At the Supreme Court sitting as the High Court of Justice

HCJ 813/14
HCJ 5135/14
HCJ 5136/14
HCJ 8225/14
HCJ 8408/14

Before:	**Honorable President M. Naor** **Honorable Justice Y. Danziger** **Honorable Justice I. Amit**
Petitioners in HCJ 813/14	Anonymous et al.
	v.
Respondents in HCJ 813/14	1. Minister of Interior 2. Attorney General 3. Government of Israel 4. Knesset of Israel 5. IDF Commander in the Area 6. State of Israel
Petitioners in HCJ 5135/14	1. Nofal 2. Nofal 3. Nofal 4. HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger
	v.
Respondents in HCJ 5135/14	1. Knesset of Israel 2. Prime Minister 3. Minister of Interior 4. Attorney General
Petitioners in HCJ 5136/14	1. Nasser 2. Shehadeh 3. HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger
	v.
Respondents in HCJ 5136/14	1. Knesset of Israel 2. Prime Minister 3. Minister of Interior 4. Attorney General
Petitioners in HCJ 8225/14	Badawi et. 51 al.

	v.
Respondents in HCJ 8225/14	1. Minister of Interior 2. Minister of Justice 3. Government of Israel
Petitioners in HCJ 8408/14	1. Mahamid 2. Mahamid
	v.
Respondents in HCJ 8408/14	1. Minister of Interior 2. Knesset of Israel 3. Prime Minister
	Petitions for Order Nisi.
	Motion by consent for submission of Updating Notice on behalf of the Petitioners in HCJ 5135/14 and HCJ 8408/14 dated June 15, 2017;
	Response of the Knesset dated August 9, 2017;
	Motion by the Knesset, with consent, to attach annex, dated September 13, 2017;
	Response of Respondents for the State dated September 9,2017
Session dates:	January 1, 2015 June 8, 2015 February 20, 2017
Counsel for Petitioners in HCJ 813/14:	Adv. Najib Ziyad
Counsel for Petitioners in HCJ 5135/14 and 5136/14:	Adv. Benjamin Agsteribbe
Counsel for Petitioners in HCJ 8225/14:	Adv. Michal Pomerantz
Counsel for Petitioners in HCJ 8408/14:	Adv. Adi Lustigman
Counsel for Respondents for the State:	Adv. Udi Eitan
Counsel for Knesset of Israel	Adv. Keren Dahari

Judgment

President M. Naor

The Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 (hereinafter: **The Citizenship Law (Temporary Order)** or **the Law**) includes a prohibition on upgrading the status of Palestinian

residents of the Area residing in Israel pursuant to temporary stay permits to "temporary residency" (residency permit type A/5) or "permanent residency". The petitions at bar impugn the scope of the aforesaid prohibition and seek to amend it such that it allows for status upgrades for residents of the Area who have resided in Israel as part of family unification proceedings for many years.

Legal background

1. Until 2002, Palestinian residents of the Gaza Strip and the Judea and Samaria Area (hereinafter: **the Area**) were eligible to receive status in Israel as part of the family unification process and in accordance with Population and Immigration Authority Procedure No. 5.2.2001. Said procedure comprised several stages that must be completed until the conclusion of the graduated procedure for status. Each stage was subject to security and police clearance and continued center-of-life in Israel. Inasmuch as the applicant met the conditions set out in the procedure, in the first stage of the graduated procedure, he or she would receive a temporary stay-permit (commonly referred to as a DCO permit). In the second stage, the applicant would receive a permit for temporary residency type A/5 (hereinafter: **temporary resident**) and finally, the applicant would be eligible for a permit for permanent residency in Israel (see AAA 6407/11 **Dejani v. Ministry of Interior – Population Authority**, §6 of the judgment of **Justice U. Vogelman** (May 20, 2013) (hereinafter: **Dejani**)).

2. The normative state of affairs described above was altered on May 12, 2002, with the adoption of Government Resolution No. 1813 concerning "The treatment of illegal aliens and the family - unification policy regarding residents of the Palestinian Authority and foreigners of Palestinian Origin" (hereinafter: **the Government Resolution**). According to said resolution, the Ministry of Interior would not process new applications for status in Israel by residents of the Area; any pending proceedings residents of the Area had entered into would be frozen; and the status of those who had entered the graduated procedure would not be upgraded to the next level (**Dejani**, §7). On August 6, 2003, The Citizenship Law (Temporary Order), was published. The Law codifies the Government Resolution and stipulates that, as a rule, the minister of interior would not grant a resident of the Area citizenship or a permit to reside in Israel and the military commander would not grant a resident of the Area a stay permit for Israel. The Law was passed as a temporary order that is valid for one year and may be extended per government decision with Knesset approval (Section 5 of the Law). The Law was challenged in a constitutional petition that was rejected by the majority opinion of an extended panel, partly in view of the exceptions introduced into the Law in 2005 and the comments made by some members of the panel regarding the need for further amendments (HCJ 7052/03 **Adalah v. Minister of Interior**, IsrSC 61(2) 202 (2006) (hereinafter: **Adalah**)). And indeed, in 2007, the Law was amended once again. Thereafter, a new petition challenging was filed. It too was rejected by the majority opinion of an extended panel (HCJ 466/07 **Galon v. Attorney General**, IsrSC 65(2) 1 (2012) (hereinafter: **Galon**).

