Ban on Family Unification

Excerpts from Supreme Court Petition: H.C. 7052/03, Adalah, et. al. v. The Minister of Interior and the Attorney General

4 August 2003

Before the Supreme Court in Jerusalem
Sitting as the High Court of Justice

H.C. 7052/03

The Petitioners

1 Adalah – The Legal Center for Arab Minority Rights in Israel
2 Attorney Morad El-Sana
3 Abeer El-Sana
4 Ranit Tbilah
5 Hatem Tbilah
6 Asala Tbilah, a minor (born 30 May 2001)
7 Dima Tbilah, a minor (born 12 March 2003)
Petitioners 6 and 7 by their parents, Petitioners 4 and 5
8 Shawqi Khatib, Chairperson of the High Follow-up Committee for the Arab Citizens in Israel
9 MK Taleb El-Sana
10 MK Muhammad Barakeh
11 MK Azmi Bishara
12 MK 'Abd al-Malek Dahamshe
13 MK Jamal Zahalka
14 MK Wasel Taha
15 MK Ahmad Tibi
16 MK Issam Makhoul

represented by attorneys Hassan Jabareen and/or Orna Kohn and/or Abeer Baker and/or Marwan Dalal and/or Suhad Bishara and/or Gadeer Nicola and/or Morad El-Sana, of Adalah – The Legal Center for Arab Minority Rights in Israel, PO Box 510, Shafa'amr 20200. Tel. 04-9501610, Fax. 04-9503140

– v. –

The Respondents

1 The Minister of Interior
2 The Attorney General

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

Petition for an Order Nisi and Temporary Injunction

A petition is hereby filed for an order nisi against the Respondents ordering them to show cause:

A. Why the provisions of the Nationality and Entry into Israel Law (Temporary Order) - 2003, which was enacted on 31 July 2003, should not be declared null and void;

B. Why the gradual process of naturalization of spouses of Israeli citizens practiced in Israel is not applied to Petitioners 3 and 5 in accordance with Article 7 of the Nationality Law - 1952.

Motion for a Temporary Injunction

The application is hereby filed for a temporary injunction directing the Respondents to refrain from executing and/or implementing the provisions of the Nationality and Entry into Israel (Temporary Order) Law - 2003 (hereinafter: the Law), until a final decision is reached on the petition herein. The grounds for the application are as follows:

1 This petition is directed against the Law, which prevents Petitioner 3, a resident of "the region" and who is married to Petitioner 2, an Israeli citizen, to obtain a permit to reside in Israel.

2 Prior to enactment of the Law, Petitioners 2 and 3 submitted all the relevant documents to obtain a permit to reside in Israel pursuant to Article 7 of the Nationality Law - 1952. However, as mentioned above, the Law that is the subject of this petition prevents issuance of said permit.

3 Also, the Law prevents Petitioner 5 from taking part in the gradual process of naturalization and from his status being upgraded from temporary resident to citizen.

4 During the legislation of the Law, the respondents failed to take into account or to set forth before the legislature the extremely grave damage that the petitioners, and thousands of Arab citizens whose applications are pending before Respondent 1, are liable to suffer. The Law retroactively infringes on the rights of many families who relied on the fact that their applications had been lawfully submitted, and it fails to provide a mechanism to hear these persons' cases, in particular, those who submitted their applications prior to the enactment of the Law. The Law therefore

contains a grave and fundamental constitutional flaw.

A copy of the Law as laid before the Knesset for second and third reading and passed by it, and a copy of the proposed bill passed on first reading are attached hereto as Appendix P/1-A.

5 In challenging the constitutionality of the Law, the petition bases its argument on the Law's violation of the Basic Law: Human Dignity and Liberty.

6 The failure to issue a temporary injunction will cause Petitioners 2-7, and many other individuals in their situation, extremely grave, irreparable damage.

