



המוקד להגנת הפרט

HAMOKED

Center for the Defence of the Individual

هموكيد - مركز الدفاع عن الفرد

Position Paper

Proposed Nationality and Entry into Israel Law (Temporary Order) (Amendment No. 2), 5767 – 2006

Introduction: the bill reinforces and expands an unconstitutional arrangement

In May 2006, the Supreme Court rejected petitions challenging the constitutionality of the Nationality and Entry into Israel Law (Temporary Order). Five¹ of the eleven justices who presided, headed by former President A. Barak thought that the law was unconstitutional and should be struck down. Five others² thought the law does meet the conditions of constitutionality, but noted (with the exception of Justice Grunis), that its provisions must be mitigated. The eleventh Justice, A. Levy, thought the law was unconstitutional but that the Knesset should be given the opportunity to replace it with a different arrangement within nine months.

Eight justices³ ruled that the temporary order strikes at the heart of the right to family life and human dignity. Seven of the justices⁴ ruled it violates the right of Israel's Arab citizens to equality. Two of the justices⁵ openly cast doubt regarding the genuineness of the security argument underlying the bill. Indeed, underneath the security pretext, the bill at issue is founded on purely racist demographic considerations.

The ruling was handed down in the framework of H CJ 7052/03 Adalah et al. v. Minister of the Interior et al. (hereinafter: the **Adalah ruling**).

The amendment bill before us (hereinafter: the **amendment bill**) purports to implement the comments made by the court in the Adalah ruling. However, a reading of the bill shows that **not only are the justices' comments not implemented, but the bill seeks to expand, extend and**

¹ President (as was his title at the time) Barak, Justice (as was her title at the time) Beinisch, Justice Joubran, Justice Procaccia and Justice Hayut.

² Vice President Emeritus, Mishael Cheshin, Justice Grunis, Justice (as was his title at the time) Rivlin, Justice Naor and Justice Adiel.

³ President (as was his title at the time) Barak, Justice (as was her title at the time) Beinisch, Justice Joubran, Justice Procaccia and Justice Hayut, Justice (as was his title at the time) Rivlin, Justice Adiel and Justice Levy. It should be noted that Justice Adiel thought the harm was proportionate under the circumstances.

⁴ President (as was his title at the time) Barak, Justice (as was her title at the time) Beinisch, Justice Joubran, Justice Procaccia and Justice Hayut, Justice (as was his title at the time) Rivlin and Justice Levy. It should be noted that Justice Rivlin thought the harm was proportionate under the circumstances.

⁵ Justice Procaccia and Justice Joubran.

reinforce the arrangement which was struck down, in principle, by the majority of the justices.

As we shall demonstrate below, the amendment bill does not rectify the defects identified by the justices. Far from it, the bill applies the draconian arrangement, so far applicable only to residents of the Territories, to citizens and residents of other countries as well. Which countries? The government will decide. The bill allows the Minister of the Interior to deny applications for status in Israel made by residents of the Territories and citizens of other countries on security grounds even if the applicants do meet the existing narrow criteria, based solely on their place of residence. The bill expands the scope of cases in which [the Minister of the Interior] is prohibited from granting status with no discretion or exceptions only due to a threat posed by a distant relative. Worst of all: the explanatory notes highlight the insertion of a “humanitarian exception”, such that would allegedly make the law constitutional in the eyes of the High Court of Justice (HCJ). Yet, the “humanitarian exception” in the bill is vacuous and it distorts the HCJ’s position.

The amendment bill continues a trend of **denying the needs and best interests of the children of permanent residents** who come under the law. This bill has surpassed itself by entirely disregarding this issue. As detailed below, this lack of regard preserves **a situation whereby children are left to lead a life without rights and without knowing what their future holds.**

The **Adalah ruling** was handed down in May 2006. The nine months determined by the HCJ for amending the temporary order are set to expire on January 16, 2007. Despite the protracted period of time that has passed, the amendment bill was brought for first reading only on December 19, 2006, less than a month before the law expires. As we shall demonstrate below, it is a harsh and harmful bill which certainly does not meet the proportionality requirement set by the HCJ. And yet, it seems that the bill’s authors are in no hurry, so much so, that one might get the impression that the long delay in presenting it is an attempt to avoid a serious and profound debate in the Knesset.

