The Courts

At The Jerusalem District Court **Sitting as the Court for Administrative Affairs**		**Adm. Pet. 752/06**
Before:	**The Honorable Judge Moshe Sobol**	**26 January 2009**

In the matter of:

1. **_____ M'atuk, I.D. number ____**
2. **_____ M'atuk, Jordanian Passport number H ____**
3. **_____ M'atuk, Minor**
4. **_____ M'atuk, Minor**
5. **HaMoked: Center for the Defence of the Individual**
   By attorney Adi Lustigman

The Petitioners

v.

Director of the Population Administration Bureau in East Jerusalem
By the Jerusalem's District Attorney's Office

The Respondents

1. Petitioner 1 is a permanent resident of Israel; she is the wife of Petitioner 2 and the mother of Petitioners 3 and 4 and of a child from a previous marriage. Petitioner 2 is a Jordanian citizen; the husband of Petitioner 1 and the father of Petitioners 3 and 4. Petitioners 1 and 2 were married in the year 2001. Petitioners 3 and 4 were born in Jerusalem in the years 2003 and 2006 and have

lived there ever since they were born, together with their mother, Petitioner 1. Their father, Petitioner 2, first received an Israeli visitor visa in the year 2004. He was later forced to leave Israel at a time when the visa was not extended. On 21 June 2004, Petitioner 1 filed an application for family unification for Petitioner 2. The application was approved on 18 September 2006, following the submission of the petition which is before us (which attacked, *inter alia*, the Interior Ministry's delay in reaching a decision on the application). On 28 September 2006, Petitioner 2 was granted a B/1 visa in the framework of the graduated procedure. According to the decision of the Interior Ministry, the graduated procedure (which lasts five years and three months) commenced only on that day, and would therefore terminate at the end of 2011, at which time Petitioner 2 will be entitled to the status of permanent resident in Israel, subject to the absence of security and criminal preclusions and subject to the continued existence of a marital relation and to the couple's center of life being inside Israel. The Petitioners object to this decision by the Interior Ministry. They claim that since Petitioner 2 was granted a visitor visa as far back as 25 May 2005, a visa which was extended periodically, and since the family unification application was submitted close to a year prior to the abovementioned date, it is this date on which calculation of the term for the graduated procedure must begin, rather than September 2006 when their application for family unification was approved.

2. The Petitioners claim that the visitor visa was granted to Petitioner 2 on 25 May 2005 and was later extended only after the Interior Ministry conducted all of the inquiries necessary for the purpose of approving a family unification application in his matter, i.e. proving the marriage is genuine, having a center of life in Israel and the absence of security and criminal preclusions. In this situation, the claim continues, it is improper to count against Petitioner 2 the Interior Ministry's protracted delay in issuing a decision on the family unification application – more than two years after the application was submitted. Moreover, the refusal to consider the period of time during which Petitioner 2 was granted visitor visas prior to the approval of the application results in a situation whereby Petitioner 2 will receive visitor visas to Israel for a period exceeding 27 months, whereas the first stage of the graduated procedure is itself 27 months during which the foreign spouse receives a B/1 visitor visa. The Petitioners claim that this outcome contradicts Sections 2(a) and 3(2) of the Entry into Israel Law 5712 - 1952 (hereinafter: **the Entry into Israel Law**), according to which the Minister of the Interior may grant a visitor visa for a period of up to three months and extend the visa periodically on condition "**that the aggregate period of extensions shall not exceed two years**". According to the Petitioners, the Interior Ministry has followed this provision over the years and, upon approval of a family

unification application, considered the graduated procedure as having begun on the day the foreign spouse received his first B/1 visit visa. The change in the approach of the Interior Ministry occurred in the year 2003, following the addition of Section 3a to the Entry into Israel Law. According to its title, this Section relates to "**extension of visas and permits of residence for foreign workers and limitations on granting recurrent visas and permits**". According to the words of the Section itself, it is an exception to Section 3(2) of the Law: while the maximum extension period of visitor visas under Section 2(3) is an aggregate of two years, when a foreign worker is at issue, as defined in Chapter Four (1) of the Foreign Workers Law 5751 – 1991, "**The Minister of the Interior may extend a visitor's permit granted to a foreign worker for periods which shall not exceed, together, five years, provided that the first period of extension does not exceed two years and that each of the periods of extension which follow do not exceed one year**". The Petitioners maintain that the Interior Ministry is not entitled to apply this special provision, which is limited to migrant workers, to family unification applications submitted by permanent residents of Israel for their spouses. This reason also warrants beginning the calculation of the term of the graduated procedure on 25 May 2005.

