At the Supreme Court **HCJ 4047/13**
Sitting as the High Court of Justice

In the matter of:

1. _____ **Hadri, ID No. _____**
2. _____ **Hadri, ID No. _____**
3. _____ **Kahouji, ID No. _____**
4. _____ **Kahouji, ID No. _____**
5. _____ **Abu 'Adrah, ID No. _____**
6. _____ **Abu 'Adrah, ID No. _____**
7. _____ **Abu Marseh, ID No. _____**
8. _____ **Abu Marseh, ID No. _____**
9. _____ **Abu Qweidar, ID No. _____**
10. _____ **Abu Qweidar, ID No. _____**
11. _____ **Ustaz, ID No. _____**
12. _____ **Ustaz, ID No. _____**
13. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – Registered Association**

all represented by counsel, Adv. Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Sigi Ben-Ari (Lic. No. 37566) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. No. 41065) and/or Hava Matras-Irron (Lic. No. 35174) and/or Tal Steiner (Lic. No. 62448) and/or Bilal Sbihat (Lic. No. 49838)
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. **Prime Minister, Mr. Benjamin Netanyahu**
2. **Minister of Interior, Mr. Gideon Sa'ar**
3. **Attorney General, Adv. Yehuda Weinstein**

all represented by the State Attorney's Office
29 Salah a-Din St., Jerusalem
Tel: 02-6466590; Fax: 02-6467011

The Respondents

Petition for Order Nisi

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause why they should not revoke government resolution 3598 of June 15, 2008[1], which instructs the Minister of Interior to refuse family unification applications of persons registered in the population registry as residents of the Gaza Strip and anyone residing in the Gaza Strip despite not being registered in the population registry as a resident of the Gaza Strip.

Preface

1. This petition is directed against a government resolution which sweepingly prohibits family unification between Israelis and their Gaza Strip spouses, contrary to family unification proceedings between Israelis and their West Bank spouses, which are permitted under certain conditions. The stories of petitioners 1-12, which will be specified in detail hereunder, demonstrate the severe implications of this policy.

2. The government resolution – which has already been extended five times – is ostensibly based on the provisions of a specific section in the Citizenship and Entry into Israel Law (Temporary Order), 5763–2003 (hereinafter: the **temporary order** or the **law**). However, as will be argued herein below, the resolution radically departs from the provision of the law, in a manner which justifies its revocation. But more importantly, the government resolution severely and disproportionately infringes the right of Israelis to family life, a right which has been recognized as situated at the heart of human dignity and liberty.

3. On January 11, 2012, a judgment was rendered in four petitions which challenged the temporary order and were joined together under HCJ 466/07 **Galon v. Minister of Interior**. The judgment examines whether the temporary order is constitutional, following amendments which were made therein after the previous petitions which were filed against the law (HCJ 7052/03 **Adalah v. Minister of Interior**). The majority justices in **Galon** ruled that the infringement of the constitutional rights meets the requirements of the limitation clause.

4. However, the **Galon** judgment was rendered, as aforesaid, after the temporary order has been somewhat mitigated by an amendment of 2005. Said amendment allowed spouses – Israelis and OPT Palestinians – to live together in Israel, under certain conditions, mainly, the minimum entry age for family unification proceedings.

5. The government resolution challenged by this petition, violates the delicate balance underlying the **Galon** judgment, by imposing a complete prohibition on family unification proceedings with Gaza Strip residents. Therefore, this petition will argue, that the government resolution does not meet the conditions required to uphold the temporary order which were established in the **Galon** judgment.

6. It should be clarified and emphasized that the petitioners are well aware of the tense security situation which exists between the State of Israel and the Gaza Strip. The petitioners do not take lightly the importance of securing State safety by reasonable and proportionate measures, by balancing between the nature of the threat faced by the State and the public at large, and by giving a proper weight to the nature and importance of the human rights which are being violated. This petition concerns the unreasonable and disproportionate nature of the sweeping policy established

[1] Which was extended by government resolutions No. 600 of July 19, 2009, No. 2097 of July 18, 2010, No. 2734 of January 16, 2011, No. 4155 of January 22, 2012 and resolution No. 31 of April 14, 2013.

by the respondents, who refuse to conduct specific examinations with respect to a specifically defined category of families, contrary to their willingness to conduct specific examinations in other cases, as will be specified below.

The Factual Background

The Parties

7. Petitioners 1-12 are "mixed" couples – Israelis and Gaza Strip residents – who are totally deprived, by the government resolution, of the opportunity to live together in the State of the Israeli spouse.

8. Petitioner 13 (hereinafter: **HaMoked: Center for the Defence of the Individual** or **HaMoked**) is a registered not-for-profit association located in Jerusalem, which acts to promote human rights of Palestinians in the OPT. Among other things petitioner 13 handles family unification proceedings of Palestinians in Israel with their family members in the OPT.

Petitioners' Stories

The Hadri family – petitioners 1 and 2

9. _____ and _____ Hadri were married in June 2007. _____ has been residing outside the Gaza Strip, where his registered address is, since about 2000, long before the spouses were married. After their marriage the spouses have been living in Jerusalem, where their three children were born.

10. On January 2, 2008 _____ submitted a family unification application with _____, at the East Jerusalem Population Administration Bureau. Over the course of 2008, _____ was orally told, that in order to continue with the processing of the family unification application, he must close all criminal files pending against him. However, the application was not denied.

11. _____ tried to close the criminal file which was pending against him (at that time only one file was pending against him), with no success. Two lawyers with whom he consulted told him, that it was preferable to wait until the file was closed than to actively act in that matter.

12. While the Hadri spouses were waiting, _____ was sentenced to a period which was referred to by the court as "short and symbolic" – thirty three days – for driving in Israel without an Israeli driving license.

    Transcripts of the hearing, the judgment and verdict dated June 13, 2011 are attached and marked **P/1.**

13. _____ was imprisoned in the Dekel prison. After serving his sentence, _____ was taken, on July 28, 2011, by the employees of the Israel Prison Service to the Erez crossing, and was immediately expelled from there to Gaza, although _____ reiterated, time and again, that a family unification application was pending in his matter and that his wife and three children were waiting for him in Jerusalem.

