

Initial Comments on the Supreme Court's Ruling on the Nationality and Entry into Israel Law

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In the Supreme Court's ruling on H.C. 7052/03, *Adalah, et al. v. Minister of Interior, et al.*, delivered on 14 May 2006, which stretches over 263 pages and includes eleven separate opinions of the eleven justice panel, the petitions² seeking to revoke the Nationality and Entry into Israel Law (Temporary Order) 2003 (hereafter: the law) as unconstitutional were rejected by a slim majority of Justices: six to five. The ruling was delivered after Adalah's petition had been pending before the Supreme Court for around three years, since its submission on 3 August 2003.

The law, which prevents the granting of status in Israel to Palestinian residents of the Occupied Palestinian Territories (OPTs) who are married to citizens and residents of Israel, was enacted on 31 July 2003. It adopted the principles of Cabinet Decision #1813 of 12 May 2002,³ which stipulates prohibitions on:

1. The submission of new applications by citizens and residents for the granting of status to their spouses who are residents of the West Bank or Gaza Strip, with the exception of the settlers living in the settlements in the OPTs.
2. The granting of any status in Israel to residents of the West Bank or Gaza Strip, unless the application was submitted prior to 12 May 2002.
3. The upgrading of status granted prior to 12 May 2002 to a resident of the West Bank or Gaza Strip (including upgrading to temporary residency, permanent residency or citizenship) even if the applications were approved and the petitioners met all of the criteria stipulated in the graduated process.⁴

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² H.C. 7052/03, *Adalah, et al. v. The Minister of Interior, et al.* and six other petitions that were joined to it by the Supreme Court.

³ Adalah submitted a petition against the Cabinet's decision on 31 May 2002. In addition to arguing that the decision is invalid because it violates constitutional rights, the petitioners also claimed that it is invalid due to a lack of authority. The hearing of the petition was combined with the hearing of another petition on the same case, submitted to the Supreme Court by the Association for Civil Rights in Israel (ACRI) (H.C. 4022/02, *The Association for Civil Rights in Israel v. The Prime Minister, et al.*), and concluded on 17 July 2003, on the eve of the law's enactment. Following the law's enactment, the Court decided on 13 November 2003 to delay delivery of its ruling on these petitions until after ruling on petitions challenging the law's constitutionality.

⁴ The graduated process for naturalization designed for the spouses of Israeli citizens and residents, which culminates in citizenship under Paragraph 7 of the Nationality Law (1952), was defined following the ruling in *Stamka* (H.C. 3648/97, *Stamka et al. v. The Minister of the Interior, et al.* PD 53 (2) 728) and detailed in the state's response of 7 September 1999 in *Issa* (H.C. 338/98, *Issa, et al. v. The Minister of the Interior*). Under the graduated process, the path to receiving status in Israel for the spouse of an Israeli citizen takes at least four and a half years before the spouse becomes eligible to become a citizen. There are several stages to this process. The first stage begins upon submission of an application and includes a six-month period of waiting for a decision. During this period, the spouse is entitled to receive a permit to reside and work in Israel. During the second stage, following the approval of the request in principle, the spouse is supposed to receive temporary residency status for a one-year period that is renewable three times; that is, four years of temporary residency status. At the end of this period, the spouse is supposed to become a citizen. During this entire period, from the

The few exceptions stipulated in the law⁵ and those added to it on 27 July 2005⁶ do not overcome the severe harm the law inflicts on the rights of Palestinian citizens of Israel to family life, equality and human dignity. The law sweepingly denies Arab citizens of any possibility of gaining status in Israel for their spouses who are residents of the OPTs. This contrasts with the case of any other Israeli citizen married to a non-citizen (as long as he or she is not a Palestinian residing in the OPTs), for whom the gradual naturalization process of granting status in Israel to spouses of citizens and residents of Israel remains in effect.

In refusing to revoke the law, the Supreme Court failed in its most important task: to protect against the violation of human rights and to provide a legal remedy to the injured individuals. Further, the Court failed in a very clear case: it upheld a racist law that denies a person's fundamental constitutional rights on the basis of his or her national identity.

A reading of the rulings by Justices who approved the law (Deputy Chief Justice Cheshin and Justices Rivlin, Gronis, Naor and Adiel), reveals very problematic legal statements that extend far beyond the domain of the Nationality and Entry into Israel Law.

submission of the application until becoming a citizen, the application is reviewed repeatedly, according to the following parameters: the lack of suspicion that the marriage is fictitious; the conduct of family life in Israel; and the absence of any security or criminal impediment.

