

The Israeli Supreme Court's Decision in the Citizenship Law Case

HCJ 466/07, MK Zahava Galon v. The Attorney General, et al.

By Hassan Jabareen and Sawsan Zaher*

Raneen, a 36-year-old Palestinian citizen of Israel, is married to 39-year-old Hatem, a Palestinian from the West Bank. They have been living together in the north of Israel since getting married in 1999, and they have three children. They lead a normal family life, with one glaring exception: Hatem has only a temporary residency permit that allows him to stay in Israel for one year. The Interior Ministry has total discretion over whether or not to issue and renew his permit. When Hatem's current permit expires, he may not be granted another. In such case he may be forced to separate from his family. This is the harsh reality created by Israel's Citizenship and Entry into Israel Law.

On 11 January 2012, the Israeli Supreme Court upheld the constitutionality of the Citizenship and Entry into Israel Law, enacted in 2003, in a 6-5 [decision](#) that spans over 230 pages in Hebrew. The law imposes severe restrictions on the right of Israeli citizens – overwhelming Palestinian citizens of Israel – to apply for permits for their Palestinian spouses and children from the Occupied Palestinian Territory (OPT) to enter and reside in Israel for purposes of family unification. Amendments to the law made in 2007 also prohibit spouses from a number of “enemy states”, defined and listed in the law as Syria, Lebanon, Iran and Iraq, to enter Israel in order to live together with their husbands, wives and children.

Adalah, as well as other human rights organizations and MK Zahava Galon, filed petitions to the Israeli Supreme Court against the law. In response, the State alleged that the purpose behind this blanket ban on family unification was to protect Israel from threats to its security, since the State lacks the means to conduct individual security checks of each applicant. The State based its arguments on its right as a sovereign entity to police its borders and permit or deny the entry of any foreigner into its territory. However, data provided by the State revealed that more than 130,000 Palestinians entered Israel for the purpose of family unification between 1994 and 2008, and that 54 of these persons were involved in some way in acts of terror against the State. Moreover, of these 54, seven were indicted, convicted and handed a prison sentence, and at least two of these seven were released from prison after serving minimal terms, which suggests that the charges against them were not serious. The fact that the law permits Palestinians from the West Bank to enter Israel in order to work, and that thousands of people receive such permits and enter Israel every day, seriously undermines the security arguments raised by the State in defense of the law.

The majority of Supreme Court justices ruled that the potential security threat posed by the family unification of Palestinians to the lives of Israelis must prevail over the right to a family life. Justice Asher Grunis, set to become the court's chief justice in March 2012, ruled that, “Human rights are not a prescription for national suicide.” He further held that the social aspects of the Citizenship and Entry into Israel Law should be weighed against the potential harm to the lives of Israeli citizens. The main themes that run through the majority judicial opinions are that the purpose of the law is legitimate and the law is proportionate and constitutional. Justices

Miriam Naor and Elyakim Rubenstein added that the right to a family life does not necessarily mean that this right should be exercised in Israel. Several justices based their decisions on European comparative case law and claimed that other courts had also denied family unification to non-citizens. This interpretation, however, contradicts [three legal expert opinions](#) examining UK, South African and European Court of Human Rights case law which Adalah submitted to the Supreme Court. The three experts found that the relevant case law applied *only when both spouses are non-citizens*. They each argued that the Israeli Citizenship Law violated the right to family life, and was discriminatory and unconstitutional.

The five minority opinion justices also declared the law unconstitutional. The main arguments made in the minority opinions were that the law violated the right to a family life, which is a constitutional right, and that it was disproportionate due to its sweeping prohibition on family unification in the absence of checks into the circumstances of each individual and the extent to which he or she may constitute an actual “security threat”. Justice Edmond Levy, who penned the opening opinion, differed from the other minority justices in holding that it was not necessary even to subject the law to the test of proportionality, since the law did not serve a sound purpose. In his view, a discriminatory law of this nature contradicts the constitutional values of Israel as a “Jewish and democratic” state.

