At the Jerusalem District Court **AP 214-08-12**
Sitting as the Court for Administrative Affairs

In the matter of:

1. **V. Shanaytah, ID No. _____**
2. **S. Shanaytah, ID No. _____**
3. **B. Shanaytah, ID No. _____**
4. **M. Shanaytah, ID No. _____**
5. **H. Shanaytah, ID No. _____**
6. **H. Shanaytah, ID No. _____**
   Minor, by her parents, petitioners 1 and 2
7. **H. Shanaytah, ID No. _____**
   Minor, by her parents, petitioners 1 and 2
8. **M. Shanaytah, ID No. _____**
   Minor, by his parents, petitioners 1 and 2
9. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**

all represented by counsel, Adv. Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Ido Bloom (Lic. No. 44538) 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)

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. **Chair of the Appellate Committee for Foreigners (Jerusalem Area)**
2. **Legal advisor to the Population, Immigration and Borders Authority**
3. **Director of the Population Administration Bureau in East Jerusalem**
4. **Minister of the Interior**

Represented by Jerusalem District Attorney
7 Mahal Street, Jerusalem
Tel: 02-5419555; Fax: 02-5419581

The Respondents

Administrative Petition

The honorable court is hereby requested to order the respondents to appear and show cause, as follows:

1. Why they should not retract their decision, not to transfer to the petitioners the open evidentiary material, underlying the decision concerning an "intention to deny" a family unification application;

2. Why a provision should not be added to the relevant procedure, according to which when notice concerning an "intention to deny" is given, and such intention is based on open criminal or security material, such material shall be transferred to the applicants.

Preface

3. This petition concerns the basic right of the individual to present his arguments before the administrative authority, in a hearing. In particular, this petition concerns the right of the individual to inspect the open evidentiary material relevant to the authority's decision, in the hearing.

4. A threatening sword is hanging above petitioners' heads in the shape of the intent to deny their family unification application for "security" reasons. In order to properly cope with the above intent of the respondent, the petitioners demanded to secure their basic right: a real and sincere opportunity to respond to the arguments raised against them in respondent's notice of his intention to deny the family unification application, on their merits, and defend against them.

5. In order to properly refer to the arguments raised against them on their merits, the petitioners demanded the entire evidentiary material, which served as the basis for the security agencies' recommendation to deny petitioners' family unification application. **It should be emphasized that, in any event, this is open information**: administrative detention orders, indictments, confirmations of incarceration periods, judgments, protocols of hearings, documentations of plea bargains etc.

6. The respondents, on their part, deny petitioners' right of inspection and right to be heard. The chair of the Appellate Committee held that there was no room to transfer the open evidentiary material to the petitioners.

7. In view of the severe violation of petitioners' basic fundamental right, a patently unreasonable violation, which is not rooted in any real material reason, this petition is hereby filed.

The Parties

8. **Petitioner 1** (hereinafter: **petitioner 1**), a resident of the state of Israel, married her husband, **petitioner 2** (hereinafter: **petitioner 2**), originally a resident of the Occupied Palestinian Territories (OPT), in 1988. Over the years their children, **petitioners 3-8,** were born. Petitioners 1-8 live in Jerusalem.

9. **Petitioner 9** is a registered not-for-profit association which has taken upon itself to assist 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.

10. **Respondent 1** (hereinafter also: the **commissioner**) 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 4 has delegated to respondent 1 his powers under sections 2(a) and (b), 3, 3a(a), (b) and (c), 4, 5, 6 – regarding specific cases, and in accordance with section 11 of said law. During the relevant period, two chairpersons presided over the Jerusalem committee: Commissioner Advocate Sara Ben Shaul Weiss, and Commissioner Advocate Zvi Gal.

11. **Respondent 2** is the legal advisor to the Population, Immigration and Border Authority (hereinafter: the **authority**). Some of the powers of respondent 4 concerning the handling and approval of family unification applications and applications for the arrangement of the status of children, submitted by permanent residents of the state residing in East Jerusalem, have been delegated to the person heading this authority. The lawyers of the authority's legal department present the authority's position to respondent 1 and to the appellants.

12. **Respondent 3** is the director of the population administration regional bureau in East Jerusalem. In accordance with the Entry into Israel Regulations, 5734-1974, respondent 4 has delegated to respondents 2 and 3 some of his powers to handle and approve applications for family unification and for the arrangement of the status of children, submitted by permanent residents of Israel residing in East Jerusalem

13. **Respondent 4** is the minister who has the authority under the Entry into Israel Law, 5712-1952, to handle all matters associated with this law, including family unification applications and applications for the arrangement of the status of children, submitted by permanent residents of the state who live in East Jerusalem.

14. For convenience purposes, respondents 2-4 will be hereinafter referred to as: the **respondent**.

Petitioners' Case

15. On July 13, 2006 petitioner 1 submitted a family unification application with petitioner 2 and applications for the registration of her children. The family unification application was numbered 1315/06. The family unification application was refused after a few days, due to lack of center of life.

16. On September 4, 2008 petitioner 1 submitted a new family unification application which was numbered 558/08.

17. On March 31, 2009, notice concerning the denial of the family unification application was received from respondent's bureau in East Jerusalem. However, the denial letter specified the name M., petitioner 4, as the sponsored spouse in the application. It seemed that the refusal related to him. In the letter the following reason was specified:

> He was formerly an administrative detainee due to his activity with the "Islamic Jihad". His name was mentioned in an interrogation as a member of a military cell of the Islamic Jihad.

A copy of the denial letter dated March 31, 2009 is attached hereto and marked **P/1**.

18. On May 18, 2009, the petitioners submitted an appeal against respondent's above decision, in which they also referred to the security arguments and to the lack of explanation as to against whom said arguments were directed. In addition, a questionnaire was attached to the appeal, which

the respondent was requested to transfer to the Israel Security Agency (ISA) and to the population administration official that denied the application. The respondent was also requested to specify, in a clear manner, the grounds for the denial and to whom it pertained.

Copies of the appeal dated May 18, 2009, and the questionnaire attached thereto, are attached hereto and marked **P/2**.

19. On June 1, 2009, respondent's response dated May 26, 2009, was received which concerned both petitioner 5, H., and petitioner 2, the father of the family. The response stated as follows:

> The sponsored spouse [namely, petitioner 2, N.D,] in the application is a former administrative detainee due to his activity with the "Islamic Jihad". His name was mentioned in an interrogation as a member of a military cell of the "Islamic Jihad". Some of S. Shanaytah's brothers were also arrested a few times due to their activity with the "Islamic Jihad". His brother M.S. Shanaytah was an administrative detainee, whereas his brother R.S. Shanaytah is a former "Islamic Jihad prisoner" who admitted of being a member of a military cell of the organization, of an attempt to recruit another young man to the organization and of his involvement with firearms.

A copy of respondent's response dated May 26, 2009 is attached hereto and marked **P/3**.

20. On June 3, 2009 a supplement to the appeal was submitted concerning the girl H. and petitioner 2.

A copy of the supplement to the appeal is attached hereto and marked **P/4**.

21. Reminders concerning the appeal were sent on July 5, 2009, August 12, 2009, September 29, 2009 and October 20, 2009. As no response has been received to the appeal, an appeal concerning the failure to respond was submitted on December 20, 2009, which was numbered 817/09 (hereinafter: the **first appeal**).

A copy of the first appeal, without its exhibits, is attached hereto and marked **P/5.**

22. In the first appeal the representatives of respondent 2 have requested many extensions for the submission of the legal department's response to the appeal. A detailed account of the extreme foot-dragging in the handling of the first appeal is described in paragraphs 20-31 of AP 28253-11-11, which is attached hereto and marked **P/18**.

23. Only on October 27, 2010, ten months after the submission of the first appeal, respondent 2's response to the appeal was received in the form of a "Notice on behalf of the Respondent and Request to Dismiss". The notice stated, in the part which pertained to petitioner 2, as follows: "In the matter of Mr. S. Shanaytah, the husband of Mrs. Shanaytah, according to the amended 'Comments of Agencies Procedure in Family Unification Applications', the Shanaytah spouses are given the opportunity to have a written hearing within 30 days, before a decision is made in the application."

