At the Jerusalem District Court
Sitting as a Court for Administrative Affairs **AP 23875-10-12**

In the matter of:

1. **M. Yusef., I.D. No. _____**
2. **A. Yusef., I.D. No. _____**
3. **Z. Yusef., No Status**
4. **M. Yusef., No Status**
5. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA**

Represented by Counsel Adv. Benjamin Agsteribbe (Lic. No. 58008) and/or Noa Diamond (Lic. No. 54665) and/or Hava Matras-Irron (Lic. No. 35174) and/or Sigi Ben-Ari (Lic. No. 37566) and/or Daniel Shenhar (Lic. No. 41065) and/or Nimrod Avigal (Lic. No. 51583) and/or Bilal Sbihat (Lic. No. 49838) and/or Tal Steiner (Lic. No. 62448)

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

4 Abu Obeida St., Jerusalem 97200

Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **Minister of Interior**
2. **Legal Advisor of the Population, Immigration and Border Authority**
3. **Chair of the Appellate Committee for Foreigners**

Represented by the Jerusalem District Attorney

7 Mahal St., Jerusalem

Tel: 02-5419555; Fax: 02-5419581

The Respondents

Administrative Petition

The honorable court is hereby requested to order the respondents to enable petitioner 1, a permanent resident of the state of Israel, to have the status of his children,

petitioners 3-4, in Israel arranged and to have them registered in the population registry with permanent status, in accordance with regulation 12 of the Entry into Israel Regulations 5734-1974 (hereinafter: **regulation 12**).

Preface

This petition concerns the refusal of the Minister of Interior to approve the application of an Israeli resident and presently a criminal prisoner, to register his children who were born in Israel in the population registry, in accordance with regulation 12. Instead, the ministry of interior has referred petitioner's mother – who, following the father's incarceration was appointed guardian of her grandchildren by the Sharia Court in order to help the family during the father's absence – to submit a new application for their registration in the population registry, claiming that petitioner's imprisonment deprives him, at the present time, of the right to register his children in the population registry in accordance with regulation 12 by himself.

This position, which deprives a person who serves a defined prison sentence of the right to have the status of his children arranged by himself and refers his mother to submit a new application in his stead, is harmful, unacceptable and contrary to the obligations imposed on the authority by the nature and purpose of regulation 12 as established by case law. Hence, this petition.

The Parties

1. **Petitioner 1** (hereinafter: the **petitioner**)**,** a permanent resident of Israel and the father of petitioners 2-4, has been serving a 27-month prison sentence since January 24, 2011. The petitioner is married to Mrs. M. Yusef., ID No. _____, originally a resident of the West Bank. The couple has three children, petitioners 2-4.

2. **Petitioner 2**, who was born in Israel and is a permanent resident of the State of Israel, is the firstborn son of petitioner 1 and the elder brother of petitioners 3 and 4. Petitioner 2 was born to his mother and father, petitioner 1, in Jerusalem on November 7, 2008.

3. **Petitioner 3** is the second son of petitioner 1 who was born in Israel to his father, petitioner 1, on October 10, 2009, and was registered in the population registry as holding an A/5 temporary residency status. This status was not extended in a timely fashion by the respondents, due the petitioner's incarceration. Presently petitioner 3 lacks status anywhere in the world.

4. **Petitioner 4** is the youngest son of petitioner 1. He was born in Israel on June 26, 2011 and also has no status anywhere in the world.

5. **Petitioner 5** is a registered not-for-profit association, that has taken upon itself to assist, among other things, residents of East Jerusalem, victims of cruelty or deprivation by state authorities, including by protecting their rights before the

authorities, either in its own name as a public petitioner or as counsel for persons whose rights have been violated.

6. **Respondent 1** is the minister who, in accordance with the Entry into Israel Law, 5712-1952, has the authority and discretion to handle all matters associated with said law, including the grant of status in Israel for humanitarian reasons.

7. **Respondent 2** is the legal advisor to the Population, Immigration and Border Authority (hereinafter: the **authority**). Some of the powers of respondent 1 concerning the handling and approval of status applications submitted by permanent residents of the state residing in East Jerusalem, have been delegated to the person heading this authority. Among other roles, the lawyers of the authority's legal department present the authority's position to respondent 2 and to the petitioners. [what is the difference between the advisor and the department]*[sic]*

8. **Respondent 3**, chair of the Appellate Committee for Foreigners, reviews applications for the grant of status in Israel to spouses of persons who have permanent residency status in Israel as well as applications for the grant of status in Israel in accordance with regulation 12 of the Entry into Israel Regulations. By virtue of his authority in accordance with section 16(a) of the Entry into Israel Law, respondent 1 has delegated to respondent 3 his powers under sections 2(a) and (b), 3, 3a(a), (b) and (c), 4, 5, 6 – regarding specific cases, and under section 11 of said law. The powers of respondent 3 were established in an internal procedure of the Ministry of Interior, procedure No. 1.5.0001, "Procedure of the Appellate Committee for Foreigners". During the above referenced period relevant to this petition, two chairpersons presided over the committee: Commissioner Advocate Sara Ben Shaul Weiss, and Commissioner Advocate Zvi Gal.

