At the Jerusalem District Court **AP 1747-01-14**
Sitting as the Court for Administrative Affairs

In the matter of:

1. **_____ Dawood, ID No. _____**
2. **_____ Dawood, ID No. _____**
3. **_____ Dawood, born in 1998, ID No. _____**
4. **_____ Dawood, born in 1999, ID No. _____**
5. **_____ Dawood, born in 2002, ID No. _____**
6. **_____ Dawood, born in 2007, ID No. _____**

Petitioners 3-6 by their natural guardians, petitioners 1 and 2

7. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**

all represented by counsel, Adv. Sigi Ben Ari (Lic. No. 37566) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Noa Diamond (Lic. No. 54665) and/or Hava Matras-Irron (Lic. No. 35174) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. No. 41065) and/or Bilal Sbihat (Lic. No. 49838) and/or Tal Steiner (Lic. No. 62448) and/or Abir Jubran-Dakawar (Lic. No. 44346);

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.

Minister of the Interior

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

The Respondent

Administrative Petition

The honorable court is hereby requested to order the respondent to retract his decision to deny the family unification application submitted by petitioner 1 for his spouse, petitioner 2, to approve the application and grant petitioner 2 a residency permit in Israel under a family unification procedure.

Preface

> A person's right to have a family is one of the foundations of human existence; its realization is a condition for making the most out of life and it is the essence of life; it is a condition for self realization and for a person's ability to share his life with his spouse and children in a sincere common fate. It reflects the essence of a person's being and the embodiment of his desires. The right to have a family is situated at the highest level of human rights. An infringement on this right is possible only when it is balanced against a conflicting value of special power and importance. In the existing tension between the value of security of life and other human rights, including the right to have a family, the security consideration prevails only where there is high probability, almost certainty, that if appropriate measures involving the infringement of human rights are not taken, public safety may be materially injured. (Judgment in HCJ 7444/03 **Dakah v. The Minister of Interior,** para. 15 of the judgment rendered by the Honorable Justice Procaccia, reported in Nevo, February 22, 2010, hereinafter: **Dakah**).

1. This petition concerns an indirect security denial by the respondent of the family unification application (hereinafter: **family unification application**) submitted by petitioner 1 (hereinafter: **petitioner 1**), an Israeli resident, for his wife, petitioner 2 (hereinafter: **petitioner 2**), A West Bank resident. The spouses have been living in Jerusalem for many years, where they raise their four minor children, petitioner 3-6 (hereinafter: the **children**), permanent residents of the state of Israel.

2. Petitioners' first family unification application has already been submitted in 1996 and was approved only in 2001. Since then and until 2008, petitioner 2 received stay permits in Israel (DCO permits) within the framework of the family unification procedure. On July 14, 2008, following an application to extend petitioner 2's stay permit, the application was denied due to indirect security reasons. A new family unification application was submitted in 2011, which application was denied for the same indirect security reasons. The appeal submitted by the petitioners following the indirect security denial of the family unification application, was rejected by the chair of the appellate committee on November 19, 2013.

3. The effect of respondent's decision to deny petitioners' family unification application on the life of the family cannot be overstated. As aforesaid, this case concerns a family that has established its life in Jerusalem and that raises four children in the city. A situation in which the mother of the family is not granted stay permits in Israel, poses a severe threat on the life of the family as well as on the future and safety of the minor children, due to an indirect preclusion only, while no wrongdoing is attributed to petitioner 2.

4. Such an extreme impingement on the life of the family and on petitioners' constitutional rights, requires a very careful examination of the security material ostensibly relied upon by the

respondent, and the balancing thereof against the severe impingement, according to the provisions of the Basic Law: Human Dignity and Liberty and according to the proportionality tests established in case law.

The Factual Part

The Parties

5. **Petitioner 1**, an Israeli resident, married **petitioner 2**, originally a West Bank resident. **Petitioners 3 – 6**, residents of Jerusalem, are petitioners' minor children, who were born and have been living in Jerusalem all their lives.

6. **Petitioner 7** 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.

7. **The respondent** is the minister who has the authority under the Entry into Israel Law, 5712-1952 (hereinafter: the **Entry into Israel Law**), 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. The respondent delegated his power to decide in such applications to the population administration bureaus. In addition, the respondent delegated his power to the appellate committee, as a sort of an additional appellate instance.

The petitioners and exhaustion of remedies

8. Petitioner 1, who was born in Jerusalem and has been living there all his life, married petitioner 2, a West Bank resident, in 1996. Ever since their marriage, the petitioners have been living in Jerusalem, in the house of petitioner 1's parents, in Sur Bahir neighborhood. Petitioner 1 is an elementary school teacher in Jerusalem. Petitioner 2 is a home maker.

9. Over the years the petitioners had four children (petitioners 3 – 6): _____, who is fifteen years old, _____, who is fourteen years old, _____, who is eleven years old, and _____, who is six years old. The children, like their father, are registered as permanent resident in Israel. All four of them go to school in Jerusalem.

The first family unification application

10. Immediately after their marriage in 1996, petitioner 1 submitted a family unification application for petitioner 2, which was approved only five years later, **in 2001**. Since then, petitioner 2 has received stay permits which were renewed on an annual basis (with the exception of a period in which a delay occurred in respondent's processing of applications for the issuance of permits, a delay with respect of which the petitioners filed a petition with the court of administrative affairs, AP 612/04, following which a permit was issued to petitioner 2), **until 2008**.

