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At the Supreme Court **HCJ 5030/07**
Sitting as the High Court of Justice **Scheduled for March 15, 2009**

In the matter of:

HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger

represented by counsel, Adv. Yotam Ben Hillel et al.
of HaMoked Center for the Defence of the Individual,
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The Petitioners

v.

Minister of Interior et al.

Represented by the State Attorney's Office
29 Salah al-Din St., Jerusalem
Tel: 02-6466590; fax: 02-6467011

The Respondent

Brief of the Petitioner

The Petitioner hereby respectfully submits its brief:

1. This petition seeks repeal of Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 (hereinafter: **the Law** or **the Temporary Order**), inasmuch as it applies to the minor children of permanent residents of Israel, as it is unlawful.

2. A number of additional public petitions challenging the Law are pending before the court and are heard in tandem with this petition: HCJ 830/07 **Tabila et al. v. Minister of Interior et al.**, HCJ 544/07 **The Association for Civil Rights v. Minister of Interior** and HJ 466/07 **Galon v. Minister of Interior**. The Petitioner is in agreement with the arguments made in these petitions and therefore has not repeated them in the petition at bar. This petition concerns a unique aspect of the challenge to the Temporary Order: **the Law's severe implications for the lives of children who are members of one of Israel's most disadvantaged populations: the children of East Jerusalem**.

3. It should be noted at this early point that applying the Law to children serves no substantive security purpose. As detailed below, the State's arguments on this point are vague, unclear and do not rely on relevant data.

4. On the other hand, the Law causes severe violations of constitutional rights. The Law breaches Israeli residents' constitutional right to a family life with their children and their right to equality. The main victims of these violations are children of permanent residents of East Jerusalem who are over 14 years of age. With no clear explanation in terms of security, the arrangement stipulated in the Law creates severe discrimination against these children. It discriminates between them and younger children, children with two Israeli parents, children of Jewish immigrants, children one of whose parents is a West Bank resident and the other an Israeli citizen.

5. It seems that the only two reasons for this discrimination are demographic and financial: it is an opportunity to cast a net around the population of "descendents of Arab nationals" and exclude it from the group of right bearers in the country, while saving on the cost of social benefits.

The injury to children

We shall first recall the sections in the Temporary Order that have implications for the children of permanent residents.[1]

The definition of "resident of the Area" – registration in the Area as conclusive evidence

6. Sec. 1 of the Law, the definitions section, sets forth:

> "Resident of the Area" – someone who has been registered in the population registry of the Area, as well as someone who resides in the Area notwithstanding the fact that he has not been registered in the population registry of the Area, but excluding a resident of an Israeli settlement in the Area.

7. This section, following an amendment made in 2005, extended the definition of the term "resident of the Area" to ostensibly include not just residents of the Occupied Palestinian Territories (OPT) who actually reside there, but also anyone who is registered in the population registry of the OPT even if they have never lived there. Under the Respondents' broad interpretation of this definition, the population registry no longer constitutes presumptive evidence of the veracity of the particulars appearing therein and turns into conclusive evidence which cannot be disputed. We note that the interpretation of this section is currently pending before the Honorable Court in AAA 1621/08 **State of Israel – Ministry of Interior v. Ziad Hatib**.

8. We note that defining a resident of the Area according to the Palestinian population registry and considering the records of the registry as conclusive evidence subverts Israeli law for an unacceptable purpose – applying the Law to as many individuals as possible. When it comes to children, the Respondents rely on this section and refuse to examine a parent's claim that his child is not a Palestinian resident in practice. The Respondents claim that the written records cannot be disputed, as if the population registry were conclusive. They do so despite being well aware that many children are registered in the OPT even though their families have always

[1] As recalled, the Law does not apply to children of Israeli citizens as they are registered as Israeli citizens at birth by virtue of being born to a citizen.

maintained a center of life in Israel (see paras. 17-18 of the petition for details on the reasons for registering children in the population registry of the OPT).

9. It seems that expanding the definition of "Resident of the Area" in the amended Law was designed to overcome the obstacle case law has presented to the Respondents' efforts to reduce the number of cases in which Israeli status is granted to children of East Jerusalem residents. In a number of judgments delivered by the Courts for Administrative Affairs, the Courts have held that the definition of "resident of the Area" that appears in the Law refers to actual residency rather than population registry records. The Ministry of Interior was accordingly required to examine status applications for children who were alleged to be residents of East Jerusalem in practice, despite being registered in the OPT, on their merits. Appeals submitted by the Respondents from these judgments have been rejected (see AAA 5569/05 **'Aweisat et al. v. Minister of Interior et al.**, judgment dated August 10, 2008 (hereinafter: **'Aweisat**). It should be noted that the Honorable Court was not required to address the interpretation of the current definition of the term "resident of the Area" in these appeals.

10. It should be noted: According to the Ministry of Interior, the Law blocks proceedings under Regulation 12 of the Entry into Israel Regulation, when the child, who was born in Israel and maintains a center of life in the country was registered in the OPT for one reason or another.

The rule – prohibition on granting status and the exception for children

11. Section 2 of the Law sets forth:

> During the period when the Law is in force, the provisions of any other law, including section 7 of the Citizenship Law, notwithstanding, the Minister of Interior shall not grant citizenship to a resident of the Area or to a citizen or resident of a state listed in the Schedule in accordance with the Citizenship Law and he shall not grant such a person a permit for residency in Israel in accordance with the Entry into Israel Law, and the commander of the Area shall not grant a resident of the Area a permit to stay in Israel in accordance with security legislation in the region.

This section is the lynchpin of the Law. It revokes powers granted to the Minister of Interior pursuant to the Entry into Israel Law and the Citizenship Law that allow him to use discretion on granting Israeli residency permits to residents of the West Bank and Gaza Strip. It also revokes the powers granted to the military commander of these territories to use discretion on granting stay permits for Israel. The Section effectively revokes family unification for citizens and residents with spouses from the OPT.

12. Section 3A of the Law relates to children:

> Notwithstanding the provisions of Section 2, the Minister of Interior, using his discretion, may –
>
> (1) grant a minor resident of the Area who has not reached 14 years of age, a license to reside in Israel for the purpose of preventing his separation from his guardian parent who lawfully resides in Israel;
>
> (2) approve an application for a permit to stay in Israel to be granted by the commander of the Area to a minor resident of the Area who is over the age of 14 for the purpose of preventing his separation from his guardian

parent who lawfully resides in Israel, and provided that said permit is not extended if the minor does not permanently reside in Israel.

13. Thus, Section 3A distinguishes between children in different age groups and creates two different classes:

    a. **Children 14 years of age and younger:** children to whom the Minister of Interior may grant **status in Israel**.

    b. **Children over 14 years of age:** children to whom the Minister of Interior may not grant status in Israel. They will, at most, be granted a **stay permit for Israel**.

14. The stay permit given to children who are over the age of 14 (hereinafter: **DCO permits**) (compared to permanent or temporary residency status): this is a military-issued permit which is parallel to a tourist visa. It is normally given for six months at a time. This is primarily a permit which allows presence in Israel and free movement inside the country. Therefore, in terms of security, it is no different from the visas granted to younger children. As noted by the Israel Security Agency (ISA, formerly also known as GSS and shin-beit) representative in the session held by the Knesset's Internal Affairs and Environment Committee prior to the first amendment to the Law, the difference is the social benefits the children receive. There are also differences in the practical details of issuing and extending the permits. These differences have a substantive impact on the lives of the individuals "enjoying" the permits.