   For the sake of convenience, respondents 1-3 shall be hereinafter collectively referred to as: the **respondents**.

<u>Petitioners' Matter</u>

9. On June 24, 2007, the petitioner, who was born in Jerusalem and is a permanent resident thereof, married M. Yusef., ID No. _____, a resident of the West Bank, born in 1989. Over the years the couple had three children, petitioners 2-4.

   A confirmation of the Israeli marriage agreement of the couple dated October 30, 2007 is attached and marked **P/1**.

10. On November 7, 2008, the petitioner and his wife had their firstborn son, petitioner 2. Petitioner 2, like his father, was registered in the population registry as a permanent resident of Israel.

Petitioner 2's birth certificate is attached and marked **P/2**.

11. On October 10, 2009 the petitioner and his wife had petitioner 3, who, after his birth, was registered by the respondents as an A/5 temporary resident only – apparently due to doubts which arose at the time with respect to the family's center of life in Jerusalem prior to the submission of the registration application.

    Petitioner 3's birth certificate is attached and marked **P/3**.

12. Following his involvement in criminal activity, the petitioner was arrested on January 24, 2011 and put on trial. On November 1, 2011, the petitioner was sentenced to 27 months' imprisonment, commencing on the date of his arrest. According to the Israel Prison Service, petitioner will have served his term on April 23, 2013 and he is expected to be released from prison on March 12, 2013.

    A copy of the criminal verdict in petitioner's matter, CrimC 55890-01-11 **State of Israel v. Yusef. et al**. is attached and marked **P/4**.

    A confirmation that petitioner is serving his prison sentence specifying the sentence completion date and anticipated release date is attached and marked **P/5**.

13. On March 13, 2011, the Sharia Court in Jerusalem issued a guardianship order to petitioner 1's mother, Mrs. D. Yusef., a permanent resident of Israel (hereinafter: the **grandmother**). The court appointed the grandmother guardian of petitioners 2-3, stating this was done in order to protect their interests, and to enable her to take care of them and provide for all their needs while their father was serving his sentence. This, due to the fact that their mother could not fully care for their needs and interests *vis-à-vis* the Israeli authorities, since in the absence of an Israeli stay-permit, her freedom of movement in the country was limited.

    The custodial order dated March 13, 2011 for petitioners 2-3 is attached and marked **P/6**.

14. On June 26, 2011, while the petitioner was serving his sentence, his wife gave birth, in Israel, to their youngest son, petitioner 4.

    A notice of live birth concerning petitioner 4 issued by the Red Crescent Hospital in Jerusalem is attached and marked **P/7**.

15. Following the birth of petitioner 4, a guardianship order was issued for him too on August 16, 2011, entrusting his grandmother with the responsibility of handling his affairs. As noted in the case of his elder brothers, the Sharia Court pointed out in the case of petitioner 4, that his grandmother had been appointed as his guardian in view of the father's incarceration and the limitations which prevented his mother from escorting him and taking care of

his needs and interests *vis-à-vis* the authorities in Israel, and for the purpose of protecting the child's best interest.

The guardianship order for petitioner 4 dated August 16, 2011 is attached and marked **P/8**.

Exhaustion of Remedies

16. On July 5, 2011, an application to have petitioner 4 registered as a permanent resident in the population registry was submitted to the population bureau of respondent 1 in East Jerusalem (hereinafter: the **registration application**). Following the submission of the application, on August 1, 2011, a hearing was held in the bureau for the grandmother of petitioners 3-4.

    The application form dated July 5, 2011 and a copy of the transcript of the hearing dated August 1, 2011 are attached and marked **P/9 – P/10** respectively.

17. On November 20, 2011, the bureau of respondent 1 rejected the application to register petitioner 4 in the population registry on the grounds that his father was serving a prison sentence. In the letter rejecting the application of petitioner 4, the bureau of respondent 1 also notified the petitioners that on the same grounds, his brother, petitioner 3's A/5 temporary residency status would not be extended.

    The letter rejecting the application to register petitioner 4 in the Population Registry and to extend the status of petitioner 3 dated November 20, 2011, is attached and marked **P/11**.

18. On December 15, 2011, on behalf of the petitioner, HaMoked filed an appeal against the refusal of the bureau of respondent 1 to register his children as permanent residents in the population registry. In the appeal, HaMoked argued, *inter* alia, that in refusing to register his small children, respondent 1 was ignoring the provisions of regulation 12 and undermines the best interest of the children as well as petitioner's right to have his children registered as permanent residents of Israel.

    The appeal dated December 15, 2011 is attached and marked **P/12**.

