At the Supreme Court **HCJ 5030/07**
Sitting as the High Court of Justice

In the matter of:

HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Saltzberger – R.A.
Represented by Adv. Yotam Ben-Hillel (Lic. No. 35418) and/or Yossi Wolfson (Lic. No. 26174) and/or Hava Matras-Irron (Lic. No. 35174) and/or Sigi Ben-Ari (Lic. No. 37566) and/or Anat Kidron (Lic. No. 37665) and/or Abeer Jubran (Lic. No. 44346) and/or Ido Blum (Lic. No. 44538)

of HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Saltzberger
4 Abu Obeidah St., Jerusalem 97200
Tel: 02-6283555; fax: 02-6276317

The Petitioner

- Versus -

1. **The Minister of the Interior**
2. **The Commander of the IDF Forces in the West Bank**
3. **The Brigadier General of the Southern Command**

Represented by the office of State Attorney
29 Salah al-Din St., Jerusalem
Tel: 02-6466590; fax: 02-6467011

The Respondents

A Petition for *Order Nisi*

A petition is hereby filed for an *Order Nisi* directed to the Respondents and ordering them to give reasons for:

A. Why the Citizenship and Entry into Israel Law (Temporary Provision) 5763-2003 (hereinafter: the "**Law**" or the "**Temporary Provision**") will not be rescinded insofar as it applies to minor children of permanent residents of Israel due to its being unconstitutional;

B. Why the Law will not be rescinded, due to its contradicting HCJ 7052/03 **Adalah et al. v. The Minister of the Interior et al.** (hereinafter: the "**Adalah Judgment**");

C. Why the Law will not be rescinded due to its being a legislative proceeding fraught with material defects, including the proceeding being contrary to the Registration of Information on the Influence of Legislation on the Child's Rights Law, 5762-2002;

D. Alternatively: Why it shall not be ruled that the Law is not applicable to a case of putting in order the status of children of residents of Israel, and in this context, it shall be ruled that any child, one of whose parents is a permanent resident of Israel, and who permanently resides in Israel with such parent, is entitled to the status of permanent residency in Israel.

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A minor is an individual, he is a human, he is a person – even if he is a small person in his dimensions. And a person, even a small person, is entitled to all of the rights of a big person.

(Justice M. Cheshin in C.A. 6106/92 **Jane Doe v. The Attorney General**, Takdin-Supreme Court 94(2), 1166, page 1168).

Introduction

1. The concern of this Petition is obvious: The rescindment of the Law, which this Honorable Court ruled, is unconstitutional. This Petition also concerns Respondents' futile attempt to "adjust" the language of the amended Law to the court's case law. This attempt was destined for failure due to its leaving, as was the wrongful central idea of the Law: Rejection of applications for the granting of status in Israel on a collective basis, with demographic-racial motives. This arrangement, the Honorable Court ruled in HCJ **Adalah**, disproportionately prejudices the right to family life and the rights of the Arabs in Israel to equality.

2. Other public petitions are pending before the Honorable Court against the constitutionality of the Law: HCJ 830/07 **Tabila et al. v. The Minister of the Interior et al.**, HCJ 544/07 **The Association for Civil Rights in Israel v. The Minister of the Interior et al.** and HCJ 466/07 **Galon v. The Minister of the Interior**. The Petitioner agrees with the claims in such petitioners and feels no need to reiterate the same here, other than insofar as is required for the sake of **the unique aspect of the present Petition: The grave repercussions of the Law on the lives of children from one of the weakest groups in Israel's population: Children of East Jerusalem**.

3. This Petition focuses on the applicability of the Law to the children of the permanent residents in Israel. In the framework of the Law, the Respondents tied their own hands such that they will not be able to exercise discretion in applications for the granting of status in Israel to children of certain ages who are defined thereby as "Residents of the Area". Such policy, which has continued already for more than five years (in a cynical contradiction to the legislation of the Law as a "Temporary Provision"), derives, even when applied to children, from extraneous – demographic, racial and economic motives. These motives may be inferred from the discussions which preceded the legislation of the Law, including the amendments thereto, and the Respondents' futile attempt to justify – also the application thereof to children – with security arguments.

4. Children are therefore at the center of the Petition. Children who reside with their parents who are residents within the boundaries of Israel who the Law, in spite thereof, leaves without status. Children who, as a result thereof, may be cut off from their parents and from their other siblings, who the Law allows status to be given in Israel. Children whose only crime was to be born at the wrong time in the wrong place, or who were registered in the wrong register, such that the Respondents are now "forced" to apply the Law to them.

5. Against the background of the Petition stands the hard reality in East Jerusalem – the place of residence of many such children. A reality in which residents of the State of Israel are compartmentalized from basic rights in the fields of education, welfare, infrastructures etc. A reality in which children are born and grow up straight into cycles of poverty and crime. A reality in which over 50% of the children handled by the welfare authorities are defined as **at-risk children**.

6. The Petitioner shall assert that the Law should be rescinded, at least insofar as it applies to children. The Law violates human rights protected by Basic Law: Human Dignity and Liberty, as this Honorable Court ruled in HCJ **Adalah**. The violation is for a wrongful purpose and is not commensurate with the values of the state as a democratic state. Alternatively, the Petitioner shall claim that the violation is over and above what is necessary. In addition, the Petitioner shall assert that the Law should be rescinded insofar as it applies to children due to the faulty proceedings for the adoption thereof which were, *inter alia*, blatantly contrary to the Registration of Information on the Influence of Legislation on the Child's Rights Law, 5762-2002.

The Provisions of the Law

General

7. The essence of the Law is the cancellation of the discretion available to the Minister of the Interior to grant status in Israel pursuant to the Citizenship and Entry into Israel Law. At the center of the Law are the intention – and the result – of preventing family reunion between Arabs from Israel and persons in the Occupied Territories.

8. Insofar as these are children of Israeli citizens, the Law harms them by destroying the family unit in which they grow up. The civil status of the children themselves is prejudiced: Due to their being children of a citizen they are citizens from birth, irrespective of their place of birth or their place of residence or of either of their parents. In the framework of the present Petition, we will not address the influence of the Law on these children.

9. The status of children, one of whose parents is a permanent resident of Israel but is not a citizen, is different – and for the present case: Residents of East Jerusalem.

10. Residents of East Jerusalem received their status as nationals of Israel following the annexation of the east of the city to Israel in 1967. They are the original residents of the Old City, its surrounding neighborhoods and the villages and refugee camps which were annexed to the municipal region. Despite the fact that it is determined that their status is granted to them pursuant to the Entry into Israel Law, it should be stated: It is Israel that entered their neighborhoods; it is not they who crossed the borders of Israel to settle therein. It is important to recall this information when the Respondents are attempting to relate to the Law from the perspective of immigration laws.

It should further be recalled that the deep societal link of the residents of East Jerusalem to the other residents of the Territories that were occupied in 1967. Jerusalem was the important municipal center for many generations of the West Bank, also after 1948. The annexation to Israel in 1967 also did not change the formation of links between the urban center in Jerusalem and the residents of the city and of the other territories and populations. From the point of view of the humanitarian international law, this is a protected population (see Section 47 of the Geneva Convention). These facts are significant from the point of view of the multitude of couples in which one of the spouses is a resident of East Jerusalem and the other is a resident of the Territories – and in any event from the point of view of the discriminatory result of the Law and the broad damage thereof to the children of East Jerusalem.

11. Whilst the status of children of citizens is conferred on them from birth pursuant to the Citizenship Law, the status of the children of East Jerusalem is regulated in two ways, the relationship between which has not yet been finally decided in the case law:

a. **Regulation 12 of the Entry into Israel Regulations** confers upon the children of residents the status of their parents. If the status of the parents is not the same, the regulation determines that the status of the father or the guardian shall be given. In the event that the other parent objects thereto, the Minister of the Interior constitutes a quasi-"arbitrator" and he rules whether the child shall be given the status of the father of the status of the mother. It is accepted, and also established in the case law, that the determination of the Minister of the Interior is made in accordance with the life center of the guardian parent.

According to the language thereof, Regulation 12 only applies to children who were born in Israel and not to children who were born elsewhere (including in the Territories) although in the case law (as we shall demonstrate) the possibility has been raised of interpreting the regulation more broadly.

The majority opinion in HCJ **Adalah** ruled, stated by Deputy Chief Justice (his former title) M. Cheshin, that the Law does not prejudice proceedings pursuant to Regulation 12 and does not prevent the Minister of the Interior from determining that the status of a child of a resident of Israel, who was born in Israel, will be status of permanent residency in Israel. However, as we shall demonstrate, the Ministry of the Interior also applies the Law to children to whom Regulation 12 directly applies. The Minister of the Interior deems himself as being obliged, according to his statements, not to determine that a child who was born is Israel is a permanent resident of the state if such child was registered in the Palestinian residents' registry.

b. Regulation 12 does not apply, according to the language thereof, to children who were born to a resident outside of Israel (despite the fact

that in the case law the possibility has been raised to broaden the regulation by way of interpretation).

According to the standard practice of the Respondent, the status of children who are born outside of Israel is regulated according to the general authority of the Minister of the Interior to grant status in Israel pursuant to the Entry into Israel. However, the case law has ruled (and such ruling was implemented as a principle by the Respondent) that the principle which is directed to the discretion of the Minister is the life center of the guardian parent. In other words: If the guardian parent actually lives in Israel, the child is entitled to status in Israel.

The result of the Law is that the Ministry of the Interior deems itself as being barred from implementing the principle of equality of the status between the guardian parent and his child.

12. Alongside the provision which precludes the discretion of the Minister of the Interior, additional provisions were determined in the Law pertaining directly to children. It is thus determined that children over the age of 14 will be able, under certain circumstances, to receive entry permits to Israel, which will allow them to live and roam therein – although they will not be given status which grants them social and health rights. This provision has particularly severe repercussions with respect to the population of East Jerusalem, which is one of the poorest and weakened in Israel.

This provision also "pulls the rug" from under the security claims which justify of the Law. As a General Security Services representative of also admitted in discussions on the Law at the internal affairs committee of the Knesset, this is a provision which has no security basis. These are merely demographic and financial considerations.

Below we will expand on the provisions of the Law, as being today (after amendment no. 2 of the Law), which have an influence on the status of the children of residents of East Jerusalem.

Definition of "Resident of the Area" – Registration in the Area Constitutes Absolute Evidence

13. In Section 1 of the Law, the definitions section, it is determined:

> "Resident of the Area" – a person who is registered in the population registry of the area, and any person residing in the area, even if he is not registered in the population registry of the area, and excluding a resident of an Israeli settlement in the area.

14. This section, after the amendment thereof in 2005, broadened the applicability of the definition of "Resident of the Area", such that it includes not only residents of the Territories who actually reside therein, but also any person who is registered in the population registry in the Territories, even if he has never resided therein. According to this broadened definition, the

population registry ceases to constitute *prima facie* evidence of the veracity of the details recorded therein, and is rendered conclusive evidence, which cannot be objected to under any circumstances.

15. Such a legal definition is unprecedented and contradicts the extensive legislative net in Israeli law, and particularly the Population Registry Law, 5725-1965. The clear purpose of the Population Registry Law is to regulate the matter of registration in the registry such that it will properly reflect the situation of the population registered therein. Registration attests to a *prima facie* situation which is real, at least in proximity to the date on which it was performed. Insofar as it subsequently transpires that the situation changed or that the registration is erroneous, it may be amended, in order to achieve the result for which the registration was made from the outset – a true reflection of the situation. Registration is thus as a rule and has been thus since time immemorial with respect to the Israeli and Palestinian population registry in the context of the granting of status to children.

16. Defining a resident of the area according to the Palestinian population registry, registration in which constituting absolute evidence, is a distortion of the Israeli law for a wrongful purpose – applying the Law to as large a number of children as possible. The Respondents refuse to examine the claim of the resident parent, whereby his child is not actually a Palestinian resident, claiming that what is written cannot be refuted, from the point of view that the registration is supreme, despite the Respondents' knowledge that in many cases children were registered in the Territories, despite that the life center of the family was in will always be in Israel.

17. Parenthetically it should be stated that there are various reasons for registering a child of an Israeli resident in the population registry in the Territories, despite the fact that the child is not a resident of the Territories. Thus, for example, a permanent resident of Israel who resides overseas for a certain period of time for work or study purposes is not permitted, during such period, and at least two years thereafter, to register his children in Israel since acquisition of the status is contingent upon proof of a life center in Israel of at least two years. In such cases, the families are forced to put the status of their children in order in the Territories since, in the absence of status, it is not possible to obtain travel documents for them, and in order not to leave them without status. Young couples also face a similar problem when, after their marriage, they resided in the Territories until their home is built in Jerusalem or a residential unit of one the siblings is vacated. During the period in which the couple resides in the Territories, the parents prefer to register their children there – for similar reasons.

In addition, there are many cases in which women and children return to live in Jerusalem, in the bosom of their family, after divorcing the spouse or after his death. During the period in which such women resided in the Territories, the children were registered there, sometimes also by the husband – in order to attempt to thwart the wife's return, with her children, to Israel.

A further obstacle in the path of registration of the children of residents in Israel is the Respondents' policy and the problematic nature of the work of

the Population Administration Office in East Jerusalem. Over the years, the policy for the registration of children has changed frequently, and has never been published. Concurrently with this policy there prevails, at the office in East Jerusalem, over the years, a serious problem of accessibility – people are forced to stand in line for over a week or buy their turn. Once they have already succeeded in entering the gates of the office, they are asked to fill in forms in Hebrew, for affidavits which require payment to an attorney, documents and statements of account from many years ago. Also, when they succeed in meeting the conditions, after having succeeded in reaching the office again in order to submit the application, they are met with additional, different and expensive requirements. Many residents who succeed in meeting the burdensome requirements receive no response from the office in East Jerusalem for a long time. Left with no other choice, the foreign parent registers the child in the Palestinian population registry, in order not to leave him without status in the world and to allow his registration at education institutions. It should be stated that in the absence of an identifying number, it is very difficult to register a child at kindergarten or school or to receive for him other essential services.

18. In conclusion, this situation, of an office which functions in a problematic manner, an absence of clear procedures and a need for payment of a lot of money in order to submit an application; and which are added to the circumstances of a destitute, poor population which, in most cases, is burdened with many children, creates great desperation among the applicants, the majority of whom are forced to postpone the registration in Israel and, in the meantime, to put in order the status of their children in the Territories.

19. The broadening of the definition of a "Resident of the Territories" in the amended Law is intended to overcome the obstacle that the case law placed before the Respondent's efforts to minimize the cases in which status shall be granted in Israel to the children of residents of East Jerusalem. In a series of judgments issued by the Court for Administrative Matters, it was ruled that the definition of a "Resident of the Territories" in the Law pertains to the situation of actual residency and not to registration. Accordingly, the Ministry of the Interior was required check individually applications for the status of children who it was asserted were actually residents of East Jerusalem but were registered in the Territories.

20. In the judgment in AP 822/02 **Gosha et al. v. Director of the Regional Population Administration Office**, which was issued in the context of the Respondents' interpretation of the present Law, prior to amendment, Justice Y. Adiel ruled:

> "It may be understood that the definition (the definition of a "Resident of the Area" in the Temporary Provision of 2003 – Y.B.) certainly includes a person who is registered in the population registry in the area. **However, this provision does not determine what the law is with respect to a person who is registered in the population registry in the area but in practice**

> **does not reside in the area. It also does not determine that registration creates an irrefutable presumption regarding the residency and life center of a person who is registered in the population registry in the area**.
>
> […]
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> **Pursuant to the Israeli Population Registry Law (Section 3 of the law) too, registration constitutes *prima facie* evidence, and not absolute evidence, of the veracity of the details recorded therein**. (The emphases have been added – Y.B.)

21. The rationale of the Gosha judgment was accepted also in other proceedings which came before the judges of the Court for Administrative Matters. After the state decided to ignore repeated judgments on the matter, and to act contrary thereto, the Court for Administrative Matters was forced to rule on the matter again and again. In AP 379/04 **Mansur v. the Ministry of the Interior** (dated June 3, 2005), Justice Y. Noam ruled:

> Counsel for the Respondent… further claimed that according to the Respondent, the judgment of the Honorable Justice Adiel in AP (Jerusalem) 822/02 in the Gosha case is an "erroneous judgment", and therefore it is not guided thereby… the Respondent's said attitude has been rejected, as aforesaid, time after time, in the case law of the Court for Administrative Matters: In the judgment of the Honorable Justice Adiel in AP (Jerusalem) 822 in the **Gosha** case…; in the judgment of the Honorable Deputy Chief Justice M. Arad in AP (Jerusalem) 577/04 in the **Alcord** case…; in the judgment that was issued by myself in AP 387/04 in the **Awisat** case; and in the judgment that was recently issued on May 24, 2005 by the Honorable Justice Y. Zur in AP 1277/04 **Zacharia et al. v. the Minister of the Interior**, in which criticism was extended across the Respondent's ignoring the repeated case law of this court.
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> […]
>
> I agree with the said conclusion of the Honorable Justice Adiel and the totality of the arguments thereof and I can only join his opinion. **The definition of a "Resident of the Area" in the Temporary Provision Law, in the foregoing manner of plurality, is directed to the link of residency to area, regardless of whether the person is registered in the area's registry**. The generally accepted test for the definition of residency is the majority of links test. However, the

> meaning of the term "resident" may change from one law to another according to the purpose of the legislation. The purpose of the Temporary Provision Law was intended to freeze, for security reasons, for such time, the issuance of licenses for permanent stay in Israel to Palestinians who are not residents of Israel, also if they have been staying within the state for some time or are even in a classified process of family reunion. … "registration in the population registry in the area, despite constituting a substantial indication of residency and life center, cannot serve as the only test, and the applicant must have additional links, either in the present or the past, which tie him to the area" (judgment of the Honorable Justice Adiel in AP (Jerusalem) 430/04 **Aljabar v. The Minister of the Interior** (not published), paragraphs 16 and 22 of the judgment). (Emphasis added – Y.B.).

