English translation: Introduction to petition filed to the Israeli Supreme Court challenging the Citizenship and Entry into Israel Law – 2022 banning Palestinian family unification

HCJ 1777/22 *Adalah et. al. v. The Interior Minister and the Knesset*

Issued 16 March 2022

On 13 March 2022, Adalah filed a petition to the Israeli Supreme Court in its own name and on behalf of three Palestinian families challenging the newly-legislated Citizenship and Entry into Israel Law (Temporary Order) -2022, demanding that the law be revoked. The petition was filed by Adalah Attorneys Adi Mansour, Rabea Eghbariah, and Dr. Hassan Jabareen. The text below, translated from the original Hebrew to English by Adalah, is the "Introduction" to the petition.

Introduction

1. This petition challenges the constitutionality of the Citizenship and Entry into Israel Law (Temporary Order) -2022, which was approved in its second and third readings in the Knesset on 10 March 2022 (hereinafter: **the Law**). The Law restricts – in a sweeping and comprehensive manner – the unification of Arab families in the State of Israel and in Jerusalem, by prohibiting the granting of legal status to Palestinian Arab residents of the West Bank and the Gaza Strip, or residents of a country defined as an enemy state (Lebanon, Syria, Iraq, and Iran), who are married to Palestinian Arab citizens or residents of Israel, or Palestinian Arab residents of Jerusalem. Most of the sections of the current law prohibiting family unification are identical to the provisions of the Citizenship and Entry into Israel Law (Temporary Order)-2003, with few minor changes.

   A copy of the Citizenship and Entry into Israel Law (Temporary Order-2022, that was submitted for the second and third Knesset readings, is enclosed and marked as Appendix E/1.

2. Both the legislative history and sections of the Law – in particular, the new section, Section 1, which defines the goal and purpose of the Law – leave no room for doubt that the dominant and primary purpose of the Law is demographic-ideological. Even the minor exceptions noted in the Law reveal its demographic purpose, e.g., Section 7(g) which stipulates that the Interior Minister has the authority to set a **maximum annual quota** of requests to be discussed in the Humanitarian Committee. Thus, the Law contradicts the rationale of constitutional law, according to which a person's liberty, dignity, and right to equality are not to be violated on the basis of their collective-ethnic affiliation. Such harm, if any, may be inflicted solely on the basis of an individual examination of a person's actions or personal qualities which bear no relation to their ethnic affiliation, and the harm must be in a proportionate manner and for a legitimate purpose.

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3. Hence, it is no coincidence that the attempt of Respondent 2 [The Knesset] to provide a security justification for the Law during the course of the hearings held before the Knesset committee also attests to the Law's demographic purpose. This forced effort – which concluded in an absurd scenario in which it was claimed that the "offspring" of a parent of Palestinian origin constitutes a threat – is based on the prohibited doctrine of "enemy aliens". This doctrine existed until World War II and was based on the assumption that, in a state of conflict between nations, each side is hostile to the other, and that the whole "nation", including its subjects and sectors, is involved in the war efforts. Under this doctrine, it is therefore unnecessary to conduct any individual examination of a person who is a national of an enemy state, as the only relevant issue is their national affiliation. The appalling historical use of this doctrine can be seen in the U.S. Supreme Court ruling delivered during World War II that allowed for internment of tens of thousands of U.S. citizens of Japanese descent solely because of their Japanese origins.[1] Hannah Arendt saw Jewish refugees as a paradigm for this doctrine, as they were expelled from Germany because they were Jews, imprisoned in France because they were Germans, and faced restrictions on their liberty in some U.S. states (including the right to family life with U.S. citizens)[2] as enemy aliens.[3]

4. This ethno-demographic doctrine is prohibited under customary international law, because it is based on a racist principle, and because history attests to the dangers created by this doctrine. Moreover, this doctrine is prohibited even in times of war, as international humanitarian law is based on the principle of distinction between civilians and combatants.[4] Therefore, and as will be explained in the legal part below, the Law in question falls within the absolute prohibitions of international law.