14. In response to HaMoked's letter, following the expulsion of _____, the Ministry of Interior informed that the application of the spouses for family unification was refused, **in view of government resolution 3598**.

15. The spouses initiated several legal proceedings in an attempt to relieve the difficult situation in which the family was entangled. On October 4, 2011, an administrative petition 7112-10-11 was

filed in their name, in which the court was requested to cancel the expulsion of petitioner 2 from Israel, which was made contrary to the procedure of the Ministry of Interior which prohibits expulsion while an application is pending. In addition, on October 11, 2011, an application was submitted to the Humanitarian Committee which was established pursuant to the **Citizenship and Entry into Israel Law (Temporary Order), 5763–2003**.

The humanitarian application of October 11, 2011, without its exhibits, is attached and marked **P/2**.

16. On November 27, 2011 a judgment was rendered in the administrative petition in the matter of the Hadri spouses, which deleted the petition. An appeal (AAA170/12) was filed on January 5, 2012 which was rejected on June 6, 2012.

The judgment in AAA170/12 is attached and marked **P/3**.

17. Respondent 2's decision dated July 1, 2012, was received on July 10, 2012, according to which petitioner 2's humanitarian application was rejected in view of the government resolution and "lack of humanitarian grounds".

Respondent 2's decision dated July 1, 2012 is attached and marked **P/4**.

18. An appeal which was filed following the rejection of the humanitarian application (Appeal 543/12) was deleted on September 9, 2012 in view of the judgment in AP 10144-11-11 **Kafaeyah Ahmad v. Minister of Interior**, which concerned – like the case of the Hadri spouses – a retroactive implementation of the government resolution on applications which were pending when the government resolution entered into force. The chair of the appeal committee held in his decision that should the legal rule be changed, in view of the appeal which was filed against the District Court's judgment in the Ahmad case, the Hadri spouses would be able to file a new appeal, and laches would not be asserted against them.

The decision of the chair of the appeal committee dated September 9, 2012 is attached and marked **P/5**.

19. The hearing of the appeal against the judgment in the Ahmad case, AAA 7212/12, is scheduled for October 21, 2013 before this honorable court.

20. Thus, as a result of a flawed conduct of the authorities in the form of an unlawful expulsion, and a retroactive implementation of an abusive, general and sweeping government resolution, the Hadri family is torn between Jerusalem and Gaza. The Hadri spouses do not wish to live in Gaza but the government resolution does not enable them to live together in Jerusalem.

<u>The Kahouji family – petitioners 3 and 4</u>

21. The spouses _____ and _____ Kahouji were married on September 30, 1999. _____ is an Israeli resident and _____ was born in Gaza and his registered address is over there. When they married _____ was a manufacture engineering student in Germany, and the spouses resided in Germany until 2001.

22. Over the years the spouses had four children: _____, born on September 30, 2000; _____, born on July 2, 2003; _____, born on January 4, 2008; _____, born on August 9, 2011.

23. In 2001 the spouses left Germany. _____ returned to Ramla and _____ to Gaza. _____ submitted for _____ a family unification application in 2002.

24. On April 15, 2004 the family unification application was approved and _____ was referred to the DCO to receive a permit for one year.

The referral to the DCO is attached and marked **P/6**.

25. Shortly thereafter, Mr. Kahouji tried to receive a permit at the Erez crossing, based on the referral of the Ministry of Interior, but at the crossing he was barred from entering Israel, he was told that no permit would be issued to him and he was sent back empty-handed.

26. A few days later representatives of the Minister of Interior called Mrs. Kahouji and told her that she should go to the Ministry of Interior and return the referral. At the Ministry of Interior she was told that the reason for the retraction of the referral could not be divulged to her.

27. In view of the above, the spouses decided that _____ would move to Gaza. The family resided there until 2011, when the spouses decided that _____ would move with the children to Israel, which offers better living conditions and education opportunities.

28. Since then the family is torn apart. _____ and the children live in Ramla, Israel. _____ lives in Gaza. _____ and the children visit the father of the family during school vacations.

29. The spouses would have preferred to live together in Israel, but this possibility is not available to them. In view of the government resolution, if _____ submits a family unification application with _____, it will be automatically denied, due to the fact that he is a Gaza resident.

<u>The Abu 'Adrah family – petitioners 5 and 6</u>

30. _____, an Israeli resident, and _____, a Gaza resident, were married in 2001. Over the years they had five children: _____, born on September 4, 2002; _____, born on November 21, 2003; _____, born on September 29, 2005; _____, born on February 4, 2007; _____, born on October 24, 2012.

31. After their marriage the spouses submitted a family unification application in Israel. In that year the application was approved and _____ received a stay permit in Israel. _____ renewed his family unification permits year after year, until 2009.

The letter approving the family unification application is attached and marked **P/7**.

One of the stay permits which were received by _____ within the family unification proceeding is attached and marked **P/8**.

32. In 2009, when _____ reached the Erez crossing to renew his stay permit, he was told that his application to renew the permit has not yet been approved and that he should go to Gaza. _____ tried to explain that he did not want to enter Gaza and that his entire family was living in Israel. He requested to call his wife, but in response he was told to "call her from Gaza". Eventually, all of _____'s pleas were in vain, and he was deported to Gaza.

33. The spouses tried to contact lawyers that would assist them in their miserable condition, but they were unsuccessful in all of their attempts. _____ also turned to the Ministry of Interior, in an attempt to find out why _____'s permit was not renewed. A clerk called Alice said that the bureau had nothing to do with that, and that this was a decision which was made by the headquarters in Jerusalem.

34. Since then the family is torn apart. _____ and the children live in Segev Shalom, whereas _____ lives in Gaza. The children meet their father only a few times per year, on their visits

during school vacations. The family's economic condition is difficult, due to the fact that the employment opportunities in Gaza are very limited, and _____ is unemployed.

The Abu Marseh family – petitioners 7 and 8

35. _____ and _____ were married on December 12, 2002. _____ is a permanent resident of the State of Israel, and _____ is a resident of the Gaza Strip. Over the years the spouses had two children, _____, born on January 4, 2007 and _____, born on August 23, 2003. Both children were born in Gaza and are registered as Gaza residents.