A copy of respondent 2's response, and letters of the Ministry of the Interior which were attached thereto, are attached hereto and marked **P/6**.

24. On November 17, 2010 the petitioners submitted a response to the notice which was submitted on behalf of the respondent. In their response, the petitioners requested that respondent 1 would direct

the respondent to refer to the arguments specified in the response and in the appeal, as if they were a written hearing.

A copy of the appellants-petitioners' response is attached hereto and marked **P/7**.

25. Following several additional responses which were submitted by the parties, respondent 1's decision was received on January 27, 2011. The decision stated, that a written hearing concerning petitioner 2's matter, should be submitted by the petitioners to the respondent, within 21 days from the receipt of the decision.

A copy of the Commissioner's decision dated January 27, 2011 is attached hereto and marked **P/8**.

26. Following petitioners' request on January 30, 2011, in which they have requested an extension which would enable them to submit their written hearing within 30 days, according to respondent's procedure, respondent 1 gave an extension for the submission of the hearing statement.

A copy of petitioners' request with commissioner's decision scrawled thereon is attached hereto and marked **P/9**.

Raising written arguments and a request to transfer open evidentiary material

27. On February 21, 2011, petitioners' arguments concerning respondent's intention to deny their family unification application were submitted (hereinafter: the **partial hearing**). In the beginning of the written arguments, it was emphasized that the petitioners demanded the entire evidentiary material which served as the basis for the security agencies' recommendation to deny the family unification application. In addition, it was requested to postpone the deliberations on the hearing until the entire open material shall have been transferred to my clients, and they would have been given the opportunity to properly respond to the material. It should be emphasized that in the partial hearing dated February 21, 2011, **the petitioners specified in detail their arguments concerning the paraphrase which was transferred to them**:

28. With respect to petitioner 2, the petitioners specified in their partial written hearing arguments concerning the paraphrase which was transferred to them. It was emphasized that petitioner 2 was never a member of the "Islamic Jihad" movement as argued, or any other similar organization. He devoted his entire time and efforts to his family and for the provision of livelihood to his children. In addition, since petitioner 2's arrest in 2002, he has neither been arrested nor interrogated. Therefore, it was argued, the "direct denial", namely, the denial which pertained to petitioner 2's alleged membership of the "Islamic Jihad" movement, had no merit.

29. With respect to petitioner 2's brother, M., it was argued that he was put under administrative detention in 2006 for a period of about two months only, that he has received permits to travel abroad and that he had in his possession a valid magnetic card. It was also argued that petitioner 2 had a very slim connection with his brother M.

30. With respect to petitioner 2's brother R.S., it was argued that the paraphrase in his matter also failed to provide the entire information which could have been provided. It did not specify, for instance, when the brother was incarcerated; for how long he has been incarcerated; which charges were brought against him and what was he convicted of; what was his sentence, etc. It was also emphasized, that according to R.S., he was imprisoned during the years 2002-2004. According to the information provided by R.S. to petitioners' counsel, his attorney made a plea bargain in his case, within the framework of which he was sentenced to three years in prison instead of the five years which the state requested. Furthermore. R.S. should have been released on March 6, 2005,

but was released **more than a year earlier**, within the framework of a prisoners' release transaction, in January 2004.

31. It was also noted that the brother R.S. received in the past a permit to travel abroad, and that he had in his possession a valid magnetic card.

32. The petitioners argued that apparently R.S. did not pose a great risk, in view of the fact that he was not severely punished, was not sentenced for a long imprisonment, and was released before he has completed his entire sentence. **This applies even more forcefully, in view of the fact that the data concerning R.S. were presented only as grounds for the existence of an "indirect threat".** The petitioners mentioned HCJ 7444/03 **Dakah v. Minister of the Interior** (not reported, February 22, 2010), according to which "the indirect threat should be carefully assessed, and attributed its proper relative weight only, nothing more than that."

33. With respect to the other family members of petitioner 2, it was argued that among his family members who resided in the West Bank, petitioner 2 had a strong connection only with his mother. His mother, who is 67 years old, has no security or criminal record, and she receives a permit to pray in Jerusalem, on a weekly basis. Petitioner 2 has another brother and six additional sisters. To petitioner 2's best knowledge, none of them has security record. His brother A.S. even received in the past stay permits in Israel for working purposes.

34. Request for open evidentiary material: As specified above, the petitioners emphasized that they would not be granted a real hearing unless they were given the opportunity to inspect the open evidentiary material, which served as a basis for the paraphrase which was transferred to them. Therefore, the petitioners requested to receive the following documents:

    a. Copies of the administrative detention orders, and any other document pertaining to petitioner 2's arrest - appeals, protocols, decisions, petitions etc.;

    b. Copies of the administrative detention orders, and any other document pertaining to the arrest of petitioner 2's brother M. - appeals, protocols, decisions, petitions etc.;

    c. With respect to the brother R.S. the petitioners requested to receive copies of interrogations, including police interrogation records; memoranda of ISA interrogations, if any; as well as all documents which pertained to the trial that was conducted against him, which were also open by their nature, including the indictment against him, the incarceration period which he served out of said period, the judgment against him (conviction and sentence), protocols of all hearings in his matter, documentation of plea bargains, if any, open material pertaining to his release under the transaction, etc.

35. Questionnaire: The petitioners also requested answers to the following questions:

    a. What is the basis for the determination that petitioner 2 was an activist in the Islamic Jihad?

    b. When was petitioner 2 active in this organization? According to the respondent, does petitioner 2 still act against the state of Israel?

    c. Has petitioner 2 been arrested in the past other than under the administrative detention 20 years ago, during the first intifada, and the arrest in the beginning of the 2000? If he was arrested, for how long has he been detained/arrested and when was he released?

    d. Has the state of Israel instituted any proceedings against him? What kind of proceedings?

e. Does the intelligence information relate to actions of petitioner 2 or only to his connections?

f. Has petitioner 2's name been mentioned in one interrogation only? Who mentioned petitioner 2's name and when? What is the connection between the interrogee(s) and petitioner 2?

36. With respect to the request for the transfer of the open material, it has been clarified from the outset that in a similar case which was considered by the Appellate Committee for Foreigners, within the framework of appeal No. 84/09, petitioners' counsel of HaMoked for the Defence of the Individual (**HaMoked**) demanded to receive the entire open material upon which the paraphrase was based. And indeed, on December 8, 2010 Advocate Mor of the legal department of respondent 2 transferred the relevant material: indictment, amended indictment, protocols and decisions of the Judea military court, judgment and sentence. It therefore seems that there is no material impediment for the transfer of the open material to the petitioners.

A copy of the partial hearing is attached hereto and marked **P/10**.

37. On March 9, 2011, following requests submitted by petitioners' counsel, a temporary remedy was granted which prohibited the expulsion of petitioner 2, until 45 days after respondent's decision in the partial written hearing which was submitted on February 21, 2011.

A copy of respondent 1's decision dated March 9, 2011 concerning the temporary remedy is attached hereto and marked **P/11**.

38. On March 24, 2011 a reminder was sent concerning the partial hearing. The reminder emphasized the fact that within their written arguments, the petitioners demanded to receive the entire evidentiary material in their matter, and to postpone the deliberations on the hearing until after they had the opportunity to inspect the material and properly respond to it.

A copy of the reminder dated March 24, 2011 is attached hereto and marked **P/12**.

39. On April 13, 2011 respondent's response was received, according to which in petitioner 2's matter "the position of the security agencies to your written arguments has not yet been transferred." The respondent has completely disregarded petitioners' demand, to transfer to them the evidentiary material.

A copy of respondent's response dated April 13, 2011 is attached hereto and marked **P/13**.

40. In a reminder dated April 27, 2011 it was emphasized once again, that the respondent was requested to transfer the entire evidentiary material concerning said matter, and to postpone the deliberations on the partial written hearing until the material shall have been inspected by the petitioners.

A copy of the reminder dated April 27, 2011 is attached hereto and marked **P/14**.

41. On May 24, 2011 an additional reminder was sent.

A copy of the reminder dated May 24, 2011 is attached hereto and marked **P/15**.

