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COMMITTEE ON THE HUMAN RIGHTS OF PARLIAMENTARIANS

▶ CASE No. PAL/28 - MUHAMMAD ABU-TEIR) PALESTINE/ISRAEL
CASE No. PAL/29 - AHMAD ATTOUN)
CASE No. PAL/30 - MUHAMMAD TOTAH)

AND

KHALED ABU ARAFEH

Report by Mr. Alex McBride, expert appointed by the Committee on the Human Rights of Parliamentarians in accordance with the resolution adopted by the Governing Council of the Inter-Parliamentary Union at its 188th session (April 2011), on Case No. HCJ 7803/06 before the Israeli Supreme Court, 26 July 2011

A. INTRODUCTION

1. I write this report for the consideration of the IPU's governing council in respect of a hearing in the Israeli Supreme Court on 26 July 2011 of appeals by Khaled Abu Arafeh, Muhammad Abu Teir, Muhammad Amran Totah, Ahmad Mahmoud Attoun (the Petitioners). The four men, three of whom are elected Palestinian parliamentarians while the fourth is Minister for Jerusalem Affairs for the Palestinian Authority, were challenging a decision by the Minister of Interior (the Respondent) to revoke their Israeli residency permits. I understand that the Petitioners' lawyers may withdraw the appeal before the court comes to its decision and that further litigation in the future is therefore possible.

2. I would like to thank the State Attorney, the Petitioners' lawyers, amicus curiae Adalah - The Legal Center for Arab Minority Rights in Israel (by attorney Hassan Jabareen) and the Association for Civil Rights in Israel (by attorney Dan Yakir), and the Israel Law Center for assisting me in observing the oral arguments in court.

B. THE PETITIONERS

3. Khaled Abu Arafeh, 50, is married with five children. He is a trained mechanical engineer and a member of the Palestinian Engineers' Council. Mr Arafeh works for several NGOs and is a senior member of the Noon Center for Koran Research. In 2006, he was appointed Minister for Jerusalem Affairs by the Palestinian Authority. He has been repeatedly arrested by the Israeli authorities and is currently seeking refuge with the International Red Cross in Jerusalem. It is alleged that he is a member of Hamas.

4. Muhammad Abu Teir, 60, is married with seven children. He studied Arabic at university and worked for Fatah. In the course of his life he has spent 25 years in prison. He has been deported to the West Bank. He was elected to the Palestinian Legislative Council in 2006 on the Change and Reform list, and the Petitioner alleges that he is a member of Hamas.

5. Muhammad Amran Totah, 42, is married with four children. He is graduate in business studies and a member of the Palestinian Center for Development of Small Businesses, a faculty member at the business school in Al Quds University and secretary of Iqraa Institution for the Preservation of the Koran and the Sunni. He was in charge of Koran learning centres in Jerusalem and was a member of the Committee of the Land Protection Committee of Wadi Al-Joz. He was elected to the Palestinian Legislative Council in 2006 on the Change and Reform list, and the Respondent alleges that he is a member of Hamas. He is currently seeking refuge with the International Red Cross in Jerusalem.

6. Ahmad Mahmoud Attoun, 43, is married with four children. He is a graduate in Islamic Shar'ia studies and serves as the imam of a Jerusalem mosque. He also runs a centre for Koranic studies. In 2006, he was elected to the Palestinian Legislative Council on the Change and Reform List and the Respondent alleges that he is a member of Hamas. He is currently seeking refuge with the International Red Cross in Jerusalem.

C. FACTUAL BACKGROUND

7. In January 2006 elections for the Palestinian Legislative Council were held for the first time since 1996. These elections also included residents of East Jerusalem even though its final status remained subject to negotiation. The Israeli government supported them. Muhammad Abu Teir, Muhammad Amran Totah, Ahmad Mahmoud Attoun stood in these elections and were elected on the 'Change and Reform' party slate. It is said by the state that the 'Change and Reform' party is a Hamas front. In March 2006, Khaled Abu Arafeh, who did not participate in the elections, and is not a member of the 'Change and Reform' party, was appointed Minister for Jerusalem Affairs by the Palestinian Authority.

