The Jerusalem District Court **Adm.Pet. 1039/09**
Sitting as the Court for Administrative Affairs

In the matter of:

1. _____ **Dabet**, ID No. _____
2. _____ **Dabet**, ID No. _____
3. _____ **Dabet**, ID No. _____
4. _____ **Dabet**, ID No. _____
5. _____ **Dabet**, ID No. _____
6. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger - registered non profit organization**

Represented by attorneys Yotam Ben Hillel (lic. No. 35418) and/or Hava Matras-Iron (lic. no 35174) and/or Sigi Ben-Ari (lic. no. 37566) and/or Abir Joubran (lic. No. 44346) and/or Ido Blum (lic. no. 44538) and/or Nirit Heim (lic. no, 48782) and/or Daniel Shenhar (lic. no. 41065)

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The Petitioners

- Versus -

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

Represented by the Jerusalem District Attorneys
7 Mahal Street, Jerusalem , 91010
Tel: 02-5419555; Fax: 02-5419581

The Respondents

Petition for an *Order Nisi*

A petition for an *Order Nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause why they will not reverse their decision to deny petitioner 1's application for a family unification with his spouse, petitioner 2, and approve the application.

The petitioners shall argue within the framework of this petition, that the respondents' decision is flawed – both in light of the concrete circumstances of the case and because they denied the application based on a government decision and on a statutory provision, which themselves should be overturned. We are referring to **Government Decision No. 3598**, dated 15 June, 2008, and to the **latter part of section 3D of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003**, as amended on 28 March, 2007. Within the framework of the petition the petitioners shall indirectly attack these provisions, as much as is necessary for the case that is being petitioned.

The petitioners would like to note that they are aware of the decision of the Minister of the Interior, in terms of which objections about the respondents' decisions on the issue of applications to grant status to a spouse of an Israeli resident shall now be transferred for adjudication by the commissioner for aliens' objections. Nonetheless, the petitioners shall argue that there is no place for transferring their case for adjudication by this commissioner. Firstly, so the petitioners shall argue, they have already forwarded their objection on the government decision, and this took the form of an appeal that they filed on the respondents' decision (see appendix **p/5** below), under the rules that were applicable up until now. This appeal was dismissed, without the petitioners being referred to the objection committee. Because this was so, the proceedings in the petitioners' case have been exhausted, and they are thus entitled to file their petition.

Moreover, the appeal – and in its wake this petition as well – conations fundamental arguments as to the constitutionality of the Government Decision as well as the constitutionality of an Act of Knesset. It involves issues that exceed the jurisdiction of the commissioner (in this matter the honorable curt is referred to the procedure "The Commissioner for Aliens' Objections at the ministry of the Interior", which appears on the website of the Ministry of the Interior). Furthermore, in light of the fundamental arguments raised by the petitioners, the latter dispatched copies of the letter of appeal to the legal advisor of the Ministry of the Interior and to the Attorney general. It is clear that the decision in the appeal (see appendix **p/6** below) was also passed with the knowledge of these factors, something which attests to the fact that the question of the constitutionality of the decision of the present respondents, against which this petition is being filed, was already discussed at levels much higher than those decisions which the commissioner is likely to examine.

Introduction

1. An Israeli resident has filed an application for family unification with his wife, originally a resident of the Gaza Strip, who has lived with him in Jerusalem for the past 14 years. More than two years after filing the application he is informed by the Ministry of the Interior that his application has been refused. The reason: in his wife's identity document it is recorded that she is a resident

of the Gaza Strip. The Ministry of the Interior basing its decision on the Government Decision, which was passed in June 2008, stating that any application to grant status which is filed by a resident of the Gaza Strip or by someone who is merely registered as a resident of the Gaza Strip, despite not living there in practice – is automatically refused.

2. The Government Decision is based, ***prima facie*** on the amendment to the Citizenship and Entry into Israel Law Temporary Order, 5763-2003, (hereinafter: the "**Temporary Order"**), from March, 2007. The amendment denies the possibility of granting even a temporary resident permit to anyone who lives in any area or in any State, in which the security forces have determined that "activities are being carried out that endanger the security of the State of Israel or its citizens". This is to be applied sweepingly without any exceptions.

3. In this petition a number of questions are raised: firstly, may the Ministry of the Interior, currently make decisions such as these which deprive the right of a resident from a family unification with his wife, who is registered as a resident of Gaza, and this despite the fact that the family unification application was filed two years before that Government Decision and almost a year before the amendment to the Law? Are we not dealing with an invalid retroactive application of the provisions of the Law and the Government Decision? Moreover are there no consequences, in this context to the protracted delay in the Ministry of the Interior's examination of the application?

4. Secondly, is the Amendment to the Temporary Order from March 2007 – which sweepingly applies to all residents of those States or areas, in which the security forces determined there are "activities that are being carried out that endanger the security of the State of Israel or its citizens" - constitutional? Does it accord with the general principles of the limitation clause?

5. Thirdly, does the Amendment to the Temporary Order – which even applies to those who are merely registered in their identity document as residents of the Gaza Strip but do not live there in practice – not exceed the provisions of the authorizing Law, which establishes that one may refuse applications of those whose **place of residence** is situated in those areas or States?

The parties to the petition

6. Petitioner 1 (hereinafter: the "**petitioner**") is a resident of the State of Israel, who lives in the Shu'fat refugee camp with his wife, petitioner 2, and their three children, petitioners 3-5. The petitioner has always lived in Jerusalem. Petitioner 2 lived until 1994 in the Gaza Strip. From the day she married the petitioner, petitioner 2 has lived in Jerusalem.

7. There is no dispute that the center of the petitioners' lives is in Jerusalem. The application that the petitioner filed in April 2006 for a family unification with petitioner 2 was postponed until 2008. The reason: "on 15 June, 2008 a Government Decision was passed in terms of which there could be no approval to grant an Israeli resident permit or permit of stay in Israel to anyone

registered in the population registry as a resident of Gaza. Since the applicant is a resident of Gaza, the application is denied."

8. Petitioners 3-5 (hereinafter also: the "**children**" or the "**petitioners' children**") are the joint children of the couple. The children, who were born in Jerusalem in 1995, 1996 and 1999 were registered as Israeli permanent residents and live with their parents in the Shuafat refugee camp. The children study at schools in Jerusalem.

9. Petitioner 6 is a registered non profit organization, whose stated aim is to assist people who have fallen victim to the abuse or discrimination by the State authorities, and this includes protecting their rights in court, whether in its own name as a public petitioner or as the representative of persons whose rights have been harmed.

10. Respondent 1 is the minister authorized under the Entry into Israel Law, 5712-1952 to handle all issues that flow from this Law, including applications for family unifications and for resolving the status of children, which are filed by permanent residents of the State who live in eastern Jerusalem.

11. Respondent 2 is the director of the Israeli population administration. Pursuant to the Entry into Israel Regulations, 5734-1974, respondent 1 delegated to respondents 2 and 3 his powers with respect to the handling and approval of applications for family unifications and for resolving the status of the children, which are filed by permanent residents of the State who live in eastern Jerusalem. Likewise, respondent 2 participates in the procedures for determining policy with respect to applications for receiving Israeli status by virtue of the Entry into Israel Law and the regulations that were issued by virtue thereof.

