At the Supreme Court **HCJ 2211/17**
Sitting as the High Court of Justice

In the matter of:

1. **_____ Abu Jamil, ID No. _____**
2. **_____ Abu Jamil, ID No. _____**
3. **_____ Abu Jamil, ID No. _____ (Minor, born in 2001)**
4. **_____ Abu Jamil, ID No. _____ (Minor, born in 2005)**
5. **_____ Abu Jamil, ID No. _____ (Minor, born in 2014)**
6. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA 580163517**

all represented by counsel, Adv. Daniel Shenhar (Lic. No. 41065) and/or Sigi Ben Ari (Lic. No. 37566) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Hava Matras-Irron (Lic. No. 35174) and/or Anat Gonen (Lic. No. 28359) 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 Petitioners

v.

1. **Minister of Interior**
2. **The Committee for Special Humanitarian Cases**

all represented by the State Attorney's Office,
29 Salah a-Din Street, Jerusalem
Tel: 02-6466590; Fax: 02-6467011

The Respondents

Petition for *Order Nisi*

A petition for *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause, why they should not upgrade the status in Israel of petitioner 2, by giving her an A/5 temporary residency status, in the framework of a family unification application which was filed for her by her husband, petitioner 1, according to respondent's 1 notice given in the framework of HCJ 813/14 **A v. Ministry of Interior**, on April 11, 2016.

Filing the petition with the High Court of Justice

In 2014, Amendment No. 22 to the Entry into Israel Law, 5712-1952 (hereinafter: the **Law**) entered into effect. Section 13(23) of the Law stipulates that the court of appeals will hear appeals against decisions of the authority pertaining to cases of entry into Israel, staying and residence in Israel or departure from Israel, or decisions pertaining to citizenship, *inter alia*, according to the Entry into Israel (Temporary Order) Law, 5763-2003 (hereinafter: the **Temporary Order**), with the exception of decisions according to section 3A1 (decisions of the humanitarian committee). To teach us, **decisions by virtue of section 3A1 will be heard by the High Court of Justice**.

On April 11, 2016, the respondents in HCJ 813/14 **A v. Minister of Interior** (pending) submitted a notice consisting of the decision of the minister of interior (respondent 1 in said petition) which stated as follows:

> At the same time, the minister of interior decided to approve the status upgrade of applicants holding stay permits in Israel whose family unification applications were submitted according to the graduated procedure until the end of 2003 (and whose applications were approved) so that temporary residency status (A/5 visa) be granted to them …. The upgrade is subject to the satisfaction of the necessary conditions for the consideration of such applications (namely, substantiation of center of life in Israel, substantiation of the sincerity of the marital connection and its continued existence, and absence of security and criminal preclusion). **Hence, directions were given by the minister of interior to the professional advisory committee to the Minister of the Interior pursuant to section 3A1 of the temporary order law**… (hereinafter: the **humanitarian committee** – D.S.), according to which any applicant who satisfied the above conditions, his status and the status of his minor children would be upgraded as aforesaid. (Emphasis added by the undersigned – D.S.).

A copy of the notice is attached and marked **P/1**.

This petition concerns a decision which was made according to the above notice of respondent 1, namely pursuant to section 3A1 of the Temporary Order, and therefore the jurisdiction to hear this petition is vested with this honorable court.

The Parties to the petition

1. Petitioner 2 (hereinafter: **petitioner 2**), born in 1983, is originally a resident of the Occupied Palestinian Territories (OPT), and the wife of **petitioner 1** (hereinafter: **petitioner 1**, and collectively: the **spouses**), resident of Israel, born in 1978. The spouses are the parents of petitioners 3-5 (hereinafter: the **children**), Israeli residents. Petitioner 2 resides in Jerusalem since 2000, and since 2003 she lives in Israel by virtue of renewable stay permits.

2. **Petitioner 6** (hereinafter: **HaMoked**) is a not-for-profit registered association which has taken upon itself, *inter alia*, to assist residents of East Jerusalem and their family members, victims of cruelty or deprivation by state authorities, including by defending their rights in court, either in its own name as a public appellant or as counsel to persons whose rights had been violated.