8. On 17 April 2006, a suicide bomber killed nine people and wounded 68 at Tel Aviv's central station. The Islamic Jihad organization claimed responsibility for the bomb attack. In response the Respondent began the process to revoke all four men's residency permits on the grounds that the Palestinian government was responsible for the attack. No evidence has been put before an open court to show that the Petitioners were involved in the attack. No criminal proceedings have been initiated against them for any bombing or attack. I note that Respondent offered the Petitioners a deal (which was rejected) where if they resigned their posts their residency permits would not be revoked.

9. Following their refusal, the Respondent sent a letter informing the Petitioners that he would revoke their residency permits under Article 11(a) of the Entry into Israel Law unless they resigned their posts. The basis of the decision was that the Petitioners were members of the Palestinian Legislative Council and the Palestinian government as well as members of Hamas. This was a breach of the "duty to loyalty" to the Israeli state as set out in the Entry into Israel Law. He gave them 30 days to comply.

10. The Petitioners sought legal representation to challenge the revocation. They deny that they were involved in terrorist activities and argue that the revocation of their residency permits is a way to punish them for their involvement in public affairs in East Jerusalem. They applied for an extension of the 30 day deadline which the Respondent refused and their residency permits were revoked. The subsequent litigation has been ongoing.

D. LEGAL SUBMISSIONS

11. The Petitioners' legal submissions can be summarized as follows:

1. The Status of Residency Permits

(i) Residency by the virtue of birth is a constitutional right. The status of the Petitioners' residency permits are akin to citizenship. The Petitioners' permanent residency is in East Jerusalem. It is a residency by virtue of birth that existed prior to the annexation of East Jerusalem. The annexation of East Jerusalem is illegal under international law and therefore the latent legal authority in East Jerusalem remains international law. Under the Fourth Geneva Convention Israel, as the occupying power, is obliged to protect residents' rights.

(ii) The granting or maintenance of residency permits should be based on "actual centre of life". This is a factual test made out by the Petitioners' having been born and living in East Jerusalem all their lives. There are no grounds therefore to revoke the residency permits.

(iii) The main test regarding the termination of permanent residency is the reality of life of the resident. The license holders status must be determined by his actual behavior and whether he requests to disconnect his permanent ties with Israel and create a new bond with another state.

(iv) Article 15 of the UN Universal Declaration of Human Rights of 1948 states that every person has the right to citizenship. Article 8 of the UN Convention on the Reduction of Statelessness of 1961 prohibits, with a few exceptions, the revocation of citizenship of a person if that revocation makes him stateless. The revocation of the Petitioners' residency permits violates their constitutional rights to residency and their right to continue to live in their homeland without the threat of expulsion.

2. "Breach of loyalty" and proportionality of the Respondent's decision

(i) The Respondent bases his decision to revoke the permits on the Petitioners' "disloyalty" to Israeli state. The Respondent has not shown any evidence that amounts to disloyalty. The Petitioners have not been prosecuted under the criminal law, aside from their alleged membership in Hamas, and they maintain that their activities were legitimate.

(ii) There are no grounds for the Petitioners' residency permits to be revoked on the basis of "breach of loyalty". Grounds may only be established if the resident is [in the Attorney-General's words] "involved in a hostile and severe activity against the security of the State."

(ii) The discretion of the Respondent to cancel a residency permit is not absolute. The Respondent's decision "is subject to judicial review as is any other discretion of a public authority." (HCJ 758/88, Kendall v. the Minister of the Interior, [1992] IsrSC 46(4) 505, 527-528; HCJ 3403/97 Ankin v. The Minister of the Interior, [1997] IsrSC 51(4) 522, 525). "There is no such thing in Israeli law as 'absolute' discretion, and even discretion that is called 'absolute' is not absolute discretion at all. (H.C.J. 4542/02, Kav LaOved Worker's Hotline v. Government of Israel. The Petitioners invite the court to review the Respondent's decision.