36. _____ has never submitted a family unification application with _____, since she was told that it would not be approved. And indeed, during their marriage government resolution 1813 has already been in force, which froze the family unification proceedings of Israelis with Palestinians.

37. The spouses wish, of course, to live together and not apart from each other. Therefore, having no other alternative, _____ and the children live in Gaza. _____, who studied computer engineering at the Birzeit University, could not find work in his field of studies in Gaza, and is forced to make a living by giving computer lessons to children.

38. Currently _____ is already 35 years old. According to the amendment to the temporary order of 2005, he has already reached the age in which a family unification application may be submitted for him, but the family is prevented from doing so due to the government resolution.

The Abu Qweidar family – petitioners 9 and 10

39. _____ Abu Qweidar, an Israeli citizen, married his wife _____ in 2003. _____ is a Gaza Strip resident. Over the years they had three children: _____, born on August 4, 2004; _____, born on August 7, 2006; _____, born on April 20, 2010.

40. When the spouses married, the temporary order has already been in force and therefore _____ could not submit a family unification application with _____. In 2005, when the temporary order was amended in a manner which enabled to submit family unification applications for women from the OPT over 25 years of age, _____ has not yet reached the required age. Only in 2011 _____ celebrated her 25th birthday, but then the government resolution has already been in force, which prevented family unification with Gaza residents.

41. In the beginning the spouses lived separately, due to the fact that _____ could not find work in Gaza to support his family. About two years ago the spouses could no longer tolerate the family's separation, and _____ moved to live in Gaza. He constantly renews stay permits in Gaza and once annually he goes to Israel to work there for a few months, in order to save money to support the family.

42. The family would have preferred to live in Israel, but the government resolution prevents them from doing so and they have no alternative but to live in Gaza.

The Ustaz family – petitioners 11 and 12

43. The Ustaz spouses were married in 1988. _____ is a permanent Israeli resident from Jerusalem, and _____ is a Gaza Strip resident. Over the years they had seven children: _____, born on June 24, 1989; _____, born on March 9, 1991; _____, born on November 4, 1992; _____, born on October 7, 1995; _____, born on September 9, 1998; _____, born on November 15,

2002; _____, born on October 22, 2004. _____ was born in Jerusalem and all other children were born in Gaza. All children are registered as Gaza residents.

44. The spouses have initially decided not to submit a family unification application because they were told that it was a long and difficult process. The spouses describe difficult living conditions in Gaza: life in the shadow of war and fear, difficult economic condition, frequent power outages, no work opportunities. The spouses would have preferred to live in Jerusalem, near Ustaz' family, but they are prevented from doing so because of the government resolution.

45. Having no other alternative, they live in Gaza, and _____ renews her stay permits in Gaza on a periodic basis.

Exhaustion of Remedies

46. On July 5, 2012 petitioner 13 sent to the respondents, a reasoned request in which it has demanded that government resolution 3598 be revoked. The letter, which was sent following the judgment which was rendered a few months earlier in HCJ 466/07 **Galon v. Attorney General** (hereinafter: **Galon**), specified in detail HaMoked's position, according to which the government resolution established a blanket policy, which did not comply with basic constitutional principles and which dramatically departed from the authorizing section in the **Citizenship and Entry into Israel Law (Temporary Order), 5763–2003**.

    HaMoked's letter dated July 5, 2012 is attached and marked **P/9**.

47. On July 31, 2012, Petitioner 13 received a letter from respondent 3's bureau dated July 25, 2012. According to the letter, HaMoked's letter was transferred to Advocate Malkiel Balas, deputy Attorney General (consultancy), for his attention.

    The letter of respondent 3's bureau dated July 25, 2012 is attached and marked **P/10**.

48. On August 5, 2012, September 6, 2012, October 14, 2012 and November 27, 2012, reminders of HaMoked's letter dated July 5, 2012 were sent.

    The reminder letters are attached and marked **P/11 A-D**.

49. On January 28, 2013, petitioner 13 received respondents' response of January 27, 2013 to its letter. Respondents' bizarre and laconic response did not refer to the claims which were specified in detail in HaMoked's letter dated July 5, 2012, but only stated that government resolution 3598 and the resolutions which followed it "do not change the provisions of section 3D of the Citizenship and Entry into Israel Law (Temporary Order), 5763–2003, as also stated in these resolutions."

    Respondents' letter dated January 27, 2013 is attached and marked **P/12**.

50. It is clear that respondents' letter did not provide any substantive response to petitioner 13's claims, which letter has obviously avoided HaMoked's main argument – that the government resolution exceeds the authorizing law.

51. On April 14, 2013 the government resolution was extended again, by resolution No. 31.

52. Hence, in the absence of any **substantive** response from the respondents to petitioner 13's letter dated July 5, 2012, the petitioners had no alternative but to petition this honorable court and request remedy.

Government resolution 3598 - background

53. Before specifying their claims concerning government resolution 3598, the petitioners will review the legislative history and relevant case law concerning said resolution.

54. The government resolution is based on Section 3D of the temporary order (hereinafter: the **authorizing section**). Section 3D in its present form, authorizes the Minister of Interior to reject applications for a residency or stay permit in Israel due to a possible security risk associated with the applicant.

55. The original version of the temporary order (of 2003) did not include a provision which involved a "security risk" simply because the original version of the law imposed a sweeping prohibition on the issuance of family unification permits to OPT residents, without any exclusion. The "security risk" section was added within the framework of the 2005 amendment, when the option to issue family unification permits to OPT residents, under certain conditions, was added, which mainly concerned the age of the Palestinian spouse – Palestinian men over 35 and Palestinian women over 25.

56. According to the explanatory notes to the 2005 amendment of the temporary order, Section 3D was added "in view" of the expansion of the exclusions which enabled the issuance of stay permits in certain cases. "To avoid the security risk arising there-from" as stated in the explanatory notes, an option was added which enabled to prevent the issuance of permits to applicants who met the criteria, based on a security preclusion (see The Official Gazette: bills – Government 173, 7 Iyar 5765, May 16, 2005).

