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At the Jerusalem District Court **AdmA 8289/08**

In the matter of:

1. **__________ Fasfus, Identity No.________**
2. **__________ Fasfus, Identity No.________**
3. **__________ Fasfus, Identity No.________**
4. **__________ Fasfus, Identity No.________**
5. **__________ Fasfus, Identity No.________**
6. **__________ Fasfus, Identity No.________**
7. **__________ Fasfus, Identity No.________**
8. **__________ Fasfus, Identity No.________**
9. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Saltzberger (R.A.)**

Represented by attorneys Yotam Ben Hillel (lic. No. 35418) and/or Yossi Wolfson (Lic. No. 26174) 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 Haim (lic. no, 48782)

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

The Petitioners

- Versus -

1. **Minister of the Interior**
2. **The Director of the Population Administration**
3. **The Director of the Population Administration Office, eastern Jerusalem**

Represented by the State Attorney's Office, 29 Salah a-Din Street, Jerusalem
Tel: 02-6466590; Fax: 02-6466655

The Respondents

Notice of Appeal

A notice of appeal is hereby filed against the judgment of the Jerusalem District Court, sitting as the Court for Administrative Affairs (the honorable Justice D. Heshin, deputy Chief Justice) in Adm. Pet. 8121/08, that was given on 24 July, 2008, and which was served on the petitioners on 27 July, 2008.

A copy of the judgment of the court of first instance is attached and marked **App/1.**

The honorable court is requested to overturn the judgment of the court of first instance, which dismissed the administrative petition. The honorable court is requested to order the respondents to approve the application by petitioner 1, who is a resident of Israel, for family unification with her spouse, petitioner 2 (hereinafter: the "**petitioner**"**)**, and to restore the petitioner's status as an Israeli temporary resident.

1. **Is the Minister of the Interior authorized to tear apart the family unit because of a risk that does not flow from one of the family members but from a half-brother of one of the spouses, where no one disputes that aside from the formal family relationship there is no connection between the spouse and those half brothers? This is the legal question which lies at the core of the current appeal.**

<u>The facts as they were ruled</u>

2. The main facts of this case were raised in the judgment of the honorable court of first instance:

    A. Petitioner 1 and the petitioner are spouses who have been married to one another for seventeen years, and they have six children (petitioners 3-8)

    B. All six of the children belonging to the couple were born in Israel. All six children of the couple are Israeli residents and are registered in the Israeli Population Registry.

    C. The petitioner was originally a resident of the territories. Petitioner 1's application to grant him Israeli residency status has been handled by the respondents for already 14 years, ever since it was filed in 1994.

    D. The family unification application was approved with a preliminary approval. As a result of this the petitioner at first received CLA permits, and later on, as of the beginning of 2001, he received a temporary residence permit which was classified as A/5.

    E. At the end of 2006, petitioner 1 requested that the residence permit of her spouse be extended yet another time, as it had been extended many times in the past. However instead of extending the permit, the entire application was dismissed. The grounds for this dismissal were that the brothers of the petitioner, Mr. Fasfus, were active in a terror organization and were involved in violent activity.

F. Only in the wake of continuous legal proceedings did the respondents deem it appropriate to elaborate upon their reasons, and to point out which of the petitioner's brothers they were referring to in their notice of refusal, and what had been ascribed to those brothers.

G. The "brothers" that we are dealing with are in fact only half brothers – sons to the petitioner's father, but from a different mother. However most importantly: as the honorable court of first instance, which delved into the classified information, notes, the **respondents do not deny that the petitioner has no contact whatsoever with these individuals.**

H. At a relatively late stage in the proceedings the respondents argued that there is negative security material also against the petitioner 1, which material did not underlie the dismissal of the application.

The Grounds for the appeal

Information which relates to the half brothers in the absence of any connection between them and the petitioner

3. The court of first instance erred when it ruled that the respondents were permitted to tear apart a family because of a risk that did not emanate from the petitioner but from other persons – persons with whom he has had no contact whatsoever aside from a blood relationship since they are his half brothers: brothers from the father's side but not form the mother's.