    We elaborate on this issue:

    a. Unlike permanent residency, or temporary residency, a DCO permit does not confer any social rights. Thus, for example, the children of an Israeli resident would not be entitled to receive child benefits or disability benefits, if, heaven forbid, they should so require. In addition, such children would not be entitled to national health insurance. Should they fall ill and require a medical diagnosis, treatment, or hospitalization, despite being children of an Israeli resident and despite residing in Israel with their mother, they would not be entitled to support from the State of Israel, unlike the children of the rest of the country's residents. Non-entitlement to national insurance is particularly grave and significant in the case of East Jerusalem children, who are born into a reality of lack of adequate infrastructure, poverty and suffering (these issues are discussed in detail in the petition, see paras. 43-59 thereof).

    b. The Ministry of Interior refers individuals who are entitled to DCO permits to the District Coordination Offices (DCOs) in the OPT using a form entitled "DCO Referral". These referrals are issued for a period of one year and may be extended for a similar period of time upon expiry. A person who wishes to extend his "DCO Referral" must arrive at the Population Administration Bureau two months before the expiration of his current referral in order for the new referral to be ready for him on the date he is summoned to the bureau, which is usually very close to the expiry date of the present referral. This matter was regulated only following a petition filed by HaMoked (AP 612/04 **Dahoud et al. v. The Minister of Interior et al.**). However, despite this undertaking, which the Respondents made before the Court, they fail to follow this procedure in many cases, leaving individuals who are entitled to DCO permits unable to obtain the referrals, without which permits are not issued, sufficiently ahead of time. As a result, many, including children, remain without valid permits, sometimes for many months.

    c. These are not the only problems facing individuals who are entitled to DCO Permits. As aforesaid, DCO referrals are issued for periods of one year, although the permits themselves

are given, as a rule, for periods of six months at most. In other words, children who are entitled to DCO permits, are required to leave their home in Jerusalem and go to DCOs in the OPT at least twice a year. Children who arrive at the DCOs with referrals from the Ministry of Interior often discover that their DCO permit is not yet ready. Sometimes the DCO is closed when they arrive. Sometimes the DCOs are closed for extended periods of time, for instance, due to strikes. In other words, this is a further obstacle in the children's path to obtaining a permit that would allow them free movement at some level or another. In these instance too, the result is that many children remain without valid permits.

d. Finally, it is not superfluous to note that children who have DCO permits only, like all individuals who are considered "OPT residents", are unable to cross any roadblock in Jerusalem and its vicinity. They may only cross at a very limited number of roadblocks (called "crossings"). This fact restricts travel, and often makes it more expensive for the entire family, as they must all travel with their siblings/children through the same crossing.

15. In conclusion: The manner in which the Law regulates the issue of children aged over 14 discriminates against such children with respect to other children of their age, children of other Israelis. In addition, such children are discriminated against also with respect to the children of residents in a similar position, who are less than 14 years of age. This discrimination is, primarily, in the receipt of basic social rights as well as discrimination in freedom of movement, which is created as a result of the problematic permits regime described above. This matter shall be further specified below.

16. It should be stated that the fate of children who receive DCO permits is unknown once they reach age 18. Indeed, the Respondents state in para. 165 of their Response that "minors who receive a residency permit or stay permit, as relevant, will continue to enjoy the same status after reaching the age of 14 or the age of 18, as relevant, subject to whether they continue to reside in Israel on a permanent basis and security and criminal clearance".

However, it is already evident that this proclamation is meaningless. This is so, for instance, in the case of children who receive temporary status and wish to marry.

Let us use the case of a young woman who receives DCO permits, reaches the age of 18 and wishes to marry her fiancé, a resident of Jerusalem. If she lives with her spouse, under current Ministry of Interior policy, she would no longer receive stay permits on the pretext that the permits had been given to her on the assumption that she lives with her mother or father who are residents. After marriage, separation between a child and her resident parent is no longer an issue. On the other hand, pursuant to the provisions of the Law, her spouse would be unable to file a family unification application for her if she is too young (under the age of 25). Will she be forced to live in Israel illegally? Will she be forced to leave Israel with her spouse, thereby jeopardizing her spouse's residency status?

This is not a theoretical scenario. Applicants in similar situations have been contacting the Petitioner. The threat of deportation from Israel has not yet been lifted from these adolescent children.

Application of the draconian security preclusion section on children

17. An additional legal provision which applies to residents' children aged 14-18 is Section 3(d) of the law, which sets forth:

> A permit to stay in Israel or a license to reside in Israel shall not be granted to a resident of the Area, in accordance with sections 3, 3A(1), 3A(2), 3B(2)

> and (3) and 4(2) and a license to reside in Israel shall not be granted to any other applicant who is not a resident of the Area, if the Minister of Interior or the commander of the Area, as the case may be, has determined, pursuant to the opinion of competent security officials that the resident of the Area or other applicant or their family member is liable to constitute a security threat to the State of Israel; in this section, "family member" – spouse, parent, child, brother and sister and their spouses.
>
> To this effect, the Minister of Interior may determine that a resident of the Area or any other applicant is liable to constitute a security threat to the State of Israel, among other things on the basis of a security personnel opinion stating that activities which pose a security threat to the State of Israel or its citizens are taking place in the country or area where the resident of the Area or any other applicant resides.

This section includes two grave provisions which are applied, *inter alia*, to the children of residents aged 14-18.

18. The first clause of the Section stipulates that a stay permit for Israel will not be granted, *inter alia*, in cases where the opinion of competent security officals has led to the conclusion that a resident of the Area or a member of his family may constitute a security threat. **For the purpose of this section, a "family member" is a spouse, parent, child, brother or sister and their spouses. As an example, an opinion by security personnel that the brother-in-law of a 14-year-old child may pose a security risk is sufficient for separating this child from his mother and expelling him to the OPT, even if the child has never met his brother-in-law and has no contact with him**.

19. It should be stated that, according to the Section, there need not be any security allegation against the child himself in order to separate him from his mother or father. In the case of family members too, who need not necessarily be immediate relatives, there is no requirement to establish security suspicions. The section requires no conviction for security offences, nor does it require the suspect to be wanted by security forces, under arrest or even under investigation. An opinion by security personnel that a distant relative might constitute a security threat is all that is needed for separating minor children from their parents.

20. In the final clause of the Section, the legislator has outdone himself by empowering the Minister of Interior, in Amendment No. 2 to the Law, to determine that an OPT resident or any other status-applicant, constitutes a security threat based solely on a determination that **activity which poses a threat to the State of Israel or its citizens is taking place in his area or country of residence**. This is a particularly draconian addition that may have harsh and absurd results with respect to the children of residents as well.

The "humanitarian section" added to the Law

21. Amendment No. 2, added Section 3A1 to the Law. The new Section empowers the Minister of Interior to approve temporary status in Israel on special humanitarian grounds, according to the recommendation of a professional committee which he appointed for this purpose.