3. The prohibition on the grant of status in Israel to residents of the Area is, as stated, subject to the exceptions set forth in the Law, some of which had been amended or added when the Law was amended in 2005 and 2007. According to the current version of the Law, residents of the Area over a certain age, may receive a stay permit from the commander of the Area in order to prevent their separation from a spouse who lawfully resides in Israel (Section 3 of the Law); minors who are residents of the Area and are over the age of 14 may receive a stay-permit from the commander of the Area to prevent their separation from their parents (Section 3A(2) of the Law); minors under the age of 14 may receive a permit for temporary residency in Israel to prevent their separation from their parents (Section 3A(1) of the Law). The aforesaid indicates that persons meeting the terms of the aforementioned exceptions may, at most, receive temporary stay permits from the commander of the Area, with the exception of minors under the age of 14, who may receive a residency permit. In addition, the Law allows for the grant of a stay-permit or temporary residency permit for humanitarian reasons (Section 3A1 of the

Law). We address the significance of this and particularly the differences between the various permits, as they were presented to us, in the section regarding deliberation and decision.

4. Another exception which is relevant to the matter at hand is stipulated in Section 4 of The Citizenship Law (Temporary Order), entitled "Transitional Provisions" (hereinafter: **transitional provisions**):

> 4. Notwithstanding the provisions of this Law –
>
> (1) The Minister of Interior or the Commander of the Area, as the case may be, may extend the validity of a permit to reside in Israel or of a permit to stay in Israel, which was in the possession of a resident of the Area upon the commencement of this Law, taking into account, among other things, the existence of a security impediment as aforesaid in section 3D;
>
> (2) The commander of the Area may grant a temporary permit to reside in Israel to a resident of the Area who has filed an application for citizenship according to the Citizenship Law or an application for an Israeli residency permit according to the Entry into Israel Law, before the 1st of Sivan 5762 (12 May 2002) and whose case had not yet been decided on the day of commencement of this Law, provided that such resident shall not be awarded, in accordance with the provisions of this paragraph, citizenship according to the Citizenship Law and shall not be granted a permit for temporary residency or for permanent residency, in accordance with the Entry into Israel Law.

The transitional provisions allow for the extension of permits in possession of residents of the Area prior to the commencement of the Law. However, it does not allow upgrading to a higher-level status. In addition, the transitional provisions allow for the grant of a temporary stay-permit to persons who entered the graduated procedure before the Government Resolution came into effect and whose application had not been decided on the day the Law came into effect. However, upgrading temporary status to temporary residency (A/5 visa), permanent residency or citizenship is not permitted.

5. The restrictions on status upgrades stipulated in the transitional provisions have been narrowly interpreted in the jurisdiction of this Court. In the known judgment in the matter of **Dufash**, the Court ruled, with the State's consent that where the authorities had been delinquent in their processing of the status upgrade prior to the Government Resolution, the prohibition on upgrades can be overcome (**AAA 8849/03 Dufash v. Director of Population Administration in East Jerusalem** (June 2, 2008) (hereinafter: **Dufash**); see also HCJ 5315/02 **Hatu v. Minister of Interior** (December 4, 2002). Following this judgment, many residents of the Area who had been residing in Israel prior to the Government Resolution were eligible to contact the Population Administration with a request for a status upgrade. However, the passage of time made it difficult to ascertain the conduct of the authorities vis-à-vis individual applicants before the Government Resolution. In this context, Justice **U. Vogelman** and I found it necessary to comment, in the judgment in **Dejani**, given several years after **Dufash**, that it may be that a general solution ought to be found for this group of persons who have been living in Israel for a long time, that would allow for upgrading their status to a higher-level status. In multiple judgments issued subsequent to **Dejani**, other justices found it appropriate to take a similar approach (see, e.g., AAA 9168/11 **A. v. Ministry of Interior – Population Immigration and Border Authority**, §23 (November 25, 2013) (Justice Z. Zylbertal, Justices S. Joubran and U. Shoham concurring); AAA 4014/11 **Abu 'Eid v. Ministry of Interior – Population Immigration and Border Authority** (January 1, 2014) (Justice D. Barak-Erez, Justices I. Danziger and I. Amit concurring) (hereinafter: **Abu 'Eid**); AAA 6480/12 Dahnus (Rajabi) v. **Ministry of Interior – Population Immigration and Border Authority** (Justice Rubinstein (November 28, 2013); AAA 9167/11 **Hassan**

v. Ministry of Interior (May 8, 2014) (Justice H. Melcer); AAA 6409/11 **Shweiki v. Ministry of Interior – Population Immigration and Border Authority**, §1 in the judgment of Justice D. Barak-Erez (August 25, 2015)).

The petitions and the preliminary responses of the Respondents

6. Despite the remarks included in the judgments, the legislator chose not to change the existing situation when The Citizenship Law (Temporary Order) was extended. Hence, the petitions at bar were submitted. These petitions are part of a series of petitions concerning residents of the Area who live in Israel with their Israeli family members as part of the family unification procedure, by virtue of stay-permits. The petitions focus on the constitutional plane and seek to amend the law such that it allows upgrading the status of residents of the Area who have been living in Israel for an extended period of time to at least "temporary residency" status (A/5 visa).

   The petitions seek to arrive at this result through slightly divergent routes: In HCJ 5135/14 and HCJ 5136/14, the Petitioners ask that an exception allowing for upgrades to temporary residency status **be read into the Law**. In HCJ 8225/14, Petitioners seek the **revocation** of the sections in the Law that prohibit the grant of residency permits to residents of the Area who are over 14 years of age (Sections 2, 3A(1), 3A(2), and 4), or parts thereof. Similarly, in HCJ 8408/14, the principal remedy sought is an amendment to Sections 2, 3A(1), 3A(2), and 4 of the Law such that they allow upgrading the status of residents of the Area who had been living in Israel for an extended period of time to temporary or permanent residency. In addition, in that petition, the Court was asked to arrive at the same result through an interpretation of Section 3C of the Law. This section grants the minister of interior discretion to grant citizenship or permanent residency to a resident of the Area who, inter alia, "identifies with the State of Israel and its objectives", has taken "substantive action to promote security, the economy or another significant state interest", or if grant of status as stated is "of special interest to the State". This petition also raised arguments related to the administrative plane against the decision not to upgrade the status of Petitioner 2 to permanent residency. In contrast, in HCJ 813/14, a more limited remedy was sought, it being the revocation of the transitional provisions alone, which, as recalled, prevent upgrades for persons who entered the family unification procedure prior to the commencement of the Government Resolution and the Law. At the same time, during oral arguments, some of Petitioners' counsel claimed that the upgrade prohibition could be overcome also by an interpretation of the phrase "resident of the Area" such that an applicant who has been lawfully living in Israel for an extended period of time would no longer be considered a "resident of the Area" to whom the Law applies (see, e.g., transcripts of hearing held on June 8, 2015, at p. 7).