22. All of the judgments mentioned above concern the putting in order of the status of children. The state probably decided to "handle" the "erroneous" judgments, according thereto, through legislation. It should be stated that at a late stage, and after reprimands from the Court for Administrative Matters, which included the matter being referred to the Attorney General, the Respondents filed appeals from the case law. However, instead of waiting for the decision of this Honorable Court of the appeals, which are still pending, the Respondents decided to amend the Temporary Provision in a manner which is compatible with the appropriate situation, in their opinion.

23. It should be emphasized: The Ministry of the Interior deems the Law as also obstructing proceedings pursuant to Regulation 12 of the Entry into Israel Regulations, when a child, who was born in Israel and whose life center is in Israel, was registered, for one reason or another, in the Territories.

The Rule – Prohibition of the Granting of Status and the Exception Concerning Children

24. Section 2 of the Law determines:

> "During the period in which this law shall be effective, despite the provisions of any law, including Section 7 of the Citizenship Law, the Minister of the Interior shall not grant a resident of the area or a citizen or resident of a country stipulated in the schedule citizenship pursuant to the Citizenship Law, nor grant him a license to reside in Israel pursuant to the Entry into Israel Law, and the Area Commander shall not grant a resident of the area a permit to stay in Israel pursuant to the security legislation in the area. "

This section is the essence of the Law – it cancels the authority of the Minister of the Interior by virtue of the Entry into Israel Law and the

Citizenship Law to exercise discretion with respect to the provision of residency licenses in Israel to residents of the West Bank and Gaza, and the authority of the Military Commander in these areas to exercise discretion with respect to the provision of permits to stay in Israel. The section cancels, in practice, the procedure of family reunion of citizens and residents with their spouses who are residents of the Territories.

25. Section 3A of the Law concerns the issue of children:

> The provisions of Section 2 notwithstanding, the Minister of the Interior may, at his discretion:
>
> (1) Grant a minor resident of the area aged up to 14 years a license to reside in Israel in order to prevent his separation from his guardian parent who is staying in Israel legally;
>
> (2) Approve an application for the provision of a permit to stay in Israel by the Area Commander to a minor resident of the area aged over 14 in order to prevent his separation from his guardian parent who is staying in Israel legally, provided that such permit shall not be extended if the minor does not reside in Israel on a permanent basis.

26. Section 3A therefore makes a distinction between children of different ages and creates two statuses that are different from one another:

A. **Children aged up to 14**: Children to whom the Minister of the Interior may grant **status in Israel**.

B. **Children aged over 14**: Children to whom the Minister of the Interior is not entitled to grant status in Israel and, at most, will be granted a **permit to stay in Israel**.

27. The substance of the permit issued to children aged over 14 (hereinafter: "the **DCO Permit**") (compared to the status of permanent residency or temporary residency):

> This is a permit on behalf of the army, which is equivalent to a visa which is granted to tourists and is, as a rule, issued for a period of six months each time. The disadvantages of this permit are:
>
> a. As distinguished from the status of permanent residency, or even temporary residency, a DCO Permit does not confer any social rights. Thus, for example, the children of an Israeli resident will not be entitled to receive child benefits or disability benefits, if, heaven forbid, they should so require. In addition, such children will not be entitled to state health insurance. Should they fall sick and require a medical diagnosis, treatment, or hospitalization, despite their being the children of an Israeli resident, who reside in Israel with their mother, these children will not be entitled to the support of the State of Israel, unlike the children of the other residents of the state. As specified

below, the absence of entitlement to state health insurance is particularly grave and significant in the case of the children of East Jerusalem, who are already growing up into a reality of an absence of proper infrastructures, poverty and suffering.

b. The Ministry of the Interior refers the persons entitled to such permits to the District Coordination Liaison Offices in the Territories, through a form called "Referral to DCO". Such referral is issued for a period of one year and may be extended for a similar period each time. A person seeking to extend the "Referral to DCO" in his possession is obligated to approach the Population Administration Office two months prior to the expiration of the previous referral, with the aim that the new referral will be ready for him on the date that he shall be invited to the office – in very close proximity to the date on which the present referral is about to expire. This matter was regulated only following a petition filed by Hamoked (AP 612/04 **Dahoud et al. v. The Minister of the Interior et al.**). The procedure that was issued following the petition may be seen on Hamoked's website, at the link:

   http://www.hamoked.org.il/items/6791_eng.pdf

   However, despite his undertaking before the court, the Respondent does not meet this procedure in many cases, such that the persons entitled to receive permits are unable to obtain, in good time, the referrals which are a condition to receipt of the permits themselves. As a result, many of them, including children, remain without valid permits, sometimes for periods of long months.

c. These are not the only problems of the persons entitled to the DCO Permits. As aforesaid, the referrals are issued for periods of one year, although the permits themselves are given, as a rule, for periods of six months at most. In other words, at least twice a year, children, who are entitled to permits, are required to leave their home in Jerusalem for the District Coordination Liaison Offices in the Territories. In many cases, when such children arrive at the DCO, equipped with a referral on behalf of the Respondent, it transpires that the permit for them has not yet been prepared. Sometimes it transpires that the DCO is closed on that day. Sometimes for longer periods of time in which the DCOs do not work, due to a strike for example. In other words, this is a further obstacle in the path of children to obtain a permit that will allow free movement at one level or another. In this instance too, many children staying without valid permits is a common result.

d. Ultimately, needless to say that children who have DCO Permits only, similarly to any person who is deemed as "residents of the Territories", are unable to pass any roadblock in Jerusalem and its surrounding areas. Their passage is restricted to a very limited number of roadblocks (called "passages"). This fact restricts, and in many cases makes more expensive, the possibility of movement of all of the family members who are forced to move together with their sisters/ brothers/ children in the same passage.

28. In conclusion: The manner in which the Law regulates the issue of children aged over 14 discriminates against such children with respect to other children of their age, children of other Israelis. In addition, such children are discriminated against also with respect to the children of residents in a similar position, whose age is lower than 14. This discrimination is, primarily, in the receipt of basic social rights as well as discrimination in freedom of movement, which is created as a result of the problematic permits regime described above. This matter shall be further specified below.

29. It should be stated that it is not known what will happen the children who receive DCO Permits when they each the age of 18. Will the validity of the permit be extended? If so, until when? Will these children be torn from their parents and be expelled from Israel?

What will happen, for example, to a young woman who until now received DCO Permits, who reaches the age of 18 and now wishes to marry her fiancé, a resident of Jerusalem? If she shall live with her spouse, she will be unable to continue to receive the stay permit, since here there is no issue of separation of a child from his parent who is staying in Israel legally. On the other hand, pursuant to the provisions of the Law, her spouse will be unable to submit an application for family reunion with her, due to her being too young (under the age of 25). Will this woman be forced to stay in Israel illegally? Will she be forced to leave Israel with her spouse, risking the residency status of the spouse?

Application of the Draconic Security Prevention Section to the Children's Cases

30. An additional legal provision which applies to the children of residents aged 14-18 is Section 3(d) of the law, which determines as follows:

> Neither a permit to stay in Israel nor a license to reside in Israel shall be granted to a resident of the Area pursuant to Sections 3, 3A1, 3A(2) and (3) and 4(2), nor will a license to reside in Israel be granted to any other applicant who is not a resident of the Area, if the Minister of the Interior or the Area Commander, as the case may be, shall have determined, in accordance with an opinion from the competent security personnel, that the resident of the Area or the other applicant or a member of their family may constitute a security risk to the State of Israel; in this section, a "Family Member" – spouse, parent, child, brother and sister and their spouses.
>
> For this purpose, the Minister of the Interior may determine that the resident of the Area or the other applicant may constitute a security risk to the State of Israel, *inter alia*, based on an opinion from the competent security personnel, and whereby, in the country of residence or the area of residence of the resident of the Area or the other applicant, activity is

> performed which may jeopardize the security of the State of Israel or its citizens.

This section includes two grave provisions which are applied, *inter alia*, to the children of residents aged 14-18.

31. At the beginning of the section it is determined that a permit to stay in Israel will not be granted, *inter alia*, also if it shall have been determined, in accordance with an opinion of the competent security personnel, that a resident of the Area or a member of his family may constitute a security risk. **A "Family Member", for the purpose of this section, is a spouse, parent, child, brother and sister and their spouse. For example, in the case of a children aged 14, the son of an Israeli resident, an opinion of the security personnel, whereby the child's brother-in-law may constitute a security risk, is sufficient to separate the child from his mother and to expel the child to the Territories, even if the child shall never have met the his brother-in-law and in any event has no contact with him**.

32. It should be stated that, according to the section, no security suspicion is required against the child himself in order to separate between him and his mother or father. Also with respect to a family member of the child, who does not need to be a close family member, there is no need to establish a security suspicion. According to the section, no conviction is required with respect to a security offence and it is not necessary for the suspect to be wanted, arrested or even under investigation. An opinion of the security personnel, whereby such distant family member may constitute a security risk, is sufficient in order to separate between parents and their minor children.

33. At the end of the section, the legislator outdid himself, in the framework of amendment no. 2 of the Law, and determined that the Minister of the Interior may determine that a resident of the Territories or any other status-applicant, constitutes security risk merely based on the determination that **in his area of residence or country of residence, activity is performed which may endanger the State of Israel or its citizens**. This is a particularly draconic addition which may cause difficult and absurd results, also with respect to the children of residents. In a case in which the 15-year-old son of an Israeli resident, who resides with her in Israel, is registered by his father, a resident of Bethlehem, in the population register of the Territories. Pursuant to the Law, the said child is deemed as s "resident of the Area". Accordingly, any activity which is performed in the **city** of Bethlehem which serves to jeopardize the state's security may deny such child even a permit to stay in Israel. It is also possible that activity of this type, which is performed in the **district** of Bethlehem, will bring about the same result. Thus also, according to the language of the section, any activity in the West **Bank territories in general** may also, according to the Minister's decision, cause the separation between a minor child and his parents.

The "Humanitarian Section" that was added to the Law

34. In amendment no. 2, Section 3A1 was added to the Law which enables the Minister of the Interior to approve temporary status in Israel on special humanitarian grounds, according to the recommendation of a professional committee which he appointed for such purpose.

35. It appears that by legislating this section, the legislator sought to cure the many defects in the Law, which were pointed out by the judges in the **Adalah** case (see below). It should already be stated now that **the majority of the judges in the judgment believed that the Law is unconstitutional, although not because a humanitarian exception is absent therefrom, but rather because the main arrangement therein is of rejection of applications on a collective basis, and without individual inspection. Graver still, the "humanitarian exception" that was added is limited from every aspect, to the point that it loses any substantial content**. Thus, for example, the maximum status that may be received according to the "humanitarian exception" is temporary. In addition, there is solution in this section for unique cases. The exception is not applicable unless a "family member" of the applicant is staying in Israel legally, and a "family member" is defined only as the applicant's spouse, parent or child. A humanitarian exception is primarily intended for non-routine cases, for unique circumstances, which are not recognized by this narrow definition. A further serious problem is the possibility of the Minister of the Interior of subjecting the humanitarian exceptions to a quota. The mere arbitrary determination of quotas is inconceivable, and stands in absolute contradiction with the idea of a "humanitarian exception".

36. It should be stated that the children of permanent residents are unable to find a remedy in this section in accordance with Subsection e(1) which determines that:

> The fact that the family member of the person applying for the permit or license, who is staying in Israel legally, is his spouse or that the couple has joint children, will not in itself constitute special humanitarian grounds.

37. Therefore, to the list of defects of the "humanitarian exception" section, is added the determination that it will not be possible to assist the children of permanent residents in the absence of an additional humanitarian reason in their case. In other words, **the child's mere residence in Israel, together with his resident parent, does not constitute sufficient humanitarian grounds for granting him status**.

Summary: The Legal Provisions Pertaining to the Children's Cases

38. According to the Respondents, the amendments made to the Law in 2005 and 2007 were intended to facilitate and render the law proportionate. Colorably, various facilitations were added to the Law, also with respect to children. However, concurrently with the Respondents' consenting to grant to children

of residents aged between 14 and 18 a permit to stay in Israel and raising the age at which status may be granted to a child from 12 (in the Law prior to the amendment) to 14, the Respondents broadened the definition of the term "resident of the Area" such that also children who were born in Israel and live therein, and to whom the Law did not apply in its previous form, will be subject to the Law.

39. In addition, pursuant to Section 3D of the Law, if the security person shall present an opinion whereby a family member, such as the brother-in-law of the child, may constitute a security risk, a child aged between 14 and 18 will be denied the possibility of receiving even a permit to stay in Israel and will face expulsion.

40. Children aged over 14 are not entitled, pursuant to the Law, to status and hence they are not entitled to any social rights or to health insurance, even if it is found that they are residing with their mother, an Israeli resident, or with their resident father, in Jerusalem, possibly even for all of their life. In addition, the Law provides no solution to the issue of the status of such children when they reach the age of 18: Will they be separated from their family and expelled to the Territories, even if they do not know a living soul there?

41. The humanitarian exception is also indecisive on the issue of children. We will demonstrate below that this was done, contrary to the position of the HCJ in the **Adalah** judgment, in a hasty and defective legislation proceeding.

42. Until this point was the theoretical background. We will now move on to examine the impact that the Law has on the day-to-day lives of the children of East Jerusalem and their families. We will begin with a general background with respect to the living conditions prevailing in East Jerusalem, and continue with the stories of several families harmed as a result of the Law.

The Living Conditions in East Jerusalem[1]

43. It is no secret that East Jerusalem is one of the poorest and most neglected places in Israel. For long years, the state's authorities have refrained from investing in and developing the east of the city. As a result, the population suffers from poverty and deprivation, from grave defects in the supply of public services, from infrastructures in poor condition and from difficult living conditions.

[1] The figures in this chapter are taken from the following sources: Memo from Ms. Rania Harish Masalha, director of the Welfare Office in East Jerusalem dated April 22, 2007; letter from Adv. Tali Nir of the Association for Civil Rights in Israel to the Director General of the Prime Minister's Office, dated February 11, 2007; background document of the Coalition for Implementation of the Free Compulsory Education Law for Preschool Children in East Jerusalem, of December 2006 (the sources on which it is based are specified in the document); Yuval Wargen, "Education in East Jerusalem", a report of the Knesset's Research Department, October 2006. The documents are attached hereto and marked **p/1**, **p/2**, **p/3** and **p/4** respectively.

44. This is a not a decree of fate. This neglect is only one of the facets of the overt policy of the Israeli government for generations, which is mainly obtaining a Jewish majority in Jerusalem and pushing the city's Palestinian residents out. In order to achieve this goal, Israel, over the years, has adopted a policy of denying the civil rights of the residents of the East Jerusalem (for example, denying residents of the city residency status and imposing many restrictions on family reunion proceedings and registration of children) and a policy of deliberate discrimination in various areas. Thus, the residents of the east of the city are discriminated against with respect to the planning and building policy, land expropriation policy, investments in physical infrastructures and in governmental and municipal services provided to them. Set forth below are several figures which demonstrate the gravity of the situation.

45. **The poverty rate in East Jerusalem** is two and a half times higher than the poverty rate in the other parts of Jerusalem: According to the figures of the Central Bureau of Statistics from 2003, **64% of the Palestinian Arab families in Jerusalem live below the poverty line**, versus 24% of the Jewish families in Jerusalem. The incidence of poverty among the Arab population in Jerusalem is also considerably higher than the incidence of poverty among the Arab population in Israel, in which the poverty index stands 48% of the families.

46. **The living conditions in East Jerusalem are crowded and difficult**. Thus, for example, in 2003 the residential crowding in the Arab neighborhoods was almost double that in the Jewish neighborhoods: 1.8 persons per room versus 1.0 persons per room among the Jewish population.

47. **The field of welfare**. The discrimination in this field is expressed, *inter alia*, in the official manpower positions allocated for handling the residents of the east of the city. Although this is one third of the population of Jerusalem, only 15% of all of the official positions are allocated to handle such residents. In addition, the number of offices in the east of the city is half the number of officers in other areas (3 versus 6). This makes a good spread of the welfare services difficult and reduces the accessibility thereto, such that many of the persons requiring such services do not receive the same. As a result, the workload placed on the social workers is impossible. Today, each social worker in East Jerusalem handles approximately 360 households, whilst the social workers in the west of the city handle approximately 165 households on average.

48. **A further example – the field of education**. The Compulsory Education Law, 5709-1949, applies to any child of compulsory education age who resides in Israel, irrespective of his status in the population registry and at the Ministry of the Interior[2]. In other words, the law does not distinguish between children with the status of citizens and children with the status of permanent resident or another status, and determines that free compulsory education applies to any child or adolescent aged 5-16 who resides in Israel.

[2] The Ministry of the Interior, Circular of the Director General 5760/10 (a): Application of the compulsory education law to children of foreign workers, June 1, 2000.

However, and despite the HCJ's case law which ruled that children of compulsory education age in East Jerusalem are to be allowed to be registered for regular learning, as stated in the Compulsory Education Law[3], the right to education of thousands of Palestinian children in East Jerusalem is currently only partially implemented and the education system in the east of the city suffers from grave problems which require unique and immediate handling.

49. At the center of the problems existing in this field stands the problem of **the grave shortage of classrooms**. In the academic year 5766 (2006), the shortage of classrooms in East Jerusalem stood at 1,354 and in 2010 the shortage of classrooms is expected to stand at 1,883 classrooms. Despite the HCJ's ruling of 2001[4] which obligated the Ministry of Education and the City of Jerusalem to build, within 4 years, 245 new classrooms, to date approximately only 40 new classrooms have been built. The result is that each year, many children seeking to lean at schools in East Jerusalem are refused **and the dropout rate in post-primary education in East Jerusalem stands at approximately 50% of the students**.

50. **Additional fields**. **The planning and building system also suffers from lasting shortages in budgets**, which has created a huge imparity between the needs of the population and the response provided thereto. There are also **grave defects in the supply of a variety of public services** such as **employment services and postal services**. **Many infrastructures in East Jerusalem are in bad condition and suffers from many faults**, for example **the water and sewage infrastructures and the road infrastructures**. The east of the city also suffers from **difficult sanitation conditions**.

