powers there is a special branch concerning the exercise of a power conferred on the body in question for a purpose other than that for which it was not intended. The disqualification of

decisions unlawfully delivered on the basis of the aforementioned principle is a fundamental tenet of administrative law in England; See:

S.A. de Smith, Judicial Review of Administrative Action (London, 4th ed., by J.M. Eavns, 1980) 325 ff.; P.P. Craig, Administrative Law (London, 1983) 354 ff.

French law also allows disqualifying a decision made by the body that is the subject of the review due to abuse of power: **detournement de pouvoir**; See: A. de Laubadere, Droit Administratif (Paris: 8eme ed.) 570-575

(HCJ 620/85 **Mi'ari v. the Speaker of the Knesset**, published in Nevo).

In HCJ 491/86, **the Tel Aviv – Jaffa Municipality v. the Minister of the Interior** (published in Nevo), the Court also referred to the exercise of power for an extraneous purpose by the administrative authority:

The third rule is that the court will not uphold secondary legislation, even if it falls squarely within the language and expressions used in the primary legislation, if its purpose is extraneous to the purpose of the main law. Author Allan expresses this on page 210 of his aforementioned book (my translation):

"The secondary legislator can employ his power for a purpose that this power was never meant to address. This deviation is known in French administrative law as detournement de pouvoir - that is a deviation from the real purpose and it raises the question of whether this breach, despite falling "squarely within" the legislation is still *ultra vires*".

Former Justice Sussman in FH 16/61 [8], page 1217, provides a positive reply to this question:

"I cannot….give decisive importance to the language of the legislator and disregard the nature of the issue under discussion.

…The fate of the citizen concerned cannot be dependent on chance terminology and the capability of the author to implement his purpose…

A primary factor in detecting legislative intent, more important than language, is the subject in question and the nature of the matter regarding which the administrative authority was granted discretion".

We find an example of this type of legislation in HCJ 98/54, 105(9), where the Food Comptroller prohibited pig farming. The Court rejected

the Food Comptroller's claims that the general powers included in the Food Control Ordinance, 1942 empower him to animal farming by means of a directive.

On page 47, Justice Berenson stated:

"…This court is empowered to examine and scrutinize the actions of the authorities not only as they appear in terms of formal legal powers, but also on the merits of the matter, , whether the power was employed lawfully, or in other words was it implemented, *inter alia* , in good faith on the basis of proper considerations and for the purpose for which the power was given….and will it not leave intact acts whose façade is lawful but whose content is not".

(Emphasis added, B.A.).

36. Thus, there are situations in which, from a formal aspect, power is granted to the administrative authority, yet a more fastidious examination of the administrative decision making process reveals that the power was employed for a purpose that is extraneous to the one for which it was granted. The Petitioners' position, as will be specified below, is that in the framework of the Respondent's decision in their matter a power was used for an extraneous purpose and as such it is ultra vires.

37. As the Petitioners will specify in detail in section 43 and thereafter, the Temporary Order was enacted for a security purpose. This position was accepted by this Honorable Court in the framework of the rulings delivered in the petitions submitted against the Temporary Order in HCJ 7052 **Adalah Legal Centre for Arab Minority Rights in Israel et al. v. the Minister of the Interior et al.** and in HCJ 466/07 **MK Zahava Gal-On v. the Minister of the Interior et al.** (published in Nevo).

38. As this is the case, and since the Petitioner resided in Israel under the graduated procedure for seven consecutive years before her husband married a second wife, it is clear that the only reason she did not complete the graduated procedure is the entry into force of the Temporary Order that prevents her from doing so. However, while the reason the Petitioner did not complete the process can be ascribed to the security purpose of the Temporary Order, the denial of her humanitarian request – which she would not have had to submit had the Temporary Order not been enacted - is based on the Respondents' battle against bigamy. In the Petitioners' view, the Respondent's exploitation of the Temporary Order - which for security reasons obligated the Petitioner to continue to participate in the graduated procedure even after the five and a quarter years during which she took part in it – for his battle against bigamy by means of removing the Petitioner from the procedure and expelling her from Israel constitutes an illegal and extraneous use of the powers the legislator granted him under the Temporary Order. In other words: the Respondent is exploiting the Temporary Order, which was enacted for security reasons and led to the situation in which the Petitioner found herself – being unable to complete the graduated