42. Hence, in view of the prolonged proceedings in their matter, the petitioners had no alternative but to submit an additional appeal (hereinafter: the **second appeal**).

The current proceeding before the Appellate Committee for Foreigners

43. On June 21, 2011 the second appeal was submitted as a result of respondent's failure to respond to the demand to receive evidentiary material within the framework of the "intention to deny" the family unification application.

A copy of the second appeal dated June 21, 2011, without its exhibits, is attached hereto and marked **P/16**.

44. In the second appeal it was argued that petitioners' case has been delayed for a long period of time, and meanwhile, they were living in severe uncertainty which did not enable them to live their lives peacefully and with a sense of stability. The failure to transfer the requested evidentiary material – open material, which is not subject to privilege rules – severely violates the right of the petitioners-appellants to be heard. This, in view of the fact that the petitioners-appellants wish to properly challenge respondent's intention to deny their family unification application.

45. In addition it was argued that respondent's protracted failure to respond was even more outrageous, in view of the fact that it was not the first time that the petitioners were waiting and waiting for respondent's decision in their matter. In the first appeal, it was mentioned, over ten months passed before any response was received from the respondent in their matter.

46. The handling of the second appeal also lingered far beyond the schedules established in the procedures of the Ministry of the Interior. For a detailed account of the foot-dragging in the handling of the second appeal, see paragraphs 51-64 of the petition in AP 28253-11-11, which is attached hereto and marked **P/18**.

47. Following the various extensions which were granted, on October 10, 2011, the decision of respondent 1 of the same day was received, according to which "**respondent's counsel shall submit to the Committee the open material which may be submitted, not later than November 6, 2001**."

Respondent 1's decision dated October 10, 2011 is attached hereto and marked **P/17**.

48. However, the open material has not been delivered to respondent 1, and respondent 2 continued with his deafening silence. Therefore, the petitioners-appellants had no alternative but to apply to the court, with the hope that this would expedite the handling of their matter.

The proceedings in AP 28253-11-11 and the continued deliberations on appeal 281/11 at the same time

49. As specified above, on November 15, 2011, an administrative petition was filed with this honorable court. At the outset of the petition, the court was requested to order the respondents to transfer to the petitioners the entire open evidentiary material which served as a basis for the recommendation of the security agencies to deny petitioners' family unification application – a recommendation which under-lied respondents' decision to give notice of an "intention to deny" the application.

50. The petition argued that the authority's failure to respond was in contrary to its duty to act promptly; that the authority's failure to respond violated the right to family life being a constitutional right and violated the rights of the children; that the Appellate Committee acted contrary to the law and procedure; that the respondents ignored the duty to give reasons imposed on them and violated petitioners' right to be heard, as outlined, *inter alia*, in the **Ghabis** judgment.

A copy of AP 28253-11-11, without its exhibits, is attached hereto and marked **P/18**.

51. As will be described below, the proceedings in the appeal continued to take place while the petition was pending.

52. On November 21, 2011, the honorable court (the Honorable Judge Ben Or) decided that a preliminary response to the petition would be submitted by the respondents not later than December 22, 2011.

A copy of the decision dated November 21, 2011 is attached hereto and marked **P/19**.

53. Extensions for the submission of respondents' preliminarily response to the petition were requested on December 22, 2011, January 12, 2012, January 23, 2012, February 6, 2012. The court has extended the dates as requested.

54. On February 16, 2012, while the petition was still pending, a "request to extend the submission of the response to the appeal" was received from respondent 2's counsel, in which a six day extension for the submission of respondent 2's preliminary response to the appeal was requested, until February 21, 2012. The decision of respondent 1 was scrawled on the request, according to which the extension was granted as requested.

A copy of the request for extension which was submitted by respondent 2's counsel and respondent 1's decision scrawled thereon, is attached hereto and marked **P/20**.

55. On February 19, 2012 the decision of the honorable court of the same day was received, according to which respondent's counsel should submit his preliminary response to the petition not later than February 21, 2012, along with an explanation of his failure to submit respondent's response on February 13, 2012, as was held by the court in its previous decision.

A copy of the decision dated February 19, 2012, is attached hereto and marked **P/21**.

56. On February 20, 2012, a request to extend the submission of respondents' preliminary response to the petition was filed. The request was filed without having obtained petitioner's position on the matter. The request stated that "Recently, the issue requested in the petition has been discussed by senior personnel on behalf of the state attorney's office, the security agencies and the Ministry of the Interior. However, they have not yet been able to formulate a position which would lead to the submission of a preliminary response, or, alternatively, to the conclusion of this petition."

A copy of respondents' request dated February 20, 2012 is attached hereto and marked **P/22**.

57. On that day an extension was granted as requested, until February 27, 2012.

58. On February 22, 2012 a "request to extend the submission of the response to the appeal" was received from respondent 2's counsel, in which an extension for the submission of respondent 2's preliminary response to the appeal was requested, until February 29, 2012. The request was transferred by respondent 1 for the petitioners-appellants' response.

A copy of the request to extend the submission of the response to the appeal and the decision of respondent 1 scrawled thereon is attached hereto and marked **P/23**.

59. Petitioners-appellants' response to the request for extension was filed on that very same day. The response noted that due to the protracted waiting period for respondent 2's response to the appeal, an administrative petition was filed with the district court. It was also stated, that in view of the fact that the matter being the subject matter of the appeal moved to the litigation level, and in view of the fact that chairpersons of the Appellate Committee were respondents in the petition, the

petitioners-appellants' position was that any communications – including requests for extension – should be exchanged between the parties' counsels, rather than between the litigants themselves. Beyond need, it was noted that the mere submission of the petition in November 2011, clearly indicated that the position of the petitioners-appellants was that respondent 2 exceeded his administrative duties. Therefore, they have objected to the requested extension.

A copy of petitioners-appellants' response dated February 22, 2012 is attached hereto and marked **P/24**.

60. On February 26, 2012 respondent 1's decision in the request for extension was received: "In view of the fact that the appellants chose to conduct the hearing before the district court, the Appellate Committee does no longer have jurisdiction to hear the appeal. Under these circumstances, there is no room for a response, an extension etc. The respondent shall submit his response within 7 days before the appeal is deleted."

A copy of respondent 1's decision dated February 26, 2012 is attached hereto and marked **P/25**.

61. On February 27, 2012 a request to extend the submission of respondents' preliminary response to the petition was filed, which stated that "The Ministry of the Interior has recently received an additional extension for the submission of its response to the Appellate Committee until February 29, 2012… for as long as the Ministry of the Interior has not formulated its position in petitioners' matter and hence, no such position has been submitted to the Appellate Committee, then, the attorney's office too has no position to the crux of the matter which may be presented before the honorable court." Petitioners' response was attached as an exhibit to respondents' request for extension.

A copy of respondents' request for extension and petitioners response which was attached thereto, are attached hereto and marked **P/26**.

62. On February 29, 2012 the decision of the honorable court was received, according to which the state's position in the petition should be filed not later than March 4, 2012.

63. On March 1, 2012 the petitioners-appellants received respondent 2's response in the appeal. At its outset, the response stated as follows: "The above captioned appeal concerns appellants' request to receive the evidentiary material within the framework of an "intention to deny" their family unification application**, before their written arguments are submitted according to the comments by agencies protocol No. 5.2.0015**." (emphasis added, N.D.)

64. The response continued to state respondent 2's position concerning petitioners-appellants' demand to transfer the open material:

> The respondent will argue that when a security preclusion is based on legal proceedings – either detention proceedings which are subject to judicial scrutiny, or other legal proceedings which are specified in the paraphrase concerning the appellant, the appellant is already aware of same, and therefore there is no room or reason to transfer the documents which concern him for the purpose of submitting his arguments in writing, under the comments of agencies protocol.
>
> For the exhaustion of the written hearing process there is neither need nor room to embark on an expedition for the location of materials which are already found in appellant's possession

65. In addition, and with respect to the requested information concerning legal proceedings, respondent 2 argued as follows:

> In view of the above specified information concerning the legal proceedings to which the appellant and his brothers were parties as described above, the appellant has the required information for the purpose of submitting a reasoned hearing in writing in his matter, in view of the fact that **the appellant was a party to said proceedings**. In view of the above, there is no room or reason for the production of said materials which relate to appellant's administrative detention due to his activity with the Islamic Jihad, of which the appellant is anyway fully aware having been a party to these proceedings in his matter.
>
> The respondent will argue further that the details specified and disclosed above, including dates which mostly relate to the appellant, facilitate the submission of a reasoned hearing by the appellant and that there is no justification or cause for the production of administrative detention orders or judicial decisions which are already in the possession of the appellant and his brothers who were also parties (each one them) to legal proceedings in their respective matters.
>
> (*ibid*, emphasis added, N.D.)

