At the Court of Appeals
Jerusalem District

Appeal 1400/17

In the matter of:

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

All represented by counsel, Adv. Benjamin Agsteribbe (Lic. No. 58088) and/or Sigi Ben Ari (Lic. No. 37566) and/or Hava Matras-Irron (Lic. No. 35174) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. No. 41065) and/or Abir Jubran-Dakawar (Lic. No. 44346) and/or Nasser Odeh (Lic. No. 68398) and/or Nadia Daqqa (Lic. No. 66713) and/or Eliran Balely (Lic. No. 73940)

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 Appellants

v.

1. **Minister of the Interior**
2. **Population and Immigration Authority**

Represented by counsels of the legal department
15 Kanfei Nesharim Street, Jerusalem
Tel: 02-5489888; Fax: 02-5489886

The Respondents

Expanded Argument on behalf of the Appellants

Following an urgent statement of appeal which was filed by the appellants with the honorable court on January 26, 2017, in the above captioned proceedings, including their application to expand the argument, the appellants hereby respectfully file their entire arguments against respondents' decision referred to above.

The Factual Part

1. **As specified in the appeal,** appellants 1-2, originally residents of the West Bank, are respectively the spouse and son of appellant 3, and they reside in Israel for many years in the framework of a family unification procedure undertaken by them together with appellant 3. Appellant 3 is the half-sister of Fadi Qanbar, who carried out the attack in Armon Hanatziv neighborhood in Jerusalem on January 8, 2017. Hence, appellants 1-2 are, respectively, the latter's brother-in-law and nephew.

2. **Appellants** 1 and 3 were married in 1990. They had six children, including a daughter who is still a minor, born in 2006. Appellant 2 was born to his parents in 1991, and is a dentist.

3. From the date of appellants 1 and 3's marriage until 2003, appellants' family resided in the Occupied Palestinian Territories (OPT), and from 2003 to date the family resides in Jerusalem. In 2007, appellant 3 submitted family unification applications for her spouse and for her children. Excluding appellant 2, all children of appellants' family are permanent residents of Israel.

Exhaustion of remedies

4. Following the attack in Armon Hanatziv neighborhood on January 8, 2017, in which appellant 3's half-brother was involved, the respondents notified the family on January 10, 2017 that respondent 1 had initiated proceedings for the revocation of the family unification procedure undertaken by appellants 1 and 2 together with appellant 3 (hereinafter: the **notice**); and that they were summoned to a hearing which would be held in respondent 2's office at 09:00 o'clock on the following morning.

5. Following discussions between appellant 2 and the respondents and after complaint had been submitted to the Attorney General regarding respondents' inappropriate conduct and the violation of appellants' right to due process, a new date was coordinated for the hearings which were scheduled for January 18, 2017.

   A copy of respondents' notice was attached to the written hearing and marked therein A.

   A copy of the complaint to the Attorney General is attached hereto and marked **C**.

6. On January 18, 2017, a hearing was held in appellants' matter in respondent 2's offices. It should be noted that in addition to the oral arguments against the notice, the appellants also submitted, on the date of the hearing, written arguments against the notice. It should be further noted that in their written and oral arguments, the appellants raised weighty arguments against the notice regarding the intention to revoke the family unification procedure undertaken by them for years, and in which they have also refuted the allegations which were raised against them by the respondents in said notice.

7. However, on January 25, 2017, respondents' decision was received by appellant 4 in its offices (hereinafter: the **decision**). The decision stated that in the hearing the allegations which had been raised against appellants 1 and 2 in the notice regarding the intention to revoke their status were not refuted. In addition, the decision noted, for the first time, that a privileged opinion had been

transferred by security agencies. In view of the above, the managing director of respondent 2's offices in East Jerusalem, Mrs. Hagit Zur, notified that she decided, for the time being, to stay the procedure undertaken by appellants 1 and 2 and to revoke at that point the stay permits which had been granted to them.

A copy of the decision of the managing director of respondent 2's offices in East Jerusalem was attached to the statement of appeal and marked therein A.

