At the Supreme Court **HCJ 3170/07**

Sitting as the High Court of Justice

Re:

1. **Dr. _____ Yunis Dwikat**
2. **Dr. _____ Yunis**
3. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger**
4. **The Association for Civil Rights in Israel**
5. **B'tselem - Israeli Information Center for Human Rights in the Occupied Territories**
6. **Gisha: Legal Center for Freedom of Movement**
7. **The Public Committee Against Torture in Israel**
8. **Yesh Din: Volunteers for Human Rights**
9. **The Jerusalem Center for Legal assistance and Human Rights**
10. **Adalah: The Legal Center for Arab Minority Rights in Israel**
11. **Physicians for Human Rights – Israel**

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Petitioners

v.

1. **The State of Israel**
2. **Commanders of the Army Forces in the Occupied Territories**

Respondents

Application on behalf of the petitioners to respond to the response on behalf of the respondents

The honorable court is hereby requested to allow the petitioners to briefly relate to the respondents' claims in the response on their behalf, which was filed on 18 September, 2007.

As was broadly detailed in the petition, prior to the filing of the petition the respondents had not provided any genuine response to the petitioners' applications (both of a general and particular nature) aside from a five-line long letter from the Office of the Minister of Defence, which was attached to the petition, the contents of which related only partially to the State's response. Other responses by the authorities, which are attached to the petition, do not outline the reasons for the respondents' position, but rather relate to pseudo relaxations that have been put in place for the separated families – relaxations that were not implemented with regard to the petitioners.

The respondents' response to the petition is the first orderly and reasoned position, which has been presented to the petitioners, which justifies the respondents' policy. For this reason, and in order that the petitioners' position in relation to these things will be placed before the court, the petitioners request to briefly relate to these things.

The respondents' counsel has left this application to the court's discretion.

And this is the petitioners' response

1. The petition is concerned with the family life of couples and their children. The father is the bearer of an identity document issued in the territories. He is a doctor by profession, specializing in pediatrics, and he practices within the Green Line with the permission of the respondents within the framework of a bursary from the Peres Peace Center. The mother who is also a doctor –whom the petitioner married while both were studying together in the Ukraine – practices her profession in Ramallah. The children, registered residents of the territories, live and study in the territories.

2. The honorable court has been presented with other similar petitions that are still pending, 46 petitions of which have been filed by HaMoked: Center for the Defence of the Individual. The petitioners live all over the territories and each is married to spouses from abroad. Amongst the other petitioners there is a couple who have been married since 1995, lived together in Hebron for the last nine years, and jointly operate the Center for Rehabilitation and Physiotherapy that they founded together in that city.[1] Also amongst the petitioners there is a resident of a village north of the West Bank, who studied veterinary science in the Ukraine where he married his sweetheart, who nowadays operates a cosmetic center in Jenin. The couple has two

[1] HCJ 3989/07 Amaro v. The State of Israel

children, the older of whom is five years old.[2] Another petition involves a couple who met while they were studying together in the University of Bulgaria. They have lived in the territories since 1998: the husband runs a sports and recreation center and the wife is a teacher of young children. Both their children study in Ramallah: the girl is in 9th Grade and their son is in 5th Grade[3].

Behind every petition there is a wife, husband, children; a life story that has been weaved together; a whole world.

3. All these couples, all the children, live under constant threat. As far as the respondents are concerned the spouses and their children must separate from each other or to go into exile *en bloc* – and must find work, schools, home, friends – in another country. The respondents refuse to present any other course of action that will allow the petitioners (and other couples in their situation) to legally live in their homes.
4. **The respondents do not have any security reason for their policy**. The respondents are not claiming (as they have claimed with regard to granting status in Israel, to Palestinians from the territories) that there is a security risk – however slight or hypothetical – to granting status in the territories to the spouses of residents of the territories. Our case, involves, as mentioned, female spouses, who are foreign citizens, and who, had they been married to Israeli citizens, and not to residents of the territories, would have been able in the current legal situation in Israel to acquire Israeli citizenship.

5. Quite the contrary, over and over again the respondents have stressed in their reply that the harm to the family life of the petitioners is done for political reasons, because of the state's foreign relations. Precisely for this reason, the petition should be granted, since –

> **"The army commander is not permitted to consider national, economic, and social interests of his state, inasmuch as this has no ramification on its security interest in the region, or on the interest**

[2] HCJ 4385/07 Odah v. The State of Israel
[3] HCJ 4354/07 Herev v. The State of Israel

of the local population. Even army needs are military needs, and are not national security needs in its broadest understanding."[4]

6. The respondents claim that already twenty years ago the Supreme Court dealt with the issue of the right to family unification of residents of the territories, and held that a resident of the territories has no right for his souse to receive status within the framework of family unification. In this regard the respondents make special reference to the *Shahin* case[5].

