At the Supreme Court **AAA 8630/11**

In the matter of:

1. **_____ Radwan, ID No. _____**
2. **_____ Radwan, ID No. _____**
3. **_____ Radwan, ID No. _____,**
   born in Israel on September 9, 1992
4. **_____ Radwan, ID No. _____,**
   born in on Israel, July 18, 1994
5. **_____ Radwan, ID No. _____**
   born in Israel on December 9, 1996
6. **_____ Radwan, ID No. _____,**
   born in Al-Bireh on July 20, 1999
7. **_____ Radwan, ID No. _____,**
   born in Al-Bireh on January 5, 2005
8. **_____ Radwan, ID No. _____,**
   born in Israel on July 1, 2009
9. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – R.A.**

all represented by counsel, Adv. Adi Lustigman (Lic. No. 29189) et al.
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Tel: 02-6222808; Fax: 03-5214947

The Appelants

v.

State of Israel - Minister of the Interior

represented by counsel from the State Attorney's Office
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Tel: 02-6466590; Fax: 02-6466655

The Respondent

Respondents' Response

According to the decision of the court dated June 12, 2013 and the extensions which were given, the appellants hereby submit their response to respondent's notice.

A. Preface

1. In its decision dated June 12, 2013 the court accepted respondent's request to complete the argument on the question of "**whether respondent's requirement that the application may be submitted only after the elapse of two years during which the minor had a center of life in Israel, does not prejudice primary legislation – section 3A of the Citizenship and Entry into Israel (Temporary Order) Law, 5763-2003, as amended**" (in 5765-2005, Amendment 1).

2. By posing the above question, the honorable court resorts to fundamental principles – the discretion exercised by the respondent, his procedures, directives and conduct are not immune from judicial scrutiny. Directives, conditions and procedures must, first and foremost, reconcile with the provisions of the law which empowers the administrative authority to establish them, and with the purpose thereof (see: AAA 9187/07 **Luzon v. Minister of the Interior** (July 24, 2008), paragraph 41 of the judgment of Justice Y. Danziger), and if this is not the case, they must be revoked (see, Yoav Dotan, **Administrative Directives** 180 (1996)).

3. On September 9, 2013 the respondent notified, that "despite the fact that it is not required by the Temporary Order Law", he was willing, **from now on**, to enable parents to submit applications for their children who were under the age of fourteen on the date of their relocation to Israel, and if the application was approved the respondent would refer to the age of the child upon the application submission date and would be willing to give him **temporary** residency visa subject to the position of the security agencies (hereinafter: **respondent's notice**).

4. The respondent has now recognized, what is self evident in a modern and democratic state, that in a proper state of affairs, any parent must be allowed to submit an application for his child upon his relocation to Israel. This arises, in fact, from the judgments in AP 8340/08 **Abu Gheit v. Minister of the Interior** (December 10, 2008) and AP 1140/06 **Za'atra v. Minister of the Interior** (November 30, 2007), as it is inappropriate that children reside in a state for a long duration of time unlawfully by virtue of the authority's policy, and even worst, that the arrangement of their future status will be absolutely and sweepingly prevented, and the above, as is recalled, ostensibly for the purpose of the examination of a center of life, which may be easily realized in a manner which does not prejudice the child. By changing his policy, the respondent has, in fact, acknowledged the difficulty posed by his previous policy and he amends it towards an application which may be reconciled with the provisions of the Temporary Order Law after Amendment 1. Nevertheless, according to respondent's notice, his new policy will be applied from now on, and therefore the appellants and others like them will not be able to receive status, since "there was no flaw" in the policy thus far. The practical meaning thereof is, that children who moved to Israel when they were slightly above the age of sixteen, will be required to be torn from their families, contrary to Amendment 1. (the respondent makes no reference whatsoever to this group despite the fact that the same rational applies thereto). In addition, the respondent refers in his response only to the grant of a temporary status and does not clarify whether said status will be upgraded, after the elapse of two years, into a permanent status.

5. As we have realized that the existence of a center of life may be examined in a very simple way which will not prejudice the children – what purpose is served by the failure to arrange the status of children, like the appellants in this case, who returned with their families to Israel when they were under the age of fourteen? Thus, the Temporary Order Law, which is intended to serve a security purpose, was amended in a manner according to which it does not apply to children up to the age of fourteen after it was clarified that there was no security justification to sweepingly refrain from the

arrangement of their status. In addition, the Law was amended in a manner which enables the arrangement of the residency in Israel of any child up to the age of eighteen, in order to prevent his separation from the family unit, as it was found that there was no security justification to prevent it.

6. The appellants welcome the partial change in respondent's policy. Partial, because said policy will still continue to apply to many children whose parents tried to arrange their status before respondent's notice and were either rejected or whose status was not arranged as a result of respondent's directive that they should wait two years for this purpose – two years following which, according to respondent's policy, their children will no longer be entitled to status.

7. Respondent's previous policy which according to his notice, will still apply to many children, has many flaws. As will be clarified below, this policy is contrary to the Law, respondent's declarations in court, the legislative purpose and the interpretation of the court. In view of said flaws the policy should be revoked, and the children whose status has not been arranged as a result thereof and contrary to the Law, should be allowed to arrange their status, and at the same time to submit an application for temporary status to the child under which he will stay in Israel until a decision is made in his application, which will be given two years later (**Abu Gheit**, **Za'atra**). In this context, the status of the appellants in the case at hand should also be arranged, similar to the judgment given in AAA 8849/03 **Dufash v. East Jerusalem Civil Administration** (June 2, 2008).