Appellants' arguments in detail

8. The appellants will prove below that the decision to revoke the family unification procedure undertaken by them together with appellant 3 is a fundamentally inappropriate decision which should be revoked. It should already be emphasized at this point that this case concerns an unreasonable and disproportionate decision, totally based on extraneous considerations. However, and above all, this case concerns a decision which was made contrary to the law, to case law and to respondents' procedures, critically violating and depriving the appellants and their family members of their fundamental rights, and primarily of the right to family life. In addition, this case concerns a decision which was made with a brazen violation of the right to due process, including appellants' right to be heard. In conclusion, and before the appellants specify in detail their arguments against the decision, they wish to remind that in the statement of appeal which was filed by them on January 26, 2017, the honorable court was requested to regard their written arguments as an integral part of the statement of appeal.

The Decision

9. The decision of the managing director of the population authority's offices in East Jerusalem to revoke the family unification procedure undertaken by the appellants was primarily made in clear excess of power. We shall clarify.

10. The decision states that:

> Following our notice dated January 10, 2017, according to which following the direction of the Minister of the Interior, the possibility to revoke your status in Israel is being considered, status which was granted to you by virtue of the graduated procedure pursuant to the Entry into Israel Law, 5712-1952, and according to the Citizenship and Entry into Israel (Temporary Order) Law, 5763-2003, the following is my decision.
>
> Following the severe attack which was carried out on January 9, 2017, in Armon Hanatziv neighborhood in Jerusalem, in which four Israeli citizens were killed, a meeting was held at the Minister of the Interior with security agencies. **In the meeting information was presented according to which members of your extended family were suspected of having connections to ISIS and of being involved in terror activity, and therefore your continued presence in Israel poses a security threat. Accordingly, a privileged opinion of the security agencies was transferred**.
>
> On January 18, 2017, a hearing was conducted in your matter in the population authority's offices in East Jerusalem. In the hearing the above said was not refuted. In view of the above, I decided to stay, **for the time being**, the

graduated procedure undertaken by you for receiving status in Israel, and **at this stage** to revoke the stay permit in your possession.

(Emphases added, B.A.)

The decision runs contrary to the law

11. The appellants will prove below that the decision runs contrary to the provisions of the Citizenship and Entry into Israel (Temporary Order) Law, 5763-2003 (hereinafter: the **Temporary Order**).

12. Section 2 of the Temporary Order provides that:

> **During the period in which this law shall be in force, notwithstanding any other statutory provision**, including section 7 of the Citizenship Law, the Minister of the Interior shall not grant a resident of the region or a citizen or resident of any country listed in the citizenship addendum to the Citizenship Law, and shall not give him temporary residency status in Israel on the basis of the Entry into Israel Law, and the **Region Commander shall not grant a resident of the region, a permit to stay in Israel**, on the basis of security legislation in the region.

Section 3(1) of the Temporary Order provides that:

> Notwithstanding the provisions of section 2, the Minister of the Interior may, using his discretion, approve the application of a resident of the region to receive a permit to stay in Israel by the region commander –
>
> **With respect to a male resident of the region who is over 35 years of age – for the purpose of preventing his separation from his spouse who lawfully resides in Israel;**

Section 3A(2) of the Temporary Order provides that:

> Notwithstanding the provisions of section 2, the Minister of the Interior, using his discretion, may
>
> ---
>
> **approve the application to grant a permit to stay in Israel by the region commander to a minor resident of the region who is over the age of 14 for the purpose of preventing his separation from his guardian parent who lawfully resides in Israel**, and provided that the said permit is not extended if the minor does not permanently reside in Israel;

Section 3D of the Temporary Order provides that:

> **A permit to stay in Israel** or a license to reside in Israel **shall not be granted** to a **resident of the region**, in accordance with sections **3**, 3A1, **3A(2),** 3B(2) and (3) and 4(2) and license to reside in Israel shall not be granted to any other applicant who is not a resident of the region, **if the Minister of the Interior or region commander, as the case may be, has determined, pursuant to**

> **the opinion of competent security agencies that the resident of the region or other applicant or family member are liable to constitute a security risk to the <u>State of Israel; in this section, "family member" – spouse, parent, child, brother and sister and their spouses.</u>** For this purpose, the Minister of the Interior may determine that a resident of the region or any other applicant is liable to constitute a security risk to the State of Israel, among other things on the basis of an opinion of competent security agencies according to which within the domiciled state or residential region of the resident of the region or the other applicant, activity is carried out which is liable to pose threat to the security of the State of Israel or its citizens.