7. The main argument put forward by the Petitioners, which, they maintain, is largely based on the remarks made in judgments rendered on this issue, is that given that these persons have been residing in Israel for many years, there is no longer security justification to prohibit upgrading their status from temporary stay (by virtue of DCO permits) to at least temporary residency (A/5 visa). Petitioners claim such persons have undergone security screenings for years and have proven that they pose no threat, and that, in any event, an A/5 visa also requires periodic security screening. In contrast, Petitioners claim, while a stay-permit confers no basic social rights, an A/5 visa does allow for same. Therefore, the Petitioners claim, the refusal to upgrade their status no longer serves the security purpose of the Law and leads to an irreversible violation of their rights.

8. In the preliminary response, the Respondents on behalf of the State argued the petitions should be dismissed both in limine and on their merits. They recalled that this Court had dismissed petitions challenging the constitutionality of The Citizenship Law (Temporary Order), and, in their view, since judgments were rendered in those petitions (in 2006 and 2012), no change in circumstances has occurred that would justify altering the finding that the Law is constitutional. Adding to that, they pointed to the fact that an A/5 visa does increase the security risk, as it is physically similar to an

ordinary ID card and allows for greater freedom of movement. Therefore, they argue, the security logic underlying the Law applies to persons who have been living in Israel for many years as well. In addition, the Respondents noted that a decision has recently been made to extend stay-permits for two years at a time instead of one year, subject to meeting the necessary conditions. The Knesset also believed the petitions should be rejected.

Developments subsequent to submission

9. Following two oral hearings held in the petitions, and given that the Law addressed therein was set to expire, the Court ordered Respondents on behalf of the State to submit an updating notice. A decision was made that following receipt of said notice, a decision would be made as to whether an *order nisi* should be issued, and if so, what *order nisi* and whether or not the panel should be expanded, or a judgment should be rendered (President **M. Naor**, Justices **I. Amit** and **A. Baron**, decision dated June 8, 2015).

Notice from Respondents for the State regarding the Extension of the Temporary Order and change of policy regarding stay-permit holders.

10. On April 11, 2016, Respondents for the State informed us that the minister of interior had decided to take action to have the Temporary Order extended for another year, until June 2017. At the same time, it was noted that the minister had decided to change his policy and approve status upgrades for residents of the Area who are in possession of Israeli stay-permits and whose application to enter the family unification procedure was approved prior to the end of 2003, in the sense that they and their children born after January 1, 1998, would be given a permit for temporary residency in Israel, an A/5 visa. The aforesaid would be granted subject to the conditions necessary for review of such applications, which are, proof of center-of-life in Israel, proof of marriage authenticity and continuity, and security and police clearance. It was further stated that said upgrade would be performed pursuant to Section 3A1 of The Citizenship Law (Temporary Order), which permits granting a temporary residency permit on humanitarian grounds (hereinafter: **the minister's decision**)

11. According to the notice submitted by the Respondents for the State, the group of persons covered by the minister's decision numbers 2,104 sponsored spouses out of 9,900 sponsored spouses living in Israel by virtue of stay-permits given pursuant to family unification applications. On the logic behind the upgrade cutoff date (end of 2003), the notice recalls that the Government Resolution was adopted on May 12, 2002, whereas the Law entered into effect on August 6, 2003. According to the Respondents on behalf of the State, the minister's decision, therefore, includes anyone who filed a family unification application prior to the passing of the Law, as well as individuals who filed their application thereafter, up to the end of the same year. According to the Respondents for the State, the distinction between individuals who filed a family unification application prior to the Government Resolution and the Law and those who did so at a later stage relies on the remarks made in the judgment in **Galon** to the effect that spouses who chose to start families with residents of the Area after the "rules of the game" had changed, did so while aware of the legal situation in Israel. The notice submitted by the Respondents for the State also clarifies that similarly to the decision made at the time regarding the extension of stay-permits for two years, subject to meeting the terms, persons holding an A/5 temporary residency permit may extend their permit for two years at a time. In addition to all this, the minister issued a directive that, in the appropriate cases, a recommendation will be made to grant or extend status for two years. Given that this was the current state of affairs, the Respondents on behalf of the State believed the petitions had been exhausted and should be deleted.

Responses and developments following the notice of the Respondents for the State

12. The petitions at bar were originally heard in tandem with five other petitions that addressed the same issue. Subsequent to the minister's decision, the status of the Petitioners therein was upgraded to

temporary residency. Consequently, the five petitions were deleted by consent (President **M. Naor**, Justices **Y. Danziger** and **I. Amit**, judgment rendered February 19, 2017). The five petitions herein remain. In four of them, all or some of the Petitioners ostensibly do not fall within the minister's decision (HCJ 5135/14, HCJ 5136/14, HCJ 8404/14, HCJ 8225/14), whereas in the fifth petition (HCJ 813/14), the sought upgrade has been granted. However, the Petitioners therein wish to pursue their petition nonetheless and seek to amend it such that it challenges both the constitutionality of the Law in general and the minister's decision (see: Notice of the Petitioners in HCJ 813/14 dated February 16, 2017). The Petitioners whose petitions remain pending have filed responses to the notice submitted by the Respondents for the State regarding the extension of the Law and the change in the minister's policy. In addition, subsequent to the notice submitted by the Respondents for the State, a third oral hearing took place on February 20, 2017, wherein parties made arguments on the merits. During said hearing, the Respondents recalled, *inter alia*, that the security logic underlying the Law, including the prohibition on status upgrades, was examined prior to the decision on extending the Law. They noted that the Foreign Affairs and Defense Committee and the Internal Affairs and Environment Committee formed a joint committee in 2015 for this purpose, tasked with examining the relevant information and make a recommendation to the Knesset on whether or not to extend the Law (hereinafter: **the joint committee**).