   As we have mentioned in the main body of the petition, even within the framework of the *Shahin* case the court held that it is the respondents' obligation to carry out a detailed examination of each and every application – and nowadays even this elementary thing is not being done. However, and this bears noting, two years have passed since the *Shahin* judgment was handed down, and the wheels of justice have not halted. Among other things, the Convention on the Rights of the Child has been signed, and the Basic Laws have been enacted. In the *Adalah* case[6] the right to a family life was established as a constitutional right, as it pertains to the core of human dignity. It was also held in the *Adalah* case that the constitutional right to a family life included the human right "that a man and his family members should be allowed" in the words of the honorable judge Levy "to lead a common life also from the perspective of the geographic location of the family unit, which they have chosen for themselves."

   The court in the *Adalah* case relates to a significant portion of the international treaties that were dealt with twenty years ago in the *Shahin* case. The court, along with the spirit of the time, changes the manner in which these treaties were interpreted twenty years ago, and finds that their conclusions, and those of other documents, some of which postdate the *Shahin* case, reverse the legal determinations of twenty years ago.

   As is well known, in the *Adalah* case the petition was eventually dismissed, because although a significant portion of the judges were of the opinion (as was the majority of judges) that every person has the basic and constitutional right to a family life in

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[4] HCJ 393/82 Jim`aith Aska'n v. Commander of the IDF Forces in the Judea and Samaria Region, *Piskei Din* 37(4) 785, 794-795.
[5] HCJ 13/86 Shahin v. Commander of the IDF Forces in the Judea and Samaria Region
[6] HCJ 7052/03 Adalah: The Legal Center for Arab Minority Rights in Israel v. Minister of the Interior (judgment dated 14 may, 2006).

his country, and despite the importance and centrality of this right they held that weighty security considerations could in certain circumstances permit a violation of it, if it has been enshrined in primary legislation.

These considerations do not underlie the respondents' policy in our case.

7. The respondents also claim that the freeze policy that they have adopted for political reasons has already been approved by the honorable court. These allegations are not completely accurate.

As a normative source for their claim the respondents refer to HCJ 2231/03, which does not clarify this issue but refers to another judgment – HCJ 5957/02. HCJ 5957/02 concerned the case of a person who resided in Israel without a permit. The court noted the breakdown between Israel and the Palestinian Authority on the issue of family unification as a matter of fact, without examining this claim at all. In light of the breakdown there was no reasonable prospect that that petitioner would receive status in the territories in the foreseeable future. Against this backdrop, the petition against the deportation order was dismissed. However although the factual matter upon which the court relied in the HCJ 5957/02 judgment was not put under any scrutiny, HCJ 2231/03 cited HCJ 5957/02 as support for the fact that the "court has not interfered in the past with the government's policy not to deal at this stage with applications for family unification that apply to the region". As stated, an in-depth look at HCJ 5957/02 demonstrates that there never was a reasoned decision on this matter.

Also in other petitions the court has avoided establishing hard and fast rules with regard to the reason for why the applications for family unification have not been transferred from the Palestinian side to the Israeli side and seriously deliberating the question of the reasonableness of the respondents' policy not to receive applications of this kind.

The respondents' freeze policy has now entered into its eighth year and the time has come that it comes under thorough judicial scrutiny.

8. The respondents add another claim which involves circular reasoning. By their logic granting the requested relief in the petition means one of two things:

One possibility is that Israel would reverse its political decision in terms of which the officers of the military administration would not receive applications that deal with the status in the territories of spouses of residents of the region from officers of the Palestinian Authority. This means that the mechanism that was determined in the interim agreements and which was established as law in the territories by the army commander will be re-activated. The respondents argue that the court would not possibly enforce such an action upon them, since this would mean obligating them to fulfill an agreement against their will.

A second possibility is that Israel would put in place a different mechanism for resolving the status of the spouses. The respondents are of the opinion that the court would not possibly enforce such an action upon them – and this time because it entails, in their minds, a violation of the agreements!

9. With regard to the resolution of the status of these spouses pursuant to the division of administrative powers as has been determined in proclamation 7 (implementation of the provisions of the interim agreement), it is difficult to understand what legal impediment there could be in the provision to operate an administrative mechanism which the respondent itself has established as part of military legislation. As has been claimed by the petitioners, and as has been declared in the affidavit of the former head of the civil administration that is attached to this petition, the reason the mechanism has not been activated is because of a decision by the respondents, and it is in their hands to change the decision. The respondents have openly acknowledged this in their response.