3. **Respondent 1** (hereinafter: **respondent 1** and together with respondent 2: the **respondents**) is the minister authorized pursuant to the Entry into Israel Law, 5712-1952, to handle all matters arising from said law, including family unification applications and applications for the regulation of the status of children filed by permanent residents of the state living in East Jerusalem. He is the one who gave the above decision, notice of which was given on April 11, 2016, and which guided respondent 2 in deciding on matters such as the one being the subject matter of this petition.

4. **Respondent 2** (hereinafter: **respondent 2** and together with respondent 1: the **respondents**) is the humanitarian advisory committee which was established pursuant to section 3A1 of the Temporary Order.

Factual background

5. Petitioner 2, born on July 25, 1983, originally an OPT resident, married in November 2000, almost 17 years ago, petitioner 1, born on August 4, 1978, an Israeli resident. On November 11, 2000, the spouses signed a marriage contract, and on November 18, 2000, their wedding celebration was held.

   Copies of respondent 2's identification card and of the wedding contract are attached and marked **P/2** and **P/3** respectively.

6. Since their marriage the spouses have been living in an apartment owned by petitioner 1's parents in Jabel Mukaber neighborhood, Jerusalem. It should be noted here that the third floor (out of three; the petitioners reside on the first floor) of the residential unit was demolished following an attack in which one of their family members was involved.

7. Over the years the spouses had three children, who are also parties to this petition. The three children were born in Jerusalem and they are permanent residents of the state of Israel. They resided in the city and were educated therein since they were born until this day. Wadi'a (petitioner 3)was born in Jerusalem on September 16, 2001; Wasim (petitioner 4) was born in Jerusalem on January 17, 2005; and Suar (petitioner 5) was born in Jerusalem on May 12, 2014. Since they were born, the children have been living near their relatives on their father's side. They were educated in Jerusalem from kindergarten until this day, and currently attend schools

in the city. Their friends are Jerusalemites. Their entire lives are and have always been conducted here.

A copy of the attachment of petitioner 1's identification card in which his children are registered is attached and marked **P/4**.

8. Petitioners' center of life, in every sense, is in Jerusalem for many years; As aforesaid the family lives in the city, the petitioners find their livelihood in the city where petitioner 1 works in the construction business; the children Wadi'a and Wasim attend education institutions in Jerusalem (the daughter Suar is very young and still stays at home with her mother). Petitioner 1 and his children are also recognized by the National Insurance Institute as permanent Israeli residents, and the family receives child benefits.

9. It should be added and emphasized here that the son Wasim suffers from significant health problems requiring supervision and treatment on a daily basis. He suffers from severe behavioral problems which started after his uncle's house had been demolished, and are manifested in anxiety and anger attacks. The son is treated by the mental health bodies and a file was recently opened for the family with the municipality's welfare department due to his condition. In addition, Wasim suffers from physical problems (enlarged spleen and anemia) requiring current supervision, diagnosis and treatment, mainly by his mother.

Copies of documents attesting to the mental and physical condition of the son Wasim are attached and marked **P/5**;

A copy of the welfare report attesting to the family's condition (including, *inter alia*, concerning the son Wasim), is attached and marked **P/6**.

10. Following the spouses' marriage, petitioner 1 filed on October 23, 2001, a family unification application with his wife with the Population and Immigration Authority. The application number is 557/01. Since, as aforesaid, there is no dispute that the center of life of the Abu Jamil family is in Jerusalem, and in the absence of any criminal or security preclusion with respect to any one of the spouses, the application was approved in 2003. Since then and until this very day petitioner 2 receives renewable stay permits in Israel on a regular basis.

Copies of receipt confirming that the family unification application was filed and the current DCO permit are attached and marked P/7A-B, respectively.

The security events and the notice which was sent to the petitioners thereafter

11. On November 18, 2014, petitioner 2's brother in law, Jassen, committed a shooting and stabbing attack in Har-Nof neighborhood in Jerusalem. The brother in law was killed in the incident.

12. It should be emphasized that the spouses, who are normative individuals, are at their wits' end ever since said incident which had deeply affected their life and the life of their children as well as the life of their extended family. It should also be emphasized that the spouses had no connection to the act of _____ Abu Jamil, and had no prior knowledge of his intentions to carry out an attack, if and to the extent he had any such prior intentions.