procedure although she complied with it for many years as an only wife– in order to deny her application on grounds of bigamy. These grounds are entirely different from and extraneous to the purpose of the power the legislator granted the Respondent when he determined that it is not possible to upgrade the Petitioner's status in the framework of the Temporary Order.

Processing Applications for Family Unification after Five and a Quarter Years

39. Moreover, because of the security purpose underlying the Temporary Order, which prevents residents of the Area – and residents and citizens of states listed in the addendum to the Temporary Order – from upgrading their status even after the termination of the full period of time set by the Respondent for the graduated procedure for family unification, the Petitioners believe that the Respondent must remain true to this security purpose and not deviate from it or expand it. We shall specify.

The Security Purpose of the Temporary Order

40. In HCJ 7052/03 **Adalah v. the Minister of Defense**, both the State and the Supreme Court emphasized that the only purpose of the Temporary Order is security:

> What is the purpose of the Citizenship and Entry into Israel Law? Opinions are divided on this question in the petition before us. Some of the petitioners and the fourth respondent (the 'Jewish Majority in Israel' Society) think that the purpose of the law is not merely a security purpose but also a 'demographic' one. According to them, the law is intended to restrict the increase of the Arab population in Israel by means of marriage to residents of the territories. **The respondents, however, argued before us that the purpose of the law is merely a security one**. I am of the opinion that the respondents are correct. In my opinion, the purpose of the Citizenship and Entry into Israel Law is a security one and its purpose is to reduce, in so far as possible, the security risk from the foreign spouses in Israel. The purpose of the law is not based on demographic considerations. This conclusion is based on the legislative history and the content of the provisions of the law
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> (Ibid, paragraph 79 of the ruling of the Honorable President (Emeritus)Aharon Barak).

41. In the State's response in HCJ 466/07 **Gal-On et al. v. the Minister of the Interior et al.,** the State made it clear that the purpose of the Temporary Order is security and that it is designed to prevent the settlement in Israel of persons found to fit the "risk profile":

> The law was enacted as a Temporary Order relating to the period of the war. It does not seek to enact a long-term demographic policy. The law

> does not absolutely prevent the entrance of enemy subjects. Regarding residents of the Area, the law is based on an estimated risk profile of terrorists and their collaborators. In practice, its main action is the postponement of the realization of residency in Israel, rather than the denial of the right, if one does exist.
>
> **The law's provisions focus on security risks and do not refer in any way to a demographic purpose.** After all, had the law been designated for a demographic purpose, it would not be possible to approve the settlement in Israel of enemy subjects who are outside the risk profile …
>
> …In contrast, the law before us does not prevent settlement in Israel, in most cases, but only postpones it until the foreign spouse is no longer within risk profile …in addition, the data indicating that thousands of enemy subjects settled in Israel in the past three years demonstrates that the law does not have a demographic purpose.
>
> (Ibid, Paragraph 153, emphasis added, B.A.)

A copy of the relevant pages of the above response is appended and marked **P/9**.

42. Hence, as only the Temporary Order stands in the way of residents of the Area and prevents them from completing the graduated procedure and receiving permanent status, the Petitioners believe that in the absence of a security or criminal preclusions, it is the duty of the Respondent to allow each resident of the Area who completed the five-and-a-quarter year period of residency in Israel in the framework of the graduated procedure for family unification, to remain in the country without taking into consideration any factor that is extraneous to the security consideration on which the Temporary Order is based.

The State's Special Interest

43. As aforesaid, the exceptional situation of the Petitioner and her children, who forcibly found themselves in a harsh situation, requires creative thinking and special attention. Therefore, the Respondent ought to have done all he could to resolve the Petitioner's status in Israel including the employment of Section 3C of the Temporary Order.