57. As is known, the petitions against the temporary order, including Section 3D in its original version, were rejected by the Supreme Court (HCJ 7052/03 **Adalah v. Minister of Interior**, rendered on May 14, 2006).

58. In 2007 the temporary order was amended again, including, *inter alia*, the security risk provision. The amendment added an additional rejection cause based on a "security preclusion": the possibility to determine that a person poses a security risk, due to activity which takes place in his "domiciled state" or "residential region" and therefore his application to a stay or residency permit must be rejected.

59. The Government bill concerning the amendment of the temporary order, under which the above option was added to section 3D, states as follows:

> It is proposed… to enable the Minister of Interior to determine that the person applying for a permit to stay in Israel or for a license to reside in Israel may pose a security risk, based, *inter alia*, on the opinion of the authorized security personnel according to which within the domiciled state or residential region of the applicant, activity is carried out which is liable to endanger the security of the State of Israel or its citizens. Such determination shall be in effect for the period prescribed by the Minister in accordance with the security condition and security considerations underlying the temporary order.
>
> (The Official Gazette: bills – Government, 273, December 18, 2006, page 184).

60. The current version of Section 3D of the temporary order provides as follows:

> A permit to stay in Israel or a license to reside in Israel shall not be granted to a resident of the region, in accordance with sections 3, 3A1, 3A(2),3B(2) and (3) and 4(2) and license to reside in Israel shall not be granted to any other applicant who is not a resident of the region, if the Minister of the Interior or region commander, as the case may be, has determined, pursuant to the opinion of authorized security personnel that the resident of the region or other applicant or family member are liable to constitute a security risk to the State of Israel; in this section, "family member" – spouse, parent, child, brother and sister and their spouses. For this matter, the **Minister of the Interior <u>may</u>** determine that a resident of the region or any other applicant is liable to constitute a security risk to the State of Israel, **<u>among other things</u>, on the basis of an opinion of the authorized security personnel according to which <u>within the domiciled state or residential region</u> of the resident of the region or of any other applicant, activity was carried out which is liable to endanger the security of the State of Israel or its citizens**.
>
> (emphasis added – N.D.)

61. As the above section indicates, a **security examination will be conducted** with respect to persons, who wish to obtain a stay permit or a temporary residency permit in Israel. The determination that an applicant poses a "security risk" is either personal (i.e. a determination that the risk "arises" directly from such individual or his family members) or general-geographic (i.e., a determination that the applicant poses a "security risk" based only on a determination made by security personnel that activity which is carried out in the domiciled state or residential region of the applicant may pose risk to State security). Government resolution 3598 concerns the latter examination.

62. Hence, Section 3D refers to three "circles of risk":

    The first circle, the closest one, is the risk which "derives" from the applicant himself (a "direct" risk);

    The second circle is a risk circle which "derives" from the applicant's mere family relations with other people who were defined as "dangerous" (an "indirect" risk);

    The third circle, the furthest one, is a risk circle which "derives" from a person's mere residence or domicile in a certain place.

    Naturally, the third circle concerns the most indirect and "weakest" type of risk, since <u>this is not an actual risk</u> which derives from the applicant himself, but merely <u>a concern of a potential vague risk</u>, which derives from the fact that he lives in an area in which "dangerous" activity is carried out in general – without a specific examination whether the applicant is connected in any way to such dangerous activity or the persons involved therewith.

63. And to be precise: Section 3D in its **entirety** concerns the examination of a **specific applicant** and specifies the cases in which his individual application for a stay or residency permit would be refused for security reasons. Attesting to that is the language of the Section which uses the singular form and refers to a "resident of the area" and "any other applicant".

Government resolution 3598

64. On June 15, 2008, Government resolution 3598 was adopted. Section C of the Government resolution provides as follows:

> **In accordance with Section 3D of the law**, and based on the opinion of the authorized security personnel, (the government resolves) to determine that the Gaza Strip is a region where activity which may endanger the security of the State of Israel and its citizens takes place, and therefore, **the government instructs the Minister of the Interior or whomever appointed by him not to approve the issuance of permits for residency in Israel or permits to remain in Israel** as per **Sections 3 and 3A(2)** of the law to persons registered in the population registry as residents of the Gaza Strip and anyone residing in the Gaza Strip despite not being registered in the population registry as a resident of the Gaza Strip.
>
> It is hereby clarified that this Section shall apply from this date forward and that it does not apply in any case to persons whose initial application has already been approved.
>
> (emphases added – N.D.)

The government resolution, as published in the web site of the Prime Minister's Office, is attached and marked **P/13**.

65. So we see that the government resolution refers to two situations: the grant of a stay permit to the spouse of an Israeli (Section 3 of the temporary order), and the grant of status to minors over 14 having a custodian parent who stays in Israel legally (Section 3A(2) of the temporary order). It does not refer to all other situations specified in Section 3D, in which security examination is conducted (status for humanitarian reasons, permit for temporary needs).

66. The announcement of the Cabinet Secretary which was published at the close of the meeting explained that the underlying rational of the resolution was the difficulty in making an individual security diagnosis for the purpose of examining the applications to enter Israel from the Gaza Strip. It was further noted that the position of the security personnel was that the Gaza Strip should be regarded as one territorial unit.

The announcement of the Cabinet Secretary dated June 15, 2008 is attached and marked **P/14**.

67. Hence, the government resolution establishes a limiting and far reaching policy. The resolution is based on the opinion of the security personnel not only for the purpose of making a determination concerning the activity which is carried out in the Gaza Strip, but also for the purpose of making a determination concerning which kind of security diagnosis should be made to persons who wish to enter Israel from the Gaza Strip. The resolution is based on the position of the security personnel that the diagnosis should be sweeping rather than specific.

68. Since June 15, 2008, the government resolution has been renewed five times: resolution No. 600 dated July 19, 2009, resolution No. 2097 dated July 18, 2010, resolution No. 2734 dated January 16, 2011, resolution No. 4155 dated January 22, 2012 and resolution No. 31 dated April 14, 2013.