(iv) Article 11(a) of the Entry into Israel Law, which gives the Respondent the power to revoke resident permits, should be read with regard to Israel's Basic Law and the Limitations Clause. Article 11 is vague and broadly drafted and does not contain the criteria that the Respondent must apply in coming to a decision on whether to revoke a permit or not. The vague drafting renders Article 11 (a) of the Entry into Israel Law unconstitutional because it transfers the legislature's authority to the executive without giving it guidelines on how that authority must be exercised.

(v) The correct test for the revocation of a permit is the resident's "centre of life" as set out in Article 11 of the Entry into Israel Law. This is a factual test. The Petitioners' "centre of life" has always been in East Jerusalem.

3. Respondent's decision to revoke violates the right to be heard

After the lapsing of the 30 days, the Respondent refused to extend the period to enable legal submissions to be made. The Respondent thereby ignored his duty to hold a hearing to enable those affected to raise arguments before a final determination of the Petitioners' status.

4. Respondent's decision violates the constitutional right to a family life

(i) The Respondent's decision to cancel the permanent residency licenses of the Petitioners constitutes an infringement of their right to family life. The Law of Return allows for Jewish families to come to Israel for the purpose of preserving the family unit.

(ii) The right to have the family unit protected is well established in international law, notably Article 16(3) of the Universal Declaration of Human Rights and Article 23(1) of ICCPR.

(iii) The Petitioners are separated from their children and this is against the children's best interests. The Israel courts have underlined that a child's interests must be a primary consideration.

12. The Respondent's legal submissions can be summarized as follows:

(i) (Article 11(a) of the Entry into Israel Law states that the Minister of the Interior "may at his discretion - (1) cancel any visa granted under this Law, either before or on the arrival of the visa holder in Israel; (2) cancel any permit of residence granted under this Law." This grants the Respondent a wide discretion to revoke a resident's permit. The Respondent was acting within the law at all times. The Respondent's authority to cancel a permit does not turn the permanent residency into "a matter of grace". Permanent residency is granted by law and only relevant considerations can activate the Respondent's authority. Relevant considerations are not limited to "centre of life" facts.

(ii) The Petitioners' membership of Hamas and their participation in the Palestinian Legislative Council elections are relevant considerations.

(iii) The Petitioners by standing in the election breached their minimum duty to the Israeli state and therefore the Respondent was entitled to exercise his discretion. The Petitioners' membership of Hamas is a threat to the security of the Israeli state and its citizens. This is akin to revoking a residency permit when a holder's presence is contrary to the public good.

(iv) The Respondent only exercised his discretion when the Petitioners refused to resign their posts. This established the grounds for the Respondent to revoke their residency permits.

(v) The revocation of the permits was not immediate and the Respondent gave the Petitioners 30 days to raise any legal objections/arguments.

(vi) The revocation decision was not disproportionate having regard to the Petitioners' status as senior members of Hamas. Muhammad Abu Teir has been convicted of terrorist offences and imprisoned. Hamas wishes the destruction of the state of Israel. The Petitioners position in the Palestinian Authority government and the Palestinian Legislative Council facilitate a security threat against Israel and its citizens.

E. THE APPEAL HEARING

13. The Supreme Court that heard the Petitioners' appeal on 26 July 2011 was comprised of a three-person bench (Justices Beinisch, Fogelman and Naor). The State Attorney opened by stating that this was a well-established situation where the Respondent had the authority to revoke the Petitioners' residency permits. The Petitioners continuing presence was a danger to the Israeli state. The Petitioners do not only have rights. They also have responsibilities. They owe the state of Israel a minimum level of loyalty, even though they are not its citizens.

14. A choice was given to the Petitioners - resign or lose your residency permits - and they decided not to resign. It was only then that the Respondent started the process to revoke their residency permits. The Petitioners were given 30 days to raise any legal arguments. The Petitioners are senior Hamas members and their positions in the Palestinian Legislative Council and the Palestinian Authority government meant that this was an unacceptable threat to Israel.