19. On January 17, 2012, an appeal rejection notice was sent from the bureau of respondent 1. In the rejection of the appeal, as in the rejection of the original application to register the children, the bureau of respondent 1 dryly reiterated his position that for as long as petitioner 1 was serving his sentence, his application to have petitioners 2-3 registered as permanent residents in the population registry could not be reviewed.

    The appeal rejection letter dated January 17, 2012 is attached and marked **P/13**.

20. On February 15, 2012, the petitioners submitted to respondent 3 an additional appeal against the decision of the bureau of respondent 1 in the appeal. In addition, a request for an interim order prohibiting the removal of petitioners 2-3 from Israel was attached to the additional appeal. In the additional appeal and as a footnote thereto, the petitioners-appellants mentioned, *inter alia*, the fact that guardianship of petitioners 2-4 had been transferred to their grandmother due to the limitations imposed on the freedom of movement of their mother as a resident of the Area that prevent her from taking care of their affairs in Israel where their center of life had maintained from the date of their birth.

    A copy of the additional appeal **122/12** dated February 15, 2012 is attached and marked **P/14**.

21. On the very same day, respondent 3 transferred the additional appeal to respondent 2, for his response. On March 11, 2012, respondent 3 granted the petitioners-appellants the temporary remedy requested by them.

    The decision of respondent 3 dated March 11, 2012 is attached and marked **P/15**.

22. On April 4, 2012, the petitioners wrote to respondent 3 and complained of respondent 2's failure to respond to the additional appeal. On the very same day, respondent 3 decided to give respondent 2 an additional seven-day extension. On April 25, 2012, in the absence of a response from respondent 2, the petitioners-appellants wrote again to respondent 3 and complained of respondent 2's conduct.

    Petitioners' requests to respondent 3 dated April 4, 2012 and April 25, 2012 and the decision of respondent 3 dated April 4, 2012 are attached and marked **P/16**.

23. On May 2, 2012, the response of counsel for respondent 2 was received. In her response, respondent's counsel requests to dismiss the additional appeal and to instruct petitioner's mother to exhaust the administrative remedies in the bureau of respondent 1. Respondent 2's counsel argued that the guardianship order was a new and later circumstance which was brought to the attention of the respondents only in the additional appeal. It should be noted that this argument is completely inconsistent with the transcript of the hearing the respondents held for the children's grandmother on August 1, 2011, which was attached to the petition above as exhibit P/10. A review of the hearing transcript shows that the respondent was aware of the guardianship order and instructed to delay the registration of the children until petitioner's release from prison. On May 6, 2012, respondent 3 requested the response of the petitioners-appellants to the request for dismissal and the arguments contained therein.

The response of respondent 2's counsel dated May 2, 2012 and the decision of respondent 3 dated May 6, 2012, written by hand on the back of the response of respondent 2's counsel, is attached and marked **P/17**.

24. On May 17, 2012, the petitioners-appellants submitted their response to the request for dismissal of respondent 2's counsel dated May 2, 2012. In their response, the petitioners emphasized that the appointment of the grandmother as temporary guardian was not a new circumstance, because the issue with which the application, the appeal and the additional appeal were concerned was the refusal of the bureau of respondent 1 to enable the **father to register his children**. Therefore, the appointment of the grandmother as guardian, a matter which was mentioned as an aside in the additional appeal, had no bearing on the remedy requested by the petitioners-appellants in that appeal. On May 20, 2012, respondent 3 transferred the response of the petitioners-appellants for the response of respondent 2's counsel, which was not given. On June 20, 2012 respondent 3 notified that in view of the failure of respondent 2's counsel to respond, she intended to make a decision in the additional appeal on its merits.

    The response of the petitioners-appellants to the request of respondent 2's counsel dated May 17, 2012 and the correspondence between the petitioners and respondent 3 concerning the (absence) of response by respondent 2's counsel until the decision dated June 20, 2012, are attached and marked **P/18**.

25. On July 22, 2012, respondent 3 decided to reject the additional appeal submitted by the petitioners-appellants.

    The decision of respondent 3 dated July 22, 2012 in additional appeal 122/12 is attached and marked **P/19**.

Respondent 3's Decision

26. In paragraphs 1-6 of the decision in the additional appeal, respondent 3 describes the factual background and reviews statutes and case law relevant to the case at hand.

27. In paragraph 7, respondent 3 rendered her decision, holding that having reviewed all relevant data, and in view of the fact that the grandmother of petitioners 3-4 had been referred to submit a new application for them, she was rejecting the additional appeal.

28. In paragraph 8, respondent 3 held that the violation of the children's best interest and their right as well as the right of petitioner 1 to family life, should be attributed solely to the petitioner, who should have foreseen the consequences of his actions before he went astray.