51. **In conclusion**: The continued neglect and discrimination in budgets and in services on the part of the authorities have caused a situation of deep poverty and constitutional problems in many fields. The repercussions of the situation are also **a series of serious social phenomena**, including: Harm to the family system; a rise in the level of domestic violence; a decline in the functioning of the family's children, which is expressed in a dropout percentage of approximately 50% from the high schools and entry into the employment black market at a young age; turning to delinquency and drugs; health and nutrition problems etc.

Children and Youth

52. But it is natural that the poverty, the collapsing education and welfare systems and the lack of infrastructures will more seriously affect populations that are, from the outset, more vulnerable. Naturally, we will focus on the population of children and youth.

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[3] HCJ 3834/01 M. Muhammed Hamdan and 27 others v. The City of Jerusalem *et al.* and HCJ 5185/01 Fadi Bariah (minor) and 911 others v. the City of Jerusalem *et al.*, partial judgment, issued on August 29, 2001.

[4] *Ibid*, *ibid*.

53. **Indeed, the situation of the children in the poverty figures** is even worse than the general situation in the east of the city: **76% of the children in East Jerusalem live below the poverty line** versus 38% of the Jewish children. Whilst the share of the Palestinian population in the entire population of Jerusalem stands at 33%, its share among the poor is 55% and among the children 57%. This means that **more than 80,300 children of East Jerusalem live in continuing poverty conditions**.

54. Thus, into this reality of neglect, poverty and crime are born the children of the residents of East Jerusalem. To the totality of these problems is added now (and in fact already for many years) the problem of putting the status of such children in order. Regardless of whether they are children of residents who were born outside of Israel but have lived therein with their parents for many years or children who were born in Jerusalem, have lived therein for the majority of their lives, and were only registered in the Territories. The welfare office in the city of Jerusalem is aware of this problem and it also treats the matter as another layer on the **totality of the problems of the residents of East Jerusalem – such as: Economic hardship and difficult housing conditions which were mentioned above**. (On this matter, see the letter of Ms. Rania Harish Masalha, director of the Welfare Office in East Jerusalem, dated April 22, 2007, attached hereto as **p/1**).

55. Indeed, the welfare personnel in East Jerusalem deal with thousands of children and youth who live in hardship and are subject to many risks. From the figures of the welfare department of the City of Jerusalem it transpires that **14,737 at-risk children and adolescents are currently known to the East Jerusalem offices**. In fact, **50% of the children handled in the east of the city are defined as at-risk children, versus 15% of the children from the entire population of Israel**. It should be stated that this figure does not reflect the actual number of at-risk children and adolescents in East Jerusalem since currently, the grave shortage of manpower and welfare infrastructures does not allow an exhaustive mapping of the population.

56. In March 2006, a report of the public committee for inspection of the situation of children and adolescents at risk and in hardship, headed by Prof. Hillel Shamid (hereinafter: the "**Shamid Report**") was submitted to the Prime Minister and the Minister of Welfare. The Israeli government decided upon the establishment of the committee on November 16, 2003. The Shamid Report defines who are children and adolescents who are at risk and in hardship (a definition which is based on approximately 20 sections in the Convention on the Rights of the Child and on accepted definitions in the professional literature and among the policy-makers in Israel):

> Children and adolescents at risk and in hardship – lives in conditions which endanger them in their family and their environment and as a result of such situations, there is harm to their ability to exercise their rights pursuant to the Convention on the Rights of the Child in the following areas:
>
> - **Physical existence, health and development**

- **Belonging to a family**
- **Learning and acquiring skills**
- **Welfare** and emotional health
- Social belonging and participation
- Protection against others and against their own dangerous conduct.

In addition, the Shamid Report states situations which increase risk:

> Such situations include **financial difficulties**, crisis situations in the family (serious illness of one of the parents, the death of a parent, separation), immigration, **belonging to a minority group**, physical handicap, learning disabilities, transition between frameworks, **life in a poor or dangerous environment**). (See the Shamid Report, on page 67). (The emphases have been added – Y.B).

The committee's report may be found at the link:

http://www.zavit3.co.il/DOCS/shmid%20report2006.pdf (in Hebrew)

57. It transpires from the aforesaid that the entire population of children and adolescents which resides in East Jerusalem, even that which is not officially defined by the welfare authorities as "at-risk children and adolescents", lives in a situation in which its possibility of exercising its basic rights is substantially prejudiced, from the point of view of the difficult living conditions and from the point of view of the difficulty of putting in order social rights, including the right to health insurance, and from the point of view of the right to development (see below on this matter) and so forth.

58. In addition, the Shamid Report states that one of the factors which increase risk is belonging to a minority cultural group. The report specified the characteristics concerned with respect to the Arab minority and pointed out the indicators of risk for this group (pages 98 – 100 of the report). As aforesaid, the situation of the residents of East Jerusalem is also more difficult than the situation of the entire Arab population in Israel.

59. In conclusion, we will state that the relation to which the Temporary Provision was applied is a reality which from outset makes proper development of children and youth difficult. When these figures of poverty and discrimination in services and infrastructures are added to the fact that many of the children of East Jerusalem are denied social rights, as a result of the Law, it is certain that the exposure to risk factors among such children increases. When the fact of such children's belonging to the Arab minority group, which is any event discriminated against, is added to their being denied provision of status, this further stimulates the feeling of belonging of the children of the east of the city to their family and society as a whole.

60. We will now examine the individual problems of various families in the city – problems which derive from the Law and the manner in which it is implemented by the Respondents.

Examples of the Law's Severe Violation

61. The arrangement in the Law on the issue of children is a sweeping arrangement whose harm is collective and naturally extensive. HaMoked: Center for the Defence of the Individual handles many of the families harmed. We will bring below examples of various situations which families are in as a result of the Law. We regret that these situations long ago became the daily routine of such families.

The Murar Family

62. Ms. _____Murar is a permanent resident of Israel, aged 39, widow and single mother. After her marriage she moved to reside in Hebron with her spouse, a resident of the city. In 1999, after her spouse's death, Ms. Murar returned to live in her parent's house in Jerusalem. Since then and until today she resides in the city together with her five children. Due to her long stay in Hebron, the Respondent was denied her residency but the same was returned to her following an application of HaMoked: Center for the Defence of the Individual.

63. _____, Ms. Murar's eldest child, was born in 1986 in Jerusalem, but was registered in the population registry in the Territories. Her other children, _____, _____, _____ and _____, were born in the West Bank and registered in the population registry in the Territories. Concurrently with her status being returned, in October 2004 Ms. Murar approached the Respondent requesting to register her children in the Israeli population registry. In view of the formula of the Temporary Provision at that time, the Respondent agreed to register only her two younger children, _____ and _____, in the population registry, with temporary residency status for two years due to their age which, at the time of submission of the application, was less than 12 years.

64. Also after the amendment to the Temporary Provision in August 2005, the Respondent refused to put the status of the older children in order and due thereto, a petition was filed with the Court for Administrative Matters (AP 311/06). Only following the filing of the petition did the Respondent agree to examine the case of the older children. Pursuant to the amendment to the Temporary Provision, and according to the age of the children, _____ and _____ received DCO permits only. With respect to the eldest child _____, the Respondent refuses, to this very day, to put her status in Israel in order claiming that on the date of return of her mother's residency, _____ was over 18 years old, despite that _____ was born in Israel and should have received the status of a resident, like her mother's status.

65. As a result of the provisions of the Law, and the manner in which the Respondent implements the same, the complicated picture of the family appears thus: The mother, Ms. Murar, holds the status of permanent resident.

The children _____ and _____ hold the status of temporary residents. The children _____ and _____ **have been denied status in Israel** and their stay is put in order by temporary permits which do not grant social rights. _____, the eldest daughter, **is also not entitled to a stay permit** and, at least from the point of view of the Respondent, does not exist at all. It should be stated that her case is still pending before the court.

66. The children _____, _____ and _____, who have been denied status in Israel, have nowhere to go. Most of the members of the late father's West Bank family are no longer alive. The only brother who is still alive suffers from serious chronic illnesses and is unable to support his extensive family of 11 persons. For eight years, the children's life center has been Jerusalem. Here they reside with their mother, brothers and sisters, here they study, and here live their friends.

67. Despite that the family, like any family, constitutes "a single human fabric", according to the song, the difference between its members' status is great. Apart from the social rights to which the older siblings are entitled, the difference is also expressed in other trivial situations which improve life. Passage through roadblocks for example. The mother and the younger siblings are able to pass through any roadblock in Jerusalem and its surroundings. The older siblings are restricted only to a very limited number of roadblocks (called "passages") through which "residents of the Territories" are permitted to pass only. This fact restricts, and in many cases also makes more expensive, the possibility of movement of the entire family. A further example – finding work. The son _____ is studying automotive electrical engineering. When he shall graduate and wish to work in Israel, his country, an integral part of the job is expected to include driving an Israeli car. This possibility is not given to "residents of the Territories" such that it is doubtful as to whether _____ will be able to find work in his profession.

However, apart from these "prosaic" problems, the older children are burdened with much weightier issues: Will they be able to continue to reside in Israel after age 18? Will they be forced to separate from their mother and their younger siblings? And above all, where will they go?

The Abu Gawila Family

68. Ms. _____ Abu Gawila is a resident of Jerusalem who married a resident of Ramallah in 1988. Until 1997, the couple lived in various leased apartments in Jerusalem and in neighborhoods in the West Bank, near Jerusalem. Since 1997, the couple have resided in Jerusalem continuously. The family currently resides in Kfar Ekev. An application for family reunion submitted by Ms. Abu Gawila for her spouse is currently pending at the Respondent's office.

69. Over the years, the couple have had seven children: The four eldest children – _____, _____, _____ and _____ – were born between 1989 and1995 in Ramallah. The three youngest children – _____, _____ and _____ were born between 1999 and 2002 in Jerusalem.

70. Already in 2000, Ms. Abu Gawila applied for the status of her children to be put in order. The Respondent initially refused the application asserting that "a life center in Israel had not been proven". Ms. Abu Gawila appealed this decision but, since no response was received to the appeal, she approached the Respondent in 2002, through the Petitioner, in a new application for registration of her children. In view of Government Decision 1813 of May 2002, the Respondent refused to handle the registration of some of the children and therefore, a petition was filed in the matter with the Court for Administrative Matters. The proceedings in this petition were ceased and in lieu thereof, a petition was filed with the HCJ against the legality of the Law, in its initial language (AP 10650/03) concerning the application of the Law to children of the residents. This petition is being heard together with the other petitions against the Law. On May 14, 2006 the judgment of the petitions was issued (HCJ **Adalah**). In the judgment, no in-principle decision was made with respect to the petitioner and her children, and therefore an additional petition was filed with the Court for Administrative Matters, which is still pending (AP 771/06).

71. Currently, according to the Respondent's up-to-date decisions of Ms. Abu Gawila's applications, her younger daughter, _____, was granted status of a permanent resident in Israel; the children _____, _____, _____, and _____ were granted status of temporary residents; whilst to her two eldest children, _____ and _____, who are still minors, **it was determined that status would not be granted**. The Respondent decided their stay in Israel would be put in order through **DCO Permits**. It should be stated that at the time of submission of the application for their registration, _____ and _____ were less than 14 years of age, although the language of the Law in such period allowed status to be granted only to a child of less than 12 years of age. The Respondent hung on this and thus decided to grant them a stay permit only.

72. As a result of this decision, _____ and _____ live in the city in which they grew up all of their lives, Jerusalem, in their house, with the status of tourists and not by virtue of Israeli documentation, despite that all of their family lives in Jerusalem where they conduct their life, in every possible sense. In the absence of status in Israel, and as distinguished from their other siblings, _____ and _____ will live without entitlement to social rights, child allowance, disability allowance if, heaven forbid, they should so require, and without health insurance. However, even merely in order to continue to live in Israel on a permit, _____ and _____ will be forced to travel to the Territories several times a year in order to renew the permits that they hold (the permits are issued for several months each time). In periods such as detention, closure, siege, warning, DCO renovations or strike – situations which occur every now and then, _____ and _____ will be unable to extend the validity of their stay permits and will be exposed to the threat of detention, expulsion and separation from their family.

73. Similarly to the children of the Murar family, _____ and _____ Abu Gawila are also forced to deal every day with the reality that the Law and the Respondent's policy have forced upon them. The many and continued delays

in the passage of the roadblocks cause the children to be prevented, in many cases, from leaving their home and their neighborhood. Thus, for example, _____ and _____ are prevented from visiting their mother's family, which lives in Jerusalem, in view of the Calandia roadblock which is placed in their path. It should be emphasized that: These problems in the passage through roadblocks also exist when they hold a valid stay permit.

74. The problems do not end here. Recently, when _____ went on a trip organized on behalf of the school where she studies, the bus was stopped for a routine inspection by soldiers. _____, who does not hold Israeli documentation but rather a stay permit only, was taken off the bus. The long minutes in which the soldiers inspected the permit that she holds seemed, to her, like an eternity. The embarrassment and humiliation that _____ suffered standing next to the soldiers outside of the bus whilst all of the children of her class were waiting only for her will not soon be forgotten.

75. However, also the grave harm to _____'s freedom of movement cannot compared to the another substantial problem which she currently faces. _____ is now 17 and a half years of age. She has no few suitors who are interested in the possibility of asking for her hand in the near future. _____ knows that one of the first questions that she is asked is whether she holds an I.D. card. In the reality that the Temporary Provision has created, it is certainly possible to understand such residents of Jerusalem who are not interested in getting involved in a relationship in which their future partner has no defined status and it is not known when, if ever, she will obtain the same in the near future. _____'s negative answer to this question very much deters such suitors who prefer to withdraw their interest. Thus, such a significant period in the life of a person who is now already a young woman, a period which was supposed to be exciting and an experience, becomes, under the auspices of the Law, from the Respondent's school of thought, a continuing disappointment.

The Guilani Family

76. Ms. _____ Guilani is a resident of the State of Israel, divorced and a single mother. Her family resides in Bab Huta in the Old City. In 1989 Ms. Guilani married a resident of Elazria and moved to live with him there. In this period the couple had their children. Apart from her second son, _____, all of the children were born in Israel. Due to financial difficulties which made payment to an Israeli hospital difficult, _____ gave birth to _____ in Elbira.

77. After serious disputes, which began a short time after the date of the wedding, Ms. Guilani separated from her spouse in 1999 and returned to live, together with her children, in Jerusalem. Initially she lived in the home of her family in the Old City and later the family moved to live in Issawiya. Several years later, she divorced her spouse and received custody of the children.

78. Ms. Guilani's three eldest children were, at the time, registered by their father in the population registry in the Territories. As aforesaid, from the first years of the marital relations, the relationship between the couple was not

good and the father hoped that registration of the children in the registry of the Territories would help him to keep them in his custody, if and when the marriage would end.

79. After her divorce from her husband and putting in order the matter of custody of the children, Ms. Guilani submitted an application for registration of her five children in the Israeli population registry. After more than one year, the Respondent gave notice that _____'s younger children – _____ **and** _____– would be registered with the status of **permanent residents**, and that _____, the third child, who was almost 12 years old on the date of the application, would be registration with the status of a **temporary resident**. The Respondent decided to grant the eldest daughter, _____ a permit to stay in Israel. Although _____ was born in Israel, and pursuant to Regulation 12 she is entitled to be registered as a permanent resident, the Respondent decided to apply the Temporary Provision to her. Since on the date of submission of the application _____ was over 14 years old, she was issued, as aforesaid, merely a stay permit. The Respondent also decided not to grant the second son, _____, status in Israel but rather to put his stay in order through **stay permits** only. _____ was born in the West Bank and therefore Regulation 12, according to the language thereof, does not apply to him. At the time of submission of the application, _____ was less than 14 years old, but the language of the Law in that period allowed status to be granted only to a child who was under 12 years of age. The Respondent hung on this and thus decided to grant him a stay permit only.

80. The application of the Law also to children of residents who were born in Israel and the absence of the possibility of granting status in Israel to children aged between 14 and 18 is entirely absurd in cases such the case of Ms. Guilani and her children. This is a single mother, divorced, who is raising her children alone. The life center of the family has been in Jerusalem for over seven years already: The family lives here, the children study at the school here, the children's friends from the school bench live here. It should be stated that Ms. Guilani's children seldom visit their father and their relationship with him is very weak. The same country, the country of their mother – their sole guardian – to which and only to which they have a link, is refusing to put their status therein in order and to act according to its duty to act in their best interests.

81. Ms. Guilani's children have thus lived for a long time without the present of a father figure. In this context, it should also be stated that the stability of the environment after the divorce has a considerable effect on the children's adjustment to the new situation. Divorce is accompanied, in many cases, also by changes such as a worsening of the economic situation, moving to a new school and place of residence (as in the present case) and so forth. Insofar as the level of changes in the lives of the children is higher, the likelihood of more serious effects on their functioning increases[5]. The application of the Temporary Provision puts the entire family in chaos again and further upsets this fragile family unit.

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[5] See S. Smilansky "Psychology and Education of Children of Divorced Parents", Ach Publishing Ltd., 1990, pages 21-22.

82. Needless to say that society in Israel has recognized the imminent difficulty inherent in the single parent family institution. This recognition is expressed, *inter alia*, in the legislation of the **Single Parent Families Law, 5752-1992**, which confers upon the single parent priority in his children being accepted to kindergarten, in professional training and in rights to increased loans on behalf of the state for various purposes. In addition, over the years, additional benefits have developed, other than in the framework of the Single Parent Families Law, such as: A discount on municipal taxes (property tax), receipt of a study grant from the National Insurance Institution, a credit for the purposes of the income tax relief and so forth.

Thus, the application of the Law to the children of Israeli residents leads to the ignoring also of cases in which it is so clear that the injustice is clearly apparent. It would be expected that the Respondent would make it easier for children in the situation of the children of the Guilani family and act according to the special importance that society ascribes to the single parent family institution. Instead, the State of Israel applies the Law in these cases and gives out the message that children of permanent residents of East Jerusalem are not entitled to society's protection from the point of view that some are equal, and some are less equal.