Section 3C of the Temporary Order states that:

> **Notwithstanding the provisions of section 2, the Minister of the Interior may award citizenship or grant an Israeli resident's permit to a resident of the region** or to a resident of a country listed in the addendum, and the region commander may grant the resident of the region a permit to stay in Israel…**or that the awarding of citizenship, the granting of an Israeli resident's permit or the granting of a**

permit to stay in Israel, as the case may be, is in the special interests of the state; in this paragraph, "family member" – spouse, parent, child.

(Emphasis added, B.A.).

46. [sic] Thus, Section 3C of the Temporary Order makes it possible to grant a stay permit or a residency visa in Israel to a resident of the Area if the grant of same is of special interest to the State. The Petitioners believe that preventing the expulsion of a mother who is the custodial parent of four minors, all of whom are permanent residents in Israel, and whose expulsion inevitably means the expulsion of the children from Israel, is without doubt, a matter that is of special interest to the State. Another special interest of the state is to prevent the expulsion of a first and only wife who took part in the graduated procedure for seven years prior to the marriage of her husband to a second wife, a marriage that was forced upon her

53. [sic] In this regard, the Petitioners request to note that many view polygamy as a veritable act of violence that perpetuates men's control over their wives and cements the wives' dependency on their husbands and their good will. In this regard see, *inter alia*, "Polygamy among the Bedouin Population in Israel", a study submitted by the Knesset Research and Information Center on October 17, 2006 to the Committee for the Advancement of the Status of Women, and a position paper written by the Association for Civil Rights in Israel in 2010 and submitted to the Committee for the Advancement of the Status of Women in preparation for a discussion on polygamy held by the committee on February 23, 2010.

Copies of the aforesaid study and the position paper are appended and marked **P/10**.

54. Moreover, in the ruling of the Haifa Court for Administrative Affairs in AP (Haifa) 59945-01-13 **S.H.M. et al. v. the Ministry of the Interior,** the Honorable Court stated its view on the anguish of foreign women who reside in Israel under the graduated procedure for family unification and fell victim to violence by their spouses:

The system of regulating status in Israel by virtue of a spousal relationship, in which one spouse is an Israeli citizen and the other a foreign national, gives the Israeli spouse effective control of the process. If he so desires he will allow the procedure to continue and if not then he will inform the Ministry of the Interior that the relationship has ended and, as a result, the foreign spouse's stay permit in Israel will be voided. **This reality is often exploited by violent spouses who take advantage of the foreign spouse's dependency on their power to control the foreign spouse's stay permit.**

> The victim of spousal violence is faced with the possibility of continuing to succumb to her abusive spouse's every whim, or else risk the revocation of her stay visa, which may cut her off from a place that has become the center of her life over the years, **and often even from her children. In practice, the Ministry of Interior, in some cases involuntarily becomes part of the power mechanism with which the abusive husband strikes his foreign spouse. If she does not keep silent and remain submissive, she will be expelled from Israel (sometimes without the possibility of testifying about the violence she experienced).**
>
> As aforementioned, the circumstances of the case before us have not been fully clarified, mainly due to the delay in the submission of the petition. However, it seems that the first husband wanted to punish the Petitioner for going to a battered women's shelter and took a step whose purpose is to get her out of Israel and away from her children. Although the Petitioner was given the opportunity to remain in Israel on humanitarian grounds, the processing of her status was nonetheless stopped after she was already entitled to permanent status.

55. The Respondent issued a procedure numbered 5.2.0019 that addresses the issue of women victims of abuse and protects them.

> A copy of the Respondent's procedure concerning female victims of abuse is appended and marked **P/11**.

56. However, unfortunately, the Respondent has not yet taken the trouble to issue regulation procedure that would protect the Petitioner and others like her, who find themselves subject, through no fault of their own, to expulsion from their homes. The Petitioners believe that this is an unacceptable situation and that it is of special interest to the state that persons who find themselves in a situation similar to that of the Petitioner and her children are not harmed, receive protection and have their status in Israel resolved.