At the conclusion of the hearing, a decision was made to refer the petitions for deliberation and judgment. Prior to the ruling, we shall address the main arguments made by the parties regarding the notices from the Respondents for the State and other important developments.

13. The Petitioners welcomed the minister's decision to allow status upgrades for persons who filed a family unification application prior to the end of 2013. However, they maintain that this approach does not exhaust all remedies sought in their petitions. The Petitioners maintain that the Respondents cannot rely on the argument that subsequent to the change in the rules of the game, there can no longer be an expectation of status in Israel pursuant to family unification. Their approach is that this is so given that the Law in question is a temporary order in nature, which has, over time, been amended in a manner that, to a degree, benefits spouses wishing to unite with their families in Israel. The Petitioners also argued that the Respondents erred in their reliance on the reasoning provided in the **Galon** judgment as justification for the scope of the minister's decision. While **Galon** refers to the time when the family **was started**, the minister's decision refers to the time the family unification **application was filed**. The Petitioners further emphasized that since the purpose of the Law is security, there is no justification to hinge eligibility for upgrades on the date on which the application was filed, but the issue is rather how much time has passed since the permit applicant entered Israel and the threat her or she poses given that time. In this context, some of the Petitioners noted they maintain it should be determined that residents of the Area who have lived in Israel for more than five years are eligible for an upgrade.

14. It was also argued that the Respondents did not provide a security-based justification for their position on this issue. According to the Petitioners, no data was provided showing that temporary residency status holders (A/5) have been involved in acts of terrorism against the State of Israel, nor was the question why the status of residents of the Area who have been residing in Israel for an extended period of time could not be upgraded to this status answered from a security perspective. The Petitioners went on to argue that disregard for the time element becomes less tenable given that the Temporary Order has entered its 14th year, and the same individuals on whose behalf the petitions were filed would continue to live in Israel by virtue of temporary stay-permits with no track ultimately leading to status upgrades. According to the Petitioners, such a result impacts the proportionality of the law in general. Another difficulty alluded to by the Petitioners is the treatment of children's status. Petitioners argue that the current decision of the minister of interior unjustly limits the right to an upgrade to children born after January 1, 1998, and only if one of their parents would receive a status upgrade. According to the Petitioners, the eligibility of children who have been living in Israel for many years should be

assessed independently from their parents and regardless of their age. Finally, the Petitioners argued that the Respondents' decision fails to offer a solution to residents of the Area who reside in Israel by virtue of a tourist visa, or persons in receipt of a temporary stay-permit on humanitarian grounds, but does not meet the conditions for the graduated procedure (for instance, persons who have become divorced, widowed, etc.).

15. Subsequently, on June 15, 2017, Petitioners submitted an updating notice, according to which, the joint committee had, shortly before that time, held two sessions (February 21, 2017, and May 29, 2017). According to the Petitioners, during these sessions, as in a previous session held by the joint committee on June 1, 2016, data provided by security officials indicated the sweeping injury involved in the prohibition on grant or upgrade of status could be reduced, at least with respect to older sponsored individuals and minors aged 14 to 18. Despite this, the Petitioners state, the chair of the joint committee was satisfied with a decision that the committee would continue its discussion of these groups and found no impediment to recommending an extension of the Law. And indeed, Petitioners state, the Knesset ultimately approved an extension for another year (up to July 30, 2018), alleging there was no factual basis justifying same.

16. Respondents for the State argued, on the other hand, that the minister's decision applied the remarks made by the Court on the matter, which were aimed at persons who resided in Israel as part of family unification prior to the Government Resolution. It was further argued, that inasmuch as the Petitioners raise reservations regarding the minister's decision, they may make same in the appropriate venue. Respondents for the State argued further that in any event, the situation of temporary permit holders has improved recently, given the promulgation of the National Health Insurance Regulations (Health Fund Registration, Rights and Duties of Recipients of Stay-Permits issued under The Citizenship and Entry into Israel Law (Temporary Order) 5763-2003) 5776-2016 (hereinafter: **the National Health Insurance Regulations**). According to said regulations, a resident of the Area in receipt of a stay-permit would be eligible for health insurance under the terms stipulated in the regulations. Therefore, the gap between the rights of stay-permit holders and temporary residents has been reduced.

17. According to the Respondents for the State, the updating notice submitted by the Petitioners does not alter their position that given the minister's decision, the petitions had been exhausted and must be deleted. They stated that legal action has already been undertaken by residents of the Area whose status was not upgraded pursuant to the minister's decision, including petitions to this Court (see, e.g.: HCJ 2328/17 **Ziadat v. Minister of Interior**; HCJ 4601/17 **Kweidar v. Minister of Interior**; HCJ 5306 **Shahatit v. Minister of Interior**). The Respondents argue that the fact that proceedings relating to the minister's decision are already underway also indicates the change of circumstances in the matter at hand, and that the arguments raised in the petitions at bar are no longer relevant. Respondents for the State also addressed the work of the joint committee, noting that it was planning to hold a follow-up discussion this November. Finally, the Respondents argued the Petitioners' attempt to expand the petitions such that they address specific groups of sponsored individuals – those aged 14 to 18 and older persons. On the merits, the argument was made that security officials did insist during the joint committee discussions that there was a security necessity with respect to sponsored individuals between the ages of 14 and 18 and that the age of involvement in terrorism has dropped in recent years. As for older sponsored persons, it was found that there were no sponsored individuals older than 65, although, pursuant thereto; a request was made to inquire whether there are sponsored individuals younger than 65.

