



Adalah Briefing Paper

Challenging the Constitutionality of the Discriminatory Nationality and Entry into Israel Law

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Adalah – The Legal Center for Arab Minority Rights in Israel raises its grave concern at the Nationality and Entry into Israel Law (Temporary Order) – 2003 (the law), originally enacted on 31 July 2003. This racist law bars Palestinians from the 1967 Occupied Palestinian Territories (OPTs) from obtaining any residency status or citizenship in Israel through marriage to an Israeli citizen solely on the basis of their nationality, thereby preventing them from living in Israel with their spouses. The law also prevents Palestinians from the OPTs from upgrading any temporary residency status already granted to them. The law has already gravely harmed thousands of married couples and their children living in Israel, as well as newly married couples. It has forced families to live under constant fear of separation, while in many other instances it has compelled spouses to live apart and torn children away from their parents. The law negates the very essence of a democratic society, and renders meaningless the citizenship of the Palestinian minority in Israel. In Adalah's view, the law constitutes one of the most extreme measures in a series of governmental actions aimed at undermining the rights of Palestinian citizens of Israel, as well as Palestinians from the OPTs. Adalah urges Israel to cancel the law, reconsider its family unification policy, and uphold its obligations under international human rights law.

1. **On 31 January 2005, the Knesset extended the Law for a second time for an additional four months.** The law was previously renewed for six months on 21 July 2004. Following its second extension, the law will remain in effect until at least 31 May 2005. The law adopted the principles of a May 2002 cabinet decision, and therefore, in practice, the government's discriminatory policy will have been in force for over three years by that date. The extension of the law further exacerbates an existing infringement on the prohibition of racial discrimination and a violation of human rights, owing to the fact that the longer the infringement goes on, the harsher the damage inflicted, since forced separation between a parent and child, man and wife, becomes more destructive the longer it continues.
2. The three main groups affected by the law are:
 - a. Newly married couples in addition to couples who did not apply prior to 12 May 2002- The law prevents the Palestinian spouse from being granted residency or citizenship status in Israel. No applications for naturalization have been accepted since 12 May 2002.
 - b. Pending applicants - Applications submitted before 12 May 2002 will be considered, however, no temporary or permanent residency or citizenship will be given. Only permits for a temporary stay in Israel may be given.
 - c. Individuals with temporary residency status - The law prohibits the upgrading of temporary residency status, granted prior to 12 May 2002, to permanent residency or citizenship, even if the requests were authorized and the applicants met the necessary criteria.
3. The law violates human rights under domestic and international law, since:
 - a. The law severely violates the fundamental human rights of individuals to equality, liberty, privacy, and family life. These rights are protected by the International Convention on the Elimination of Racial Discrimination (ICERD), to which Israel is a party. Specifically, the law violates Article 5.d.(iv) of the ICERD, which provides that, "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without discrimination as to race, color, or national or ethnic origin, to equality before the law, notably the enjoyment of the right to marriage and choice of spouse." Further, the CERD in its General Comment No.30 para. 13 and 14 recommended that State Parties, "Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or

P.O. Box 510 Shafa'amr 20200 Israel Tel: (972)-4-950-1610 Fax: (972)-4-950-3140

شفاعامر ٢٠٢٠٠ ص.ب. ٥١٠ هاتف: ٤-٩٥٠١٦١٠ فاكس: ٤-٩٥٠٣١٤٠

שפועם 20200 ת.ד. 510 טלפון: 04-9501610 פקס: 04-9503140

Email: adalah@adalah.org

<http://www.adalah.org>

naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents," and, "Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of State Parties' obligations to ensure non-discriminatory enjoyment of the right to nationality."