The Legal Argumentation

83. Below the Petitioner shall assert as follows:

a. The court in HCJ **Adalah** ruled that the Law, in its previous language, disproportionately prejudices the right to a family life and the right to equality. Amendment no. 2 to the Law did not remedy these defects and even exacerbated the same.

b. Leaving the language of the provision of the Law, in the framework of amendment no. 2 of the Law, in place, also ignores the ruling of the judges in HCJ **Adalah**. In the context this petition we will address the same from the perspective of the harm to children.

c. Leaving the language of the provisions of the Law in place derives from extraneous, demographic and economic considerations and stands in contradiction with the *prima facie* purpose of the Law – the security purpose. The same is usually true but is particularly prominent with respect to the repercussions of the Law on children.

d. The proceeding of the legislation of the Law was fraught with material defects throughout. In addition, the legislation proceeding acutely deviated from the rules set forth in the Registration of Information on the Effect of Legislation on the Child's Rights Law, 5762-2002.

e. The Law prejudices basic rights of Israeli residents and their children. These rights are protected constitutional rights. The harm to the rights is severe and does not meet the test of the restriction clause of Basic Law: Human Dignity and Liberty:

1. The law is intended to promote wrongful purposes and is tainted by racism.

2. Binding the hands of the Respondent such that he is not entitled to exercise discretion in individual cases is a wrongful means and disproportionate, even for achieving any appropriate goal. Such means stand in contradiction with fundamental perceptions of law which call for individual attention for every person and preclude acts of arbitrariness and collective harm.

3. Fettering discretion is also choosing the most damaging means since any appropriate purpose may be achieved also though the more proportionate means of exercising concrete discretion.

4. The harm of the Law to children and families and the prejudice to equality and human dignity are thus severe, the purpose, in the best case scenario, being feeble and hypothetical, that the Law also does not meet the proportionateness, in the narrow sense thereof.

84. In view of the aforesaid, the Petitioner shall assert that the Law is to be declared null and void, insofar as it pertains to children. Alternatively, the Law could be interpreted such that it does not prevent granting status to minors, the children of a resident of Israel.

Amendment No. 2 in View of HCJ Adalah

General

85. In **the Adalah judgment** issued in May 2006, the Supreme Court rejected petitions against the Temporary Provision. Five[6] out of the eleven judges on the panel, headed by retired Chief Justice A. Barak believed that the Law is unconstitutional and should be rescinded. Five others[7] believed that the Law meets the conditions of the constitutionality, but mentioned (except for Justice Gronis) that its provisions should be softened. The eleventh Justice, Edmond Levi, that constituted the balance pivot in the judgment, ruled that the Law is unconstitutional and its violation of the right to family life and of the right to equality is disproportionate. Nevertheless, Justice Levi ruled, that the Knesset should be allowed to replace it with another arrangement within nine months. Justice Levi ruled in Section 9 of his judgment:

> The starting point of my position that seeks to explore means less harmful than those undertaken in the Citizenship Law, leans on the assumption that at the end of the day there would be no refuge from exchanging the sweeping prohibition in the Law, with

[6] Chief Justice (his former title) Barak, Justice (her former title) Beinish, Justice Jobran, Justice Procaccia and Justice Hayot.

[7] The Deputy Chief Justice (retired) Cheshin, Justice Gronis, Justice (his former title) Rivlin, Justice Naor and Justice Adiel.

> an arrangement based upon an individual inspection of the Petitioner to unite with its spouse…however, a time is needed in order to do all that, and I believe that placing a framework according to which the Respondents would be required to set up an improved arrangement within nine months, is reasonable. (HCJ 7052/03 **Adalah et al. v. The Minister of the Interior**, Takdin-Supreme Court 2006(2), 1754, page 1924).

Justice Levi added in Section 11 of his judgment:

> I shall offer my colleagues, that subject to the above mentioned, we shall reject the petitions insofar as they pertain to give now an absolute order ordering the annulment of the Citizenship Law due to being unconstitutional. Nevertheless, I shall emphasize that in the event the Respondents shall not succeed to do what they were asked to do, I doubt whether the Law would be able to persist and go through the judicial review also in the future. (Ibid, ibid).

86. In addition, the new arrangement, as found expression in amendment no. 2 of the Law, does not meet the HCJ's requirements. It is an arrangement that its essence is rejecting applications on a collective basis, and without individual inspection. This way this arrangement does not amend the ruling of this Honorable Court in the Adalah case, according to which this Law disproportionately violates the right to family life and the rights of the Arabs in Israel to equality. As we demonstrated in the above mentioned Sections 34-37, the "humanitarian exception" that was added to the Law is very limited, to the point that it loses all substantial content. Anyway, and as previously mentioned, adding the exception in itself cannot cure the many defects in the Law.

87. Moreover, amendment no. 2 includes also broadening of that draconic arrangement. Thus, for example, while until today this arrangement applied only to residents of the Territories, then from now on it shall also apply to citizens of other states and their residents. Which are these states? The government shall determine. The same also in the matter of the security prevention. According to amendment no. 2 of the Law, the Minister of the Interior may determine that a resident of the Territories or any other status-applicant, constitutes a security risk merely based on the determination that **in his area of residence or country of residence, activity is performed that may endanger the State of Israel or its citizens**. This addition threatens to make void and to block any possible fracture in the fortified refusal wall of the Temporary Provision.

The Court's Treatment regarding the Children's Rights

88. Amendment no. 2 of the Law constitutes a continuance of the trend to disavowal of the needs and the best interests of the children of residents, to which the Law is applied. The drafters of the amendment, in other words –

the Respondents, outdid themselves and completely ignored them. As aforesaid, the drafters of the amendment were proud of trying to adjust the amendment to the HCJ's rulings in the **Adalah** case. However, as in other issues, also in the matter of the children, they missed their goal. Their disregard of the influence of the Law on the children of Israeli residents is contradicted to the HCJ's rulings, also on this issue.

89. The HCJ judges, in their opinion in the **Adalah** case, focused on the severe influence of the Temporary Provision on the rights of Israelis who are getting married with residents of the Territories. Although one of the petitions, in which the HCJ was moved to rule in the framework of its judgment, dealt explicitly with the issue of the influence of the Law on children (The petition of the Center for the Defence of the Individual – HCJ 10650/03 **Abu Gawila et al. v. The Minister of the Interior et al.***)*, most of the judges did not discuss much the matter, and it is a pity. Nevertheless, the statements of the judges that did choose to refer to the subject, reveal a clear picture, whereby the sections of the Law that are dealing with the status of the children constitute part of a wrongful and unconstitutional arrangement. Moreover, also one of the majority judges, Justice M. Naor, that decided not to revoke the Law, was not comfortable about the way the Law applies on children. We will specify this.

90. Chief Justice (retired) A. Barak referred in his judgment to the right of the Israeli parent to raise his child in his country, on one hand, and to the right of the child to grow up in a complete and stable family unit on the other hand:

> **Consequently, respecting the family unit has two aspects. The first aspect is the right of the Israeli parent to raise his child in his country.** This is the right of the Israeli parent to fulfill his parenthood completely, the right to enjoy the relationship with his child and not be separated from him. It is his right to raise his child in his home, in his country. It is the right of the parent not to be forced to emigrate from Israel, as a condition to fulfilling his parenthood. It is based on the autonomy and the privacy of the family unit. This right is being violated if the minor child of the Israeli parent is not allowed to live with him in Israel. **The second aspect is the right of the child to family life. It is based on the independent recognition of the human rights of children.** These rights are basically granted to any individual, to the adult and to the minor. The child "is a human being with his own rights and needs" (Fam.Ap. 377/05 **Jane Doe and John Doe the Parents Designated to Adopt the Minor v. The Birth Parents et al.** (unpublished)). **The child has the right to grow up in a complete and stable family unit. His best interests require that he not be separated from his parents and that he grows up in the bosom of them both.** Indeed, it is difficult to overstate the

> importance of the relationship between the child and each of his parents. The continuity and the constancy of the relationship with his parents are important element of the proper development of children. From the child's viewpoint, separation from one of his parents might even be conceived as abandonment and have an affect on his emotional development. Indeed, "the children's best interests require that they grow up in the company of their father and mother in the frame of a stable and loving family unit, while separation from parents involves a degree of separation between one parent and his children" (L.C.A. 4575/00 **Jane Doe v. John Doe**, PD 55(2) 321, 331). (HCJ 7052/03 **Adalah et al. v. The Minister of the Interior**, Takdin-Supreme Court 2006(2), 1754, page 1770). (The emphases have been added – Y.B).

91. Also Justice S. Jubran, who joined the position of the Chief Justice (retired) A. Barak, referred in Sections 11-14 of his judgment to the considerable significance of the shared life of a child with his parents, and to the state's duty to beware from violating them, excluding cases where it serves the child's best interests:

> Raising a child by his parents, expresses simultaneously **both the right of the child to grow up in his parents' home and also the right of his parents to raise him.** This combination of interests, embodies the essence of the relationship between parents and their children, in the frame of family life that **the state should beware from violating them and do so only if the child's best interests require.**
>
> In addition, subsequently:
>
> **No doubt that forcing a separation between a child and any of his parents, is a very severe violation of the rights of the child to grow up in the bosom of his family and in the bosom of his parents.** Of course as long as it is a functioning family, which by the child being in its bosom there is no violating for him…
>
> This is not merely violation of "**the child's best interests**", but a violation of the real "**right**" of a child to grow up in the bosom of his parents, and the state is obliged to avoid in its actions from violating this right (see C.A. 2266/93 **John Doe, Minor v. John Doe**, PD 49(1) 221, 234-235). **Tearing the family unit apart, separating the child from one of his parents, is a severe violation of the rights of the child, a violation that the state is required to avoid to the possible extent…**

> The same with everything related to the right of the parent, who is conferred with an inherent right, protected by law, to raise his child in his bosom and be separated from him, as long as it does not violate the best interests of the child…
>
> **No doubt, that separating the parent from his child, separating the child from one of his parents and dismemberment of the family unit, are very severe violations of both the rights of the parents and the rights of their children. These violations are contrary to the fundamental rules of the Israeli law and stand in contradiction with the principles of protecting the dignity of the parents and their children as human beings, which the State of Israel is committed to as a member of the reformed family of nations.** (Emphases added – Y.B).

92. One of the majority judges in the judgment, Justice M. Naor, expressed her dissatisfaction with the way the Law is applied nowadays on children. In Section 24 of her judgment, Justice Naor ruled that in the event of extending the validity of the Law:

> I shall add that, in my opinion, it is also worthy to consider **a substantial raise of the age of the minors upon which the prohibition in the Law shall not apply** (HCJ 7052/03 **Adalah et al. v. The Minister of the Interior**, Takdin-Supreme Court 2006(2), 1754, page 1908) (Emphasis added – Y.B.).

93. Also the Deputy Chief Justice (his former title) M. Cheshin, who delivered the opinion of the majority, referred to the subject in his judgment. In Section 22 describes Justice Cheshin the facilitations that according to him were done in the Law, upon accepting amendment no. 1 of the Law, in August 2005. He rules in this matter:

> Also it was determined (in Section 3A) that in order to prevent the separation of a minor from a guardian parent who is staying legally in Israel, the prohibition in the Law shall not apply on a minor until the age 14 years, and that with the approval of the Minister of the Interior and the Area Commander, the stay of a minor, resident of the area, aged over 14 years shall be permitted, here also in order to prevent the separation from his guardian parent. **It should be emphasized, that the provision in Section 3A is dealing only with minors, residents of the area, who were not born in Israel, and who are asking to join a guardian parent who lives in Israel. A minor who was born in Israel to an Israeli citizen or resident, is entitled to receive his parent's status, according to the provisions of**

> **Section 4(A)(1) of the Citizenship Law, 5712-1952 and to Regulation 12 of the Entry into Israel Regulations, 5734-1974.** (Emphasis added – Y.B.).

Subsequently, Justice Cheshin adds in Section 67 of his judgment:

> The Law does not apply at all on a child who is born in Israel to an Israeli parent since this child receives a status as of his Israeli parent.

94. Thus, according to the position of Justice Cheshin, it is a proportionate law. Nevertheless, his ruling relies, *inter alia*, on the assumption that the violation of the children is less than the violation actually expressed in the interpretation of the Respondents. In other words, that does not include all such children that despite being born in Israel, the Respondents apply the Law on them and prevent them from receiving status in Israel.

95. As aforesaid, six out of the eleven judges of the panel ruled that the Law violates the constitutional rights to family life and equality in a disproportionate way. By adding Justice Naor, then exists a solid majority among the HCJ judges against applying the Law on children. Minimally, it is a position that asks the legislator to minimize the application of the Law on children.

96. In conclusion, we shall further emphasize – also amendment no. 2 of the Law does not meet the principles and the demands outlined by the HCJ, as found expression in HCJ **Adalah**. As we shall demonstrate below, this amendment too does not cure the constitutional defects existing in the Law since the beginning. The Respondents were given the opportunity to amend the Law in the matter of the children, so that at least with respect to that issue, the provisions of the Law shall be consistent with the judges' statements and the spirit of the judgment. Such a pity that the matter of the children was again forgotten, and was not mentioned even by a single word.

97. As a result thereof, also following amendment no. 2, children of residents of Israel, who reside in Israel, remained without status in Israel and with no social rights. Since these facts are not considered by the Respondents as a "humanitarian matter"[8], then the mere addition of the "humanitarian exception" to the Law does not assist them. Also following the amendment of the Law, the mere registration of the children in the Territories continues to constitute a conclusive evidence of them being "residents of the Territories", and therefore – a sufficient condition for applying the Law on them. Also following the amendment of the Law, arranging the matter of children aged between 14-18 still depends on such or another claim regarding the security risk reflected by their relative. Such a claim would even deny the possibility to grant them a temporary permit to stay in Israel they shall face expulsion.

[8] See Section 3A1 of the amended Law.

The Proceeding of Legislation of the Citizenship and Entry into Israel Law (Temporary Provision)

98. The proceedings of legislation of the Law – both the Law itself and the two amendments – manifest the great indifference towards the rights of the children of the residents of Israel, up to deliberate repudiation. Moreover, in these proceedings the wrongful way, by which many of the laws in Israel are received, is revealed again. What a pity that this happens during legislation of one of the most severe, racist and violating laws known by the state.

Legislation of the Original Law and the First Amendment to the Law

99. In the original bill of law, the matter of the children was not mentioned at all, and any allusion to the Respondents' intention to apply it on the children of the permanent residents could not be found. This matter was not mentioned at all also during the presentation of the Law in the plenum, by the then Minister of the Interior, Mr. Avraham Poraz.

The bill of law that includes explanations is attached hereto and marked **p/5**.

The protocol of the discussion in the plenum dated June 17, 2003 appears in the Knesset's website:
http://www.knesset.gov.il/plenum/data/02651804.doc (in Hebrew)

The protocol of the discussion in the plenum dated June 18, 2003 appears in the Knesset's website:
http://www.knesset.gov.il/plenum/data/02647304.doc (in Hebrew)

100. The disregard from the matter of the children continued also in the discussions of the Knesset's Internal Affairs and Environment Protection Committee. Despite the great problematic nature of this Law, the discussion concerning the original bill of law, lasted two discussions only, and another discussion that was devoted to the vote. The initiators of the legislation that were present during the discussions of the committee – representatives of the Justice Department, representatives of the Judicial Bureau of the Ministry of the Interior and representatives of the Population Administration Office – tried to underrate, to the possible extent, the influence of the Law on children. Although they were already aware of the implications of the Law on the children of the permanent residents, since the freezing policy of applications for family reunion, including its application on children, has started ever since the government's decision, more than a year before that discussion. The attempts of the legal adviser of the committee, Adv. Frankel-Shor, of the chairman of the Child Welfare Committee, MK Melchior and of the representative of haMoked, the Center for the Defence of the Individual, Adv. Lustigman, to get the subject on the agenda – did not receive, generally speaking, an appropriate attitude.

101. The legal adviser of the committee, Adv. Frankel-Shor, even placed before the committee an amended bill of law, which included alternative recommendations for issues in the governmental bill of law that she found problematic. In the matter of violating the children, the legal adviser

recommended to amend Section 1 of the Law, which is the definitions section, so that before the end of the section "and excluding a resident of an Israeli settlement in the area", shall be added "excluding a child and excluding a resident...". With this, the legal adviser wanted to take the matter of the children outside the incidence of the Law. Moreover, the legal adviser added in her bill of law that the definition of a child shall be the same as its definition in the Registration of Information on the Influence of Legislation on the Child's Rights Law, 5762-2002; Also this bill of law did not receive a relevant answer.

A draft of the bill of law placed by the legal adviser of the committee before the Knesset, is attached hereto and marked **p/6**.

102. The severe defects in the proceeding of legislation continued also in the discussion of the committee that was devoted to the vote on the Law. During the discussion, the Knesset Members wanted to voice their reservations with respect to the bill of law, but the Chairman of the committee, MK Yuri Shtern, has decided that there shall be no discussion with respect to the reservations. Despite the opinion of the legal adviser of the Knesset and the legal adviser of the committee, who argued that the procedure requires that the reservations should be discussed in the committee during the vote on the Law, and that this is what should be done.

103. Since the reservations were not read, the same with the bill to amend the Law, placed by the legal adviser of the committee before the Knesset on the day before, the alternative that was recommended in the above mentioned bills, to insert into the definitions section of the Law another sentence according to which the Law should not be applied on children, was nor brought before the members of committee.

104. Instead, the government has recommended its own amendment, according to which a sentence shall be added to Section 3, according to which it would be possible to grant a permit to stay in Israel or a license to reside in Israel in order not to separate a child aged up to 12 years from his parent who is staying in Israel legally. This amendment was added after the discussions in the committee, and was brought before the committee during a closed meeting to Knesset members only, which was declared as a vote without discussion. Therefore, it cannot be understood why age 12 was decided, and why with respect to a child above this age it shall not be possible to exercise discretion.

The full protocols of the discussions of the committee (in Hebrew) appear in the Knesset's website:
http://www.knesset.gov.il/protocols/data/html/pnim/2003-07-14-01.html

http://www.knesset.gov.il/protocols/data/html/pnim/2003-07-29-02.html

http://www.knesset.gov.il/protocols/data/html/pnim/2003-07-30-03.html

105. On July 31, 2003 the Knesset plenum discussed the bill of law in second and third reading. Several Knesset members expressed their reservation from the

appropriateness of the proceeding in the committee. Thus for example, MK Roman Bronfman, a member of the committee:

> […] in the end the bills of laws of Adv. Frankel-Shor were not discussed by the committee, and were not presented to the members of the committee, in order for us to be able to choose one alternative versus a second alternative versus a third alternative. This was the reason why I approached the Chairman of the Knesset, and I do not usually do that during the seven years of my office, this is the first time that I approached the Chairman of the Knesset and asked to stop an improper proceeding of legislation. (Page 9 of the protocol of the discussion in the plenum).