Notably, the Israeli Supreme Court also upheld the Citizenship and Entry into Israel Law on a previous occasion, in May 2006, in another 6-to-5 [decision](#) delivered in response to legal challenges launched against the law by Adalah and other human rights organizations, as well as members of Israel's parliament. In the first judgment in 2006, Justice Levy ruled the law unconstitutional, but went on to state that the Knesset should be given time to amend the law in order to make it proportional. Thus in the decision from 2006, six of eleven justices decided that the law was unconstitutional, while in the court's new decision from 2012, six of eleven justices ruled the law constitutional. This backwards step in the court's jurisprudence regarding the right to a family life in Israel can be explained in large part by changes in the political makeup of the court and the rightward shift in the Israeli government. The current Netanyahu-Lieberman government, in office since 2009, has passed a series of [laws that discriminate against Palestinian citizens of Israel](#). A majority of government ministers regard Palestinian citizens as “disloyal”, a “fifth column” and a “demographic threat”. The current government has also launched a serious attack on the activist role of the Supreme Court and has attempted to limit its powers of judicial review.

As a result of the court's decision, thousands of Palestinian families living in Israel, including Raneen and Hatem's family, face the immediate and concrete threat of forced separation. Significantly, while Palestinian citizens of Israel face these severe restrictions on the right to family unification, Jewish citizens of Israel enjoy the right to marry any Jewish person living outside of the territory of Israel under the Law of Return, even if he or she is a citizen or resident of an “enemy state”, and to gain immediate status for him or her in Israel. In fact, Israeli law creates three tracks of naturalization in the State of Israel. The highest track is for Jewish people, who are automatically entitled to Israeli citizenship under the Law of Return. The second track is for non-Jewish foreigners, who can apply for Israeli residency status through a process of individualized interviews and background checks. The third and lowest track is for the

Palestinian/Arab/Muslim spouses of Palestinian citizens of Israel who are prohibited from entry for the purpose of family unification under the Citizenship and Entry into Israel Law.

The two Supreme Court decisions on family unification from 2006 and 2012 have generated an intense legal debate in Israel over whether demographic considerations – the desire to preserve a Jewish majority within the Green Line – were the real impetus for the law. The security arguments presented by the State before the Supreme Court are unconvincing given official data indicating that the family unification process does not, in fact, pose a security threat to Israel. In our opinion, the true debate between the justices is that surrounding the identity of Israel as a “Jewish and democratic” state. One side of this debate argues that the Jewish State should preserve the Jewish majority, and views the ban on family unification between Palestinians within Israel as a means of safeguarding these values. The other side, which concurs that Israel should maintain a Jewish majority, nonetheless regards this sweeping ban as a threat to the democratic character of the State, since no democratic state in the world prohibits family unification based solely on a person’s ethnicity or national belonging.

This debate in and of itself calls the equality of Palestinian citizens of Israel into question, and turns the basic principle of non-discrimination into a matter of judicial interpretation to be reexamined on a case-by-case basis. Although the 2012 ruling represents a step backwards from the 2006 judgment, the 2006 decision also demonstrates that the basic issue of equality of Palestinian citizens of the State remains unresolved. Hence the court allowed itself to suspend the constitutional protection provided by the right to a family life. This suspension of the rule of law in the case of family unification also puts many other questions concerning the rights of Palestinian citizens of Israel up for public and parliamentary debate. The prevailing perception of the family unification case as a political issue for debate, rather than a matter that involves constitutionally-protected basic rights, in turn legitimizes the government and Knesset’s enactment of more laws that discriminate against Palestinian citizens of Israel.

When the issue of “equality” for Palestinian citizens of Israel is seen as a political rather than a constitutional question, it is then a short step to also view human rights groups that strive to achieve the rights of dignity and equality for Palestinian citizens as political organizations, and the Supreme Court’s jurisprudence in such cases as political, and thus subject to intervention by the Knesset. However, the Knesset’s interference in the work of the Supreme Court threatens the fundamental principle of the separation of powers. Thus the main analysis of the Citizenship Law should concentrate on the denial of fundamental rights that it entails, and the dangerous extent of that denial. This is not to argue that racist policies against Palestinian citizens of Israel began with the Citizenship Law. However, the heightened danger that is presented by the Citizenship Law lies in its codification of discriminatory policies; this creates an unobstructed road to unbridled racism.

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