Violation of the Right to Family Life and Infringement of the Principle of the Best Interests of the Child

57. As is well known, the right to family life is a basic constitutional right in Israel and a derivative of the right to human dignity. This position earned the sweeping support of eight of the eleven justices who sat on the panel that heard HCJ 7052/03 **Adalah v. the Minister of the Interior** (hereinafter: **the Adalah case**). Chief Justice A. Barak determined the following in Paragraph 34 of his ruling:

> **…**from human dignity, which is based on the autonomy of the individual to shape his life, we derive the derivative right of establishing the family unit and continuing to live together as one unit. Does this imply also the conclusion that realizing the constitutional right to live together also means the constitutional right to realize this in Israel? My answer to this question is that the constitutional right to establish a family unit means the right to establish the family unit in Israel. Indeed, the Israeli spouse has a constitutional right, which is derived from human dignity, to live with his foreign spouse in Israel and to raise his children in Israel. The constitutional right of a spouse to realize his family unit is, first and foremost, **his right to do so in his own country. The right of an Israeli to family life means his right to realize it in Israel.**
>
> (Emphasis added, B.A.).

58. The establishment of the right to a family life as a constitutional right leads to the determination that any violation of this right must be exercised in accordance with Basic Law: Human Dignity and Liberty – and only on the basis of **highly substantial considerations** which must be based on a **solid evidentiary foundation** that supports these considerations.

59. Justice Procaccia in her ruling in the Adalah case stated as follow:

> The requirement of proportionality in the limitations clause is based on the principle of balancing between the violated human right and the conflicting value with which it contends. It involves an examination, inter alia, of whether the benefit achieved from the conflicting value is commensurate with the violation of the human right. The balance is affected by the relative weight of the values; in assessing the weight of the right, **one should take into account its nature and its status on the scale of human rights. One should take into account the degree and scope of the violation thereto**. With regard to the conflicting public interest, one should consider its importance, its weight and the benefit that accrues from it to society. There is a reciprocal relationship between the weight of the human right and the degree of importance of the conflicting public interest. **The weightier the human right and the more severe the violation thereof, the more it is necessary, for the purpose of satisfying the test of proportionality, that the conflicting public interest will be of special importance and essentiality. A violation of a human right will be recognized only where it is essential for realizing a public interest of such strength that it justifies, from a constitutional viewpoint, a proportionate reduction in the right** (Levy v. Government of Israel [99], at p. 890; Beit Sourik Village Council v. Government of Israel [2], at p. 850 {309}). According

> to the tests of the limitations clause, both the violated right and the public interest are examined in accordance with their relative weight, where the basic premise is:
>
> > 'The more important the violated right, and the more serious the violation of the right, the stronger the public interest must be in order to justify the violation. A serious violation of an important right, which is merely intended to protect a weak public interest, may be deemed to be a violation that is excessive' (per Justice I. Zamir in Tzemah v. Minister of Defence [9], at p. 273 {672})
>
> (Emphasis added, B.A.).

60. From the general to the specific. The Petitioner in question is the custodial parent of four minors, permanent residents of Israel, and there is no dispute that they have done no wrong. The fact that the Petitioner, a mother of minors who are permanent residents of Israel found herself forced into a bigamous marriage and threatened with having her children taken away from her should she get a divorce, after having participated in the graduated procedure for years as her husband's only wife, renders the Respondent's refusal in her case an excessive violation of her right and her children's right to family life in their home in Israel.

61. Moreover, the denial of the Petitioner's request for status inevitably causes a grave and irreversible violation of the rights of Petitioners 2-5, her minor children, who are already in a state of tension, uncertainty and instability due to the fear that their mother, and they along with her, will be expelled from their home. Such a decision can only mean the forced emigration of the children from the only country and city they have known and from their home, with no other place where they can lawfully live.