66. In addition, respondent 2 argued further that according to intelligence information, the petitioner-appellant continued to be active in the Islamic Jihad since he was released from administrative detention in 2003.

67. Towards the end of the response, respondent 2 notified that "the appellants are given an additional opportunity to respond to the security preclusion in their matter… within 30 days."

68. Respondent 1's decision dated March 1, 2012, which was scrawled on respondent 2's response, granted 21 days for petitioners-appellants' response.

    A copy of respondent 2's response in the appeal and respondent 1's decision scrawled thereon is attached hereto and marked **P/27**.

69. Following the developments in the appeal, the petitioners submitted to the court an updating notice on their behalf on March 1, 2012. At the outset of their notice, the petitioners advised, that despite respondent 1's decision according to which the Appellate Committee no longer had jurisdiction over the matter, respondent 2's response was submitted to the Appellate Committee, rather than directly to the court. The petitioners attached respondent 2's response to their notice.

70. In addition, the respondents referred to respondent 2's response on its merit. The petitioners argued that respondent 2's position according to which "there is neither need nor room to embark on an expedition for the location of materials which are already found in appellant's possession" was peculiar, to say the least, since it indicated that the materials were not in respondent's possession and that he had to embark on an "expedition" for their "location". However, in making an administrative decision, it is assumed that the respondent relies on real evidentiary material, and does not accept the recommendation of the security agencies as a *'fait accompli'*. In addition the petitioners argued that respondent 2's position disregarded the **Ghabis** judgment and petitioners' right to be heard.

71. The petitioners have further argued that when "indirect" security denials were concerned – which were attributed to family members rather than to the person himself – the disclosure of the material held by the authority was especially important, in view of the fact that in such cases – contrary to the manner by which the respondent has presented the issue – the person himself had no access to the evidentiary material upon which the respondent relied when he gave notice of his intention to deny the application. Finally, the petitioners argued that the disclosure of the entire open material to them in the hearing stage, can promote the efficiency of the proceeding and prevent unnecessary proceedings in the future.

72. On March 4, 2012 respondents' preliminary response in the petition was received. The response argued that "In view of the fact that the response of the Ministry of the Interior was given, the cause which delayed the Appellant Committee from making a decision was ostensibly removed and the petition should be summarily rejected due to the fact that it became redundant and due to the fact that the petitioners have not exhausted the remedies available to them as required by law."

A copy of the preliminary response to the petition dated March 4, 2012 is attached hereto and marked **P/28**.

73. On March 12, 2012, at the court's order, the petitioners filed a notice on their behalf. In their notice the petitioners argued that contrary to respondents' position, the required remedies were specifically exhausted prior to the filing of the petition. In addition, the petitioners reminded that **respondent 1 had ordered respondent 2 to transfer to the Committee the open material, before the petition was filed**. The petitioners also argued that there was no room to remand the matter to the Appellate Committee, after it has been considered – as respondents' counsel has advised – by senior personnel of the Ministry of the Interior, the state attorney's office and security agencies.

A copy of petitioners' notice dated March 12, 2012 is attached hereto and marked **P/29**.

74. On April 17, 2012, a hearing in the petition was held. The hearing focused on the exhaustion of remedies issue, and it was eventually decided that the matter should be remanded to the administrative proceeding, to be resolved by the chair of the Appellate Committee; The petition was therefore rejected. In view of respondent's failure to uphold the time schedules, costs in the sum of NIS 2,000 were awarded in favor of the petitioners.

A copy of the protocol of the hearing and of the decision dated April 17, 2012 is attached hereto and marked **P/30**.

75. On that very same day an updating notice was submitted to the Appellate Committee, which described the chain of events in the petition.

A copy of the updating notice in the appeal *[sic]* dated April 17, 2012 is attached hereto and marked **P/31**.

76. On April 18, 2012 respondent 1 transferred the updating notice which was submitted by the petitioners-appellants for "the response and comments of respondent's counsel" within 21 days.

A copy of respondent 1's decision dated April 18, 2012 is attached hereto and marked **P/32**.

77. After the above 21 days elapsed, and in the absence of respondent 2's response and comments, the petitioners-appellants submitted to respondent 1, on May 9, 2012, a request in which they have requested that decision be rendered in the appeal.

A copy of the request for the rendering of a decision dated May 9, 2012 is attached hereto and marked **P/33**.

78. On May 9, 2012 respondent 1's decision was received, according to which "A decision in the appeal will be rendered on the date established in the Committee's procedure."

A copy of respondent 1's decision dated May 9, 2012 is attached hereto and marked **P/34**.

79. As the date established in the Committee's schedule for the rendering of a decision by the Committee's chair passed, the petitioners-appellants submitted on July 16, 2012 an additional request for the rendering of a decision in the appeal.

A copy of the request for the rendering of a decision is attached hereto and marked **P/35**.

80. On July 24, 2012, **a year and one month after its submission**, a decision in the appeal dated July 19, 2012 has eventually been received.

81. Respondent 1 opens his decision with a review of the underlying facts of the appeal, and notes that on February 21, 2012, the petitioner-appellants had a written hearing.[1] Following a review of the parties' arguments and the relevant law, respondent 1 specifies his decision.

82. With respect to the demand to review the open evidentiary material, respondent 1 holds as follows:

> The information attributed to appellant 2, is severe both on the direct level which concerns him, as on the indirect level, which is based on his family members. These two levels of information are very relevant and are compatible with the provisions of the Temporary Order Law. Hence, said opinion of the security agencies, may prevent the appellants from obtaining the right to enter and stay in Israel and may cause the denial of their family unification application, **unless an appropriate argument against the recommendation of the security agencies is presented**.
>
> (paragraph 26 of the decision, emphasis added, N.D.).

83. With respect to the demand to transfer the evidentiary material, respondent 1 holds that the purpose of petitioner-appellants' demand is to examine the basis for the decision of the security agencies, which was transferred as a recommendation to the respondent before he makes a decision in the application. Respondent 1 continues to hold that "the appellants do not wish to examine respondent's discretion, but rather, to examine, once again, the reasons for and the arguments which were raised in the administrative detention proceedings, in appellant 2's indictment proceedings or the quality of the intelligence information which was in the possession of the ISA. This is not the appropriate arena to discuss these questions."

84. Respondent 1 refers to the "common practice" of transferring a paraphrase which is "broad enough" to the appellants, and holds that there is an "internal logic" in respondent's conduct. He

[1] Respondent 1 notes in paragraph 7 of his decision that "On December 8, 2010, the respondent transferred to appellants' counsel the requested material which consisted of an amended indictment, protocols and decisions of the Judea martial court, judgment and sentence." This is, apparently an error of omission, since, as is known, the requested material has never been transferred to the petitioners-appellants, and their appeal precisely concerns this issue.

also points out that the position of the security agencies, in addition to the fact that it requires respondent's consideration, is an "administrative evidence" as this term is defined in case law.

85. Thereafter respondent 1 holds that although it was not said so by the respondent, "it would be appropriate to determine and this is also the common practice, that after receipt of the position of the security personnel, the latter will be required to **support their recommendation by <u>privileged</u> information which would be disclosed solely to the respondent**, which **substantiates their recommendation in the open paraphrase**." (emphases added, N.D.).