15. The State Attorney was asked if Respondent saw secret evidence of the Petitioners' activities prepared by the General Security Services (known as Shin Bet). This question was not directly answered. It became clear that there is secret intelligence not seen by the Petitioners which purports to show that they were active in Hamas. The State Attorney refused to show the evidence to the Petitioners'.

16. The justices clarified that the Respondent gave the Petitioners the choice to resign and thus save their residency status. They queried whether this indicated that their alleged activities were not very serious. The State Attorney said that the Respondent was no longer willing to offer the Petitioners the choice to resign. No reason for this change was given other than that the Petitioners' membership of Hamas was allegedly ongoing.

17. The justices pursued their line of questioning with a hypothetical scenario: if there were new elections and the Petitioners were not elected, would it then open the chance of restoring the residency permits? The State Attorney did not answer this question but said it would be open to the Petitioners to apply for residency permits. The justices persisted saying that if the Petitioners' status changed then why not give them back their residency permits since it was the same offer made in 2006? The State Attorney said that the Respondent would not now change re-open the 2006 invitation. The justices were surprised a deal that was on the table in 2006 was not re-offered.

18. Naitsana Laitner from the Israel Law Center, which represents settler groups in East Jerusalem, argued that the Respondent has the authority to revoke a residency permit. He was not only within his rights but reacting to a security threat. Residents of Israel should not be able to swear allegiance to two different governments. Hamas is responsible for killing thousands of Israelis. Residency gives the Petitioners freedom of movement in Israel and that is a serious security risk.

19. The Association for Civil Rights in Israel wanted to address the status of Jerusalem in international law. The Petitioners had been obliged to take residency because Israel is an occupying power. The justices were not interested in hearing oral argument on this point even though it made up a sizable portion of the Petitioners' legal submissions. The Association was unable to develop the argument. The justices said that there is a minimum level of loyalty for Israeli citizens and shouldn't it therefore be the case that residents adhere to that minimum level. The Respondent is saying that membership of Hamas and membership of the Palestinian Legislative Council taken together falls below the minimum loyalty to the state of Israel. The Association for Civil Rights in Israel pointed out that Israel supported the elections and therefore by extension the Palestinian Legislative Council.

20. Hassan Jabareen from the Adalah The Legal Center for Arab Minority Rights in Israel argued that there are no criteria in the Entry into Israel Law for what constitutes disloyalty and nor are there criteria setting out what the Respondent should take into account when coming to a decision to revoke a permit. This is a gap in the law. In other countries, the executive has guidance from the legislature and/or the courts on how discretion should be exercised. He invited the court to consider what criteria should be in place to guide the Respondent on whether or not to revoke a residency permit.

21. The justices said that this was not the time to talk about criteria. According to the Respondent and the secret evidence he had before him, the Petitioners were a danger and that must trigger his right to exercise his discretion to revoke the residency permits. Mr Jabareen argued that the limitations clause contained within Israel's Basic Law (passed into law after the Entry into Israel Law) should invalidate such a sweeping power as set out in Article 11. There were other options open to the Respondent like administrative detention or opening criminal proceedings but the Respondent did neither of these things. The Petitioners were not even arrested.

22. The justices asked Mr Jabareen if he objected to them seeing the secret evidence. Mr Jabareen said that the problem with that was that neither he nor the Petitioners could see it and therefore challenge its accuracy.

23. Mr Jabareen asserted that the "centre of life" is what the Respondent should focus on when coming to a decision and this should form the basis of establishing criteria when deciding whether a residency permit should be revoked or not. The revocation creates a dangerous precedent where being a member of Hamas could lead to the revocation of a residency permit.

24. This concluded the oral argument heard by the court and the justices reserved their judgment to a future date that they did not specify.