22. It appears that by legislating this section, the legislator sought to rectify the many flaws in the Law that were pointed out by the justices in HCJ 7052/03 **Adalah et al. v. The Minister of Interior et al.**, TakSC 2006(2), 1754 (hereinafter: **Adalah**). As noted in the petition, **the majority of the Adalah bench believed that the Law was unconstitutional, not because it**

lacked a humanitarian exception, but rather because its main arrangement is a flat denial of applications on a collective basis without individual examination. Graver still, the "humanitarian exception" that was added is so restricted that it loses any real meaning. Thus, for example, the maximum status that may be received under the "humanitarian exception" is temporary. In addition, the Section presents no solution for unique cases. The exception is inapplicable unless the applicant's "family member" is legally present in Israel. A "family member" is defined as only the applicant's spouse, parent or child. Needless to say, humanitarian exceptions are primarily designed for unusual cases and unique circumstances that do not come under the terms of this narrow definition. A further serious issue is the fact that the Minister of Interior may subject humanitarian exceptions to a quota. Placing arbitrary quotas is entirely unacceptable and diametrically contradicts the idea of a "humanitarian exception".

23. It should be stated that this Section provides no remedy for the children of permanent residents. Under Subsection e(1):

> The fact that the family member of the applicant for a permit or license, who lawfully resides in Israel is his spouse, or that the spouses have children together, will not, in and of itself, constitute special humanitarian grounds.

24. Therefore, the failure to assist the children of permanent residents in the absence of additional humanitarian grounds in their case can be added to the list of flaws plaguing the "humanitarian exception" section. This flaw means that **the fact that the child resides in Israel with his resident parent does not constitute sufficient humanitarian grounds for granting him status**.

Summary: The legal provisions pertaining to children

25. According to the Respondents, the amendments made to the Law in 2005 and 2007 were intended to mitigate the Law and make it proportionate. Seemingly, the amendments did introduce some improvements on the issue of children. However, concurrently with the Respondents' concession to grant children of residents who are between the ages of 14 and 18 permits to stay in Israel and to raise the cut-off age for granting status from 12 (in the Law prior to the amendment) to 14, the Respondents expanded the definition of the term "resident of the Area" such that children who were born and live in Israel, and to whom the previous version of the Law did not apply, now come under its terms.

26. In addition, pursuant to Section 3D of the Law, if security personnel presented an opinion whereby a member of the child's family member, such as a brother-in-law, might constitute a security threat, a child aged between 14 and 18 would be denied the possibility of receiving even a permit to stay in Israel and face expulsion.

27. Children aged over 14 are not entitled to status under the Law, and hence they are not entitled to any social rights or insurance. This is the case even if they are deemed to be residing with their mother, an Israeli resident, or with their resident father, in Jerusalem, possibly throughout their lives.

28. The humanitarian exception has also forsaken the children. As detailed in the petition, this was done in contravention of the Court's position in **Adalah**, and through a hasty and defective legislative process.

The Court's position on children's rights

29. Amendment no. 2 to the Law continues the trend of disavowing the needs and best interests of the children of residents who come under the Law. The drafters of the amendment, in other words – the Respondents have outdone themselves in completely ignoring these needs and interests. As aforesaid, the amendment's drafters touted their attempt to adjust the amendment to the HCJ's holdings in **Adalah**. However, as they did on other issues, they also missed their goal on the issue of the children. The disregard they have shown to the Law's influence on the children of Israeli residents is inconsistent with HCJ holdings on this issue.

30. The **Adalah** justices focused on the harsh impact the Law has on the rights of Israelis who marry residents of the Territories. Lamentably, most of them did not devote attention to the impact the Law has on children despite the fact that one of the petitions on which they ruled in the **Adalah** judgment specifically addressed this issue (HCJ 10650/03 **Abu Gwella et al. v. Minister of Interior et al.**) Nevertheless, remarks made by the justices who did choose to refer to the subject clearly reveal that the sections of the Law pertaining to the status of children form part of a wrongful and unconstitutional arrangement. Moreover, one of the majority justices who decided to refrain from repealing the Law, Justice M. Naor, was not comfortable with the manner in which the Law applied to children. We explain in detail.

31. In his judgment, President (emeritus) A. Barak referrs to the right of the Israeli parent to raise his child in his country on the one hand, and the right of the child to grow up in a complete and stable family unit on the other:

> **Respect for the family unit has, therefore, two aspects.**
> **The first aspect is the right of the Israeli parent to raise his child in his country**. This is the right of the Israeli parent to realize his parenthood in its entirety, the right to enjoy his relationship with his child and not be severed from him. This is the right to raise his child in his home, in his country. This is the right of the parent not to be compelled to emigrate from Israel, as a condition for realizing his parenthood. It is based on the autonomy and privacy of the family unit. This right is violated if we do not allow the minor child of the Israeli parent to live with him in Israel. **The second aspect is the right of the child to family life. It is based on the independent recognition of the human rights of children.** These rights are given in essence to every human being in as much as he is a human being, whether adult or minor. The child 'is a human being with rights and needs of his own' (LFA 377/05 **A v. Biological Parents** [21]). **The child has the right to grow up in a complete and stable family unit. His welfare demands that he is not separated from his parents and that he grows up with both of them.** Indeed, it is difficult to exaggerate the importance of the relationship between the child and each of his parents. The continuity and permanence of the relationship with his parents are an important element in the proper development of children. From the viewpoint of the child, separating him from one of his parents may even be regarded as abandonment and affects his emotional development. Indeed, 'the welfare of children requires that they grow up with their father and mother within the framework of a stable and loving family unit, whereas the separation of parents involves a degree of separation between one of the parents and his children' (LCA 4575/00 **A v. B** [26], at p. 331). (**Adalah**, judgment of President Barak, para. 28) (emphases added – Y.B).

32. Justice S. Joubran, who supported the position of President (emeritus) A. Barak, also refers in his judgment (paras. 11-14) to the considerable significance attached to the child's shared life with his parents, and to the State's duty to refrain from interfering in this shared life, with the exception of cases where such intervention serves the child's best interests:

> The raising of a child by his parents reflects simultaneously **both the right of the child to grow up in his parents' home and the right of the parents to be the persons who raise him**. This combination of interests embodies the nature of the parent-child relationship within the framework of family life, **which the state should protect against any violation, unless it is required in the best interests of the child**.

Justice Joubran added:

> No one disputes that enforcing a separation of a child from his parents constitutes a very serious violation of the rights of the child to grow up with his family and with his parents. This is of course the case as long as the family concerned is a functioning one, where the child is not harmed by being with it…
>
> We are not speaking merely of harm to the '**best interests of the child**,' but of a violation of a real '**right**,' which is possessed by the child, to grow up with his family, and the state has a duty to refrain in its actions from violating this right (CA 2266/93 **A. v. B** [61], at pp. 234-235). **By tearing asunder the family unit, by separating the child from one of his parents, there is a serious violation of the rights of the child, a violation that the state is obliged to avoid in so far as possible…**
>
> The same is true with regard to the right of the parent, who has a natural right, protected by the law, to raise his child with him and not to be separated from him, as long as this does not involve any harm to the best interests of the child...
>
> **There is no doubt that separating a parent from his child, separating a child from one of his parents and splitting the family unit involve very serious violations of both the rights of the parents and the rights of their children. These violations are contrary to the basic principles of Israeli law and are inconsistent with the principles of protecting the dignity of parents and children as human beings, to which the State of Israel is committed as a society in the family of civilized peoples.** (Emphases added – Y.B).