10. The claim, with respect to the resolution of the status of the spouses through any other means, that it involves a "breach of the agreements" is in fact an artificial claim.

As stated in paragraph 26 of the petition, entry into the territories of those who are not registered in the population registry can be done in two ways: through a visitors permit to the territories (which the Palestinian Council issues with Israel's approval) or through entry visas to Israel issued by the Israeli Ministry of the Interior. This second possibility is also enshrined in the interim agreement (in paragraph 14 of section 28, appendix 3).

The first option was frozen in 2000. Over the course of 2006 the respondents also froze the second option, of visas from the Israeli Ministry of the Interior, an option

which in practice mainly served visitors from western countries. In the wake of international pressure the respondents backtracked, and put into place a procedure that regulates the granting of these visas and their extensions. According to this procedure one may extend the visas either by filing an application directly with the Ministry of Interior's Legation in Bethel or through transferring the application to the legation through the relevant factor in the Palestinian Authority. The procedure was attached to the petition as appendix p/16.

Though not emerging from the [wording of the] procedure itself, the latter did not apply to the general population, but was confined to those who originated from specific countries. This selective and discriminatory application of the procedure, which has ensured that the petitioners (the majority of the population) are unable to benefit from it, is apparently so self-understood by the respondents, that they do not even bother mentioning the procedure in the response and explaining why it does not apply with relation to the petitioners.

Nonetheless it does emerge from the procedure that when they have an interest in the result, the respondents find an avenue for protecting the family life of residents of the territories who are married to certain foreign residents. For this purpose the respondents are prepared to keep in contact both with the resident himself and with factors from the Palestinian Authority, and this is even during the period of the Hamas government. There was no motive for this – not political and not practical and no one thought that it entailed a breach of the agreements.

11. Moreover although the power to deport illegal residents from the territories was transferred to the Palestinian Authority pursuant to the agreements (paragraph 15 of section 28 above) it was determined that this did not exclude the powers of the respondents in this matter, alongside the powers that had been assigned to the Palestinian Authority[7]. The respondent's interference in issues of immigration to the territories is not therefore necessarily a breach of the agreements.

12. However the question of the agreements is a secondary question. Israel's foreign relations is something with which the petitioners have no interest involving themselves. Exercising the administrative powers pursuant to the applicable law is at the core of this petition. The source for the respondents' powers is not the interim

[7] HCJ 7607/05 Abdallah (Hussein) v. Commander of the IDF Forces in the West Bank, *Takdin-Elyon* 2005(4), 2859.

agreements but international humanitarian law which has determined the obligations and powers of an occupying power. It is not agreements, not military legislation and not even the decisions of Israeli political factors that can undermine the rights of residents of the territories. This principle has been enshrined in Article 47 of the Fourth Geneva Convention which states:

> **"Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention […] by any agreement concluded between the authorities of the occupied territories and the Occupying Power"**

13. In fact every action of the State of Israel in the territories has a political aspect to it. Does not the route of the separation wall have a political aspect? After all this is an issue that has been the subject of negotiations between Israel and the Palestinian Authority. Are not the arrangements for residents of the territories who wish to go abroad enshrined in agreements? And yet the court has dealt with these issues on a regular basis. Is it not the case that the respondents are fatally harming the rights of residents of the territories and are then seeking to defend themselves with the baseless pretext of non-justiciability? It is fitting to be reminded once again :

> "**There is no basis to the doctrine of institutional non-justiciability, where recognizing such would likely avoid an examination into a violation of a human right"** [8]

14. In conclusion: there is no practical impediment to the practical implementation of the rights of residents of the territories to a joint family life with their spouses who are not registered in the territories – as has been requested in the petition. At one end of the scale there is the right of women, men and children to a family life – in accordance with Israeli law and in accordance with international law: to ensure orderly life in the territories which have already been held in belligerent occupation for forty years; to protect the family as a basic unit of society and to protect human rights. At the other end of the scales – political considerations, which the respondents have not detailed, and which to all appearances have the aim of turning the family life

[8] HCJ 769/02 The Public Committee Against Torture in Israel v, The Government of Israel (judgment from 14 December, 2006, paragraph 50 of Chief Justice Barak's judgment)

of the civilian population into a bargaining chip in political negotiations. These latter considerations cannot be allowed to tip the scales.

20 September, 2007

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Adv. Yossi Wolfson	Adv. Oded Feller

Counsel for the Petitioners