62. The best interests of the child constitute a basic and entrenched principle in Israeli law. In CA 2266/93 **A v. B** IsrSC 49(1) 221, Justice Shamgar ruled that the state must intervene to protect a child from a violation of his rights.

63. The Convention on the Rights of the Child sets forth a list of provisions that mandate the protection of the child's family unit. The preamble to the convention states:

> (The States Parties to the present Convention)… 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 determines:

> 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) determines:

> 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.

64. The convention's provisions regarding the rights of the child have gained increasing recognition as a supplementary source on the rights of the child and as a guide to interpreting "the best interests of the child" as a paramount consideration our legal system: See CA 3077/90 **A**. **et al. v. B.** IsrSC 49(2) 578, 593 (Honorable Justice Cheshin); CA 2266/93 **A, a Minor et al. v. B** IsrSC 49(1) 221 pp. 232-233, 249, 251-252, (Honorable President Emeritus Shamgar); CFH 7015/94 **the Attorney General v. A.** IsrSC 50(1) 48, 66 (Honorable Justice Dorner), HCJ 5227/97 **David v. the Supreme Rabbinical Court** (TakSC 98(3) 443), Paragraph 10 of the ruling of Honorable Justice Cheshin.

65. Thus, the expulsion of the Petitioner, who is a single parent to her four minor children, will also inevitably lead to the expulsion of Petitioners 2-5 from their country and home. Beyond the grave consequences that will result from forcibly cutting the children off from their natural environment, their family and friends, the demand that their mother leave Israel also directly affects the children's legal status as permanent residents in Israel. This is due to the fact that should they leave Israel along with their mother, the children will, firstly, forfeit their status as Israeli residents under the National Insurance Law, status that grants them social security rights and particularly the right to health insurance. In addition they may, at a later stage, be removed from the Respondent's population registry and forfeit their status as permanent residents in Israel. This is due to the fact that unlike citizens who do not lose their status in Israel even if they leave its borders and do not return

for many years, permanent residents of Israel will lose their status, *inter alia*, pursuant to the Entry into Israel Regulations, 5734-1974, if they do not return to the country within seven years. Thus, the Respondent's decision in the case of the Petitioner also has direct and far-reaching implications on the legal status in Israel of her children, whom she is raising.

66. Unfortunately, the harm that will be caused to the Petitioner's children who are residents of the country, its consequences and implications, were not examined in any way whatsoever by the Respondents before they made their decision in the Petitioner's matter, contrary to the principle of the best interests of the child which determines that the best interests of the child must be the primary concern in every decision involving children. For this reason, the Petitioners believe that the Respondents' above described conduct impaired the reasonableness of the decision.

Granting Status to a Parent of Israeli Children

67. In a direct relation to the principle of the best interests of the child, it is important to note that in HCJFH 8916/02 **Dimitrov v. the Ministry of Interior – the Population Registry** (published in Nevo), it was ruled that this principle may justify the resolution of the status of a parent, even if it is contrary to the general premise that a child follows his parents rather than vice versa:

> The principle of the child's best interest has long been recognized as a principal value of our legal system, the importance of which cannot be overstated. Indeed, as a general rule "it is impossible to examine the matter of minors without examining their best interest" (CA 7206/93 **Gabay v. Gabay**, IsrSC 51(2) 241, 251). Thus, in the formulation of his decision, which determines the status in Israel of a foreign parent, the Minister of Interior must consider, *inter alia*, the best interest of the child of that parent and the effect such a decision may have on him. The Respondent's position, as aforesaid, is that despite the fact that as a general rule, parenthood to an Israeli citizen, cannot, in and of itself, grant permanent status in Israel, he also agrees that each case should be examined on its merits, to ascertain whether there are special humanitarian needs which justify a deviation from the general rule. Taking into consideration special needs may also include the needs of the child of the foreign spouse. The child's best interest, therefore, constitutes a consideration which should be taken into account by the respondent within the examination process."