13. There is no dispute that the above Temporary Order is the legislation which applies to appellants' matter. However, the above provisions clearly indicate that the revocation of a stay permit held by an OPT resident for security reasons may be done only under the conditions specified in the Temporary Order. And to be precise: not without reason does the Temporary Order define, in so many words, who is a family member for the purpose of revoking the procedure undertaken by OPT residents. Hence, only when an opinion of security agencies provides that a security preclusion exists which arises personally from an individual holding a stay permit or his family member in the OPT, can the respondents revoke the family unification procedure undertaken by the person holding the stay permit.

14. However, in the case at hand the respondents openly state in the decision, as well as in its preceding notice that they act outside the scope of the law, in view of the fact that the information in their possession **pertains to members of the extended family**.

15. It appears from the decision that the respondents, which as is known, conceived the Temporary Order and its draconian provisions, forgot what they themselves wanted to establish. As aforesaid, the decision explicitly states that the "preclusion", and therefore also the privileged opinion of security agencies, pertain to appellants' extended family, rather than to the appellants themselves or to their family members residing in the OPT. In view of the above, there is no doubt that the above decision runs contrary to the Temporary Order and is therefore fundamentally inappropriate. In view of the above, the appellants are of the opinion that in the case at hand the respondents should have disregarded the opinion of the security agencies which makes no difference whatsoever, since this opinion is nothing but a recommendation to the respondents to act outside the scope of the law and contrary thereto, and if this is the case, what are we to do.

<u>The decision runs contrary to case law</u>

16. As specified in appellants' written arguments – arguments of which no mention was made in respondents' decision, and which were therefore attached as an integral part to the appeal at hand – in addition to that the decision is contrary to the law, it also totally contradicts case law. The appellants, *inter alia* in their written arguments, pointed at the ample outstanding authority on the status of the right to family life and on the possibility and conditions for the revocation of permits which have already been granted; in particular the appellants referred to statements made by the Supreme Court in its judgments in HCJ 7444/03 **Daka v. Minister of the Interior** (hereinafter: **Daka**) and in HCJ 7052/03 **Adalah - The Legal Center for Arab Minority Rights in Israel v. Minister of the Interior**. In their written arguments the appellants also pointed at the fact that the right to family life was given the status of a binding constitutional right, that any violation of said right could be made only according to the provisions of the Basic Law: Human Dignity and Liberty – and based only on weighty considerations and solid evidentiary infrastructure attesting to said considerations.

17. However, respondents' conduct in the case of the appellants and their other family members with respect of whom the above referenced inappropriate decisions were given, not only fails to reconcile with applicable case law, but rather, it totally contradicts said judgments. Accordingly, *inter alia*, in an interview given by respondent 1 to the media it was declared by him as follows:

> **I also prevent** suspects **until it is unequivocally clarified within the next few months that they really have no connection**, I will not let them walk around freely in Israel with a blue identification card…

The following is a link to the interview conducted with respondent 1, from which the above quote is taken: http://soundcloud.com/glz-radio/2rmnapoiupgp

It is important to note that the decision which is challenged in this appeal totally reconciles with the words of respondent 1 in said interview, since the decision explicitly states as follows:

> In view of the above, I decided to stay, **for the time being**, the graduated procedure undertaken by you for receiving status in Israel, and **at this stage** to revoke the stay permit in your possession.

18. Hence, instead of acting within the scope of the Temporary Order and based on case law according to which revocation of procedures and invalidation of permits would be allowed only in cases in which it was proved that it was highly likely that threat was posed by a certain person or his first degree relative, the respondents turned the tables, while making clear statements to that effect. Instead of conducting a meticulous and thorough examination to rely on solid evidentiary infrastructure in making such an exceptional and injurious decision, the respondents rushed and revoked the procedures undertaken by the appellants for many years and invalidated their status "for the time being" and "at this stage", due to indirect suspicions, until things are properly clarified.