12. Respondent 3 directs the Eastern Jerusalem district office of the population administration. Pursuant to the Entry into Israel Regulations, 5734-1974, respondent 1 delegated to respondents 2 and 3 his powers with respect to the handling and approval of applications for family unification and for resolving the status of the children, which are filed by permanent residents of the State who live in eastern Jerusalem.

13. For the purposes of convenience respondents 1-3 will hereinafter be referred to as the: "**respondents**".

The case of petitioners 1-5

14. The petitioner and petitioner 2 married each other in 1994. The wedding took place on 21 June, 1994 and on that very day the couple traveled in their car to Jerusalem. It should be noted that during that period residents of the territories were not required to present an Israeli entry permit. The couple's entry into Israel was therefore free of any problems.

15. From the day of their marriage, the couple has lived in the Shuafat refugee camp. The petitioner has lived in the camp since 1966. Prior to that year he had lived in the Old City.

It should be noted further that the petitioner was married in the past to another woman, _____ Dabet, who died on 18 August, 2003.

16. As stated, there is no dispute that the center of the family's lives is located in Jerusalem. Documents attesting to this have been attached to the application for a family unification (see appendix **p/1** below) as well a letter from petitioner 6 dated 19 October, 2008 (see appendix **p/5** below). The children were born in Jerusalem and study there. The National Insurance Institute of Israel has recognized the petitioner and his children as Israeli residents: the petitioner receives income support benefits and child support benefits, and the petitioner and his children are insured with health insurance. The respondent also does not dispute the fact that the center of the lives of the family is located in Jerusalem. Proof to this effect: the respondent approved the registration of petitioners 3-5 as permanent residents of Israel – after they proved that apparently they maintain the center of their lives in Jerusalem.

17. On 27 April, 2006 the petitioner filed an application for family unification with petitioner 2 (application no. 783/06). On the day of filing the application the respondent delivered a letter to the petitioner, stating that the application would not be handled until petitioner 2 changed her personal status in the population registry and in the identity document to "married". The petitioner did so on 29 May, 2006, and informed the office of the respondent of this fact.

A copy of the receipt of filing the application, a copy of the respondent's letter dated 27 April, 2006, and a copy of petitioner 2's identity document, with an updated on 29 May 2006 indicating that she is married is attached and marked **p/1**, **p/2**, and **p/3** respectively.

18. As of the date of filing the application, the petitioner has visited the office of the respondent once a month in order to ascertain with the clerks at the office whether a decision in his application has been made. On every occasion he has been told that his "application is being investigated". It should be noted that aside from the center of life documents and the curriculum vitae form, which were filed at the office of the respondent over the course of July 2006, the respondent has not demanded any further documentation from the petitioners, and has never arranged a hearing for them.

19. At the beginning of September, 2008 **more than two years after filing the application**, the petitioner received the respondent's notice stating that the application was denied. The reason:

> **On 15 June, 2008, a Government Decision was passed in terms of which there could be no approval to grant an Israeli resident permit or permit of stay in Israel to anyone registered in the population registry as a resident of Gaza. Since the applicant is a resident of Gaza, the application is denied**.

A copy of the respondent's letter (hereinafter: the "**decision**" or the "**respondent's decision**") is attached and marked **p/4.**

20. On 19 October, 2008 the petitioners filed an appeal against this decision. In the appeal the petitioners argued, among other things, that the respondent's decision is akin to a retroactive application of Government Decision dated 15 June, 2008 (Decision No. 3598). The family unification application was filed in April, 2006 before the Government Decision was passed, and before an amendment was made to the section of the Law that enabled the passing of such a decision. It involved an invalid decision, which was at odds with the general rule prohibiting a retroactive application. **This is certainly the case, when the Government Decision itself sets out that it is to be applied prospectively.**

21. The petitioners also argued that the latter part of **section 3D of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003**, as amended on 28 March, 2007, is in and of itself, unconstitutional. Under the section it is sufficient that in whatever city, in whatever area or in whatever State there is a carrying out of "activities that are liable to endanger the security of the State of Israel or of its citizens" – in order to cause the automatic denial of any family unification application. The petitioners argued that this involved a sweeping rescinding of the constitutional right to a family life. Since this section does not require that as a condition for a denial, some type of claim must be averred as to the foreseeable and apparent security risk emanating from the applicant for status – we are dealing with a disproportionate violation.

22. Finally the petitioners argued that since Government Decision No. 3598 was based on an unconstitutional provision of the Law it should rightly be dismissed. Moreover, the Government Decision is in contravention of the provisions of section 3D itself, which determines that one may only refuse a family unification application "on the basis of an opinion from authorized security personnel which states that in the **domiciliary State or in the domiciliary area of the resident of the area or of any other applicant** activities are being carried out which are liable to endanger the security of the State of Israel or of its citizens". To those who do not, in practice, live in the Gaza Strip – even if they are registered in the population registry as residents of Gaza (like the petitioner, who has lived in Jerusalem for 14 years) – the section is not meant to apply at all.

A copy of the letter of appeal is attached and marked **p/5.**

23. On 2 November, 2008 petitioner 6 received the respondent's reply to the appeal:

> In response to the above-referenced appeal, I must inform you that pursuant to the Government Decision 3598 dated 15 June, 2008, under section 3D of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003, the Gaza Strip should be viewed as an area in which activities are carried out which are liable to endanger the security of the State of Israel or of its citizens. Pursuant to the aforesaid, the Minister of the Interior has instructed <u>not to approve</u> the granting of

> an Israeli resident permit or permits of stay in Israel under sections 3 and 3 A(2) of the Law to someone who is registered in the population registry as a resident of the Gaza Strip as well as to anyone who lives in the Gaza Strip, despite not being registered as a resident of the Gaza Strip. This guideline applies to the application in question and for that reason it has been decided to deny it (Emphasis original – Y. B.).

The decision on the appeal is attached and marked **p/6.**

24. Our eyes are witness to the fact that the decision on the appeal did not relate to one argument that was raised in the appeal. Instead of this, the decision on the appeal establishes, without going into any detail, that the Government Decision "applies to the application in question and for that reason it has been decided to deny it". In light of this, and since the respondent stands by his denial of the petitioners' family unification application – this petition has been filed today.

The legal framework

25. We shall firstly note that the decision does not point to any reason for denying the application, aside from the claim that the Government Decision dated 15 June, 2008 *prima facie* applies to the case of the petitioners. And there is good reason why this is so. Weighing up the relevant considerations for a family unification proceeding would have brought the respondent to conclude that the application should be approved.

26. The criteria for approving a family unification application are well known. The applicant spouse must prove the existence of a center of life in Israel; the couple must produce evidence with respect to the sincerity of the bond between them; and it is also required that there be no criminal or security impediment against the applicant spouse. (See in this regard, for example: HCJ 7139/02 **'Abbas Basa et al v. Minister of the Interior**, *Piskei Din* 57(3) 481, 485; Adm.Pet. (Jerusalem) 139/07 **Moshe Cohen et al v. Minister of the Interior**, *Takdin Mehozi* 2007(3) 4445, 4452; Adm.Pet. (Jerusalem) 139/07 **Moshe Ro`i et al v. Minister of the Interior**, *Takdin Mehozi* 2007(4) 5999).

27. No one disputes that the petitioners complied with all the conditions for an approval of their family unification application. As was detailed above, there is no dispute over the fact that the center of the lives of the petitioners is located in Jerusalem and that the couple maintain a joint household. In addition, there is no impediment, criminal or security, to approving this application. The respondent does not even claim that there is an impediment of this sort.