68. Accordingly, the Respondent issued several procedures regulating the status of children of illegal aliens who have assimilated in Israel including the regulation of

their parents' status as temporary residents (see Government Resolution 1289 of 2004, Government Resolution 156 of 2006 and Government Resolution 2183 of August 2010). Generally, according to the above government resolutions, a child's assimilation in Israel for four years and nine months is sufficient to regulate his permanent status and the temporary status of his parents, who are living in Israel **illegally**. These arrangements are appropriate and humane. They derive from Israel's commitment to the principles of the best interests of the child, and express its responsibility for the consequences of having no methodical immigration policy, and years of non-enforcement.

69. The Petitioners believe that this rationale is valid *a fortiori* in the case of the Petitioner who is a mother of Israeli children and who lawfully resided in Israel for many years. The reason for granting status to illegal aliens in Israel who are parents of children who are Israeli residents is clear. The interest of the minors requires that their parents do not live with them for many years as residents who in practice have no rights. These welcome rationales should also be applied in the matter of the petitioner.

70. AP (Beer Sheva) 313/06 **Physicians for Human Rights – Israel v. the Minister of the Interior** (published in Nevo), concerned a request to resolve the status of a petitioner who had divorced the father of her children and never took part in the family unification procedure due to a polygamous marriage. The inter-ministerial committee denied the mother's request to grant her status because of the proliferation of polygamy. The court ruling in the matter is also relevant to our matter:

> The decision to deny the Petitioner's matter itself raises the question of the fate of the four young daughters (the youngest of whom is five years old) who are in her custody. The removal of the mother of four girls out of the borders of Israel will leave the four minor girls without a parent to protect and raise them. The decision to deny the request and the reasons provided by the Respondents in their response did not clarify in any way whatsoever what will become of these four young girls, all of whom are, as stated, citizens of the state. Will their father be prepared to raise them? And if so is he able and competent to raise them? And if the father of the girls is unwilling or unable to do so, is there an institution that will? Is it appropriate at all to decide to expel the mother from Israel while leaving four young girls in care outside the home? Is it not required that the authority that examines the Petitioner's request for a residency visa simultaneously examine the immediate consequences and effects it will have on the lives of her four young girls, their fate, emotional well-being and their future? Or is the proposed solution in this case, as stated by the

> counsel for the Respondents in his oral arguments, that the four young girls – citizens of Israel –follow their expelled mother to the city of her birth, Hebron in the Palestinian Authority? The uniqueness of the situation at hand lies in the close and inevitable tie between the authority's decision regarding the application of the Petitioner herself and the far reaching consequences it has on the fate, emotional well-being and interests of her four young, minor daughters. Had the Petitioner been alone, there would have been no room for questioning the justice of the authority's decision to deny her request, due to each of the reasons provided by the Respondents in their response. However, as the decision has such far-reaching results for the fate and emotional well-being of the Petitioner's four young girls, it is impossible, in my view, to be satisfied with the committee's decision as it stands without examining the implications of the request submitted to it on the fate of the girls, where they will grow up, with who, and how they will be provided for after their mother, the Petitioner, is expelled from Israel.

71. In this case, the Court was not satisfied with ruling that the matter be returned to the committee, but also criticized the manner in which the committee conducted its examination of the matter, and instructed it as to the manner in which it is expected to act in a humanitarian case affecting minors:

> …Due to the sensitivity appropriate to the unique situation of the matter at hand, the Respondents decided to allow the Petitioner to bring her request to the inter-ministerial committee beyond legal and procedural requirements. The Respondents acted properly and appropriately in this regard. However, as the Respondents opened the gates of the inter-ministerial committee - the committee's decision making process in regard to the Petitioner's request ought to have been carried out and formed together with an examination of the highly unique consequences the decision would have on the interests of the four young girls, their fate, future and their well-being. The committee should have allowed the Petitioner, or her counsel, to appear before it and present the required reports of the social welfare authorities that are responsible for the fate and safety of the youngest citizens of the state. The committee ought to have considered the possibility of initiating the submission of a report from the responsible authorities. And, above all, the committee's decision should have listed grounds reflecting the examination of the above aspects of this unusual and unique request that was brought before it.