7 On behalf of many families, Petitioner 1 filed a petition on 30 May 2002 against Government Decision 1813 of 12 May 2002, which adopted principles comparable to the provisions of the Law (H.C. 4608/02, *Awad, et. al. v. Prime Minister, et. al.*, pending). In the said petition, this Honorable Court issued an order nisi and temporary injunctions against deporting the petitioners. Indeed, this motion relates to legislation and not to a government decision, as was the case in H.C. 4608/02. But since the damage caused to the petitioners is the essence in both cases, and not the process by which the decision was reached, this motion should be treated in the same manner, and the temporary injunctions requested should be granted.

The said government decision is attached hereto as Appendix P/1-B.

8 The appendices to the petition and the factual and legal grounds supporting it constitute an integral part of this motion.

9 It is proper and just that this motion be granted.

The grounds for the petitions are as follows:

Then Almitra spoke again and said, "And what of Marriage, master?"
And he answered saying:
You were born together, and together you shall be forevermore.
You shall be together when white wings of death scatter your days.
Aye, you shall be together even in the silent memory of God.
But let there be spaces in your togetherness,
And let the winds of the heavens dance between you.
Love one another but make not a bond of love:
Let it rather be a moving sea between the shores of your souls…

Khalil Gibran, *The Prophet*

Factual Background

Preface

1 This petition deals with the constitutionality of the Nationality and Entry into Israel (Temporary Order) Law - 2003 (hereafter: the Law), which the Knesset passed on 31 July 2003. This statute prevents the submission of new applications by Israeli citizens to obtain a status in Israel for their spouses who are residents of the West Bank or Gaza Strip, and prevents the granting of any status in Israel to a person who did not submit an application prior to 12 May 2002.

2 The Law also provides that temporary resident status that was granted prior to 12 May 2002 shall not be upgraded to permanent resident status and/or citizenship, even if the application was approved, the applicant met all of the tests in the gradual process for naturalization of spouses of Israeli citizens (hereinafter: the gradual process), and there was no information that raised suspicions against the applicant. The gradual process was established following the judgment in H.C. 3648/97, *Stamka, et. al. v. Minister of Interior, et. al.*, 53(2) P.D. 728; and in the context of H.C. 338/98, *Issa, et. al. v. Minister of Interior*, not yet published.

The statement of the State Attorney's Office is attached hereto as Appendix P/2.

3 The Law violates the constitutional right to equality between citizens of the State of Israel. This is the first Law since the basic laws were enacted that denies constitutional rights to citizens on the explicit and direct grounds of ethnic identity. This Law does not grant rights to a specific group because of its ethnic identity, but makes explicit rather than indirect use of ethnic identity to infringe on the unalienable rights of a section of its citizenry on the basis of ethnic origin or national identity. Therefore, it not only discriminates on the basis of ethnic origin or national identity, but is also tainted by explicit racism.

4 The extremist nature of the Law is further aggravated by the fact that it relates to the right of citizenship. The Law is flagrantly directed against citizens of the State of Israel who are married to Palestinians from the West Bank or the Gaza Strip, and against their constitutional rights to family life, dignity, equality, and privacy. It expressly excludes Israeli settlers who reside in the same two areas. Thus, the Law directly discriminates against Arab citizens of Israel, for they are the citizens who marry Palestinian residents of the West Bank and the Gaza Strip.

5 This petition does not deal with Israel's immigration policy. The Law does not seek to regulate immigration policy, nor is that its purpose. The petition deals with rights granted to citizens of the state who seek to live together with their spouses and/or their minor children in order to carry on family life like other individuals.

6 Therefore, any attempt by the Respondents to base their arguments on an analogy with the Law of Return and/or the rights of states in determining their immigration policy and/or on various definitions of the meaning of "Jewish state," is irrelevant in this petition, because the petition does not deal with these matters.

7 The petition relates to the gross discrimination based on ethnic origin between citizens of the State of Israel as individuals, i.e., to civic discrimination between individuals within the state. In this context, it should be mentioned that there is broad agreement in Supreme Court judgments on the matter of civic discrimination toward Arab individuals, holding that such discrimination is prohibited on ideological, nationalist grounds. This was the principle set forth in the decision in *Qadan*. It was also the minority view (of the Honorable Justice Heshin) in *Adalah, et. al. v. Tel Aviv – Jaffa Municipality, et. al.*, which discussed the status of the Arab language in mixed-population cities.