86. In conclusion, respondent 1 welcomes respondent 2's request to make a decision in the family unification application "only after a written hearing is held for the appellants." Respondent 1 holds that the open paraphrase is broad and sufficient, and that "the respondent is not required, not now and not at all, to examine each and every item and information brought to its attention by any of the state authorities. For as long as a reasonable person can assume that this is a reliable information, then the ISA position will be accepted as an administrative evidence based on which, among its other considerations, the respondent will make its decision."

87. Respondent 1's decision was concluded with the determination that a written hearing would be held for the appellants within 30 days (despite the fact that as was noted in the beginning of the decision, such a hearing has already been held for them) and with the deletion of the appeal.

A copy of respondent 1's decision dated July 19, 2012 is attached hereto and marked **P/36**.

88. Petitioners' position is that respondent 1's decision is fundamentally erroneous and cannot be upheld. We shall specify our position herein-below.

<u>The Legal Framework</u>

> I am therefore of the opinion that the petitioner was correct in his demand, not only because his right to inspect documents derives from the provisions of the law, but – mainly – because common sense and elementary fairness in public relations between the government and the citizen mandate this conclusion… the authority may claim that a specific document is privileged based only on weighty arguments, and the burden of proof rests with the party which claims privilege.
>
> (HCJ 337/66 **Estate of Fitel v. Assessment Committee of the Holon Municipality**, IsrSC 21(1) 69, 72 (1967)).
>
> … the question is very simple: the underlying premise, rooted in the rules of natural justice, is that a party whose matter is pending in court is entitled to review the court's "file" which concerns him, unless the right of inspection was expressly limited by statute.
>
> (LCA 3564/12 **Bayer v. Plurality Ltd**., judgment dated August 1, 2012)

89. Sponsored spouses in family unification applications, are required, on more than one occasion, to challenge a notice of the Ministry of the Interior concerning an intention to deny their application based on privileged information in their matter. In such cases the task of the families and their counsels is not an easy one: coping with arguments which are based on evidence which they cannot

review. In such case the court acts as petitioners' "eyes and ears", when it examines the privileged information within the framework of the hearing of the petition. Such a hearing, which is held *ex parte*, has long been referred to as follows:

> Such a hearing, which is held *ex parte*, undoubtedly burdens the ability of petitioner's counsel to cope with respondent's arguments. There is no doubt that such a deviation from the rules of the adversarial hearing burdens petitioner's counsel. It also burdens the court which seeks to conduct an open and efficient dialogue with the counsels of both parties, and it naturally turns the court into petitioner's "representative" in this unilateral hearing.
>
> (HCJ 1520/09 **Jabarin v. Commander of IDF Forces in the West Bank** (not reported)).

90. However, in this case, it has not been argued that the evidentiary material was privileged. There is no apparent reason to deviate from the rules of adversarial hearing. The petitioner and his counsel should be given the opportunity to take an equal part in the legal process, and raise substantiated arguments, following an inspection of the evidentiary material. In other words, the petitioner does not need "eyes and ears" which are not his own.

91. In the appeal, the petitioners have broadly discussed the right to be heard and the right of inspection which is derived there-from. The respondents chose to disregard said right, and to dismiss petitioners' demand to inspect the material offhandedly, as if it was a whim, based on an odd argument that there was no need for the petitioners to inspect the material. This position of the respondents is particularly peculiar, in view of the fact that it was also expected of the respondent to inspect the documents, before he adopts the recommendation of the security agencies. And if the respondent inspects the material, how can he argue that petitioners' demand sends him on an "expedition for the location of the materials'?

92. In the following pages the petitioners will discuss in detail their rights which were violated, and will refer to respondent 1's decision, its unreasonableness and failure to comply with the standards of proportionality.

<u>Disregarding the duty to give grounds and violating the right to be heard</u>

93. Respondent 1's decision lacks any material discussion of the weighty arguments raised by the petitioners concerning the duty to give grounds, the right to be heard and the right of inspection which is derived there-from. By his utter disregard of these fundamental arguments, respondent 1's decision is like a building which was erected on unstable foundations.

94. Whereas, petitioners' position is that the duty to give grounds and the right to be heard are at the heart of the matter at hand. Therefore, we shall discuss these principles in depth.

<u>Preface – the duty to give grounds and the right to be heard</u>

95. Petitioners' position is that before the authority makes a decision in their matter, **they have the right to inspect** the documents upon which the intention to deny their application is based. This is a fundamental right, which constitutes part of **the right to be heard**, and which constitutes an integral part of the rules of natural justice.

96. *Vis-à-vis* petitioners' right of inspection and the right to be heard, the respondents in this case have **the duty to give grounds**, which like the former rights, constitutes an integral part of petitioner 2's right to a fair hearing and due process, and was also recognized as a right by English Common Law and thereafter by Israeli jurisprudence, which acknowledged the existence of the rules of natural justice. The rationale underlying the authority's duty to disclose its reasons to the individuals whose steps may be limited, is clear: in the absence of a detailed account of the reasons for the denial, the person who is injured by the decision of the authority is unable to refute the arguments raised against him. His protected rights may be restricted without any scrutiny or examination.

97. The importance of having the authority's reasons disclosed for the purpose of securing a due process is demonstrated, most of all, by those cases in which the authorities agreed to specify, to a certain extent, the reasons for the refusal to make a disclosure, following which, the "refused" succeeded to prove, relatively easily, that the arguments raised against them were not grounded, thus causing the withdrawal of the preclusion. This was the case, for instance, in HCJ 8857/08 **'Asfour v. Military Commander of West Bank**; HCJ 25/09 **Ghanem v. Military Commander of West Bank** ; HCJ 4819/09 **Dr. al-Hor v. Military Commander of West Bank; HCJ 10104/09 Abu-Salameh v. Military Commander of West Bank.**

A review of these files shows that a thorough inspection, with the assistance of counsel, of documents which are submitted by authorities and various agencies in cases in which the authorities claim that a security preclusion exists, may disclose things and sometimes even errors, which can tip the scale and change the decision.

<u>The right to be heard and the right of inspection</u>

98. The right to be heard by the administrative authority, which considers or intends to take an action which violates a person's right or interest, was recognized as a primary right, which constitutes part of the rules of natural justice (see for instance: HCJ 3/58 **Berman v. Minister of the Interior**, IsrSC 12 1493, 1508; HCJ 3379/03 **Moustaki et al. v. The State Attorney's Office**, IsrSC 58(3) 865, 889; HCJ 5627/02 **Saifv. Government Press Office** IsrSC 58(5) 70, 75).

99. It has recently been held by this honorable court that ""**the key for conducting a meaningful hearing, is that the applicants are given substantive information**, to the maximum extent possible, subject to inherent limitations, so that they are afforded the opportunity to adequately prepare for the proceeding." (AAA 1038/08 **State of Israel v. Ghabis**, not reported).

100. It has long been recognized that the right to be heard consists of **the right to inspect** the material which was used by the administrative authority to make its decision:

> Indeed, the right to inspect the documents which are used by the authority to make its decision is reasonably derived from a person's right to be heard and raise his arguments before the administrative authority which is about to make a decision in his matter. This, however, subject to such qualifications and limitations which are required to secure the proper operation of the administrative authority. **Without the right of inspection, the right to be heard will never be complete. And without the right to be heard – the decision of the administrative authority may be incomplete and flawed**. This approach to the right of inspection of the individual who may be injured by the decision of the authority, is compatible with the current generally

> acceptable approach which tends to restrict the privileges on information which is held by the public authority and limit them only to essential needs for the attainment of an important public interest.
>
> (HCJ 7805/00 **Aloni v. The Comptroller of the Jerusalem Municipality**, TakSC 2003(2) 1121, page 1131).