18. The Knesset made similar arguments to those of the Respondents for the State. In addition, it argued that the joint committee was not competent to suggest updates to the Law, and was confined to recommending for or against its extension. The Knesset further argued that during the joint committee sessions held on June 1, 2016, February 21, 2017, and May 29, 2017, the representatives of the Israel Security Agency (ISA) noted the security need for the Law, which was the reason it was ultimately

extended until June 2018. At the same time, despite the argument made by the Knesset that the joint committee could not make recommendations regarding altering the wording of the law, it did update that the feasibility of upgrading minors and older adults would continue to be assessed after the summer recess, in November 2017. According to the Knesset, the joint committee will review the issue in its entirety and consider whether there is room to recommend amendments to the Temporary Order to government officials. To complete the picture, the Knesset clarified that one petition was pending before the Court (HCJ 5124/17) wherein it was argued that residents of the Area who are older than 50 should be exempted from the Law.

Deliberation and decision

19. The petitions at bar seek to once again put the constitutionality of The Citizenship Law (Temporary Order) to scrutiny. The majority of the petitions seek a constitutional intervention in the Law that would allow for upgrading the status of Area residents who have resided in Israel for a protracted period of time. The others seek the same outcome by way of interpretation as well. In my view, there is no cause, at this point, to issue *orders nisi* in the petitions. In **Galon**, I noted that the law that is the subject of the petitions at bar "may be considered a 'temporary order', but the temporary has been prolonged as hope for better days in the relationship between Israel and the peoples of the region which has remained over the years, has, alas, been shattered against the rock of reality" (ibid., p. 243). Even today, the threat of terrorism still looms over citizens and residents of the country. Given the current state of security, during the discussions held by the joint committee, ISA representatives expressed their position that residents of the Area still pose a threat that justifies upholding the Law:

> The consistent position held over the years by the ISA has been that parts of this same population do pose a risk, a threat. Over the years, as we have pointed out, the threat emanates partly thanks to the freedom of movement versus a stronger connection which presents potential to terrorist organizations… At the very least, the last year has shown that the threat is not merely potential, not just a threat in theory but also in practice… (Transcript of joint committee session on June 1, 2016, p. 19).

Similar remarks were made in the joint committee session held on May 29, 2017:

> Our position is that there is a security need to extend the Temporary Order. We support this need following positions expressed in previous years regarding the danger we see in the relevant population. A review of the past two years, 2015-2016, and the state of security during these years, which involved an increase in terrorism, including increased involvement in terrorism by the family unification population, we believe that, at this time, the need persists and the Temporary Order should be extended by an additional year. (Ibid., p. 11).

During that session, data was presented with respect to the degree to which Israeli status recipients are involved in terrorism:

> In general, out of the population of status recipients pursuant to family unification and their family members, the ISA has identified 139 as involved in terrorist attacks from 2001 to April 2017. Of these, 49 had received status due to marriage to an Israeli. The remaining 90 are relatives of persons who received status due to family unification. We clearly identify a significant increase in terrorism involvement on the part of persons who received status thanks to family unification and their family members. In concrete terms, we

> point to 66 persons who have been involved in terrorism in the period in question, i.e., October 2015 to April 2017, six of them between January and April of 2017, when we concluded this examination. (Ibid., p. 17).

Later in the discussion, it became clear that of the 66 persons involved in terrorism in the latter period of time, 14 were defined as "second generation", i.e., relatives of individuals who received status due to family unification (ibid., p. 19).

20. And so, there has been no significant change in the general security aspect since judgments were rendered in **Galon** and **Adalah**. These judgments provide a significant point of departure in the matter at hand. The change in the roster of the Supreme Court bench since these judgments were issued does not change this fact (see, cf.: **Galon**, §3 of the opinion of Justice **E.E. Levy**, and §2 of the opinion of Vice President **E. Rivlin**). I recall that in the judgment in **Galon**, given some six years ago, this Court found, by majority opinion, that there was no room to intervene in The Citizenship Law (Temporary Order). Even previously, The Law, in its slightly divergent version at the time, was upheld in **Adalah**. Our rulings in **Galon** and **Adalah** were based on the conclusion that the security purpose of The Law – preventing use of Israeli status recipients for the commission of acts of terrorism – justifies, in the circumstances, the violation of the rights to family life and equality. In **Adalah**, we also pointed to the exceptions added into the law which impacted its proportionality (see, e.g., ibid., §§116, 123 of the opinion of Vice President (emeritus) **M. Cheshin**). While the law is periodically extended by government order with Knesset approval, this does not mean that questions of principle already discussed and decided in previous actions need be addressed every time someone decides to submit a petition (see, cf.: **Galon**, §§2, 5 of the opinion of President **D. Beinisch**). At the same time, the issue of upgrades was never clarified in previous actions. In **Adalah**, the discussion focused on the blanket ban on residency in Israel by residents of the Area, as was the case in **Galon**. In **Galon**, Justice **E. Rubinstein** did draw a distinction between a **stay permit** and **citizenship** but did not address the differences between stay permits and temporary residency. In **Galon**, I mentioned the contention that the differences in the social rights granted to minors who hold DCO permits as compared to others who have temporary residency raise some difficulties. However, I found that the Petitioners therein had not demonstrated cause for constitutional intervention in same. I also noted that a pending petition addressed the question why rights under the Social Insurance Law and the National Health Insurance Law should not be given to the family members of Israelis who lawfully reside in Israel but cannot receive a temporary residency permit due to the provisions of The Law (HCJ 2649/09 **The Association for Civil Rights in Israel v. Minister of Health** (November 4, 2015) (hereinafter: **ACRI**); see more on this matter below). Despite this, as stated, the issue of upgrades was not the focal point of previous proceedings.