13. It should also be noted in this context that the authorities did not even wish to interrogate the spouses after the incident. Hence, that the security agencies also understand that there is no connection, and not even the slightest one, between the spouses and the incident.

14. It seems that these unequivocal facts were not considered by the respondents. When HaMoked: Center for the Defense of the Individual started handling the Abu Jamil spouses, a letter from respondent 1 was received in its offices, inviting the Abu Jamil spouses to submit their written and oral arguments against the intention not to grant petitioner 2 temporary residency status (A/5), *in lieu* of the periodic renewable military permits. The notice, dated September 13, 2016, which reached the family towards the end of September 2016, was drafted as follows:

> **In view of information received from security agencies, we currently consider to refuse to upgrade the status of Mrs. Abu Jamil in the framework of the above captioned family unification application for the following reasons:**
>
> **The brother of the sponsored spouse, _____al-Halsa – was arrested on August 9, 2016, on suspicion of firearms trade.**
>
> **The brother in law of the sponsored spouse, _____ Abu Jamil, committed a shooting and stabbing attack in the Har-Nof synagogue on November 18, 2014.**

A copy of the notice is attached and marked **P/8**.

15. Following the notice, an oral hearing was held for the spouses in the ministry of interior's offices in East Jerusalem. The vast majority of the hearing pertained to the spouses' position concerning the deeds of the dead family member, and the relations of petitioner 2 with her detained brother. In the hearing written arguments were submitted against the intention not to upgrade petitioner 2's status.

A copy of the written arguments, as submitted to the ministry of interior on October 30, 2016, without their exhibits, is attached and marked **P/9**.

16. After several nerve-racking months, the ministry of interior notified that it rejected the arguments of the spouses, and decided to leave in place the decision to refuse to upgrade petitioner 2's status. The letter of the ministry of interior dated January 25, 2017, which reached HaMoked's offices on February 13, 2017, specifies the reasons underlying the decision to eventually turn down the upgrade:

> **Brother - _____al-Halsa – was arrested on August 9, 2016, on suspicion of firearms trade.**
>
> **Brother in law - _____ Abu Jamil - committed a shooting and stabbing attack in the Har-Nof synagogue on November 18, 2014.**

A copy of the ministry of interior's office is attached and marked **P/10.**

17. Accordingly, with a stroke of a hand, the respondent harms thee fabric of life of an entire family, spouses and their children, who built a home in Israel and maintain their family life therein, based only on the actions of petitioner 2's dead brother in law, and unknown deeds of her brother, with which petitioner 2 had no connection whatsoever, while no interrogation or enforcement measures are taken against any of the spouses – namely, the security agencies themselves were not of the opinion that any threat was posed petitioner 1 and petitioner 2. Nevertheless, the respondents find said flawed factual infrastructure sufficient to violate fundamental rights of a Jerusalem resident and his wife for almost twenty years, by a rigid, vindictive and inappropriate decision, leaving petitioner 2 at the mercy of military permits, renewable once annually, with no prospect of having her most fundamental rights protected as a resident of the city of Jerusalem for almost two decades and a mother of children therein. Hence, this petition.

The Legal Framework

18. Petitioners' position is that the refusal to update the status of petitioner 2 according to respondent 1's undertaking is a severe, unreasonable and disproportionate decision, which is therefore inappropriate and should be revoked. In addition, it will be argued that under the above described circumstances of the spouses, the decision is contrary to the principle of the child's best interest and violates petitioners' right to family life. It will also be argued below that the above notice is based on extraneous considerations, since the sole purpose of this decision is to punish and harm innocent people who were not involved in anything, and had no prior knowledge of the deeds attributed to petitioner 2's brother in law, or to the alleged deeds of her brother. We are therefore concerned with collective punishment measures towards innocent people based merely on vindictive reasons. We shall discuss things in an orderly manner.

Respondents' decision does not reconcile with the law

19. As noted above, on April 11, 2016, the notice of the minister of interior was submitted in the framework of HCJ 813/14, which is currently pending before the Supreme Court, according to which he undertakes to upgrade the status of individuals holding military stay permits in Israel, and in whose matter a family unification application was filed not later than the end of 2003, which application was approved.