At the end of the discussion, the Knesset approved the recommended law in third reading.

The protocol of the discussion in the plenum can be found in the website of Center for the Defence of the Individual:
http://www.hamoked.org.il/items/5721.htm (in Hebrew)

106. The bill of the amendment of the Law, published in May 2005, was presented by the Respondents as such that were intended to facilitate and render the law proportionate. Colorably, indeed various facilitations were added to the Law, also in the matter of children. Thus the bill enabled to grant DCO Permits to the children of the residents aged between 12 and 18 (during the discussions age was raised to 14), and this is relatively to the former version that did not enable at all arranging their stay in Israel. Nevertheless, as aforesaid, the Respondents broadened the definition of the term "resident of the Area" such that also children who were born in Israel, and to whom the Law did not apply in its former form, shall be subject to the Law. In addition, pursuant to Section 3(D) of the amended law, should the security persons present an opinion whereby a family member, such as the brother-in-law of the child, may constitute a security risk, the minor shall be denied the possibility of receiving even a permit to stay in Israel and shall face an expulsion.

107. The proceeding of the legislation of the amendment took longer time, relatively to the proceeding of the legislation of the original law, and many more meetings took place. Nevertheless, also this proceeding was tainted with fundamental defect, *prima facie* procedural, but is wedded to the material injustice in the Law. We shall clarify this.

108. The Registration of Information on the Influence of Legislation on the Child's Rights Law, 5762-2002 (the **Registration of Information on the Child's Rights Law**) requires special procedures in laws that have influence on the fate of children. The essence of the Law is in Sections 2 and 3 of the law.

The purpose of the law was determined in Section 2:

> The purpose of this law is to force the Knesset members and the government to examine the influence of the bill of law on the rights of children, in the spirit of the convention, during the preparation of a bill of law for first reading. (the United Nations Convention on the Rights of the Child – Y.B.)

109. The influence of the bill of the Citizenship and Entry into Israel Law on children was not examined during its preparation for first reading. The First Respondent did not even mention such a violation when he presented the law in the plenum prior to holding the vote in first reading,

In Section 3 of the Registration of Information on the Child's Rights Law it was determined that:

> **In the explanations of the bill of law for first reading, that *prima facie* seems to involve, directly or indirectly, an influence on the rights of the children, the following should be indicated as the case may be:**
>
> **(1) The existence of a violation or the existence of an improvement concerning the rights of children and their scope, including their living conditions and the services conferred upon them;**
>
> (2) The data and information that shall be served to determine the aforesaid in paragraph (1), if existing.
>
> (The emphasis has been added – Y.B.).

110. In the meeting of the Internal Affairs and Environment Protection Committee of the Knesset dated July 29, 2003 (In other words, still during the discussions with respect to the legislation of the original law) the legal adviser of the committee referred to the Law, as follows:

> **(…) there is a Registration of Information on the Influence of Legislation on the Child's Rights Law…Section 3 of the bill of law determines that in the explanations of the bill of law for first reading, that *prima facie* seems to involve, directly or indirectly, an influence on the rights of children, the following should be indicated as the case may be, and there is in here a beginning of a list.**
>
> A governmental bill of law arrives the Knesset for the first time, in first reading, to the Knesset plenum. When the blue [a bill] is placed before the Knesset, **it is the government's duty to write in the explanations, the indirect and direct influences of the bill of law.**

> With respect to the Knesset members, either they do it in a primary reading or the bill of law is handed to the committee, and while the committee prepares the bill of law for first reading, it is the duty of the committee, such as the duty of the government, to address in the explanations to the indirect or direct influence on children, (it was written in the protocol, probably by mistake, "direct influence on the Knesset members" – Y.B. – ibid on page 5).
>
> I further said in the closed meeting, that in the event that the government did not write in the explanations about the influence on children, there is a possibility to cure the defect. Let the members of the committee present before the Internal Affairs Committee of the Knesset, what is the direct or indirect influence and this way there is no need to return the Law for first reading in the Knesset plenum. (The emphasis has been added – Y.B.).

111. The statements of the legal adviser of the committee received, similarly to the Law itself, a mere disregard. The violation caused to the children is not mentioned in the explanations of the original law and of the bill of amendment. The violation to the children was mentioned by the Knesset members and representatives of human rights organizations during the discussions in the committee, but not by the Law's proposers. All they did was to confirm during the discussions of the committee that indeed the Law should apply to children, but denied the violation – and indeed where there in no right there is no violation of the right. The Law's proposers, on behalf of the Ministry of the Interior and the Justice Department, avoided from providing data and information concerning the subject, and questions raised by the Knesset members and by guests of the committee remained unanswered.

Legislation of the Second Amendment to the Law

112. On December 18, 2006 the bill of the Citizenship and Entry into Israel Law (Temporary Provision) (Amendment no. 2), 5766-2006 was published. This proceeding of legislation includes also many defects. Similarly to the bill of the original law and to the bill of the first amendment, also this bill completely ignored the influence of the Law on the children of residents of Israel. This time their matter was not mentioned even by a word. It seems that the drafters of the bill were satisfied that the arrangement that existed in the Law, after its amendment in 2005 was satisfactory.

113. Moreover, the timing of proposing the bill of amendment was problematic, saying the least. Judgment **Adalah** was given in May 2006. The nine months ruled by the HCJ as the timeframe to amend the Temporary Provision were about to expire on January 16, 2007 (see above mentioned Sections 85-97 in the matter of the judges' position in the judgment). Despite the long time that was at the disposal of the state, the bill of amendment was brought for first

reading only on December 19, 2006, less than a month before the expiry of the Law. Although it was a severe, violating bill of law, that certainly did not meet the demand of proportionateness set by the HCJ, it seemed that someone believed that one month is a reasonable time for a serious and relevant discussion on the bill, which includes first, second and third reading, and in between – an exhaustive discussion in the committee.

114. The Respondents accomplished their mission. Until the expiry date of the Law, only one committee meeting took place, on January 8, 2007. Due to the desire to continue the discussion concerning the bill of law, the Law as it is was extended by additional three months. In view of the fact that it was a blunt contradiction to the HCJ's position, additional petitions were filed, after this additional extension, to this Honorable Court: HCJ 830/07 **Tabila et al. v. The Minister of the Interior et al.**, HCJ 544/07 **The Association for Civil Rights in Israel v. The Minister of the Interior et al.** and HCJ 466/07 **Galon v. The Minister of the Interior**. These petitions are still pending before the HCJ.

115. We shall dwell a little upon the discussion of January 8, 2007. During the discussion, the undersigned mentioned the disregard of the bill of amendment from the matter of the children of residents of Jerusalem, and the fact that until today the state did not give any argument for the application of the Law on the children. Adv. Frankel-Shor, the legal adviser of the committee, has mentioned that:

> **At the beginning of the meeting, the chairman of the committee said that he is interested to see whether it is possible to raise the age of the children. Even if it is possible to raise the age of the children but not to 18, is it also possible to find some social solution for this population of children? It is true that the government did not address that in the bill of law, but this is a legitimate position of the committee. Sir (the chairman of the committee – Y.B.) can have a discussion concerning the issue.** (The emphasis has been added – Y.B.)

116. Also the Chairman of the committee then, Mr. Raleb Majadele, referred to the matter:

> **I still insist that social rights could be given to ages 16-18 (the intention was probably to ages 14-18 – Y.B.). I do not accept what was said by a Knesset member from the right that he wants them hungry without health and social security. It does not serve the State of Israel. Whoever is thinking that it serves him when the neighbor in the Authority next to us is hungry, is mistaken. There is no security risk by giving health and social security. It involves milliards, but it does not involve security risk. Let us**

> **give hope to the people who want to be all right.** (The emphasis has been added – Y.B.)

The protocol of the discussion dated January 8, 2007 can be found in the Knesset's website at the link: http://www.knesset.gov.il/protocols/data/rtf/pnim/2007-01-08.rtf (in Hebrew)

117. As aforesaid, after this discussion, the Law was already extended by three months. It could have been expected that during these three months intensive discussions would be held in the committee, in order to clarify, to the possible extent, all the problems raising from the Law. These hopes were proved false. Until the day of accepting amendment no. 2 of the Law, only two more committee meetings on the subject took place, while the first of them was dedicated mostly to the **report of the Advisory Committee for Examining the Migration to the State of Israel Policy**, headed by Prof. Amnon Rubinstein. This report that wishes to determine basic principals for the migration to the State of Israel policy, indeed relates in its essence to the Temporary Provision, but it has no connection whatsoever with the concrete provisions of the Temporary Provision.

118. The second, and the last, meeting took place on March 20, 2007, a day before the Knesset was taking a vacation. As a result of the pressing time, the new Chairman of the committee, MK Ophir Pines-Paz, tried 'to press", to the possible extent, problematic issues related to the Law into the limited timeframe of the discussion. In view of the short time and the numerousness of the participants in the meeting, this attempt was doomed to fail.

119. It should be stated that the legal adviser of the committee published towards the discussion her own bill of amendment to the Law. In the Petitioner's opinion, also this bill includes many defects. However, she tried to reinstate the way an application for family reunion has been examined in the past. In other words, in an individual way, and not by way of a sweeping denial of the Minister of the Interior discretion, as done by the Temporary Provision. **In the matter of the children, the bill indicated that there is a need to consider granting documentation different from the one given today** (see footnote in Section 9 of the bill).

The draft of the bill of amendment to the Law, placed by the legal adviser of the committee before the Knesset's, is attached hereto and marked **p/7**.

120. The legal adviser bill did not receive a serious discussion. The same happened also with many of the other criticism directed to the bill of the second amendment of the Law. In the spirit of the "bazaar" that surrounded the discussion, the matter of the children was again left outside the Law. Desperate attempts done by the undersigned to get this subject on the agenda were in vain. The legal adviser's offer during the discussion on January 8, 2007 to have a discussion in the matter of the children was not discussed. The specific words of the former Chairman of committee, according to which all children until age 18 should be granted with social rights – were forgotten.

At the end of the meeting, the committee approved the bill of amendment, after several amendments, not even one of them concerning the children.

It should be stated, that as of the day of writing these lines, the protocol of the discussion in the committee dated March 20, 2007 was not yet published.

121. On March 21, 2007 the Knesset voted on the bill of amendment in second and third readings. During the discussion in the plenum many of the Knesset members repeated again the regrettably familiar criticism, against the racist provisions of the Law. As expected the Law passed without problems.

The protocol of the discussion in the Knesset plenum dated March 21, 2007 can be found in the Knesset's website at the link:

http://www.knesset.gov.il/protocols/data/rtf/pnim/2007-01-08.rtf

122. Thus, it can be said wholeheartedly that many defects were included in the proceeding of legislation – since the beginning at until the end of it. Starting with his complete disregard from the Registration of Information on the Child's Rights Law, and ending with a rapid and particularly incomplete proceeding of legislation. This is, in a complete contradiction to the essence of the Law and to the difficult questions within, questions that are of the severest known by the Israeli codex.

123. The HCJ's authority to activate judicial review on the proceeding of legislation of the Knesset was already recognized in the past in this Court's ruling. (See: HCJ 761/86 **Mi'ary v. The Chairman of the Knesset**, PD 42(4) 868; HCJ 975/89 **Nimrodi Land Development Ltd. v. The Chairman of the Knesset**, PD 45(3) 154; HCJ 8238/96 **Abu 'Arar v. the Minister of the Interior**, PD 52(4) 26). In HCJ 4885/03 **The Israeli Birds Breeders Organization Agricultural Cooperation Society Ltd. v. The Israeli Government**, PD 59(2), 14 (the **Birds Breeders Organization** case), Justice (her former title) D. Beinish gave an extensive review in this matter. In the above mentioned HCJ 975/89 and HCJ 8238/96, it was ruled that the criteria for this Court's interference in the proceeding of legislation is if the defect happened in the proceeding of legislation is "a defect that goes down to the root of the proceeding". Justice Beinish clarifies in the **Birds Breeders Organization** case that the question what is "a defect that goes down to the root of the proceeding" is determined by the strength of the violation that this defect violates "the essential values of our constitutional regime" or the basic values of our constitutional regime, placed upon the basis of the proceeding of legislation (see Section 16 of her judgment). Among the elementary principles of the proceeding of legislation of our parliamentary and constitutional regime, Justice Beinish includes the majority decision principle; the formal equality principle (according to which "one vote to each one" of the Knesset members); the publicity principle; the participation principle (according to which each Knesset member has the right to participate in the proceeding of legislation). (See Section 18 of the judgment).

124. The Petitioner shall argue that in the case before us, among the elementary principles of the proceeding of legislation that were violated severely and considerably, are the participation principle and the publicity principle.

125. With respect to the participation principle: in HCJ 5131/03 **MK Litzman v. The Chairman of the Knesset**, PD 59(1) 577, emphasized Chief Justice Barak (on page 588) that the participation of a Knesset member in the proceeding of legislation is not limited only to "the accessibility to the proceedings of the House" or to participation in the discussion and the vote, but it also includes "the practical possibility to form its will" with respect to the bill of law.

With respect to the publicity principle: Justice D. Beinish in the **Birds Breeders Organization** case, ruled (in Section 21 of her judgment) that: "the publicity principle in the proceeding of legislation is designated to increase the transparency of the Knesset's work during the proceeding of legislation and with such even to increase the accountability of the Knesset members towards their voters. The exposures of the bills of law and of the proceedings of legislation before the public were designated also to enable the public to express its position regarding the bills of law and to try and take part in the proceeding of legislation by approaching its selectmen."

126. In the explanations to the bill of the **Registration of Information on the Child's Rights Law**, it was said that:

> Frequently, the influence of bills of law, both private and governmental, on children and their rights is not taken into account while setting policy and formatting legislation. Therefore, it is offered to determine that the explanations to the bill of law shall include information about the nature of the implications of the bill of law on children, according to the principles of the United Nations Convention on the Rights of the Child (which was ratified in Israel and became valid already in 1991). **Imposing such a liability shall make the various persons take into account the implications of the bill of law on children and to consider possible alternatives that will less violate this population.** (See: Bills of Law 3125, 1st of Tamuz 5762, June 11, 2002) (The emphasis has been added – Y.B.).

127. As mentioned above, during the entire proceedings of legislation of the Law, including its amendments, the Respondents did not act according to their statutory duty pursuant to the Registration of Information on the Child's Rights Law. As a result of their omission, the destructive influence of the Law on children was not brought to the attention of the Knesset members and the wide public. This violation of the publicity principle prevented from giving the subject the appropriate attention and creating a public discussion regarding the issue. As a result, it was difficult to expect that the discussion in the Knesset – both in the plenum and in the committee – will go down deeply, and the many negative aspects of the Law would be raised in its

framework. The attempts of organizations, like the Petitioner, to get this subject on the agenda were not sufficient. The rapid proceedings to approve the Law and its amendments (at least the second amendment of the Law) have also caused that the practical option of the Knesset member to form his mind, and consider the alternative which should less violate the children of the residents – was mortally violated. Therefore, it is possible to determine that also the 'participation principle' of the Knesset members was not respected.

128. For finalizing this matter, the statements of Justice M. Cheshin in the **Birds Breeders Organization** case, in Section 3 of his judgment, are appropriate (in that case with respect to the "The Plan for the Recovery of the Israeli Economy Law"):

> The nation has chosen its selectmen to discuss profoundly the bills of law placed before them, to contemplate with respect to their content, to converse with each other, to exchange opinions, to argue, and this way to appropriately supervise the conduct of the government. Therefore the house of representatives is named a parliament, coming from the word PARLER, to talk. All this was missing from the discussion concerning the bill of the Economy Plan Law and only if because the Knesset members did not have enough time to read in depth whatever was placed before them, to read, to contemplate, to exchange opinions… intrinsically – which is the most fundamental manner – we shall find it hard to describe the proceeding of legislation of the Law as a proper proceeding. We shall observe the proceeding of legislation from its outset and until its end, and we know that in practice it was the government that legislated the Economic Plan Law. As if the Knesset has disassembled from its primary authority to legislate, and bestowed its authority to the government. The Knesset - of its own accord - followed blindly the government's decision, gave up its authority of its own accord – of the superior authority of the legislator – to determine life order for the state.

With respect to the same law, which has – similarly to the Temporary Provision before us – changed the basic rules, Justice Cheshin, in Section 4 of his judgment, ruled:

> As if all elements that are making the democracy in Israel were forgotten: separation of powers, decentralization, transparency, publicity, and participation of the nation in the legislation. What has happened to the Knesset – or should we say: what has happened to the Government – to make it so hurry, and in such quick proceeding lost the old arrangements in the Economic Plan Law?...Does it happen everyday that

> thus life orders are turned upside down? But the Knesset lent a hand – and knowingly – to the hasty move that was taken, and thus exploited, *de facto*, its authority as the entity with the highest authority in Israel. The date of legislation of the Economic Plan Law, at least as far as its agriculture chapter is considered, is not a day of gloriousness to the proceeding of legislation in the Knesset.

Violation of Basic Human Rights

129. Every child who is born in the world is entitled to be registered as a human creature recognized by the authorities.

> The child shall be registered immediately after his birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know his parents and be cared for by them. (Article 7(1) of the Convention on the Rights of the Child (Conventions 1038)).

See also Article 8 of the Convention and Articles 6 and 15 of The Universal Declaration of Human Rights – 1948, Article 24 of the International Covenant on Civil and Political Rights, Articles 16 and 24 of the International Covenant on Civil and Political Rights (Conventions 1040) that came into force with respect to Israel on January 3, 1992.

130. The right to identity and nationality is then acknowledged as a basic right in the international law, which was adopted by the State of Israel.