B. Respondent's policy according to which the application may be submitted only two years after the minor has established a center of life in Israel violates primary legislation

8. In HCJ 7052/03 **Adalah et al. v. Minister of the Interior**, TakSC 1754 (2) 2006, Deputy President, the Honorable Justice M. Naor, has already expressed her dissatisfaction of the manner by which the Temporary Order Law was applied to minors. In paragraph 24 of her judgment, Justice Naor stated that if the Law is extended:

> **… in my opinion, a significant increase of the age of the minors to whom the prohibition of the law will not apply, should also be considered**. (*ibid* page 1908).

9. In paragraph 5 of his judgment in **Adalah,** the Deputy President, as then titled, the Honorable Justice M. Cheshin, describes the relaxations which were made in the Law, according to him, upon the adoption of Amendment 1, in August 2005. In this matter he states as follows:

> **It should be admitted: the Citizenship and Entry into Israel Law in its original version harmed children considerably by preventing them from living with their custodial parent in Israel. But after the law was amended by adding the arrangement in section 3A - the situation has improved greatly: both with regard to minors under the age of 14 and minors above the age of 14. According to the law in its current form, I see no proper justification to declare it void in this respect.**

Thereafter, the Honorable Justice Cheshin adds in paragraph 67 of his judgment:

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

The Honorable Justice Cheshin noted, that the Law did not apply to children, like the appellants in this case, who were born in Israel, and in our case regulation 12 of the Entry into Israel Regulations, 5712-1952 applies, according to which such a child will receive the same status as his parents.

The appellants in this case were born in Israel to a mother who is an Israeli resident. Regulation 12 applies to their case and the limitations imposed under the Temporary Order Law do not apply. Nevertheless, the respondent applies the provisions of the Temporary Order Law to them and others in their condition. The denial of status is contrary to the Law and Regulations and is unlawful.

10. In HCJ 466/07 **Gal-On v. Attorney General** (January 11, 2012) the Deputy President, the Honorable Justice M. Naor, described the amendments to the Temporary Order Law which concerned children, and which served, *inter alia*, as the basis for the determination that the law was proportionate, as follows:

> **As was further explained in the judgment of the Deputy President Cheshin in the previous petitions – minors up to age of fourteen are entitled to receive status in Israel to prevent their separation from their custodial parent who lawfully resides in Israel, and therefore their right to live with their custodial parent is not prejudiced in any way, whereas minors above the age of fourteen can receive a residency visa in Israel to prevent their separation from their custodial parent. Said visa will be extended only if the minor resides permanently in Israel. The Deputy President noted in the previous judgment that this arrangement was satisfactory and that the legislator did well in the establishment of an exception which enables children to stay in Israel with at least one on their parents. Indeed, it was so emphasized there, the <u>original law</u> has considerably injured children who were prevented from residing with their custodial parent, however, the injury as of the date the previous petitions were heard, was limited (see pages 414-416 of the judgment of the Deputy President in the previous petitions).** (Paragraph 18 of the judgment of the Deputy President, the Honorable Justice Naor, in **Gal-On**).

11. In AAA5718/09 **State of Israel v. Srur** (April 27, 2011), which was referred to by the Honorable Justice Naor in her judgment in **Gal-On**, the court pointed at the intention of the legislator to give children up to the age of fourteen the same status as their parents:

> **A study of the protocols documenting the Committee's sessions reveals the rationales behind these changes. The protocols mention the need to grant children under 14 years of age status which is identical to the status of their parents who live in Israel, not immediately, but rather after a probationary period of a number of years, during which the child would be granted temporary status in order to ensure that these children indeed live in Israel on a permanent basis (see: Protocol, 466th Session, 16th Knesset, 17-19, 23, 25 (July 11, 2005) (hereinafter: protocol 466) which refers to granting permanent status following a graduated procedure. See also Protocol, 486th Session, 16th Knesset, 12 (July 25, 2005) (hereinafter: protocol 486) which addresses the raising of the cut off age from 12 to 14)** (paragraph 32 of the judgment of the Honorable Justice Vogelman).

12. While defending the constitutionality of the Law in **Adalah** and **Gal-On**, the respondent explained to the court that children up to the age of fourteen will be given the same status as their parents and that any child up to the age of eighteen will be entitled to status. In **Gal-On** it was clarified that the status would be extended also after the child becomes an adult. The State's declarations were entrenched in **Adalah** (for instance, the comment of the Deputy President as then titled, the Honorable Justice Cheshin in paragraph 65 of his judgment) and in **Gal-On** (for instance, paragraph 18 of the judgment of the Deputy President, the Honorable Justice Naor).

13. However, at the same time, the respondent established arrangements, outside the context of the Law and contrary to his declarations, the interpretation of the court, the intention of the legislator and the legislative purpose, as a result of which only children who were under the age of twelve when they returned to Israel, would be entitled to status. The respondent has also limited the age of the children who are entitled to permits for the prevention of their separation from their parents to the age of sixteen, and all of the above for the purpose of examining a center of life, an examination which may also be done in a manner which will not injure the child and will limit his right to receive status or permit, as the case may be. (See and compare, HCJ 827/08 **Natalia Sandzuk v. Ministry of the Interior** (December 24, 2008)).

14. The impingement inflicted on children as a result of respondent's policy to reduce the number of children who are entitled to status and postpone the age based on which the application is examined, does not serve a proper purpose, cannot be reconciled with the values of the State and is certainly over and above need.