20. The underlying rational of the above decision is clear – since the provisions of the Temporary Order prohibiting family unification with Palestinians continue to apply, with no foreseeable end on the horizon, this honorable court ordered the minister of interior to modify his policy with respect to individuals, such as petitioner 2 in the case at hand, who have been living in Israel for many years, and whose temporary and frail status is renewed every year, subject to meticulous security checks. There is no reason that such individuals, it was so held, would be "stuck" for many years with a quasi-status of renewable military stay permits' holders, and would not be able to establish, instead, stable family life in their country. This is the purpose of the notice which was submitted to the HCJ, and this is the justification underlying the request to upgrade petitioner 2's status.

21. The family unification application filed by petitioner 1 for his wife **satisfies the conditions of the notice which was submitted to the HCJ**, since it was filed, as aforesaid, in 2001. It may also be argued that the mere notice of the refusal to upgrade status embeds the position that petitioner 2's status should be upgraded, together with all other applicants who applied to the respondents, and who meet the criteria which were established by them.

22. Respondents' notice therefore veers from the law. Whichever way you look at it; According to the respondents, there is no intention to deny petitioner 2 the military stay permits which she has been receiving for the last 14 years consecutively and rightfully so, since there is no dispute that she poses no security or any other threat. Hence, what is the basis of respondents' decision not to upgrade her status? If no security threat is posed by petitioner 2, then, there is no reason to arbitrarily exclude her from the group of the individuals entitled to upgrade according to the undertaking given to the HCJ. This raises the concern, that we are concerned here with mere vengeance, but vengeance is not a reasonable consideration among the considerations that the administrative authority should take while exercising its powers under the law.

23. In petitioners' case there is no dispute that they did nothing wrong. Neither Israel Police, nor the Israel Security Agency (ISA) and not even the Population Authority argue that any of the spouses was involved in the acts of _____ Abu Jamil in any way or manner whatsoever, or that any of them had prior knowledge of his intentions to carry out his acts – to the extent he had any such prior intentions. Petitioner 2's brother in law, as a result of whom security preclusion could have ostensibly been raised against her, is longer alive. The same applies to the alleged deeds of petitioner 2's brother (since he has not yet been convicted). The spouses had no connection, no involvement and no knowledge, and not even the slightest one, of said deeds.

24. Therefore, and in the absence, in the case of the spouses at hand, of the basic reasons which are required to substantiate a security preclusion for the upgrade of status in Israel and for the justification thereof, the decision to refuse to upgrade status for the reasons specified therein, does not reconcile with respondents' undertaking to the HCJ.

<u>The decision not to upgrade petitioner 2's status is unreasonable</u>

25. The decision of the administrative authority must be within the scope of reasonableness. A decision shall be within the scope of reasonableness if it is based on a proper weighing and balancing of the different relevant factors which should be considered. In HCJ 341/81 **Moshav Beit Oved v. Commissioner of Transportation,** (IsrSC 36(3) 349, 354 (1982)), the court held that:

> In delineating the limits of the "scope of reasonableness" one should consider, *inter alia*, the question, whether the administrative authority gave proper weight to the different relevant factors which it should take into consideration. The decision of the administrative authority will be revoked as having exceeded reasonableness, if the weight given to the

> different factors is not proper under the circumstances of the case. Indeed, these weighing and balancing are at the heart of the duties of the administrative authority, and the court is vested with the authority to review the manner by which they are implemented.

26. Moreover. The scope of reasonableness within which the administrative authority operates while making a decision changes from one decision to the other, and is established, inter alia, according to the impact of the decision on human rights:

> … the range of the scope is affected by the nature of the matter. A distinction is drawn between decisions which are technical in nature and substantial decisions, such as a decision which limits human rights… decisions dealing with human rights… narrow down the scope of reasonableness (Eliad Shraga and Roi Shahar, **The Administrative Law (Causes of Intervention)** (Shesh Publishers, 2008, page 242)).

And also:

> The nature of the required administrative evidence, the quantity and quality thereof, derive from the nature of the matter at hand, and from the consequences of the administrative decision taken. The weight of the evidence required to support a decision having a direct impact on fundamental rights of the individual and which may violate human rights, differs from a decision which has a marginal impact on the interest of the individual and on the interest of the public (LA 426/06 **Hawa v. Israel Prison Service**, TakSC 2006(1) 3425, paragraph 14 of the judgment).