11. On July 14, 2008 the respondent rejected petitioner 2's request to extend her stay permit for security reasons (hereinafter: the **first denial notice**), in which the respondent stated as follows:

> The sister of the sponsored spouse - _____ _____ Sa'afin – was mentioned in an interrogation of a Hamas detainee as having been

involved in activities of the "Al-Kutla al-Islamia" organization when she was a student in Birzeit university;

The brother in law of the sponsored spouse: _____ _____ Sa'afin – there is ample negative security material about him. In 1998 he was detained and admitted in his interrogation that in 1996 he had been recruited to a Hamas cell and that within the framework of his activity with Hamas, he was guided and operated by Hasnin Romana – from Al Bireh. The latter, known as a Hamas wanted terrorist, was killed on December 1, 2003, held several positions with the "Al-Kutla al-Islamia" organization. He admitted to have expressed his willingness, several times, to act as a suicide bomber in a terror attack and that he regarded suicide as an Islamic act of heroism. He was a Hamas prisoner from January 13, 1998 until April 17, 2001.

The first denial notice on respondent's behalf dated July 14, 2008 is attached hereto and marked **P/1**.

12. On July 31, 2008 the petitioners appealed the denial of their family unification application and in view of the fact that the appeal remained unanswered, a petition to the court of administrative affairs was filed on November 13, 2008 (AP 8951/08).

13. In the context of the petition, on March 4, 2009, Advocate Rosenthal, who handled the matter of Mr. and Mrs. Dawood on behalf of HaMoked for the Defence of the Individual, received an updated paraphrase and a protocol of the interrogation of the Hamas detainee, in which the name of of petitioner 2's sister was mentioned.

The paraphrase and the protocol of the interrogation which was attached thereto are attached hereto and marked **P/2**.

14. On March 30, 2009 a hearing in the petition was held, by the end of which the court decided that respondent's counsel would transfer to petitioners' counsel the administrative order of 2009 concerning petitioner 2's brother in law, the decision which was made in the judicial review of the administrative detention order and the interrogations of the brother in law from 2006.

15. On March 31, 2009 the order and the decision of the military court Ofer, were transferred.

The administrative order dated January 19, 2009 and the documents of the judicial review of the administrative order dated January 26, 2009 and February 2, 2009, are attached hereto and marked **P/3**.

16. Following the above, on April 3, 2009 the petition was deleted by the parties' mutual consent.

<u>The second family unification application</u>

17. On December 20, 2011 petitioner 1 submitted a new family unification application for petitioner 2.

18. In his letter dated June 12, 2012, the respondent notified of his intention to deny the family unification application. The reasons specified in the notice of the intention to deny are very similar to those specified in the first denial notice dated July 14, 2008. In addition, administrative

detentions of the brother in law Abdallah were mentioned therein (hereinafter: the **second denial notice**). The following are the reasons for the denial in their entirety:

> Mrs. Dawood's sister, _____, was mentioned in an interrogation of a Hamas detainee (1994) as having been involved in activities of "Al-Kutla al-Islamia" when she was a student in Birzeit university;
>
> Mrs. Dawood's brother in law, _____, Hamas activist, former prisoner (1998-2001), admitted of having been recruited to a Hamas cell. Within the framework of his activity with Hamas, he was guided and operated by Hasnin Romana, a senior military Hamas activist, who was shot and killed in 2003.
>
> When he was a student he was a member of "Al-Kutla al-Islamia". Was mentioned as one of the senior coordinators of the educational activity and colleges in the Ramallah area *vis-à-vis* senior Hamas activists from the Hamas headquarters in Ramallah. Admitted to have expressed his willingness, several times, to act as a suicide bomber in a terror attack, and that he regarded suicide as an Islamic act of heroism. Later on, in his interrogation, he claimed that he was only bragging.
>
> He was an administrative detainee in 2009 due to his activity with Hamas and Kutla.
>
> Later on he was detained again and put under administrative detention from June 2011 until May 2012 in view of his involvement in conspiratory Hamas activity.

Respondent's second denial notice dated June 12, 2012 is attached and marked **P/4**.

19. The notice stated that the petitioners had the right to transfer their written response to the above (a right regulated in respondent's procedure 5.2.0015 "comments of agencies protocol in family unification applications") and on July 11, 2012 the petitioners forwarded their response to the notice of the intention to deny (hereinafter: the **written hearing**).

    The written hearing on petitioners' behalf without its enclosures dated July 11, 2012 is attached hereto and marked **P/5**.

20. In their written hearing, the petitioners referred, *inter alia*, to the leading judgment concerning the denial of family unification applications for security reasons, the **Dakah** judgment, and to the distinction made therein between a direct threat and an indirect threat, and to the specific considerations which should be taken into account when the denial concerns an application which has already been approved, and when the family unification application concerns a sponsored woman, a mother of young children.

21. On October 28, 2012 respondent's response to the written hearing was received, in which the respondent reiterated his decision that the application should be denied for security reasons and repeated the reasons which were specified in the second denial notice.

Respondent's decision dated October 28, 2012 is attached hereto and marked **P/6**.

