At the District Court in Jerusalem **Adm. Pet. 413/03**
Sitting as the Court for Administrative Matters

In the matter of: **_____ Alsadeh et al.**

all represented by attorney Adi Landau *et al.*
of HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger
4 Abu Obeideh Street, Jerusalem 97200
Tel. 02-6283555; Fax. 02-6276317

The Petitioners

v.

Director, Population Administration Office in East Jerusalem

represented by the Jerusalem District Attorney's Office
4 Uzi Hasson Street, Jerusalem
Tel. 02-6208177; Fax. 02-6222385

The Respondent

Petitioners' Reply to the Respondent's Preliminary Response

In accordance with the decision of the Honorable Court of 6 July 2003, the Petitioners hereby respectfully submit their reply:

1. This petition involves the Respondent's failure to reach a decision, for one year and four months, on the Petitioners' application for family unification. Also, the petition deals with the Respondent's decision to apply Government Decision 1813, *of May 2002,* retroactively as regards the Petitioners' request for temporary-resident status for the spouse, which was submitted *in November 2001* in accordance with the family unification procedure in force at the time.

2. Initially, we wish to point out that the Respondent's notification of 6 March 2003 on the approval regarding "extension of the D.C.O. permit" for the spouse was sent to the Petitioners for the first time as an attachment to the Respondent's response, of 3 July 2003, herein.

   In a telephone conversation of 26 March 2003 that the undersigned made to counsel for the Respondent, the latter stated that the Respondent agreed in principle to

approve continuation of the family unification process whereby the spouse's stay would be arranged by means of a D.C.O. permit.

The undersigned stated that, such being the case and with the knowledge of the family, the family intended to continue with the petition in that the second relief sought in the petition was not provided.

The Respondent's counsel stated that she would again review the issue and give her official response to the court and to the undersigned.

However, as stated in the Petitioners' motion of 2 July 2003, *months passed* before any response was given.

The reason for the delay – security grounds?

3. According to Respondent's counsel in Section 4 of the response, on 6 February 2003, the security officials' response was received regarding the security grounds relating to the spouse, whereby handling of the Petitioners' application should be postponed for six months. The reply infers that, based on these grounds, the spouse was summoned to undergo questioning in March.

   However, it is apparent from Petitioner 9's handling of dozens and hundreds of family unification applications that, just before the said time, a requirement was added to the family unification procedure whereby the person invited must undergo questioning by the GSS, as an imminent part of the procedure when an upgrading of visa status is involved. In all the applications that Petitioner 9 was involved in during this period, the male spouse or even the female spouse was summoned to questioning by a GSS agent. Therefore, the summoning of the petitioner to interrogation reflects the routine handling of the application, and not any security basis for rejecting the application.

4. Petitioner 9 also knows that in the said period of time, in which security was so tense, if there had been any fear that the spouse constituted a security risk, it would not have been inconceivable to reject the Petitioners' family unification application. Therefore, it is surprising, to say the least, to see the Respondent's contention that it was decided to delay the handling for six months, while at the same time the application was transferred to the officials for further handling.

5. Furthermore, according to the Interior Ministry's procedures, applicants for family unification are to be informed of delay/rejection of the application for reasons related to a security or criminal background. According to the procedure, where security grounds exist, delay is not an option. Rejection is the only course.

The form of the procedure, whose appendixes constitute samples for the wording that the Respondent must deliver to those who make inquiry, is attached to the reply and marked Rep/1.

6. Therefore, it is inconceivable that the Respondent would draw explanations from out of the blue to account for his extreme foot-dragging, without basing his contentions on any proof, when his refraining to act according to his own procedure would provide him with the requisite obtuseness by means of which it would be possible to raise any contention.

The proposed Nationality and Entry into Israel (Temporary Order) Law, 5763 – 2003

7. On 27 January 2003, the Honorable Court ordered that the Respondent file its preliminary response within 30 days, i.e., by 27 February 2003. The Respondent filed its response to the petition on 3 July 2003, four months after the date set by the court. During this period, the government's decision became a proposed bill. That being the case, the Respondent can now quote at length from the new proposed bill and its explanatory notes.

8. The Petitioners will argue that the said proposed bill has not yet gone through the parliamentary process that would enable the Respondent to rely on its provisions. This proposed bill is still at the beginning of the process, and many changes may occur before a final version is achieved, provided that the proposed bill is enacted into law.

9. The current version itself is not at all clear as to whether the upgrading provisions apply retroactively in those cases in which the upgrading did not take place solely because of the delay or negligence of the Respondent. Furthermore, it goes without saying that even statutes are not applied against the public retroactively. As counsel for the Respondent stated in Section 6 of the response, the proposed bill was formulated after the petition was filed.