101. In another matter it was held, that the right to be heard is not merely the right of the individual to present his arguments before the authority. Rather, the right to be heard means the right to have a **fair hearing**, which enables the citizen to cope with arguments raised against him:

> The case before us demonstrates the great importance that should be attributed to a strict adherence to the rules concerning the right to a fair hearing. Since the petitioner has not been given the opportunity to hear the complaints against him and to present his own position, he became convinced that the considerations of the authorities were inappropriate and discriminatory and his trust as a citizen in the government was undermined.
>
> The rules concerning the right to a fair hearing are aimed at preventing this state of affairs, since the purpose thereof is not only to ensure that in practice justice is made with the injured individual, but also to ensure that the trust of the public in good governance is maintained…
>
> This right is not only a formal procedure of invitation and hearing. The right to be heard means the right to a fair hearing (HCJ 598/77, page 168). The meaning of this right is to give a proper opportunity to respond to information which was obtained and which may affect a decision which concerns petitioner's matter (see: HCJ 361/76).
>
> **Therefore, the right to be heard is not properly exercised, if the applicant is not advised of the information which was obtained in his matter and is not given the opportunity to properly respond thereto**.
>
> (HCJ 656/80 **Abu Romi v. Minister of Health**, IsrSC 35(3) 185, 190; emphasis added, N.D.).

102. **The personal right of inspection**, namely – a person's right to inspect the material which pertains to him, personally, and which is found in the files of the public administration – is based on the authority's status as a trustee of the public:

> The rule is that documents which were received by the authority while exercising the power entrusted with it by law, should be open and available to the involved party; and the authority's argument that the involved party does no longer have the right to see a document which was filed is not acceptable… **the argument that in the absence of a legal duty to disclose, I am**

> **entitled to conceal and not to disclose – may be made by a person or private entity… but it cannot be made by an authority which operates under the law**. The private sphere is different from the public sphere. Whereas a private entity acts as it pleases, grants and denies at will, the latter was created for the sole purpose of serving the public, and it has nothing of its own; whatever it has is entrusted with it as a trustee. In and of itself it has no additional rights, or different or separate rights from those which derive from said trusteeship or which were granted to or imposed on it pursuant to statutory provisions.
>
> HCJ 142/70 **Shapira v The Regional Committee of the Bar Association,** IsrSC 28(1), 325, 330; emphasis added, N.D.).
>
> On this issue see also: LCA 4999/95 **Alberici International v. State of Israel**, IsrSC 50(1) 39, 44; LCA 291/99 D.N.D. **Stone Supplies Jerusalem v. VAT Director**, TakSC 2004(2) 194, page 200.

103. As to the importance of the right of inspection, as part of the exhaustion of the right to be heard of the person who may be injured by the decision of the administrative authority, it was held that:

> **Preventing the injured party from receiving all evidentiary material, violates his right to be heard, <u>and in such an event he is no longer required to show that under the special circumstances of the case miscarriage of justice was also caused</u>**. The concern (even if not substantiated) that the authority erred in making its injurious decision is embedded in the mere fact that the right to be heard and challenge the evidence which were received was not fully granted to the injured party. The protected value of human dignity, in the Basic Law: Human Dignity and Liberty, also leads to the inevitable conclusion that even an impingement of human dignity for a proper purpose, should not be made unless the person whose dignity may be impinged, has been given the right to be heard, **namely, the right to receive the evidentiary material in its entirety and an opportunity to respond thereto, a right which constitutes a "safety belt" against an "excessive" injury.**
>
> (HCJ 4914/94 **Terner v. State Comptroller et al**., IsrSC 49(3) 771, page 791; emphasis added, N.D.)

<u>The implementation in our case</u>

104. In the case at hand, the security agencies recommended to the respondent to deny the family unification application, in view of direct and indirect, privileged and unprivileged material, which exists against petitioner 2. The respondent, of his part, informed of his intention to deny the family unification application, based on the recommendation of the security agencies, if petitioner 2 does not present strong enough arguments which would override the arguments of the security agencies. Petitioner 2 was given the opportunity to present his arguments before the respondent in the procedure of a "written hearing"

105. When "indirect" security preclusions are concerned – which are attributed to family members rather than to the person himself – the disclosure of the material which is in the authority's possession has special importance. In such cases the person has no access to the evidentiary material on which the security agencies based their recommendation to deny his application. He has no independent right to obtain the material and he cannot contact the relevant parties directly and request, for instance, detention orders, police interrogation records and convictions of other people. On many occasions, open materials which relate to the person himself, are not in his possession as well. This is the case particularly if the relevant proceeding took place several years ago. Namely, even in cases of "direct" denial which is based on open materials, there are difficulties in accessing the material.

106. The respondent cannot possibly argue against alleged activities of a third party and shift the burden to the applicant to turn every stone in a hopeless search for the material which was used "against" him. This is a frivolous request and a brazen violation of the right for due process.

107. Therefore, it is incumbent upon the respondent to transfer to petitioner 2 the relevant material, so as to establish his right to be heard.

108. Petitioner 9 has already argued that the right to have a fair hearing was meaningless unless the applicant received the opportunity to inspect all relevant materials to the decision, in a letter which was sent to the respondents on March 1, 2011 concerning the "comments of agencies protocol in family unification applications."

A copy of the letter concerning comments of agencies protocol is attached hereto and marked **P/37**.

<u>The right of inspection as reflected in **Ghabis** – pre-conditions for the exercise of the right to a fair hearing</u>

109. The judgment in AAA 1038/08 **State of Israel v. Ghabis** (hereinafter: **Ghabis**) concerned the duties imposed on the respondents while denying family unification applications. In addition to the obligation to establish a procedure which governs applicants' right to be heard before their fate is decided by the respondents, the court has also discussed in the judgment additional conditions which derive from the grant of the right to a fair hearing.

110. Thus, it was held in paragraph 31 of the judgment, that in order to exercise the preliminary right to be heard, the hearing should be conducted "**following a detailed notice which specifies, to the maximum extent possible, the basis for the intent to deny the application, so that the applicants will be able to adequately prepare themselves therefore**." (emphasis added, N.D.).

111. The Supreme Court added that in cases in which the opinion of the security agencies was based on privileged intelligence information:

> An effort should be made to prepare a paraphrase of the material, with as many details as possible, with an attempt not to provide only laconic statements. In the confrontation between the individual and the authority the balance of power is never even, **and the above applies even more forcefully in cases in which the material concerning the applicant is unknown to him. An**

> **effort should be made to limit this restriction to the required minimum.**
>
> (emphasis added, N.D.).

112. In paragraph 34 the court warned that:

> The grant of the right to be heard is important; but it is important to ensure that the hearing is substantive and that it does not turn into a formal and meaningless proceeding. **The key for turning the hearing into a meaningful proceeding is, that the applicants are provided with substantial information, to the maximum extent possible, even if subject to inherent restrictions, so that they would be able to adequately prepare for the proceeding."**
>
> (*ibid*; emphasis added, N.D.)

113. It was also held in paragraph 7 of the judgment of President Beinisch in **Ghabis** as follows:

> "In conclusion I would like to point out, that substantial importance is attributed to a meticulous adherence to the procedures of the Ministry of the Interior which pertain to the manner of presentation of a concise description of the material which may be disclosed to the individual whose application for status is examined, in view of the nature and objective of these procedures. As is recalled, the premise underlying the establishment of the "procedure for comments of [security] officials" **was that the Ministry of the Interior should use its best efforts – subject to limitations of privileged information - to provide the individual details concerning the information underlying the decision not to grant him status in Israel for security or other reasons**.
>
> (*ibid*; emphasis added – N.D.)

114. Hence, **Ghabis** concerned mostly the duties imposed on the respondent, with respect to a security preclusion which was based on **confidential information**. In such an event, the disclosure of the entire material to the applicants is not possible for security reasons. However, notwithstanding the known limitations, the court in **Ghabis** holds that it should be meticulously ascertained that the information which is disclosed to the applicants, is maximal. **Otherwise, the hearing proceeding will be meaningless**.

115. The above said is even more relevant when **open** material is concerned. When the material is open, there is no impediment which prevents its transfer to the applicants. This material is highly accessible by the authorities. Moreover: as will be specified below, it is assumed that the authorities also examine it before they make their decision in a family unification application.

116. Therefore, the **Ghabis** judgment tries to clear – as much as possible – the smoke screen which always exists when the respondent relies on privileged information in the examination of a family unification application. The underlying premise of **Ghabis** was the recognition of applicants' inherent inferiority in proceedings which involve privileged information. In this case the

respondents put the petitioners in an even more inferior position – without any need or real reason. In this case, with respect to the open material, respondent's notice concerning an "intention to deny" is not engulfed by any smoke screen. The respondents wish to unnecessarily encumber the petitioners, and restrict their right to be heard beyond need.