5. The present Law is the most racist law in the Israeli book of laws. There is no country in the world that violates the citizenship or residency status of its citizens or residents – a status which has at its core the right to establish a family – on the basis of ethnic or national affiliation. There is no country in the world that restricts the right of its citizens or residents to family life with spouses who belong to their own nation or people. Even the court in South Africa, in a precedent-setting ruling in 1980, overturned the order prohibiting the unification of Black families in areas where Whites lived, stipulating, *inter alia*, that Apartheid was never intended to impede family life.

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[1] *Korematsu v. U.S.,* 323 U.S 214 (1944).
[2] *Knauff v. Shaughnessy*, 338 U.S. 537 (1950).
[3] Hanna Arendt, "We Refugees, in the Jew as Pariah: Jewish Identity and politics in the Modern Age," 55-66 (Ronald H. Feldman ed., 1978).
[4] Michael Kagan, "Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East," 38 Colum. Hum. Rts. L. Rev. 263 (2007).
[5] *Komani NO v. Bantu Affairs Administration Board, Peninsula Area*, 1980 (4) SA 448(A). See also Christopher Forsyth, "The Judges and Judicial Choice: Some Thoughts on the Appellate Division of the Supreme Court of South Africa since 1950," Journal of Southern African Studies, Vol. 12, No. 1, October 1985, 102-114.

6. When the main sections of the Law (as earlier specified in the 2003 Citizenship and Entry into Israel Law) were previously brought twice before this Court and before expanded panels of eleven justices, the law was not overturned solely due to a single vote. However, no rule was established according to which family life can be restricted continuously and permanently by law on the basis of the national affiliation of citizens or residents, or for an ethno-demographic or ideological purpose.

7. Before briefly explaining why it is essential to conduct a judicial review and to issue an interim injunction despite the two previous rulings, we will examine the developments that led to the ban on the unification of Palestinian families in Israel. The judgment in HCJ 3648/97 ***Stamka v. Minister of the Interior***, PD 53(2) 728 (hereinafter: **the Stamka case**) was the first to consider the issue of family unification of Jewish citizens after the Interior Minister modified his policy and determined that the Law of Return does *not* allows a foreign spouse of an Israeli Jewish citizen to automatically obtain citizenship. The Israeli Supreme Court accepted the Interior Minister's new interpretation of the Law of Return and ruled that this interpretation of the law achieves equality for all citizens as it relates to the naturalization process. In so doing, Justice Cheshin set an important precedent according to which the family unification process must be subject to the rule of law, as it is a matter relating to the right to equal citizenship, and that both Jewish and Arab citizens must undergo a well-defined and written procedure. Prior to the **Stamka** case, the process of family unification of Arab citizens and permanent residents of Jerusalem was at the full discretion of the Interior Minister. For the first time in Israeli legal history, the Interior Minister was obligated to regulate the issue of family unification and subject it to clear standards pursuant to a process called the "graduated procedure".

8. However, before the implementation of the "graduated procedure" that seeks to examine, *inter alia*, the security and criminal history of an applicant, family unification was banned by a government decision and later by the Citizenship and Entry into Israel Law (Temporary Order - 2003, which prohibited the granting of legal status in Israel to residents of the Palestinian Authority. In HCJ 7052/03 ***Adalah v. Minister of the Interior*** (hereinafter: the **Adalah case**), which was heard before a panel of eleven justices, the 2003 law was upheld by a single vote, although in his opinion, Justice Levy determined that the law would be unconstitutional if not for its temporary status. Judge Levy ruled that the legislature be granted time to amend the law. The majority of justices ruled that the law was disproportionate, although most of them ruled that its purpose was security. The second judicial review of the law was in HCJ 466/07 ***MK Zehava Galon Meretz-Yahad v. Attorney General***, PD 65(2) 44 (2012), (hereinafter: the **Galon case**), and once again the law was upheld by a single vote.