And this is what was said in the honorable court of first instance:

> An examination of the circumstances of the case, against the backdrop of the unconcealed and classified information that was presented before me, leads me to the conclusion that no cause has surfaced justifying an intervention with the respondent's decision. This is the case, even if the petitioner and his family have lived in Israel over the course of at least a decade, and **despite the claim of the petitioner, which was not refuted (paragraph 61 of the replication) that he does not maintain any contact with his half brothers. Firstly, […] secondly, under these circumstances it is not possible to deny the potential risk to the security of the State and the public, which flows from the mere residence of a man whose family members have ties to hostile agents; as was said in the dicta of Chief Justice Barak in the Amarah case: "In the harsh security reality in which Israel has been placed at this time, 'broad security margins' are required when resolving the Israeli status of a resident of the region" (*Ibid., ibid.)***

That is to say that the risk is entirely hypothetical and theoretical. It is based on (partial) blood ties and nothing further**.**

4. It would not be belaboring the point to note that the petitioner's claim, which was not denied, was not that his connection with his half-brothers was very weak, but rather that the connection had for many years been intentionally severed. **The petitioner's father married four wives, who bore him 21 children. Three of these have been associated with a security risk.** These three are also brothers from the same mother. **The petitioner and his close family signed a document renouncing these brothers, in every aspect.** This was in light of those half brothers' involvement in violent disputes in their home village, in addition to their harassing of the village inhabitants. The petitioner has intentionally kept away from these half brothers, even from their family celebratory events. Thus, for example two of these half brothers recently entered into the covenant of marriage – and the petitioner and his family members were not present at the wedding, and neither were they invited thereto.

5. In its relinquishment of its demand to show an actual connection with the family relative, which thus also creates a tangible risk on the part of the spouse of the Israeli resident, the honorable court deviated both from the legislator's intent and from court rulings in this matter.

6. In the official annotation to Amendment No. 1 to the Temporary Order (the Amendment in which was added the reference to the family members of the summoned party) it is said in relation to section 3D:

> In light of the expansion of the safeguards that are proposed in section 2 of the Bill, and for the sake of preventing a security risk as a result thereof, it is proposed that the Temporary Order establish the principle, which has been recognized in court rulings, that a security risk which flows from a family relative **in the first degree** of the applicant for family unification in Israel of or the applicant for another permit of stay, **could prevent** the granting of a permit of stay in Israel to that resident. This is in light of the professional assessment of the security personnel which states that the **connection** between the resident of the region and the aforesaid family member, from whom emanates the security risk is bound to be exploited, as has been proven on more than one occasion in the past. (Bills 173, 7 Iyar 5765, 16 May 2005, page 626). (Emphasis added – Y.B.)

7. The explanatory notes to Amendment No. 1 to the Temporary Order (and an almost identical version to this appears in the proposed Amendment No. 2) therefore emphasizes the issue of a **connection** between the summoned party and the family relative. That is to say, that it is anticipated that only when there is an actual connection (and not one that is "on paper" alone) – will it be possible to deny the application of the summoned party. (And note well: even

where this is indeed an actual connection, this connection **could** only **prevent** the granting of the permit). That being the case, the legislator sought to avoid a situation in which a denial of a family unification application is **automatically** accepted, merely because of the 'on paper" family relationship.

8. The court ruling adopts the principle that states that there needs to be an actual connection and it must be claimed that this family connection has the potential of causing tangible risk. Thus, for example in Adm. Pet. 796/03 the court reached the conclusion that a security risk from the summoned party was only foreseeable after the court had been presented with classified information as to the question of the nature of the connection between the summoned party and his brother, who it was alleged was a senior Hamas activist, and as to the frequency of the meetings between the two (see Adm. Pet. 796/03 **Mimi et al v. Minister of the Interior**, *Takdin Mehozi* 2005(1) 7716, paragraph 18 of the judgment). (For a similar case see: Adm. Pet. 683/07 **Shavir et al v. Ministry of the Interior**, *Takdin Mehozi* 2007(4) 8546).

9. A similar case to ours, in the sense that there also a family unification application was denied because of the brother of the applicant, who had been convicted of involvement in a terror attack and who had had been incarcerated for many years, is the case in the framework of which Adm. Pet. 460/07 was filed. In that case it was held that there is a foreseeable security risk emanating from the applicant because of the fact that she maintained contacts with that same brother and visited him in jail over the course of the years, including recently (see Adm. Pet. 796/03 **Awisat et al v. Ministry of the Interior**, *Takdin Mehozi* 2007(3) 4306). As stated the applicant does not maintain any contact with his half brothers and when they were behind bars – he never visited them at their place of incarceration.

10. The respondents' position is that the public security risk arises from the concern that aid, knowingly or unknowingly, will flow from the applicant to a family relative in the first degree, who seeks to harm the security of the state. As stated, in the case before us it is not possible to point to any connection between the petitioner and his half brothers. How therefore would the petitioner assist them, 'knowingly or unknowingly', if he does not talk to them, if he does not meet with them, and if he has completely renounced them?