33. One of the majority justices, Justice M. Naor, expressed her dissatisfaction with the manner in which the Law is currently applies to children. In para. 24 of her opinion, Justice Naor ruled that should the Law be extended:

> I would add that the state should also consider, in my opinion, **a significant increase of the age of minors to whom the prohibition in the law will not apply** (**Adalah)** (Emphasis added – Y.B.).

34. Vice President (as was his title at the time) M. Cheshin, who delivered the majority opinion, also referred to the subject. In para. 22 of his judgment, he describes the mitigating changes that were introduced into the Law with Amendment No. 1 of August 2005 and holds:

> It was also determined (in s. 3A) that in order to prevent the separation of a minor from his custodial parent who is lawfully in Israel, the prohibition in the law shall not apply to a minor of up to 14 years of age, and that with the approval of the Minister of the Interior and the military commander, the stay in Israel of a minor who is a resident of the territories and who is up to 14 years of age will be allowed, here too in order to prevent his separation from his custodial parent. **It should be emphasized that the provisions of section 3A of the law only concern minors who are residents of the territories, were not born in Israel and wish to join their custodial parent who lives in Israel. A minor who was born in Israel to a citizen or resident of Israel is entitled to receive the status of his parent, according to the provisions of s. 4A(1) of the Citizenship Law, 5712-1952, and r. 12 of the Entry into Israel Regulations, 5734-1974.** (Emphasis added – Y.B.).

In para. 67 of his judgment, Vice President Cheshin adds:

> The law does not apply at all to a child who was born in Israel to an Israeli parent, since such a child receives the same status as his Israeli parent.

35. Vice President Cheshin does believe the Law is proportionate. Yet, this holding is based, *inter alia*, on the assumption that the violation of children's rights is less severe than the one caused as a result of the Respondents' practical interpretation of the Law. In other words, he believes the violation does not extend to all those children to whom the Respondents apply the Law and deny status despite the fact that they were born in Israel.

36. As aforesaid, six of the panel's eleven justices ruled that the Law disproportionately violates the constitutional rights to family life and equality. If one adds to that Justice Naor's position, there is a solid majority among HCJ justices against applying the Law to children. At the very least, this is a position which requires the legislator to minimize the Law's application to children.

37. In conclusion, we reiterate – even in its post Amendment No. 2 version, the Law still fails to meet the principles and requirements expressed in **Adalah**. As we demonstrate below, this amendment also fails to rectify the constitutional defects that have plagued the Law since it was first conceived. The Respondents were given an opportunity to amend the Law with respect to children so that at least with respect to that issue, the provisions of the Law would conform to the statements of the justices and the spirit of the judgment. It is lamentable that the issue of the children was once again entirely forgotten, not a single word spoken of it.

38. As a result, even after Amendment No. 2, the children of residents of Israel, who reside in Israel, remain without status in the country and with no social rights. Since these facts are not deemed "humanitarian"[2] by the Respondents, the mere addition of the "humanitarian exception" to the Law is of no assistance to them. A child's mere registration in the OPT also continues to

[2] See Section 3A1 of the amended Law.

constitute conclusive evidence of his being "an OPT resident" and, therefore, sufficient grounds for applying the Law. Additionally, even after the amendment to the Law, the matter of children aged between 14 and 18 still depends on some vague claim regarding a security threat posed by a relative. Such a claim would deny the possibility of granting them even a temporary permit to stay in Israel they face only one fate - expulsion.

Violation of Basic Human Rights

39. Every child who is born in the world is entitled to be registered as a human creature recognized by the authorities.

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. (Article 7(1) of the **Convention on the Rights of the Child**).

See also Article 8 of the Convention and Articles 6 and 15 of The Universal Declaration of Human Rights – 1948, Article 24 of the International Covenant on Civil and Political Rights, Articles 16 and 24 of the International Covenant on Civil and Political Rights which came into force with respect to Israel on January 3, 1992.

40. The right to an identity and a nationality is then acknowledged as a basic right in international law, which was adopted by the State of Israel. The Temporary Order undermines this right.

The State's response to the petition

41. The Respondents' response, which relates to all the petitions challenging the Temporary Order addresses the arguments made in the petition at bar very briefly. The Respondents devote only two pages of their 80-page response to the issue of children. Their position boils down to a statement made in para. 162 of the Statement of Response to the effect that: "even those who maintain that an Israeli parent has a right to live in Israel with his children agree that this right is upheld by the provisions empowering the Minister of Interior to grant youths stay permits for Israel. The petition must be rejected for this reason alone, as the Law violates no constitutional right".

42. This argument cannot stand. **First**, as explained in detail in the petition, the **Adalah** judgment explicitly states that the right to family life is a constitutional right which includes the right of the Israeli parent to raise his children in Israel. The Court also held that the Temporary Order infringes on the right to family life. The disagreement centered on the proportionality of the infringement. **Second**, as detailed below, granting children stay permits does not, in any way, uphold the right to family life. **Third**, in claiming that the law ostensibly "violates no constitutional right", the Respondents also ignore the violation of Israel's permanent residents' right to equality.

We address each of these issues, beginning with the violation of the right to family life.

The right to family life and the right of children to protection by society

43. The residents of East Jerusalem have the right to live with their children in Israel safely during the processing of their status applications. The state has an obligation to prevent harm to these individuals as they are residents of Israel and parents of children. Yet this is not all the State must do. It must actively protect its citizens from any impediment to their ability to provide their children with the protection they need.

44. The right to family life is a basic constitutional right in Israel. It is part and parcel of the right to human dignity. This was widely supported by the Supreme Court justices presiding in **Adalah**. Eight[3] of the 11 justices of the panel, ruled that the Temporary Order violates the nucleus of the right to family life and to human dignity. President (emeritus) A. Barak summarized the rule established in the judgment with respect to the status of the right to family life in Israel in para. 34 of his judgment:

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

45. International law also establishes that the right to family life should be defended in the broadest possible manner. Thus, for example, Article 10(1) of **The International Covenant on Economic Social and Cultural Rights,** ratified by Israel on October 3, 1991, sets forth:

> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children…

(See also: Article 16(3) of the **Universal Declaration of Human Rights** adopted by the General Assembly of the United Nations on December 10, 1948; Article 17(1) of the **International Covenant on Civil and Political Rights**, which came into force with respect to Israel on January 3, 1992), Article 8 of the **European Convention on Human Rights**.

46. The Courts' case law set constitutional limits on State interference in the family unit and in the parents' autonomy with respect to decisions concerning their children. This case law was presented in detail in the petition and we need not repeat it. As detailed above, the **Adalah** justices have also addressed this issue.

How is a resident's right to a family life with his child upheld in practice?

47. In other words: what parameters are included in the constitutional right when the issue involves the child of an Israeli resident?

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[3] President (emeritus) Barak, Justice (her former title) Beinisch, Justice Joubran, Justice Procaccia, Justice Hayut, Justice (his former title) Rivlin, Justice Adiel and Justice Levi. It should be stated that Justice Adiel thought that the violation was proportionate under the circumstances.