The decision runs contrary to respondents' procedure

19. As specified in the written arguments, the decision also fails to reconcile with procedure No. 5.2.2015 of the population authority captioned "Procedure on security agencies comments on applications for status in Israel by virtue of spousal relations with an Israeli (hereinafter: the **procedure**), in view of the fact that in appellants' case the basic conditions required to deny their application and revoke the stay permits which were held by them for years, as said conditions were established in sections 3.3-3.4, were not met. According to the procedure an application may be denied due to intelligence information pertaining to the sponsored spouse, or alternatively, in exceptional cases only, for reasons related to the applicant, including, for instance, when he serves time in prison, is detained until termination of proceedings or when charges are pending against him for which a long incarceration period is expected to be imposed on him.

20. The procedure does not include any provision according to which a family unification application may be denied for reasons pertaining to a family member of the sponsoring spouse. Hence, the decision which punishes the appellants for deeds of their second and third degree relatives, respectively, due to the reason that "**Several members of your extended family are suspected of having connections to ISIS**", not only fails to reconcile with the provisions of the Temporary Order and with court judgments, but also runs totally contrary to respondents' own procedure.

Clear extraneous considerations including prohibited collective punishment

21. The decision also proves that it is not premised on any substantive security preclusion embedded in the appellants themselves, but rather on considerations extraneous to the legislation, the law and procedures pertaining to family unification applications, The above also arises from an interview,

parts of which were quoted in appellants' written arguments, in which respondent 1 publicly stated as follows:

> **When I hear that the family of the perpetrator of this terrorist has three siblings who knew of his connections to the Islamic State and of his identification with the Islamic State and failed to notify and did nothing. The sister who praises and glorifies this murder. When I see these things and all of them carry our blue cards and wander around in Israel I first of all must, now not as revenge, yet not even for deterrence purposes, first of all to take these cards away from them so that they do not freely wander around so that we shall know to prevent the next attack**.
>
> (See link to the interview above).

22. It should be noted that contrary to respondent 1's declarations of the will to limit the freedom of movement of the brothers and sisters of the perpetrator, respondents' decision to revoke the family unification procedure was given only in the matter of second and third degree relatives, as is also manifested by the language of the decision itself which explicitly states that the procedure was revoked since several members of appellants' extended family were suspected of having connections to ISIS. On this issue the appellants wish to point out that as of the date hereof all first degree relatives of the perpetrator were released, which also attests to the fact that the suspicions concerning the existence of links to ISIS were not substantiated. It is therefore clear that there is no security preclusion in the matter of the appellants in the case at hand who are only distant relatives – of both the perpetrator and of those anonymous family members suspected of having connections to the organizations specified in the decision.

23. Taking measures against the second and third circle of family members – innocent individuals to whom no guilt is attributed – teaches more than anything else that the proceeding is not premised on any substantive security preclusion, and most certainly not against the appellants, but rather on considerations extraneous to the family unification procedure.

24. Another extraneous consideration underlying the decision, as manifested in respondent 1's media interviews is the desire to punish the family members. In addition, the various media reports indicate that the purpose of the measures taken against the Qanbar family members was to revenge and punish, and alternatively, to deter potential perpetrators, as a lesson for all to see and beware.

25. Accordingly, for instance, on January 10, 2017 – even before notice was given to the Qanbar family members of the intention to revoke their status and of the fact that they were summoned to a hearing – respondent 1's office (Barak Seri, respondent 1's media advisor), issued a media release which included a quote of respondent 1's words:

> **The Minister of the Interior, Aryeh Deri said following his decision: "It is a decision which marks a new era against terror and against perpetrators with status, who have abused their status for the purpose of executing severe attacks against civilians. From now on there will be zero tolerance towards anyone involved in attacks against Israel and towards his family members. From now on, anyone plotting, planning or considering the execution of an attack will know that his family members will pay a heavy price for his deeds. The ramifications will be severe and far reaching, like in the decision I made with respect to the mother and family members of the perpetrator who executed the attack in Armon Hantziv in Jerusalem**".