15. In **Srur** it was held that the subjective purpose of the section 3A was to realize the security purpose of the Law, in a proportionate manner and by limiting the violation of human rights to the maximum extent possible, so as to enable to the maximum extent possible, to give a minor up to age of fourteen, the same status as his custodial parent. The court also discussed the objective purpose of the Law and held:

> **We now proceed to examine the objective purpose which concerns the fundamental values of the legal system in a modern, democratic society (see Barak, pages 201-204). The objective purpose is examined, *inter alia*, against the background of the essence of the statute, the overall legislation and the fundamental principles of the legal system (see Barak pages 249-251). The fundamental values of the legal system include the protection of human rights and the interpretation rules in effect in our legal system require that a statute be interpreted in a manner which is consistent with the protection of these rights whilst reducing their violation to the maximum extent possible (see Hatib, §§5, 10). […] As mentioned above, Section 3A proclaims itself as intended to prevent the separation of a child who is a resident of the Area from his parent who lawfully resides in Israel. Thus, one of the objective purposes of this arrangement is the protection, subject to prescribed limitations, of the constitutional right to family life… on the issue of the parent's right to raise his child and the child's right to grow up with his parent in other contexts see: LCA 3009/02 A v. B, IsrSC 56(4) 872, 893-894 (2002); CFH 6041/02 A v. B, IsrSC 58(6) 246 (2004); HCJ 11437/05 Kav LaOved – Worker's Hotline v. Ministry of Interior ([reported in Nevo], April 13, 2011), paragraphs 38-39 of the judgment of Justice A. Procaccia (hereinafter: Worker's Hotline)).**

Another fundamental value of our legal system, which runs like a golden thread through the judgments of this court, is the principle of the child's best interest. This principle guides the court in any proceeding which focuses on issues concerning minors, even when the case concerns the exercise of administrative power (see: AAA 10993/08 A v. Ministry of Interior ([reported in Nevo], March 10, 2010), paragraph 4 of the judgment of my colleague, Justice N. Handel. On the applicability of this principle in other contexts see: CrimA 49/09 State of Israel v. A ([reported in Nevo], March 8, 2009), paragraph 20 of the judgment of Justice Y. Danziger; see also Article 3 of the Convention on the Rights of the Child (signed in 1990)). […] (paragraphs 33-35 of the judgment of the Honorable Justice Vogelman).

16. Thereafter, the Honorable Justice Vogelman discussed in **Srur** the importance of granting a child the same civil status as his custodial parent, against the backdrop of the security purpose of the Temporary Order Law:

> **From the combination of the right to family life and the principle of the child's best interest derives the importance of giving a child the same civil status as his guardian parent:**
>
> **"Israeli law recognizes the importance of giving the child the same civil status as his parent. Thus, Section 4 of the Citizenship Law provides that a child of an Israeli citizen shall also be an Israeli citizen, whether he was born within Israel (4A(1)) or without Israel (4A(2)). Similarly regulation 12 of the Entry into Israel Regulations, 5734-1974, provides that 'A child who was born in Israel, and to whom section 4 of the Law of Return, 5710-1950 does not apply, shall have the same status in Israel as his parents." (Adalah, paragraph 28 of the judgment of President A. Barak) [...]**
>
> **As aforesaid, Section 3A limits the application of Regulation 12 to residents of the Area and does not directly refer to the principle according to which a child should be granted the same status as his guardian parent, but rather only to the desire to prevent the separation of a child from his parent who resides in Israel. However, according to accepted rules of interpretation, this section must be interpreted, to the maximum extent possible, in light of this guiding principle. Another objective purpose underlying Section 3A is the realization of the general security purpose of the Temporary Order Law which requires the imposition of certain restrictions on human rights for the purpose of safeguarding the security of the citizens of the State of Israel. As specified above, setting a cut-off age below which a minor will be given a residency permit in Israel and above which he will be given a stay-permit only is based on these security considerations (see also Section 3D of the Temporary Order Law which concerns a security preclusion for the grant of status to residents of the Area).** (*ibid*., paragraph 36. Emphases added - A.L.).

17. Also relevant are the words of the Honorable Justice, as then titled, Procaccia in HCJ 7444/04 **Dakah v. Minister of the Interior** (February 2, 2010), which concerned family unification between spouses, under the shadow of a security preclusion:

> **In view of this reality, in which a fundamental right of spouses, Israeli citizens and residents, to unite with their spouses from the Area, is violated, a purposive interpretation of the Temporary Order Law is required, which restricts the scope of said violation only to such extent which is required for the realization of the security interest**. […] (*ibid.*, paragraph 20. Emphasis added – A.L.).

18. The decision to examine the existence of a center of life of two years was given without regard to the Law, and without taking into consideration the severe consequences that said examination will have on children, in the manner that the respondent wishes to apply it, in view of the limitations imposed by the Law and its purpose. The respondent in fact agrees that according to a "liberal" interpretation of the Law parents should be allowed to submit applications immediately upon their relocation to Israel and that the submission date of said applications should be regarded as the effective date for the purpose of determining the children's age (paragraph 6 of his notice). Notwithstanding the above, the respondent wishes to apply said determination in a future facing manner. Consequently, all those children who were injured as a result of the problematic implementation, which contradicts the purpose and language of the Temporary Order Law (Amendment 1) – nevertheless, will not have their status upgraded according to their age upon their relocation to Israel with their families.