F. OBSERVATIONS - PRELIMINARY

25. The hearing in this case concerned the discretion the Respondent must exercise when deciding to revoke East Jerusalem residency permits. The Petitioners were not charged with any criminal offence and they were not standing trial. The protections afforded defendants in a criminal case under Israeli domestic legislation and international law are therefore inapplicable.

26. The revocation has nevertheless had a severe impact on the Petitioners. Muhammad Abu Teir has been obliged to leave his birthplace to reside in the West Bank and the other three men are taking refuge in the Jerusalem offices of the International Red Cross. They are unable to continue the ordinary routine of their lives, and they have been rendered stateless. This raises a number of international law issues, and potentially activates several provisions of the International Covenant on Civil and Political Rights (which was ratified by Israel without any relevant reservations or derogations on 3 October 1991). Article 12 of the ICCPR provides, for example, that 'everyone lawfully within the territory of a State shall, within that territory, have the ... freedom to choose his residence' and that 'no one shall be arbitrarily deprived of the right to enter his own country.' Subject to well-known and vexed questions about the status of Palestinian-born residents of Jerusalem, it may also raise issues under Article 13 of the ICCPR which establishes limits on a state's power to expel 'aliens' who are 'lawfully in the territory of a State Party to the present covenant'.

27. In view of the fact that my brief was to observe the hearing of 26 July 2011, I shall not dwell on these matters, but it is proper to observe that this case raises issues that has concerned international bodies for some time. As long ago as 1998, the United Nations Human Rights Committee expressed "profound concern" about an unpublished directive promulgated by the Respondent Minister of Interior which pursued a policy of revoking the citizenship of Palestinian residents of East Jerusalem who failed to prove that the city had been their "centre of life" for the previous seven years.[1] The policy was reversed in part after March 2000, but several Israeli human rights monitoring groups have expressed worry that the ministry has in more recent years restarted a policy of "quiet transfer".[2]

28. Having regard to these concerns, it is also right to make a preliminary observation about the status of the Fourth Geneva Convention (GCIV) in Israel. This treaty, which the country ratified on 6 July 1951, deems to be "protected persons" all those people "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of ... [an] Occupying Power of which they are not nationals" (Article 4). Israel disputes the treaty's applicability to East Jerusalem,[3] but the United Nations Security Council and General Assembly

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1 Human Rights Committee, Concluding Observations on Israel (1998), UN Doc. CCPR/C/79/Add.93, para. 23.

2 See B'Tselem, Revocation of Residency in East Jerusalem, 6 May 2010, available online at www.btselem.org/printpdf/51824; see also the ongoing monitoring efforts of HaMoked (the Center for the Defence of the Individual) at www.hamoked.org/Document.aspx?dID=744_update and www.hamoked.org/Document.aspx?dID=868_update.

3 Israel's official position has been that the provisions of GCIV are not applicable because Jordan was not a "high contracting party" for the purposes of the Fourth Geneva Convention and therefore not a legitimate sovereign when ousted from East Jerusalem in 1967, and the Supreme Court has ruled that GCIV is not directly applicable: see Ayub v. Minister of Defence (the Beit El Case), HC 606/78. Government officials long ago stated however that Israel would in practice observe the treaty's humanitarian provisions, and whenever this concession is made by government lawyers, the Supreme Court has acknowledged that GCIV reflects customary international law. See e.g. Beit Sourik Village Council v. The Government of Israel, HCJ 2056/04, para. 23; see generally Meir Shamgar, 'Legal Concepts and Problems of the Israeli Government: The Initial Stage', in Shamgar (ed.), Military Government in the Territories Administered by Israel 1967-1980 (1982), at pp. 13-59.

have affirmed the contrary on numerous occasions.[4] From an international perspective, therefore, the Petitioners fall to be considered "protected persons" under Article 4 of GCIV.

29. One consequence is that there is a very strong argument that the Respondent's decision to revoke the Petitioners' residency permits breaches Article 49 of GCIV, which prohibits the "individual or mass forcible transfers" of protected persons "from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not ... regardless of their motive." I am aware that the Israeli Supreme Court has ruled that the phrase "individual or mass forcible transfers" does not include the transfer of individuals[5] but this interpretation remains contentious even within Israel. It has never been accepted by any authoritative judicial or humanitarian body outside the country.