29. In paragraph 9 of the decision, respondent 3 vindicated the respondents from any liability for the violation of the children's best interest and their right to

family life and held further, that the referral of the children's grandmother to submit a new application for them in no way harmed the children's best interest or violated their right to family life.

30. Thus, the content of the decision indicates that there is no dispute between the respondents and the petitioners as to the determination that the failure to register them in the population registry harms the children's best interest and violates petitioners' right to family life, but rather as to the question of who bears the responsibility for such injury. Respondent 3 vindicates the respondents from any responsibility for any harm caused to the children and their family, holding that the grandmother's referral to submit a new application does not harm the children. Furthermore, the language of the decision in paragraph 7:

> **…I have decided to reject the additional appeal taking into consideration the proposal of respondent's counsel**, that the application be submitted by the grandmother.
>
> (emphasis added, B.A.)

indicates that according to respondent 3, not only does the grandmother's referral not harm the children's best interest and their right to family life, but rather it obviates the respondents' obligations under regulation 12, to protect the children's best interest and their right as well as the right of petitioner 1 to family life.

31. Furthermore, as will be further described below, the referral of the petitioners to register the children by the grandmother constitutes pretence of innocence and "procrastination". This, in view of the fact that the respondents do not accept applications for the registration of children submitted by a guardian, despite the fact that they are obligated to do so in accordance with regulation 12, and despite the fact that guardianship orders are obligatory orders issued by a court recognized in Israel.

<u>The Legal Framework</u>

32. Firstly, the petitioners will hereinafter review the existing case law concerning the interpretation of regulation 12, and thereafter, demonstrate that the decision of respondent 3 dated July 22, 2012 is based on a narrow interpretation, which is completely inconsistent with the acceptable interpretation, and that this is an invalid, unreasonable and extremely harmful decision. The petitioners will specify, *inter alia*, that by rejecting petitioner's application and referring his mother to submit a new application for the children, the respondents absolve themselves of their obligations under regulation 12, disavow the principle of the child's best interest, and send the petitioners on a wild-goose chase. We shall hereby lay out our arguments in an orderly manner.

Registration in accordance with regulation 12 of the Entry into Israel Regulations and the Child's Best Interest

33. Regulation 12 of the Entry into Israel Regulations, 5734-1974 (hereinafter: **regulation 12**) provides as follows:

> **A child who was born in Israel and is not subject to section 4 of the Law of Return, 5710-1950, will have the same status in Israel as his parents; If his parents do not have the same status, the child will receive the status of his father** or guardian, unless the other parent objects to same in writing; If the other parent objects, the child will receive the status of one of his parents, as determined by the minister.
>
> (emphasis added, B.A.)

34. The purpose of regulation 12 was already set in the judgment in HCJ 979/99 **Carlo v. Ministry of Interior** (reported in Nevo):

> A question arises, what is the purpose underlying regulation 12? It seems that the situation which the legislature foresaw and wished to prevent was the creation of a discrepancy or a gap between the **status** of a **parent whose presence in Israel was governed by the Entry into Israel Law**, and the **status** of **his child who was born in Israel**, and whose mere birth in Israel did not grant him a legal status therein. As a general rule, **our legal system, recognizes and respects the value of the integrity of the family unit and the interest of maintaining the welfare of the child**, and therefore the creation of a gap between the status of a minor child and the status of his parent who has custody **or who is entitled to custody over him**, should be prevented.
>
> (*Ibid.*, emphases added, B.A.).

35. In its judgment in AAA 5569/05 **Ministry of Interior v. 'Aweisat** (published in Nevo), the Supreme Court elaborated on the purpose of regulation 12:

> It should be emphasized that when the Minister of Interior considers an application submitted under regulation 12, he must give significant and considerable weight to the welfare of the child and to the integrity of the family unit. This is for two main reasons. Firstly, **he should take into consideration the fact that the secondary legislator chose to promulgate a special regulation on the subject of the status of children who were born in Israel**. As we have already noted, for the most part the provisions of the Entry into Israel Law or the regulations promulgated there-under do not establish criteria for granting permanent residency permit in Israel. Therefore,

> the mere fact that a special regulation was promulgated concerning the arrangement of the Israeli status of children who were born in Israel indicates that the secondary legislator wanted to establish that when dealing with these minors special and significant weight should be given to the consideration concerning the integrity of the family unit. Secondly**,** he should consider **the special nature of regulation 12 being a regulation designed to promote human rights**, from **two major aspects**. The first aspect relates to **the right of the parent** with Israeli status to raise his child, that is to say, the constitutional right of the parent to family life. **The second aspect relates to the independent and autonomous rights of the minor** to live his life alongside his parent.
>
> (*Ibid.*, paragraph 20, underlined emphases in the original, other emphases added, B.A.).