C. The Courts' directive regarding a lenient implementation of the Temporary Order Law due to its severe violation of rights and its long application period, even in cases in which a decision was given years ago

19. In AAA 8849/03 **Dufash v. East Jerusalem Civil Administration** (June 2, 2008) and in many judgments which followed it, the court have leniently addressed the upgrade of the status of adults in order to reduce the damage caused as a result of the Temporary Order Law. Thus, for instance, in AP 35406-01-12 **Sa'ada v. Minister of the Interior** (March 22, 2012), it was unthinkable to argue that the **Dufash** rational should not be implemented because it was given many years after the specific refusal to upgrade the status of the petitioner, a refusal which was clearly unjustified, as was clarified by the **Dufash** judgment. And see also, AP 8436/08 **'Aweisat Sabah et al. v. Ministry of the Interior** (September 14, 20080, AP 422-05-10 **Nassrin Abu Qalabin v. Ministry of the Interior – Population, Immigration and Border Authority** (October 17, 2010), AP 1953-05-11 **Natasha et al. v. Ministry of the Interior** (July 28, 2011, AP 27661-11-11 **Aharam et al. v. Ministry of the Interior** (February 2, 2012, AP 4469-04-11 **Bader et al. v. Ministry of the Interior et al**. (February 27, 2012) – in all of the above cases and in many others upgrade application were denied according to respondent's previous policy and implementation and were re-considered years later following their amendment in the context of the **Dufash** judgment. Thus, for instance, issues which were considered before AAA 55669/05 **State of Israel v. 'Aweisat** are also decided according to said judgment.

20. Recently, the court stated again, that after so many years during which the Temporary Order Law has been in force, it should be considered to remove the limitations posed on the grant of a temporary status, also in ordinary cases of family unification applications between adults, whose status upgrade is restricted by the language of the Law (See sections 4(1) and (2) of the Temporary Order Law) and also where no mistake or unreasonable delay occurred. In AAA 6407/11 **Dejani v. Minister of the Interior** (May 20, 2013) which concerned status upgrade, following the **Dufash**

judgment, of a person who was allegedly entitled to an upgrade before the restrictions which were imposed by the Temporary Order Law, the Deputy President, the Honorable Justice Naor, commented that following an additional extension of the Law:

> **The condition of those who do not receive an upgrade despite the fact that they have commenced the graduated procedure so long ago, should be considered…** (paragraph 6 of the judgment of the Honorable Justice, Deputy President Naor).

The Honorable Justice Vogelman joined the opinion of the Deputy President and held:

> **Under these circumstances, it seems that the provision concerning the freezing of the upgrade of those who fall under the transitional provisions is no longer necessary in view of the security purpose of the Temporary Order Law – a purpose which was noted by the court when it examined its constitutionality. Firstly, in the case of the latter, not only that an individual examination may be conducted, but rather, such an examination is indeed conducted, in practice, each year on the permit's renewal date. Secondly, this concerns people who are subordinated to an examination by the security agencies for over a decade, since the permits are renewed only in the absence of security preclusion. Thirdly, even after a person's status is upgraded in Israel – from residency under a DCO permit to residency under an A/5 temporary residency visa (which is the relevant category to which we refer) - he continues to be subordinated to security examination, according to the provisions established in respondent's procedures within the framework of the graduated procedure** (paragraph 19 of the judgment of the Honorable Justice Vogelman).

And see AAA 9168/11 **A v. Ministry of the Interior** (November 25, 2013), paragraph 23 of the judgment of the Honorable Justice Zilbertal; AAA 4014/11 **Kafayeh Abu 'Eid v. Ministry of the Interior Population Authority** (January 1, 2014).

21. To date, the court has also exercised broad, lenient an sensitive interpretation concerning the issue of the upgrade of the status of children. See for instance, the judgment of the Honorable Judge Sobel in AP 311/06 **Munir v. Minister of the Interior** (August 21, 2008); paragraphs 10 and 11 of the judgment of the Honorable Judge Marzel in AP 24885-09-10 **Halabiyeh v. Minister of the Interior** (July 28, 2011); the judgment of the Honorable President, as then titled, Judge Arad, in AP 1238/04 **Joubran v. Minister of the Interior** (August 19, 2009); the judgment of the Honorable Judge, Deputy President, as then titled, Tzur, in AP 8386/08 **Arab al-Swahreh v. Minister of the Interior** (December 14, 2009).

22. In the **Dakah** judgment which concerned an adult spouse, against whom the allegation of a security preclusion was raised, it was held:

> **The proper balancing between a fundamental human right and the security value is required not only for the examination of the constitutionality of the Temporary Order Law. It is also required, to the same extent, for the actual interpretation of the Law and the implementation of its provisions.**

> **Indeed, "A violation of a human right will be recognized only where it is essential for the realization of a public interest of such strength that it justifies, from a constitutional viewpoint, a proportionate infringement on the right (Adalah, my judgment, paragraph 4).** (paragraph 13)

The above determinations are even more forcefully relevant with respect to children who have no security background and where there the sanction of prevention of status is not necessary for the examination of the family's center of life. Unlike **Dejani, Abu 'Eid** and **A.**, in our case there is no need to amend the Law, as the Law has already been amended in 2005 after it was clarified that there was no security justification to prevent the upgrade of the status of children up to the age of fourteen. In our case to, the children, who are entitled to enjoy Amendment 1 and respondent's new policy, have been residing in Israel for years under stay permits and annual examinations. Thus, for instance, it is the sixth year in which the appellants at hand receive stay permits with no rights, *in lieu* of the status that should be granted to them as stipulated by the Amendment to the Law and regulation 12.

23. Why then, albeit the directive of this honorable court to apply the Temporary Order Law narrowly[1], was the Law applied in such a broad manner which is not compatible with its security purpose, specifically to children, the most vulnerable group, the best interests of which should be given first priority by the State? And why currently, does the respondent also wish to apply his new, fortunate decision, which provides such an easy solution for the examination of a center of life, only in future facing manner? It is hard to understand. Why a twelve and-a-half years old child who has currently relocated with his parents to Israel after having resided in the Occupied Palestinian Territories (OPT) for a few years, will be entitled to status, whereas a child who relocated with his parents to Israel two years ago when he was also twelve and-a-half years old will not be given status? Why should the latter, whose circumstances are exactly the same as those of the first child, remain without status and without rights, as opposed to his younger siblings, **when the Law does not and did not limit the grant of status and in the absence of security considerations which justify the denial of status?**

D. Discretion to absolutely deny discretion

24. The respondent did not explain in his updating notice the reason for the distinction which was drawn between children whose applications would be submitted in the future and children who have submitted their applications in the past, other than the erroneous argument, that "there was no flaw" in the previous policy which he decided to amend.