48. The '**Aweisat** case, brought before this court, related to granting status to children under the Entry into Israel Law. Indeed, the issue there was granting status according to Regulation 12 of the Entry into Israel Regulations, i.e., status to children who were born in Israel. However, as per President (emeritus) Barak in **Adalah** "Even though this regulation does not apply, according to its wording, to children of residents who were not born in Israel, it has been held that the purpose for which r. 12 was intended applies also to the children of permanent residents who were born outside Israel." (para. 28 of President (emeritus) Barak's judgment). In any event, under the Respondents' interpretation of the Temporary Order, there is no difference between children of residents who were born in Israel and children born outside the country. The former, if registered in the OPT, should also come under the Temporary Order, according to this interpretation.

In **'Aweisat**, the Court held:

> **[W]hen the Minister of the Interior considers an application filed under Regulation 12, he must give significant weight to the best interest of the child and to the integrity of the family unit... [W]e must take into account the special nature of Regulation 12 as a regulation designed to promote human rights. It does so from two aspects. One aspect relates to the right of the parent who has Israeli status to raise his child, that is to say the constitutional right of the parent to a family life. The second aspect relates to the independent and autonomous rights of the minor to live his life alongside his parents. President Barak related to this in <u>Adalah</u>: "The *second* aspect is the right of the child to family life. It is based on the independent recognition of the human rights of children. These rights are given in essence to every human being in as much as he is a human being, whether adult or minor … The child has the right to grow up in a complete and stable family unit. His welfare demands that he is not separated from his parents and that he grows up with both of them. Indeed, it is difficult to exaggerate the importance of the relationship between the child and each of his parents. The continuity and permanence of the relationship with his parents are an important element in the proper development of children. From the viewpoint of the child, separating him from one of his parents may even be regarded as abandonment and affects his emotional development."** (Paragraph 28 of the judgment of President A. Barak in **Adalah**).
>
> These two aspects – the one focusing on the right of the parent who has Israeli status to live with his child in Israel, and the other, focusing on the minor, whose human right not to be separated from his parents must be respected despite the fact that he has no status in Israel – underlie the purpose of Regulation 12. Against this backdrop, the Minister of the Interior is required to exercise his authority in such a way that these considerations are given significant weight, so that he can achieve the special purpose of the regulation. Indeed, recognition of the family unit which has expanded upon the birth of the child, and recognition of the minor's independent rights to a continuous relationship with his parents and to adequate emotional development, require that when considering an application under Regulation 12, significant weight be given to the fact that the child's center of life is in Israel, alongside his mother, his father or both (**'Aweisat**, para. 20) (emphasis added).

49. In a different case involving status pursuant to Regulation 12, the Court held:

> As a rule, our legal system recognizes and respects the value of the integrity of the family unit and the best interest of the child. Therefore, **it is necessary to prevent a discrepancy between the status of a minor child and the status of his guardian parent or the parent who has custody rights. From the point of view of granting Israeli residency permits, too, it seems that there is no justification for creating such a discrepancy as whatever justifications served as the foundation for granting the parent a residency permit would apply, as a rule, also to any child of his who was born in Israel and who resides with said parent**.
>
> (HCJ 979/99 **Carlo et al. v. Minister of Interior**, TakSC 399(3), 108, p. 109) (emphasis added).

50. Thus, granting status to a child of a resident under the Entry into Israel Law includes a number of elements: the integrity of the family unit, comparing the status of the child to that of his resident parent and the child's best interest. The Petitioner will argue that the State's position takes only one of these elements into consideration, namely, allowing a resident parent to live with his child in Israel, yet ignores the other elements. It should be noted that even on this issue, the solution the State offers – granting stay permits – is incomplete and deficient. Granting the children of residents stay permits overlooks the principle of status parity and the best interest of the child – a supreme value in Israeli and international law alike.

Status parity

51. Current case law produced by the High Court of Justice and the Court of Administrative Affairs (which now hears, *inter alia*, petitions regarding the Respondents' decisions on entry and residency visas under the Entry into Israel Law) has placed Regulation 12 alongside other statutory provisions that related to children of citizens and to the issue of bringing their status on par with that of their parents'. For example, President (emeritus) Barak ruled as follows in **Adalah** (para. 28 of his judgment)

> Israeli law recognizes the importance of making the civil status of the parent equal to that of the child. Thus, s. 4 of the Citizenship Law provides that a child of an Israeli citizen shall also be an Israeli citizen, whether he is born in Israel (s. 4A(1)) or he is born outside it (s. 4A(2)). Similarly, r. 12 of the Entry into Israel Regulations, 5734-1974, provides that 'A child who is born in Israel, to whom s. 4 of the Law of Return, 5710-1950, does not apply, shall have the same status in Israel as his parents.'

52. In the judgment given in AP 1158/04 **Nabhan v. the Regional Population Administration Bureau**, the Court held that under Regulation 12, anyone who was born in Israel to a parent who was a resident of Israel and who entered Israel legally, was entitled to acquire the status of his parents or one of his parents. The Court noted:

> This conclusion also necessarily follows from another parallel drawn in Regulation 12. The Regulation strives to apply to anyone who was born in Israel "and to whom Section 4 of the Law of Return, 5710-1950, does not apply"… Any Jew who was born in Israel or immigrated to Israel before the Law was enacted is deemed equal to anyone who immigrated to Israel under the Law. Moreover: any Jew born in Israel after the law came into force is

> deemed equal to a person who immigrated to Israel under the law… The law does not stop at conferring rights on Jewish immigrants only but goes on to establish that "the rights of an immigrant pursuant to this Law as well as other statutes", are also conferred on "the children and grandchildren of Jews, as well as the spouses of Jews and the spouses of the children and grandchildren of Jews". **The simple fact that Section 4 of the Law of Return, 5710-1950 is mentioned in Regulation 12 indicates that the Regulation was designed to regulate the status of individuals who are not immigrants but residents of Israel. There is no need to create an unnecessary discrepancy between the arrangement pertaining to Jews and Jewish immigrants and the arrangement pertaining to other residents. If the Law of Return extended the arrangement set therein in a comprehensive manner, there is no need to prevent Regulation 12 from similarly applying to the children of Israeli residents by including a restrictive arrangement within the Regulation**. (emphasis added – Y.B.).

53. The foregoing indicates that in the case law generated by the courts, Regulation 12 is viewed as **complementing the provisions of the Citizenship Law, 5712-1952** and **the Law of Return, 5710-1950.** Together, these provisions provide a protective shield for parents – whether citizens or residents, Jews or non-Jews – and their children, and ensure that the principle of status parity between them is respected. Indeed, Regulation 12 applies verbatim only to children who were born in Israel, but as aforesaid, its rationale – at least with respect to status parity – should apply to all children of residents, irrespective of their place of birth.

54. The Law prevents such application. It denies the possibility of granting status to children of Israeli residents who are between the ages of 14 and 18 only because they were born outside of Israel. Status is withheld even if such a child maintains a center-of-life in Israel. Moreover, under the definition of "resident of the Area" in Section 1 of the Law, it is sufficient for a child to have been registered in the population registry of the OPT, even if he has never lived there, to be denied status. Thus, variables over which children have no control, such as birthplace, date of birth, and place of registration, seal their fate to live a life without status in Israel.