⁵ The law stipulated limited exceptions according to which the Minister of the Interior and the military commander in the West Bank and Gaza Strip are authorized to grant a permit to enter Israel for a limited period of time for work purposes or medical needs, or for other temporary purposes, for a cumulative period not to exceed six months. In addition, the law stated an explicit exception with regard to granting status in Israel to collaborators with the security forces, which allows the Minister of the Interior to bestow citizenship or a permit to reside in Israel to a resident of the OPTs if the Minister is convinced that he or she "identifies with the State of Israel and its goals, and that the resident or his family members performed a meaningful act to advance the security, economy, or another matter important to the state, or that granting citizenship or giving the permit to reside in Israel are of special interest to the state."

⁶ The law was enacted as a temporary order for a period of one year. It was subsequently extended three times and a number of amendments were added to it on 27 July 2005, the last time it was extended. These revisions were designed to allow, in extremely limited circumstances, the temporary unification of the families of Israeli citizens and residents with their Palestinian spouses residing in the OPTs, on the basis of temporary visit permits. In reality, the amendments to the law are of no help to the overwhelming majority of families harmed by the law, since in order to be eligible to submit applications for a temporary permit, the spouse who is a resident of the OPTs must meet an age requirement when submitting the application, of 35 years and over for men and 25 years and over for women. Only a minority of the families damaged by the law meet these age-related criteria. Moreover, even those few families who meet the conditions and whose application is approved are eligible to receive at most a permit for a temporary visit, which does not allow for social benefits or permission to work in Israel. A further amendment to the law allows applications to be denied based on a suggestion by security officials not only that the petitioner him or herself but also members of his or her family *might* constitute a security threat to the State of Israel. It is therefore clear that very few individuals will receive even a temporary permit. It should be noted that the figures presented by the Attorney General to the Supreme Court on 7 February 2006 indicate that since the law's amendment on 27 July 2005 until the beginning of February 2006, over 1,500 applications for temporary permits were submitted (or initiated) under the amendment, of which only 33 had been approved as of that time.

Such is the statement, supported by several of the Justices, in the words of Justice Cheshin, that Palestinians who are residents of the OPTs:

[A]re enemy nationals and as such constitute a risk group for the citizens and residents of Israel.⁷

Especially grave is the legitimization Justice Cheshin gives to the use of collective punishment in certain circumstances, in complete contradiction to a fundamental principle of international law, which imposes an absolute prohibition on collective punishment:

Some argue that the sweeping prohibition in the Nationality and Entry into Israel Law constitutes a collective violation against all of the Arab population in Israel for the crimes of the few, who previously resided in the region [the OPTs] and today reside in Israel. We shall agree of course that collective infringement has a harsh and harmful result which a democratic state should refrain from. Nevertheless it is my opinion that sometimes we cannot refrain from it. From time to time the harm [caused] by the few is so severe and harsh that it could justify collective prohibitions; particularly so where we cannot identify and locate those few who wish to harm and that the harm that they might cause is extremely harsh and severe...⁸

There is also grave significance in Justice Cheshin's approach that lowers the evidentiary threshold required to justify the violation of human rights to the "bad tendency test."⁹

It should be noted that harsh judicial statements were not only made in the rulings of the Justices who supported the law, but also in the rulings of the Justices who opposed the law. For example, Chief Justice Barak gave a justification for the absolute presumption of security risk that justifies the withholding of status and even the cancellation of existing status, not only on the basis of a danger posed by the person seeking status him or herself, but also on the basis of a risk posed by members of his or her family.¹⁰

These examples are only a small part of the many grave legal statements in the ruling with extremely dangerous ramifications for the constitutional protection of human rights in Israel, which extend far beyond the matter of the Nationality and Entry into Israel Law.

However, a close reading of the ruling shows that a majority of Justices on the panel did not justify the law; rather most of the Justices determined that the law violates the constitutional rights to family life, equality and human dignity in a disproportionate manner. This is so despite the fact that all of the Justices determined that the purpose of the law is to protect the security of the state.¹¹ Justices Procaccia and Joubran even raise doubts over whether or not the law has an ulterior, demographic, motive. There was a broad consensus that the law meets the first two sub-criteria of the limitation

⁷ Para. 2 of Deputy Chief Justice Cheshin's ruling.

⁸ Para. 115 of Deputy Chief Justice Cheshin's ruling.

⁹ Para. 109 of Deputy Chief Justice Cheshin's ruling.

¹⁰ Para. 94 of Chief Justice Barak's ruling.

¹¹ Para. 82 of Chief Justice Barak's ruling.

clause; that is, the law maintains a rational connection between the means and the end, and constitutes a means of lesser injury. However, most of the Justices determined that the law disproportionately violates constitutional rights, as it does not fulfill the third sub-test of the proportionality test: the test of suitable proportion between the benefit the means brings and the violation of rights the means engenders.

Most of the Justices determined that not all of the means justify the security end, which was presented by the state as the law's single fundamental goal. The fact that despite this, the necessary majority was not found to revoke this law, makes the court's failure to provide a remedy to those injured by the law all that more severe.