72. AP (Tel Aviv) 10-09-39083 **(Minor) et al. v. the Ministry of the Interior** which concerned the petition of an Israeli girl who requested that her mother be granted status, it was decided that the mother would be given temporary status that will be renewed and upgraded to permanent status:

> This is a matter of a girl who was born in Israel and has lived her entire life, to the present time, only in Israel, since she was born in 2002 to the present. She studies in the Israeli educational system. There is no, nor can there be, any dispute regarding the girl's right to remain in Israel, and of course, in these circumstances, she is entitled to have her mother, the only parent raising her, be able to remain in Israel with her.

73. The statement of Honorable Justice Dr. Marzel, in his judgment in AP (Jerusalem) 37903-03-11 **A. v. Ministry of Interior** is also relevant to our case:

> It is clear that under such circumstances considerations of the child's best interests, as well as considerations of the right to family life, should be taken into account. Although the child's status does not grant, in and of itself, status to his parent, case law recognized the principle according to which certain humanitarian cases may justify, and even require, a deviation from the rule that a child does not create status for his parents (see for instance, HCJ 4156/01 **Dimitrov v. Ministry of Interior**, IsrSC 56(6) 289, 294 (2002); also see HCJFH 8916/02 **Dimitrov v. Ministry of Interior** (not reported, [reported in Nevo], July 6, 2003); AAA 10993/08 **A. v. State of Israel** (not reported, [reported in Nevo], March 10, 2010); see also, AP (Jerusalem) 529/02 **Burna v. Minister of Interior** [reported in Nevo] (August 26, 2002); AP (Tel Aviv) 1295/03 **Shabasof v. Minister of Interior** [reported in Nevo] (March 8, 2005)). Furthermore, the separation of a minor who is an Israeli citizen from his parent, involves, at least ostensibly, a certain violation of the minor's right to family life (see and compare, HCJ 7052/03 **Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior** (not reported, [reported in Nevo], May 14, 2006); see also, AP (Tel Aviv) 3111/08 **Salamovah v. State of Israel** [reported in Nevo] (June 4, 2010)). Hence, before making a decision concerning the status or lack of status of a foreign parent of a minor who is an Israeli citizen, the entire circumstances of the case should be thoroughly examined, including the possible consequences of the minor's separation from his parent. This examination should be based on a professional and exhaustive factual inquiry (compare, AP (Jerusalem) 705/07 **Muskara v. Minister of Interior** [reported in Nevo] (December 21, 2009); AP (Tel Aviv) 3143/04 **Mariano v. Minister of Interior** [reported in Nevo] (May 22, 2005)).

74. Thus, the principle of the best interests of the child and his right to family life require the Respondents to consider the consequences their decision has on the children as part of of their overall considerations prior to rendering a decision in a matter of parents of children who are permanent residents of Israel. At times, the best interests of the children require

granting real status to the parent they live with here in Israel. The petitioners believe that their matter is one of these cases, particularly given the fact that it concerns an individual who has been in Israel for many years and has completed the family unification procedure, at least in terms of the period of time during which she participated in the graduated procedure.

Conclusion

75. The present petition concerns a mother to Israeli minors who, as a result of her husband's actions, which were forced upon her, found herself without any legal status in Israel, and a candidate for expulsion from her home. As specified in the petition, this is an unreasonable decision which contradicts all logic. In place of accepting the request of a person who resided in Israel legally for more than five and a quarter years – either because this regards a paramount humanitarian matter or because it is of special interest to the state not to expel a mother to minors who are permanent residents in Israel - the respondent used the Temporary Order and denied the Petitioner's request.

76. In light of the aforesaid, the Court is requested to issue an *order nisi* as sought, which will include the remedies listed in the preface of the present petition, and after hearing the Respondent, render it absolute. The Court is also requested to rule that the Respondent bear the Petitioners' expenses and legal fees.

January 1, 2015

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