3. To these claims, the Interior Ministry responds by stating that considering the period between 25 May 2005 and the day on which the family unification application was approved as part of the graduated procedure would result in the a reduction of the period and betray the purpose which lies at the foundation of the procedure. The purpose is to conduct ongoing, periodic monitoring of the extent to which the couple, both resident and foreign, live up to the conditions without which a family unification application shall not be approved; i.e. the existence of a genuine and valid marriage in Israel while continuing to have a center of life in Israel and the absence of a criminal or security threat emanating from granting status in Israel to the foreign spouse. Such monitoring is conducted over the course of the graduated procedure, at annual "review stations", whose frequency was established by the Interior Ministry and approved by the Supreme Court. The importance of multiple repetitions of the reviews over the course of the graduated procedure stem, *inter alia*, from the fact that evidence regarding the fulfillment of the conditions for approval of a family unification application are not static but may develop and accumulate over time. Reducing the term of the graduated procedure, according to the Interior Ministry, will reduce the number of "review stations" and diminish the procedure's efficacy. This is so since the inquiries held ahead of granting visitor visas to the foreign spouse prior to the approval of a family unification application are less comprehensive than those conducted at the application approval stage.

The Interior Ministry disagrees with the Petitioners' claim that Sections 2(a)(2) and 3(2) of the Entry into Israel Law apply to them rather than Section 3a of the Law. According to the Interior Ministry, since the visas granted to Petitioner 2 beginning in May 2005 were B/1 work visas, then up to the approval of the family unification application Petitioner 2 was indeed considered a foreign worker whose matters are regulated under Section 3a of the Law, which sets the maximum extension period of a work visa at 5 years.

The Interior Ministry does not entirely deny the possibility of Petitioner 2 having his graduated procedure term reduced. In this context, the Interior Ministry refers to a provision in a procedure which applies in this matter and which empowers the Head of the Population Authority (formerly the Population Administration) "**under particularly extraordinary circumstances presented to him, to reduce any period set forth in this procedure, for reasons which shall be recorded**". The Interior Ministry maintains that submission of an application under this provision is the only route open to the Petitioners for having the term of the graduated procedure reduced. However, since the Petitioners may submit such an application only at the end of the term, the petition brought before the Court in this matter is indeed premature and must therefore be rejected *in limine*. Inasmuch as the Petitioners submit an application for a "deduction of periods" at the end of the term of the graduated procedure, such application will be considered by the Head of the Population Authority in accordance with the criteria detailed in the procedure.

4. I prefer the claims of the Petitioners over those of the Interior Ministry. I shall first address the last claim made by the Ministry of the Interior. If the Petitioners are correct in claiming that the graduated procedure commenced a year and four months prior to the approval of the family unification application, it is obvious that it is impossible to demand that they wait until the "**end of the graduated procedure**". (Section 32 of the response) After Petitioner 2 completes the graduated procedure according to the Interior Ministry's calculation (at the end of five years and three months from the day the family unification application was approved), what the Interior Ministry refers to in its response as a "deduction of periods" will be devoid of any practical significance. This is so since in that situation, when Petitioner 2 submits his application for a "deduction", his status would already be approved for an upgrade to permanent residency, owing to the completion of the graduated procedure, even under the strict approach which came under attack in the petition. The importance of moving up the starting point of the graduated procedure lies before the end of the procedure under the same strict approach, when Petitioner 2 seeks to pass from one stage to another earlier. Such passage is not governed by the Interior Ministry's procedure which necessitates the existence of "**particularly extraordinary circumstances**".