28. **In conclusion of this matter: according to the relevant considerations that must be considered in the framework of an examination of a family unification application – the petitioners' application should be approved. The respondent has not shown otherwise, however at present he relies**

upon at the Government Decision dated 15 June, 2008 and has claimed that as a consequence thereof the application should not be approved.

As shall now be demonstrated in detail, there is nothing in the Government Decision which supports the respondent's decision.

The Normative Framework

29. Paragraph 3 of Government Decision 3598 dated 15 June, 2008 establishes:

> Pursuant to section 3D of the Law, and on the basis of an opinion by the authorized security personnel it is determined that the Gaza Strip is an area in which activities are being carried out which are liable to endanger the security of the State of Israel or of its citizens, and therefore the Government directs the Minister of the Interior or someone else authorized to do so, not to approve Israeli resident permits or permits of stay in Israel under sections 3 and 3A (2) of the Law, of someone who is registered in the population registry as a resident of the Gaza Strip, as well as someone who lives in the Gaza Strip even if they are not registered in the population registry as a resident of the Gaza Strip. **It is hereby declared that this section applies from now on** and does not apply in any case to someone whose first application was already approved. (Emphasis added - Y. B.)

The Government Decision is attached and marked **p/7.**

The latter part of section 3D, which was added to the Temporary Order of March 2007, and upon which basis Government Decision 3598 was passed, established the following:

> In this regard the Minister of the Interior may determine that a resident of the area or any other applicant is bound to pose a security risk to the State of Israel, inter alia on the basis of an opinion by the authorized security personnel and which states that in the **domiciliary State or in the domiciliary area of the resident of the area or of any other applicant activities are being carried out which are liable to endanger the security of the State of Israel or of its citizens**.

30. The petitioners' claims within the framework of this petition are the following:

A. In light of the fact that the family unification application was filed on 27 April, 2006 more than two years before the Government Decision and almost a year before the Temporary Order added an amendment that authorizes the Minister of the Interior to pass decisions of the

nature of Decision 3598 (the latter part of section 3 D) – **their application to the petitioners' case is akin to a retroactive application, which has no justification at all in the circumstances of the case.**

B. In the alternative, the petitioners will claim that even if there is no impediment to applying the latter part of section 3 D to the petitioners' case – the latter part of section 3 D is itself unconstitutional. This is so since it does not comply with the conditions of the limitation clause.

C. The petitioners will also claim that Government Decision 3598, since it relies on an unconstitutional section of a Law – is null and void. This decision is also null and void at its very essence since it does not only apply to someone in whose "domiciliary State or domiciliary area activities are being carried out which are liable to endanger the security of the State of Israel or of its citizens" but also to someone who is registered in those areas, even if they do live there in practice. Thus Decision 3598 has deviated from the confines of the authorizing Law, on which basis it was passed.

D. The respondent's decision violates the petitioners' constitutional rights to a family life and disregards other humanitarian circumstances in the petitioners' case.

31. We shall note that despite the fact that the content of section 30 (b-c) above is subject, as a rule, to the authority of the High Court of Justice, the central issue for discussion in the present petition is the respondent's decision according to the Citizenship and Entry into Israel Law (Temporary Order) – an issue that should be brought before the honorable court (see section 12(3) of the **First Annexure to the Courts for Administrative Affairs Law,** 5760-2000). Pursuant to the general principle that states that the "secondary point follows the main one" – the honorable court has subject-matter jurisdiction to hear the other issues that are raised in the petition. It shall be further noted that the authority of the court is not restricted even when dealing with an attack against a section of a Law that is alleged to be unconstitutional. In this regard compare the determination of the Supreme Court in HCJ 8276/05 **Adalah v. Minister of Defence**, *Takdin Elyon* 2006(4), 3675 (paragraph 13 of the judgment), in terms of which the civil courts also have the authority, within the framework of specific actions, to test the claims against the constitutionality of section 5B of the Civil Damages Law.

We shall now discuss the claims at length.

The retroactive application of the amendment to the temporary order and of Government Decision 3598

The retroactive application of legislation – General

32. Section 21 of the Interpretation Law, 5741-1981, which is entitled "time of coming into force" establishes:

> An enactment shall come into force at 00.01 hours on the day of its coming into force

Section 22 of the Interpretation Law, which is entitled "restrictions as to effect of repeal" establishes:

The repeal of any Law shall not -

1) revive anything that is not valid at the time the repeal comes into force;

2) **affect any earlier effect of, or anything done under, the repealed law**;

3) **affect any right or obligation under the repealed law or any sanction for an offence thereunder.**

33. As is well known under Amendment No. 1 to the Temporary Order, from August 2008, permanent residents who are married to residents of the territories, and whose spouses are above the age of 25, may file a family unification application for their spouses (section 3(2) of the Temporary Order). The latter part of section 3D constitutes a repeal of this law, with respect to all those who live in those States or those areas, in which it has been determined that "activities are being carried out which are liable to endanger the security of the State of Israel or of its citizens". This being the case, section 22 of the Interpretations Law applies to our case.

The petitioners filed their application pursuant to the right that vested in them under Amendment No. 1 to the Temporary Order. The respondent's decision, which establishes that the petitioners' application should be denied, therefore repeals the action that was performed under the previous law and harms the petitioners' rights under the repealed law. In the petitioners' opinion one may not repeal the petitioners' application is such a fashion, and to then retroactively apply the amendment to the Law and the Government Decision. Below we shall elaborate upon this issue.

34. Court precedent dictates that one may not establish Laws, secondary legislation or administrative provisions, whose application is retroactive. On the issue of retroactive application of amendments to the Law it has been held that:

> It has not been argued before us, and not even at the court of first instance, that the amendment to the Victims of Hostile Activities Law is of retroactive force, in the sense that it is possible to apply it retroactively to events that happened before the time that it entered into force. **And indeed, the rule is that in the absence of any other provision "one may not ascribe to a substantive statute (as opposed to a procedural statute) any retroactive validity. The reason for such a rule is that we do not ascribe to the**

> **legislator an intent "to deprive a person of a right that already vested in him before the Law was issued" (from the dicta of the honorable (then) Justice Zusman in CA 398/65, 405). This rule became consolidated and was recognized in legal literature, and when it comes to us it has also received constitutional validity in section 22 of the Interpretation Law" (CA 2/84, 730/83-732 Director of Land Appreciation Tax v. Elkoni et al ; Monrobe v. Director of Land Appreciation Tax**, *Piskei Din* 39(3) 169, 176. (CA 383/87 **Shalom Malka v. Ararat Insurance Company Ltd**, *Piskei Din* 42(3), 650, 654) (Emphasis added – Y.B.)

35. **Despite the rule that one may not ascribe retrospective validity to a statute can we still determine that the latter part of section 3 D is meant to apply to the petitioners' application?**

In other words should the provisions of the amended section 3D actively apply so that it includes the petitioners' application, which was filed about a year before the Amendment?