25. The sole, weak, reason which supported respondent's argument that there was no flaw in his previous policy, was the **broad discretion** which was vested with him, which according to him, reconciled with the Temporary Order Law – despite the fact that, as we have seen, said policy was in contrary with the Amendment to the Law.

26. Nobody denies the fact that the respondent has the authority and duty to examine each application which was submitted to him, and to refuse to approve it if the applicant poses a risk to state security and public safety (see **Stamka,** pages 787-788; HCJ 2527/03 **Assid v. Minister of the Interior**, IsrSC 58(1) 139, 143-144) or in the absence of a center of life in Israel. However, a sweeping decision, not to arrange any status whatsoever, merely because the applicants are a parent who is an

[1] See also, HCJ 466/07 Gal-On v. Attorney General (January 11, 2012), paragraph 48 of the judgment of the Honorable Justice Rubinstein, paragraph 5 of the judgment of the Honorable Justice Handel, paragraphs 2 and 16 of the judgment of the Honorable President, as then titled, Beinisch, paragraph 26 of the judgment of the Honorable Justice Arbel, paragraph 7 of the judgment of the Honorable Justice, as then titled, E. Levy.

Israeli resident and his minor children, who relocated to Israel after the age of twelve and before the age of fourteen or between the ages sixteen to eighteen concerning the grant of a permit, violates the fundamental rights of the residents in a severe and substantial manner which is not required and does not reconcile with the Law. Restricting respondent's discretion, in a manner that no child will be able to receive status in Israel under any circumstances, if he returned with his family when he was over the age of twelve, and in a manner that no child who returned with his family when he was over the age of sixteen *[sic]*, constitutes an extreme, offensive and inappropriate measure which is largely disproportionate.

27. The respondent quotes in his notice parts of paragraph 47 of the **Srur** judgment, but said quote rather supports appellants' position, in view of the fact that the mentioned discretion concerns "the possibility to give the minor permanent status at the end of the graduated procedure."

28. Furthermore, the words of the Honorable Justice Vogelman on this issue in **Srur** are relevant in this context:

> **At this stage, it is possible to summarize and state that the language of the section - both original and amended - and the legislative history, indicate that considering the general security purpose of the Temporary Order Law and the desire to protect the integrity of the family unit and the child's best interest, the legislator sought to give a minor, resident of the Area under the age of 14, the same status as his custodial parent, to the maximum extent possible. The aforesaid notwithstanding, the legislator sought to leave the Ministry of Interior some leeway to exercise discretion and allow for a graduated procedure**.

29. We have seen that in fact, the respondent does not wish to exercise the discretion which was vested with him. In his flawed policy thus far, the respondent exercised his discretion to deny his own discretion. The argument that discretion may be used to absolutely deny discretion, in a manner which does not reconcile with the Law and which even contravenes the Amendment to the Law, as a means to refrain from giving status to children like the above appellants and many others, constitutes a clear cynical use of the term "discretion".

E. Past Policy concerning the Registration of Children – Secretive and Unstable

30. The unreasonableness and impingement which arise from respondent's decision to arrange the status of children according to the date of their return to Israel only from now on are even greater in view of the fact that the policy regarding the registration of children constantly changed in the past and was not published (See AP (Jerusalem) 530/07 **Association for Civil Rights in Israel v. Ministry of the Interior** (December 5, 2007)]. Until the proceeding in AP 727/06 **Nofal v. Minister of the Interior** (May 22, 2011), there was no regulated procedure which entrenched the criteria for the arrangement of the status of children. This should be coupled with the severe conditions which existed in the Ministry of the Interior and which made it difficult for parents to apply to the bureau (See for instance, **Raful Rofe Jabra v. Minister of the Interior et al.** (October 6, 2005); AP (Jerusalem) 754/04 **Badawi v. Director of the Population Administration Bureau** (October 10, 2004)).

A collection of appellant 9's correspondences with the respondent throughout the years, in an attempt to understand his changing policy of which it learnt from sporadic and specific answers, correspondences which were mostly one-sided, is attached and marked **App/1**. From May 2002 government resolution 1813 was applied to resident's children, in a manner which completely

prevented the arrangement of their status until the enactment of the Temporary Order Law, which established age limitations, which the respondent tries to disregard.

31. In **Abu Gheit** of 2008, it was held that parents should be allowed to submit an application for their children upon their relocation to Israel. After the submission of the application, the children should bi given residency visas in Israel which would be extended until a two year center of life is substantiated, at which time their permanent status may be arranged:

> **The court's words in Abu Qweidar should be carefully examined and it should be noted that <u>they referred to the substantiation of a center of life as a "fundamental principle for the approval of applications for the</u> <u>registration of children", namely, the approval of their status as permanent residents pursuant to regulation 12,</u> and did not refer at all to the question of the "interim" status (in respondents' words) which would be given to the children before the applicant – the parent who is a permanent resident – has proved the existence of a center of life in Israel for two years.** (*ibid,* paragraph 10 of the **Abu Gheit** Judgment and see also paragraphs 11-12 of said judgment. Emphases added – A.L.)