The proceedings in appeal 811/12

22. On November 5, 2005 *[sic]* the petitioners appealed respondent's decision. The appeal opens with the words which summarize the main arguments raised therein:

> What is the meaning of an "indirect denial for security reasons" of a family unification application? When will a decision to "indirectly deny" a family unification application be deemed proportionate and reasonable, in view of the principles established in **Dakah**? The appeal at hand concerns these issues. In the following pages we shall describe how the Ministry of the Interior (hereinafter also: the **respondent**), uses the "indirect denial" cause as an automatic denial cause, without laying down a proper evidentiary infrastructure concerning the specific sponsored spouse in the family unification application, and without specifying the ostensible threat posed, according to it, by the approval of a family unification application of a woman who has been living in Jerusalem for many years, a mother of young children, whose family unification application has already been approved in the past.

The appeal without its enclosures is attached hereto and marked **P/7**.

23. Following repeated extensions which were given to the respondent, a response to the appeal was submitted on June 19, 2013, in which the respondent reiterated his arguments.

The response to the appeal without its enclosures is attached hereto and marked **P/8**.

24. The decision dated November 19, 2013 which rejects the appeal was received by the petitioners on November 20, 2013. In his decision, the chair of the appellate committee held that respondent's decision in the matter of the appellants-petitioners was proportionate and reasonable and should not be interfered with.

The decision of the chair of the appellate committee dated November 19, 2013 is attached hereto and marked **P/9**.

The Legal Framework

The constitutional right to family life and the violation thereof

25. Respondent's denial of petitioners' family unification application violates their right to live together as a family and maintain a family unit, with their children, as they have chosen to do. The right of each person to marry and establish a family unit is a fundamental right in our legal system, which derives from the right to human dignity. In HCJ 7052/03 **Adalah v. Minister of the Interior** (reported in Nevo, May 14, 2006), which discusses the constitutionality of the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 (hereinafter: the **Temporary Order**), the right to family life in Israel was given the status of a constitutional right entrenched in the Basic Law: Human Dignity and Liberty. President Barak summarized, with the consent of eight out of the eleven justices of the panel, the rule which was established in said judgment concerning the status of the right to family life in Israel:

> From human dignity, which is based on the autonomy of the individual to shape his life, stems the derivative right to establish the family unit and to continue to live together as one unit. Does this lead to the conclusion that the realization of the constitutional right to live together also means the constitutional right to realize this right in Israel? My answer to this question is that the constitutional right to establish a family unit means the right to establish the family unit in Israel. Indeed, the Israeli spouse has a constitutional right, which derives from human dignity, to live with his foreign spouse in Israel and to raise his children in Israel. The constitutional right of a spouse to realize his family unit is, first and foremost, his right to do so in his own country. The right of an Israeli to family life means his right to realize it in Israel (paragraph 34 of the judgment of the Honorable President *(emeritus)* Barak).

26. International law also provides that each person has the right to marry and establish a family. Thus, for instance, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, which was ratified by Israel, stipulates as follows:

> 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…

And see also: The Universal Declaration on Human Rights and Articles 8(1), 17(1), 16(3) of the International Covenant on Civil and Political Rights.

27. Granting the right to family life the status of a constitutional right is followed by the determination that any violation of this right should be made in accordance with Basic Law: Human Dignity and Liberty and comply with the proportionality tests and the limitation clause. The decision of the administrative authority to violate the right to family life must be made according to the principles of reasonableness and proportionality, based on solid evidentiary infrastructure. A heightened obligation is imposed upon the respondent to maintain a proper administrative system, which ensures that the power to deny family unification applications, a power which violates a protected constitutional right, is exercised only where such denial is fully justified, and only when a conflicting powerful public interest exists which prevails over the violated right.

28. The required weight of the evidence underlying the administrative decision depends on the nature of the decision. The weight of the evidence must reflect the importance of the right or interest harmed by the decision and the extent of the harm caused. The fact that respondent's decision violates fundamental rights of the appellants, obligates the respondent to base his decision on weighty assessments and data:

> As far as the deprivation of fundamental rights is concerned, equivocal evidence are insufficient… I am of the opinion, that the evidence required to convince a statutory authority that the deprivation of a fundamental right is justified, must be clear, unequivocal and convincing… the greater the right, the greater the scope and weight of the evidence underlying a decision to limit said right (EA 2/84 **Neiman v. Central Election Committee,** IsrSC 39(2) 225, 249-250).

29. The more important and central the violated right is, the greater the weight given to it in the balancing between said right and other conflicting interests of the authority. (PPA 4463/94, LA 4409/94 **Golan v. Israel Prison Service**, IsrSC 50(4) 136, 156).

Violation of the constitutional right to family life due to security preclusion

30. The Entry into Israel Law and the Temporary Order enable the Minister of the Interior to exercise wide discretion in family unification applications, and to deny a family unification application in the event that the sponsored spouse in the application poses a security threat.

31. The violation of the constitutional right to family life for security reasons imposes on the impinging authority a particularly heavy burden, within the framework of which it must prove that there is high probability, almost reaching certainty, that public safety may be at risk. We shall broadly reiterate the quote from **Dakah** which appears in the beginning of the petition:

> A person's right to have a family is one of the foundations of human existence; its realization is a condition for making the most out of life and it is the essence of life; it is a condition for self realization and for a person's ability to share his life with his spouse and children in a sincere common fate. It reflects the essence of a person's being and the embodiment of his desires. The right to have a family is situated at the highest level of human rights. An infringement on this right is possible only when it is balanced against a conflicting value of special power and importance**. In the existing tension between the value of security of life and other human rights, including the right to have a family, the security consideration prevails only where there is high probability, almost certainty, that if appropriate measures involving the infringement of human rights are not taken, public safety may be materially injured**. **The burden to prove the probability of a security risk to an extent which justifies an infringement of human rights lies on the state…** the state must prove that the probability of a threat to public safety is at the highest level, reaching, at least near certainty, and that it is impossible to defend against it without violating human rights. (paragraphs 15-16 of the judgment rendered by the Honorable Justice Procaccia. All emphases in all quotes were added by the undersigned, unless otherwise stated).