36. And indeed, the interpretation of regulation 12 as a regulation designed to promote human rights in general, and children's rights in particular, is consistent with the status of the principle of the best interest of the child as a fundamental and well rooted principle in Israeli jurisprudence. Accordingly, for instance, in CA 2266/93 **A. v. A.**, IsrSC 49(1) 221, Justice Shamgar held that **the state should intervene to protect a child from having his rights violated.**

37. Therefore, pursuant to the acceptable interpretation set forth in case law, **other than in rare and extreme cases, and in the absence of a specific security or criminal preclusion, the authority is obligated, under regulation 12, to protect the rights of the parent and his child, and to bring the status of the child on par with the status of the parent who has Israeli status.**

38. Indeed, in accordance with case law, this principle does not apply where both parents, together with their children, maintain a center of life outside Israel, or where the parent who is a resident is not interested in maintaining a center of life together with his child (see the **Carlo** matter, above). However, in the matter at hand**, the resident father chose to maintain a center of life in Israel together with his resident children and had, in fact, done so prior to his incarceration**. Furthermore, the family unit the petitioner maintains with his family in Israel has never ceased to exist and still continues to exist during the incarceration, when the father re-unites with petitioners 3-4 in the family home in Jerusalem whenever he receives a home leave from prison. Another fact attesting to the continuous existence of the center of life and family unit in Israel is that petitioners 3-4 have no ties whatsoever connecting them with any other place in the world, and like their elder brother, who was granted the status of his father, they have also lived in Jerusalem since the day they were born. Therefore, and taking into consideration the broad interpretation of regulation 12 adopted by the courts, as a regulation designed to protect human rights, the respondents should have done everything in their power to enable the father who wanted to arrange the status of his minor children, who were

born in Israel, to have their status arranged and protect the autonomous rights of these children as well as their right and their father's right to family life.

Respondents' Interpretation of Regulation 12

39. However, contrary to the interpretation given to regulation 12 in case law, which clearly broadens the protection of the rights of the parent and his child, the respondents chose in this case to give regulation 12 a very narrow interpretation, pursuant to which the mere absence of the father from home relieves them of any obligation whatsoever to arrange the status of the children in accordance with regulation 12. It is needless to note that in this case the respondents did not bother to conduct any real investigation of petitioners' family life and therefore, the answers to the following questions were not examined: Did the family maintain a center of life in Israel prior to the incarceration of the father? Do the children have any ties connecting them to any place in the world other than Israel? Consequently, the question of the weight that should be attributed to such answers has not been examined either. Therefore, instead of attributing significant and considerable weight to the welfare of the children and to the integrity of their family unit as required by case law, respondent 3 preferred, in its decision dated July 22, 2012, to place all the responsibility for the harm on the petitioner's shoulders. It seems that the respondents are ignoring the fact that regulation 12 was promulgated for them and that it imposes upon them an obligation to act – not to avoid acting – and protect the constitutional right of the parent and his children to family life and the independent and autonomous rights of petitioners 3-4. As specified above, respondents' disavowal of their obligations towards the petitioners is complemented by the statement made by respondent 3 that the grandmother's referral to submit a new application does not violate the best interest of the children and their right to family life.

The Grandmother's Referral as Grounds to Reject the Additional Appeal

40. The petitioners strongly dispute the statement that the grandmother's referral to submit a new application does not violate the rights of the children. Their position is that this is a false referral that lacks any substance. The reason for this position is twofold. Firstly, the respondents notified the grandmother of petitioners 3-4 at her hearing at the bureau in East Jerusalem on August 1, 2011 – exhibit P/10 of the petition – that in spite of the fact that she had been appointed the children's guardian, the application would not be processed for as long as the father was serving his prison sentence. Secondly, it should be emphasized that the referral is contrary to respondents' policy. The respondents do not recognize the validity of guardianship orders issued by the Sharia Court, do not uphold them and refuse to process applications for the registration of children in the population registry which are not submitted to them by the natural guardian of the children but rather by a guardian appointed for the children by the Sharia Court.

41. The case of M.N. is one of many cases, identical in form to the case at hand, which demonstrates respondents' policy of not processing applications for the registration of children submitted to them by a guardian who was appointed by the Sharia Court. The application submitted by M.N.'s incarcerated father to have her registered in the population registry was rejected by the respondents although her grandmother had been appointed as her guardian. In their letter dated November 2, 2011, the respondents refused to handle the application for as long as the girl's father was serving his prison sentence. In said letter and as petitioners' grandmother in the present case was told in the hearing held for her on August 1, 2012 [*sic*], M.N.'s grandmother was not referred to arrange the registration of her grand-daughter in the population registry and the only thing she was told was that after the father's release he may submit a new application for M.N.

    Respondents' decision in application **911/10** for the registration of M.N. dated November 2, 2011 and the additional appeal in her matter dated December 21, 2011 are attached and marked **P/20**.

42. It should be noted that following the rejection, an appeal and an additional appeal were submitted. When the additional appeal was pending, M.N's father was released from prison, as a result of which the additional appeal became obsolete.