A copy of the advisor's media release is attached and marked **D**.

26. In the radio interview mentioned above which was held on January 11, 2017, respondent 1 expressly explained why he had decided to act as he did in the matter of the extended Qanbar family, making reference to another incident which had taken place a year earlier (residency revocation of individuals who were involved in an attack which led to the death of the late Alexander Levlovitch):

> **… young persons who said, wait a minute, the landlord is out of his mind he starts revoking citizenships. Guys, if I succeed to prevent attacks and save the lives of our children I am willing to receive every day a main editorial in Haaretz**

And

> **Now they will understand. Now you know what you have here, you will know that when you take such an action you take away from your family members, from your mother, your siblings. National Insurance, it's a driver's license' it's a work permit in Israel. It's many things. People will think twice**.

And

> **And I also prevent. <u>It's not only deterrence I also prevent suspects until it is unequivocally clarified within the next few months that they really have no connection, I will not let them walk around freely in Israel with a blue identification card</u>**

27. And again, on January 25, 2017, and before the decision regarding the revocation of the family unification procedure and regarding the invalidation of appellants' stay permits was delivered, the respondents rushed to place an announcement on respondent 2's website regarding the decision which stated, *inter alia*, as follows:

> The Minister of the Interior Aryeh Deri revoked in the past hour the status of the family members of the perpetrator Fadi Qanbar. As is remembered, immediately after the attack which took place in Jerusalem about two weeks ago, in which four soldiers were killed, Minister Deri notified that he would act expeditiously for the revocation of the status of the perpetrator's family members residing by virtue of a family unification procedure…
>
> **Minister Deri clarified: "<u>Only immediate and practical actions will deter perpetrators. I am confident that the revocation of the status of the family members will operate as a warning sign for others contemplating to execute attacks and kill Israeli citizens</u>**."
>
> (Emphasis added, B.A.)

A Copy of the announcement of the population authority is attached hereto, marked **E**.

28. With respect to the relevance of the fact that an extraneous consideration was taken into account, the position of the court is clear. More than three decades ago Justice I. Cohen held that while examining the act of the authority one should examine "whether the extraneous consideration or the inappropriate purpose had actually affected the act of the authority, and if it did, the authority's act

should be revoked." (HCJ 392/72 **Emma Berger v. District Planning and Building Committee**, IsrSC 27(2), 764, 773).

29. The Supreme Court also stressed that a decision violating a person's fundamental right should not be upheld only because of the desire to deter future potential perpetrators. In a case pertaining to the assignment of a person's place of residence in an occupied territory, president A. Barak held that the place of residence of a person who does not pose any danger, may not be assigned merely because it would deter others:

> It follows that the basis for exercising the discretion for assigning residence is the consideration of preventing a danger posed by the person whose place of residence is being assigned. **The place of residence of an innocent person, who does not himself pose any danger, may not be assigned merely because the assignment of his place of residence would deter others.** Likewise, one may not assign the place of residence of a person who is not innocent and did carry out acts that harmed security, when in the circumstances of the case he **no longer** poses any danger. Therefore, if someone carried out terrorist acts, and assigning his residence will reduce the danger that he presents, it is possible to assign his place of residence. **One may not assign the place of residence of an innocent family member who did not collaborate with anyone, or of a family member who is not innocent but does not pose danger to the area. This is the case even if assigning the place of residence of a family member may deter other terrorists from carrying out acts of terror** (HCJ 7015/02 **Ajuri et al., v. Commander of IDF Forces in the West Bank et al**., TakSC 2002(3), 1021, page 1029) (Emphases added by the undersigned).

30. In addition, it should be emphasized that the decision to revoke the procedure undertaken by the appellants and to invalidate the permits which had been granted to them under the above described circumstances, is nothing but punishment contrary to one of the most fundamental rules of justice – **the prohibition against the punishment of one person for acts executed by another person**. Any legal system is premised on this rule which is also deeply rooted in our heritage. This approach is most clearly expressed in the Book of Deuteronomy:

> Fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers; a person shall be put to death for his own wrongdoing (Deuteronomy 24, 16).

