At the Jerusalem District Court **AP 000771/06**
Sitting as High Court for Administrative Affairs

Before: **Honorable Justice Moussia Arad, Vice President** Date:

In the matter of:
1. **_____ Abu Gwella, ID _____**
2. **_____ Abu Gwella (Minor)**
3. **_____ Abu Gwella (Minor)**
4. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

Represented by Counsel, Adv. Adi Landau et al.

The Petitioners

v.

1. **Minister of Interior**
2. **Director of the Population Administration**
3. **Director of the East Jerusalem Population Administration Office**

Represented by the Jerusalem District Attorney

The Respondents

Judgment

General:

1. In the petition at bar, the Petitioners asked the Court to instruct the Respondents to approve a family unification application filed by Petitioner 1 (hereinafter: the Petitioner) for her children, Petitioners 2 and 3 and to grant them a permit for temporary residency in Israel.

Facts and Procedures:

2. The Petitioner married a resident of Ramallah in 1988. The couple's older children were born in the Area and the younger ones were born in Israel. The Petitioners have been living in an apartment in Kafr 'Aqab, inside Israel, since June 2000.

3. The Petitioners' first application to have Petitioner's children registered was denied by the Respondents on August 22, 2001, for failure to prove center-of-life in Israel during the relevant time.

4. On July 30, 2002, the Petitioners attempted to file a new application for the registration of the Petitioner's children in the Israeli population registry under Regulation 12 of the Entry into Israel Regulations 5734-1974. On August 11, 2002, the Respondents responded that since Petitioners 2 and 3 and two of their siblings had been born in the Area and registered in the population registry of the Area, their matter would be considered only as part of a family unification application. At the request of the Petitioners, the Respondents clarified on September 3, 2002 that the application for the registration of the Petitioner's two younger daughters, born in Israel, had been approved and that a family unification application was required for the registration of the remaining four children, born in the Area, Petitioners 2 and 3 included. It was further stated that in light of Government Resolution No. 1813 of May 12, 2002 (hereinafter: the Government Resolution), the Respondents were not accepting new applications for status in Israel from residents of the Palestinian Authority.

5. On December 2, 2002, the Petitioners petitioned this Court (AP 952/02), arguing the Government Resolution that precluded filing new family unification applications should not be applied in their matter.

6. On July 31, 2003, the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 (hereinafter: the Temporary Order) was enacted. The Temporary Order anchored the main elements of the Government Resolution in statute, while stipulating exclusions and transitional provisions in other sections of the statute. One of the exclusions, stipulated in Section 3(A) of the Temporary Order, provides that: "The Minister of Interior… may grant a minor who is a resident of the Area and who is under 12 years of age a permit to reside in Israel in order to prevent his separation from his guardian parent who lawfully resides in Israel".

7. On September 8, 2003, the Court ordered the stay of proceedings in AP 952/02 and on November 5, 2003 the petition was withdrawn at the Petitioners' request. On December 3, 2003, the Petitioners filed a petition to the Supreme Court of Justice, in which they challenged the Temporary Order. Their petition was heard jointly with other petitions addressing the same matter (HCJ 7052/03 **Adalah et al. v. Minister of Interior et al.** TakSC 2006(2) 1754, the petition was dismissed on May 14, 2006).

8. On August 4, 2004, the Petitioners sent a letter to the Respondents, alleging no response had been given to an administrative appeal they claimed they filed in 2001. In response to this communication, the Respondents told the Petitioners on January 13, 2005, that a family unification application may be filed for Petitioners 2 and 3. On March 14, 2005, a family unification application was filed for four of the Petitioner's children, including Petitioners 2 and 3.

9. On August 1, 2005, the Citizenship and Entry into Israel Law (Temporary Order) (Amendment) 5765-2005 (hereinafter: the Amended Law) entered into effect. In Section 2 of the Amended Law, the exclusion to the grant of status to children who are considered residents of the Area was changed. The change was incorporated into Section 3A of the Temporary Order:

> Notwithstanding the provisions of Section 2, the Minister of Interior, using his discretion, may –
>
> (1). Grant a minor resident of the Area who has not reached 14 years of age, a permit to reside in Israel for the purpose of preventing his separation from his guardian parents who lawfully reside in Israel;
>
> (2). Approve the application to grant a permit to stay in Israel by the Commander of the Area to a minor resident of the Area who is over the age of 14 for the purpose of preventing his separation from his guardian

parent who lawfully resides in Israel, and provided that said permit is not extended if the minor does not permanently reside in Israel;

10. On February 13, 2006, the Respondents approved the Petitioners' 2005 application. It was decided that the two younger children would receive temporary residency visas in Israel and Petitioners 2 and 3 would receive DCO permits, pursuant to the Amended Law.