32. In AP **Nofal** of May 2011, the court ordered the respondent to revise the procedure regarding the registration of children in a manner that would entrench the **Abu Gheit** determinations therein (See *ibid,* paragraph 11), something which has not been done until this very day. Even when the procedure was published, at a later stage, according to paragraph 10 of the **Abu Gheit** judgment, the time criterion according to which a two year center of life should be maintained in Israel was not included in the procedure which was published.[2] On this issue it should be noted that an application may be submitted for a child who accompanies a foreigner who is married to an Israeli citizen, **when the child is abroad or immediately upon his arrival**, when the effective date for the examination of his age is the application submission date (see procedure 5.2.0008).

33. Only since the procedure for the arrangement of the status of children was published within the framework of AP **Nofal**, a procedure which did not include the criterion of a two year center of life in Israel, had respondent's policy on this issue been partially clarified, in a manner which made it easier for parents to follow the complex and costly procedure involved therewith.[3] According to respondent's decision, specifically the children whose applications were processed when the criteria and application procedures for the arrangement of the status of children were not known by the public – are the ones who will be prejudiced. Relevant to this matter are the words of the court in AAA 4014/11 **Kafayeh Abu 'Eid v. Ministry of the Interior Population Authority** (January 1, 2014).

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[2] Procedure 2.2.0010 Arrangement of the Status of Children which was published following AP **Nofal** may be found in http://www. Piba.gov.il/Regulations/7.pdf. Only recently the procedure was changed and separated into two procedures.

[3] For demonstration purposes, in the current clearer situation, following the publication of the procedure – (which has not yet been published in Arabic) the registration fee of a child who was born outside Israel amounts to NIS 750. A family which relocates to Israel and has six children (such as the appellant at hand), must pay NIS 4,500 for the purpose of submitting the application for the arrangement of their status. When the application is approved the family must pay twice, year after year, fee in the amount of NIS 180 for each child who receives an A/5 temporary status. Children who receive DCO permits should appear before the bureau in Jerusalem, and in addition, before the District Coordination Office in the OPT, many times more than once, on each annual renewal, to actually receive the permit. The lines are long, many documents and affidavits should be attached. In most cases the annual stay permits are consecutive, and the period of six months which was required for the approval of applications from the date of their submission, currently extends far beyond that. The above is not intended to challenge this state of affairs in this context, but rather to shed some light on the nature of the procedure and the situation in which the children of Israeli residents find themselves also after the publication of the procedure.

> **[…] A rigid implementation of the requirement for a "center of life" in Israel for a period of at least two years is problematic in view of the fact that said criterion was not properly published in the procedures of the Ministry of the Interior (information which was presented to us on in respondent's response dated September 8, 2013).**
>
> **[…]**
>
> **The first detail which should be taken into consideration as aforesaid, is the source of the requirement for a "center of life" in Israel for a period of at least two years as a condition for the commencement of the processing of the family unification application and the manner by which said requirement is published. As aforesaid, in respondent's notice which was filed after the judgment of the court of first instance was given and even after the hearing before us, it was clarified that in fact, family unification applications were not approved in the absence of proof regarding the existence of a "center of life" of two years, despite the fact that said requirement appears neither in 2007 procedure nor in the updated version of the procedure, as a formal condition. The respondent has neither mentioned any other publication of said demand, despite the fact that it has already been held by this court that a condition precedent for the application of internal directives which have a bearing on the rights of the individual is their publication in a reasonable manner (HCJ 5537/91 Efrati v. Ostfeld, IsrSC 46(3) 501, 513 (1992)), and currently this requirement also applies by virtue of the explicit provision of section 6 of the Freedom of Information Act, 5758-1998 (See further: Daphna Barak-Erez Administrative Law A 346-347 (2010) (hereinafter: Barak-Erez)). Needless to say, that proof of a "center of life" of two years is a condition which pertains directly to the rights of those who apply for status in Israel by virtue of family unification. Being aware of the entire conditions for obtaining permanent status in Israel is essential for those who seek status and is required to enable them to plan their steps. As is known, the above was repeatedly said specifically in connection with the procedures of the Ministry of the Interior in matters concerning receipt of status in Israel (See: HCJ 355/98 Stamka v. Minister of the Interior, IsrSC 53(2) 728, 768 (1999); HCJ 7139/02 Basa v. Minister of the Interior, IsrSC 57(3) 481, 490 (2003))** (judgment of the Honorable Justice Barak-Erez, paragraphs 27 and 28).

34. Children who returned to live in Israel before the dates set forth in the Law, but whose applications were summarily rejected; delayed in the absence of a published procedure; due to the conditions in the bureau; or which were not submitted following respondent's directive not to submit applications before the requirement for a center of life of two years shall have been fulfilled – are entitled under the Law to obtain status or permit in Israel, as the case may be, according to the date of their relocation to Israel and they should not be deprived of said right.

F. From the general to the particular – the status of appellants 3 and 4 should be arranged

35. The respondent argues in paragraphs 7A and B of his notice, that the new policy should not be applied to the appellants for two reasons. The first one, the absence of any flaw in his policy. We explained why this argument has no merit, and that respondent's previous policy was indeed flawed as it was established in a manner which circumvented Amendment 1 to the Law. The second reason, is the 'abandonment" of the original application for the arrangement of appellants' status, in respondent's words, in view of their failure to submit an appeal or file a petition against the decision to deny their application due to an absence of a center of life of two years. We shall explain below why the respondent cannot use this argument, when contrary to his procedures, he failed to advise the appellants of their right to submit an appeal or file a petition, and when the procedure regarding the registration of children was neither formalized nor published in public at that time. In any event, even if the appellants were advised of their right to submit an appeal, as the policy which was established by the respondent contrary to the Law was changed, it should be applied to children who came to Israel with their families before they were fourteen years of age. One way or the other, it is not the children appellants' fault that their parents acted according to respondent's directive, according to which an application in their matter should be submitted two years later.