Chief Justice Barak stated in his ruling that:

A democracy does not act this way. A democracy does not impose a sweeping prohibition and thus divide its citizens from their spouses and not allow them to conduct family life; a democracy does not impose a sweeping prohibition and thus leave its citizens with the option of living in the state without the spouse or leaving the state in order to conduct a proper family life; a democracy does not impose a sweeping prohibition and thus separate parents from their children; a democracy does not impose a sweeping prohibition and thus discriminate between its citizens in their fulfillment of family life. Indeed, democracy cedes a certain degree of security in order to obtain an immeasurably larger degree of family life and equality. This is how a democracy acts in periods of peace and tranquility. This is how a democracy acts during periods of fighting and terror. It is precisely during these difficult periods when the strength of democracy is revealed. It is precisely in the difficult situation in which Israel is immersed today that Israeli democracy is being tested.¹²

The state based the arguments it presented to the Court on one main contention: that the law constitutes a security imperative. In its response to the petition, the Attorney General argued that the law constitutes an essential means for countering the security risk of "increasing involvement" in "terror activity" by Palestinian residents of the OPTs who received status in Israel via family unification. The state argued that from the beginning of the second Intifada until the enactment of the law in July 2003, 20 Palestinians who had received status in Israel via family unification had been involved in "facilitating terror attacks." **The state provided incomplete information to the Court pertaining to only six of those "involved."** During the course of the judicial proceedings, the state admitted that this figure included those who had been investigated and not those who were convicted, but argued that, in the meantime, six additional suspects had been questioned and that intelligence information exists relating to the involvement in activity directed against the security of the state by additional Palestinians who had received status in Israel through family unification.¹³ The state argued that:

... [T]here is a security imperative to prevent the entry of residents of the region [the OPTs] into Israel – whoever they may be – since their entry... into Israel, and their free movement within the state's borders after receiving Israeli

¹² Para. 93 of Chief Justice Barak's ruling.

¹³ Para. 31 of the state's response of 7 February 2006.

documentation, is liable to endanger the peace and security of the citizens and residents of the state...¹⁴

The Attorney General also argued that the fundamental purpose of the law is to reduce the risk of harm to the right to life of Israel's citizens and residents, and that the state's duty is to protect its citizens and, therefore, that the law constitutes a form of self-defense.

Adalah offered the Court a detailed response to the state's arguments. A reading of the ruling gives the impression that the readiness of most of the panel of Justices to determine that the law's violation is disproportionate – despite its presentation as a security imperative – was made possible after the Justices realized how weak and unconvincing the security consideration is in this case.

The security consideration was raised in the explanatory text accompanying the legislation when it was first proposed. Since that time, representatives of the state have failed to present serious data in support of it. According to the information presented by the state, those investigated for suspicion of involvement in endangering security comprise a fraction of one-thousandth of all of the Palestinians who have received status in Israel under family unification. The initiators of the legislation sought to ascertain the inherent danger posed by all Palestinian recipients of status, because they are Palestinians, and thus to turn this into an absolute presumption. Using this flimsy presumption of dangerousness, they sought to justify the imposition of the sweeping prohibition on family unification and to deny any consideration of each case on its own merits.

The critical manner in which Justice Procaccia examines the security consideration is particularly interesting. She remarks on the serious weakness of the security consideration and states that:

I have reservations regarding the strength of this consideration with regard to the data that the state submitted and its analysis [of the data] against the background of the government's policy in related areas.¹⁵

In her ruling, Justice Procaccia makes reference to the way in which the Court has acted in the past in confronting the claim that a security imperative exists and the way it is acting today:

The claim of a 'security imperative' voiced by the state is not a magic formula that must be accepted when raised without investigation and inquiry. There were days in the past when the state's claim of a security imperative was accepted at face value, without examining its meaning and weight. Those days are past, and for many years the authorities' claims of security imperative are examined on their merits by the judiciary in various contexts. Indeed, as a rule, the Court acts with restraint in examining the security considerations of the authorities and does not interfere in them lightly. Still, when the exercising of a security policy entails the violation of human rights, the Court should examine the reasonableness of the

¹⁴ Para. 13 of the state's response of 6 November 2005.

¹⁵ Para. 1 of Justice Procaccia's ruling.

authorities' considerations and the proportionality of the means it seeks to employ.¹⁶

In light of this ruling, and also from an examination of the way in which the Court has dealt with other recent petitions, such as the issue of the Separation Wall and prohibition orders restricting individuals from leaving the country, it seems that Justice Procaccia is describing an ideal rather than the reality.