55. Applying the principle of status parity to East Jerusalem residents and their children is necessary in view of their special status as individuals whom Israel made its residents in 1967. In this regard, their having one actual status and not another gives them the same civil rights conferred on citizens, except in a limited number of fields[4]. The Law does not mention any possibility of categorically preventing their children from obtaining status. Accordingly, there is no reason to preempt the Minister's discretion on granting status to the children of residents, whether they were born in Israel or the OPT. There is no reason to preempt the application of the basic principle of status parity to these children as well.

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[4] The Entry into Israel Law distinguishes between residents and citizens on the following matters: the right to vote in parliamentary elections, status subjected to actual residency, such that status is "revoked" if the status holder's center-of-life is outside Israel for a period of approximately seven years and different travel documents for residents and citizens. Another difference is that unlike the children of Israeli citizens, children of residents who are born in Israel do not receive their parents' status automatically. Rather, their status is determined in accordance with Regulation 12. The registration of children who were born outside of Israel and only one of whose parents is a resident – is not regulated in statute or regulation, but until the Temporary Order was enacted, the ability to grant them status was never questioned.

The best interest of the child

56. **The principle of the best interest of the child** is an elementary and well established principle of Israeli law. It is designed to direct the deciding authority, administrative or judicial, to use the best interest of the child as the criterion guiding any decision it makes concerning children. The international **Convention on the Rights of the Child**, which was ratified by Israel has gained increasing recognition as a complementary source on the rights of the child and as a guide to the interpretation of the "best interest of the child" as a primary consideration in our legal system, determines a series of provisions that require protection for the child's family unit. Thus, for example, Article 3(1) of the convention sets forth:

> 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…

57. Justice M. Cheshin referred to the matter in one of the cases brought before the court:

> **The best interests of the minor are a primary and decisive consideration. Disregard for the best interests of the minor; a decision which is not in the child's best interest or contrary to it; a decision on a minor that involves extraneous considerations; lack of appropriate weight to the best interests of the minor** – all these shall give rise to our authority to intervene in the rulings before us…and as aforesaid in CFH 7015/94 **Attorney General v. A.**, IsrSC 50(1) 119, 48: "The best interest of the child is the primary consideration, the decisive consideration. Indeed, there will be other considerations …but all these are secondary, and all of them are subordinate to the best interest of the child. (HCJ 5227/97 **Michal David v. The High Rabbinical Court**, TakSC 98(3), 443, p. 446). (emphasis added – Y.B.).

On this issue see also the remarks of Honorable President Shamgar in CA 2266/93 **A. v. B.**, IsrSC 49(1) 221, 235-236; HCJ 1689/94 **Harari et al. v. Minister of Interior**, IsrSC 51(1) 15, p. 20 opposite the letter B.

58. The State's obligation to ensure respect for the best interest of the child includes the duty to allow the child to maintain a normal relationship with his parents, exercise his right to education and have other social and cultural rights:

> Recommendation No. R(84)4 defines such responsibilities "as a collection of duties and powers which aim at **ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education**, his maintenance, his legal representation and the administration of his property".
>
> The Recommendation on policy to support positive parenting [Recommendation No. R(2006)19] recommends that the governments of member states **acknowledge the essential nature of families and of the parental role and create the necessary conditions for positive parenting in the best interests of the child and take all appropriate legislative, administrative, financial and other measures to this effect**.

> The goal of policy and measures should be **the harmonious development (in all its dimensions) and proper treatment of children, with due regard for their fundamental rights and dignity**.
>
> (COUNCIL OF EUROPE ACHIEVEMENTS IN THE FIELD OF LAW, FAMILY LAW AND THE PROTECTION OF CHILDREN, Prepared by the Secretariat of the Directorate General of Human Rights and Legal Affairs (DG-HL), CJ-FA (2008) 2, Strasbourg, August 2008).

How is the Best Interests of the Child Actually Determined?

59. The petition details the considerations that must be taken into account when contemplating what the best interest of a certain child or group of children might be. These considerations were detailed, *inter alia*, in a 2003 report by the Committee for Examining Elementary Principles relating to the Law and Children and their Legislative Implementation, headed by Justice S. Rotlevi, (hereinafter: **the Rotlevi Report**). The Committee presents a model which it suggests should be incorporated into the Law Promoting Children's Rights. The model includes a checklist intended to guide and instruct deciding officials on the considerations they should take into account when determining the best interests of the child (Rotlevi, general, beginning at p. 136). The "child's wishes, feelings, opinions and position on the matter at hand" are among factors that must be considered, as well as "the child's age and developing connections"; "the dimension of time in the child's life"; "the present and future impacts of the decision or action on the child's life"; "the child's connections and relationships with his parents and other significant people in his life"; "the position of the child's parents and other significant people in the child's life on the matter at hand"; "the relevant professional knowledge on the matter at hand".

60. The children whose best interests should be examined in this case, are all those minors who are children of Israeli residents and whose center-of-life is in Israel, but are nonetheless denied status by the Law. It would appear that very little, if any, thought was given to the impact of giving these children temporary permits, some of which do not confer any social rights. A partial examination of the parameters included in the Rotlevy report checklist would suffice to demonstrate this hypothesis.

61. For example with respect to **the present and future impacts of the decision or action on the child's life**, the report indicates (p. 145): "This section directs the deciding official to give special consideration to the short and long term impacts his decision might have on the specific child on whose matter he is to decide. The purpose is to emphasize the deciding official's obligation, with respect to the implications of his decision or action on the child's life, to relate to the unique characteristics of the specific child before him rather than rely on general assumptions about children. The section also aims at directing the deciding official **to the need to assess**, either alone or with the assistance of experts, as the case may be, **the possible implications** of each of the possible decisions." (emphasis in original– Y.B).

    In this context, one might ask: At the time the choice was made to give children aged 14 to 18 stay permits at most, did anyone assess its particular implications? Did whoever make the assessment consider the economic, social and health implications of the decision to deny these children social rights?

    The petition detailed the dire economic circumstances in which East Jerusalem children live. This situation is a result of decades of neglect by every Israeli government authority. This is a large group of children, many of whom are defined as "**at risk**" to begin with. These are the "specific" children whose matter the Rotlevy report instructs us to consider. The result of the decision that

was made is that these children are left with no social rights, no health insurance with an indeterminate status and no clear future. It is clear that no consideration was given to the special characteristics of this group of children.

62. With respect to the consideration of the **dimension of time in the child's life**, the Rotlevy Report indicates (p.144) that "children's grasp of time is significantly different form adults'– what an adult perceives as a short time could seem as an eternity to a child …protracted proceedings are more injurious to children because they are in a constant state of development, because of the implications that prolonged uncertainty have for them and because such proceedings extend the time children spend in a situation that does not serve their best interests."

This is not an abstract concept for the children of residents, who find themselves with an undefined status for lengthy periods of time. This uncertainty becomes concrete with every encounter with soldiers who do not hesitate to detain children who have DCO permits and whose family unification application has been approved. This uncertainty is strengthened because a date for a possible upgrade of their permit seems far from reality. Will they be permitted to stay in Israel? Will they ever be able to received status in Israel? Where and in what conditions will they be able establish their family?