32. With respect to the violation of the right to family life by the Temporary Order, the Honorable Justice Procaccia notes in **Dakah** (paragraph 20 and onwards) that purposive and restrictive interpretation should be applied to the permitted scope of such violation. Thereafter she differentiates between a security preclusion raised against a new applicant, whose family unification application has not yet been approved, and an applicant whose application was approved in the past and who now wishes to extend the validity of the stay permit in his possession. The provisions of section 3D of the Temporary Order, according to which permit shall not be granted to any person with respect of whom there is a security preclusion, apply directly to an applicant of a new permit, whereas the transitional provision according to which the Minister of the Interior is entitled to refrain from extending the permit, taking into account, *inter alia*, the existence of a security preclusion, applies to an applicant wishing to renew the permit in his possession. The Honorable Justice Procaccia holds that the different wording stems from the different balancing which should be made between the security threat and the right to family life when the case concerns a person who was granted with a permit in the past, since his family has been living in

Israel for years, it raises its children in Israel and his specific expectation for the realization of his family life is very powerful.

33. The principle is that "the greater the expectation to family unification, in view of the specific circumstances of the matter, the more powerful the security interest which is required to justify a violation of such expectation should be":

> The application of **a person whose family unification application has already been approved in the past**, and who stays in Israel by virtue of said permit, to extend his residency permit, is subject to the first transitional provision in section 4(1) of the Law. According to this provision, the security preclusion described in section 3D of the Law constitutes only one of a host of considerations that the Minister of the Interior should take into account for the purpose of making his decision as to whether to extend an already existing residency permit in Israel. According to this provision, within the framework of his authority and the discretion exercised by him, **the Ministry of the Interior is authorized and allowed to extend the validity of an already existing residency permit, even in the event of a security preclusion,** as specified in section 3D of the Law**,** all in accordance with the entire circumstances of the matter, and the relative weight which should be properly attributed to each one of the relevant considerations, in the context of the specific constitutional balancing which is also derived from the requirement of reasonableness with which an administrative decision must comply (paragraph 32 of the judgment of the Honorable Justice Procaccia).

34. A decision made by the Minister of the Interior not to extend the residency permit of a sponsored spouse, puts the entire family in a tragic state which is described in **Dakah** as follows:

> A refusal to extend the validity of a residency permit in Israel to a spouse, resident of the Area, who resides in Israel by virtue of family unification, is one of the most severe injuries inflicted on the fabric of family life and on the spouse who is an Israeli resident… Following the grant of the initial family unification approval, the establishment of a family unit commences, and the united family starts to settle down in Israel… children are born, they receive Israeli residency, they go to schools in Israel, and the family integrates into the fabric of Israeli society. The refusal to extend the validity of a residency permit in Israel to a person who complies with the conditions of the first transitional provision, **forces the members of the united family in Israel to make a tragic choice. They must choose between the cut-off of the entire family from Israel**, from the relatives, the extended family, the friends who live in Israel, from the culture and from the sources of employment on which they rely. This cut-off means a family, social, economic and cultural severance of a united family which lived and laid down its roots in Israel, sometimes for many years. The other option is a separation between the spouses. The Israeli spouse remains in Israel, the foreign spouse returns to the Area, and the children are severed from one of their parents. The split-up of the family under these circumstances has severe ramifications on all involved parties – the spouses and the children – and

> it involves the breaking up of the human, social, cultural and economic structures of the family (paragraph 34 of the judgment of the Honorable Justice Procaccia).
>
> And see also AP 8182/08 **Marbu'a v. Ministry of the Interior** (reported in Nevo, November 23, 2008).

35. The Honorable President (as then titled) Beinisch, who added her opinion to **Dakah**, reinforces the distinction drawn by the Honorable Justice Procaccia, based on the wording of the Temporary Order, between a new applicant and a person who applies for an extension of an already existing permit and adds that this distinction also arises from the underlying principles of administrative law, which differentiates between the non-renewal of an existing license and the grant of a new license (paragraph 3 of her opinion).

36. A proper weighing of the conflicting values, the right to family life and the security threat, also requires, within the rules of proportionality, the examination of alternative means to achieve the purpose:

> The proper weighing of conflicting values should be made very carefully. A proper balancing thereof may justify, in appropriate cases, the taking of **proportionate measures to achieve the security purpose which do not involve the total denial of family unification,** and facilitate the maintenance thereof subject to certain conditions such as – the grant of short term temporary permits which enable the exercise of continuous supervision over the conduct of the spouse and the family, the imposition of restrictive conditions concerning the maintenance of ongoing relations with family members who are involved in terror, the prevention of visits in the Area, the exercise of continuous supervision and surveillance by the authorities, etc. (paragraph 42 of the judgment of the Honorable Justice Procaccia).