On the rule that a statutory amendment, and also a change in policy, will not apply retroactively, the comments of Professor Y. Zamir in HCJ 5496/97, *Asher Mordi et al. v. Minister of Agriculture et al., Takdin Elyon* 2001 (2) 130, 134, are appropriate:

> **In principle, the law detests retroactive application. This is true about statutes and regulations, and also as regards administrative directives. See HCJ 7691/95, *MK Sagui v. Government of Israel, Piskei Din* 52(5) 577, 597-598 (hereinafter: Sagui). Accordingly, in principle, application of directives, including changes in directives, that entail harm must relate to the future. Retroactive application of**

directives, including any change in a directive, is improper. As President Barak said in *Kahalani* (above, Paragraph 10), at page 281:

The permission given to an administrative authority to change policy from time to time, including a policy regarding the granting of financial benefits, is limited, generally, to a change intended for the future. Even if the change in policy is done with authority, solely for substantive reasons, and in a reasonable manner, applying the change retroactively on a person who prepared his actions in accordance with the old policy is still perceived as unjust and unreasonable, and sometimes may even be deemed to have been made without authority.

Later in his opinion, Justice Zamir discusses the discrimination that is liable to result form retroactive application of a change in policy, as follows:

Let us assume that examination of the application in the district office is delayed due to a heavy workload or defective work procedures in the office, or because the district office sent the application for external review and the review was held up for a long time. Is this a substantive reason to reduce the amount of the grant? The answer is clear: no.

The Honorable Justice Beinish joins Justice Zamir's opinion, as follows:

As for me, I believe that, as a result, the time for approval of an application is arbitrary and irrelevant as regards making a decision on the question of providing the grant, except for cases where the delay in giving approval results from the conduct of the applicants themselves. Therefore, I agree with the result that my colleague reached as regards the unacceptability of the distinctions made by the administration in accordance with the time for giving the approval, and that such distinctions may not be allowed to stand.

10. Also, according to Section 4(1) of the Proposed Bill:

The Minister of the Interior… may extend the validity of a permit to reside in Israel or of a permit to stay in Israel that

was held by a resident of the region prior to the commencement of this Law.

If the Respondent had reached a timely decision on the Petitioners' application (that is, within two months), or even prior to the filing of the petition, the spouse would have held a temporary-resident permit for many months before "the commencement of this Law," which, it should be recalled, is only a proposed bill.

11. In Section 9 of the Respondent's response, it is argued that, according to the above government's decision, following its publication, upgrading of the spouse's residency permit is not allowed.

This argument is not correct, for the Respondent could have, and even has, upgraded the status of invitees in the family unification process, despite the provisions of the government's decision, after its publication, in cases where the failure to make a decision on the applications prior to the government's decision resulted from reasons unrelated to the applicants, but to the conduct of the Respondent.

For example, in AdmP 813/02, *Anbawi v. Population Administration Office,* the Respondent approved upgrading the permit to stay in Israel of the petitioner *to an A/5 visa,* despite the freeze, because the application was submitted prior to the government's decision and the Respondent delayed handling the application.

12. It would not be reasonable or fair to apply the government's decision retroactively, when the criteria for determining the persons to whom the decision applies affects only the fortuitousness and arbitrariness of the time that one clerk or another handled the matter, and not to orderly criteria that relate to applicants, such as the time of submission of the application. The policy that the Respondent wishes to employ is based on chance, the vacation taken by the clerk handling the particular applications, in comparison to the diligence of another clerk before that particular week, a situation that makes a laughing stock of the rules on which proper public administration is based, of minimal fairness, and of the rule of law.

For example, a resident who was financially able to retain an attorney and file suit after his application was not approved for three months, will receive an upgraded status. On the other hand, a resident without that capability has to wait, as in the case of the Petitioner herein, for more than one year, and although the fee was paid before the application was submitted, and more than one and a half years passed before the policy was changed, her application is rejected.

13. An absurd situation arises, whereby the Respondent drags his feet and does not approve applications within the time schedule that he set, or the policy is changed and the government's decision and the non-upgrading of applications are declared,

affecting even those applications that were not approved solely because of delay on the part of the Respondent. After a petition is filed, the Respondent's counsel also drags his feet, such that, although the petition was filed one year and two months after the request for upgrading of status was made, it takes the Respondent five months after the filing of the petition to announce his decision. In the meantime, the government's decision had become a proposed bill.