9. Despite the aforementioned cases, the present petition will argue that it is essential to again judicially review the Law in question for four main reasons. First, the 2003 law stipulated that its validity could be extended by a government order with the approval of the Knesset. However, the present 2022 Law is the first law that is not formally enacted through the automatic extension of

a government order but rather was legislated as an ordinary law with its own legislative history, despite the clear similarity between the sections of this Law and those of the 2003 temporary order. No clear rule confirming the constitutionality of this law has ever been established. Second, as will be explained in detail in the factual part of the petition, most of the justices in the previous two cases gave serious weight to the fact that the 2003 law was a temporary order, and this fact influenced the examination of the law's proportionality. Although the current Law defines itself as a "Temporary Order", the history of its sections attests to the fact that it is permanent and not a temporary legislation. The provisions of the order have been repeatedly extended since 2003 (with the exception of a short period of time in 2021 due to a coalition crisis) and it has, in fact, become a permanent order for nearly 20 years. Third, both the legislative history and the provisions of the law under discussion make it unequivocally clear that the purpose of the law is demographic-ideological. Even the Attorney General's representative acknowledges that the dominant component of the law is demographic, although he believes this [purpose] to be legitimate. The Israeli Supreme Court has never ruled that a demographic purpose is a legitimate ground for the denial of family life. Fourth, an explicit deliberation of this law is crucial as the case at hand involves the enactment of a highly racist law.

10. Therefore, the petitioners' current legal arguments are different as nearly 20 years have elapsed since the **Adalah** case, and in light of developments in domestic and international law. First, it will be argued that the Law that is the subject of the petition at hand is unconstitutional because it harms the **status of citizenship, which supersedes constitutional law,** and that this violation rises to a level that amounts to a **change in basic rights or in status that supersedes constitutional law.** Thus, and regardless of whether such change should have been made by means of a Basic Law or through ordinary legislation, this substantial change cannot be made by means of a standard temporary order that is extended each year. The focus here is on the citizenship status of Arab citizens [of Israel] and the permanent residency status of Jerusalem residents, as family life is at the core of the status of citizenship under international law (see also the **Stamka** case which emphasizes that the issue of family unification applicable to citizens is first and foremost a matter of citizenship, which is the "mother of all rights").

11. The law in question creates two separate paths within the status of citizenship in all that relates to the citizenship of spouses: one that applies to Jewish citizens pursuant to the **Stamka** ruling and the Law of Return, and another that applies to Palestinian Arab citizens and residents. It must be noted that the law also applies to "nationals of enemy states", but it does not apply to "nationals of enemy states" who are of Jewish descent because of the Law of Return. Hence, the creation of such racist tracks in relation to citizenship status cannot be undertaken by means of a temporary order. This is a matter that lies at the core of the constitution.

12. The second part of the legal argument will examine the present Law within the framework of the principles of the Limitation Clause. It will be argued that the Law violates the rights to dignity, equality in citizenship, and family life without a proper purpose, emphasizing that its clear and

stated purpose is ideological and demographic. The Law is also disproportionate in that: it does not pass the test of rational connection; it is all-encompassing, does not provide for individual examinations, and disregards the existence of the "graduated procedure" that is in force pursuant to the **Stamka** judgment; and the harm it creates is not temporary but has become, in effect, permanent contrary to the stance of most of the justices in the **Adalah** and the **Galon** cases. Furthermore, the law does not meet the narrow test of proportionality, since racist legislation contrary to customary international law can never pass the harm-benefit test.

13. The factual part of this petition will relate the stories of the petitioners, who are victims of a continuous and permanent ban on family unification. It will present the historical, legal background: the **Stamka** ruling and the "graduated procedure", and then the **Adalah** and the **Galon** cases, particularly in relation to the temporary nature of the 2003 order. It will detail the legislative history of the present Law and will also refer to its new provisions that differ from those of the 2003 law, with an emphasis on the stated purpose of the Law. In addition, it will present international criticism of the ban on the unification of Arab families in Israel and Jerusalem.

Application for an interim injunction

The Court is hereby requested to issue an injunction ordering the delay of the entry into force of the Citizenship and Entry into Israel Law (Temporary Order) -2022 until a final decision is delivered on this petition. This petition and all its arguments and appendices form an integral part of this request.