36. The denial of appellants' 2006 application was not lawful, and was made according to a policy which was neither lawful nor constitutional. Said policy has now been changed, but the respondent wishes to apply the change in a restricted and limited manner. Under the above described circumstances, the demand for a center of life of two years as a condition for the **submission** of the application by a parent for his minor children is an extremely unreasonable demand which destroys families and particularly children, in view of the fact that the arrangement of their status is conditioned on an unlawful residency for years, and in view of the fact that the delay of the application submission date is used to thwart the grant of status to the children, endlessly.

37. In our case, the mother, appellant 1, submitted an application for the arrangement of the status of her children, who were born in Israel, immediately upon her return to Israel and before appellants 2 *[sic]* and 3 were fourteen years of age – appellant 3 was thirteen years and nine months old and appellant 4 was twelve years and one month old. The respondent does not dispute the date of the family's return to Israel as was clarified during the litigation, and also recently, in the hearing (see the protocol of the hearing dated June 12, 2013, end of page 1 and page 2 lines 4-8. And see also paragraph 7 of respondent's decision sitting as an objection committee, exhibit **P/24** of the petition which was attached as exhibit **S/1** to appellants' summations: "In June 2006 the objecting parties moved to live in Israel"). However, when the appellant mother applied to the respondent upon her return to Israel, she was given notice, of what has not been published in public, that the relevant procedure did not concern the registration of children, as it was referred to in the past, and that despite the fact that the children were born in Israel a family unification procedure should be initiated. In our case appellant 1 was instructed to firstly apply in writing, to schedule a date for the submission of the application, which would be later submitted and fees would be paid. Appellant 1 found it difficult to cope by her-self with respondent's requirements which were given to her verbally, particularly in the absence of procedure which could guide her as to the appropriate forms and the other complex requirements of the procedure. Therefore, she turned to a lawyer, before her children turned fourteen years of age. However the attorney's letter was sent shortly after appellant 3's fourteenth birthday and when appellant 4 was not yet twelve and-a-half years old. Eventually, even if appellants' attorney at that time would have applied to the respondent somewhat earlier, the application of appellant 1 would have been denied, in view of respondent's policy which did not enable the submission of applications before the elapse of two years during which the family has resided in Israel. It is clear that had respondent's procedures been published, appellant 1 would have been aware of her rights and could have acted according to the directives of the procedures

and her application would not have been delayed due to the need to make inquiries and the services of a lawyer would not have been required.

38. The respondent argues that appellant 1 cannot petition against his policy, in view of the fact that she did not appeal the decision. In the denial letter, the respondent did not inform the appellant mother of her right to file an appeal, contrary to the provisions of respondent's procedure No. 5.1.0001. Therefore, appellant 1 did not know that she could do it. It is improper to raise a procedural argument, when the respondent gave no notice of the required procedure in such a material issue, when the constitutional rights of Israeli residents and their children are concerned and when a material response and a current change of status will not cause the respondent any harm and will reconcile with Amendment 1 of the Law. In this case the application was initially denied unlawfully, in a period of extreme changes in the law which were not brought to the attention of the public, based on inappropriate policy, the results of which contravene the Amendment of the Temporary Order Law. Hence, there were flaws in the mere policy of the respondent which was **currently changed**, in the absence of any procedures, not to mention the fact that no criteria and application procedures were published and brought to the attention of the public, and in the failure to refer the appellants to the appeal procedures which were available to them.

39. The rational of the application of the **Dufash** judgment, following which upgrade of status was requested in many cases many years after such applications were denied based on government resolution 1813 and the Temporary Order Law, is all the more so relevant when children are concerned, the previous policy in whose matter, which established wide limitations which had no basis in the Temporary Order Law, was canceled. Thus, attention should be given to the fact that unlike **Dufash** not only that the Law does not restrict the arrangement of their status, but rather, the Law was amended to reduce the harm caused to them, **in the absence of security justification**.

40. The respondent did not fulfill his obligation to implement the determinations of the conclusive **Abu Gheit** judgment, in which it was held that the submission of an application for the children and the spouse should be allowed upon the family's return to Israel, and that temporary residency should be arranged until the application is examined. The respondent failed to integrate the **Abu Gheit** determination in his procedures and failed to bring them to the attention of the public (see paragraph 11 of the **Nofal** judgment). Nevertheless, the respondent expected that families like the appellants' weak family would be familiar with the judgment, guess the application procedures which were not formalized and will know their rights concerning the possibility to arrange the status of the family's children, in the absence of any published procedure and criteria in this regard. Now too, as the policy has changed in a manner which recognizes the rights of parents and children to submit to the respondent an application for the arrangement of their status upon their relocation to Israel, the new policy has not published anywhere, and despite respondent's undertaking to do so without delay, it has not yet been incorporated into the procedures which pertain to the arrangement of the status of children (paragraph 6 of his notice). Such a cruel and harsh sanction should not be imposed on families, only because the family members were not knowledgeable of the innovations of the case law and of the secrets of a concealed bureaucracy, while the respondent himself failed to take any measure to integrate the court's directive into his policy.

41. In the above **Abu 'Eid** matter, not only that the appellants did not live in Israel during the two years which preceded the submission of the application, but rather, the appellants did not live in Israel at all when the application was submitted and during later years. Nevertheless, it was held, that the respondent should have discussed the application and make a decision therein according to the date on which two years have passed from the date of the family's return to Israel. Notwithstanding the above, the unjustified delay in the approval of the application, was discussed according to the **Dufash** judgment, which was given many years (amounting to about two decades) after said

occurrences. Among other things, the court pointed at the lacking and offensive administrative infrastructure at that time, due to the absence of procedures, the failure to publish application procedures, and the absence of the criterion of residency in Israel for two years on the application submission date, also in the procedures which were established years later and were published by the end of 2008. And see for instance, AAA 9168/11 **A. v. Ministry of the Interior**, paragraphs 20-22; and see **Joubran** above.