30. In relation to the general international human rights issues that arise in this case, there are potentially concerns as well about the Respondent's decision to target the Petitioners on the basis of their political activities and alleged partisan affiliations. Although the mutual animosity between Israel and Hamas is a matter of some notoriety, no democratic state that purports to protect the freedoms of speech, assembly and political participation can simply silence or exclude people whom it suspects to have links with hostile parties, particularly where - as in the present case - they are elected representatives or officials of a government with a popular mandate. There are certain situations in which international and regional human rights bodies have upheld banning orders against extremist movements, but Israel has never purported to ban the Change and Reform electoral list. The Human Rights Committee has observed in addition that any restrictions on free movement are liable to fall foul of Article 12 of the ICCPR insofar as they draw distinctions that are based on political opinions.[6]

31. It is finally important to observe that the Petitioners' are husbands and fathers. Their domestic lives are already seriously affected by the Respondent's decision to revoke their residency permits, and issues consequently arise in respect of the family and child rights protected by (among many other well-known international human rights provisions) Articles 17, 23 and 24 of the ICCPR.

32. For the sake of clarity, I reiterate that the foregoing matters are not recounted with a view to advancing any opinion about whether they actually evince or constitute violations of international human rights standards. They are central to the Petitioners' grievances against the Respondent however, and as such they formed an essential part of the appeal which I was in Israel to monitor.

G. OBSERVATIONS - THE HEARING OF 26 JULY 2011

33. The Respondent had based his original revocation decision on secret reports prepared by Shin Bet which apparently alleged that the Petitioners were senior members of Hamas who were involved in unspecified terrorist activities which threatened the security of the Israeli state. Acting on the basis of this material, the Respondent concluded that the Petitioners were in breach of their minimal duty to Israel and that he could and should revoke their residency permits. The Supreme Court, even though it had not seen this material, then placed significant weight upon it. The Petitioners were barred from being able to see the material and therefore could not challenge it.

34. Article 14(1) of the ICCPR reflects an obligation under international law binding on all states to observe certain basic standards in their judicial assessments of a person's domestic legal status. According to its terms:

> "[in the determination of a person's] rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

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4 See e.g. S.C. Res. 446 (22 March 1979), S.C. Res. 478 (20 August 1980); see also the Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention dated 5 December 2001, available online via the ICRC website at www.icrc.org/eng/resources/documents/misc/5fldpj.htm.

5 Affo et al. v. Commander of the IDF Forces in the West Bank, HCJ 785/87, HCJ 845/87.

6 Human Rights Committee, General Comment No. 27, 2 November 1999, para. 18.

35. A preliminary question arises over whether Article 14 is capable of governing the Respondent's initial decision. It is well-established that not all hearings and proceedings fall within the Article, and the Human Rights Committee held relatively recently in Zundel v. Canada that a deportation hearing on national security grounds is not a "suit at law" within the meaning of Article 14.[7]

36. It seems clear to me, however, that Article 14 clearly applied in this case. This case did not involve the deportation of someone who had arrived from a different country; it was the revocation of the Petitioners' right to remain in the city where they had been born. It is hard to imagine many civil determinations that could have more impact on the day-to-day lives of the Petitioners, and Israeli law itself regards the right as one that merits legal protection, to the extent that it provides for direct appeals to the Supreme Court. In the absence of clear legal authority to the contrary, there are many cogent reasons to consider that Article 14 is applicable in principle and none to exclude it outright.