36. In CAA 7678/98 **Pensions Officer v. Doctori et al**, *Takdin Elyon* 2005(2), 3289, 3298 it was held that:

> As a rule, it is within the power of the legislator to determine the scope of validity of a legislative act from the perspective of time, and included in this it may determine, whether explicitly or implicitly its retrospective or active application. (CAA 1613/91, **Arbiv v. State of Israel**, *Piskei Din* 46(2) 765, 775; CrimA 3025/00 **Harosh v. State of Israel**, *Piskei Din Yisraelim* 54(5) 111). The existence of an intention such as this may be derived from the purpose of the Law and from its objects. "The Law will have the same application at the required time for the realization of its object. One may discover the object of the law from its language, its constitutional history, its later legislation and the basic principles of the system" (the **Arbiv** case *Ibid.,* 776). **One of the accepted presumptions that are entrenched in the basic principles of the system is that the object of the Law, generally speaking, is not intended for its retrospective application but looks towards the future, unless in the Law itself there is a contrary provision, whether explicit or implicit** (CA 27/64 **Bader v. The Israel Bar Association**, *Piskei Din* 18(1) 295, 300) (Emphasis added – Y.B.).

37. It has also been held that:

> While it is true that the legislator can and may enact laws with retroactive application, in a **case where the legislator does not reveal, either explicitly or implicitly, an intention to grant the Law retrospective force, we then need to seek a solution in the general accepted rules of interpretation. And these general rules of interpretation which go back to ancient times dictate that one may not ascribe to a fundamental statute retrospective validity… (CA 730/83 Director of the Capital Gains Tax v. Elkoni et al,** *Piskei Din* 39(3) 169, 174). (Emphasis added – Y.B.).

38. It transpires from the cited references that one must examine whether the legislator sought to apply the latter part of section 3D even to those applications which were filed before its amendment. Only in a case where the Law contains an explicit or implicit provision, with regard to the retroactive or active application of the Amendment, then one is to avoid using the accepted rules of interpretation, in terms of which legislative acts do not have retrospective application.

39. **In the present case there is no indication whatsoever that the legislator sought to apply the latter part of section 3D even to an application which was filed before its amendment**. The petitioners shall argue in this case, that the prohibition on retroactive (or active) application of the Temporary Order – as it is also on other laws and policies related to granting status – is for a good purpose. It has its origins in the fact that the procedure for examining applications for granting status oftentimes take a long time (and in the case being petitioned – a bit too long), and therefore special weight is given to the **date of filing the application.** The court insisted that:

> **Indeed the law recognizes the importance of the date on which an application for granting an Israeli resident permit is filed, as opposed to the date in which the decision is given, and this is because, inter alia, it takes into account the prolonged period of the procedure for handling applications of this sort.** Thus, section 4(2) of the Temporary order determines a transition provision which applies to applications that were filed before 12 May, 2002, and which allows the granting of permits of stay in Israel even in those cases where the regular situation would not allow the resident of the area to lawfully stay in Israel under the Temporary Order. (Adm.Pet 8295/08 **Mahahareh et al v. Minister of the Interior** judgment dated 24 November 2008, unreported).

In the same matter it was held:

> **The effective date is the date of filing the application and not the date at the end** of the two years of permit

> a/5 (as the respondent held – Y.B.) **The effective date claimed by the respondent is unreasonable also because according to it the determining factor as to the question whether the petitioner's status will be upgraded will also be dependent on the amount of time the respondent takes to decide the case.** So, for example in the case before us the registration of the petitioner with the status of a/5 was done on 17 January, 2006, which is to say, half a year after the application was filed where for the purpose of filing the application there is a need to arrange for an appointment at the office of the respondent.). **The date which is dependent on the amount of time between receiving the application and up until the decision on it, becomes a chance date for which it is not fitting to use as the effective date** (and compare the dicta of Justice M. Heshin in CA 4809/91 **The Local Council for Planning and Construction v. Moshe Kehati**, *Piskei Din* 48(2) 190, at paragraph 16). (Adm.Pet. 8336/08 **Zahaikah et al v. Minister of the Interior**, judgment dated 2 December, 2008, unreported) (Emphasis added – Y.B.)

40. Therefore the petitioners' position, in terms of which the amendment provision of section 3D of the Temporary Order should only be applied prospectively – conforms to the fundamental principles underlying the examination of applications of this kind. There is therefore no rationale for specifically applying the latter part of section 3D retrospectively, and thereby harming the reliance interest and legitimate expectations of the applicants.

The application of the Government Decision to the petitioners' case – unreasonable in the circumstances of the case

41. The petitioners shall argue that even if it were possible to argue that the Amendment to the Law and the Government decision may be applied to the petitioners' application for family unification, the respondent's decision is unreasonable in the circumstances of the case. We shall explain this.

42. As a rule, according to the procedures of the respondent that have been in place for a number of years, the investigations that the respondent carries out before a family unification application is approved with an initial approval last an "undefined number of months **up until a period of about six months".** (HCJ 3648/97 **Stamka v. The Minister of the Interior**, Piskei Din 53(2), 728, 786; Adm.Pet. (Jerusalem) 757/06 **Suliman et al v. The District Office of the Population Administration**, *Takdin Mehozi* 2006(4), 525). The investigations that the respondent carries out includes investigations of the documents that are filed by the applicants, an application to the security personnel, and an application to the National Insurance Institute of Israel (hereinafter: the "**NII**") upon whose investigations the respondent relies in order to determine whether the applicant maintains the center of life in Israel.

43. As stated the family unification application was filed on 27 April, 2006. On the day of filing the application the respondent delivered a letter to the petitioner, stating that his application would not be handled until petitioner 2 changes her personal status in the population registry and in the identity document to "married". Petitioner 2 did this on 29 May, 2006, and informed the office of the respondent of this fact. It should be noted further that additional documentation attesting to the center of life was also filed with the respondent, in accordance with the latter's requirements, on 5 July, 2006. Over the course of that month the petitioner also filed a "curriculum vitae form" – the form was forwarded to the Israel Security Agency (Shin Bet)[1]. As to the information that was received by the NII in this case, it was not bound to raise any problems, since the NII viewed the petitioner as an Israeli resident as far back as 1967, in the wake of investigations that were carried out in his case from time to time, where it emerged that throughout the years he maintained the center of his life in Jerusalem[2]. The petitioner even receives an income support benefit.

44. Therefore, *prima facie,* already in July, 2006 all the required documents and all the information necessary for approving the petitioners' application was placed before the respondent. This is true with the possible exception of a report of the position of the security personnel. Despite this, the respondents' decision was only passed more than **two years** later. Such conduct is unbecoming of proper administration, and amounts to extreme tardiness when examining a family unification application. As emerges from a court ruling, even where the delay in the respondent reaching a decision is connected to a delay in the security personnel giving their reply – such a prolonged delay in the security personnel giving their reply is akin to an unjustified delay.

So, for example in Adm.Pet. (Jerusalem) 413/03 **Sa'ada et al v. Director of the East Jerusalem Population Administration**, (judgment dated 23 November, 2008, unreported) it was held that a delay of **six months** in an answer from the Shin Bet was unjustified, and this was even under the assumption that the petitioner's matter in that proceeding required this special examination (see paragraph 10 of the judgment).

And so, for example in Adm.Pet. (Jerusalem) 8436/08 **Sabah et al v. Ministry of the Interior,** (judgment dated 14 September, 2008, unreported) it was held that a delay of **nine months** for the respondent to give his decision was unreasonable. This was so even taking into account the fact that the Israel Police delayed their reply to the respondent's inquiry concerning the petitioner in that proceeding for six months:

> From the petitioners' viewpoint, the delay was in the decision to an application which they filed with the Ministry of the Interior alone and not with the Israel

[1] These details emerged from a conversation that the undersigned carried out on 25 November, 2008 with Mrs. Naomi Shaar, the clerk who handled the petitioners' family unification application on behalf of the respondent

[2] This information was relayed to an employee of petitioner 6, Mrs. Liat Negrin in a conversation that took place with Mrs. Etti Ra'anan, an employee of the residency department at the NII, on 25 November, 2008.