The Legal Argument

69. It will be hereinafter argued that the government resolution exceeds the authorizing section of the temporary order and establishes an unconstitutional policy without authority. The policy established in the government resolution is sweeping, and is in contrary with the exceptions mechanism which was approved in the **Galon** case. And most importantly - this policy infringes in a severe and disproportionate manner basic rights and in particular – the right to family life.

We shall specify the above in detail herein-below.

The government resolution departs from Section 3D of the law

70. The government resolution opens with the statement that it is made "**according** to Section 3D of the law". However, in significant aspects, the government resolution exceeds by far the power granted under Section 3D, in a manner which renders it not only unreasonable and disproportionate, but also in excess of legal power. We shall explain.

A. From a specific examination to a sweeping determination

71. As recalled, Section 3D enables the Minister of Interior to determine that a specific person poses a risk based on various examinations. In the event that in the opinion of the security personnel, activity which may pose risk to State security is carried out in a person's **domiciled state or residential region**, the Minister of Interior **may** determine that **such specific person** is dangerous.

72. Hence, **Section 3D in its entirety concerns the risk posed by a specific person**; The last part of the Section refers to a possible kind of opinion, which may be relied on while considering the risk posed by such specific person.

73. However, the government resolution establishes a definitive rule concerning a **general** risk posed by **any person** who is registered as a Gaza Strip resident or who resides in the Gaza Strip. Based on this sweeping determination, a general and comprehensive policy was established according to which the Minister of Interior – the authorized minister under the temporary order – will not grant stay or residency permits to Gaza residents.

B. General directive where discretion should be exercised

74. Following the general determination of the government resolution, according to which each and every "Gaza resident" is dangerous, the resolution prohibits the Minister of Interior to exercise discretion of any sort, by instructing him not to approve applications for stay or residency permits of "Gaza residents".

75. It should be noted that Section 3D of the temporary order provides that **one of the ways** to determine whether a **specific** risk is posed by a person applying for a permit or status, is to rely on the opinion of the security personnel, concerning the domiciled state or residential region of such person. Eventually, the sole and exclusive discretion to examine and decide whether or not and to what extent such an opinion is to be relied on, is vested with the Minister of Interior, and according to the language of the temporary order, the resolution should pertain to a specific person.

76. However, the Government resolution **prohibits** to exercise specific discretion when an applicant who is a "Gaza resident" is concerned.

C. From "his domiciled state or residential region" to "registered or resides"

77. The temporary order refers, as aforesaid, to the possibility to determine that a person is "dangerous" due to activity which is carried out in his "domiciled state" or "residential region".

78. As specified above, the possibility to determine a security risk based on a person's domiciled state or residential region was added in the amendment to the temporary order of 2007. The amendment, which was passed by the Knesset plenum on March 21, 2007, adopted the government's proposal on this issue, according to which the "geographic" risk **would be determined based on the applicant's domiciled state or residential region**.

79. However, the government resolution significantly expands the geographic risk, by turning it into a "prescriptive risk": according to the government resolution, a "geographic" risk may also be posed by a person whose registered address in the population registry is Gaza, even if he does not live there at all, if he has not been living there for a long time, or even if he has never been there.

80. This was the case of petitioner 2, who was not living in Gaza when the temporary order and thereafter the government resolution entered into force. His only sin was that his registered address was in Gaza, and therefore he was torn from his family having no ability to return to live with it.

Unconstitutional policy which was established without authority

81. The fact that the government resolution exceeds the power granted in Section 3D is conspicuous. The purpose of Section 3D is to create a delicate balance between the basic rights and the public interest. The government resolution destroys this balance by exclusively applying the "security" consideration, in a sweeping manner, without a specific examination and without having any discretion exercised.

82. As will be immediately explained, this resolution, which was adopted without authority, severely and disproportionately infringes basic rights, and primarily, the right to family life.

A. Violation of the balancing system; Unreasonableness and failure to meet the proportionality standards

83. As recalled, in a judgment rendered on January 11, 2012, the Supreme Court rejected the petitions which were filed against the temporary order. All justices acknowledged the existence of the constitutional right to family life, which derives from the right to human dignity, however, it was ruled that even if there was a violation of the constitutional rights, including the right to equality, then this was a violation that met the requirements of the limitation clause. In particular, the majority justices referred to the importance of the amendment to the temporary order, which rendered the sweeping prohibition of family unification obsolete:

> I pointed out that the infringement of the constitutional right of the group of Israeli spouses was severe. The sweeping prohibition imposed on this group on establishing a permanent residence in Israel together with the foreign spouse who is a resident of the Area – a group which practically consists of Arab citizens of the State of Israel only – amounts to a constitutional infringement. **When we examine the severity of the infringement we should take into consideration the exceptions in the revised law**. I am of the opinion that one exception is significant due to its nature. The sweeping prohibition does not apply "to a male resident of the Area over the age of 35" and "to a female resident of the Area who is over the age of 25 – to prevent their separation from their spouses who legally reside in Israel (section 3 of the amended law). **I am of the opinion that the limitation of the sweeping prohibition**

> **in the manner described above constitutes a meaningful step to mitigate the infringement**.
>
> (**Galon**, paragraph 5 of Justice Handel's judgment. Emphases added – N.D.)

84. Hence, the implementation of the law is subject to a proper balance between the basic rights and the public interest, in order to give effect to the determination that the law meets the requirements of the limitation clause:

> …we must interpret the temporary order law, and implement its provisions in a way that will properly convey the tension between the right to family life which is afforded to each and every Israeli citizen and resident, and the security considerations of the State, by **constitutionally balancing, in a proper manner, a person's basic right which is at the highest level of human rights, against the opposing public interest.** The interpretation and implementation of the provisions of the above referenced law stem from the constitutional obligation to protect the right to a family as a governing right in as much as the law so permits, **while taking into consideration in a proper and proportionate manner the security interest in as much as required by the factual circumstances and only to the extent necessary**. The proper balance between a person's basic right and the security value is required not only for the purpose of examining the constitutionality of the temporary order law. **It is equally required for the purpose of having the provisions of the law interpreted and implemented in practice.**
>
> **(**HCJ 7444/03 **Dakah v. Minister of Interior,** paragraph 13 of the judgment rendered by Justice (emeritus) Procaccia; hereinafter: **Dakah**; Emphases added, N.D.).