37. It is important next to consider whether the Respondent's revocation was a determination by a 'competent, independent and impartial tribunal established by law'. The Human Rights Committee has stated in its General Comment No. 32 (2007) that this requirement is not subject to any exception, and that it implies actual independence from the executive branch.[8]

38. I have no evidence about the extent to which the Respondent was or was not 'competent, independent and impartial' within the meaning of Article 14, but his status as a government minister means that he was self-evidently not independent of the Israeli executive. That is not to say that his quasi-judicial role was automatically unfair: administrative determinations are a routine aspect of efficient government around the world, and it is clearly established under the jurisprudence of the Human Rights Committee and other regional human rights courts that they are capable of satisfying international law standards. It lends additional force to the observations made above about the Supreme Court's supervisory function, however. In a case where the maker of a quasi-judicial decision is a senior member of government, it is axiomatic that oversight by the courts should be thorough - especially having regard to the obligation that states bear under Article 2 of the ICCPR to give effect to the treaty and guarantee victims of violations an effective remedy.

39. Having regard to these matters, it was incumbent on the Supreme Court to strike a careful balance between the national security concerns voiced by the Respondent on behalf of the Israeli government and the Petitioners' right to a fair determination of their rights and obligations. And though Article 14 applies on its face to first instance hearings rather than appeals, the same standards of fairness which ought to have been observed by the Respondent are necessarily relevant to the Supreme Court's duty in this regard. It was hearing an appeal from a closed administrative procedure at which the Petitioners had been unable to see adverse material relied upon by the Respondent, or to make representations about its significance. In such circumstances, it was incumbent on the Supreme Court to scrutinize the earlier process carefully and cure any deficiencies, failing which its own ruling would amount to an affirmation of those deficiencies.

40. In this regard, the Respondent's reliance on secret material gave rise to serious prima facie concerns. As has been observed by the UN Human Rights Committee in the context of Article 14(1), the concept of a fair hearing "should be interpreted as requiring a number of conditions, such as equality of arms [and] respect for the principle of adversary proceedings".[9] In its General Comment No. 32 (2007), "the principle of equality between parties applies ... to civil proceedings, and demands, inter alia that each side be given the opportunity to contest all the arguments and evidence adduced by the other party."[10]

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7 Zundel v. Canada, 1341/2005, 20 March 2007, para. 6.8. See also the earlier case of V.M.R.B. v. Canada (236/1987) in which the court had left undecided the question of whether immigration hearings and deportation proceedings were "suits at law" within the meaning of Article 14: para. 6.3. For general observations by the Human Rights Committee on the meaning of the term "suit at law", see Y.L. v. Canada (112/81), paras. 9.1 & 9.2.

8 Human Rights Committee, General Comment No. 32, 23 August 2007, para. 19.

9 Morael v. France (207/86), para. 9.3.

10 Human Rights Committee, General Comment No. 32, 23 August 2007, para. 13.

41. Israeli courts have long claimed to recognize and remedy the potential for injustice that is inherent in secretive procedures,[11] and in the present case the justices apparently took a preliminary step in this regard by asking the Petitioners' lawyers if they objected to the court having regard to the secret material. But I was surprised to find that in the hearing of 26 July 2011, that appeared to be the extent of their inquiry. When the Petitioners' lawyers stated that they did object, because they would have liked to make submissions on its accuracy, the court did not invite them in general terms to expand on their concerns. It did not propose to hold an in camera hearing, or to edit the material to assess whether some of it might safely be disclosed to the Petitioners. Once the Petitioners had objected, it did not even indicate whether it was purporting to ignore the existence of the evidence, or proposing to override the objections and take the material into account. In respect of this last question at least, it is to be hoped that the Court will clarify the position when giving reasons for its eventual judgment, because I left the appeal hearing entirely uncertain about the extent to which the court intended to have regard to the secret evidence.