The actual implementation: how will the exercise of the right of inspection contribute to a meaningful realization of the right to be heard?

117. A review of respondent 1's decision in the appeal, a decision which has completely ignored, as aforesaid, petitioners' arguments concerning the right to be heard and the right of inspection, creates an erroneous impression that petitioners' demand to inspect the open material is some sort of a whim of the petitioners intended to unnecessarily bother the respondent.

118. Beyond need, the petitioners wish to explain – on the practical level – how inspection of open material can assist them to properly raise their arguments in the hearing. This, obviously, without derogating from their general argument concerning the right of inspection, which exits in any event (and without making an argument concerning the need to show, in any specific proceeding, why they need the open material).

119. The following are two examples from cases which were handled by HaMoked, in which the inspection of the open material was of the utmost importance.

120. An original indictment as opposed to an amended indictment: In one of the cases which were handled by HaMoked, the respondent advised of his intention to deny a family unification application due to the deeds of the sponsored spouse's brother. According to the denial letter, the sponsored spouse's brother "admitted of being a member of a PLO cell which had arms, admitted of trade in firearms, and of his participation in the throwing of Molotov cocktails at a military vehicle."

A copy of the denial letter in the family unification application 622/07 is attached hereto and marked **P/38**.

121. In the handling of an appeal in the same matter (appeal 84/09), appellants' counsel has received the open evidentiary material concerning the brother: indictment, amended indictment, protocols of hearings in the martial court, decision, sentence. A review of said materials indicated that an amended indictment was filed against the brother, and that a plea bargain was reached under which he retracted his denial of the offenses which had been attributed to him, and admitted of having committed the offenses which were specified in the amended indictment. It turned out that no mention was made in the amended indictment, neither of the offense of participation in throwing Molotov cocktails at a military vehicle, nor of the accusation that the brother was a member of a PLO cell which had arms in its possession. Clearly, the brother did not admit to these deeds, which were not included in the amended indictment as in the plea bargain. The appellants have obviously referred to this matter in their written hearing.

A copy of the open documents which were transferred to HaMoked in appeal 84/09 is attached and marked **P/39**.

A copy of the written hearing which was submitted in family unification application 622/07 is attached and marked **P/40**.

122. From general notices to an ostensibly severe paraphrase: In another case which was handled by petitioner 9, a petition was filed in which the state argued that a West Bank resident was precluded from travelling to Yemen for his sixth year of medical studies (HCJ 10104/09 **Abu Salameh v.**

Military Commander of the West Bank). In respondent's preliminary response a paraphrase was given, according to which the objection to petitioner's travel abroad was based on petitioner's notices which were given in a police interrogation, according to which he agreed to take part in a military training conducted by the Hamas and the PLO, and that while staying abroad he met with Hamas activists including the bodyguard of Khaled Mashal.

A copy of respondent's preliminary response in HCJ 10104/09 is attached hereto and marked **P/41**.

123. In the handling of the petition the above police interrogation records of the petitioner were received. A review of said interrogations enabled petitioner's counsel to refer to them and raise arguments concerning the security denial. Thus, for instance, it turned out from the open material that the only ostensible "consent" for taking part in the military training which was mentioned in petitioner's notice, were things which were said in a "messenger" conversation (internet messages) with a co-student, in which the petitioner has already explained that he had no interest in taking part in said training.

A copy of the open material which was transferred in HCJ 10104/09 is attached and marked **P/42**.

A copy of respondent's response in HCJ 10104/09 is attached and marked **P/43**.

124. And indeed, upon the conclusion of the hearing in the petition, the respondent agreed to grant the petitioner a permit to travel from the West Bank to Jordan.

A copy of the judgment dated December 28, 2009 is attached hereto and marked **P/44**.

125. Additional general examples for the advantage of the inspection of the open material: In addition to the above, there are many additional examples for the advantages of the inspection of the open material. An inspection of a protocol of a hearing in which an administrative detention order was scrutinized by the court provides an indication of different sets of balances which were applied by the Judge (for instance, grounds for the shortening of the detention); an inspection of the interrogations and statements can shed light on a vague statement made with respect to a person – such as the petitioner at hand – that "his name was mentioned as an… (activist in a certain organization);" an inspection of the entire relevant open material will clarify whether the court's decision was appealed, what was held in the appeal proceedings; etc., etc.

126. Obviously, the list of examples is not closed; It is also obvious that the scope of the open material which is transferred to the applicants should not be limited and classified in advance, since (metaphorically) "The wisdom of a talented defense attorney is endless, and no one can guess how he would have used the material before him" (CrimApp 35/50 **Malka v. Attorney General** (IsrSC (4) 1950; 429,433).

Recommendation as an administrative evidence without any examination: respondent's duty to inspect privileged information but not open information?

127. In his decision, respondent 1 holds that "Logic dictates that this is not the appropriate place to discuss the manner by which the security agencies establish their recommendation. Rather, it is respondent's decision which should be discussed – and which, as aforesaid, has not yet been made." (paragraph 29). Respondent 1 continues to hold that "The respondent is not required, not now and not at all, to examine each and every item and information brought to its attention by any of the state authorities. For as long as a reasonable person can assume that this is a reliable information, then the ISA position will be accepted as an administrative evidence based on which, among its other considerations, the respondent will make its decision." (paragraph 32).

128. Hence, respondent 1 determines that the position of the security agencies is a sort of an "expert opinion", and that the respondent is not obligated to "lift the veil" and examine what stands behind this opinion. Furthermore, respondent 1 is of the opinion that the petitioner too, who challenges respondent's intention to deny the family unification application, is entitled to inspect only the evidentiary material which was before the respondent (and only for as long as the material is not privileged).

129. Obviously, this is an absurd position. The fact that the respondent is assisted by experts who give him advise and convey their professional opinion, cannot erect a "wall" between people such as the petitioner and the consulting body, and cannot serve as a cause for the denial of the demand to inspect the material upon which the recommendation was based.

130. Moreover. The practice that respondent 1 outlines in his decision – according to which the respondent is not required to examine the recommendation of the security agencies – is contrary to the basic principles of administrative law and, in fact, enables the authority to relinquish its discretion:

> By the mere fact of having the power – **he should have acted out of his own initiative, to obtain all relevant material, based on which a decision may be made either this way or the other. He is the authority which was appointed by the legislator to handle the matter and he is the one who had to take action and gather information on this issue, which would assist him in making his decision…**
>
> **In view of all of the above, the inevitable conclusion is that the decision making process in this case by the competent authority was flawed and consequently invalid: in fact, a proper examination process did not take place, as required**. If the minister did not have enough data, including professional opinions of a proper level, which could refute petitioners' position or put its weight and persuasive power in doubt, then **he should have acted to obtain an opinion in order to carry out the data gathering process, and have available to him enough material, based on which he would be able to make a decision…**
>
> If he did not take any action to gather information, he could not have moved on to the next stage of review and consideration – which must precede the decision making, namely, the stage in which the expert opinions are compared and weighed one against the other. This is done, *inter alia*, by the examination of the pros and cons of each position. Therefore, **the essential basis which is required to establish a decision is missing, a decision which could have been regarded by the court as a decision of the competent authority which was made after an open minded examination free of rigid prejudices.** It could have been regarded by the court as a choice between various reasonable alternatives, with which the court usually does not intervene…

> **The court's meticulous insistence that a proper decision making process be carried out before a decision is made by the party which was granted the authority by law, may be the most efficient means to secure that the discretion granted by the legislator to this branch or another of the executive authority, is not exercised in a defective manner, which may render the law and its objective meaningless**. The obligation to consider all data methodically, fairly and in a pertinent manner, and to conduct a complete and orderly process in which contradicting opinions are weighed **may reduce, to a large extent, the danger that relevant aspects be disregarded and that flawed or arbitrary acts be taken, which may injure the individual and the public at large**.
>
> (HCJ 297/82 **Berger v. Minister of the Interior**, IsrSC 37(3), 29, paragraphs 8-10; emphasis added, N.D.).