The prophets Yirmiyahu and Yechezkel also reiterate the rule that one family member should not bear the iniquity of another family member:

> The soul that sins, it shall die; a son shall not bear the iniquity of the father, and a father shall not bear the iniquity of the son; the righteousness of the righteous shall be upon himself, and the wickedness of the wicked shall be upon himself.

31. And to be precise, the above approach which discusses the prohibition against the punishment of one person for the deeds of another person pertains to a father and his son, namely, to first degree relatives, one of whom had undoubtedly sinned. It is therefore all the more so clear that the above-said is relevant to the matter of the appellants at hand, who are distant relatives of those referred to in the decision only as suspects of having connections to ISIS.

32. The severe impact that the decision to deny the family unification application has on the entire family of the appellants is clear. With a single stroke, appellants 1-2 were condemned to one fate – expulsion.

33. The decision is much more severe in view of the fact that this case concerns normative individuals who have been residing lawfully and continuously in Israel for many years, while undertaking a family unification procedure and receiving stay permits and who have integrated into society. This is where the family lives; this is where the children were educated; this is where appellant 1 makes his living and provides for his family; this is where appellant 2 was educated, grew up and studied dentistry; and this is where they conduct their lives. The family's center of life therefore, in every possible aspect – is in Jerusalem. As an immediate result of the decision the appellants would be uprooted from their hometown for no fault of their own and would be torn away from their other family members.

34. It should also be noted that the language of the decisions and the uniform and vague notices which were sent to all individuals being the subject matter of the decisions – other than the mother of the family – attests to the fact that no real specific examination of each case on its merits was conducted before the decisions were sent. A uniform decision sent to such a large group of family members necessarily indicates that this case concerns a collective punishment, or alternatively that the decision stems from vindictive and deterring motives, measures which as aforesaid, are extraneous by their nature to family unification procedures. Therefore the appellants are of the opinion that for these reasons also the decision at hand is fundamentally inappropriate and should be revoked.

Breach of the rules of natural justice

The right to be heard and the right of inspection ancillary thereto

35. As will be specified in detail below, no substantive hearing was held in appellants' matter. The respondents breached their obligation to grant the appellants the right to present their arguments against the evidence substantiating the decision made against them, since said evidence was not at all presented to them, despite appellants' request to receive the documents which served as the evidentiary infrastructure of the decision. Instead, the appellants underwent a formal and meaningless proceeding the purpose of which was pre-determined.

36. The right to present arguments before the administrative authority which considers or which is about to take measures violating the person's rights or interests was recognized as a primary right, constituting part of the rules of natural justice (see for instance: HCJ 3/58 **Berman v. Minister of the Interior**, IsrSC 12 1493, 1508; HCJ 3379/03 **Moutasky v. State Attorney's Office**, IsrSC 58(3) 865, 899; HCJ 5627/02 **Saif v. Government Press Office**, IsrSC 58(5) 70, 75).

37. The Supreme Court held that "**The key for turning the hearing into a substantive proceeding is that the applicants are granted actual information**, to the maximum extent possible, even within understandable restrictions, to enable them to properly prepare for the proceeding." (AAA 1038/04 **State of Israel v. Ja'abis**, reported in Nevo).

38. In another case it was held that the right to be heard is not only the right of the civilian to be heard by the authority, but is rather the right to receive a **fair hearing**, enabling the civilian to challenge the claims raised against him:

> This right is not only a formal procedure of summons and hearing. The right to be heard means the right to a fair hearing (HCJ 598/77, page 168). The meaning of this right is to give a proper opportunity to respond to information

which was obtained and which may affect a decision which concerns petitioner's matter (see: HCJ 361/76).

Therefore, the right to be heard is not properly exercised, if the applicant is not advised of the information which was obtained in his matter and is not given the opportunity to properly respond thereto.

(HCJ 656/80 **Abu Romi v. Minister of Health**, IsrSC 35(3) 185, 190)(Emphasis added, B.A.).