H.C. 6698/95, *Qadan, et. al. v. Israel Lands Administration*, 54(1) P.D. 258.

H.C. 4112/99, *Adalah, et. al., v. Tel Aviv - Jaffa Municipality, et. al.*, Takdin Elyon 2002 (2) 603, 635.

8 The petition relates directly to the rights of citizens of the State of Israel to exercise their constitutional right to personal liberty, which is granted in Article 5 of the Basic Law: Human Dignity and Liberty. This liberty is the basis of individual autonomy, of an individual's self-determination in establishing family life according to his or her choice.

9 This liberty is linked to the most fundamental human need to love: to love and be loved by a spouse, to aspire to establish a home, and to live together without institutional obstacles. The Law seeks to limit the freedom of ordinary citizens to choose as their hearts dictate, by restricting the ethnic identity of their spouses. The public cannot meet the proscriptions of the Law, for love between human beings does not recognize ethnic borders. Quite the opposite, it disdains such borders. Therefore, this attempt by the Law will not succeed, not because the individuals are criminals, but

because the Law seeks to regulate by means of ethnic identity "matters of love" between individuals, something which legislation cannot guarantee. On this point, the comments of the Honorable Justice Heshin in *Stamka* are appropriate:

> This response, that love would also prevail over a separation of months, is cynical and improper. Furthermore, it would be improper to make light of the injury to the couple's dignity and family unity. And the separation of the lovers, how can that be mitigated in our case? Have we forgotten the pain of Desdemona when the Duke ordered Othello to leave and fight in Cyprus?
>
> *Desdemona:*
>
> *That I did love the Moor to live with him,*
> *My downright violence and storm of fortunes*
> *May trumpet to the world: my heart's subdued*
> *Even to the very quality of my lord:*
> *I saw Othello's visage in his mind,*
> *And to his honor and his valiant parts*
> *Did I my soul and fortunes consecrate.*
> *So that, dear lords, if I be left behind,*
> *A moth of peace, and he go to the war,*
> *The rites for which I love him are bereft me,*
> *And I a heavy interim shall support*
> *By his dear absence…*
>
> (William Shakespeare, *Othello*)
>
> Should our hearts be indifferent to the distress of separation? Justice Elon spoke of the distress of separation in App. Perm. App. 488/77, *John Doe and Jane Doe v. Attorney General*, 32(3) P.D. 421, as follows, at page 432:
>
> > The sages said that matching a person is as hard as the parting of the Red Sea…
> >
> > And if matching and cooperation of couples are such, then even more so is their severance and their "parting" from each other as hard as the parting of the Red Sea.
>
> And we should not disregard the financial problems entailed in the forced separation of the couple ... Indeed, the magnitude of the right and the strong radiation that shines from within it, would dictate, as if from themselves, that the means that the Ministry of Interior chooses would be softer and more moderate

> than the harsh and drastic action that it decided to use. And it is hard to refrain from concluding that the respondents completely disregarded – or gave little account to – these basic rights of the individual to marry and to establish a family. If these comments are made about an alien, they apply even more so to an Israeli citizen who is a partner in the marriage… The respondents should have selected other means to achieve their goal – a goal proper in itself – means that minimize harm to the individual. For example, by increasing the monitoring of persons staying illegally in Israel, expanding examination of the authenticity of the marriage, and the like.
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> H.C. 3648/97, *Stamka, et. al. v. Minister of Interior, et. al.*, 53(2) P.D. 728, 782-786.

10 Simply put, we are dealing with human beings. Men and women will continue to fall in love, dream together, commune with each other, become engaged, marry, and build a family. The Law will cause much suffering and will embitter their lives, their days and nights. The Law will turn joy into suffering, or at least, mix in suffering amidst the joy. It will present the couple with harsh alternatives on a daily basis regarding their private lives and the intimacy between them. The Law will control their private sphere. The Law cares nothing about the public sphere; rather, it penetrates, enters, observes, controls, and exists constantly only in the domain of the individual, even though the marriage is lawful, legitimate, and proper according to Israeli law. Therein lies the further harm caused by the Law in separating the lovers: violation of the right to privacy, enshrined in Article 7 of the Basic Law: Human Dignity and Liberty.