> Police, with which it did not file any application. From this viewpoint, the delay does not become any more justified when it tarries at the doorstep of the police and not at the doorstep of the Ministry of the Interior. This is at least the case where the Ministry of the Interior avoided approaching the police and hastening them to give their delayed reply, as was done in the case before us. (paragraph 6 of the judgment).

So too in the case for which Adm.Pet. (Jerusalem) 1173/07 **Khaldun et al v. Ministry of the Interior**, *Takdin Mehozi* 2008(1), 12716 was filed – it was held that a period of time of **14 months** to approve a family unification application was unreasonable:

> Counsel for the respondent have also referred us to a ruling that recognized the great burden that is imposed upon the Ministry of the Interior in general, and on the office of the Population Administration in the eastern part of the city, in particular, and these things are well known. The problem is that I have not seen any justification for a delay in delivering the police's position to the respondent. More than 13 months are required for the police to give its position – "no comment" – and this is an unreasonable time period. The respondent's position that states that the "delay in giving an answer to the application is connected to factors that are external to the respondent, and there is no justification for imposing expenses on the respondent in these circumstances" is not acceptable to me. What is the difference to me if it is the Ministry of the Interior or the Israel Police or some other government agency? The petitioners are forced to file their petition because of an unjustified and long-drawn-out delay to receiving a substantive response to their application (paragraphs 6-7 of the judgment).

45. **It thus emerges from the cited references that a delay of more than two years in giving a decision to a family unification application very much exceeds the bounds of reasonableness, whatever the circumstances happen to be.**

46. **In conclusion of this issue:**

Applying the latter part of section 3D of the Temporary Order and the Government Decision of June 2008 to the petitioners' case is akin to a retroactive application. As we have seen, the Temporary Order, which is worded prospectively, as well as basic principles in the examination of applications to grant Israeli status, lead us to the conclusion that there is no cause for a retroactive application of the latter part of section 3D. Since there is no sign that the legislator sought to endow section 3D with retrospective

force – there is then no rationale to apply this section (and in its wake Government Decision 3598) to the petitioners' case.

However even if it were possible to say that the latter part of section 3D of the Temporary Order was meant to apply also to family unification applications that were filed before its enactment – its application to the petitioners' case is patently unreasonable.

The respondent's conduct in the present case transgresses his obligations to act with reasonableness and fairness. Furthermore, after the respondent delayed the "handling" of the petitioners' application for so long, he now bases himself on the Government Decision – which was passed more than two years after the filing of the family unification application – and applies it to the petitioners' case. We are dealing therefore with conduct which extends to a real lack of *bona fides.*

47. **In the final instance, we shall recall that the decision to deny the family unification application is in contravention of Decision 3598 itself, which establishes that "this section applies from now on". It appears therefore that not only the petitioners are contending that the application of the Law on their case constitutes an invalid retrospective application. The members of the Government, who passed Decision 3598, also determined that it would not be reasonable to apply the Amendment to the Law to someone whose application was filed before the Amendment to the Law.**

The amendment to section 3D - unconstitutional

48. In the alternative and going further than what it is required, the petitioners shall argue that even the contents of the latter part of section 3D of the Temporary Order are unconstitutional. We shall note in this context that currently there are petitions pending before the High Court of Justice challenging the constitutionality of Amendment No. 2 of the Temporary Order (HCJ 466/07; HCJ 544/07; HCJ 830/7; HCJ 5030/07). In the framework of this petition, we shall not refer to the general arguments against the Law, but we shall confine our remarks to the latter part of section 3D, which establishes:

> In this matter, the Minister of the Interior may determine that a resident of the area or any other applicant are bound to constitute a security risk to the State of Israel, *inter alia* on the basis of an opinion issued by the authorized security personnel stating that **in the domiciliary State or in the domiciliary area of the resident of the area or of any other applicant activities are being carried out which are liable to endanger the security of the State of Israel or of its citizens**.

49. Under this section the possibility of granting even a permit of stay to those persons – spouses of Israeli citizens and residents, as well as their children over the age of 14 is rejected merely on the basis of their domicile. The Law

thereby singles out a whole population and imposes upon it a sweeping verdict, without any distinction. It is sufficient that in whatever city, in whatever area or in whatever State "activities are carried out which are liable to endanger the security of the State of Israel or of its citizens" – in order to bring about an automatic denial of any family unification application, including applications that have succeeded to slip through the narrow exceptions of the Law.

50. In this context the petitioners would like to relate to two central questions that emerge from the wording of the latter part of the section, from a constitutional perspective: firstly, is there a requirement that the harm to the constitutional rights is being done "in a law" or "by law"? And secondly, is there a proportionality requirement?

The harm "in a law" or "by law"

51. Section 8 of the Basic Law: Human Dignity and Liberty establishes:

> There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required

52. The requirement of the limitation clause that the harm to the Basic Right may only be done by a law or under a law means that the executive authority may not harm a person's basic right unless it is authorized to do so by law. In his book *Parshanut BaMishpat* [Interpretation in Law], professor A. Barak relates to this matter:

> "By a Law" – this does not mean merely that a Law of Knesset contain this limitation. The requirement does not come to indicate the need for a formal legal source for the limitation of a human right. If this element was satisfied merely by this, it would not need any special requirement. In my opinion it adds and determines that this formal source needs to fulfill additional requirements that are natural and essential for the maintenance of law as a factor which steers human behavior… **legislation which establishes that human rights be limited by the discretion of so-and-so without establishing any yardstick for the exercise of discretion by the so-and-so does not fulfill the minimum requirements of a limitation "by a law" in our legal system. (**A. Barak *Parshanut BaMishpat*, volume 3 – constitutional interpretation, 490-491. (hereinafter: "**Barak**")). (Emphasis added).

Later on it is determined that:

> **According to this approach, the requirement that a violation of a human right be done "by law" means**

> **that the Law itself shall determine yardsticks, within which framework the discretion is exercised** (Barak, 502) (Emphasis added).

53. The significance of the latter part of section 3D is that it grants the Minister of the Interior permission to establish a sweeping prohibition, without exception, to deny the granting of a permit of stay to anyone who is domiciled in those areas or States in which activities of any sort are being carried out "that are liable to endanger the security of the State of Israel or its citizens." This involves granting the broadest form of discretion to the Minister of the Interior to practically remove from the Temporary Order Arrangements wide areas from the total areas upon which the Knesset applied the Order from the outset. This indeed was done through Government Decision 3598, when they deprived anyone who lives in the Gaza Strip or who is merely registered as a Gaza resident from the possibility of receiving a permit of stay. This is in contravention of the regime which applies to the other areas, under the Temporary Order.