21. The petitions at bar revolve around the issue of upgrades. One cannot ignore the fact that the Temporary Order has become the "Long Standing Order", to quote Justice E. E. Levy in **Galon** (§33), has, over time, has exacerbated difficulties that had not been fully clarified in previous constitutional proceedings, in particular with respect to Area residents who have resided in Israel for many years, and usually only hold temporary stay permits (see also, HCJ 5539/05 **'Atallah v. Minister of Defense**, §11 of the judgment of Justice **A. Grunis** (January 3, 2008) (hereinafter: **'Atallah**)). In the petitions at bar, we have been presented with the disadvantages of holding temporary permits of this sort as compared to receiving temporary residency status (A/5). For instance, some branches of the National Insurance program are subject to residency, and hence DCO permit holders are ineligible for social rights thereunder (see HCJ 494/03 **Physicians for Human Rights v. Minister of Finance**, IsrSC 59(3) 322 (2004); compare to HCJ 8961/06 **A. v. Prime Minister** (July 13, 2008)); there are significant obstacles to obtaining a driver's license (see **'Atallah**), and in the past, there was no eligibility for health insurance. Even today, after the National Health Insurance Regulations were enacted, ostensibly making health services available to residents of the Area under certain conditions, some issues,

regarding which I shall express no position, remain disputed (the aforesaid petitions regarding ineligibility for health insurance were deleted in the judgment rendered in **ACRI** following the enactment of the regulations. At the moment, new petitions challenging the current version of the Regulations are pending; e.g., HCJ 7470/16 **Shweiki v. Minister of Health** and HCJ 9327/16 **al-Zeir v. Minister of Health**). As such, though the gaps between those in possession of temporary permits and those in possession of other permits have been somewhat bridged, temporary residency permits are still advantageous to temporary permits from a social security standpoint. This state of affairs raises difficulties, as, given the repeated extensions of the Law, a person may hold DCO permits for a very long period of time without any changes occurring in their status (see: **'Atallah**, §11 of the opinion of Justice A. Grunis). However, given the change of circumstances, primarily, the minister's decision, in my view, the petitions at bar have been exhausted. I shall now provide the reasoning for my conclusion.

22. The petitions at bar are largely based on the judgment in **Dejani** and the judgments that followed. Some expressly note that they seek to "instruct the Respondent to apply the Court's remarks in the matter of **Dejani** and the judgments that followed, both with respect to the Petitioner and all other persons in the same predicament" (HCJ 5136/14, §82 of the petition; HCJ 5135/14, §78 of the petition). In **Dejani**, Justice Vogelman and I noted that upgrading the status of Area residents who have resided in Israel for many years should be considered. We were of the opinion that such consideration should be given also given the fact that such persons are subjected to security screenings for a lengthy period of time and will continue to be subjected to such screening in future if they receive "temporary residency" status (A/5 visa). However, our aforesaid remarks, which were later adopted by other justices of this Court pertained to a **specific** group of Area residents, namely, a group of residents whose applications were already in the "pipeline" prior to the Government Resolution. Our reference to this group was predicated on two reasons, the first having to do with the judgment in **Dufash**. As recalled, that judgment allowed many who had entered the family unification process prior to the Government Resolution to apply for upgrades. However, to quote my colleague Justice **I. Amit** in one of the cases, "The crack opened by the very brief judgment in Dufash… had become, over time, an opening to a great hall" (**Abu 'Eid**, §1). The number of applications and the lapse of time produced practical difficulties in identifying those within the group in whose files errors had been made prior to the Government Resolution. Therefore, I believed that a general solution ought to be found for persons who had entered the family unification process prior to the Government Resolution, rather than relying on investigation and inquiries into individual cases retrospectively. The second reason was that anyone who had been in the midst of the family unification process when the Government Resolution was adopted, and whose center-of-life remained in Israel, has been living in the country for many years, during which they are subjected to periodic security screening (at the time the **Dejani** judgment was rendered, the residents of the Area in question had been living in Israel for more than 11 years). As I noted in **Dejani**:

> Finally, I wish to make a general comment **concerning the failure to upgrade the status of individuals who embarked on the graduated procedure prior to the government resolution of 2002**: as mentioned by my colleague, we denied petitions challenging the lawfulness of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003. The validity of said law has been extended from time to time. I am of the opinion that it would be appropriate – if and when the law is extended again – to take into consideration the condition of the individuals who do not receive an upgrade despite the fact that they commenced the graduated procedure such a long time ago. Perhaps with respect to these individuals, after such a long stay in Israel, an individual examination may be conducted … Perhaps the fact that the Petitioners and others like them do not receive an upgrade despite the fact that they have lived in Israel for such a long time, is the underlying

basis for the approach manifested in the Dufash judgment, and in the many other judgments which were submitted by Petitioners' counsel and the judgments which were mentioned by my colleague, Justice Vogelman, and myself. **However, it is my opinion that the solution for the failure to upgrade, should be general rather than conditioned on the question, which can no longer be properly examined, why the processing of one or another family unification application was delayed over a decade ago. The above said should be considered by the legislator** [§6; emphases added, M.N.].

And as noted therein by Justice **U. Vogelman**:

Following the above, I reviewed the opinion of my colleague, the Deputy President, who joined me in my conclusion, and added a general comment concerning the failure to upgrade the status of individuals who commenced the graduated procedure before the effective date. My colleague proposes the legislator consider, within an amendment to the Temporary Order Law, the application of a different approach to this group, in view of the passage of time. I would like to join her in this comment.

The Appellant and others in his situation – the processing of whose applications was halted given the Government Resolution and the Temporary Order Law – are included in the transitional provision set forth in section 4(1) of the Law. Namely, they continue to lawfully reside in Israel with the same status they had on the effective date (May 12, 2002). The Appellant herein has resided in Israel lawfully for many years by virtue of temporary stay permits (DCO permits), renewable on an annual basis, subject to security screening.