Justice Procaccia notes that it is difficult to identify a rational line of policy in the state's approach to the security risk allegedly posed by those seeking family unification:

Given its different attitude to risk-groups that have something in common or are united, it became accustomed to the existence of dangers greater than those attributed to Palestinian spouses without imposing blanket prohibitions, but it does not refrain from an almost total denial of family unification in a way that is incommensurate with the anticipated related threat. The law's focus on the group of spouses from the region [the OPTs] is incompatible with the state's policy *vis-à-vis* risks that are no less, and are perhaps even greater than those stemming from family unification. In other contexts, which raise significant risks, the state refrains from [imposing] sweeping harm. It seeks to spread the risk in a way that is as intelligent and proportionate as possible. This is not the case with regard to those seeking family unification.¹⁷

Justice Procaccia here refers to a comparison which the petitioners drew between the sweeping ban imposed on those seeking family unification and the policy that allows the entry of laborers and merchants on the basis of individual security checks.

Justice Procaccia goes on to state that:

This raises a concern that the real purpose of the law does not fully coincide with the declared security purpose, and that the strength of the security consideration is not as significant as was claimed.¹⁸

Conversely, Chief Justice Barak did not cast doubt upon the veracity of the security consideration, but ruled that:

The additional security that the sweeping ban brings is not proportional to the additional damage caused to the family life and equality of the Israeli spouses. True, the blanket prohibition provides increased security: however, it is attained at too heavy a price. True, the possibility of enhancing security via the blanket prohibition is not 'weak and theoretical.' Nonetheless, in comparison to the serious damage caused to human dignity, the relation is not proportionate. Rubinstein and Medina expressed this well in noting that, "The measure employed is clearly not proportionate, mainly because of its sweeping nature." In a similar spirit, Davidov, Yovel, Saban and Reichman noted that, "The cumulative harm and severity of the new law constitute grave harm, perhaps even fatal harm, to rights that are close to the 'core' of human dignity, and this is without suitable justification based on the behavior and concrete risk posed by those hurt by the law. In this situation, it is

¹⁶ Para. 10 of Justice Procaccia's ruling.

¹⁷ Para. 19 of Justice Procaccia's ruling.

¹⁸ Para. 19 of Justice Procaccia's ruling.

difficult to see how any proportionate relation exists between the serious violation inherent in the law and the hypothetical purpose the law is designed to achieve. In these circumstances, when the law's ability to achieve its purpose is unclear and the damage is certain and severe, the gap between the benefit and the damage in the new law is disproportionate. If there is a single and exceptional case in which the test of proportionality needs to be applied in its narrow sense – it seems that this is the case.”¹⁹

Justice Procaccia warns against the danger “inherent in a sweeping injury to people belonging to a specific group through the indiscriminate attribution of a label of risk, and from the concern entailed in using the security argument as an excuse for generally disqualifying a complete community.”²⁰ She cites the ruling in the case of *U.S. v. Korematsu*, in which the U.S. Supreme Court refused to intervene against the sweeping sanctions imposed against American citizens of Japanese descent during the Second World War as an instance of a grave constitutional error that should be guarded against:²¹

... [W]e can recall cases from history when this occurred, and which were recognized as a mistake in later constitutional thinking; a clear error. It is enough to bring one example of this from the well-known case of *The U.S. v. Korematsu*, 323 U.S. 214 (1944), when American residents and citizens of Japanese descent living in the United States were brought to detention in their own state during the Second World War, when the United States was at war against Japan. There were individuals among this community who were suspected of disloyalty to the country. As a result, a general sanction of quarantine was imposed on a complete community. A majority in the American Supreme Court approved these sweeping measures. The minority thought otherwise. The justification for enacting these security measures was expressed in the majority opinion by Justice Black in words that remind [us] in principle of the state's arguments before us... the ruling of the majority of Justices in the American Supreme Court in *Korematsu* are considered by many to be one of the darkest episodes in the constitutional history of Western countries... the circumstances of that case are completely different from those arising in our case, but the spirit behind the constitutional perspective applied in the majority opinion is not foreign to the arguments voiced by the state in the matter before us. We should be wary of making similar mistakes. We should refrain from causing sweeping damage to an entire community living within our midst, which deserves constitutional protection of its rights; we shall defend the security of our lives through individual measures of supervision, even if this entails imposing an additional burden upon ourselves, and even if this means leaving some margins of chance of risk. In this way, we will defend not only our lives but also the values of our lives.

It seems that the majority of Justices on the panel did not heed Justice Procaccia's warning.

For thousands of couples who have been compelled to live separately for over four years, for thousands of children who live cut off from one of their parents, for many families living together secretly with the fear of expulsion hanging over them, the opinion of the majority of the Justices on the panel that the law disproportionately violates their

¹⁹ Para. 92 of Chief Justice Barak's ruling.

²⁰ Para. 21 of Justice Procaccia's ruling.

rights is inadequate. They need, urgently, an effective legal remedy: a remedy the Supreme Court failed to provide them in this ruling.