54. **It is the petitioners' contention that we are dealing with the granting of sweeping discretion to violate constitutional rights** (as to the matter of the Temporary Order's violation of constitutional rights – see below) **without establishing yardsticks for exercising this discretion. From the aforesaid it emerges that this does not comply with the primary requirement of the limitation clause, in terms of which a violation of human rights shall be "by law".**

In this context the petitioners shall argue (see the following paragraphs 60-65) that the very determination of areas or States, whose residents may not, under any circumstances, file an application for granting status – is invalid, in that it is disproportional. However even if it was proportional, establishing which of these areas – on which a decision will be made that activities of any sort are being carried out "that are liable to endanger the security of the State of Israel or its citizens" – is akin to a "primary arrangement" which should be regulated in primary legislation. Delegating this determination by the legislative authority to the executive authority contravenes the basic rules of Public Law, in terms of which general policy and fundamental yardsticks that underlie action shall be enshrined in primary legislation, whereas regulations, Government Decisions or administrative provisions are only meant to establish "secondary arrangements". (In this matter, see for example: Y. Zamir *Administrative Legislation: The Cost of Efficiency* [in Hebrew] in *Mishpatim* 4 1973; A. Rubinstein *The Constitutional Law of the Sate of Israel* [in Hebrew] 803 (volume 2, 1996); CA 542/88 **Pri HaEmek Farmers' Cooperative Union Ltd. v. Sdeh Yaakov – Moshav Ovdim**, Piskei *Din* 45(4) 529, 552).

55. As to the distinction between a "primary arrangement" and a "secondary arrangement" it has been held that:

> There is no definitive distinction between a primary arrangement and a secondary one. There is a lot of haziness when it comes to determining the borderline that distinguishes these two kinds of arrangements. In a

> similar vein Professor Klinghoffer has noted: "The conceptual border that separates a primary arrangement from a secondary one is not susceptible to a general definition, via an abstract thought process. It is dependent on the nature and specific character of the matter that constitutes the object of the arrangement, and therefore the determination whether a specific arrangement is primary or secondary is only possible through an inductive process, that has to be performed with common sense and with logical judgment". (Klinghoffer, 122) **Indeed the nature of the arrangement, its social ramifications, the degree of harm to the individual's choice – all of these impacts the scope of the primary arrangement and the degree of specificity that is required from it.** (HCJ 3267/97 **Rubinstein v. Minister of Defence** *Piskei Din* 52(5), 481, 518). (Emphasis added).

It has been further held that:

> The answer to the question whether or not a random activity by the Government constitutes a primary arrangement may be found – therefore – in the circumstances of each and every case, paying attention to the nature and character of the matter, while relying, obviously on good and common sense, and logic. Thus, inter alia, we may examine the degree of impact of the arrangement upon the Israeli public, **and it is clear that the consequence of an action that is designed for a narrow and specific purpose – and which by its nature is approximates executive powers – is not the same as the consequences for action that impacts an entire sector – or possibly the society as a whole – which in its essence is much closer to a primary arrangement by its very definition** (compare: the Rubinstein case, 523, 529; HCJ 910/86 **Rusler v. Minister of Defence**, *Piskei Din* 42(2) 337, 505). We shall examine for example the purpose of the action, **if it is designed for a purpose that is publicly controversial – a purpose that is bound to arouse anger and rancor amongst a potion of the people – or perhaps would attract broad public agreement** (Rubinstein case, 527- 528) (HCJ 11163/03 **Supreme Monitoring Committee for Arab Affairs in Israel et al v. The Prime Minister of Israel**, *Takdin Elyon* 2006(1), 2562, 2593). (Emphasis added).

56. According to the parameters that were cited above, it is clear that determining in which areas "activities that are being carried out that endanger the security of the State of Israel or its citizens" – is akin to a "primary arrangement": there

is no dispute that the degree of harm to the rights of Israeli citizens and residents to a family life, because of this decision is great; no one disputes the fact that we are dealing with a determination that may impact a large public; there is also no dispute that we are dealing with a determination that is publicly controversial.

57. Moreover, the Temporary Order itself attests to the fact that we are dealing with a primary arrangement. It is the Temporary Order that established a list of specific States, whose citizens or residents cannot, under any circumstance, receive Israeli status (section 2 and the Amendment to the Temporary Order). Furthermore, the Temporary Order goes into the smallest details as to who may receive status or permit of stay under the Law. The Temporary Order establishes that the male spouse of an Israeli female can, from a certain age, receive a permit of stay in Israel and the female spouse of an Israeli male can, from a certain age, receive a permit (section 3 of the Temporary Order). This is the case also when it comes to the children of residents: children below a certain age can receive Israeli status and children above a certain age cannot (section 3A of the Temporary Order). In those cases the Temporary Order established an exact age, above which the foreseeable danger emanating from an applicant for status is apparently less.

58. If the above is true than, a fortiori, an arrangement, which establishes certain areas, whose residents cannot under any circumstances, and without any relationship to the personal risk foreseeable to emanate from them, receive status, is a primary arrangement, and one that should be established in primary legislation. The Knesset is the body that needs to establish which areas qualify – as it has done with respect to certain States that are listed in the Annexure – and it needs to ascertain that there is no establishment of sweeping arrangements, which so severely violate the rights of Israeli citizens and residents. It has already been held that:

> The basic approach that lies at the heart of the constitutional system in Israel tells us that the legislative branch — the Knesset — is the organ that stands at the top of the pyramid of the branches of government that determine the norms that prevail in Israel, and that the government and its agencies have the function of implementing the norms determined by the Knesset. In the language of the law, it is said that the Knesset is competent to determine, in statutes, 'primary arrangements' — arrangements that determine the main norms and the criteria for implementing them — whereas the government is in principle only competent to determine, in various types of regulations and actions, 'secondary arrangements'. (HCJ 11163/03 **Supreme Monitoring Committee for Arab Affairs in Israel et al v. The Prime Minister of Israel**, *Takdin Elyon* 2006(1), 2562, 2587).

59. **In conclusion of this matter:**

It is the petitioners' stated position that the latter part of section 3D grants sweeping discretion to harm constitutional rights, without establishing clear yardsticks for exercising this discretion. In the present case these yardsticks would mean a clear determination as to the areas, whose residents "are liable to constitute a security risk" (this, even before discussing whether such a determination, in and of itself, is proportional). This aspect does therefore not comply with the initial requirement of the limitation clause, in terms of which a violation of a right must be "by law".

The violation is disproportional

60. As is well known in HCJ 7052/03 **Adalah et al v. Minister of the Interior et al**, *Takdin Elyon* 2006(2) 1754, it was held that the Temporary Order violates the constitutional right to a family life[3] of Israeli citizens and of residents and their constitutional rights to equality.[4] The dispute among the judges – and still today it is not clear whether it has been settled – revolved around the question of proportionality of the violation of the constitutional rights. Nonetheless, what is clear is that at least some of the judges who held that the Temporary Order, in its previous version, was constitutional – said so, inter alia, in light of the fact that the Law establishes exceptions to the complete prohibition within it (see in this regard paragraphs 21-22 of the judgment of Justice Heshin; paragraph 6 of the judgment of Justice Adiel; paragraph 17 of the judgment of Justice Rivlin). Thus, in the opinion of those judges, those exceptions somewhat blunted the sweeping prohibition placed by the Law, and made the Law more proportional.

61. The Temporary order that was not repealed by the HCJ included therefore a certain system of checks and balances. The amended Order allows one to evade this system of checks and balances. The latter part of section 3D – which was amended after the judgment in the **Adalah** case was delivered – established a sweeping prohibition, without any exceptions, on anyone whose domicile was in areas or States in which the Minister of the Interior or the Government decided activities of any sort were being carried out "that are liable to endanger the security of the State of Israel or its citizens." The most serious thing about this as it relates to our case, is that because a mechanism was put in place that allowed the government to ignore those very same checks and balances, the legislative branch's authority was delegated to the executive branch, as was explained above.