5. The procedure necessitates "**particularly extraordinary circumstances**" for the purpose of granting an application intended to "**reduce any period set forth in this procedure**". The Petitioners, however, are not seeking a reduction of the graduated procedure. The disagreement between them and the Interior Ministry does not relate to the question of the **duration** of the graduated procedure applying to Petitioner 2 – which is agreed to be five years and three months – but rather to the question of the time at which this procedure **commenced**. A ruling on this latter question depends on how events transpired in practice rather than on whether some extraordinary circumstance exists. In practice, events transpired such that as of 25 May 2005, Petitioner 2 received visitor visas to Israel from the Interior Ministry following the submission of an application for family unification for him by Petitioner 1. Since these are extendable visas, indeed their maximum duration is 27 months, as emerges from the combination of Sections 2(a)(2) and 3(2) of the Entry into Israel Law (three months and a further two years). This total period is also the period of the first stage of the graduated procedure, in which the foreign spouse receives a B/1 visitor visa. It follows that at the end of 27 months from 25 May 2005, the Interior Ministry was obliged to upgrade the status of Petitioner 2 to an A/5 temporary permit and begin the second stage of the procedure, this so long as the graduated procedure continued. This is how the Interior Ministry has acted in the past (see the sample notice sent by the Interior Ministry in similar cases – annex P/15 to the petition) and this is how the Interior Ministry must continue to act today.

   The Interior Ministry's claim that Petitioner 2 comes under Section 3a of the Entry into Israel Law, which permits extending a work visa granted to a "**foreign worker**" for an aggregate period of five years cannot be accepted. Section 3a(d) of the Entry into Israel Law clarifies: "**In this Section, 'foreign worker' – as defined in Chapter Four (1) of the Foreign Workers Law**." Chapter Four (1) of the Foreign Workers Law establishes (Section 1m): "**A person shall not employ a foreign worker, unless the person in charge has given written permission for employing the foreign worker by said employer and in accordance with the conditions of the permission**". That is to say: a "**foreign worker**" for the purposes of Chapter Four (1) of the Foreign Workers Law, and, it follows, for the purposes of Section 3a of the Entry into Israel Law, is a foreign worker employed in Israel in accordance to a permit issued by the person in charge of the Foreign Workers Department in the Ministry of Industry, Trade and Labor [hereinafter: MITL]. The Interior Ministry is not claiming that the Petitioner before us has received such a permit from the person in charge. In any case, no claim is made that Petitioner 2 was employed or permitted to be employed in Israel under the visitor visas he was granted by the Interior Ministry.

Indeed, those visas were B/1 visas, that is, temporary work visas. However, the practical significance of such a visa is not a permit to work in Israel but rather a permit "**to enter Israel in order to gain temporary paid employment therein**" (Regulation 5(a) of the Entry into Israel Regulations 5734 - 1974). It is entry into Israel for the purposes of employment which is permitted by force of a B/1 visa and not employment in Israel itself, which requires a permit from the MITL. Only a worker who received a work permit from the MITL is entitled to have his Israeli visa extended for a total period of five years, as stipulated in Section 3a of the Entry into Israel Law. This is not the case of a person such as Petitioner 2, who indeed received visas to **visit** Israel for the purpose of employment, but was not permitted to **work** for an Israeli employer. Such a person is not considered a "foreign worker", and as such, the maximum length of his visitor visas to Israel is 27 months, as stipulated in Sections 2(a)(2) and 3(2) of the Entry into Israel Law. Indeed, the visitor visas were granted to Petitioner 2 in the framework of the Interior Ministry's processing of the application for family unification submitted for him by a resident of Israel by reason of their marriage, and not in the framework of an application for a work visa. Former Interior Minister, Avraham Poraz, addressed this distinction in his appearance before the Internal Affairs Committee of the Knesset during its deliberations on the addition of Section 3a to the Entry into Israel Law. And so he spoke there: "**We are in the territory which is named a visitor visa, which is also slightly skewed, since we should have, in my opinion, created a different category for foreign workers and not call it a visitor visa… these are the routine cases, simple workers doing manual labor, who arrive to work in construction, or agriculture or other jobs. They come for a period of five years… I state, for the record, a foreign worker who marries an Israeli – at that moment, switches to the graduated procedure…**"

6. The purpose of the graduated procedure leads to the same conclusion. The purpose, as explained, is conducting periodic monitoring of whether the couple fulfills the conditions required for the approval of a family unification application: the existence of a genuine marriage; conducting a center of life in Israel; and an absence of a security or criminal preclusion. Inquiry regarding these parameters vis-à-vis the Petitioners was conducted before Petitioner 2 was granted a visitor visa on 25 May 2005. Thus, in August 2004, the Interior Ministry received an investigation which was carried out by the National Insurance Institute in April 2004 regarding Petitioner 1 (section 4 of the response); the position of the police which indicated it had no objection to the couple's family unification application was received on 13 July 2004 (section 5 of the response); and on 7 February 2005, a similar response by the ISA [Israel Security Agency] (ibid) was received. The