11. On February 20, 2006, the Respondents were sent an administrative appeal against the decision to grant Petitioners 2 and 3 DCO permits only rather than temporary residency visas. In the appeal, the Petitioners argued that their application was filed in 2000 and denied in 2001 and that the denial was appealed, but no response was received. The Petitioners also argued that an additional application for child registration was filed on July 30, 2002. Therefore, according to the Petitioners, the Respondents should have considered the application filed in 2000 according to the law that was in effect at the time, or the application filed by the Petitioners in 2002 according to the law in effect today, after the enactment of the Amended Law. It is noted that Petitioners 2 and 3 were granted DCO permits on April 2, 2006.

12. The current petition was filed on August 3, 2006. In their response to the petition, the Respondents agreed, beyond the requirement of the law, to grant Petitioner 3 the requested remedy, since, at the time of the application to the Minister of Interior in July 2002, Petitioner 3 was still under the age of 12. Therefore, the petition has been rendered moot with respect to his matter, and has been reduced to the matter of Petitioner 2 alone.

Parties' Arguments

13. The Petitioners argue that Petitioner 2, born in November 1989, is entitled to a temporary residency visa in Israel. The thrust of their argument is that the application they made in 2002, when Petitioner 2 was still under 14 years of age, should be considered under the Amended Law. According to the Amended Law, the Minister of Interior may grant a minor resident of the area who is less than 14 years old a residency visa in Israel for the purpose of preventing his or her separation from a parent who lawfully resides in Israel (in contrast, according to the Temporary Order prior to the Amended Law of 2005, the Minister of Interior could grant a residency visa in Israel to a minor only up to age 12). According to the Petitioners, since on the date on which the 2002 application was filed, Petitioner 2 was under 14 years of age, it is possible to grant her a temporary residency visa in Israel. The Petitioners argue that their position that the Amended Law must be applied to the 2002 application is the obvious conclusion, given the purpose of the Amended Law, namely, making the Temporary Order more proportionate and given the Supreme Court ruling in HCJ 4022/02 **Association for Civil Rights in Israel et al. v. Minister of Interior**, TakSC 2007(1) 18 (2007) (hereinafter - **HCJ 4022/02**).

14. The Respondents argue that there is no cause for the Court's intervention in their decision to grant Petitioner 2 DCO permits only. In their response to the petition, the Respondents initially argued that the application that was filed in 2005 (when Petitioner 2 was over the age of 14), was the relevant application in the Petitioners' matter, since in July 2002 it was not possible to file new family unification applications. Following the verdict in **HCJ 4022/02**, in which the Court ruled that in the matters of individuals who tried to file applications in the time between the issuance of the Government Resolution and the entry into effect of the Temporary Order, the provisions of the Temporary Order apply directly, the Respondents abandoned this claim and considered the Petitioners' matter according to the date on which the latter attempted to file the application in July 2002 (hereinafter: the 2002 application). However, the Respondents argue that the 2002 application should be considered according to the law that was in effect at the time of submission. The Respondents' view is that, according to **HCJ 4022/02**, the law in effect at the time of submission was

the version of the Temporary Order that predated the Amended Law. They argue that **HCJ 4022/02** does not support the theory that the mitigating provisions of the Amended Law should apply to those who filed an application three years previously, in 2002. On the day on which the 2002 application was filed, Petitioner 2 was older than 12, and therefore, according to the Temporary Law in effect at the time, it was not possible to grant her an Israeli residency visa. The Respondents were prepared to consider the application of Petitioner 2 also according to the Amended Law, but in reference to her age at the time it was passed (2005), rather than at the time the application was filed (2002). In 2005, Petitioner 2 was over the age of 14 and, therefore, according to the provisions of the Amended Law, she could only receive DCO permits.

The Respondents' position is that if the statutory amendment were to apply to pending applications, then it is the time at which the application is approved, not the time at which it was filed, that would decide its fate. The Respondents consider such a situation to be entirely unreasonable outcome.

Hearing

15. There is no dispute that the application that must be considered with respect to this petition is the 2002 application. According to **HCJ 4022/02**, the provisions of the Temporary Order apply to this application directly. The question on which the parties to the petition are in dispute is whether the 2002 application comes under the original provisions of the Temporary Order with respect to granting status to a child, or under the provisions as amended in the Amended Law. In order to rule on this issue, we must examine the applicability of Section 2 of the Amended Law, which stipulated the changes to the exclusion regarding the grant of status to a child.