11. And even if in the present case the partial blood relationship, which is an empty shell, is sufficient to tear up the family – the implications for such a thing is that no discretion was exercised, and the denial was issued automatically.

12. The grounds that the court of first instance used as support for their stated ruling, in terms of which today's realities require "broad security margins", do not hold up in the case before us. First, it is not at all clear whether the dicta of Chief Justice Barak in **the Amara case** (HCJ 2028/05 **Amara et al v. Minister of the Interior et al**, *Takdin* Elyon 2006(3) 154), which was cited by the court of first instance is relevant to our case. Since in the **Amara** case the applicant did not claim that ties had been cut off between her and her family relatives, because of which the family unification application was denied.

The very dismissal of a person's application because of a risk that flows not from him but from another person with whom he has a connection is a most severe exception to the principle of individual responsibility. Already here, in the words of the retired Chief Justice, "broad security margins", were used. Broadening these security margins even further, even in situations in which it has been proved that there is no actual connection and the risk may be confined to the slimmest hypothesis – such a broadening deviates from the security purpose and its harm to human rights is over and above that which is necessary. This was also not done in the **Amara** case.

13. Moreover in the judgment in the **Amara case**, Chief Justice Barak cites his own dicta from the HCJ **Adalah case**. Amongst other things, Chief Justice Barak refers to paragraph 113 of his judgment in the **Adalah case**. In that paragraph Barak noted the importance of an individualized test, which is meant to be carried out on anyone who applies for Israeli status:

> …in these situations the disproportionateness of a comprehensive prohibition is very conspicuous. Why should an Israeli couple not be allowed to maintain a family life in Israel with his alien spouse, where an evenhanded investigation concludes that the alien spouse does not constitute a security risk, and where there is only a small risk that things will change in the future? Even if the onus of proof has been transferred to the shoulders of the Israeli spouse, why should we prevent him the opportunity to prove that that onus has been discharged?

14. In our case the petitioners laid out the series of facts before the court of first instance, and no one disputes that they discharged the onus of establishing that there is nothing in the information that may be ascribed to the half brothers that shows any foreseeable risk emanating from the petitioner.

The court of first instance disregarded this, and thereby erred.

<u>The petitioners' interest after years of residence in Israel by permit</u>

15. The honorable court of first instance also erred by not attaching appropriate weight to the fact that the petitioners' family and their children resided in Israel over the course of the years, that the family unification application that was filed fourteen years ago was approved, and that the petitioner received Israeli resident permits and thereafter a residence permit that was renewed again and again. Is it not obvious that the law pertaining to refusing the granting of a new permit is not the same as the law pertaining to refusing to extend an existing permit?

16. And these are the words of the court in this matter:

> An examination of the circumstances of the case against the backdrop of the unconcealed and classified information that has been presented before me, leads to

> the conclusion that there is no cause for intervening in the respondent's decision. This**, even though the petitioner and his family lived in Israel for at least one decade, […]** firstly**, at the time of granting the permit of stay to the petitioner it was made clear to him that its validity was conditional upon the fact that no criminal or security impediment would be created by his staying in Israel, so the mere fact that he resides in Israel is insufficient to justify his continued stay there despite the security risk that flows from it. (p/1)**

17. The court of first instance itself accepted the position of the petitioners, in terms of which the relevant section pertaining to their case was section 4(1) of the Temporary Order, a section that is concerned with extending existing permits. This section refers to section 3D, which is concerned with the refusal of applications because of information that pertains to family members. However while section 3D adopts categorical language ("a permit of stay in Israel or an Israeli residence permit shall not be given") section 4(1) addresses the risk that flows from family members as just one of the considerations amongst many other considerations ("the Minister of the Interior or the Regional Commander, as the case may be, may extend the validity of an Israeli residence permit or of a permit of stay in Israel, which is in the possession of a resident of the region on the eve of the commencement of this Law, taking into account, among other things, the existence of a security impediment as stated in section 3D").

18. The honorable court of first instance thus erred in that it held that it was sufficient that the respondent had reserved for itself the right not to extend the permit, to nullify any reliance interest of the petitioners. Is it indeed sufficient to cancel out the relevance of many years of granting permits?

<u>Is there indeed a risk in permitting thepetitioner's residence in Israel?</u>

19. The petitioners' family unification application, which was already approved in 1999, was refused solely because of the information pertaining to the three half brothers of the petitioner.