granting of the visitor visa to Petitioner 2 some three months after the position of the last institution was obtained (and this too not without a number of reminders having been sent to the Interior Ministry by HaMoked: Center for the Defence of the Individual, Petitioner 5, in the interim) fulfilled, therefore, the requirement for inquiry and monitoring which is included in the graduated procedure. The same applies to the next visitor visa granted to Petitioner 2 on 24 November 2005, at which point, the couple underwent a review in the regional bureau of the Interior Ministry and produced documents relating to the question of their center of life during 2005 and their domicile since their marriage (as stated in the letter summoning them to the review – annex P/12 to the petition; the letter erroneously indicates the date 30 January 2005). During the validity period of this visa, the Police again gave notice that it did not object to the family unification application (on 5 July 2006). The updated position of the ISA was delayed, which contributed to the delay in the Interior Ministry's extending the visa which expired on 8 February 2006. This forced the Petitioners to submit their petition (after many reminders by HaMoked: Center for the Defence of the Individual did not help). After the petition was filed, the ISA produced its position, in which it again stated that it did not object to the approval of the application (on 13 September 2006). A few days later (on 18 September 2006) Petitioner 2 was granted another visitor visa. The family unification application was approved at the same time. Indeed, the Interior Ministry is willing to consider only this final visa (which unlike the preceding visas, was granted for a longer, one-year period) as opening the graduated procedure. Nonetheless, since the preceding visas were also granted in the framework of processing the family unification application submitted by Petitioner 1, and on the basis of inquiries and data collected by the Interior Ministry as regards the conditions required for approval of the application, the purpose of the graduated procedure cannot justify a distinction between the early visas and the visas granted after the petition was submitted.

7. Moreover, justification of the distinction would, in effect, constitute a justification of an unjustified delay by the Interior Ministry in approving the family unification application for more than two years since its submission. Such a delay cannot be explained by waiting for the positions of the Police and the ISA, as the affirmative response of the last of these organs (the ISA) had been in the possession of the Interior Ministry since as far back as February 2005, over eighteen months before the application was approved by the Interior Ministry. The requirement to clarify the couple's center of life and the authenticity of the marriage cannot explain the aforementioned delay either, seeing as the Interior Ministry was in possession of the report of the National Insurance Institute investigation conducted in the matter of the couple and valid for April 2004

ever since August 2004 (two months following submission of the application); this was joined by another investigation report valid for August 2004 (in mid-2005). In addition, the couple's child (Petitioner 3), who was born in Jerusalem in 2003and registered in the Israeli population registry, which also indicates proof of the family's center of life in Israel. Despite all this, the Petitioners were first summoned to a review in the Interior Ministry for 24 November 2005, some eighteen months after the application was submitted. 10 more months elapsed from the review until the approval of the application, during which, the Interior Ministry continued to drag its feet despite repeated written reminders which it received from HaMoked: Center for the Defense of the Individual. In this state of affairs, it is appropriate and fitting not to force the Petitioners to bear the ramifications of the procedure's prolonging, but rather to allow them to reap the benefits of the fact that the basic inquiries required for the approval of the graduated procedure were conducted prior to granting Petitioner 2 with the first visitor visa on 25 May 2005.

Indeed, the Interior Ministry claims in the response (section 42), that a visitor visa which is granted outside the graduated procedure is unlike the same visa which is granted within the procedure with respect to the scope of the inquiries that are conducted. However, this claim is vague and has no basis in the individual parameters of the current case or the concrete reviews which were conducted in the application of the petitioners. The claim also lacks a supporting affidavit as required by law: the affidavit which was submitted in support of the response relates only to the "**facts related in the factual chapter of the State's response**". The factual chapter of the response includes sections 1 to 16 therein. The claim under review is not included in this chapter, but rather in the chapter of the response which analyzes the legal foundations (sections 17 to 42).

8. Considering the aforementioned, the petition is hereby accepted, inasmuch as the calculation of the term of the graduated procedure of Petitioner 2 within the framework of the family unification application submitted for him by Petitioner 1 shall begin on 25 May 2005.

The Respondent shall pay the Petitioner's court fee and legal fees to the sum of 5,000 NIS plus VAT.

Issued today, 1 Shvat 5769 (26 January 2009), in the absence of the parties.

The Court Clerk will provide copies to the parties' counsels.

Moshe Sobel, Judge