43. Two additional cases which demonstrate respondents' policy of not upholding orders issued by the Sharia Court and refusing to process applications for the registration of children submitted by a guardian appointed by this court are the cases of A.E. and the children S.G., E.G. and E.G. The first case concerns a child who was abandoned by his parents, following which his grandmother was appointed his guardian by the court. The grandmother, whose application was rejected by the respondents, filed a petition in this matter with the Court for Administrative Affairs – AP 810/06 (published in Nevo). After the petition filed by A.E.'s grandmother was rejected, an administrative appeal was filed with the court in AAA 9043/07, following which the case was remanded to the Sharia Court. The second case concerns three children, members of one family, one of whom has cancer. The children's grandmother was appointed to act as their guardian by the Sharia Court after their father was sentenced and incarcerated. In this case, as in previous cases, the respondents persistently refuse to acknowledge the validity of the guardianship order issued by the Sharia Court for the children's grandmother.

    A copy of the decision dated January 19, 2012 in the matter of S.G., E.G. and E.G., is attached and marked **P/21**.

    So we see: although regulation 12 provides that a minor should be granted the same status held by his resident parent or **guardian**, in cases involving guardianship orders issued by the Sharia courts concerning the children of residents of East Jerusalem, the respondents defiantly refuse to recognize the orders as complying with the term "guardian" as defined in regulation 12, and this, contrary to their obligation to uphold conclusive orders of a court recognized by the State of Israel.

44. In any event, petitioners' position is that despite his incarceration, the **petitioner** has the right to have his children registered in accordance with regulation 12, a right which is not affected by his incarceration. We shall elaborate on this issue in the next chapter.

45. Furthermore, the referral of petitioners 3-4's grandmother to submit a new application for them is not only contrary to respondent's *de-facto* policy of ignoring guardianship orders issued by the Sharia Court, but also the court's decision in AP 700/06 **Rabiha Da'na v. Director of the Population Authority in East Jerusalem**. In said judgment, which addressed the refusal of the Ministry of Interior to arrange the status of a child who was born in Jerusalem, whose case fell under regulation 12 and whose grandparents had been appointed by the Jerusalem Sharia Court to act as her guardians, the court held, *inter alia*, that:

> The application of regulation 12 to cases in which the minor is under the custody of a guardian will be made taking into consideration the main purpose of the law, regulations and the fundamental principles of maintaining the integrity of the family unit, and subject to the governing principle of the need to maintain the "best interest of the child". **Therefore, in such rare cases, where the "best interest of the child" mandates that the child be put in the custody of a guardian – whether due to the incompetence of his parents or for other reasons because of which parents fail, without reasonable cause, to fulfill their parental duties – the respondent should act in accordance with regulation 12 and its purpose and to register the child in accordance with the guardian's status**.

46. Thus, it was explicitly held in said judgment that the child should be registered the status of his guardian only in rare cases of parental incompetence or where the parents unreasonably refrain from fulfilling their parental duties. Therefore, in accordance with said judgment, in the case at hand, where the petitioner insists on his right and duty to have status of his children in Israel arranged by himself , their grandmother should not be referred to act in his stead, and he should not be deprived of his right and duty to have the status of petitioners 3-4 arranged.

47. Thus, the grandmother's referral to submit the application for her grandchildren is artificial, contrary to respondents' *de-facto* policy of refraining from upholding guardianship orders issued by the Sharia Court and to reject such applications. It is also contrary to the judgment in AP 700/06. Therefore, contrary to respondent 3's statements made in her decision dated July 22, 2012, the grandmother's referral to submit a new application which served as the basis for the rejection of the additional appeal did violate the best interest of the children and their right to family life.

<u>Deprivation of Petitioner's Rights while Serving a Prison Sentence</u>

48. Respondent 3 also errs, where in section 8 of her decision, she imposes the responsibility for the rejection of the application on petitioner 1, who should have allegedly foreseen the consequences of his actions. On this matter, the petitioners would like to point out, that whatever petitioner 1's sins may be, they do not relieve the respondents of their duty to protect the rights of the children and their father, in accordance with the acceptable interpretation of regulation 12, as specified above.

49. Furthermore, it seems that respondent 3, who, in her decision, relieves the respondents from the responsibility for the harm caused to the petitioners, ignores the fact that the petitioner continues to retain the right to see to his children's registration while a prisoner. This right stems from the prevailing approach, of both international and Israeli law, that imprisonment, by itself, does not deprive the imprisoned person of his fundamental rights. Although the prison walls limit the inmate's freedom of movement, with all ensuing consequences, they do not revoke his other fundamental rights, other than those explicitly deprived by law:

> **It is a great rule with us that any and all human rights afforded to a person as a human being are retained by him, also while in detention or incarceration, and the imprisonment alone cannot deprive him of any right whatsoever, unless such is mandated by and arises from the deprivation of his right to free movement, or where there is an explicit provision in the law to that effect…** This rule has long been rooted in Jewish heritage: As stated in Deuteronomy 25, 3: 'then thy brother should seem vile unto thee', sages established a major rule in Hebraic punishment doctrine: 'when beaten – he is like your brother' (Mishna, Makot, 3, 15). **And this great rule is relevant not only after he has completed his sentence but also while serving a sentence, because he is your brother and friend, and he retains and is entitled to his rights and dignity as a human being**.
>
> (HCJ 337/84 **Hukama v. Minister of Interior**, IsrSC 38(2) 826, 832; and see also: **Dovrin**, paragraph 14 to the judgment rendered by Justice Procaccia; CA 4463/94 **Golan v. Israel Prison Service**, IsrSC 50(4) 136, 152-153; CA 4/82 **State of Israel v. Tamir**, IsrSC 37(3) 201, 207; HCJ 114/86 **Weil v. State of Israel**, IsrSC 41(3) 477, 490).
>
> (emphases added, B.A.)

50. And it was so held in the comprehensive judgment of Justice Danziger in LHCJA 6959/09 **Maher Yunes v. Israel Prison Service**, in paragraph 36, therein:

> The approach of Israeli jurisprudence concerning the purpose of a person's incarceration is that it is exhausted by the

> deprivation of the personal liberty of the individual, by way of limiting his freedom of movement. According to this approach, even when a person is incarcerated, he continues to retain any human right afforded to him. Indeed, "**when admitted into prison a person loses his liberty but he does not lose his dignity.**"
>
> (emphasis added, B.A.)

51. Justice Procaccia as well, explicitly states in paragraph 29 of her judgment in LCA 993/06 **State of Israel v. Mustapha Dib Mari Dirani** that:

> The second principle… concerns the overall responsibility of the state towards those held in its custody and care. The governmental power involved in holding people in custody, be it detention or imprisonment, **imposes upon the state the obligation to maintain the well-being of those held in its care**, both physically and mentally, and to ensure that all of their rights are protected; it must provide for their health and basic needs as human beings; it must provide them with reasonable accommodations, adequate nourishment, and physical and mental medical treatment as may be required; it must respect the constitutional rights of the persons held in custody to life, dignity and protection of the body… **the realization of the above responsibility of the state does not concern the detainee or prisoner only; it concerns society as a whole. The violation of the fundamental rights of those held in state custody injures not only these individuals but also harms society's character and its commitment to the principles of democracy and the rule of law**. The prevention of such injury, therefore, concerns the entire society, which is committed to norms of human rights, morals and ethics.
>
> (emphases added, B.A.).

52. Article 10(1) of the Covenant on Civil and Political Rights provides that:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

This article was interpreted by the human rights committee, the body responsible for the implementation of the covenant, in CCPR General Comment No. 21 dated April 10, 1992, in a very broad manner:

> [R]espect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. **Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment**.

53. The principle pursuant to which prisoners are entitled to all human rights other than those denied by the mere fact of the incarceration, was also established in articles 1 and 5 of the Basic Principles for the Treatment of Prisoners, adopted by the General Assembly of the UN (in Resolution 45/111 dated December 14, 1990). article 1 provides that:

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.

And according to article 5:

> Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and. Where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

54. Therefore, beyond the deprivation of the personal freedom of the prisoner while in prison, the law does not allow to violate the rights of the prisoner, and even in prison, **petitioner 1 remains a permanent resident of Israel, and as such he has the right to bring the status of his children, who were born and who reside in Israel, on par with his own.** Thus, the determination that petitioner 1 is responsible for the consequences of his actions and as such, also for the rejection of the application is fundamentally erroneous.

Petitioners 3-4 Pay for the sins of Petitioner 1

55. In their decision to reject the application of petitioner 1 to arrange for the registration of his children in the population registry by himself, the respondents also punish the young children, who have not sinned, as written: "The parents have eaten sour grapes, and the children’s teeth are set on edge" (Jeremiah 31, 28).

56. As described above, in accordance with case law, regulation 12 should be interpreted in a manner which gives effect to the rights of the child and imposes upon the respondents, *inter alia*, the obligation to protect the autonomous rights of the children. The regulation must certainly not be interpreted in a manner which violates the rights of the child beyond the boundaries of reasonableness and proportionality, as respondent 3 has done.

57. The respondents cannot ignore the fact that petitioners 3-4 were born into a certain reality, in which their family maintained its center of life in Israel. The incarceration of petitioner 1 in 2011, did not change this reality. Petitioners' family continues to reside in Israel and have a center of life therein. Petitioner 1, as well, comes home and unites with his family while on home leave from prison. The fact that the petitioner is serving a prison sentence has not caused

the family unit to disintegrate and the temporary and partial separation is not an outcome of a decision made by the family, let alone of petitioners 3-4.