27. From the general to the particular. The decision not to upgrade the status of petitioner 2 is undoubtedly a decision which pertains directly to human rights since the implications of the decision on the future of petitioner 2, who has been in living in Israel for many years, and on the future of her other family members, and particularly her children and husband, are very severe. The children were born in Israel and live here from birth among their family members and friends. Here they live, here they were educated and here they made friends. Therefore, the scope of reasonableness available to the respondents while making a decision in such a sensitive matter is in any event relatively narrow. Nevertheless, it seems that the respondents have brazenly exceeded the scope of reasonableness available to them. As will be demonstrated below, the language of the decision indicates that the respondents failed to exercise discretion, and it is consequently clear that they have not deigned to properly weigh and balance the relevant factors to the decision, contrary to the requirements specified in the above judgments.

Respondents' decision not to upgrade the status of petitioner 2 is based on extraneous considerations

28. In view of respondents' notice it seems that the Abu Jamil family is punished for the deeds of others, for mere vengeance purposes and for all to see and beware.

29. We are concerned with considerations extraneous to the family unification procedure, since it is clear that had the relevant considerations for family unification procedure, as established in the Temporary Order and court judgments been purely weighed, they would have necessarily led to the obvious conclusion that notwithstanding the issues of the brother in law and the brother (and particularly in view of the fact that the brother in law is no longer alive and that the brother has not yet been convicted and he is still presumed innocent), the procedure for the upgrade of the status of petitioner 2, who is entitled to it under the law, should be continued.

30. As to the relevance of the consideration of extraneous considerations, the position of the court in its judgments is clear. More than three decades ago Justice I. Cohen has already held that while examining the act of the authority one should examine "whether the extraneous consideration or the inappropriate purpose had a substantial impact on the act of the authority, and if this was the case, the act of the authority should be revoked" (HCJ 392/72 **Emma Berger v. District Planning and Building Committee** IsrSC 27(2) 764, 773).

31. Hence, and since it seems that the considerations underlying the decision to refuse to upgrade the status of petitioner 2 are considerations of vengeance, punishment and deterrence, we are concerned with extraneous considerations which were unlawfully weighed. This was stressed by the honorable court in a case in which the assigning of a person's place of residence in an area under belligerent occupation was discussed. In said case it was held by the then President A. Barak that the place of residence of person who does not pose any risk cannot be assigned only because it would deter others:

> It follows that the basis for exercising the discretion for assigning residence is the consideration of preventing a risk posed by the person whose place of residence is about to be assigned. **The place of residence of an innocent person who does not himself pose any risk may not be assigned, merely because assigning his place of residence will 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 under the circumstances of the case he no longer poses any risk. Therefore, if someone carried out terrorist acts, and the assigning of his place of residence will reduce the risk posed by him, his place of residence may be assigned. **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 who poses no risk 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, D.S.).

32. The refusal to upgrade the status of petitioner 2 under the above described circumstances is nothing but collective punishment, contrary to one of the most fundamental rules of justice – the prohibition against the punishment of one person for deeds executed by

another person. All legal systems are 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.

33. The severe impact that the decision to refuse to upgrade the status of petitioner 2 has on the life of the entire Abu Jamil family is clear. With a single stroke of a pen, petitioner 2, a wife and mother of three young children including a child who needs constant medical and mental supervision and care, who has been living in Israel lawfully for many years, was condemned to live forever with the sword of expulsion hanging over her head. Consequently, from the date on which said notice was received by it, the family experiences deep anxiety and constant stress, arising from the uncertainty surrounding the status of the mother of the family. It is clear that respondents' notice also has a very severe impact on the spouses' young children, and particularly on the son Wasim, whose personal safety and anxiety as a result of the frail status of their mother harms them in a very deep and severe manner.

34. The decision to refuse to upgrade the status of petitioner 2 is much more severe in view of the fact that this case concerns an individual who has been residing lawfully and continuously in Israel for many years, while undertaking a family unification procedure and receiving stay permits in Israel, and hence there is no dispute that she is entitled to have her status upgraded under the law. During said period the spouses' children were born, who are permanent Israeli residents. This is where the family lives. This is where the children are educated. This is where petitioner 1 makes his living and provides for his family, and this is where they conduct their lives. The family's center of life therefore, in all possible respects – is in Jerusalem. The immediate result arising from the decision denying the upgrade would leave petitioner 2 hanging in midair, deprived of basic social benefits, with no ability to obtain a driver's license to provide the optimal care to her ill son, the only member of her immediate family in this situation, with the sword of expulsion incessantly hanging over her head, having no ability to acquire status in her city, Jerusalem.