Harm to the Petitioners

14. While the Respondent and those close to him diligently endeavor to draft statues, the rights of the family – this couple who have been married for more than a decade and their six minor children – to maintain a family unit in a normal, certain manner are infringed. So too is their right to know that they can rely on the promises and a fair application of the rule of law and fair policy of state agencies.

15. On the other hand, the grave harm caused to the Petitioners provides no benefit to the Respondent or the public, for Petitioner 2, a 48-year-old male, has never been deemed a danger to the public, except for the recent court document stated above. The spouse's past is free of any criminal or security stain; he has never been arrested or questioned for an offense.

16. As set forth at length in the petition, the Respondent breached the state's constitutional and international obligations to respect the supreme value of family life and the best interests of minor children. It also breached Israeli law that statues and policy are not to be applied retroactively. The Respondent is acting in this way for arbitrary reasons relating to the slow pace at which the clerks in his office work, and his actions are not based on criteria applied equally, such as the time that the application was submitted on behalf of the applicants with whose fate he is entrusted.

Conclusion

17. The Petitioners set forth at length in the petition the constitutional and international obligations of the state to respect the supreme value of family life and the best interests of minor children, as well as the principle that legislation and policy are not to be applied retroactively. In ignoring these obligations, the Respondent is flagrantly unreasonable in his actions, causing grave harm to lives of the residents and to public trust.

18. Therefore, the Petitioners repeat their request to the Honorable Court to order the Respondent to approve the Petitioners' application for family unification, such that the spouse is allowed to stay in Israel pursuant to an A/5 visa. Reference is made to the relief requested in Section 67 of the petition.

As a supplement to grounds for the application, the court is referred to the petition.

In light of the aforesaid, the Honorable Court is requested to give its ruling on the basis of the contents of the petition and to order the Respondent to pay the costs of suit and attorney's fees.

Today, 15 July 2003

[signed]
Adi Landau, Attorney
Counsel for Petitioners

Procedure for Comments by [Security]

Officials regarding Applications for Family Unification

1. General

1.1 In exercising his discretion pursuant to the Entry into Israel Law and the Nationality Law, the Minister of the Interior may take into account, *inter alia*, the question whether approving the application of a foreigner to stay in Israel is liable to create a danger to public safety and welfare, to state security, or to the state's vital interests.

1.2 Therefore, in handling applications for family unification submitted by Israeli citizens and permanent residents to obtain a status for the foreign spouse, the Ministry of the Interior must forward to security and police officials (hereinafter: the security officials) the particulars of the application and obtain their recommendation and opinion as to whether approval of the application will create a danger to public safety, state security, or the state's vital interests.

1.3 The referral to security officials is necessary both at the time of the initial submission of the application, prior to its approval, and during each of the years of the graduated process, and certainly in the last stage of the process – before the granting of the status of Israeli citizen or permanent resident to the foreign spouse.

1.4 In examining the application and making their recommendation to the Minister of the Interior, in addition to the question of the gravity of the existing information, the security officials shall relate also to the question of whether the information they have relates to the Israeli or foreign spouse, and also to the question of the kind of information: conviction, pending cases, and/or intelligence information, and also to the stage in the graduated process in which the spouse is in.

1.5 Upon receiving the recommendation of the security officials, the Ministry of the Interior is required to take into account the information presented to it as set forth above, according to the stage of the graduated process, and to decide whether or not to reject the application.

2. Handling

2.1 When the relevant procedure calls for the security officials to be consulted prior to giving a decision on the application, the query to the security officials, delineating the identity of the Israeli spouse [the applicant], the foreign spouse [the invitee], and the stage of the graduated process in which the spouse is in.

3. Responses of the security officials

3.1 At the time of submission of the application – reasons related to the invited spouse (the foreigner)

3.1.1. When the security officials recommend rejection of the application for reasons related to convictions of the invited spouse and the Ministry of the Interior considered and found that it should adopt the recommendation and reject the application, a letter is to be sent to the applicant that his [or her] application for family unification for his [or her]spouse has been rejected for the reason that the foreign spouse had been convicted of offenses, which are delineated in the letter of rejection.

The form of the letter of rejection is attached as Appendix 1.

3.1.2 When the security officials recommend rejection of the application for reasons related to pending cases against the invited spouse and the Ministry of the Interior considered and found that it should adopt the recommendation and reject the application, a letter is to be sent to the applicant that his [or her] application for family unification for his [or her]spouse has been rejected for the reason that criminal cases are pending against the invited spouse, which are delineated in the letter of rejection. The letter shall also mention that an application on behalf of the invited spouse may be submitted if and when these cases are closed.