20. Nonetheless, at a much later stage (in the State's Reply to the Petition to Disclose Evidence, dated 23 September, 2007) it was mentioned for the first time that of late "the respondents have gathered additional information on the petitioner's own connection to terror activities." (Paragraph 35 of the Reply)

    However even this claim does not ascribe any risk to the petitioner himself. All that emerges from this claim is that the petitioner has an unclear connection to "terror activities", about which we have not been provided with the slightest information

21. Within the framework of the petition, the petitioners have claimed that this position of the respondent is difficult to understand. According to the respondent the material that links the petitioner himself to terror activities, was

received in the period between 20 August, 2007 (the date when the first privilege certificate was issued) and 23 September, 2007 (the date of filing the Reply to the Petition to Disclose Evidence). What happened therefore over the course of that month (or a little while before then, close in time) which led to the “accumulation” of evidence that suddenly links the petitioner to terror activities?

22. Prima facie, there is no reason that precisely now they would receive incriminating security evidence against the petitioner. As aforesaid, the first petitioner has taken part in the phased process as far back as 1999, and as of the year 2001 he carries a temporary identity document. In the course of this period, aside from bureaucratic delays on the part of the respondent’s office, his applications for an extension of the validity of the permits that were given to him were always approved – without any problems. There is a presumption by the respondent and by the security authorities that each of these times a comprehensive investigation was done with respect to the petitioner. Even after these repeated and comprehensive checks never once was there a claim against him that there is any foreseeable risk emanating from him. And behold, within the space of one month, when the respondent and the security authorities found themselves in a defensive position vis-à-vis their decision to dismiss the application, precisely then new information emerges? Indeed it is clear that this period is probably the least likely one in which the petitioner would involve himself in activity which he has never been involved with before, an activity that would endanger everything he had built his life on, over the years.

23. It should be noted that from the experience of petitioner 9, the respondent has the habit occasionally of attaching to security material that already exists on a person or on his family member additional weaker material against the person himself or against another family member. This, in order to “strengthen” the exiting material. Is it possible perhaps that the respondent was also of the opinion that it did not have tangible information creating a connection between the petitioner’s half brothers and the petitioner himself, and therefore it added “bonus claims” that pertained to the petitioner himself? As stated, the petitioner himself never presented security problems. **In light of these strange developments, the petitioners raised the following question: is it possible that the information ascribed to the petitioner himself is in fact a variation in one way or another of the information that already exists with respect to his half brothers?**

24. In its judgment the court of first instance noted these strange developments raised by the petitioners in this context (see paragraph 4 of the judgment). However, the court did not discuss the question of the information ascribed to the petitioner himself, but only noted that such information exists (see paragraph 10 of the judgment). This being the case, it was difficult for the petitioners to contend with the nature and strength of the information ascribed to the petitioner himself. Nonetheless the respondents’ conduct and the court’s decision itself goes to show that the information ascribed to the petitioner himself is not very significant, and was only cited with the aim of “strengthening” the information ascribed to the half brothers:

A Already in the respondent's reply to the petitioners' application to withdraw the first petition (the reply is attached to Adm. Pet. 8121/08 as appendix p/20), it was stated in paragraph 8:

> The security impediment upon which the administrative decision was accepted referred to the brothers of the petitioner and to their incriminating security activities. We shall explain that in the course of handling the administrative petition, updated negative information was received by security personnel, which is <u>ascribed to the petitioner himself</u>. The respondents' decision in the family unification application was not based on this information, at the outset; however it is clear to all that this information <u>strengthens</u> the respondent's decision (Emphases original – Y.B.).

And in paragraph 10 of that reply it is stated:

> **The security information ascribed to the petitioner does not constitute a basis for making administrative decisions**, and therefore there is no need for filing a new petition on this issue… (Emphasis added – Y.B.)

B Thus this was also the case in the respondent's reply to the decision of the court of first instance to grant a temporary injunction in the second petition (this reply is attached to this appeal as appendix app/4). In paragraph 8 to this reply it was stated:

> The petitioners and their counsel are well aware that the **information directly linked to the petitioner did not constitute a basis for reaching an administrative decision …** (Emphasis added – Y.B.)

C Within the framework of the second petition the court of first instance issued a temporary injunction which instructed the respondents to avoid deporting the petitioner from the country. In light of the respondents' application, a hearing on the application for a temporary injunction was brought forward and was joined with the hearing on the petition itself. The problem was that even by the end of the hearing the temporary injunction was not rescinded. **Moreover in the judgment on the petition the court of first instance ordered that the temporary injunction continue to stand in its present form for a period of 45 days from the date that the judgment was given.** (See paragraph 11 t the judgment).

It would be an understatement to note that even the court of first instance held that the foreseeable risk emanating from the **petitioner himself** was not exactly of the gravest nature.