85. As to the exercise of the balancing system in the event of a security need, it was stated that:

> It was said more than once, that the State's argument of a "security need" is not a magic word, which justifies its acceptance without any consideration. Although the court usually restrains itself while it exercises judicial review over the security considerations of the authority, where the security policy infringes human rights, the reasonableness of the authority's considerations and the proportionality of the measures it wishes to exercise should be reviewed in depth (HCJ 7015/02 **Ajuri v. Commander of IDF Forces**, IsrSC 56(6) 352, 375-376 (2002) (hereinafter: the **Ajuri** case); HCJ 9070/00 **MK Livnat v. MK Rubinstein**, IsrSC 55(4) 800, 810 (2001)). In such review, an evaluation should be made of the severity of the security risk, according to probability standards, against the importance of the right of the individual which is being infringed, and of the proportionality of the infringement of the right for the purpose of protecting public interest. The examination of the security consideration is twofold: firstly, the credibility of the argument

> concerning the security needs is examined; thereafter, the severity of the security consideration is examined in terms of the probability that the security risk will indeed materialize (Adalah, paragraph 11 to my judgment).
>
> **The constitutional balancing is firstly made on the general level, and thereafter a specific-individual examination is warranted in each and every case. A sweeping injury caused by the authority to individuals who wish to exercise their basic rights, by failing to make an individual constitutional balancing which is based on specific data unique to the case, is in contrary to constitutional principles, which warrant the exercise of both general and specific balancing**. Such sweeping injury as described above prejudices the duty imposed on the administrative authority to attribute relative weight to all data relevant to the administrative decision, and reach a conclusion which is based on a proper balancing between them. It may attribute excessive weight to a certain interest with no justification, while discriminating against a governing human right of a main importance in a disproportionate manner. It may cause severe damage to the values of life and culture, and infringe upon the principles of the democratic regime which is premised on the protection of human rights.
>
> **(Dakah,** paragraphs 17-18. Emphases added, N.D.).

86. Hence, the "security risk" must undergo an individual, specific examination, whereas, the government resolution cancels the individual constitutional balancing examination and establishes a criterion for a sweeping classification of a "security risk".

87. The severity of the injury caused to human rights by the government resolution and its disregard of the balancing that should be carried out by the State is especially conspicuous in view of the nature of the security risk referred to herein. It should be remembered that this is the most indirect and "weakest" security risk: it derives neither from the applicant himself, nor from any specific family member. It is based solely on a person's place of residence or even worse – solely on his registered address. If a specific examination is warranted when the severity of the risks is "greater", a specific examination is most certainly required when the security risk is vague, general and weak such as a risk which is solely based on a person's place of residence or his registered address.

88. Appropriate to this issue are the comments of the court in **Dakah**:

> **In each particular case, the probability that the permit applicant himself would be subject to influence and pressure by family members, thus becoming a source of direct security threat, should be examined**. In this matter, objective data should be used, to the extent possible, such as, information regarding the long presence in Israel, for years, of the foreign spouse, against whom not even the slightest piece of information has been obtained associating him with any activity against Israel, despite having family relationships with terrorists. Such information may refute, at least *prima facie*, a presumption of an indirect security preclusion.

(Ibid, paragraph 41).

89. If the above statements are relevant to a risk which is associated with a specific person, they are doubly applicable to a risk which is based solely on a presence in a geographic area.

90. It should be emphasized that contrary to the statement made by the Cabinet Secretary in his announcement, specific examinations of Gaza residents are routinely conducted by security personnel, and no claim has been made concerning their inability to conduct such examinations. Thus, for instance, in the case of Gaza residents who receive a permit or license for humanitarian reasons or for temporary purposes – since, the government resolution does not apply to these cases. Thus, for instance, in the case of a person whose family unification application has already been in process prior to the government resolution. Thus, for instance, in the case of individuals who receive entry permits into Israel for religious purposes during the holidays (mainly the Christian Gaza residents). Thus, for instance, in connection with family visits between Israelis and Gaza residents.

91. The decision to define all Gaza residents as "dangerous" in a general and sweeping manner, with a complete disregard of different circumstances, injures individuals who are clearly not dangerous but will be automatically classified as such. Thus, for instance, PLO members who oppose the Hamas regime and are even persecuted by it; individuals who receive entry permits into Israel for work purposes; individuals who reside in Gaza for a short period of time, etc.: **neither one of them will be afforded the opportunity to refute their classification as dangerous, and they will be automatically denied of the right to live with their family members in Israel.**

92. As is known, in a constitutional examination of a policy such as the one which was established in the government resolution, the compliance of such policy with the proportionality standards is examined, which examination is divided into three sub-tests: the rational connection test, the least injurious means test and the proportionality test in its narrow sense (HCJ 6427/02 **The Movement for Quality Government in Israel v. Israel Knesset**, IsrSC 61(1) 619 (2006)). In this case the existence of a least injurious means is eminent, which is: the conduct of specific examinations concerning the individuals who apply for family unification and who are Gaza Strip residents, in the exact same manner this is done with respect to individuals who apply for family unification from the West Bank, and who meet the age exceptions specified in the temporary order.

93. **The court rejected the petitions against the temporary order only due to the balancing system entrenched therein**. The "sweeping risk" policy which prohibits any specific examination whatsoever, as expressed in the government resolution, violates this delicate balance in a manner which does not comply with the temporary order, and therefore does not comply with the proportionality standards. This policy infringes upon basic rights in a severe and disproportionate manner; it should be revoked in view of its unconstitutionality.