63. To conclude on this matter:

The aforesaid indicates that the State's position whereby granting these children temporary permits to remain in Israel sufficiently upholds their right to family life cannot stand. In this context, the European Court of Human Rights has ruled that the obligation to allow individuals to exercise their right to family life includes the duty to grant status and ensure that individuals do not remain with a temporary and unclear status for extended periods of time. The provision of stay permits does not necessarily prove that the right to family life has not been breached. The substantive rights granted by the specific permit must be examined:

> Where the domestic legislation provides for several different types, the Court must analyse the legal and practical implications of issuing a particular permit.
>
> (**Sisojeva et al. v. Latvia**, ECtHR Grand Chamber, Application No. 60654/00, judgment of 15 January 2007, para. 91)

64. Another case that was brought before the European Court of Human Rights involved an immigrant who had received renewable stay-permits for France over many years.[5] The Court held that the French refusal to grant the applicant status in the country infringed on her right to family life as she was not given the possibility of living with a sense of certainty and security regarding her status and a violation of her social rights and her ability to work for a living. The scholar Thym has said of this judgment:

> [The Court in the case of **Ariztimuno Mendizabal v. France**] deliberately takes up the original conclusion on the general indifference of Article ECHR towards the structure of national immigration law by confirming that the provision 'does not guarantee the persons concerned the right to a particular type of residence permit (indefinite, temporary or other), **as long**

[5] **Ariztimuno Mendizabal v. France**, ECtHR, Application No. 51431/99, judgment of 17 January 2006, para. 66, 70-71.

> **as the solution proposed by the authorities allows for the effective exercise of their right to respect for private and family life'… the Court continues with an examination of the effects of the 'precarious and uncertain situation the applicant sustained for a long period' and which 'had important consequences for her in material and psychological terms (precarious and uncertain employment, social and financial difficulties, impossibility to open a bar in default of a carte de séjour required for the exercise of the profession she was trained for)'**.
>
> (Thym D., Respect for private and family life under Article 8 ECHR in immigration cases, International Comparative Law Quarterly, Vol 57, January 2008. pp 87-112).

65. These holdings were made with respect to adults. They are all the more relevant for minors. As we have seen, resolving the matter of the children who are the subject of this petition with temporary stay permits violates their resident parents' constitutional right to family life. Leaving so many children without status and social rights while severely restricting their freedom of movement brutally harms the family unit and the parents' autonomy in making decisions regarding their children.

66. Not only are the Respondents ignoring these **rights**, to which these children are entitled, they are also ignoring the children's **best interests**, which require allowing them to grow up with their parents, who are residents in Israel. The best interests of the child dictate that children be allowed to grow up inside the family unit that supports them for as long as they are minors and provided their parents are not dysfunctional. The refusal to register a child as a resident of Israel, when his parent is an Israeli resident living in Israel forces separation between children and their parents, harms their development and interferes with the family unit to children's detriment rather than to their best interest. The alternative is for children to remain with their parents in Israel without a stable and clear status unless and until their families succumb to the difficulties of living without status.

The Right to Equality

67. In HCJ 6427/02 **Movement for Quality Government in Israel v. Knesset**, TakSC 2006(2) 1559, the Supreme Court ruled on the question of ascribing the right to equality to the right to dignity. The Court held that the right to human dignity includes the right to equality, inasmuch as this right is closely linked to human dignity (para. 40 of the judgment of President (emeritus) Barak). In **Adalah**, President (emeritus) A. Barak ruled that:

> Does the right of the Israeli spouse to have a family unit in Israel, by virtue of equality with the right of other Israeli couples to have a family unit in Israel, constitute a part of the right of the Israeli spouse to human dignity? The answer is yes. Both the protection of the family unit in Israel, and the protection of the equality of this family unit with the family units of other Israeli couples, fall within the essence of human dignity. The prohibition of discrimination against one spouse with regard to having his family unit in Israel as compared with another spouse is a part of the protection of the human dignity of the spouse who suffers that discrimination.

68. With respect to the question of whether the Law violates the right of Arab citizens and residents to equality, President (emeritus) A. Barak rules in para. 51 of his judgment:

> In the case before us, the impact of the Citizenship and Entry into Israel Law is solely to restrict the right of Arab citizens and residents of Israel to family life. This is a discriminatory outcome. This discrimination is not based on a relevant distinction. If we accept it, 'we will carry out a serious act of discrimination, and we see no proper purpose for the act' (*per* Justice M. Cheshin in **Stamka v. Minister of Interior** [24], at p. 759; see also the remarks of Justice A. Procaccia in HCJ 2597/99 **Rodriguez-Tushbeim v. Minister of Interior** [76], at pp. 450-451). The conclusion is that the law violates the constitutional right to equality.

Six more Judges of the panel joined this position[6].

69. Thus, it was ruled that the Law violates the constitutional right of the Arab citizens and residents of Israel, to equality, since its impact – limiting the right of the Arab citizens and residents of Israel, and their right only, to family life – is discriminatory. As we have seen, the right to family life is also the right of the Israeli parent to raise his minor children with him in Israel and the right of an Israeli child to grow up in Israel with his parents. These rights, of the parent and of the child, are violated when it is impossible to grant the child status in Israel, with all the related implications.

70. When Israel applied its laws and jurisdiction to East Jerusalem, it also applied the principles of equality and human dignity and liberty. **When the Respondents enacted a law that deprived them of the power to arrange for the status of children in the Israeli population registry, they had an obligation to duly consider the right of East Jerusalem residents to equality with the rest of the residents of the country, citizens and non-citizens alike.**

The Right to Development

71. In addition to the violation of the children's and their parents' civil rights, the Law also violates the children's social and economic rights. As aforesaid, the Law does not allow granting social rights to children of residents who are more than 14 years old. Thus, the Law violates their right to have their health protected, to develop capabilities and skills that will allow them to live with dignity, and their right to a minimum standard of living, which will allow the fulfillment of these rights. These rights are included in the **right to development**, articulated in **Article 6 of the Convention on the Rights of the Child**, whereby**:**

    1. States Parties recognize that every child has the inherent right to life.

    2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

    This right constitutes the basis for the proper development of children, and is intended to provide for all their physical, emotional, social, economic and cultural needs. **The right to development**

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[6] Justice (her former title) Beinisch, Justice Joubran, Justice Procaccia, Justice Hayut, Justice (his former title) Rivlin and Justice Levi. It should be stated that Justice Rivlin thought that the violation was proportionate under the circumstances.

is unique to children since they continue to develop throughout the stages of childhood until maturity. A child who does not have the proper conditions for development is a child who will not enjoy the right to dignity and equality[7]. It should be stated, that the above-mentioned Article 6 frames this right in a general manner. Many other articles relate specifically to rights that are connected to the right to development. (Thus for example, the right to physical development – the right to health – was anchored in Article 24 of the Convention. The right to emotional development was anchored, *inter alia*, in Articles 28-29 of the Convention which address education etc.).

72. The right to development has received the status of a fundamental right in the case law of this Honorable Court. Thus, Justice Dorner has ruled:

> It is the right of every child – and it is also a fundamental right – to have his physical and emotional needs provided at the level required for his proper development. This right of the child who is helpless and dependent on others, has supreme status. (CFH 7015/04 **Attorney General v. A**., IsrSC 50(1) 48, 66).

See also (in the context of the right of a minor with a disability) the judgment of Justice E. Levi in HCJ 7974/04 **A. v. Health Minister**, TakSC 2005(2), 1376.