42. In paragraph 36 of his summations, the respondent argues: "… the submission of a "futile application", when the applicants know that they do not satisfy the material requirements for the receipt of status, cannot create for the applicants a right to receive status according to their age on the date on which such "futile application" was submitted." However, why an application of an Israeli resident to live lawfully in her country with her spouse and children is a futile application? And how should the applicants know that they do not satisfy the "material requirements" if those were not brought to the attention of the public and in the absence of any procedure in this regard?

43. As soon as appellants' matter was transferred to HaMoked, for its handling, within the framework of the appeal which was filed against respondent's decision to regard the appellants as OPT residents and apply to them the provisions of the Temporary Order Law, in a manner which would prevent them from receiving status, it was written:

> **According to AP 8340/08 Abu Gheit v. Minister of the Interior, even if the family unification application and the application for the arrangement of the status of the children is not finally approved in the absence of a two year center of life, the application should be accepted and the graduated process should commence. A final approval of the application, and the arrangement of a permanent status, will be given two years later. Otherwise, how can the family members establish their center of life in Israel, while they reside therein unlawfully. Hence, your bureau should have examined the application of my client and approve the residency of the children in Israel before they proved residency of two years herein. Notwithstanding the above, and contrary to Abu Gheit, on October 28, 2007 your denial of the application was sent, due to lack of "permanent and continuous center of life of at least two years within Israel." Later on, the applications of our client to register her two young children and for family unification with her husband were also denied, for the same reason, despite the fact that at that time my client and her family have already been living in the Jerusalem area for over two years, and despite the fact that the my client was recognized by the National Insurance Institution as a resident, as of June 2006**. (see paragraphs 5-7 of exhibit P/12 which was attached to the petition, exhibit S/1 of the summations).

44. Indeed, it turned out that the instructions which were given to the appellant to submit a new application after the passage of two years (according to her understanding from the date of the denial), as a result of which two of her children remained without status, had no justification.

45. To say today, that the new policy will not apply to the children, while there is no dispute that they were not yet fourteen years old when the family returned to Israel and despite respondent's agreement, that generally, parents should be allowed to submit an application upon their return and that the child's age will be his age on the application submission date – is a cruel and offensive

decision, and is at least disproportionate, as we have seen that the objective of the examination of a center of life may be achieved in a manner which will injure the children to a lesser extent, and in view of the outrageously clear fact that no security purpose exists.

G. Conclusion

> **The consideration of the child's best interest is the superior consideration, the decisive consideration. Indeed, along this consideration, additional considerations will be taken into account… but they will all be secondary considerations, and will all bow down to the consideration of the child's best interest. (**FH 7015/94 **Attorney General v. A.,** IsrSC 50(1) 48, 119).

46. Respondent's policy concerning the registration of children, which required a waiting period of two years in Israel before the submission of the application, was established, without any **basis** therefore in the Temporary Order Law, and caused unconstitutional and unlawful injury to many children and families. Consequently, young children who were twelve and thirteen years old when their parents relocated to Israel, were left without status, without substantial fundamental rights, in an endless probationary process and children who returned to Israel with their parents and siblings when they were sixteen years old were torn from their families.

47. Respondent's notice dated September 9, 2013 in which the change of policy was declared, does not point at any real reason for respondent's previous policy, which was amended following the court's comments, other than the expression "there was no flaw". No reason was given which could justify the failure to cancel the policy with respect to children who were unlawfully injured by it. A reason which explains the distinction between a child who submitted his application in 2012 before the policy was changed, who will not receive status, but will remain under a perpetual probationary process, and a child who submitted his application in 2014 after the policy was changed and who will receive status. The respondent does not refer at all to the fate of children who were between at the ages of sixteen to eighteen when the family relocated to Israel, who are currently torn from their families contrary to the law and respondent's notice to the court in **Gal-On**. The respondent mentions a temporary status only rather than a permanent status, as was given to children up to the age of fourteen after a probationary process of two years.

48. The blessed change in respondent's position from now on is not sufficient. Young children should not be left alone, and the principle according to which a child should be given the same status as his parents should not be deviated from, only because the children were not fortunate enough, and their parents submitted an application for the arrangement of their status earlier, when an unreasonable policy was applied. Children, to whom the Temporary Order Law was applied, contrary to its language, as a result of the structure created by the respondent. The children's best interest is not a technical or procedural matter but rather substantial one. The above is much more outrageous, in view of the fact that throughout the years and until recently, the same procedural basis which is referred to by the respondent, was not published and made available to the public, in the absence of criteria and application procedures and in view of the frequent and extreme changes of policy which took place until the policy has stabilized upon the publication of the procedures.

49. As if the injury caused by the Temporary Order Law for over a decade (and which will continue to be caused in the future) is not enough, the respondent extended it beyond the limits of the Law, and applied it to persons whose right to receive status or residency permit in Israel was not restricted by the legislator. Persons, to whom the Law does not apply, should not be injured sweepingly and continuously, without a specific examination. The respondent must handle applications for the

grant of residency status to children in a fair, expeditious, simple and efficient manner, without incriminating children of unlawful residency, according to properly published procedures and according to reasonable criteria which take into consideration the child's best interest and reconcile with the Law.

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Advocate Adi Lustigman
Counsel to the appellants

Today: February 24, 2014