The Right to Family Life and the Right of Children to Protection by Society

131. The residents of East Jerusalem have the right to live safely with their children in Israel, while their legal status is arranged. The state is obliged to prevent from violation of these people, as being residents of Israel and parents of children. But this is not the end of the role of the state. It should defend its citizens actively, from violating their ability to grant their children the protection that they need.

132. The right to family life is a constitutional basic right in Israel, which is included in the right to human dignity. This position received the sweeping support of the Supreme Court judges in the **Adalah case**. Eight judges[9] out of 11 judges of the panel, ruled that the Temporary Provision violates the hard core of the right to family life and to human dignity. Chief Justice (retired) A. Barak summarized, in Paragraph 34 of his judgment, the rule that

[9] Chief Justice (his former title) Barak, Justice (her former title) Beinish, Justice Jobran, Justice Procaccia, Justice Hayot, Justice (his former title) Rivlin, Justice Adiel and Justice Levi. It should be stated that Justice Adiel thought that under the circumstances the violation is proportionate.

was determined in the judgment with respect to the position of the right to family life in Israel:

> The secondary right to establish a family unit and to continue living together as one unit, is derived from the human dignity, which is based on the autonomy of the individual to form his life. Does it necessarily mean that the actualization of the constitutional right to live together means also the constitutional right to actualize it in Israel? My answer to this question is that **the constitutional right to establish a family unit means the right to establish a family unit in Israel. Indeed, the Israeli spouse has the constitutional right, which is derived from the human dignity, to live with his foreign spouse in Israel and raise his children in Israel. The constitutional right of a spouse to actualize his family unit is, first and foremost, his right to do so in his country.** The right of an Israeli to family life means his right to actualize it in Israel. (The emphasis has been added – Y.B.).

133. Also the international law determines that the right to family life should be broadly defended. Thus, for example, Article 10(1) of **The International Covenant on Economic, Social and Cultural Rights,** Conventions 1037, that was ratified by Israel on October 3, 1991, determines that:

> The widest possible protection and assistance should be granted to a family, which is the natural and fundamental group unit of society, particularly for its establishment and as long as it is responsible for the care and education of dependent children…

(See also: Article 16(3) of **The Universal Declaration of Human Rights** adopted by the General Assembly of the United Nations on December 10, 1948; Article 17(1) of **The International Covenant on Civil and Political Rights**, Conventions 1040, which came into force with respect to Israel on January 3, 1992).

134. Following these provisions, Article 8 of The European Convention for the Protection of Human Rights, determined that:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

> protection of health or morals, or for the protection of the rights and freedoms of others.
>
> (Convention for Protection of Human Rights and Fundamental Freedoms, 1950).

135. The Courts' case law placed constitutional boundaries with respect to the interference of the state in the family unit and in the autonomy of the parents in decision making in anything concerning their children.

> **The parents' right to hold their children and raise them, with all its entails, is a constitutional, natural and primary right, as an expression of the natural connection between parents and their children** (C.A. 577/83 **The Attorney General v. John Doe**, PD 38(1) 461). This right founds expression in the privacy and autonomy of the family: **the parents are autonomous in making decisions in everything concerning their children – education, way of life, residence etc., and the interference of the society and the state in these decisions is an exception that should be justified** (See above mentioned C.A. 577/83, on page 485). The routes of this attitude are in the recognition that the family is "the most elementary and ancient social unit in the history of man, that was, is, and shall be the element serving the securing the existence of the human society" (Justice (his former title) Alon in C.A, 488/77 **John Doe et al. v. The Attorney General**, PD 32(3) 421, on page 434). (C.A. 2266/93 **John Does v. John Doe**, PD 49(1) 221, pages 237-238). (The emphasis has been added – Y.B.).

136. In Fam.Ap. 377/05 **Jane Doe and John Doe the Parents Designated to Adopt the Minor v. The Birth Parents et al.**, Takdin-Supreme Court 2005(2) 617, page 654, Justice Procaccia rules that:

> **The right to parenthood and right of a child to grow up in the bosom of his natural parents are rights interwoven with each other, which together create the right to autonomy of the family. These rights are part of the foundations of the human existence, and it is difficult to describe human rights equal to them in their importance and strength.** In another case, we spoke of the aforesaid combination between the right of the biological parent to his child, and the right of the child to grow up in the bosom of his birth parents, as follows:
>
> **"The law sees in the connection between a parent to his child a natural right with a constitutional dimension, which has two sides: the one – the right**

> **of every child to be placed under the custody of his parents, and to grow up and be brought up by them; the second – the right of a parent, by virtue of blood relation, to raise and bring up his child in his custody, and to fulfill towards him his obligations as a parent**…The rights of the children to a relation of parenthood and the parents' rights and obligations towards their children create an integrated system of rights and values that led to a legal recognition in the autonomy of a family – **a recognition that denies an external interference in the completeness of the family unit except in defined causes that are well proven. The law protects the natural family unit due to several considerations**, in which the best interests of the child and the natural parents' rights have a weighty position….the depth and the strength of the parenthood relation that treasures within the natural right of a parent and his child to a living relation between them, has turned the family autonomy into a value with a first rate legal status, of which the violation is tolerable only in very special and exceptional situations." (L.C.A. 3009/02 **Jane Doe v. John Doe**, PD 56(2) 872, on pages 894-895). (The emphasis has been added – Y.B.).

137. In this context Justice Procaccia mentioned in the same judgment a case law of the European Court of Human Rights, that has also referred to the matter of the protection that the state should grant to the relation between a parent and his child:

> The Court recalls that the essential object of article 8 is to protect the individual against arbitrary action by the public authorities…according to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the state must act in a manner calculated to enable that tie to be developed, and legal safeguards must be created that render possible, as from the moment of birth, the child's integration in his family… In this context, reference may be made to the principle laid down in Article 7 of the United Nations Convention on the Rights of the Child of 20 November 1989 that a child has, as far as possible, the right to be cared for by his or her parents. (Keegan v Ireland (App. No. 16969/90), European Court of Human Rights (1994) 18 EHRR 342, [1994] ECHR 16969/90, para 50).

138. For finalizing this matter, we shall state that the right to family life – which was determined, as aforesaid, as a constitutional right in HCJ **Adalah** –

includes also the right of the child to grow up in a country together with his parents.

139. Justice Procaccia referred to that in A.C.H. 6041/02 **John Does v. John Doe** (in the context of taking a child away from his parent's custody), (6)פ"ד נח 246:

> Taking a child away from his parent's custody and removing him to the welfare authority or to a children's facility concerns by nature to an **issue with a constitutional nature which concerns the value of the protection of the personal and familial autonomy of the child and his parent and to the important social value concerning the protection of the natural family relation between parents and children and of the complex weave of rights and obligations deriving from this parenthood relation. It concerns the natural right of a child to be under the custody of his parents, and to grow up and be brought up by them; it concerns his elementary rights as a human being to life, to dignity, to equality, to expression and to privacy** (The Declaration of Human Rights of 1948; The Convention on the Rights of the Child; C.A. 6106/92 **Jane Doe v. The Attorney General**, PD 48(2) 833, 836; A.C.H. 7015/94 **Attorney General v. Jane Doe**, PD 50(1) 48, 100). **It concerns the unique rights of children by virtue of being children, including the right to grow up in the bosom of a family and to keep in touch with their parents** (The Committee for Checking Elementary Principles in the Field of the Child and the Law and Implementing Them in Legislation headed by Justice Saviona Rotlevi, 2004, General Part, page 26); i**t concerns the right of a parent by virtue of the blood relation, to raise and bring up his child, as well as fulfill his obligations towards him by virtue of his parenthood. The rights of the children to a relation with their parent, and the rights and the obligations of the parents towards the children create an integrated system of rights, obligations and values that establish the autonomy of the family.** (A.C.H. 6041/02 **John Does v. John Doe**, PD 58(6) 246, 275-276).

140. Also Chief Justice (retired) Barak referred the matter specifically in the **Adalah** case, in Section 27 of his judgment:

> **The right to family life is also the rights of the Israeli parent to have his minor children grow up with him in Israel, and it is the right of an Israeli child to grow up in Israel together with his parents.** (The emphasis has been added – Y.B.).

In the matter of the scope of this right, see the statements of Chief Justice (retired) Barak, brought above in Section 102.

The Best Interests of the Child

141. **The principle of the best interests of the child** is an elementary and established principle in the Israeli law. The purpose of the principle is to direct the deciding factor - in other words, any administrative or judicial authority – while making decisions concerning children, to do so based on the criteria of the best interests of the child. **The U.N. Convention on the Rights of the Child**, which was ratified by the State of Israel, and gains an increasing recognition as a complementary source to the rights of the child and as a guide to the interpretation of the "best interests of the child" as a primary consideration in our law, determines a series of provisions that require protection of the family unit of a child. Thus, for example, Article 3(1) of the convention determines:

> 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…

142. Justice M. Heshin referred to the matter in one of the cases:

> **The best interests of the minor are a primary consideration, which shall be the decisive factor. Disregard of the best interests of the minor; a decision contrary to his best interests or not of the best interests of the minor; a decision with respect to a minor while involving an extraneous consideration; not giving an appropriate weight to the consideration of the best interests of the minor** – all these shall awake and arouse our authority for intervention in the rulings before us…and as aforesaid in A.C.H. 7015/94 **Attorney General v. Jane Doe**, PD 50(1) 119, 48: "The consideration of the best interests of the child is the primary consideration, the decisive consideration. Indeed, beside this consideration shall be additional considerations…but all these shall be secondary considerations, and all of them shall bow to the consideration of the best interests of the child. (HCJ 5227/97 **Michal David v. The High Rabbinical Court**, Takdin-Supreme Court 98(3), 443, page 446). (The emphasis has been added – Y.B.).

For this purpose, see also the statements of the Honorable Chief Justice Shamgar in C.A. 2266/93 **John Doe v. John Doe**, PD 49(1) 221, 235-236; HCJ 1689/94 **Harari et al. v. The Minister of the Interior**, PD 51(1) 15, on page 20 opposite the letter B.

<u>How is the Best Interests of the Child Actually Determined?</u>

143. **The Committee for Examining Elementary Principles in the Field of the Child and the Law and Implementing Them in Legislation**, headed by Justice S. Rotlevi, presented in a report that was published by the committee in December 2003 (the "**Rotlevi Report**"), a model which it offers to anchor in the Promoting the Rights of the Child Law. This model includes, *inter alia,* a checklist that is intended to guide and lead the deciding factor with respect to the considerations it should take into account while determining the best interests of the child (see Rotlevi Report, the general part, starting from page 136 and so forth). There is a need to take into consideration, *inter alia*, the "Child's will, feelings, opinions and position with respect to the discussed matter"; "the age of the child and his developing connections"; "the time dimension in the child's life"; "the influence on the child's life in the present and in the future as a result of the decision or the action"; "connections and relationships of the child with his parents and with other significant people in his life"; "the position of the child's parents and other significant people in the life of the child regarding the discussed matter"; "the relevant professional knowledge regarding the discussed matter".

With respect to this list, the report indicates, on page 141, that:

> The factors making decisions **with respect to children in general or with respect to groups of children** (headed by the various government departments and the local authorities) should develop for themselves checklists that fit the context discussed by them, based on the presented checklist…the checklist proposed in the article is an open list, to which every deciding factor can add additional considerations as long as they are relevant to the decision and consistent with the rights of the child and with the listed factors. (Original emphasis – Y.B).

The general part of the Rotlevi Report may be seen on the Justice Department's website, at the link:

http://www.justice.gov.il/NR/rdonlyres/658D27AD-F09E-4E67-A7F6-29971ADBF0BF/0/DOH_HAVEADA_11.pdf (in Hebrew)

144. The children, who their best interests should be examined in this case, are all such minors, the children of residents of Israel, that their lives center is in Israel, but – the Law prohibits their registration as residents. It seems that not much thought, if any, with respect to the influence on the best interests of the children subject of this petition, was given to the decision to grant such children temporary permits – that some of them, as aforesaid, do not grant any social rights. An inspection, partial only, of the parameters listed in the checklist that appears in the Rotlevi Report, demonstrates that.

145. For example, the Report indicates on page 145, that with respect to the **influence on the life of the child in the present and in the future as a result of a decision or the act,** "this article directs the deciding factor to devote a special thought to the implications of his decision on the specific

child before him in the present – in the short term and in the long term. Its purpose is to emphasize its obligation with respect to everything related to the implication of the decision or the action on his life, to refer to the unique characteristics of the specific child before him rather than relying only on assumptions concerning "the generic child". Moreover, its purpose is to direct the deciding factor **to the necessity to evaluate**, either by itself or with the assistance of experts, as the case may be, **the possible implications** of any of the possibilities on the decision on the agenda." (Original emphasis – Y.B).

In this context, the question is: whether, when it was determined that children aged 14-18 shall receive, at the most, stay permit, did anyone evaluated the implications of choosing this option precisely? Did anyone consider – what are the economic, social, health implications of the decision to prevent social rights from these children? Did anyone consider the fact that "the specific child" in this case is the children of East Jerusalem who live, as we have seen, in a deep poverty? Was the data indicating such high percentages of youth in East Jerusalem who are defined, from the outset, as **at-risk youth**, taken into consideration?

146. With respect to the consideration of the **time dimension in the child's life**, the Rotlevi Report indicates, on page 144, that "the way children grasp the concept of time is significantly different than the way adults grasp it – whatever seems in the eyes of adults as a short time can be grasped in the eyes of children as an endless eternity …continuation of proceedings violates the children with a more severe violation due to them being in a permanent situation of development and due to the implications of their being in an uncertainty their respect to their condition, during a long period of time, and placing them for a long time in a situation with is not consistent with their best interests."

The uncertainty, indicated by the report, is not a virtual concept in the eyes of the children of the residents, who find themselves for a long time in an undefined status. It becomes concrete with the image of soldiers detaining at the roadblocks also children having DCO permits, though their application for family reunion was "approved". Uncertainty is strengthened when a date for a possible upgrade of their permit seems far from reality. More than anything, the uncertainty is embodied in the fear of the day when the children are 18 years old – Would they be permitted to stay in Israel? Would they ever be able to received status in Israel? Where and in what conditions would they be able establish their family?

147. It transpires from the aforesaid that by applying the Law on children of the residents of Israel, the Respondents violates the children's constitutional right to grow up with their parents in Israel. Tearing families apart into different statuses, leaving so many children without status at all, without social rights and within a severe violation of their freedom of movement – harshly violates the family unit and the autonomy of the parents in making decisions with respect to their children.

148. However, as we have seen, not only that the Respondents ignore these **rights**, which are available to such children, they even ignore the **best interests** of the children, which require granting them the option to grow up together with their parents, who are residents in Israel. According to the principle of the best interests of the child, as long as they are minors, and as long as their parents are properly functioning, the best interests of the children require to let them grow up in a family unit, which supports them. The denial to register a child as a resident of Israel, when his parent is an Israeli resident living in Israel, means – to force a separation of the child from his parent, to harm his development and to interfere in the family unit in contrary to his best interests. Alternatively, having no other choice, the child shall stay with his parent in Israel, but without a stable and clear status, as long as the difficulties of life without a status do not subdue the family.

The Parent's Obligations to his Children

149. The violation of the Law is not limited to the denial of the basic rights of the parent and of his child. It also impedes, in an almost active way, the parent's option to grant his children with their basic needs as the parent obliged by law. The parent's obligation towards his children and the forbiddance of neglect are obligations that are well anchored in the Israeli legislation. Thus, for example**, Section 15 of the Legal Capacity and Guardianship Law, 5722-1962**, with the heading the parents' roles, determines:

> The parents' guardianship includes the obligation and the right to take care of the minor's needs, including his upbringing, studies, qualification for work and occupation and his work, and protecting, managing and developing his assets; and attached to it is the permission to hold the minor and to determine his place of living, and the authority to represent him.

Section 323 of the Penal Code, 5737-1977, determines:

> A parent or whoever has the responsibility for a minor, a member of the family, is obliged to provide him with his livelihood, to take care of his health and to prevent abuse of him, a bodily harm or other harm of his well being and health, and he shall be perceived as the one who caused the results for the life or health of the minor because of not fulfilling his above mentioned obligation.

And see more **Section 373 of the law**.

150. The Law prevents the parent to act in accordance with these obligations. Thus, the Law makes the parents criminals against their own will. Even worse: The Law impedes the central social tool for protecting the body, the life and the dignity of the children. It is impossible that a parent, who is obliged by law to hold his child and care for all his needs, and subject to penal sanctions, shall not be able to do so.

The Right to Equality

151. In HCJ 6427/02 **The Movement for Quality Government in Israel v. The Knesset**, Takdin-Supreme Court 2006(2) 1559, page 1576, the Supreme Court ruled with respect to the question of ascribing the right to equality to the right to human dignity. It was ruled that the right to human dignity includes within the right to equality, in as much as this right is related to the human dignity with a tight relevant relation (Section 40 of the judgment of Chief Justice (retired) Barak). In the **Adalah** case, the Chief Justice (retired) A. Barak ruled that:

> Does the right of the Israeli spouse to establish a family unit in Israel out of equality within relation to other Israeli spouses to establish a family unit in Israel, constitutes a part of the right of the Israeli spouse to human dignity? The answer is yes. Both the protection of the family unit in Israel, and the protection of the equality of this unit with relation to family units of other Israeli spouses are in the core of the human dignity. Prohibition of the discrimination of one spouse with respect to establishing his family unit in Israel with relation to other spouse is part of defending the human dignity of the discriminated spouse.

152. With respect to the question whether the Law violates the right to an equality of Arabian citizens and residents of Israel, Chief Justice (retired) A. Barak rules in Section 51 of his judgment:

> In the matter before us, the impact of the Citizenship and Entry into Israel Law is limiting the right of Arabian citizens and residents of Israel, and their right only, to family life. This is a discriminatory impact. This discrimination is not based on a relevant distinction. If we accept it, "we shall perform a severe act of discrimination, and we did not find a worthy cause for the act" (the statements of Justice M. Cheshin in the Stamka case, on page 759; See further the statements of Justice Procaccia in HCJ 2597/99 **Tushbeim v. the Minister of the Interior**, PD 58(5) 412, 450-451). The conclusion is that the Law violates the constitutional right to equality.

Six more Judges of the panel joined this position[10].