To complete the picture on this right, see extensive reference in the Rotlevi Report, pp. 167-206.

73. The right to development of the children of the permanent residents, who reside in Israel, should be examined also in view of the conditions prevailing in East Jerusalem, the conditions in which many of these children reside. As we demonstrated in the petition, the children of East Jerusalem suffer discrimination, compared to other residents and citizens of Israel in almost every aspect of life: education, welfare, infrastructure, etc. There is no dispute that in this situation, the right to development is among the first to be violated. Applying the Temporary Order to these children entrenches the already existing discrimination and exclusion and yet again gives a sense that racism is at play.

74. We have first seen that the Temporary Order does not allow residents of East Jerusalem and their children to enjoy the right to family life in a manner which upholds the child's best interest and allows parents and children to lead a life that may be defined as normal. We have now shown that this is not just a violation of the right to family life, but also of the right to equality. Denying status and social rights leads to a situation in which many children are destined for a life of detachment, "neither here nor there", a life without dignity. As such, their parents suffer discrimination compared to other parents. Permanent residents of East Jerusalem are unable to give their children what every other parent can (and, according to the law[8], must) give their children.

75. It should be noted that in this context, the Law does not just cause effective discrimination, but rather discrimination is enshrined in the statutory provisions themselves. The Temporary Order

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[7] See: S. Rotlevi, "The Responsibility of the State in Fulfilling the Rights of Children", Hamishpat 22 (2006) 3-11, on page 10. The article may be found at the link:

http://www2.colman.ac.il/law/hamishpat_j/22/Rotlevi.pdf (in Hebrew)

[8] On parental obligations toward children, as they appear in the Legal Competency and Guardianship Law and the Penal Code, see secs. 149-150 of the petition.

discriminates against children to whom it applies compared to other children of citizens or residents who live in Israel. Thus, children who are over the age of 14 suffer discrimination compared to younger children, children both of whose parents are Israeli, children of Jewish immigrants, children one of whose parents is an OPT resident and the other an Israeli citizen.

76. As known, the non-discrimination principle is a basic tenet of international law as well. When a country breaches the prohibition on discrimination in such a blatant manner, particularly when it comes to children's rights, the onus of justifying the breach shifts and it must provide justification:

> Several general international law principles are particularly relevant as potential tools for the protection of child migrants… One of these is the cardinal **non-discrimination principle**. International law does not prohibit all distinctions between people, only those that are arbitrary, disproportionate or unjustifiable. **Given the moral and legal imperative to treat all human beings including children and non-citizens, as of equal worth, the onus is on those who seek an exception to the equality principle to justify it.**
>
> (Abram, E.F., **The Child's right to family unity in international immigration law**, Law & Policy, Vol 17, 1995, p. 417).

77. As we demonstrate below, the Respondents have not met this burden. The discrimination against children of permanent residents in East Jerusalem is not based on relevant considerations. For this reason too, the Law must be repealed, at least inasmuch as it applies to children.

Violation of rights for demographic and economic purposes

The absence of substantive security grounds

78. The Respondents make vague arguments regarding the security risk emanating from the children whose rights the Law substantively violates.

79. It must be emphasized: Figures provided by the State relate to the involvement of minors in terrorism in a general manner. The State has never presented any figures relating to involvement of children who received status or stay permits in Israel in terrorist attacks. The State cited no figures in the proceedings on the petitions heard in **Adalah**. The State cited no figures in its preliminary response to this petition, nor did it do so subsequently, in the Statement of Response.

80. Moreover, **the State has never provided a plausible explanation as to why these children may be granted stay permits, which allow free movement throughout Israel, but not status.**

In section 164 of the Statement of Response, the Respondents note that "these youths will be identified as residents of the Area and therefore their movement in Israel will not be free. As such, the threat they pose will be diminished, despite the fact that they are in Israel."

81. This is a vague argument, which is largely an attempt to throw sand in the eyes of the Court. The children who will prevail over the bureaucratic hurdles and receive stay permits will be able to go anywhere inside Israel once they have the permit. If and when they are stopped by police, they will be released immediately as they are lawfully present in Israel. Those children will not be stopped by police more often than their peers who have status in Israel. As is known, the decision whether or not to stop a person is based on his or her overall appearance and has nothing to do with the person's status in Israel. When a member of the security forces decides to stop a person

to check his papers, he does not know what kind of papers the person has. When it becomes evident that the person has status or a valid stay permit he is released immediately.

82. To conclude on this issue: The Law was applied to the children of permanent residents in the framework of a policy which is officially based on the ostensible need to guard against foreigners' entering Israel for security reasons. Even if it were genuine[9], it is clear that the Respondents cannot make this argument with respect to minor children of residents who live in Israel with their parents and where no security risk is attributed to either the children or the parents. In fact, the application of the Law to children and the willingness to grant them DCO permits, while at the same time refusing to grant them permanent status and social rights, undermine the credibility of the security argument.

Demographic and economic considerations

83. Since no substantive security grounds appear to be present, the only possibility the Petitioner can conjecture is that the Law is applied to children based on demographic-racist and economic considerations.

84. At this point, we recall the discussions that preceded Government Resolution No. 1813 of May 2003. We recall the presentation the Minister of Interior made to the government on the eve of the vote on Resolution 1813 describing how "Arab foreign nationals" multiply and become stronger, have many children, have an immense "potential for growth" and how their progeny also marry and may receive status in Israel and so on and so forth. The succession of generations up to grandchildren and great grandchildren is demonstrated in a diagram, at the bottom of which there is a cost calculation.

85. We also recall the legislative process and amendments. We recall the discussions of the Knesset's Internal Affairs and Environment Committee in which ISA representatives and others stated that minors pose no security threat and that the considerations relevant to them are economic. The aforementioned was presented in detail in the petition.

86. Thus, the Respondents' statements are self-contradictory. On one hand, the Respondents claim that the minors pose a security threat (though they present no figures on involvement by children of residents in violent activities against Israel. It appears the Respondents possess no such figures). On the other hand, the Respondents themselves claim the fact that if a child between the ages of 14 and 18 receives a stay permit, it means that he is no longer a security threat.

87. It is inconceivable that demographic and economic considerations lead to a violation of the fundamental right of Israeli residents to have their children be granted status. This purpose is inappropriate and inconsistent with the values of the State of Israel as a democratic country. The facts and arguments presented above clearly indicate that demographic and economic considerations had a pivotal role in the Respondents' decision to apply the Law to the children of Israeli residents. How can the Law be justified on security grounds when these children can be granted a stay permit for Israel? How does denying these children social rights serve the security purpose of the Law?

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[9] For doubts on the credibility of the security motivation, see: **Adalah**, para. 24 of the judgment of Justice S. Joubran; para. 13-14 of the judgment of Justice A. Procaccia.

Conclusion

88. The Petitioner therefore argues that the Law must be repealed, at least inasmuch as it applies to children. The Law violates human rights that are protected by Basic Law: Human Dignity and Liberty, as held by this Honorable Court in **Adalah**. This violation is caused in furtherance of an unacceptable purpose and is inconsistent with the democratic values of the State of Israel. The Petitioner alternatively claims that the violation is extremely excessive.

Jerusalem, 12 March 2009

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(File No. 50717)