11 The Petitioners will argue that the Law is unconstitutional because it infringes upon the constitutional right to equality; the constitutional right to personal liberty of the individual to maintain a family life of his choosing; the constitutional right to privacy; and the constitutional right to due process by retroactively infringing on rights granted to individuals and by failing to grant the right to be heard.

12 The Petitioners will further argue that substantial flaws characterized the legislative process in enacting the Law and that these flaws go to the very heart of the matter. The Law does not comply with the limitations provision; it was not legislated for a proper purpose; it is sweeping in scope, lacks internal logic, violates constitutional rights in a manner that is greater than necessary; and is disproportionate.

13 Parenthetically, on 30 May 2002, Petitioner 1 petitioned this Honorable Court against Government Decision 1813 of 12 May 2002, in its name and on behalf of fourteen families who were harmed by the decision, among them the family of Petitioners 4-7 of the present petition. In the earlier petition, the petitioners attacked the constitutionality of the Government Decision, which revoked, *inter alia*, the relevance of the gradual process for granting a status in Israel as regards to citizens and permanent residents of Israel married to residents of the West Bank, the Gaza Strip, and/or any person who is of Palestinian origin. Shortly after the filing of the petition, the Honorable Court issued interim orders prohibiting the deportation of the Palestinian spouses. On 14 July 2002, the Court issued an order nisi. The petition is still pending (H.C. 4608/02, *Awad, et. al. v. Prime Minister, et. al.*). Following the passage of the Law, which incorporated the main elements of said Government Decision, a hearing on the Government Decision became less relevant, and it became necessary to directly attack the new law due to the constitutional problems it raises. Upon the filing of the present petition, simultaneous notice will be given to the Honorable Court in H.C. 4608/02, whereby Petitioner 1 gives notice of the filing of this petition and requests that the 30 May 2002 petition remain pending until the final disposition of the present petition.

[...]

Defects in the Legislative Process and the Lack of a Factual Basis

61 The Knesset enacted the Law although it did not have a reliable factual and informational basis for either the need for the statute or the statute's implications. Also, the promoters of the legislation failed to present any data to support their arguments for the need for the legislation. On the one hand, they argued that there was a security need for the statute in light of the increasing involvement, in the "course of terrorist attacks," of residents of the West Bank and Gaza Strip who received a status in Israel pursuant to family unification. On the other hand, according to their statistics, *twenty* persons were suspected of being directly or indirectly involved, and this number includes persons involved in the weapons trade, out of a total population of many *thousands* of residents in the West Bank and Gaza Strip who received a status in Israel as part of family unification. The response filed on 13 April 2003 on behalf of the respondents in H.C. 4608/02, which dealt with the legality of the government's decision of 12 May 2002, set forth only six examples in which persons who received a

status in Israel were directly or indirectly involved in perpetrating and assisting in the commission of attacks against Israelis. Therefore, even if these statistics are reliable, they represent only a tiny fraction of the total number of persons who obtained a status through family unification. Surely, it is wrong to use these few cases to learn anything about the danger of persons who receive a status, and even more so as regards to all residents of "the region."

Page 20 of the minutes of the Knesset's Internal Affairs Committee meeting, held on 14 July 2003, is attached hereto as Appendix P/12.

The respondents' response in H.C. 4608/02 is attached hereto as Appendix P/13.

62 It should be mentioned that, despite explicit requests of members of the Internal Affairs Committee to delay the second and third hearing of the proposed bill before the Knesset, Committee members were not provided with the data they requested regarding the bill. At the Committee's meeting on 14 July 2003, Attorney Manny Mazuz, deputy attorney general and representative of the Justice Ministry, was asked about the number of adults among the persons who received a status in Israel as part of family unification. His response was, regrettably, "Why is that important?"

See page 16 of Appendix P/12.