Indirect security preclusion

37. The rules of natural justice and basic human principles totally condemn the infliction of any harm or the punishment of a person due to the wrongdoings of his friend or family member. A deviation from this principle and a violation of petitioners' constitutional right, at no fault of their part, although permitted under the Temporary Order, requires a particularly thorough and meticulous examination and a rigorous judicial review consisting of a specific and individual examination of each and every case.

38. **Dakah** established the circumstances under which the competent authority may revoke a family unification permit which was granted to a spouse, resident of the Area, due to kinship between the spouse and a person posing a security threat, **in the absence of security information concerning a direct involvement of the applicant in activity against the state of Israel**, and the manner by which the right of the Israeli spouse for the realization of family life with his spouse, who is a resident of the Area, in terms of equality, should be balanced against the interest of protection of public safety.

39. The following comments were made on an indirect security preclusion:

> … it should be emphasized: **the subject matter of the security preclusion under the law is, in any event, a security threat posed by the permit applicant himself** – either a direct threat, which stems from the concern that he is directly involved in terror activities, **or an indirect threat, which stems from the concern that he would be inappropriately used by family members who are involved in terrorism. The purpose of the security preclusion** is not to prevent a threat posed by a family member of the permit applicant, as such. It is concerned with **the extent such threat projects on the security threat posed by the permit applicant due to his possible exploitation by terrorists for destructive purposes**… a direct security threat posed by a resident of the Area, which justifies a denial of an application for a residency permit in Israel due to direct security preclusion, cannot be compared to an indirect security threat which concerns the threat posed by the **potential influence** of the family member on the foreign spouse (paragraph 38 of the judgment of the Honorable Justice Procaccia).

40. And more on the manner by which the degree of the threat which arises from family relations may be assessed:

> **… the indirect threat should be carefully assessed, and attributed its proper relative weight only, nothing more than that. A sweeping conclusion that each and every permit applicant, who has family ties with a person involved in terrorist activity, is disqualified, *a priori*, from family unification, should be avoided. 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**. For this purpose, **objective information should also 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; When the case concerns women from the Area** who live in Israel for years within the framework of family unification**, who raise a number of children and share the burden of providing for the family, the concern that the potential risk** of getting involved in terrorist activity **would be realized by them** in view of family ties to relatives involved in terrorist activity **may be small;** one should neither take lightly the meaning of the statistical data concerning the rate of cases in which it has been proved that such family relations, in fact, lead to the involvement of said residents of the Area in hostile activities against Israel. Such statistical data were not presented to the court. It should be further noted, that **the strength of the family connection maintained by the permit applicant with his family members who are involved in hostile activities**, as a factor which indicates, in and of itself, of a potential risk, **should not be necessarily attributed a decisive weigh**t, although the weakening of the connection or its total severance may be required to reduce the concern of the

existence of an indirect security threat (paragraph 41 of the judgment of the Honorable Justice Procaccia).

The child's best interest

41. The principle of the child's best interest, which is well rooted in Israeli jurisprudence, is a fundamental leading principle when balancing of rights is required. The right of minor children to live with their parents was recognized as an elementary constitutional right by the Supreme Court. See for instance the words of the Honorable Justice Goldberg in HCJ 1689/94 **Harari et al. v. Minister of the Interior,** IsrSC 51(1) 15, page 20, opposite the letter B.

42. The Convention on the Rights of the Child of 1989, which was ratified by Israel, specifies a host of provisions which require that the family unit of the child be protected. Article 3(1) of the convention states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration…

Article 9(1) states:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

43. The provisions of the Convention on the Rights of the Children are increasingly recognized as a complementary source for the rights of the child. When statutes are interpreted, the "child's best interests" and his rights are situated in the center. See: CA 3077/90 **A et al. v. B**, IsrSC 49(2) 578, 593 (words of the Honorable Justice Cheshin); CA 2266/93 **A, minor et al. v. B**, IsrSC 49(1) 221, pages 232-233, 249, 251-252 (words of the then Honorable President Shamgar); FH 7015/94 **The Attorney General v. A**, IsrSC 50(1) 48, 66 (words of the Honorable Justice Dorner); HCJ 5227/97 **David v. The Supreme Rabbinical Court** (TakSC 98(3) 443), paragraph 10 of the judgment of the Honorable Justice Cheshin.

44. Along the child's best interest and his rights, stand the duty and the right of the parent to live with his child, raise him, and provide for his needs. Only in very exceptional cases a violation of the parent – child bond is permitted:

> The depth and strength of the parental bond, which contains within it the natural right of a parent and his child to a bond of life between them, has made family autonomy a value of the highest legal status, and a violation of this bond is allowed only in very special and exceptional cases. Every separation of a child from a parent is a violation of a natural right and therefore, the exceptions which allow the deprivation of said right, either forever or for a limited time, should be interpreted in an extremely careful and restrictive manner (LCA 3009/02 **A et al. v. B**, IsrSC 56(4), 872, pages 895-896).

45. The respondent in the petition, the Minister of the Interior, is obligated to act according to the principle of the child's best interest and ensure, to the extent possible, that children are not separated from their parents and live in an integrated and safe family unit.

From the general to the particular – the specific balancing

46. A proper balancing of the indirect security allegations and the unquestionable and critical violation of petitioners' right to family life and the children's best interest should have caused the respondent to approve the family unification application and grant petitioner 2 residency permits in Israel. However, the respondent, in his decision to deny the application, acts contrary to the principles of reasonableness and proportionality and contrary to the balancing which is required in petitioners' case.