Respondent 2 has completely and inappropriately failed to exercise its discretion

> The recommendation of the ISA and other security agencies is not a decisive factor, second to none. The ISA does not have a "veto right" on the approval of family unification applications. Indeed, the opinion of the ISA has a central position among respondent's considerations,

> and rightfully so; however, the respondent should take into account a host of additional considerations while making a decision in a family unification application. Accordingly, for instance, the respondent should consider the extent of the security threat *vis-à-vis* the violation of the right to maintain a family unit and enabling a parent to live with his children. This right also derives from the superior status that the principle of the "child's best interest" has in our jurisprudence. The principle of the child's best interest is a guiding principle whenever the legal system is required to exercise its discretion in the interpretation and implementation of the provisions of the law…
>
> It should be noted, with all due caution, that it is difficult to disregard the impression that those who conducted the hearing… completely failed to examine the data in petitioner's case and did not exercise any independent discretion, but rather simply adopted the recommendations of the ISA… (the judgment in AP 1196-05-10 **Nasser v. The State of Israel**, reported in Nevo)(Emphases added, D.S.).

35. The language of the decision being challenged in this petition indicates unequivocally that in in making their above decision the respondents have completely failed to exercise the discretion vested in them, while blindly relying on the position of the security agencies, as a conclusive determination which could not be challenged. Moreover. The respondents do not even try to conceal the matter and notify in their decision that appellants' arguments, both written and oral, were transferred to security agencies that reiterated their position according to which the upgrade of petitioner 2's status should be objected to.

36. We are therefore apparently concerned with a decision which had not only been made contrary to the law but also with a complete inappropriate failure to exercise discretion and blind reliance on the opinion of security agencies.

The violation of the right to family life and the failure to satisfy the proportionate injury requirement

> A person's right to have a family is one of the foundations of human existence; its realization is a condition for making the most out of life and it is the essence of life; it is a condition for self-realization and for a person's ability to share his life and fate with his spouse and children. It reflects the essence of a person's being and the embodiment of his desires. The right to have a family is situated at the highest level of human rights. An infringement on this right is possible only when it is balanced against a conflicting value of special power and importance. **In the existing tension between the value of security of life and other human rights, including the right to have a family, the security consideration prevails only where there is high probability, almost reaching certainty, that if appropriate measures involving the infringement of human rights are not taken, public safety may be materially injured**. (HCJ 7444/03 **Dakah v. Minister of Interior**, paragraph 15 of the judgment of the Honorable Justice Procaccia,

reported in Nevo, February 22, 2010, hereinafter: **Dakah**)(Emphasis added, D.S)

37. Establishing the right to family life as a constitutional right entails the determination that any violation of said right should be effected according to the Basic Law: Human Dignity and Liberty – and only for weighty considerations. All of the above, based on solid evidentiary infrastructure attesting to said considerations. Said determination imposes on the respondents an elevated duty, to meticulously ensure that the administrative system ascertains that the power to refuse to upgrade status in the framework of family unification procedure brought to it, a power which violates a protected constitutional right, is used only in cases in which the use thereof is fully justified.

38. The Law and Temporary Order enable the respondents to exercise broad discretion with respect to family unification applications, so that whenever the sponsored spouse in a family unification application poses a security threat, the application may be refused (there is a question as to whether an upgrade of status may be denied in such a situation; the question remains theoretical in the case at hand since it was not argued that petitioner 2 herself poses any risk).

39. Accordingly, like any limitation on a fundamental right, a decision to refuse to upgrade the status of a woman who has been living in Israel for so many years **should be made according to rules of reasonableness and proportionality**, giving proper weight to the importance of the violated fundamental right.

40. A violation of human rights, and in the case at bar a violation of the right to family life, is lawful only if it satisfies the test of reasonableness and the test of proper balancing between said right and other interests which should be protected by the authority. The more important and material the violated right, the greater is the weight given to it in the balancing between said right and the conflicting interests of the authority (AAP 4463/94, LHCJA 4409/94 **Golan v. Israel Prison Service**, IsrSC 50(4) 136, 156).