A tangible example of the sweeping application of this section is the case of petitioner 2 in the present case. A 52-year old woman who is not in good health and against whom a claim has never been made that she or any of her family members pose a foreseeable security risk, a woman who has lived outside the Gaza Strip for many long years – is prima facie trapped in the network of this draconian section.

62. The constitutional question concerning this sweeping sanction was also raised in the HCJ when it dealt with the constitutionality of the Civil Damages Law

[3] This was held by 8 of the 11 justices of the judicial panel
[4] This was held by 7 of the 11 justices of the judicial panel

(Amendment No. 7) 5765-2005, which established that the State would not be responsible in tort law for damages that were caused in an area of hostilities and which was the result of an action carried out by the security forces. Chief Justice (ret.) Barak related to this matter at length, and also cited from the **Adalah** case in this context:

> **Indeed the proportional method is derived from an individual test of each and every case.** This test shall examine whether a case falls within the definition of a "belligerent act", whatever its official definition happens to be. **It is possible to broaden this definition but one may not substitute this individual investigation with a sweeping denial of responsibility.** I insisted upon this in the Adalah case:
>
> The requirement to adopt measures to minimize the violation frequently prevents a resort to a flat ban. The reason for this is that in most of the cases the employment of a detailed-individualist yardstick achieves the same fitting purpose while employing means whose violation of a human right is lesser. The principle has been accepted into the rulings of the Supreme Court… **a sweeping limitation of a right, which is not based on an individualist examination, is a measure that is vulnerable to the claim of disproportionally. So it was the case with our law. And so it is the case in comparative law"** (paragraph 69 of my judgment). (HCJ 8276/05 **Adalah v. Minister of Defence**, *Takdin Elyon* 2006(4), 3675, 3693) (Emphasis added – Y.B.)

63. Later on Chef Justice (ret.) A. Barak also related to the positions of the other justices in the **Adalah** case:

> Justice D. Beinisch noted that the "**non performance of the individualist investigation and the establishment of a sweeping prohibition grant markedly wide margins to the value of security without suitably balancing it with other values and rights that stand opposed to this value"** (paragraph 11 of her judgment). Likewise Justice A Hayyut noted that "**security needs, with all its importance, cannot render sweeping group prohibitions which are not attentive to the individual as valid"**… there is certainly room for a presumption of dangerousness which the respondents seek to apply to the issue of family unifications between Arab citizens of Israel and residents of the Area. Nonetheless, and in order that the fear of terror does not take over our democratic traits, it is appropriate that this presumption be refutable within the framework of an individualist and detailed test

> which should be allowed in each and every case" (paragraphs 4 and 5 of her judgment). Justice A. Procaccia emphasized in her judgment that "we should be wary of the lurking danger that is latent in the sweeping violation of human beings who belong to a certain community by attaching danger labels without distinction…**we shall protect the security of our lives through individual means of supervision even if this means that we are burdening ourselves with an additional burden (**paragraph 21 of her judgment). Justice M. Naor noted that "**I do not dispute the importance of carrying out an individualistic investigation, in the event that such a thing is possible… as a rule it is acceptable to me that a violation of a basic right is suspect to the claim of disproportionality if it is performed across the board and not on the basis an individualistic basis"** (paragraph 20 of her judgment). Justice A. Rivlin also emphasized the importance of an individualistic investigation, but was of the opinion that in that case this type of investigation would not realize the goals of the Law. Justice A. Levy emphasized in his judgment that "**at the end of the day there will be no escape from converting the sweeping prohibition in the Law to an arrangement, underlying which will be a detailed test.** (Paragraph 9 of his judgment) (Emphasis added - Y.B.).

At the end Chief Justice (ret.) A. Barak noted that:

> The case before us is different to that of Adalah. Nonetheless there are parallels between them. In both cases important human rights have been violated. Amendment No. 7 negates the right in tort, and it is thereby liable to leave the injured party or his family penniless. **In both cases the State elected a sweeping denial** ("the State is not responsible for monetary damages") **over an individualist examination of each and every case** if there is "belligerent activity". (*Ibid., ibid.*) (Emphasis added – Y.B.).

64. Therefore it was held in HCJ 8276/05 that section 5C of the Civil Damages Law does not conform to the proportionality test, because it sweepingly denies the State's responsibility for damage caused in an area of hostilities and which was a result of an action carried out by the security forces. The fitting solution, according to the HCJ would be an individualist investigation of each and every case. Also with regard to the latter part of section 3D one should apply the same rule, and repeal the constitutionality of the section because of its sweeping application.

It would not be superfluous to once again note the explicit dicta of Justice Hayyut in the **Adalah** judgment: "**security needs, with all its importance, cannot render sweeping group prohibitions which are not attentive to the individual as valid"** (section 4 of her judgment).

65. **In conclusion of this matter:**

The dispute with regard to the Temporary Order's violation of the constitutional rights of the Israeli citizens and residents – came before the court for its resolution in HCJ **Adalah**. It was held that indeed the right to a family life and the right to equality of Israeli citizens and residents had been violated. The dispute remains on the proportionality of that violation. As we have seen, on the issue of the latter part of section 3D, the legislator chose an even more harmful measure, and limited the respondent's discretion in such a way that it would not be possible to even grant a permit of stay in Israel to anyone whose domicile is in those areas or States in which it has been decided that activities of any sort are being carried out "that are liable to endanger the security of the State of Israel or its citizens". We are dealing with a sweeping sanction. This measure will always be suspected of a lack of proportionality.

66. We have therefore seen that the latter part of section 3D does not comply with at least two conditions of the limitation clause. Since in the opinion of the petitioners, the respondent's decision should be repealed even without making determinations regarding the constitutionality of this section, the petitioners have not, within this framework, laid out a comprehensive constitutional analysis. Nonetheless in the event that this becomes necessary it shall be done.

Government Decision 3598 – unconstitutional

67. It emerges from the aforesaid that Government Decision 3598 is based on an unconstitutional provision of the law. That being the case the decision should rightly be appealed. However the Government Decision is also unconstitutional at its very essence, since it exceeds the authority that vests in it by law. We shall explain this.

68. The Government Decision instructs the Minister of the Interior "not to approve the granting of Israeli resident permits or permits of stay in Israel under sections 3 and 3A (2) of the Law to anyone who is registered in the population registry as a resident of the Gaza Strip." That means it is sufficient for a person to be registered in the population registry as a resident of the Gaza Strip in order to deny the application of his spouse for a family unification with him.

69. We are dealing with a decision that is in contravention of the provisions of section 3D itself, which establishes that one may only deny a family unification "on the basis of an opinion from the authorized security personnel, in terms of which in the **domiciliary State or in the domiciliary area of the resident of the area or of any other applicant** activities are being carried out which are liable to endanger the security of the State of Israel or of its citizens" (Emphasis added – Y.B.).

70. In the latter part of section 3D the legislator consciously determined not to include the **place of registration** of the "resident of the area or any other applicant" as a basis for denying the possibility of granting a permit of stay in Israel. Instead the legislator selected the "**domiciliary State"** and **"the domiciliary area"** of that **"**resident of the area or any other applicant". It is clear that we are dealing with criteria, underlying which are narrow factual tests, which relate to one question exclusively: **where in practice does that "resident of the area or other applicant live"?**

The Temporary Order therefore requires that there be a link in practice, in reality, between that resident and his domiciliary area. In light of this, applying the latter part of the section on the basis of registration alone constitutes exceeding that authority.