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

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

(HCJ 4914/94 **Terner v. State Comptroller et al**., IsrSC 49(3) 771, page 791)

(Emphasis added, B.A.)

39. In AAA 1038/08 **State of Israel v. Ja'abis** (reported in Nevo) (hereinafter: **Ja'abis**) engaged in the right to be heard and the obligation to hold a hearing imposed on the Ministry of the Interior while denying a family unification application for security reasons, it was held by the court that:

The grant of the right to be heard is important; but it is important to ensure that <u>the hearing is substantive and that it does not turn into a formal and meaningless proceeding</u> (paragraph 34 of the judgment of the Honorable Justice Rubinstein).

An examination of some of the decisions to deny being the subject matter of the appeals before us, raised our concern that the open information summaries (paraphrases) mentioned in the decisions to deny were not detailed enough and did not enable the individual to adequately respond to the allegations raised against him. In our opinion**, the authority should consider this aspect and examine whether the current state of affairs gives a true and adequate solution to this aspect of disclosure of the material to the individual who applies for status, as is mandated by the nature of the procedure and the nature of the violated rights when a decision to deny** the application is made, all subject to security constraints. (The Honorable

President (*emeritus*) Justice Beinisch, paragraph 7 of the judgment in **Ja'abis**).

The hearing must be preceded by as detailed a notice as possible of the reasons due to which the denial of the application is contemplated, to enable the applicants to properly prepare themselves for it. The value of the right to be heard is considerably reduced in the absence of such a preliminary notice, whereas when such notice is given the applicants are able to exhaust the hearing held to them. In this context it has already been said by Justice – as then titled – Landau that **"the arguments of the opponent may be refuted only when they are known; a Sphinx may not be argued with**"

(Deputy President Rubinstein, paragraph 31 of the judgment in **Ja'abis**).

(Emphases added, B.A.).

40. As aforesaid, in the case at hand no detailed information of the material underlying the decision to revoke appellants' family unification procedure was transferred. In appellants' hearing no information was provided which enabled the appellants to respond to the allegations raised against them. Even today the appellants do not understand how they should have responded to the notice regarding respondents' intention to deny their family unification application based on the suspicion that certain members of their extended family have a connection to ISIS and to terror activity? How they should have understood from said notice what was the precise suspicion raised against them? How they should have defended against such allegations? How they should have raised arguments against an allegation referring to anonymous members of their extended family who were not identified in the notice? How they should have defended against the allegation that said individuals had a connection to one organization or another while the notice provided no details as to the nature of said connection?

41. The above queries were explicitly raised by appellants' counsel in the oral hearing:

> … with respect to the paraphrase – I ask myself if you understand it. Am I supposed to guess who is referred to therein? What does it mean to be suspected of having connections? What suspicion? How can a person defend against such allegations? It turns the entire proceeding into a farce, other than the fact that they are relatives they are not full brothers, they have their own lives and I request to abolish the proceeding and receive an expanded paraphrase. Do you know who is concerned? What extended family? And what are the connections they refer to? I don't understand it.

A copy of appellants' oral hearing is attached and marked **F**.

So we see. As the transcript of the hearing itself indicates, the respondents have not only failed to provide the appellants, neither during the hearing nor thereafter, with any details regarding the allegations and have not only failed to provide expanded paraphrases as requested, but have rather continued to act in an inappropriate manner as they have been acting from the commencement of the proceeding.

<u>The duty to give reasons</u>

42. In addition to the violation of appellants' right to be heard the respondents breached by their conduct the duty to give reasons. A material reasoning, which enables the "ordinary civilian" to understand

the reasons of the authority, constitutes an integral part of democratic culture. It is the heart and soul of an open administration treating the individual with executive fairness.