63 The data that was provided to legislators is unreliable and therefore cannot provide a factual foundation for the legislation. At the meeting of the Internal Affairs Committee on 14 July 2003, attorney Mazuz contended that from 1994 to 2002, 130,000 to 140,000 Palestinians settled in Israel in the framework of the family unification process. In comparison, Mr. Herzl Gedz, director of the Population Administration, contended that from 1993 to 2002, 22,400 applications were filed to grant a status to residents of the West Bank and Gaza Strip, of which 16,007 were approved.

See pages 4 and 15 of Appendix P/12.

64 Mr. Gedz admitted during the hearing in the Internal Affairs Committee that he did not have the precise number of child-applicants, nor did he have the breakdown of figures according to the gender of the applicants. Although the Committee's acting chairperson asked Mr. Gedz to provide the figures to Committee members, the figures were not provided before the members of the Committee approved the bill for second and third reading.

See page 17 of Appendix P/12.

65 Mr. Gedz also did not have statistics on the number of applications to obtain a status that were submitted by citizens and permanent residents of Israel who are married to Jordanian citizens. The Committee's acting chairperson asked him to provide the information. These figures were not provided to the Committee's members before they approved the bill for second and third reading.

See page 19 of Appendix P/12.

66 Mr. Gedz also did not have the annual breakdowns of the number of applications that were approved, and did not provide them to Committee members before they approved the bill for second and third reading.

See page 19 of Appendix P/12.

67 Attorney Danny Guata, legal advisor of the GSS, was asked about the number of cases in which Jordanian citizens married to citizens or residents of Israel were involved in terrorist attacks. He did not respond. The acting chairperson asked attorney Mazuz to inform the members how European countries and the United States cope with the situation of armed conflict. Mr. Mazuz did not provide said information to the Committee.

See pages 20 and 22 of Appendix P/12.

68 Therefore, the data that was provided did not justify the legislation under review. Even if the argument is accepted whereby twenty (or six) individuals were involved in attacks, these cases (notwithstanding their severity, which cannot be belittled), cannot form the basis for the suspicion against an entire population because of its ethnic identity. Certainly, definite assumptions cannot be derived and proven beyond doubt from these cases. In this context, the comments of the Honorable Justice Heshin in *Stamka* are appropriate:

> If, for example, the percentage of fictitious marriages is only a (relatively) small percentage of all marriages in this category, is it justifiable to harass hundreds of innocent couples because of the few transgressors? Is it proper to maltreat the many because of the few? … The established rule is that, until an authority makes a decision that affects the rights of the individual – whether an individual decision or decisions on general policy – it must collect the relevant data, separate the wheat from the chaff, analyze the data, consider it, determine the significance of the proposed decision and its anticipated consequences, and only then act… Let us assume that one out of every ten marriages is fictitious. Is there a rational connection between the means and the purpose? Is it a proper rational connection where the nine suffer because of the one? It is hard not to get the impression that chance

> will be decisive as to whether the policy leads to the uprooting of fictitious marriages or harm to authentic marriages. The damage – the damage to authentic marriages – is real and proven; the benefit – the harm to fictitious marriages – is speculative and unproven. Furthermore, lacking statistics, it is hard to disregard the real possibility that many – those individuals in authentic marriages – will suffer because of the few – those persons in fictitious marriages.
>
> H.C. 3648/97, *Stamka v. Minister of Interior, et. al.*, 53(2) P.D. 728, 777-786.

[...]

75 Furthermore, GSS officials at various levels of the agency interfered in the legislative process of the bill, even though the legislation was civil in nature. GSS officials even appeared before the Internal Affairs Committee in a closed session.

76 Therefore, the legislature did not have adequate or convincing information that justified the need for the legislation. This testifies to the improper purpose of the legislation and of substantive flaws in its adoption. Also, the legislature did not comply with the statutory requirements of the Notification on the Effect of Legislation on the Rights of the Child Law - 2002.

[...]

For all the above reasons, the Honorable Court is requested to grant the remedies set forth in this petition, and to order the Respondents to pay the costs herein.

[*signed*]	[*signed*]
Hassan Jabareen, Advocate Counsel for Petitioners	Orna Kohn, Advocate Counsel for Petitioners

Hassan Jabareen is the General Director of Adalah and the Editor-in-Chief of Adalah's Review
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