25. **Emerging from the above excerpts, is that both according to the claims of the respondents and according to the impression of the court, at the center of the claims against the petitioner was the information ascribed to the half brothers, and not the information ascribed to the petitioner himself**. It appears that the information ascribed to the petitioner himself is at best marginal and it not at all clear whether we are not in fact dealing with a variation of one sort or another of the information that existed in the matter of his half brothers. Despite this, and despite the vigorous denials of the petitioner with respect to any connection with terror activities, the court of first instance leave in place this surplus of change in its judgment, and thereby erred.

<u>The violation of the right to a family life</u>

26. No one disputes that the respondent's conduct immediately and mortally harmed the rights of the petitioners to live together and to maintain a family unit as they had chosen. The harm is especially severe, in light of the many years of living as a family in Jerusalem, in light of the family unification application that is still pending since 1994, and in light of the fact that as of 2001 the petitioner has also held a temporary identity document. In the course of this period they bore their children, Israeli residents from the womb and from their birth. The immediate ramifications of this decision are the uprooting of an entire family, against their will, and their expulsion abroad.

27. When these are the ramifications of a decision by an authority, one should, at the outset, approach an examination of this application with maximum caution, and certainly one should take into account the right of the petitioner and her children to a family life, which nowadays has attained the status of a basic constitutional right, which is included in the right to human dignity (HCJ 7052/03 **Adalah et al v. Minister of the Interior et al** *Takdin Elyon* 2006(2) 1754) (hereinafter: the **Adalah case**) The court of first instance recognized this, and held in paragraph 9 of the judgment:

> However because of the importance of the right to family life, which was recognized by the majority of the justices of the Supreme Court as a constitutional right derived from the right to dignity (see HCJ 7052/03 **Adalah - Legal Center for Arab Minority Rights in Israel et al v. Minister of the Interior et al** (unreported 14 May, 2006), it was held in a ruling that the determination of the Minister of the Interior by virtue of section 3D of the Law needs to be proportional and must conform to the specific circumstances of each and every case. It has also been held, that before deciding an application, he must examine the existence of an actual or potential risk on the part of the spouse, which is based on precise information, which in turn is based on an appropriate factual infrastructure, which refers to the persons in question. (see **Amara** case above)

28. However despite these clear dicta, when it came to examining whether the respondent fulfilled its obligation to test the "existence of an actual or potential risk on the part of the spouse" – the court of first instance chose not to intervene, and thereby erred. From what has been detailed above, the claim with respect to the foreseeable risk that emanates from the petitioner amounted, in the main, to information that concerned the half brothers, with whom the petitioner has no connection whatsoever. **An appropriate balance between these claims and between the undoubted harm to the petitioner's right to a family life – is meant to lead the respondent to a decision that will add to and approve the family unification application.**

Summary

29. The respondent's decision has yielded harsh and immediate results. The respondent's decision does not only deny the petitioner his status, for which he toiled many years, but it also places the whole family into complete chaos since the implication is very simple: expulsion.

30. When a decision of an administrative authority has such harsh ramifications, it is only proper that it be made after exercising strict discretion. This was not the case when it came to the petitioners. The respondent, as is its wont, automatically accepted the recommendations of the security personnel, and it appears that it did not balance these recommendations at all with the foreseeable results of the decision. It thereby abused its powers.

31. Even when we examine the recommendations on their merits, it appears that there is nothing concrete in them. Those half brothers of the petitioner, because of whom the application was denied, do not maintain any type of contact with the petitioner. The petitioner, for his part, does not maintain any contact with them. In the absence of any connection, one may not deny the family unification application. Certainly when it involves a family which, for many years established its life here, a fact that merely intensifies the harsh ramifications of the decision.

32. In light of the fact that there was never a claim against the petitioner that he himself had constituted a security risk, the claims that were "added" later, in terms of which the petitioner himself was also "connected to terror activities"- appears suspicious. From the respondent's conduct itself and from its utterances in the course of the previous legal proceedings – it emerges that even the respondent's claim itself was never a claim that was central to the denial.

33. Despite all of this, the court of first instance chose not to intervene in the respondent's decision. As shall be detailed at a later occasion – the court thereby erred.

For all these reasons the honorable court is requested to rescind the judgment of the court of first instance, and to grant the petitioner the relief requested at the beginning of this appeal. The honorable court likewise is requested to order the respondents to pay the petitioners' costs and attorney fees.

Jerusalem 28 September, 2008,

Adv. Yotam Ben Hillel

Counsel for the petitioners

[T.S. 7356]