> The right to receive reasons is not only the right to governmental fairness. It also provides a "security belt" and guarantee protecting the material rights being the subject matter of the authority's decision. The rational underlying the duty to give reasons is, *inter alia*, to enable the person prejudiced by the administrative decision to examine whether the decision meets the requirements of the law, and whether there are any basis and grounds to subject it to judicial review. In addition, reasoning contributes to proper relations between the administrative authority and the civilian, which should reduce the feeling of governmental arbitrariness (see Izhak Zamir, **The Administrative Authority** (5756 (B) 897-898).
>
> The reasoning is one of the underlying principles of the administrative decision. In its reasoned decision the authority explains to the civilian, its counter-party, its considerations and reasons. **In this manner, the known removes the concern from the unknown and from extraneous considerations, and the required transparency and fairness of the acts and decisions of the authority are upheld**. Moreover, in the absence of reasoning, the decision is bare and lacking as far as judicial criticism of the decision and its adequacy is concerned" (Labor Appeal 1460/01 **Abu 'Awad v. 'Amasha** Tak-National 2002(2) 588, 589).

43. Reasoning should provide the person who was injured by the decision of the authority with tools which would enable him to put the decision to the test and criticism of the appellate instances, and which would enable said instances to properly perform their duty. The reasoning should also reflect the main parameters of the authority's decision-making process and should not satisfy itself with providing the captions of the reasons underlying the decision. Therefore, in the absence of a justified preclusion, it is clear that the transfer of the materials underlying the decision to the injured party for his review is of great importance.

44. As aforesaid, on the date of the hearing the appellants submitted to the respondents written arguments which included many arguments against the proceeding instituted by them in their matter. In addition, in the oral hearing the appellants posed questions to the respondents and requested to receive an expanded paraphrase. However, appellants' arguments fell on deaf ears and were not referred to in the decision. In so doing, the respondents failed to fulfill their duty to adequately reason the decision. Parenthetically it should be noted that the language of the decision is incredibly similar to the language of the notice which preceded the hearing, as if the latter has never taken place. Hence, the appellants will argue that the decision which was given violated their right to receive adequate reasoning as well as their right to be heard, and therefore the decision is inappropriate.

45. Therefore, and since until the date hereof the appellants do not understand why and what they are being blamed of by the respondents, this case concerns a decision and a proceeding which preceded it, which are nothing but a violation of appellants' right to due process, literally. Respondents' conduct is even more so inappropriate in view of the clear holdings of the Supreme Court regarding the manner according to which a proceeding such as the proceeding at hand should be conducted so as to be considered an appropriate proceeding.

46. Appellants' position is that the language of the decision and the notice as well as respondents' manifested disregard of the weighty legal arguments raised before them in the oral and written arguments and of their request to receive an expanded paraphrase, all attest to the fact that the

proceedings which preceded the decision were idle proceedings, held for appearance only, this and nothing more. For this reason also the decision should be revoked.

Violating the child's best interest

47. As specified in the written arguments, the decision also runs contrary to the principle of the child's best interest. The appellants are certain that in the speedy inappropriate proceeding which was conducted, the respondents not only failed to consider the principle of the child's best interest as a primary consideration, but have rather failed to discuss it altogether. Also attesting to that is the identical language of the uniform decision.

48. Appellants 1 and 3 have six children all of whom are still dependent on their parents including a minor daughter. The decision condemning the father of the family and the only one of the family's children who does not hold permanent residency status to expulsion, necessarily causes a severe injury to the minor daughter, who did nothing wrong and who, from the date of her birth, lives in Jerusalem and is raised therein surrounded by her parents and other family members.

Conclusion

49. All of the above indicate that the decision to injure the appellants, normative individuals who did nothing wrong, as a result of the deeds of their second and third degree relative, based on a vague suspicion that several members of their extended family are suspected of having a connection to ISIS, is a scandalous and fundamentally inappropriate decision amounting to incurable injustice. It is a decision premised on clear extraneous considerations of collective punishment, deterrence of others and mere vengeance. It is inconceivable that such a faulty decision which critically violates fundamental rights of innocent persons shall remain in force.

50. In view of all of the above the honorable court is hereby requested to accept the appeal – based on all of appellants' arguments as raised in the written arguments, the statement of appeal and the expanded arguments herein filed – and to direct the respondents to immediately revoke their above referenced inappropriate decision.

Jerusalem, February 2, 2017

_____

Benjamin Agsteribbe, Advocate
Counsel to the appellants

(File No. 96755)