94. In conclusion, the comments of Justice (emeritus) Edmund Levy in his judgment in **Galon** are appropriate:

> Go out and learn, **applications which passed the various hurdles of the law and reached this point, may be exposed to a sweeping rejection, which has nothing to do with specific information, and this, for instance, only because the Palestinian spouse resides in an area in which activity is carried out which may put at risk the State of Israel or its citizens**. The statements included in the government resolutions which extended the validity of the law, attest, *inter alia*, to the

broad scope of such limitation. The third paragraph of the resolution dated June 15, 2008 and the resolution dated July 19, 2009, provide, that the limitation applies to the entire area of the Gaza Strip, throughout its length and breadth, based on the opinion of security personnel. It makes one wonder how long it will be before such decision is applied to the entire areas of Judea and Samaria, from which originated in 2009, for instance, hundreds of terror attacks against Israelis (Israel Security Agency annual summary 2009: data and trends in Palestinian terror 10 (2009); minutes of the meeting dated 16 Adar 5770 (March 2, 2010), page 4, line 30)). And what is the meaning of the expression 'activity is carried out'? Is it limited to the activity on the date on which the application for status in Israel was submitted or does it also apply to past organizations? **And shouldn't the foreign spouse be afforded the opportunity, even if the State had met the initial burden imposed on it to show that he posed a security risk, to prove on his part that although his family members or neighbors in the residential region were involved in terror, he himself had nothing to do with such activity? It should be reiterated that the examination of a person's compatibility with this risk profile or another, is not an individual examination, and this should be clearly stated**.

(Ibid, emphases added, N.D.).

B. Bound discretion

95. As aforesaid, the government resolution is based on Section 3D of the temporary order. According to the temporary order the power of the Minister of Interior to refuse a family unification application due to a security preclusion is a **discretionary power**. This is clearly indicated by the language of the law, according to which "the Minister of Interior **may** determine…". This means, that the Minister of Interior should examine **each case on its merits** (and therefore the language "resident of the area or the other applicant" is used – a non-sweeping language which refers to an individual application for a stay permit). **With respect to each case, the Minister of Interior must decide, whether the resident of the Area may pose a security risk to the State of Israel**. This decision will be based, *inter alia*, on the opinion of the competent security personnel.

96. Furthermore. In **Dakah** it was specifically held, that although the law provided categorically that "a permit will not be granted" where a security preclusion existed, "**the exercise of this power involves discretion**, but in balancing the considerations, especially considerable weight is given to the security aspect." (ibid, paragraph 31).

97. It is clear that this holding also applies to a security preclusion which derives from the domiciled state or residential region of the resident of the Area, since this is an entirely "indirect" risk, which does not derive from a risk posed by the person himself, but rather from his place of residence. This means that when the risk arises from the "place of residence" the exercise of power must involve the exercise of discretion all the more.

98. Therefore, even in the case of a Gaza Strip resident, which is ostensibly subject to government resolution 3598, the arrangement of his status in Israel is not sweepingly prohibited. As held in

Dakah, the risk posed by him should be balanced against the severity of the infringement of the right to have a family, which is embedded in the refusal to grant the permit.

99. It is clear that a situation in which a thorough examination is conducted, the circumstances of the case are examined and discretion is exercised with respect to a person whose brothers are Hamas activists, whereas the application of a person who resided in the Gaza Strip for one month is summarily rejected, without any examination whatsoever, is manifestly absurd.

100. And this is exactly what the government resolution does: it establishes a sweeping rule and implements a blanket policy on all cases brought before the Minister of Interior, and thus, in fact, binds his discretion *a-priori*.

101. It should be emphasized that this resolution is in contrary to the basic principle of administrative law, according to which the establishment of a policy and internal directives does not exempt the authority of its obligation to consider each case on its merits, according to its circumstances (HCJ 327/52 **Zamir v. Commissioner of Transportation**, IsrSC 7 358; HCJ 92/83 **Naggar v. Director of Victims of Work Accidents and Hostile Activities Insurance Division**, IsrSC 39 (1) 341; HCJ 2709/91 **Hefziba Construction and Development Company Ltd. v. Israel Land Administration**, IsrSC 45 (4) 428; HCJ 10/79 **Herman v. Mayor of Tel Aviv-Jaffa**, IsrSC 33 (3) 60; Zamir, 701-703; 784-786).

102. And worse than that: the discretion in this case, was bound based on the ISA recommendation (see announcement of the Cabinet Secretary, above). As is known, the ISA is a consulting body only, and the administrative authority should exercise its discretion independently and on an individual basis (see AP 1196-05-10 **Naser v. The State of Israel**).

C. Expanding the "geographic connection"; Breaching the separation of powers

103. As described above, the government resolution instructs the Minister of Interior "not to approve the issuance of permits for residency in Israel or permits to remain in Israel as per Sections 3 and 3A(2) of the law, **to persons registered in the population registry as residents of the Gaza Strip** and anyone residing in the Gaza Strip despite not being registered in the population registry as a resident of the Gaza Strip." (emphasis added, N.D.). **This means that a family unification application submitted for a person whose registered address is in the Gaza Strip, will be rejected based on this fact only**.

104. This policy is in contrary to the provisions of Section 3D itself, which provides that a family unification application may be rejected only "on the basis of an opinion of the authorized security personnel according to which **within the domiciled state or residential region** of the resident of the region or of any other applicant, activity was carried out which is liable to endanger the security of the State of Israel or its citizens." (emphasis added – N.D.).

105. In the last part of Section 3D the legislator has consciously chosen not to add the **registered address** (which constitutes, as is known, a *prima facie* evidence only and nothing more than that) of the "resident of the region or of any other applicant" as a basis for the rejection of his application to receive a stay permit in Israel. Instead, the legislator chose the expressions "**domiciled state**" and "**residential region**" of said "resident of the region or of any other applicant". It is clear that these criteria are premised on narrow factual tests, which refer to one question only: **where does said "resident of the region or any other applicant" actually live?**

In view of the above, the implementation of the last part of the Section based on registration only constitutes a clear departure from the provisions of the authorizing law.

106. On this matter it should be noted, that it has been long held by the courts that the fact that a person was registered in the OPT, did not attest, in and of itself, that said person was indeed maintaining his **center of life** in the OPT. If such holdings were made in connection with the term "center of life", it is only evident that a person whose registered address is in Gaza but who does not actually live there – may not be regarded as someone the "residential region" of whom is Gaza.