71. The purpose of the Temporary Order (at least its declared purpose) is security related. That being the case one can understand the legislator's choice of the expressions "**domiciliary State"** and **"domiciliary area".** That is to say the legislator established that it would only be possible to deny applications for the granting of status if it is filed by someone, who in practice lives in those places in which "activities are being carried out which are liable to endanger the security of the State of Israel or of its citizens". It would not be possible to refuse someone who is connected through other links, and whose domicile is not really in those areas or States.

72. As stated, the petitioner has lived in Jerusalem for the past 14 years. Certainly Gaza is neither her "**domiciliary State"** nor her **"domiciliary area".** The courts have already held that nothing may be gleaned from the fact of being registered in the territories to prove that the person indeed maintains the center of his life in the territories (see in this regard, recently: AdmA 5569/05 **Minister of the Interior v. Dalal 'Aweisat et al**, unreported; Adm.Pet. (Jerusalem) 817/07 **Ziad Khatib et al v. Ministry of the Interior**, *Takdin Mehozi* 2008(1) 2177).

If these are the determinations with regard to the term "center of life" then one may say a fortiori that one cannot refer to someone who is merely registered as a Gaza resident, and does not live there in practice – as someone for whom Gaza is his **"domiciliary area".** As a result thereof, one may not apply the latter part of section 3D to those persons, including, petitioner 2.

The violation of the right to a family life

73. One cannot overstate the harsh significance that the respondent's decision has had on the lives of the petitioners. At one stroke of the pen petitioner 2 – a wife and mother of three minor children – has become a candidate for deportation. From the day that she received the decision petitioner 2 lives in daily fear, and she almost completely avoids leaving the entrance of her home. Obviously this has most severely affected the petitioners' children as they worry for their personal security and fear the deportation of their mother from their home, and therefore – from their lives.

74. Today, in a period after HCJ 7052/03 **Adalah et al v. Minister of the Interior et al**, *Takdin Elyon* 2006(2) 1754 – no longer is there any dispute that the right to a family life is a basic constitutional right in Israel, and is included in the right to human dignity. This position attracted the overwhelming support of eight of the eleven Justices on the judicial panel in that decision. Chief Justice A. Barak held in paragraph 34 of his judgment:

> Derived from human dignity which is based on the autonomy of the individual to shape his own life, is the subsidiary right of establishing the family unit and continuing one's joint life together as one unit. Does this also lead to the conclusion that the realization of the constitutional right to live together means that there is also a constitutional right in this realization in Israel? My answer to this question is that **the constitutional right to establish a family unit means that there is a right to establish a family unit in Israel. Indeed, an Israeli spouse is vested with this constitutional right, which is derived from the right to human dignity, to live with his alien spouse in Israel and to raise his children in Israel. The constitutional right of the spouse to establish his family unit is first and foremost his right to do so in his own State. A right of an Israeli to a family life means a right to realize it in Israel** (Emphasis added– Y.B.).

75. With regard to the constitutional right to a family life it was recently held that :

> The (justified) reference of the Minister's Decision to the right of the petitioner to maintain a family life in Israel with his wife and daughter, refutes in essence the argument that appeared in the letter of reply…in terms of which family unification is not a vested right but is founded exclusively on humanitarian grounds. This type of argument could have been argued in days gone by, before the rulings were passed in the **Adalah** case and in HCJ 2028/05 **Amarah v. Minister of the Interior**…**today, after these judgments said what they said, it is clear that not only is the right of a citizen or a resident of the State that his spouse or child live together with him in Israel considered a vested right, but the status of this right is that of a basic constitutional right to that core of rights associated with the basic constitutional right to human dignity** (Adm.Pet (Jerusalem) 310/07 **Mugrabi v. Minister of the Interior**, *Takdin Mehozi* 2007(4). 12341 (2007), at paragraph 5 of the judgment) (Emphasis added– Y.B.).

76. The status of this right to a family life being a constitutional right, has direct ramifications for the possibility of harming the right and denying a family unification application that is filed by a citizen or a resident of the State for his spouse or children. The determination of right to a family life as a constitutional right brings with it the other determination that any harm to this right need to be done pursuant to the Basic Law: Human Dignity and Liberty – and only out of very grave considerations. This would have to be based on a solid evidentiary basis which attests to such considerations. This determination imposes upon the respondent the heightened obligation to be extremely scrupulous in ensuring that there is an administrative mechanism, which in turn will ensure that the exercise of its authority to deny family unification applications that are brought before it, authority that harms protected

constitutional rights, will only be done in cases in which there is full justification for doing so.

Can the respondent's decision, which so mortally harms the petitioners' right to a family life, withstand these conditions? Can the decision, which is entirely based on the fact that petitioner 2 is registered in the population registry as a resident of Gaza, constitute a consideration that may be pitted against the right to a family life and against the harsh results of its violation in the present case? From what has been detailed above, it emerges that the answer must be in the negative.

77. Furthermore, the respondent's decision ignores other claims by the petitioners, which were already raised in the letter of appeal that was sent to the respondent. As stated, Jerusalem constitutes the center of the lives of the petitioners, for all intents and purposes. The petitioner has lived in Jerusalem for more than forty years. Petitioner 2 has lived here for the past 14 years. Here is their home. They have a very loose connection to the territories. Ever since 1994, the year that petitioner 2 left the Gaza Strip, she has not returned to it, not even for a visit. She communicates with her family members who remained in the territories via the telephone, once every few months. The petitioners also have no connection to any other State. It emerges from the aforesaid, that in practice the couple have nowhere to go.

78. Moreover, the petitioners are not youngsters. The petitioner is a 60-year old man and petitioner 2 is 52 years old. In addition, the couple suffers from complicated health problems. The petitioner suffers from hypercholesterolemia**,** a high level of triglycerides in the blood and from a neural sensory loss of hearing. Petitioner 2 suffers, inter alia, from high blood pressure, diabetes and lower back pains. In addition it is very difficult for petitioner 2 to walk and she requires an operation to her legs.

Documents showing the heath situation of the petitioners were attached to the letter of appeal.

79. It emerges from the collective of presented facts that the health situation of the couple, their age, and their connection to Jerusalem – do not allow them to recreate their lives in another place. As to petitioner 2, even in Jerusalem – her own city, her life is not a real life. The fact that petitioner 2 does not have permits of stay in Israel exposes her to the dangers of detention and even deportation. As a result, petitioner 2 almost completely avoids leaving the home.

80. **And it bears emphasizing: The respondent claims that the purpose of the Temporary Order is security related. This begs the question: How was this purpose given expression, when the matter involves a 52-year old woman, with a not insignificant number of health problems, who has already lived in Jerusalem for 14 years, and neither against her nor against her family has it ever been claimed that they pose a security risk? How was this purpose given expression when we are dealing with a woman whose only link to the Gaza Strip is her registration in the population registry?**

Summary

81. **For all these reasons the honorable court is requested to issue an order nisi as requested at the beginning of this petition, and after receiving the respondent's response, make it absolute. Likewise the court is requested to order the Respondent to pay the petitioners' costs and attorney fees.**

Jerusalem, 12 January, 2009

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Adv. Yotam Ben Hillel

Counsel for the petitioners

[T.S. 57899]