41. The required weight of the evidence underlying the decision of the administrative authority depends on the nature of the decision. The weight of the evidence should reflect the importance of the right or interest violated by the decision and the magnitude of the violation. The fact that respondent 1's decision violates fundamental rights of the Abu Jamil spouses, requires the authority to ensure that his decision is based on weighty estimates and data (see EA 2/84 **Neiman v. Central Election Committee**, IsrSC 39(2) 225, 249-250).

42. Relevant to this matter are the words of the Honorable President retired, Justice Beinisch, in **Dakah**:

> **Thus, for instance, a decision not to extend a residency permit which was granted in the past due to a security preclusion which arises from a close family member of the applicant will satisfy the proportionally tests, if the Minister of the Interior fulfilled his obligation to conduct a thorough and rigorous examination of the entire administrative evidence presented to him, based on which he**

> **wishes to define the scope and extent of the potential risk posed by the foreigner for whom the status is requested, and prove by significant administrative evidence that a security threat is indeed posed by the status applicant because of the threat posed by his family member** (and see also, paragraph 17 in **Amara).** In this context, I adopt the words of my colleague in paragraph 41 of her judgment concerning the gamut of the considerations which should be taken into account in the assessment of the risk posed by the applicant, and concerning the appropriate weight which should be attributed, in the assessment of severity of the risk, to security information regarding a direct security risk posed by the applicant as opposed to security information concerning an indirect risk posed by him, because of his family members.

And also:

> **The specific expectation for the realization of the right to a family where a family unification permit had been granted in the past and its renewal is requested, is not similar in force to the expectation for a permit when such permit has not been granted in the past**.

And also:

> It is obvious that the expectation of spouses for the renewal of a residency permit, where they had been granted a family unification permit in the past, is of a great magnitude. This magnitude is greater than the magnitude of the expectation of spouses who have not yet been granted a unification permit in the past, and whose family unification application has not yet been decided prior to the effective date. In addition, with respect to a family the unification of which had been permitted in the past, a difference may exist between the magnitude of the expectation of a family which has been residing in Israel for many years and laid down roots in Israel, which has a number of children who are raised and educated in Israel, and a young couple who has just received a unification permit, who has been living in Israel for a short period of time, who has not yet established a complete family unit and who has not yet integrated into the Israeli labor market and society.
>
> … **the weightier the expectation for family unification in view of the specific circumstances of the case, the stronger the security interest must be to justify a violation of such expectation**. (Paragraph 24 of the judgment of the Honorable Justice Procaccia)(Emphases added, D.S.)

43. It should be pointed out that the clear distinction between a decision not to give a license and the revocation or refusal to renew a license, or (like in the case at bar) an adverse change in the conditions of the license which was drawn by the court in Dakah, is not

new and is well rooted in case lae for many years. Accordingly, inter alia, it was held in HCJ 113/52 **Zacks v. Minister of Trade and Industry**, IsrSC 6(1) 696, 700 by the Honorable Justice Vitkon:

> The revocation of a license which has already been given should be distinguished from the grant of a new license. A new license, according to case law, even a substantiated suspicion may – usually – suffice to deny the license, but with respect to a revocation of license which has already been granted, we are of the opinion that after it was granted it should not be revoked based on mere suspicions without an investigation that the relevant party is invited to take part in and present his arguments.

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

44. When the Ministry of Education wishes to use its power to revoke an existing license, it must base its decision on solid evidence and do it with special care. Relevant to this matter are the words of the Honorable Justice Rivlin in HCJ 1712/00 **Orbanevitch v. Ministry of Interior**, IsrSC 58(2) 951, 957:

> In the context at hand, the authority is required to exercise special care, in view of the significant effect that the decision has on the petitioners. Indeed, visas which were issued or citizenship which was granted cannot be revoked based on negligible evidence.
>
> (HCJ 3615/98 **Nimushin v. Ministry of Interior**, TakSC 2000(3) 2916)(Ibid., emphases added, D.S.)