131. Indeed, the party having the authority to notify of an "intention to deny" in this case, is the respondent. The respondent – and not the ISA. The security agencies **are an advisory body only**:

> The recommendation of the ISA and other security agencies is not a decisive *'sine qua non*' factor. **The ISA does not have a "veto right" on the approval of family unification applications**. Indeed, the ISA's opinion plays a central role in respondent's considerations, and indeed the ISA's position has been rightfully afforded said position. However, while making his decision in a family unification application, the respondent must take into consideration a host of other considerations as well.
>
> (AP (Haifa) 1551-06-09 **Nasser v. Ministry of the Interior** (reported in Nevo); emphasis added, N.D.)

132. Thus, the administrative authority must independently consider the relevant considerations, within the framework of the family unification application. It is clear, that it must review the open material, before it gives notice of an intention to deny a family unification application, for two main reasons: to prevent a situation in which it relinquishes its discretion and assigns it to a body which is not authorized to make a final decision but only to consult (in this case – the ISA), and to ensure that it upholds the duty to give reasons which is incumbent upon it.

133. However, respondent 1's position is even more absurd. He holds that it would be appropriate for the respondent to require the security agencies to support their recommendation by **privileged** information which would be presented solely to the respondent (paragraph 31). However, in the same decision he "exempts" the respondent from the requirement to inspect the **open** documents upon which the recommendation of the security agencies was based! Why do the reasons – the correct ones – for respondent 1's determination that the respondent should inspect the privileged information before making a decision, fail to apply to the open information? Why, with respect to the open material, does respondent 1 consider the transfer of a general paraphrase to the respondent as sufficient? This, specifically with respect to material which is much more accessible and the review of which is not limited to officials with security clearance. **The above position of respondent 1 is peculiar, and is contrary to the independent discretion principle.**

How will the petitioners lift the burden imposed on them?

> Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. "It is possible," says the gatekeeper, "but not now." At the moment the gate to the law stands open, as always, and the gatekeeper walks to the side, so the man bends over in order to see through the gate into the inside. When the gatekeeper notices that, he laughs and says: "If it tempts you so much, try it in spite of my prohibition. But take note: I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other. I can't endure even one glimpse of the third." The man from the country has not expected such difficulties.
>
> (Franz Kafka, **Before the Law**, from **The Trial**; translated from German (to Hebrew – translator's comment): Avraham Carmel, published by Shoken; 1992)(translated to English by Ian Johnston – translator's comment).

134. Respondent 1 holds as follows: "Without taking a stance concerning the decision which would be finally made by the respondent by the end of the proceeding, I will just say that the negative security information attributed to appellant 2, is severe… said opinion of the security agencies, may prevent the appellants from obtaining the right to enter and stay in Israel and may cause the denial of their family unification application, **unless an appropriate argument against the recommendation of the security agencies is presented. Hence, the appellants must raise a defence and make their arguments. Otherwise, the application is expected to be denied.** (paragraphs 26-27 of the decision; emphasis added, N.D.).

135. We shall summarize the manner by which petitioners' matter will be handled, according to respondent 1: the respondent examines petitioners' family unification application; in his examination, respondent 1 receives the position of the security agencies; the security agencies provide the respondent with their opinion, according to which – based on open and privileged material – the family unification application should be denied; the respondent should request the security agencies to support their recommendation with privileged material. However, with respect to the open material it is not "required, not now and not at all, to examine each and every item and information brought to its attention by any of the state authorities."; the respondent transfers to the petitioners a paraphrase concerning the security preclusion and gives them an opportunity to present their arguments – however, it does not allow them to even inspect the open material in their matter; if the petitioners fail to raise substantial arguments against the recommendation of the security agencies, their family unification application will be denied.

136. The respondents impose on petitioner 2 the burden to refute the claims raised by the security agencies against him. They ostensibly enable him to present his arguments before them. Petitioner 2's condition is problematic from the outset, since he cannot inspect the privileged material in his matter, and cannot raise his arguments with respect to the contents thereof, but only with respect to the paraphrase which was given to him. Respondent 1 however goes one step farther, and ties petitioner 2's hands even more. He further limits his right to be heard. Respondent 1 holds, that petitioner 2 should raise his arguments concerning the position of the security agencies towards

him, without having been exposed to the open details of said position, without having been given the opportunity to refer specifically to the evidentiary material. Needless to note, that in this state of affairs, respondent's position, according to which petitioner 2 has not met the burden imposed on him and has not refuted the position of the agencies – will not be at all surprising.

137. The right to be heard given by respondent 1 to the petitioners is deceiving, bogus. An illusion. How will the petitioners meet the burden imposed on them, to challenge the claims raised against them, in the absence of an opportunity to inspect the materials in their matter? This, when their starting point is inferior to begin with, since the respondent relies also on privileged information, which they will not get to see.

The violation of the right to family life

138. Both International law and Israeli law attach great importance to the family, and impose on the state a duty to protect it. Thus, for instance, Article 10(1) of the International Covenant on Economic, social and cultural Rights, which was ratified by Israel on October 3, 1991, provides that:

> 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…

139. In HCJ 7052/03 **Adalah v. Minister of the Interior** (TakSC 2006(2), 1754) it was even held that the right to family life was a constitutional right, embedded in the right of human dignity. This position was sweepingly supported in said judgment by eight out of the eleven justices of the panel.

140. The determination that the right to family life is a constitutional right entails the determination that any violation of said right should be made according to the Basic Law: Human Dignity and Liberty – and based only on weighty considerations.

141. Blocking petitioners' ability to present all of their arguments against the security preclusion which is raised against them, without giving them a full right to be heard, severely violates the right to family life. As stated in the decision of respondent 1, the failure to meet the burden to refute the security agencies' position would lead to the denial of the family unification application. The respondents do not enable the petitioners to meet the burden imposed on them – and from here the way to a severe violation of the right to family life is short.

The decision of respondent 1 lacks reasonableness and proportionality

142. The administrative authority must act reasonably, proportionately, fairly and for the attainment of a proper objective. These are major principles which govern the scope of respondent's discretion being an administrative authority.

143. On this issue see: HCJ 1689/94 **Harari et al. v. Minister of the Interior**, IsrSC 51(1), 15; and HCJ 840/79 **The Contractors and Builders Center in Israel v. The Government of Israel**, IsrSC 34(3), 729, pages 745-746, the words of the Honorable Justice Barak (as then titled):

> The state, through those who act on its behalf, is the trustee of the public, and the public interest and properties were entrusted to it to be used for the benefit of the public at large… this special status imposes on the state the obligation to act reasonably, honestly, based on pure motives and in good faith. The state must not discriminate against, act arbitrarily or in bad faith, or be in a conflict of interests situation. Shortly, it must act fairly.

144. The above indicates that respondents' position concerning the transfer of open evidentiary material within the framework of "written hearing" proceedings does not comply with test of reasonableness. Moreover, respondents' decision does not comply with the test of proportionality either. It severely violates fundamental rights, including the right to be heard, without any apparent justification. Contrary to the limitation of the right to inspect privileged information – in which case the right to be heard and the right to family life are balanced against the principle of the protection of public safety – in this case, no such balancing system is required. The respondents did not point at any injury to public interest, which can justify the substantial violation of petitioners' rights.

Conclusion

145. Petitioners' request is ostensibly simple: to fully realize their right to be heard, by enabling them to inspect the open evidentiary material upon which the security agencies' recommendation was based, and refer to this material in their "written hearing". Instead of having their basic request accepted by the respondents, the petitioners encounter procrastination, prolonged proceedings and refusal to realize their rights without any real reason.

146. In view of all of the above, the honourable court is hereby requested to order the respondent to transfer to the petitioners, forthwith, the open evidentiary material as requested. This is the only way which will enable the petitioners to raise their full arguments against the intention to deny their family unification application. In addition, the honourable court is hereby requested to order the respondent to permanently entrench, in protocol, a practice for the transfer of open material to applicants within the framework of a "written hearing". Finally, the court is hereby requested to order the respondent to pay costs of trial and legal fees.

Jerusalem, July 14, 2012.

_____

Noa Diamond, Advocate
Counsel to the petitioners

(File No. 57819)