The respondent has failed to properly weigh the fact that this case concerns petitioners whose family unification application has already been approved in the past

47. As specified above, petitioner 1, a resident of Jerusalem, married petitioner 2, a West Bank resident, in 1996 and their family unification application, which was submitted immediately after their marriage, was approved in 2001. Ever since, petitioner 2 received residency permits in Israel until 2008, when her application was denied for indirect security reasons. The petitioners submitted a new family unification application in 2011 which was denied for the same indirect security reasons.

48. Although, formally, this is a new application, the denial of petitioners' application should be regarded as a denial of an application to extend a permit, rather than as a denial of a new application, in view of the fact that the application was approved in the past and petitioner 2 received, over the years, residency permits, and in view of the fact that the first and second security denials are identical in nature.

49. The rational underlying the distinction between a denial of a new application and a denial of an application to extend a permit in a pending application, applies to petitioners' case. Hence, the refusal to continue to grant petitioner 2 residency permits in Israel forces the family to make a tragic choice – the severance of the entire unit from Israel after having lived many years in Jerusalem, or alternatively, splitting the family unit up by having petitioner 2 sent back to the West Bank, leaving behind her children with their father.

50. Therefore, Section 4(1) of the Law applies to petitioners' case, according to which significant weight is given to the expectations of the person who wishes to renew a permit, and the security preclusion constitutes only one of a host of considerations which should be taken into account. In view of petitioners' expectation, who have established their home in Jerusalem, and whose children were born and raised there for many years, a very powerful security interest is required to justify an intention to deny the application. And also in the event that a security preclusion exists, it will constitute only one of a host of relevant considerations.

51. Within the framework of the decision of the Appellate Committee for Foreigners, the respondent erred in that he has reviewed appellants-petitioners' matter in the context of section 3D of the Temporary Order (paragraphs 16-18 of the decision) rather than in the context of section 4(1) and failed to make the proper balancing according to this section.

The respondent attributed too much weight to the indirect security threat

52. An analysis of the security material concerning the sister and the brother in law and its influence on the threat posed by petitioner 2, indicates that the respondent attributed too much weight to the indirect security threat, failed to properly balance it against the critical harm caused to the petitioners and did not meet the burden of proof imposed on him when a violation of the constitutional right to family life is concerned.

53. Firstly, we shall discuss the security allegations regarding the sister and the brother in law and thereafter we shall discuss the argument concerning the potential projection that the indirect security threat may have on petitioner 2.

The allegations concerning petitioner 2's sister Shaden

54. Respondent's allegation concerning petitioner 2's sister Shade, as stated in the first and second denial notices and in respondent's response to the appeal, is that she was mentioned in an interrogation of a Hamas detainee in 1994 as having been involved in activities of "Al Kutla al Islamia" when she was a student in Birzeit university.

55. Firstly, it should be noted that the respondent reiterates his above allegation concerning the sister Shaden, without any change or update, for more than five years, ever since the first denial notice. In view of the fact that the respondent has no updated information concerning Shaden and that his allegation ever since 2008 pertains, as will be further elaborated below, to events which occurred more than ten years ago, no weight should be given to respondent's claim concerning the indirect threat attributed to petitioner 2 due to her sister Shaden.

56. In this context it should be noted, that the Honorable Judge Ron Shapira held, with respect to two years old direct(!) security material, that the failure to update the security information constitutes a material defect which undermines the decision making process and the determination concerning a security preclusion against the sponsored spouse (ADA 1196-05-10 **Nasser v. State of Israel**, reported in Nevo, August 22, 2010, hereinafter: **Nasser**). And note, unlike the indirect preclusion against petitioner 2, the Naser case concerned a direct security preclusion and negative security information against the sponsored spouse him-self. Nevertheless, in view of his comments concerning the security information, the Honorable Judge Shapira accepted the petition and ordered that the family unification procedure should be continued and that residency permits should be granted to the sponsored spouse.

57. Secondly, respondent's allegation that petitioner 2's sister "was mentioned in an interrogation of a Hamas detainee (1994) as having been involved in activities of "Al Kutla al Islamia" when she was a student in Birzeit university", is peculiar, since the sister Shaden studied in Birzeit university in 1999-2004, and therefore it is unclear how an interrogation which was conducted in 1994 could have pointed at this or another activity on her part. The petitioners raised this query before the respondent, both in the written hearing and in the appeal, but the respondent has failed to refer to this query and reiterated his allegation against Shaden word by word, which in and of itself provides an indication of the seriousness attributed by the respondent to the material concerning the sister and to the potential influence it may have on the threat posed by petitioner 2.

58. From the protocol of the interrogation of a "Hamas detainee" which was transferred to Advocate Rosenthal within the framework of AP 8951/08, it seems that the respondent referred to an interrogation which was conducted in 2004 rather than in 1994 to Mrs. Yakin Khazatmeh. From the protocol of the interrogation which is illegible, it is not clear where and in which context petitioner

2's sister Shaden is mentioned, and it is only obvious that no security preclusion may be based on such interrogation.

59. In addition, it is unclear how the interrogation of Mrs. Yakin Khazatmeh of 2004 came up, all of a sudden, in 2008, as a cause for the denial of petitioners' family unification application, in view of the fact that the family unification application was approved in 2001, and petitioner 2 continued to renew the family unification permits, for a number of years after the above interrogation and after the sister has completed her studies. It is unclear what caused the respondent to decide that the sister's conduct in the beginning of the 2000's, could affect the risk posed by petitioner 2 in 2008.