45. Accordingly, in view of the above judgments and particularly in view of the court's holdings in **Dakah**, and in view of the circumstances of petitioners' case, and primarily, as described above, the fact that the spouses had no connection to, knowledge of or influence on the deeds of their relatives, respondents' notice of the refusal to upgrade petitioner 2's status does not satisfy the required administrative standards. Therefore, and since the notice is aimed at violating a fundamental right, the right to family life of the spouses and their minor children, we are concerned with a fundamental flaw and with an inappropriate notice.

Violation of the best interests of the children Wadi'a, Wasim and Suar

46. The International Convention on the Rights of the Child includes a host of provisions according to which protection must be afforded to the family unit of the child.

The preamble to the Convention states as follows:

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

Article 3(1) of the Convention stipulates:

> 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.

47. The provisions of the Convention on the Rights of the Child receive increasing recognition as a complementary source for the rights of the child and as a guide for the interpretation of the "child's best interest" as a superior consideration in our jurisprudence: see CA 3077/90 **A *et al*. v. A,** IsrSC 49(2) 578' 593 (Honorable Justice Cheshin); CA 2266/93 **A, minor *et al*. v. A,** IsrSC 49(1) 221, pages 232-233, 249, 251-252 (then Honorable President Shamgar); FH 7015/94 **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 judgment of the Honorable Justice Cheshin.

48. The best interests of the children Wadi'a, Wasim and Suar should be the primary consideration while considering the arrangement of petitioner 2's status. Relevant to this issue are the words of the court in AP (Jerusalem) 705/07 **Mari Lovo Romero Muskara v. Minister of Interior** (reported in Nevo):

> The right to family life is a fundamental constitutional right recognized by Israeli law as well as by international law. This right has two aspects: the first, the right of the Israeli parent to maintain ongoing relations with his child and not to be separated from him, and the other, the right of the minor to family life while his best interest mandates not to separate him from his parents and maintain ongoing relations with each one of them. From the minor's perspective his separation from one of his parents may have severe ramifications on his life and development. It should be emphasized that the parents' right to maintain relations with their children is independent and distinct of the children's right to maintain close and ongoing relations with their parents. … **In the examination of the humanitarian circumstances of the case at hand, the consideration of the child's best interest is a consideration of substantial importance, if not a superior consideration. Indeed,**

> **other considerations may be added to this consideration, but these are mostly secondary considerations which are not as equally as important as the primary and central consideration of the child's best interest**.

49. In addition, it was held by case law that the child's best interest should be taken into account while considering whether or not status should be granted to his foreign parent, despite the fact that the child's lawful status in Israel does not, in and of itself, grant his parent status:

> **And what are these humanitarian considerations? Without exhausting the matter, 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).

50. From the general to the particular. The notice of the refusal to upgrade the status of petitioner 2, while violating the right of the spouses and their children to family life, with no justification and in complete contrast to the undertaking given to the HCJ, also constitutes, in addition to the above said, an extreme violation of the obligation of the administrative authority to be guided by the principle of the child's best interest. The spouses have three minor children in the ages of sixteen, twelve and two. The son Wasim also suffers from significant health and mental problems and needs constant assistance and care. Petitioner 2 is primarily responsible for raising and caring for the children, and particularly the ill son. Refusing to upgrade the status of petitioner 2 necessarily inflicts a severe harm on the children who did nothing wrong, children who from birth live and grow-up in Jerusalem with the spouses, the members of their extended family and their friends. Hence, granting petitioner 2 temporary status which would grant her social benefits and freedom of movement, and in addition, the ability to obtain a driver's license which would assist her to care for Wasim, would significantly contribute to resolve the family's distress and would coincide with the principle of the child's best interest, obligating the respondents as a main consideration in exercising the administrative discretion.

Conclusion

51. All of the above indicates that respondents' decision being challenged in the petition at bar is an unreasonable and disproportionate decision, which was given contrary to the law, with a complete failure to exercise discretion, thus severely violating petitioners' fundamental rights.

52. Therefore, the honorable court is hereby requested to revoke respondents' decision and direct them to approve the upgrade of petitioner 2's status in Israel to temporary residency status (A/5). In addition, the honorable court is requested to obligate the respondents to pay attorneys' fees and costs of trial.

Jerusalem, March 9, 2017.

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Daniel Shenhar, Advocate
Counsel to petitioners

(File No. 95517)