153. Thus, it was ruled that the Law violates the constitutional right of the Arabian citizens and residents of Israel, to equality, since its impact –

[10] Justice (her former title) Beinish, Justice Jobran, Justice Procaccia, Justice Hayot, Justice (his former title) Rivlin and Justice Levi. It should be stated that Justice Rivlin thought that under the circumstances the violation is proportionate.

limiting the right of the Arabian citizens and residents of Israel, and their right only, to family life – is a discriminatory impact. As we have seen, in above mentioned Section 140, the right to family life is also the right of the Israeli parent to grow up his minor children with him in Israel and the right of an Israeli child to grow up in Israel together with his parents. These rights, of the parent and of the child, are violated when it is impossible to grant a child with a status in Israel, with all the implications accompanying thereto.

The violation of the right to equality of the residents of East Jerusalem and their children has also additional sides, to be specified below.

The Principle of Equalizing the Status between a Child and his Guardian Parent

154. The Israeli Law adopted the principle, whereby the status of the child should be the same as the status of his guardian parent the resident of Israel, provided that the child is living with such parent within the boundaries of the state. This principle is a direct result of respecting the right to family life and the interest of protecting the child wellbeing. Thus for example, Justice (her former title) Beinish ruled in one of the cases, that:

> **As a rule, our legal system recognizes and respects the value of the completeness of the family unit and the interest of protecting the child wellbeing, and therefore it is necessary to prevent from creating a disparity between the status of a minor child and the status of his parent who holds him or is entitled to hold him**. (In HCJ 979/99 **Carlo (minor) et al. v. the Minister of the Interior** (not published, paragraph 2 of the judgment of Justice D. Beinish (hereinafter: **HCJ Carlo**)). (The emphasis has been added – Y.B.).

See for this purpose also: the judgment of Chief Justice (retired) A. Barak in HCJ Adalah, in Section 28 of his judgment; A.P. 1195/06 **Anna Kasp et al. v. the Minister of the Interior et al.**, Takdin-District Court 2006(3), 7671, page 7678.

155. The Petitioner shall argue, that the arrangement determined in the Law violates this elementary principle and discriminates against the residents of East Jerusalem and their children, relatively to other residents and citizens residing in Israel. As shall be clarified below, the law is not supposed to distinguish in this context between citizens and residents or between Jews and non-Jews. The Temporary Provision distinguishes between people when the difference is unjustified, and it is therefore a wrongful discrimination. (For this purpose, see for example: Justice M. Cheshin in HCJ 6051/95 **Recanat v. the National Labor Court**, PD 51(3) 289, 311).

156. On children who were born in Israel, applies directly **Regulation 12 of the Entry into Israel Regulations, 5734-1974 (hereinafter: Regulation 12)**, which determines that:

> A child who was born in Israel, and Section 4 of the Law of Return, 5710-1950, does not apply on him, his status in Israel shall be the same as the status of his parents; should the parents have more than one status, the child shall receive the status of his father or of his guardian unless the other parent objects to it in writing; should the other parent object, the child shall receive the status of one of his parents, as determined by the Minister.

157. Nevertheless, in HCJ Adalah, rules Chief Justice (retired) A. Barak explicitly, in Section 28 of his judgment, that:

> **Although this regulation does not apply, according to the language thereof, on the children of residents that were not born in Israel, it was ruled that the purpose which regulation 12 was intended for, applies also on the children of permanent residents who were born outside of Israel.** (The emphasis has been added – Y.B.)

Chief Justice Barak mentioned, in this context, the above mentioned **HCJ Carlo**, where Justice (her former title) D. Beinish rules, as aforesaid, in Section 2 of her judgment, that:

> As a rule, our legal system recognizes and respects the value of the completeness of the family unit and the interest of protecting the child wellbeing, and therefore it is necessary to prevent from creating a disparity between the status of a minor child and the status of his parent who holds him or is entitled to hold him.

She also rules in Section 3 of her judgment, that:

> **Personally, I believe that there should not be a distinction between the status of a minor child and the status of his guardian parent in Israel, whether in the framework of the interpretation of regulation 12 or by setting an appropriate criteria for guiding the discretion conferred upon the Minister of the Interior in the Entry into Israel Law.** (The emphasis has been added – Y.B.).

158. In accordance with the above mentioned, we shall hereby examine the significance ascribed by the courts' judgment to the principle of equalizing the status, as was reflected with respect to regulation 12. While we keep in mind that the **purpose which regulation 12 was intended for, applies also on the children of permanent residents who were born outside of Israel**, according to Chief Justice (retired) A. Barak.

159. The updated case law of the HCJ and the Court for Administrative Matters (that discussed nowadays, *inter alia*, petitions with respect to the Respondents decisions concerning to the entry visas and permits to stay pursuant to the Entry into Israel Law), placed regulation 12 beside other legal provisions related to the children of citizens and equalizing their status with the status of their parents. Thus for example, ruled Chief Justice (retired) A. Barak in the **Adalah** case (Section 28 of his judgment), that:

> **The Israeli law recognizes the significance of equalization of the civil status of a parent to the status of his child.** Thus, **Section 4 of the Citizenship Law**, determines that a child of an Israeli citizen shall also be an Israeli citizen, whether born in Israel (4A(1)) or outside of Israel (4A(2)). Similarly, **Regulation 12 of the Entry into Israel Regulations, 5734-1974**, determines that "A child who was born in Israel, and Section 4 of the Law of Return, 5710-1950, does not apply on him, his status in Israel shall be the same as the status of his parents". (The emphasis has been added: Y.B.).

160. In the judgment of A.P. 1158/04 **Nabhan נבהאן v. the Regional Population Administration Office**, it was ruled that pursuant to Regulation 12, whoever was born in Israel to a parent resident of Israel, who entered into Israel legally, is entitled to acquire the status of his parents or one of his parents. It indicates that:

> This conclusion is also required by other equalization stretched in Regulation 12. The regulation aspires to apply on whoever was born in Israel "and Section 4 of the Law of Return, 5710-1950, does not apply on him"…every Jew that immigrated to Israel before the law came into force, and every Jew that was born in Israel after the law came into force, the law with respect to him is as the law with respect to a person who immigrated to Israel pursuant to the law. Moreover: Also a Jew who was born in Israel after the law came into force, the law with respect to him is as the law with respect to a person who immigrated to Israel pursuant to the law…However, the law confers rights not only to a Jew-immigrant, but it also determines that "the rights of an immigrant pursuant to this law and also pursuant to any other legislation", are conferred also "to the child and the grandson of a Jew, to the spouse of a Jew and to the spouse of the child and of the grandson of a Jew". The mere mentioning of **Section 4 of the Law of Return, 5710-1950,** in **Regulation 12**, indicates that the regulation aspired to arrange the status of the persons who are not immigrants but residents in Israel. No need to create an unnecessary disparity between the

> arrangement, which applies on immigrants or on Jews, and the arrangement, which applies on other residents. If the Law of Return extended the arrangement set in it in a comprehensive manner, there is no need to prevent in the boundaries of **Regulation 12** an applicability of the regulation likewise on children of residents of Israel. (The emphasis has been added – Y.B.).

161. According to the gathered information, the court's case law seems Regulation 12 as **a complementary link to the provisions of the Citizenship Law, 5712-1952** and **the Law of Return, 5710-1950.** These provisions serve together as a quasi protection shell for the parent – whether he is a citizen or a resident, Jew or non-Jew – and for his child. This is in order to make sure that the principle of equalizing the status between them shall be honored. Indeed, Regulation 12 applies according to the language thereof, only on children who were born in Israel, but as aforesaid, the rationale in the Regulation – at least in everything related to the principle of equalizing the status – should apply on all of the children of the residents, irrespective of their place of birth.

162. The Law prevents this application. It denies the possibility of granting a status to the children aged 14-18 of the residents of Israel, only due to the fact, that they were born outside of Israel, also in situations where their life center is in Israel. Moreover, in accordance with the definition of "Resident of the Area" in Section 1 of the Law, only registering a child of a resident in the Population Registry in the Territories, even if he has never resided therein, is sufficient to prevent him the possibility of status. A situation was therefore created, in which variable conditions – birthplace, date of birth, and place of registration – on which such children have no control whatsoever, determine their destiny to life without status in Israel.

163. Applying the principle of equalizing the status on the residents of East Jerusalem and their children is also required in view of the special status of these residents. These are people who the State of Israel turned them into residents in year 1967. From this point of view, their actual status and the absence of another actual status grant them with civil rights the same as conferred to citizens, except in limited number of fields[11]. The Law does not mention any possibility to prevent categorically from granting status to such children. Accordingly, there is no reason to prevent in advance the Minister's discretion in granting status to the children of residents, whether they were born in Israel or born in the Territories. There is no reason to prevent in

[11] Pursuant to the Entry into Israel Law, there is a distinction between residents to citizens in the following subjects: the right to vote in the Knesset's elections, dependency of the status on the actual place of residence, such that the status is "revoked" if the life center of a resident is outside Israel for a period of about seven years and the difference in the travel documents. Another difference is that in contrary to children of Israeli citizens, the children of residents who are born in Israel do not receive their parents' status automatically, and their status is determined in accordance with Regulation 12. The issue of registering children who were born outside of Israel and only one of their parents is a resident – is not arranged by law or by regulations, but until the Temporary Provision, there was no doubt in the mere ability to grant them status.

advance the application of the basic principle of equalizing the status – also on such children.

164. When the Israeli Law was applied on East Jerusalem, the principle of equality and the principle of human dignity were also applied. While legislating a law that takes away from them the authority to arrange the status of children in the Israeli population registration, the Respondents should have given the appropriate weight to the right of the residents of East Jerusalem to equality with the rest of the state's residents, citizens and non-citizens, excepts for, as aforesaid, all the fields in which a difference exists.

The Right to Development

165. In addition to the violation of the civil rights of the children and their parents, the Law also violates the social and economic rights of the children. As aforesaid, the Law does not allow granting social rights to the children of the residents more than 14 years old. Thus, the Law violates the right of the children to protect their health, to the development of capabilities and qualifications that shall allow them to live with dignity, and the right to live with a minimum standard of living, which shall allow the actualization of these rights. These rights are included in the **Right to Development**[12], which found expression in **Article 6 of the Convention on the Rights of the Child**, whereby**:**

A. The states members acknowledge the natural right of every child to life.

B. The states members shall make sure until the most possible measure the survival of the child and his development.

This right constitutes the basis for the proper development of children, and it is intended to provide all their physical, emotional, social, economic and cultural needs. **The right to development is a unique right of children, due to being a population group, which is developing during all stages of childhood until maturity.** A child who does not have the proper conditions to develop is a child who does not enjoy the right to dignity and equality[13]. It should be stated, that the above mentioned Article 6 constitutes the general frame of this right in the Convention. Many other articles relate specifically to rights that are connected to the right to development. (Thus for example, the right to physical development – the right to health – was anchored in Article 24 of the convention. The right to emotional development was anchored, *inter alia*, in Articles 28-29 of the convention, dealing with education etc.).

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[12] See: A. Ben-Aryeh *et al.*, "The Right of the Children to Development – Perceptions and Positions of Israeli and Palestinian Children Concerning the Rights of Children", Hamishpat 22 (2006) 52-62, on page 53. The article may be found at the link: http://www2.colman.ac.il/law/hamishpat_j/22/Ben%20Arye.pdf (in Hebrew)

[13] See: S. Rotlevi, "The Responsibility of the State in Fulfilling the Rights of Children", Hamishpat 22 (2006) 3-11, on page 10. The article may be found at the link: http://www2.colman.ac.il/law/hamishpat_j/22/Rotlevi.pdf (in Hebrew)

166. The right to development received a status of an elementary right in the judgment of this honorable Court. Thus, Justice Dorner ruled in one of the cases:

> **It is the right of every child – and it is also an elementary right – that his physical and emotional needs shall be provided in the level required for his proper development, this right of the child who is helpless depended on others, has a premiere status**. (A.C.H. 7015/04 **The Attorney General v. Jane Doe**, PD 50(1) 48, 66).

See also (in the context of the right of a minor with disability) the judgment of Justice E. Levi in HCJ 7974/04 **John Doe v. the Health Minister**, Takdin-Supreme Court 2005(2), 1376.

For the purpose of the completion of the picture in the context of this right, see an extent reference in the Rotlevi Report, pages 167-206.

167. The right to development of the children of the permanent residents, who reside in Israel, should be examined also in view of the conditions prevailing in East Jerusalem, the conditions in which many of such children reside. As we demonstrated above, almost in every area of life, the children of East Jerusalem are being discriminated relatively to other residents and citizens in Israel. The same in the areas of education, welfare, infrastructures, etc. No doubt that in this situation, the right to development is among first rights to be violated. Applying the Temporary Provision on these children is therefore an additional establishment of the discrimination and exclusion having once again the bad smell of racism.

168. After determining that the rights violated by the Law are constitutional rights, we shall now examine whether the violation is justified according to the "restriction clause".

Prejudice to Rights: For Illegitimate Purposes – Demographics and Economics

169. Applying the Law on the children of the permanent residents was done in the framework of a policy, which its proclaimed purpose is supposedly the need to beware of entering foreigners into Israel due to the security threat. Even if it was a sincere claim[14], it is clear that this argument is irrelevant to the Respondents when speaking of minor children of residents, residing with their parents in Israel, who neither they nor their parents are attributed with security riskiness. On the contrary, applying the Law on children, as well as the readiness to provide them with DCO Permits, and at the same time the refusal to grant them with permanent status and social rights, undermine the credibility of the security argument.

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[14] For wonderments with respect to the credibility of the security consideration, see: HCJ Adalah, Section 24 of the judgment of Justice S. Jobran; Sections 13-14 of the judgment of Justice A. Procaccia.

170. Up to date, the state did not present any data connecting the children of the permanent residents, who received status or permits to stay in Israel, with any security risk. In their answer dated February 7, 2006 to the petitions that were filed against the Law, the Respondents presented data concerning the involvement in terrorist acts of the residents of the Territories, who received status in the framework of a procedure of family reunion (see Section 29 of the response etc.). The problem is that the only data presented by the Respondents with respect to the minors, were related to the **involvement of minors, generally speaking**, in terrorist acts. As aforesaid, no data was presented with respect to minors who are the children of the permanent residents who received a status or a permit to stay in Israel.

The answer of the Respondents may be found at the Hamoked for the Defence of the Individual website, at the link:

http://www.hamoked.org.il/items/4488.pdf (in Hebrew)

171. The only possibility conceived by the Petitioner is that applying the Law on children derives from demographics-racists considerations and from economics considerations.

172. It is possible to learn more about these considerations from the discussions that preceded the government's decision 1813 in May 2002. In the presentation brought by Respondent 1 before the government on the eve of the vote on decision 1813, the Population Registration described how "foreigners with Arabian nationality" are increasing and intensifying, giving birth to many children (10-12 children a couple), their "growth potential" is enormous, also their offspring is getting married and shall receive a legal status in Israel, and so forth and so forth. The distribution of the generations as far as grandchild and great-grandchild is described in diagrams that speak for themselves – with a monetary calculation at the end of them.

173. In addition to the racist headlines of the kind of "one member brings another one" (page 13 of the presentation), the presentation demonstrates in the chapter by the name of "A little of the budget where to? And the reward?" "How much does **only** the child benefit cost us?" (original emphasis – Y.B.). The Population Registration Bureau gets the result of NIS 3.3 billion in 10 years! (On page 16 of the presentation). The accurate calculations brought by the Respondents with respect to the funds of the National Insurance Institution spent on an increasing mob, in contrast with the absence of required security and other data, are conspicuous.

The presentation of the Population Registration, on the basis of which the government voted in favor of the government decision 1813, is attached hereto marked **p/8**.

174. The Respondents' "insistence" on presenting particularly the demographics and economics purposes for the application of the Law on the children of residents, continued also in the proceedings of the legislation of the Law and the amendments. Thus for example, in the discussion of the Internal Affairs

and Environment Protection Knesset committee dated July 11, 2005, Adv. Danny Geva, the representative of the General Security Services referred to the matter. It seems from his words, that minors reflect no security problem. Following are parts from that discussion, referring to the issue (page 31 of the protocol of discussion):

> Danny Geva:
>
> The original bill spoke of a situation in which children until age 12 were not included. I will not repeat things that were said, but at the end they were actually excluded from the original bill of law and today the exclusion expanded even more in such a way that everyone get, I repeat this and I will repeat this also ten times, since birth until age 18, they get a possibility to avoid from being separated from their parents.
>
> Yochi Genesin:
>
> They are speaking of social rights, this is a separate question.
>
> Danny Geva:
>
> **The moment this child who asks for a permit to stay in Israel receives a permit to stay, then there is no more security problem, then he enters, receives a permit, what is the security context?**
>
> […]
>
> Miri Frankel-Shor (the legal adviser of the Knesset committee – Y.B.):
>
> So now is the question why the separation of 12? Actually what needs to be is, if minor then minor all the way.
>
> Yochi Genesin:
>
> In the security aspect.
>
> […]
>
> Miri Frankel-Shor:
>
> Maybe there is a need that the minor who passed shall increase from age 12 to age 16. The question addressed to you is, why did you think that the age 12 limit is right, and the answer cannot be because 12 is in the original Temporary Provision because if you are

already doing this, why was the limit set with respect to age 12? What is the rationale behind this thing?

The Chairman Raleb Majadele:

From the security aspect. Danny please.

Danny Geva:

We noticed at this point that in fact, the man gets his wish and here the security problem is being solved because at the moment he receives a permit, he no longer constitutes a risk.

(The emphases have been added – Y.B.).

The protocol of the discussion may be seen on the Knesset's website, at the link:

http://www.knesset.gov.il/protocols/data/rtf/pnim/2005-07-11.rtf (in Hebrew)

175. Subsequently, in the discussion of the Internal Affairs and Environment Protection committee of the Knesset dated July 25, 2005, the Chairman of the committee, the Knesset Member Majadele, revealed the content of his conversation with the "authorized persons" concerning this subject, as follows (see page 17 of the protocol of the discussion):

The Chairman Raleb Majadele:

At the end of last week, we spoke over the phone concerning this matter. After we pushed to the corner, everyone who participated in the conversation it was clarified that in the bottom line it is a monetary question. They insisted that this is a Law with security purpose, but said: in this section – no. It is monetary. During those conversations, debates arose and it was very clearly said: social rights are money. By the way, the Head of the General Security Services said that this section does not concern him, since it is social rights, it is money. (The emphases have been added – Y.B.).