60. It should be further emphasized that the sister Shaden has never been interrogated, detained or tried and that she is a mother of young children.

The allegations concerning the brother in law Abdallah

61. With respect to respondent's allegation concerning Abdallah's arrest in 1998-2001, this period precedes the approval of the family unification application and the annual renewals thereof. Thus, the brother in law's arrest was known to the security agencies, which nevertheless had no preclusion, as far as they were concerned, which prevented the approval of the application. It is therefore unclear why this arrest, about 13 years ago, became relevant in 2008, within the framework of the first denial notice, and why the respondent continues to mention it in the subsequent denial notices too. The same is also relevant to the period during which the brother in law studied in Ramallah, from 2000 to 2005.

62. The above indicates that Abdallah's arrest and alleged activity before 2008, did not project on the threat posed by petitioner 2 until 2008. Therefore, and even more forcefully, they cannot project on the threat currently posed by her.

63. As to Abdallah's administrative detention in 2009, with respect of which the detention order, the protocol of the hearing and the decision in the judicial review of the order were received in AP 8951/08, the case concerns an order which was shortened due to the medical condition of the brother in law (he underwent an operation to remove a tumor from his back).

64. As to Abdallah's administrative detention from June 2011 until May 2012, it should be noted, that on May 1, 2012, within the framework of the judicial review which was exercised on the administrative detention order, the Honorable Military Judge Amir Doron decided to revoke the administrative detention order and release Abdallah from the administrative detention since he was not convinced that the intelligence information which was presented to him justified his continued detention. The decision to release him was preceded by a decision dated February 28, 2012, in which the Honorable Military Judge, Ashuel, shortened Abdallah's detention from three to two months, and a decision dated January 23, 2012 in HCJ 9633/11, within the framework of which the respondent notified, according to the recommendation of the court, that he was willing to submit the administrative detention order for judicial review more frequently. The military prosecution has not appealed the decision to release Abdallah from the administrative detention.

The decision in the judicial review 1300/12 dated May 1, 2012 is attached hereto and marked **P/10**.

The judgment in HCJ 9633/11 dated January 23, 2012 is attached hereto and marked **P/11**.

65. Hence, it is clear that at least upon the release of the brother in law from the administrative detention, if not earlier, the security information in Abdallah's matter did not justify his continued detention and that upon his release, clear and present danger to the security was not posed by him, as the administrative detention requires (see for instance HCJ 2320/98 **El-Amla v. The Military Commander of the West Bank Area** (reported in Nevo, July 19, 1998) and HCJ 11006/04 **Kadri v. The Military Commander of the West Bank Area** (reported in Nevo, January 13, 2004)).

66. Under the above circumstances, the respondent failed to satisfy the required heavy burden of proof and failed to prove that there was a high probability almost reaching certainty that public safety would be put at risk as a result of the approval of petitioners' family unification application. Indeed, if the direct security threat in the matter of the brother in law Abdallah does not meet the high probability almost reaching certainty test, how can the indirect security threat in petitioner 2's matter, which merely stems from the family relations with the brother in law, meet this test? And if the indirect security threat does not meet the high probability almost reaching certainty level, it does not carry enough weight which justifies a violation of petitioners' constitutional right to family life and a denial of their family unification application.

67. It should be further noted in this context that the discussions and decisions concerning the administrative detention of the brother in law Abdallah indicate that the material in his matter concerns organizational activity in the Hamas organization and it has not been alleged that he was involved in military activity.

The respondent did not conduct an individual examination and did not satisfy the burden of proof regarding the risk posed by petitioner 2

68. It should be reminded again that the respondent does not attribute to respondent 2 any involvement in activity which puts safety at risk and that throughout the duration of her presence in Israel, for 18 years(!), no security allegation whatsoever was raised against her. The security threat which is referred to by the respondent, is based only on indirect familial threat arising mostly from petitioner 2's brother in law and the potential risk that the brother in law would influence petitioner 2 and use her for his needs.

69. The respondent has indeed specified in detail the security threat posed by petitioner 2's brother in law but has completely ignored the issues pertaining to the manner by which such security threat affects the risk posed by petitioner 2. The respondent has not discussed question of the probability that the brother in law would try to use petitioner 2 and to the extent any such probability existed, what were chances and probability that petitioner 2 would be influenced by such attempts or cooperate with him. In the absence of any reference to said questions, it is unclear what is the probability that any risk would materialize as a result of the approval of the family unification application, which remains merely an assumption.

70. In this sense the respondent acted in a sweeping and automatic manner. He has failed to carefully assess, as required, the indirect risk in the specific case, and to conduct an individual examination of petitioner 2. As stated in **Dakah,** the potential risk posed by petitioner 2's brother in law and the potential indirect risk posed by petitioner 2 are not identical and a sweeping conclusion should not be made according to which any permit applicant who is related to a person who is involved in terror activity, is disqualified from having his family unification approved.

71. The respondent has failed to specify and explain the fact that after a long presence of many years in Israel no security allegations were raised against petitioner 2 and how this fact is reconciled with

the concern that she would be recruited or assist her brother in law, who, according to the respondent, was involved, for many years, in dangerous security activity. The respondent has not explained how and why he attributed to petitioner 2 indirect risk despite her objective circumstances – a woman who raises children and who has been living for many years in Israel – which reduce the concern for the realization of the potential indirect risk.