16. A new law may have retroactive, current or prospective applicability (PPA 1613/91 **Arbiv v. State of Israel**, IsrSC 46(2) 765 (1992) (hereinafter: **Arbiv**). Retroactive applicability changes the legal meaning or the future legal outcome of events that took place in the past, or situations that were completed in the past (HCJ 7159/02 **Avraham Mordechai v. Assessment Officer Dan Area**, §14 (November 23, 2005); Aharon Barak, **Interpretation in Law** (Vol B, Legislative Interpretation, 1994), 623)). In contrast, a new law has current applicability if it is applied to an existing situation immediately (**IBI Investment House (1978) LTD. V. Elscint LTD.**, §13 (December 14, 2006), (hereinafter: **IBI**)). The application of a new law to new situations or actions that will take place after the law comes into effect constitutes prospective applicability of a law (**Arbiv**, p. 778). The premise in our legal system is that a law applies from the present time onwards, rather than retroactively. This is an interpretative presumption against retroactive applicability (**Arbiv**, pp. 776-777).

17. The Amended Law does not contain transitional provisions and so lacks explicit reference to the question of its temporal applicability. When a statute does not contain transitional provisions, its temporal applicability is determined, with the aid of the rules of interpretation, according to the purpose the statute was designed to fulfill (**IBI**, §14). The purpose of the Amended Law can be devised from the bill's explanatory notes:

> In accordance with Government Resolution No. 2265 of July 18, 2004, and in light of the remarks made by the Supreme Court of Justice in petitions filed regarding the Temporary Order (HCJ 7052/03 **Adalah - Legal Center for Arab Minority Rights et al. v. Minister of Interior** and HCJ 8099/03 **The Association for Civil Rights in Israel v. Minister of Interior**), it is suggested that at the time the Temporary Order is extended, it shall also be amended such that the exclusions to the application of the restrictions stipulated therein are expanded. This expansion shall be made in respect of populations that potentially pose a reduced security threat, according to assessments made by security officials. This is intended to achieve the

objective of the Temporary Order on the one hand, and ensure that this objective is achieved in a more proportionate manner on the other.

The above indicates that the purpose of the Amended Law, as the Petitioners claim, is to make the Temporary Order more proportionate. In view of this purpose, and in the absence of a transitional provision stipulating otherwise, no distinction should be made between applications that were pending at the time the Amended Law was enacted and applications filed thereafter. The conclusion, therefore, is that Section 2 of the Amended Law has current applicability.

18. This conclusion is consistent with remarks made by the Supreme Court in **HCJ 4022/02**. That ruling examined the question of what law must apply to a family unification application that was filed after the Government Resolution was passed and before the Temporary Order was enacted. On this matter, §5 of the judgment states as follows:

> … The matters of individuals who wished to file applications during the interim period, namely in the time that elapsed between the Government Resolution and the entry of the Law into effect, come directly under the provisions of the Law. In its original version, the Temporary Order entrenched the Government Resolution in legislation, placing an almost complete ban on the grant of Israeli status to residents of the Area. **The amendment to the Temporary Order eroded the almost complete ban placed by the Government Resolution, allowing certain exclusions, as detailed above. As such, the amendment introduced an arrangement that somewhat improved the situation of those who wished to file applications such as the aforesaid: While prior to the Government Resolution they had no possibility of receiving status, according to the Citizenship and Entry into Israel Law, status may be received if one of the exclusions stipulated in the Law applies**" (§5 of the judgment, emphasis added, M.A.)

19. Since there is no dispute that the matter of Petitioner 2 should be reviewed in reference to the 2002 application, this application should be regarded as pending, awaiting resolution. Therefore, the application of Section 2 of the Amended Law to this application does not constitute retroactive application, but rather current application of the Law. In light of the conclusion that Section 2 of the Amended Law has current applicability, the 2002 application must be reviewed according to said Section. Since at the time the 2002 application was filed, Petitioner 2 was still under the age of 14, the Minister of Interior may grant Petitioner 2 a residency visa in Israel, pursuant to Section 3(A)1 of the Temporary Order, which was added in Section 2 of the Amended Law.

20. Therefore, the petition is accepted in the sense that Petitioner 2 shall also be granted an A/5 temporary residency visa in Israel.

The Respondents shall pay for the costs incurred by the Petitioners and for legal fees in the sum of 7,500 NIS.

The secretariat shall provide a copy of the verdict to parties' counsel.
Issued today, 23 Av, 5767 (7 August, 2007), in the absence of the parties.

Moussia Arad, Vice President