58. As specified above the decision dated July 22, 2012 indicates that the respondents do not dispute the fact that the children's best interest and rights have been severely violated.

59. The Convention on the Rights of the Child contains a number of provisions imposing an obligation to protect the child's family unit.

The Convention's preamble states as follows:

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

Article 3(1) of the Convention provides:

> 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…**
>
> (emphasis added, B.A.).

60. The provisions of the Convention on the Rights of the Child are increasingly recognized 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 governing consideration in Israeli jurisprudence: see CA 3077/90 **A. et al. v. B.**, IsrSC 49(2) 578, 593 (Honorable Justice Cheshin); CA 2266/93 **A., minor et al. v. B.**, IsrSC 49(1) 221, at pages 232-233, 249,251-252 (Honorable President *emeritus* Shamgar); CFH 7015/94 **Attorney General v. A.**, IsrSC 50(1) 48, 66 (Honorable Justice Dorner); HCJ 5227/97 **David v. Supreme Rabbinical Court** (TakSC 98(3) 443) in paragraph 10 of the judgment rendered by Honorable Justice Cheshin.

61. From the general to the particular. The petition at hand concerns young children whose father is serving a defined prison sentence. The incarceration of a parent puts the entire family, and especially the children, in a state of crisis.[1] The Prisoner Rehabilitation Authority, a statutory body appointed by

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[1] See a background document on the subject of Rehabilitation of Prisoners' Children (submitted to the Knesset Committee on the Rights of the Child), written by: Naomi Mei-Ami, Knesset Center of Research and Information, May 9, 2004. Available at http://www.knesset.gov.il/mmm/data/pdf/m00821.pdf (Hebrew)

the Ministry of Welfare, has recognized the unique characteristics of children of prisoners, and uses various mechanisms in order to protect the children of prisoners during this difficult period.[2]

62. As a matter of course, therefore, upon the admittance of a father of a family to prison, various mechanisms are utilized for the purpose of maintaining the integrity of the family unit and the best interest of the child – commencing from prison visits and ending with support provided by social services.

63. Respondents' refusal to register the children, prevents the above bodies from fulfilling their duties, and prevents the children from having access to them. In addition, in this case, the rejection of the father's application and the referral of the grandmother to submit a futile application, also violate the right of the children to health and education, as without status, they are not entitled to national health insurance and education services.

International Law

64. In addition to the violation of the principle of the child's best interest, the respondent is in violation of additional international undertakings of Israel. We shall elaborate.

65. Article 24(2) of the International Covenant on Civil and Political Rights, 1966, ratified by the State of Israel on August 18, 1991 and entered into effect with respect to Israel on January 3, 1992, provides that:

> Every child shall be registered immediately after birth and shall have a name.

66. **So we see that in this case, as well as in the case of regulation 12, the obligation to register the child is the obligation of the authority and it is not subject to the parents' cooperation**.

67. By refusing to enable the petitioner to have his children registered in the population registry and referring their grandmother to submit an application in his stead, the respondent are also violating the most fundamental liberties which the State of Israel undertook to protect when it signed the International Covenant on Economic, Social and Cultural Rights, ratified on October 3, 1991.

In accordance with article 9 of the covenant:

The States Parties to the present Covenant recognize the right of everyone to social security.

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[2] Website of the Prisoner Rehabilitation Authority, http://www.pra.co.il, (last accessed September 23, 2012).

And in article 12 of the covenant:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

68. In addition, the respondent is in violation of his obligations under the International Covenant on Civil and Political Rights (section 63 above).

In accordance with article 16 of the covenant:

Everyone shall have the right to recognition everywhere as a person before the law.

69. In the spirit of international recognition of the right to nationality and its importance, the right to nationality has also been recognized in Israel as a fundamental right. However, regretfully, in their rejection of the application, the respondents are ignoring this recognition and violating the international undertakings of the state, thus making empty words of the declarations of the state which were given when it signed the conventions and ratified and gave effect to most of them.

Conclusion

70. Respondents 1-3's rejection of an application of a father, an Israeli resident, to register his young children, who were born in Israel and who reside in Israel with their elder brother who is registered as a permanent resident, due to the fact that they are forced to be temporarily separated and the referral of his mother - their grandmother - to submit a hopeless application, are unacceptable. This rejection contradicts regulation 12 and its aims, harms the best interest of the children and their rights in a severe and disproportionate manner, and deprives their father of his right to have his children registered, a right he retains even while in prison.

71. Such a decision should be condemned. The court is hereby requested to order the respondents to immediately approve the application of petitioner 1, and to enable him, as the natural guardian of his children, to arrange the status of petitioners 3-4 and register them as permanent residents in the population registry. The honorable court is also requested to order the respondents, jointly and severally, to pay legal fees and trial costs in favour of the petitioners.

Jerusalem, October 16, 2012

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Benjamin Agsteribbe, Advocate
Counsel to the petitioners

(File No. 70982)