Under these circumstances, it seems that the **provision regarding the moratorium on status upgrades for individuals who fall under the transitional provisions** is no longer necessitated by the security purpose of the Temporary Order Law – a purpose addressed by this Court in its examination of the constitutionality thereof. Firstly, as far as the latter are concerned, not only is an individual examination possible, such an examination is, in fact, conducted annually upon the renewal of the permit. Secondly, these individuals have been under the scrutiny of security officials for over a decade, as permits are renewed only in the absence of a security preclusion. Thirdly, even after a person's status in Israel is upgraded – from stay with a DCO permit to residency with an A/5 temporary residency visa (and this is the category with which we are concerned) – they continue to be subjected to security screenings, in view of the provisions set forth in Respondent's procedures for the graduated procedure.

Therefore, I am also of the opinion that the legislator should reconsider the limitations imposed on upgrades to the status of individuals who lawfully reside in Israel with a stay permit pursuant to the transitional provisions of the Temporary Order [emphases added, M.N.].

The judgments that followed **Dajani** adopted our remarks therein and did not seek to extend them to additional groups. This indicates that the Petitioners' contention whereby the jurisprudence of this Court had expressed a position that any resident of the Area who had been living in Israel for many years as part of a family unification process is eligible for a status upgrade. Accepting this decision means reading something into the jurisprudence that is absent from it. **Thus far**, jurisprudence referred to the group of Area residents who, as stated, had applications "in the pipeline" on the effective date. The minister's decision does offer a solution to at least some members of this group. It also gives some effect to the remarks made back in **Galon**, whereby the necessity or scope of the Temporary Order should be revisited with attention to changes that may occur in reality. See ibid., §§ 47-48 of the opinion of Justice **E. Rubinstein**; §42 of the opinion of Justice **H. Melcer**; §15 of the opinion of President **D. Beinisch**). Is this sufficient, or is there room to grant relief to the Petitioners who seek, some through interpretation and some through constitutional intervention, to expand the group that is eligible for upgrades pursuant to the Law?

23. In my view, the arguments concerning the interpretation of the Law should be rejected. In the oral hearing before us, an argument was made that The Citizenship Law (Temporary Order) can be interpreted such that persons lawfully residing in Israel for many years (some of the Petitioners suggested five years as a general rule), will no longer be considered a resident of the Area to whom the Law applies. However, the Law expressly prescribes that a resident of the Area is a person who "is registered in the population registry of the Area, as well as someone who resides in the Area notwithstanding the fact that he is not registered in the population registry of the Area, but excluding a resident of an Israeli settlement in the Area". In other words, the Law does not define a resident of the Area based on the actual ties to the Area but based on registration in the population registry. The clear language of the law poses a veritable impediment to the Petitioners' interpretive arguments, and its purpose does not aid their cause either. In the judgments in **Adalah** and **Galon**, the Court noted the State's position whereby the "presumed danger" posed by residents of the Area may materialize after receipt of status in Israel. In addition, jurisprudence expressed the position that permit recipients may, in fact, carry out terrorist attacks after some time (see: **'Atallah**, §10 of the opinion of Justice **A. Grunis**). Another argument was that an exception allowing for upgrades could be read into the Law, by way of interpretation. In my view, given the language and purpose of the Law, this is not a matter of interpretation, but a request for constitutional relief. It follows that the arguments regarding interpretation cannot be accepted. The correct framework is the constitutional one, and it is not for naught that the petitions at bar focused on same.

24. It is also my view that at present, there is no room to grant constitutional remedy either. The minister's decision has provided an administrative opening for upgrading the status of Area residents who reside in Israel under the family unification process, by way of contacting the Humanitarian Committee under Section 3A1 of the Law (see, and compare to the remark of Justice **N. Handel** in **Galon** (§5), who alluded to the possibility of a broad interpretation of the powers to issue permits on humanitarian grounds). The minister's decision is confined to a certain group. However, without setting anything in stone, there is no impediment to raising arguments against its scope using the appropriate channels. And indeed, as the Respondents for the State have indicated, petitions concerning the manner in which the minister's decision is to be applied are already pending. The petitions relate to residents of the Area who, it is argued, meet the criteria for upgrades set forth by the minister, yet were denied such upgrades when they applied for them. Two of the petitions argued, as an aside, that even if the Petitioners therein were not covered by the minister's decision, their status should nevertheless be upgraded (HCJ 4601/17, HCJ 5306/17). While the aforesaid petitions do focus on the individual circumstances of the Petitioners therein, they do support the conclusion that the administrative remedies must be exhausted. Since there is an alternative route wherein general or individual arguments may be raised against the prohibition on status upgrades for residents of the Area who have resided in Israel for a protracted period of time (without making a decision as to whether the correct path is a petition to this Court or another venue),

I see no room, at this stage, to grant constitutional relief. Intervention in a Knesset law, particularly after it was held constitutional in two judgments given by extended panels of this Court, must constitute, in the circumstances, a measure of last resort to be invoked only after other legal avenues, if such are available, have been exhausted. This should be the course taken in the case at hand. At the same time, I see no justification to allow the petitions to remain pending until a decision is rendered on the meaning of the minister's decision. As stated above, the normative framework on which the petitions relied was our judgment in **Dejani**. However, once the remarks made in **Dejani** were addressed in the minister's decision (albeit tardily), the legal situation is not as it has been. There is no dispute that the minister's decision does reflect **some measure** of progress with respect to residents of the Area who have been residing in Israel for some time (see and compare: HCJ 8318/10 **The Association for Civil Rights v. The Government**, §14 of my opinion (August 24, 2017); **ACRI**). Given the framework for deliberation outlined by the petitions at bar, and given the current procedural stage – this should suffice. Therefore, I accept the approach proposed by the Respondents for the State, whereby the petitions **at bar** are no longer relevant, and that, at this advanced procedural stage, there is no room to permit their amendment. Finally, I shall remark that the constitutional remedies sought in the petitions raise various difficulties, but, given the above, this is not the place to discuss this matter.