- b. The law also violates provisions of the UDHR, ICESCR, ICCPR, and CRC, affording special protection to the family as the fundamental unit of society. These instruments and the Declaration of the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live, all further prohibit arbitrary interference with the right to family life, and obliges states to protect it. Moreover, as noted by the UNHRC in its General Comment No.19 from 1990 on Article 23 of the ICCPR, "... the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."
 - c. The law flagrantly discriminates against Palestinian citizens of Israel and Palestinians from the OPTs. In practice, the law will overwhelmingly affect Palestinian citizens of Israel, the citizens of the state who have non-citizen Palestinian spouses. Further, the total ban on family unification exclusively and solely targets Palestinians from the OPTs; the general policy for residency and citizenship status in Israel for all other "foreign spouses" remains unchanged. These measures constitute discrimination on the basis of nationality and ethnic origin. Moreover, international human rights law, which forbids discrimination in matters relating to nationality and ethnic origin, particularly prohibits such discrimination in matters relating to the right to citizenship. In particular, Article 1.3 of the ICERD states that State parties may not discriminate against any nationality, and Article 3 forbids racial segregation.
 - d. The law is disproportionate to the alleged security reasons cited by the government to justify its enactment. The government claims that the law is essential because Palestinians from the OPTs who have obtained citizenship/residency status in Israel via family unification have been increasingly involved in terror activity. However, the government referred to only 23 people out of a group of thousands of status-receivers whom the state alleged were indirectly involved in terror, without providing full details. Even if this data is reliable, moreover, the numbers presented constitute a minute number of people, and thus the law is completely disproportionate. Further, the state has many other tools and mechanisms, which it has utilized and continues to utilize in order to address security concerns. The "graduated procedure" for naturalization grants the government wide authority to conduct criminal and security background checks on all persons seeking citizenship/residency status in Israel. By setting forth such a sweeping ban, the law amounts to collective punishment, which cannot be justified by security concerns.
4. It should be noted that during the legislation process in 2003 senior officials from the Ministry of Interior and the Ministry of Justice who testified before the Knesset Internal Affairs and Environment Committee stated that since 1993, 100,000-140,000 Palestinians have been granted official status in Israel following family unification. In response to inquiries by Knesset Committee members, these officials later revised these figures, admitting that only 22,414 requests for status were submitted by Palestinians, out of which 16,007 were approved and 6,400 were rejected. However, these officials failed to answer whether the number of applications submitted equaled the number of individuals who actually sought status or whether these figures merely represented multiple applications submitted by each individual. They also failed to provide numbers as to how many individuals actually received status after approval of their applications. The officials then contended that 20 Palestinians from the OPTs who received status in Israel via family unification have been involved in some type of terror activity. No detailed, specific examples were provided at the hearing to support these claims.

5. **The petition which was filed by Adalah on 3 August 2003 is still pending before a 13-Justice Panel of the Supreme Court. [See H.C. 7052/03, Adalah, et. al. v. Minister of Interior, et. al.] Adalah represents three Palestinian families, the Chairperson of the High Follow-up Committee for Arab Citizens in Israel, and nine Arab Members of Knesset before the Court.** Six more petitions were also submitted against the law, and are also still pending before the Court. The Court has joined these petitions for hearings and decision. In its petition, Adalah requested that the Supreme Court cancel the law, arguing that the law is unconstitutional, as it contravenes the Basic Law: Human Dignity & Liberty – 1992, and violates the basic rights of citizens and residents and their families, and is therefore legally void. Together with the petition, Adalah also filed a motion for injunction asking the Supreme Court to freeze the implementation of the law, pending a final decision on the case. The Supreme Court rejected the petitioners' request. At a hearing on 9 November 2003, the Supreme Court of Israel issued an order nisi compelling the state to explain why the law should not be declared null and void. The Court did, however, issue a small number of individual injunctions preventing the deportation of some of the petitioning Palestinian spouses; the injunctions remain in effect until the Court issues a final decision on the petition. **On 18 January 2004, the Supreme Court held a second hearing on the petitions. No other hearings have been held on the case to date.**
6. **On 21 July 2004, the same day as the Knesset approved the six-month extension of the law, Adalah submitted a motion to the Supreme Court requesting an injunction to freeze the implementation of the law.** Adalah argued that the government and the Knesset did not present any information to justify the extension. Moreover, the extension of the law contradicts what the Attorney General (AG) has previously stated before the Supreme Court in response to the petition filed on 3 August 2003. In his response, the AG argued that the law is constitutional and proportionate, because it would remain in effect for only one year, emphasizing its temporary nature. **On 25 July 2004, Adalah submitted a further motion to the Supreme Court, requesting the issuance of a judgment as early as possible on the petition, which has now been pending before the Court for more than year, and for an absolute order declaring the law null and void.**
7. During the Knesset debates over the Israeli cabinet's decision to extend the law, some Members of Knesset who supported the legislation stated clearly that the actual aim of the law was to limit the number of Palestinian citizens/residents of Israel, the so-called "demographic threat" to maintaining a Jewish majority in the state, and not the security concerns presented by the government to justify these measures. Prior to the Knesset approval to the cabinet's request to extend the law, no data was provided to demonstrate that any persons requesting to be granted status in Israel through family unification posed a security threat.
8. The AG informed the Court on 9 August 2004 that the government may seek to amend the law once again in February 2005, through widening the exceptions to the ban on family unification as stipulated under the law. **On 16 December 2004, based on the AG's representations, the Supreme Court issued a decision postponing the delivery of a final judgment or an interim order on the petitions, due to (i) the short time before the expiry of the law in February 2005, and (ii) the respondents' announcement that the government would prepare an amendment to the law and present it to the Knesset before the expiry of the law.** The Court concluded that it would deliver its decision based on the new legal reality which would be created in under two months. The law is not an ordinary statute, the Court noted, and "justifies special treatment."
9. **On 31 January 2005, the Knesset extended the law in its existing form, without amendment, for an additional four months.** The AG informed the Court of this development only on 18 February 2005. **On 21 February 2005, Adalah submitted another motion to the Supreme Court, demanding that it freeze the law and rule on the pending petitions challenging the law.** Adalah argued that the two reasons given by the Court for not issuing a judgment on the petition were rendered irrelevant by the issuance a Cabinet decision of 23 January 2005, which asked the Knesset to extend the law, un-amended, for four months, and which clarified that the legal reality had not in fact changed. Adalah argued that the Court's failure to rule would violate the rule of law, undermine the status of the Court, and disproportionately violate the petitioners' constitutional right to access the courts, including the right to receive a remedy within a reasonable amount of time.