The form of the letter of rejection is attached as Appendix 2.

3.1.3 When the security officials recommend rejection of the application for reasons related to intelligence information and the Ministry of the Interior considered and found that it should adopt the recommendation and reject the application, a letter is to be sent to the applicant that his [or her] application for family unification for his [or her]spouse *has been rejected.* The notification of rejection will include a brief description of the intelligence information (hereinafter: the paraphrase) on which the rejection was based.

The form of the rejection to which the paraphrase provided by the security officials is to be added is attached as Appendix 3.

3.1.4 In extraordinary cases in which security officials are of the opinion that the brief paraphrase cannot be made, as set forth above, the rejection will be issued without the paraphrase, noting the fact that the application was rejected for reasons related to criminal activity or because of danger to state of security or the public welfare, to state more details. security or to the state's vital interests, and that it is not possible, for reasons

- The form of the rejection for activity that endangers state security and further details of such cannot be provided is attached as Appendix 4.
- The form of the rejection based on criminal activity is attached as Appendix 5.

3.2 At the time of submission of the application – reasons related to the Israeli spouse

3.2.1 In general, an application for family unification will be rejected for reasons related to the applicant in exceptional cases, such as when the applicant is serving a prison sentence or is in detention and/or has a pending case against him [or her], as to which the applicant is expected to receive a lengthy prison sentence in the near future, or where the applicant is incarcerated until the end of the judicial proceedings.

3.2.2 Therefore, in cases in which the security officials recommend rejection of the application for reasons based on convictions of the applicant for which he [or she] is serving or is likely to serve a lengthy prison sentence and/or is incarcerated until the end of the judicial proceedings, notification of rejection is to be given to the applicant accordingly, mentioning that upon release from detention/imprisonment, a new application for family unification may be submitted for the foreign spouse, and that at this stage, the spouse must leave Israel.

- The form of the letter of rejection is attached as Appendix 6.

- The form of the rejection for the reason that there are pending cases, in which it is anticipated that the applicant will be sentenced to a lengthy period of detention/imprisonment in the near future or where the applicant is incarcerated until the end of the judicial proceedings, is attached as Appendix 7.

3.3 During the course of the graduated process – reasons related to the invited spouse (the foreigner)

3.3.1 Convictions

As stated in the submission of application stage.

The responses will be made in accordance with the attached appendixes referred to above.

3.3.2 Court action

3.3.2.1 As a rule, when a court action, opened after approval of the prior residency permit that was given him [or her] as part of the graduated process, is pending against the invited spouse, discretion will be exercised abed on the individual case, taking into account the kind of offense, the gravity of the offense, the gravity of its consequences, the number of offenses for which cases have been opened, and so on.

The form of the letter is attached as Appendix 8.

3.3.3 Intelligence information

3.3.3.1 As a rule, when there is intelligence information against the invited spouse, discretion will be exercised taking into account the specific scope of involvement, severity of involvement, and so on.

The responses will be made in accordance with the appendixes attached to the submission of application stage.

3.4 During the graduated process – reasons related to the Israeli spouse

3.4.1 When, during the graduated process, the applicant is detained/imprisoned, the circumstances and substance of the matter will be taken into account. The fact of detention/imprisonment will be taken into account where a request to extend the permit is submitted, provided that the foreign spouse is still married to the applicant, the center of life is in Israel, and there are no other criminal or security grounds to reject his request. Among the factors to be taken into account are the period of time since the application was approved, custody of minor children, the degree of ties to Israel, and so on.

THE STATE OF ISRAEL

Ministry of the Interior

(4)

Family unification No. _____

Date: _____

_____

_____

_____

_____

Hello,

Re: **Application for Family Unification No. _____**

I hereby inform you that your application for family unification with _____ ID/Passport No. _____ has been rejected in light of information on activity in which the invited spouse has been involved and which can endanger the security of the state.

For reasons of security and/or the public good, it is not possible to set forth the particulars in greater depth than as stated above.

Your spouse must leave Israel immediately.

Sincerely,

Name: _____

Position: _____

Signature: _____

Population Administration District Office _____Telephone ___

_____

STATE OF ISRAEL

Ministry of the Interior

(3)

Family unification No. _____

Date: _____

_____

_____

_____

_____

Hello:

Re: **Application for Family Unification No._____**

I hereby inform you that your application for family unification with _____ ID/Passport No. _____ has been rejected, in accordance with data in our possession, which indicate that:

_____

_____

_____

_____.

Your spouse must leave Israel immediately.

Sincerely,

Name: _____

Position: _____

Signature: _____

Population Administration District Office _____Telephone _____