72. In addition to the above it should be noted that the connection between petitioner 2 and her sister is relatively weak. They speak on the phone once every few weeks, and in the single times per year that petitioner 2 visits her mother's house, she occasionally meets her sister over there. The connection between petitioner 2 and her brother in law is much weaker. She hardly ever meets him in person and she does not speak with him on the phone either.

73. Furthermore. Despite respondent's decision not to grant petitioner 2 residency permits in Israel due to security allegations, petitioner 2 occasionally receives visitation permits in Israel and has a magnetic card in her possession. As is known, the visitation permits as well as the magnetic card are issued by the military commander to persons with respect of whom no security preclusion exists.

Copies of four recent entry permits into Israel which were issued to petitioner 2 are attached hereto and marked **P/12**.

A copy of a magnetic card is attached hereto and marked **P/13**.

74. In the above **Nasser** judgment, the Honorable Judge Shapira writes about such a situation, in which "one hand prohibits petitioner's entry into Israel while the other gives him the permit" as follows:

> … it is difficult to accept the position that on the one hand the Israel Security Agency claims that petitioner's entry into Israel puts public safety at risk, while on the other hand the military commander grants an entry permit into Israel for commercial purposes which enables free movement in most parts of Israel. If indeed the mere entry of the petitioner into Israel puts public safety at risk what difference does it make whether he enters as a merchant or as spouse of an Israeli citizen. In this regard the administrative authority does not meet the burden of proof and fails to substantiate its allegation that the mere entrance of petitioner 2 into Israel poses a security threat.

75. To conclude this part it should be reminded that in **Dakah** – which embodies, as aforesaid, the case law concerning the manner by which indirect security information may be used in the context of the Temporary Order – the security information which was attributed to the relatives of the sponsored spouse was much more severe than the information attributed to petitioner 2's relatives. In **Dakah** the information concerned involvement of relatives of the sponsored spouse in terror activity, including military activity under the auspices of the International Islamic Jihad and the Al-Qaeda Organization and attempts to carry out terror attacks against Israelis. In addition, the kinship between the activists and the sponsored spouse in **Dakah** was much closer than the kinship in petitioner 2's case. Whereas the **Dakah** case concerned the three brothers and father of the sponsored spouse, this case concerns only the brother in law of petitioner 2. Nevertheless, all Justices of the panel in **Dakah** were of the opinion that a proper balancing between the conflicting considerations resulted in the revocation of the decision of the Minister of the Interior to deny the

family unification application and ordered that Mrs. Dakah should be allowed to continue to live in Israel with her family.

The respondent has failed to properly weigh alternative means to achieve the objective

76. As specified above, in the proper balancing of conflicting values, the respondent must consider, as part of the proportionality obligation, alternative means to achieve the security purpose in a manner which would not completely destroy petitioners' family life.

77. In **Dakah** various restrictions were imposed which facilitated the attainment of the security purpose without violating petitioners' right to family life, despite the fact that, as specified above, said case concerned a very powerful security interest in the form of the three brothers and father of the sponsored spouse, who were engaged in security activity which amounted to actual terror. Nevertheless, it was held that the sponsored spouse should be given residency permits subject to the imposition of certain restrictions on her conduct. The possibility to change this arrangement after a while was not ruled out including the option to consider the grant of temporary status in the future (paragraph 53 of the judgment of the Honorable Justice Procaccia).

78. With respect to the petitioners, it seems that no alternative arrangements or other options were examined. Ever since the first denial in 2008, over the course of five years, during which changes have most probably occurred in the security situation and in the threat posed by petitioner 2's relatives, the respondent has not made any proposal for alternative measures other than a total denial and dissolution of the family unit. It seems that the respondent has decided to deny the application and failed to comply with his obligation to examine with an open heart and mind the implementation of more proportionate means for the prevention of the alleged indirect security threat.

Conclusion

79. The refusal to enable the arrangement of petitioner 2's status critically injures the petitioners, crushes any normative aspect of family life and causes great tension, instability, uncertainty and insecurity in the life of the family.

80. Petitioners' children are severely injured by respondent's refusal to arrange the status of their mother. The mental stress at home as a result of the fact that a residency permit in Israel has not been issued, the injury caused to the family and the uncertainty concerning the ability of all family members to continue to live together in their home in Jerusalem may cause irreversible damage to the minor children, all due to the indirect security risk which is alleged against their mother.

81. The law and case law provide that petitioners' life should not be injured in such a severe manner, unless a rigorous examination has been conducted and only if it is required due to a specific, clear and present danger posed by petitioner 2's presence in Israel.

82. As specified in the petition, the violation of the constitutional right to family life, and the violation of the children's best interest contrary to the fundamental principle of the child's best interest, are excessive, disproportionate and are not based on a proper balancing between the relevant interests and considerations in petitioners' case.

Therefore, the honorable court is hereby requested to accept the petition and order the respondent to approve petitioners' family unification application, in the sense that residency permits would be granted to petitioner 2. In addition, the court is hereby requested to order the respondent to pay petitioners' costs and legal fees.

Jerusalem, January 1, 2014

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Sigi Ben Ari, Advocate
Counsel to the petitioners

(File No. 15645)