The protocol of the discussion may be seen on the Knesset's website, at the link:

http://www.knesset.gov.il/protocols/data/rtf/pnim/2005-07-25.rtf (in Hebrew)

Prejudice to Rights without there being a Rational Link between the Purpose and the Means

176. As aforesaid, the proclaimed purpose of the Law is security. But we shall emphasize again: Up to date the State did not present any data connecting the

children of permanent residents who received a status or permits to stay in Israel, with any security risk whatsoever. In this matter, we have seen above the statements of the representative of the General Security Services in the discussions held in the Internal Affairs and Environment Protection committee of the Knesset (in the discussion dated July 11, 2005, page 31 of the protocol).

177. Also in the discussions concerning the legislation of the second amendment of the Law, came up the matter of applying the Law on children. The then chairman of the committee, Mr. Raleb Majadele, referred to the matter in the discussion dated January 8, 2007 (on page 11 of the protocol):

> In the previous discussion, we demanded that if they are not giving a permanent status, then at least they should give social rights, in order not to have more poverty. I will not say what the response of political persons in the Knesset was.

At the end of the meeting, the Chairman of the committee referred to the matter once again (see page 27 of the protocol):

> I still insist that social rights could be given to ages 16-18 (the intention was probably to ages 14-18 – Y.B.)**. I do not accept what was said by a Knesset member from the right that he wants them hungry without a health and social security. It does not serve the State of Israel. Whoever is thinking that it serves him when the neighbor in the Authority next to us is hungry is mistaken. There is no security risk when giving health and social security. It involves billions, but it does not involve security risk. Let us give hope to the people who want to be all right.** (The emphasis has been added – Y.B.).

The protocol of the discussion dated January 8, 2007 may be seen on the Knesset's website, at the link:

http://www.knesset.gov.il/protocols/data/rtf/pnim/2007-01-08.rtf (in Hebrew)

178. Thus, the declarations of the Respondents contradict each other. On the one hand the Respondents claim that minors reflect security risk (but they do not bring any data indicating the involvement of the children of residents in a violent activity against Israel, and it seems that they do not have this data). On the other hand, the Respondents themselves claim that the moment these children aged 14-18 receive permits to stay, it means that they no longer constitute security risk.

179. In conclusion, we shall say that in view of the content of the presentation presented by the Respondents, in view of various statements of Knesset members and Government members, and as arises from the discussions that preceded the legislation of the Law and its amendment – it can no longer be

denied, that monetary considerations and demographics considerations, as well as mere racism, are at least part of the purpose that the Law is based on. Minimally, these are considerations with crucial weight with respect to the application of the Law on children of the permanent residents in the State of Israel.

180. It is inconceivable that demographics and economics considerations should violate the basic right of residents of Israel to arrange the status of their children. This purpose is not a worthy purpose, and is not commensurate with the values of the State of Israel as a democratic state.

181. According to the gathered information, the conduct of the Respondents in this case rises to the level of bad faith with respect to the motives that were behind the application of the Law on children, and of considering extraneous consideration concerning the matter. Justice Shamgar describes in Judgment Lugacy what is the behavior in bad faith by the authority:

> …When the authority that gives the reason, which constitutes camouflage or an external cover to the other hidden intention, knows for certain that the outwards statements are not identical with the thoughts. Then we have before us a typical example of an absence of integrity or fraud. (HCJ 376/81 **Moshe Lugacy et al. v. The Minister of Communications et al.**, PD 36(2), 449, page 459-460).

182. Also suitable for this matter are the statements of Justice I. Cohen who ruled in the past that in examining acts of the authority there is a need to check "whether the wrongful consideration or the wrongful purpose had a concrete influence on the act of the authority, and if such was the case then the activity of the authority should be annulled." (HCJ 392/72 **Emma Berger v. the District Committee for Planning and Building** PD 27(2), 764, 773).

183. In our matter, the extraneous, cynical purpose of which the Respondents' decision is based on is visible and it seems that there was not even an attempt to disguise it. It is clear from everything mentioned above that the extraneous, demographics and monetary considerations received a "place of honor" in the Respondents' decision to apply the Law on the children of residents of Israel. How can the security purpose of the Law be justified, in this context, when these children can be granted a permit to stay in Israel? How preventing the social rights from these children serves this security purpose?

Prejudice to Rights: Disproportionate – Choosing the More Prejudicial Means

The Duty to Exercise Discretion when Deciding upon the Registration of a Child

184. As we have seen, the guidelines in registering the children of residents is determined in Regulation 12 of the Entry into Israel Regulations: a child of whose both parents are residents, a child of whose father is a resident and a child of whose guardian is a resident, are entitled to status by virtue of the

regulations. A child of whose mother is a resident shall be resident by virtue of the regulations, in the event the Minister of the Interior shall rule so after consideration, while the only criterion that was accepted all those years on this matter is the life center criteria.

Same criteria were applied during the years also with respect to children who were born outside of Israel, almost promiscuously.

The Law limits the discretion of the Respondents with everything related to granting residency licenses in Israel. The Law was not applied, therefore, on status conferred upon Regulation 12 (even if determining the status involves exercising discretion). This, until the first amendment of the Law in year 2005. As aforesaid, in the framework of this amendment, it was determined that the definition of "Resident of the Area" includes not only the resident of the Territories, who actually reside therein, but also any person who is registered in the Population Registry in the Territories, even if he has never resided therein. The authorities that initiated the amendment interpret it as preventing from the Minister of the Interior to exercise the proceedings pursuant to Regulation 12 on children who were born in Israel and reside with their parents the residents of Israel, if they were registered in the Territories. Seemingly, this interpretation is not consistent with the statements of the Deputy Chief Justice (his former title) in HCJ Adalah, but is applied in practice.

185. Let us suppose, for the sake of argument, that there are purposes that can justify filtering with respect to the children who receive a permanent status in Israel (for example in the spirit of the judgment in the above mentioned matter of Carlo). Limiting the discretion of the Respondents, in a way that **no child** above the age of 14 can receive a status in Israel **in any case**, constitutes a choice of an extreme mean whose violation is far beyond necessary.

186. The mean of limiting the discretion is a mean, which is also contrary to basic perceptions of the law. The administrative authority must consider in a relevant manner an application to exercise authority in the permission given thereto, and to make use of it in a reasonable, proportionateness, good faith, without arbitrariness, without considering extraneous considerations and while giving an appropriate weight to the elementary rights and to the elementary principles of our legal system (see Raanan Har Zahav, **The Israeli Administrative Law** (5756-1996), on pages 103-109, 435-440, and the references brought therein; HCJ 3648/97 **Bijelbahan Fatel et 31 al. v. The Minister of the Interior et 3 al.**, PD 53(2) 728, on page 770).

This duty of the authority is part of the foundations of the Administrative Law and found an expressed in the case law, also in the context of granting the status to children. (See in this matter: HCJ 48/89 **Issa v. The Administration of the Regional Bureau et al.**, PD 43(4), 573).

Limiting the discretion of the authorities means to force them to act arbitrarily.

A law that obliges the authorities to act arbitrarily, and the Respondent to be a "legitimate villain", is a law that undermines the foundations of the Administrative Law, which is entirely based on the combination of conferring authority and discretion. This is a law that undermines also the possibility of judicial review, since in the absence of discretion by the authority, it is also impossible to criticize the discretion.

And here, actually, the profound rationale of the entire law: the Government desire to act arbitrarily and with racism, and in order to block the judicial review on its decision, it passes (in a hasty and wrongful proceeding of legislation) a provision of law that supposedly is limiting thereof – and actually limits the courts of law. Except for this Honorable Court, that has the power to rescind the provision.

This is an "HCJ bypass law" of the worst kind. This Law should be rescinded.

Collective Sanction

187. By denying the possibility of granting a status in Israel to children of permanent residents aged more than 14 years, the Law roughly marks an entire population, on national basis, and impose on it a terrible and sweeping fate, indiscriminately. It is in fact a collective sanction on hundreds and maybe even thousands of children, unfairly.

These children are prevented from receiving status in the place they live therein. Their parents, residents of Israel, are prevented from the right to grant their children a status in their country.

188. The Respondents' rationale, with respect to the need to apply the Law collectively, that there are limitations in the individual diagnosis in the question – whether a person constitutes a security risk. In Section 28 of their answer dated February 7, 2006 to the petitions that were filed against the Law, the Respondents indicate those claimed limitations. Thus, for example, they determine that "in the circumstances of the time and the place, it is obvious that the security authorities have information gaps with respect to the activities of the residents of the area, especially those residing in areas A and B". Clearly this claim cannot be accepted when speaking of children, which proved to be living with their parents the residents of Israel, in other words – in a place where the security authorities can get any desired information concerning them.

The response of the Respondents may be found on Center for the Defence of the Individual website, at the link:

http://www.hamoked.org.il/items/4488.pdf (in Hebrew)

189. The Respondents also indicate at the same place, that "the risks comes from anyone who can enter Israel on a permanent basis with an Israeli documentation that allows also lodging in Israel, and to legally move in all areas of the state". Also this rationale is no longer relevant to these children.

Any of such children whose application is approved, and passes the pedant security inspections – the Respondents approve receiving a permit to stay in Israel, which allows free movement and lodging within the state.

These examples add to the fact that the Respondents did not bring any evidence for the involvement of such children in any activity against Israel (see above mentioned Section 170).

190. Thus, this position of the Respondents sweepingly sanctions children and their parents, while the Respondents do not even bother to explain the purpose of the harsh sanction – denying such an elementary right. The Supreme Court has annulled, in the past, a collective sanction for the reason of disproportionateness. Thus, for example, in the judgment in the matter of Ben Attiya, in which denying the right of a school to perform an exam was discussed, after many incidents of copying in former exams were found in it, the Court ruled:

> The occurring of relatively many incidents, of violating the purity of the exams indicates the limpness of the supervision, and the way of dealing with the event is by increasing the effectiveness of the supervision and appropriate sanctioning of everyone concerned, and not by sanctioning the pupils of "the next cycle and the educational institution and its teachers". (HCJ 3477/95 **Ben Attyia v. the Minister of Education, Culture and Sport**, PD 49(5) 1, on page 8).

In the matter, subject of this Petition, the Court's position is intensified, in view of the fact the ceasing the ministration is not derived by the actions or omissions of any of such children of residents, and is not related to them in any way whatsoever.

191. The question of the legality of a collective sanction was raised lately also in an HCJ that dealt with the constitutionality of the Civil Wrongs Law (Amendment No. 7), 5765-2005, which determined that the state shall not be held responsible in torts for damage that was caused in a conflict zone due to an act executed by the security forces. The Chief Justice (retired) A. Barak referred to this matter at length, including in the context of the **Adalah** judgment:

> **Indeed, the proportionate way is by an individual inspection of each and every case.** This inspection should check whether the case is within the bounds of a "warlike operation", anyway it is defined. **This definition could be expanded, but this individual inspection cannot be exchanged with sweeping denial of responsibility.** I referred to that in the Adalah case:
>
> The need to take the less violating mean, often prevents the use of a flat ban. The point in this is that in many of

> the cases the use of an individual criteria achieves the worthy purpose, while using a mean, which its violation of the human right is lessened. This principle is accepted in the judgment of the Supreme Court…**a sweeping limitation of a right, which is not based on an individual inspection, is a mean which is suspected to be absent of proportionateness. The same is in our own law. The same with the comparative law**. (Paragraph 69 of my judgment). (HCJ 8276/05 **Adalah v. The Minister of Defence**, Takdin-Supreme Court 2006(4), 3675, on page 3693). (The emphases have been added – Y.B.).

192. Subsequently, Chief Justice (retired) A. Barak refers also to the positions in the matter of the other judges in the **Adalah** case:

> Justice D. Beinish mentioned that "**not performing an individual inspection and setting a sweeping prohibition grant too broad margins to the value of security without having an appropriate confrontation with values and rights versus this value"** (paragraph 11 of her judgment). Similarly, mentioned Justice E. Hayot that "**the security needs, upon all their significance, cannot permit sweeping collective prohibitions that are not attentive to the individual…** There is certainly a need for the risk presumption that the Respondents wish to apply in this issue of family reunion between Arabs, citizens of Israel, and residents of the area. Notwithstanding, and in order that the fear of the terror should not violate our democratic measures, it is advisable that this presumption would be rebutable in the framework of an individual inspection of which should be enabled in each and every case" (paragraphs 4 and 5 of her judgment). Justice A. Procaccia emphasized in her judgment that "we should be careful from a lurking danger lying in the sweeping violation of people belonging to a specific public by labeling a risk indiscriminately…**we shall protect our life security by individual means of supervision even if it overburdens us with an additional burden**" (paragraph 21 of her judgment). Justice M. Naor mentioned that "**I do not disagree with the significance of conducting an individual inspection, in case it is possible…in general I agree that violation of an elementary right is suspected to be absent of proportionateness if it is done sweepingly and not based on an individual inspection**" (Paragraph 20 of her judgment). Also Justice E. Rivlin emphasized the importance of the individual inspection,

> but thought that this inspection would not fulfill the purpose of the Law in that case. Justice E. Levi emphasized in his judgment that "**at the end of the day there would be no choice other than exchanging the sweeping prohibition in the Law with an arrangement based on an individual inspection**" (Paragraph 9 of his judgment). (The emphasis has been added – Y.B.).

Finally, mentioned Chief Justice (retired) A. Barak that:

> The case before us is different from the Adalah case. However, there are similarities between them. In both cases very significant human right were violated. Amendment no. 7 denies the right in torts, and thus may make the injured person or his family penniless. **In both cases the state chose a sweeping denial** ("the state is not liable in torts") **upon an individual inspection of each and every case**, whether it is "a warlike action". (Ibid, ibid). (The emphasis has been added – Y.B.)

193. In conclusion: the Respondents chose the most violating mean in this case, and limited their discretion in a way that pursuant to the Law – they cannot grant status in Israel to children aged 14-18. It is a collective sanction. This mean shall always be suspected to be absent of proportionateness. The same is with the Law in general. The same is also sevenfold with respect to children. As we have seen, also the feeble excuses used by the Respondents, with respect to their incapability to conduct an individual inspection, are irrelevant in the matter of children residing with their parents the residents of Israel.

The Prejudice to Rights is Disproportionate, in the Narrow Sense

194. We have seen the scope of the violation of the families. The children of the Murar, Abu Gawila and Guilani families are only few examples.

195. Every family has its own difficulties. Every family has its own characteristics. But the common denominator is the inability to deal nowadays with the collective provisions of the Law. Many families are divided today to various statuses. The status of many children is prevented in the state where they live thereat, in which they wish to move freely, to travel together with their schoolmates on a trip on behalf of the school, a state in which they wish to find a spouse and establish a family. Children are not receiving the medical and social rights of which they are entitled to by virtue of being children of residents. And this is all due to arbitrary data, of which such children could not have any influence: date of birth, place of birth and place of registration.

196. Applying the Law on children of East Jerusalem is only another layer in the discriminating and humiliating "treatment" that the residents of East

Jerusalem receive. As we have seen, the direct injured persons by the discriminating policy of Israel, in all areas, are the children. It is enough to mention that at least 50% of the children of East Jerusalem are considered children at risk, in order to draw conclusions regarding the decisive "contribution" of the Temporary Provision on the rights of these children and their future.

197. The violation of the children is therefore certain and concrete. The purposes of the Law, on the other hand, are not more than dim, hypothetical and mysterious. The presumption that a 14 years old child may be in the future a risky terrorist, who will abuse his residency, is not only, as we have seen, a hypothetical and unestablished presumption, but also it includes a prejudiced, humiliating and wicked judgment.

The balance between the doubtful purposes of the Law and the elementary rights that it violates thereof, clearly inclines to the determination that the violation of right is at least disproportionate.

Conclusion

198. The Citizenship and Entry into Israel Law (Temporary Provision) constitute a flagrant breach of the elementary rights of residents of Israel and their children: the right to grant status to minors, to protect the family unit, to protect the best interests of minors, the right to equality, the right of minors to relation with their parents and the rights of parents to relation with their minor children. The Law violates the right of the residents and their children to status, with the disguise of a collective security risk that the Respondents unjustly attribute to the children and with no anchor in the reality.

199. The Respondents have created a gloomy reality, whereby in one family one application to arrange the status of two children is denied, while the arrangement of the status of the other children is approved. Although all of them children of a resident of the State of Israel and reside in Israel with him.

200. It is infuriating, that in every aspect whatsoever, the State, including all of its branches, conducts a discriminatory policy in the matter of the children of the residents. The same with respect to budgets directed to the welfare and education of the children of East Jerusalem, compared to other areas in the city and in other parts of the country. And the same with respect to discriminating them and discriminating their parents in the civil rights to which they are entitled to. By its refusal to grant such children a civil status in Israel, the State is doing a greater injustice. As a result, the inequality expands, and the message passed to the residents and their children that they are not wanted here, is getting even sharper. How does it contribute to the security consideration that the Law is – allegedly – based upon? Only the Respondents can answer.

201. The children of the permanent residents, of whom the status is denied, are sentenced to life of landlessness and uncertainty. What shall happen when they reach the age of 18? Should the validity of the permit to stay that they own, be extended? If yes – until when? Should they be torn apart from their

parents and be exiled from Israel? This way, the Respondents ignore their basic duty to act in accordance with the best interests of the children, precisely at the ages when the relation with the family and the surroundings is so essential for their development. Needless to say, that the right of the children to proper development is violated also by not receiving the social rights, of which they would have been entitled as a result of receiving the status in Israel. Thus, the Respondents are making the parents of the children offenders against their own will, and prevent from them the possibility to provide their children even the most basic needs, as required by the law.

Therefore, for all these reasons, the Honorable Court is requested to issue an *Order Nisi* as requested in the beginning of the Petition, and after having received the Respondents' respond to the *Order Nisi,* make it absolute and order the Respondents to pay costs.

Jerusalem, today June 7, 2007

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(T.S. 50717)