25. During the last oral hearing before us and in the final updating notice from the Petitioners in HCJ 5135/14 and HCJ 8408/14, the Petitioners shifted the focus from all residents of the Area who have been living in Israel for an extended period of time to two particular groups among them – minors aged 14 to 18 and older adults. I am of the opinion that it is not possible to address the arguments relating to these groups within the confines of the decision in the **present** petitions. As stated above, the petitions at bar focused on the impact the duration of stay in Israel has on eligibility for upgrades, rather than the unique features of the groups of minors and older adults. At this late stage in the proceedings, it is difficult to accommodate the sought change of course, which, to add, has not been accompanied by a motion to amend the petition. As I noted in one of the cases, there are circumstances in which no room can be given to "rolling" petitions which seek to raise an issue that was not specified in them initially (HCJ 8749/13 **Shafir v. Minister of Finance**, §19 of my opinion (August 13, 2017); see and compare also to the aforementioned HCJ 8318/19). While it is true that the two petitions at bar (HCJ 8408/14 and HCJ 8225/14) sought remedies directly relating to minors over the age of 14. However, the arguments raised in support thereof were not specific to this group. Note too, that during the joint committee discussion, security officials did address that fact that given the declining age of persons involved in terrorism (in particular over the last two years), there is a security need pertaining to sponsored individuals between the ages of 14 and 18 (transcripts of joint committee session held May 29, 2017, p. 14). As for older adults, the Population Authority and security officials noted that this was an "empty group", that is, there are no persons older than 65 among residents of the Area who reside in Israel as part of a family unification process. In any event, we took note of the notices given by the Respondents for the State and the Knesset to the effect that the matter of minors and older adults (younger than 65) would be revisited this coming November by the joint committee, which is set to discuss whether legislative amendments to the Temporary Order should be recommended to the government. The next joint committee discussion will rely, *inter alia*, on the figures requested and received in the application dated June 12, 2017, entitled "Request for information and figures for the joint committee on the Citizenship and Entry into Israel Law". The request was made by the joint committee to representatives of the minister of defense, the ISA, the Population and Immigration Authority and the minister of public security. The requisite details included, *inter alia*, information about involvement in terrorism and the nature of involvement in terrorism by three main groups: minors aged 14 to 18; men aged 18 to 55; women aged 18 to 50 [sic]; men older than 55 and women older than 55. Also requested were details on how many of these persons had received status pursuant to the family unification procedure and how many are relatives of persons who received status pursuant to family unification (second generation). Inasmuch as the Petitioners find the discussion on the matter to be unsatisfactory, the doors of this Court remain open to them, and I make no conclusive decision either

way. In this context, it is important to note that a petition is pending with respect to the group of adults (HCJ 5124/17).

26. Finally, I wish to address the allegation that the Law is extended annually in an almost automatic fashion. The actions of the joint committee, which include follow up discussions over the last few years, indicate that, at least since the committee was established, the law has not been extended without a reevaluation of the need for it. As noted above, in the sessions held by the joint committee in 2016-2017, various issues relating to the Law were discussed, and the joint committee is scheduled to convene in the near future and receive for its review further details from security officials regarding the need to extend the Temporary Order further. In light of this, it is clear that oversight of the law has changed in a manner that makes it difficult to hold, at present, that the Law is extended without substantive review.

Conclusion

27. The petitions at bar have been pending for a number of years, during which, the legal situation had undergone developments. These developments, primarily the minister's decision, have improved the predicament of **some** residents of the Area who are in possession of stay permits pursuant to the family unification process. Given this change, and as I have noted above, I do not see room, at the present time, to issue *orders nisi* as part of the scope of the discussion demarcated by the petitions at bar. However, the fact that the Joint Committee has seen fit to ask various officials for more detailed figures on the security need for the law in its current iteration strengthens the understanding that there is a great deal of importance in continuing the examination of the matter by the competent officials. While we have found that the present petitions have been exhausted, the Petitioners will presumably act in accordance with their notices and complete the factual review they have begun. Presumably, in future, one solution or another will be found for the population of status recipients who are not covered by the minister's decision, and I make no conclusive decision.

28. Given the above remarks, the petitions are deleted. In the circumstances, no costs order will be issued.

President

Justice I. Amit

I concur.

1. I too believe that there is no room to revisit the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 after it had been twice reviewed by an extended panel of eleven justices in the judgments rendered in **Adalah** and **Galon** (HCJ 7052/03 **Adalah v. Minister of Interior**, IsrSC 61(2) 202 (2006); HCJ 466/07 **Galon v. Attorney General**, IsrSC 65(2) 1 (2002) [sic]).

   However, given that the result in these two judgements was decided by a single vote and given the passage of time, I believe that the present need is to soften the Temporary Order, at least in the spirit of the remarks made by my colleague the President with respect to persons who had already commenced family unification prior to the Government Resolution (residents of the Area whose applications were in the "pipeline"). The decision of the minister of interior to upgrade the status of residents of the area

whose application to enter the family unification process was approved by the end of 2003 is a significant step to be welcomed. For my part, I would not rule out considering taking another step and further softening the Temporary Order.

2. The bottom line is that I concur with my colleague that at the present time, there is no room to grant constitutional relief. However, it cannot be ruled out that this Court will be asked in future to discuss constitutional remedies with respect to the Temporary Order and it is presumed that the Respondents will take note of the remarks made by the Court.

Justice

Justice Y. Danziger

I concur with the opinion of my colleague, President **M. Naor**, and the remarks of my colleague, **I. Amit**.

Justice

Decided as noted in the opinion of Justice **M. Naor**.

Given today, 28 Tishrei 5778 (October 18, 2017).