107. All of the above indicate that the government resolution disregards the legislator's clear statement (in a law which was enacted based on a government bill!) and expands the "geographic risk" immeasurably. This is a clear act of legislation, which constitutes a severe breach of the separation-of-powers principle.

D. The establishment of a primary arrangement and infringement of basic rights: exceeding power

> A basic rule of the Israeli administrative law provides that when the act of the authority is premised on a regulation or an administrative rule, the general policy and principle criteria underlying such act should be entrenched in the primary legislation pursuant to which the regulation was promulgated or the administrative rule made. In a more "technical" language the basic rule provides, that "primary arrangements" which establish the general policy and the guiding principles – should be made part of a law enacted by the Knesset, whereas the regulations or administrative rules should establish "secondary arrangements".
>
> (HCJ 3267/97 **Rubinstein v. Minister of Defence**, IsrSC 52(5) 481, paragraph 19 to the judgment of Justice Barak).

108. Section 3D of the temporary order establishes a general policy and principle criteria concerning the scope of the "security rejection", the exercise of individual discretion and the persons to whom the geographic risk pertains. Evidently, the Knesset has established in this matter a clear and comprehensive "primary arrangement". The government resolution does not only establish secondary arrangements concerning the implementation of the provisions of Section 3D, **but also establishes primary arrangements of its own, and worse than that: it establishes primary arrangements which clearly contradict the arrangement outlined by the legislator**. Hence, it is evident that the government resolution establishes arrangements without authority.

109. Moreover. The government resolution concerns a material and weighty issue: the realization of the basic right to family life, through family unification proceedings of Israeli residents and citizens with their spouses and children. Currently, in the post **Adalah** era, there is no longer any dispute that the right to family life is a basic constitutional right in Israel, constituting part of the right to human dignity. This determination was reinforced in the **Galon** judgment.

110. The status of the right to family life as a constitutional right, directly affects the ability to violate said right. The fact that the right to family life was granted the status of a constitutional right entails the determination that any violation of this right must be made in accordance with the Basic Law: Human Dignity and Liberty – only by law or pursuant to a specific statutory authorization, and only for weighty considerations.

111. The government resolution, however, severely infringes the right to family life, without any legal authorization to do so. It shuts the door on family unification with Gaza residents, despite the fact that the temporary order left this issue to the discretion of the Minister of Interior: it broadens the

geographic risk to a risk which is based on registration, contrary to the clear statement of the legislator; it establishes a sweeping risk *in lieu* of the requirement to make a specific diagnosis.

112. In addition to the severe infringement of the right to family life, the government resolution severely infringes the rights of children. Firstly, as is known, the government resolution applies directly to minors above 14. Secondly, the immense harm caused by the resolution to families, naturally affects the children whose family is separated and torn apart as a result of the government resolution.

113. As is known, **the government is not authorized to decide on infringement of constitutional rights, and therefore, its resolution – which infringes basic constitutional rights without any authorization to do so – should be revoked**.

On this issue see:

HCJ 1/49 **Bejerano v. Minister of Police**, IsrSC 2(1) 80;

HCJ 2918/93 **The Municipality of Kiryat Gat v. The State of Israel**, IsrSC 47(5) 832;

HCJ 5128/94 **Noam Federman v. Minister of Police**, IsrSC 48(5) 647.

114. It should be emphasized, that even the general powers of the government can not substitute the requirement for statutory authorization:

> There are to be no infringements on this liberty absent statutory provisions which comply with the constitutional requirements. The government's general administrative powers fail to fulfill these requirements. Indeed, when the legislator sought to endow the ISA with the power to infringe upon a person's human right, special provisions were enacted for this purpose.
>
> HCJ 5100/94 **Public Committee Against Torture in Israel v. The State of Israel,** IsrSC 53(4) 817).

115. In any event, and notwithstanding the government resolution, the Minister of Interior is still obligated to exercise his independent discretion and make specific decisions, according to Section 3D of the temporary order, in view of the nature of the issue at hand which concerns the exercise of a balancing system between the right to family life and protection of public security by conducting an **individual** examination of the person applying for a permit or status (on this issue see Section 10 of Attorney General Directive 1.1001 **The status of a government resolution concerning a specific issue *vis-à-vis* the authorized minister**). The law specifically provides that the Minister of Interior must exercise individual discretion; The government resolution can not "abolish" said obligation of the Minister of Interior.

The Attorney General's directive 1.1001 is attached and marked **P/15**.

116. Hence, the government resolution which immeasurably broadens the provisions of Section 3D of the law, constitutes not only a primary arrangement but also a provision which infringes on basic rights without a statutory authorization. In view of all of the above, said resolution should be revoked.

<u>Conclusion</u>

117. The temporary order, the validity of which was affirmed by this honorable court, imposed a severe and often impossible hardship on thousands of families. However, as the stories of petitioners 1-12 of this petition demonstrate, spouses one of whom is a Gaza resident do not even have the slightest gleam of hope that Israeli spouses of West Bank residents have. In these cases, the government of Israel resolved, by an extreme and disproportionate measure, to prohibit any family unification proceeding whatsoever, even if the Gaza resident spouse meets the age exceptions.

118. The government resolution inflicts severe, disproportionate, unreasonable and sweeping harm on such spouses. This harm is aggravated in view of the fact that it was inflicted in excess of power, without statutory authorization and in breach of the separation of power principle.

119. **Hence, for all of the above reasons, the honorable court is requested to issue an *order nisi* as requested in the beginning of this petition, and after receiving respondents' reply, make the order absolute, and to order the respondents to pay trial costs.**

120. This petition is supported by the affidavit of petitioner 1 and by the affidavits of petitioners 5, 7 and 11, which were signed before an attorney in Gaza and were sent to the undersigned by fax, subject to coordination by phone. The honorable court is requested to accept these affidavits and the powers of attorney which were also sent by fax, taking into consideration the objective difficulties involved in a meeting between the petitioner and his legal counsels. The affidavits of petitioner 3 and petitioner 9 were signed in Israel and were also sent by fax; an original copy will be submitted to the court at a later date.

June 6, 2013

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Noa Diamond, Advocate

Counsel to the petitioners