The lack of a ruling also violates the principle of legal certainty, since not only do eight petitions remain pending, but so do many hundreds of others which the Court has either refused to hear or has frozen until the delivery of a decision in this case. Moreover, Adalah further argued that the state failed to fulfill its duty to notify the Court of the developments resulting from the government's decision not to amend the law, and to ask the Knesset to extend it as it is. The duty to inform the Court of any essential changes of circumstances is extremely weighty, and especially so in this case, since the declared change of circumstances constituted the main basis for the Court's decision not to issue a verdict or interim order.

10. **On 1 March 2005, the Supreme Court rejected the motion**, ruling that since the law was renewed for a "limited period of time (only 10 months)" in 2004 and 2005 and because the writing of new amendments to the law is in a "very progressive stage," the motion is dismissed. The Court did not rule on Adalah's demand that the Court issue a decision without further delay on petitions currently pending before it challenging the constitutionality of Law. In response, Adalah emphasized that the Court's decision confirming the extension of a law which prevents spouses from living together in Israel does not give any value to the basic right for family life. It is Adalah's position that, in this case, the Supreme Court preferred institutional considerations and negated basic human rights recognized in international human rights covenants ratified by Israel.
11. United Nations (UN) committees, the European Union, Palestinian, Israeli and international human rights organizations and legal academics have all called on Israel to revoke the ban on family unification. For example:
 - a. In August 2003, the UN Human Rights Committee in its final Concluding Observations on Israel, para. 21 similarly urged Israel to, "... revoke the Nationality and Entry to Israel Law (Temporary Order) of 31 July 2003, which raises serious issues under articles 17, 23 and 26 of the Covenant. The State party should reconsider its policy with a view to facilitating family unification of all citizens and permanent residents. It should provide detailed statistics on this issue, covering the period since the examination of the initial report."
 - b. In August 2003, the UN Committee on the Elimination of Racial Discrimination (CERD), in an urgent action procedure, stated that the law, "raises serious issues under ICERD" and called on Israel to, "revoke this law and re-consider its policy with a view to facilitating family unification on a non-discriminatory basis."
 - c. In August 2004, again in an urgent action procedure, the UN CERD issued a second decision on the law, reiterating its August 2003 position.
 - d. In September 2003, the European Parliament Resolution on Human Rights in the World in 2002 and European Union's Human Rights Policy stated that "The European Parliament... calls on the Israeli government not to ratify or apply this discriminatory and racist law."
 - e. In February 2004, Al-Haq, the Palestinian Centre for Human Rights – Gaza (PCHR) and Adalah submitted a Written Intervention to the Commission on Human Rights in which the organizations raised their concern over the passage of the law.
 - f. In a press release dated July 2004, the International Federation for Human Rights (FIDH) and its member and partner organizations called upon Israel to, "revoke the Citizenship and Entry to Israel Law and to respect in all circumstances the right to non-discrimination, as provided for in international human rights Instruments to which Israel is a party."
 - g. Amnesty International's report on Israel and the Occupied Territories published in July 2004 under the title 'Torn Apart: Families Split by Discriminatory Policies,' states that, "the law formally institutionalized a form of racial discrimination based on ethnicity or nationality."
 - h. In a press release issued in July 2004, Amnesty International condemned the Knesset's extension of the law, stated that "Israel invokes spurious 'security' justifications for a law which institutionalizes racial discrimination and violates international law," and called upon the Israeli authorities to, "...repeal this law once and for all, and [...] put an end to discrimination based on ethnicity or nationality."
 - i. In a letter to all Members of Knesset sent in July 2004, Human Rights Watch expressed its "extreme concern" at the proposed extension of the law, drew attention to its discriminatory nature, and set out the contraventions of international law involved in its implementation.