42. Although my uncertainties in this regard obviously do not in themselves constitute a sound basis to impugn the court's procedures, the Petitioners were also left to believe that the Supreme Court was purporting to meet their concerns and to assess their legal rights with nothing more solid than assurances of good faith. While I saw no reason to doubt that good faith, that was entirely inadequate to satisfy international standards of fairness and due process. What was required were robust procedures to ensure that the material would be scrutinized and assessed with as much regard for the Petitioners' interests as was possible having regard to legitimate national security concerns. This calls for an attempt to balance the issues at stake. I note that in the United Kingdom, for example, a suspected terrorist whose entitlement to remain in the country has been adversely affected by the government's use of secret material is not automatically allowed to see the basis for the state's decision; he is always entitled in his immigration appeal hearing, however, to have his interests advanced by independent counsel, whose specific role is to examine and make representations on sensitive material.[12] Israel might well choose to strike the balance somewhat differently, but one conclusion is clear. A determination of rights that relies on secret evidence cannot be effectively scrutinized unless efforts are made to assess state claims of national security by standards other than those advanced by the state itself. That calls for a procedure which gives an adversely affected party a meaningful way of challenging those claims – and which rests on foundations more substantial than the personal integrity of judges alone.

43. In the present case, the Petitioners were informed about the existence of adverse material, and invited blindly to challenge its contents. That caused them self-evident difficulties and it meant that they could not effectively advance arguments to counter those on which the Respondent had relied to make his decision. There was consequently an inevitable risk that the Petitioners rights of residence were being revoked on the basis of inaccurate, partial and second-hand information. In the circumstances, the Petitioners could not, in the words of General Comment No. 32, "contest all the arguments and evidence adduced by the other party".

44. One final cause for concern was that the court declined to hear full submissions from the Petitioners' lawyers on the applicability of international law and the criteria, if any, that the Respondent should have considered when coming to a decision. It is possible that the court, having read the parties' various written submissions, took the Petitioners' arguments into account in fact, but given the importance of this case, the justice's unwillingness to hear oral submissions was remarkable. At a minimum, the Petitioners should have been entitled to air reasoned and arguable points of law and fact. In this context, I observe that the Human Rights Committee found a violation of Article 14(1) of the ICCPR in a case where a Finnish court failed to allow litigants to comment on their opponents' legal brief. It stated then that "it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party."[13] The justices' failure in this regard made it look instead as though they were either not interested in the Petitioners' arguments or predisposed to rule against them. A fundamental principle of a fair hearing - perhaps the most fundamental - is that justice must be

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11 Itzhak Zamir, Human Rights and National Security, 23 Isr. L. Rev. 375, 399 (1989), and CrimA 6659/06 A v. State of Israel [2008].

12 On the balance that is struck in the UK's Special Immigration Appeals Commissions, see e.g. the remarks of Lord Hope in RB (Algeria) (FC) and Another v. Secretary of State for the Home Department; OO (Jordan) v. Secretary of State for the Home Department [2009] UKHL 10, at paras. 230-34.

13 Äärelä and Näkkäläjärvi v. Finland (779/97).

seen to be done. The failure to observe that principle here made it at least apparently possible that the justices were merely rubberstamping a pre-ordained decision of the executive.

H. CONCLUSION

45. The hearing before the Supreme Court on the 26 July 2011 fell short of some basic principles of fairness. It is a matter of particular concern that, in circumstances where the very basis of the Petitioners' challenge was that secret material had been used to their great legal detriment, the Supreme Court made no attempt to disclose a redacted version of that material to the Petitioners, or to enable them otherwise to understand and challenge the basis on which their legal rights were being altered. This breached the "equality of arms" principle which is a central safeguard of any adversarial trial system, as acknowledged by Article 14 of the ICCPR.

46. The seriousness of the hearing's shortcomings in this respect was compounded by the court's decision to proceed with little apparent regard for several of the Petitioners' submissions. Article 11 of the Entry into Israel Law is drafted in terms which are remarkably broad. The Supreme Court would not, however, hear submissions on the ambit of the Respondent's power to revoke a person's residency rights, or on the criteria that he ought to apply when coming to such a decision. For all the reasons outlined above, this potentially left the Petitioners and their families with no remedy for a number of international law violations, in violation of, inter alia, Article 2 of the ICCPR. It also meant that the hearing of 26 July 2011 fell short of the obligation that is fundamental to a legal system which purports to be based on the rule of law – the duty to ensure that justice is seen to be done.