Our detailed opinion regarding the provisions of the bill follows:

The humanitarian exception: smoke and mirrors

The bill’s explanatory notes allegedly show that the addition of the humanitarian exception corresponds to the position of the HCJ justices in the **Adalah case** and rectifies the defects in the temporary provision. This is not true. While even the justices who found the law to be constitutional thought it required a humanitarian exception, the majority of the justices thought the law was unconstitutional, not because it lacks a humanitarian exception, but because its main arrangement involves the wholesale rejection of applications without individual examination. Such an arrangement causes disproportionate harm to the right to family life and the right of Arabs in Israel to equality.

Worse still, the “humanitarian exception” in the bill has been so restricted that it loses any real content:

The highest status that may be obtained under the “humanitarian exception” is temporary. The comparison between the “humanitarian exception” and the arrangement for collaborators and their nuclear families (Section 3C of the law) is particularly outrageous. Regarding the latter, the Minister of the Interior is actually empowered to grant a permit for permanent residency in Israel, as if to say, as much as a case may be of the utmost humanitarian essence, still, collaborators and their families are more important.

No solution for unique cases. The exception is inapplicable unless the applicant's "family member" is lawfully present in Israel. "Family member" is defined as spouse, parent or child. Compare this narrow definition to the definition of family member in Section 3D(b) which restricts the possibility of family unification if the "spouse, parent, child, sibling as well as the spouse and child of each of these" may pose a threat to state security. A humanitarian exception is primarily intended for unusual cases and special circumstances which do not necessarily fit this restriction: a person who faces mortal danger in the Territories and has found refuge with friends or distant relatives in Israel; a widow who has no one in the world but her late husband's relatives who provide for her, and other such cases. The law continues to deny the Interior Minister's discretion to allow granting status in these unique cases.

The exception is inapplicable in cases of automatic preclusion due to a relative. Section 3D of the law categorically prohibits the authorities from approving applications when a relative of the person is defined as a security threat. This prohibition is insurmountable even in cases where it is positively proven that the threat posed by the relative has absolutely no impact, in the individual case, on the threat posed by the person for whom status in Israel is sought. Section 3D has been substantially expanded in the current bill. The "humanitarian exception" does not apply when Section 3D applies, i.e., even in the most humanitarian of situations, even when an individual examination clears the person of any security suspicions, no discretion in his matter will be possible.

The humanitarian exceptions will be subject to a quota. According to the bill, the Minister of the Interior will be allowed – government approval suffices – to set annual quotas for approval of humanitarian residency and stay permits. This is inconceivable. The very setting of arbitrary quotas conflicts with the concept of a 'humanitarian exception'. Humanitarian exceptions are the cases in which the state grants status or stay permits beyond the requirement of law, in order to prevent a situation whereby the applicant is wronged in a manner unacceptable in a proper, humane society. How can a quota be established for such cases? Do ten, fifty, a hundred cases constitute a sufficient quota? And what happens when the Interior Ministry receives the 101st case which is worse than all its predecessors?

The suggestion to set quotas also conflicts with the purpose of the law which, according to the state's position, has been and remains security. The cases which will be brought for consideration under this section will obviously involve individuals whose applications are meticulously examined and disapproved at the slightest concern of a security threat. Why is a quota required for this purpose? It seems that while the state stresses before the HCJ, time and again, that the purpose of the temporary order is security related, in practice, during deliberations prior to enacting the law, in statements by senior officials after its legislation and now also prior to its amendment – the state insists on exposing the true purpose of the temporary order – the demographic purpose.

The application of the restriction to risk countries

While the addition of the "humanitarian exception" is vacuous and does nothing to reduce the number of individuals who manage to escape the clutches of the law, indeed, with relation to **expanding the law's applicability**, the authors of the bill have greatly increased the number of individuals who fall victim to it. Such is the case of those defined 'citizens or residents of risk countries'. The Minister of the Interior will now also be prohibited from granting them citizenship or residency permits in Israel, and the military commander will not be permitted to grant them stay permits for Israel. Yet for some reason, whilst the law opens a narrow window (subject to gender and age restrictions) Israelis and their spouses from the Territories to have a shared family

life, in the case of ‘citizens and residents of risk countries’ there are no exceptions and the prohibition is absolute.

The bill also leaves the identity of these “risk countries” to the sole discretion of the government.

The application of the temporary order to citizens of risk countries who do not necessarily live there poses another difficulty. If such citizens live in a different country, which in itself is not included in the list of risk countries, why should the law apply to them? One might also ask: how does this correspond to the law’s security purpose? Is the criterion for applying the law again racism rather than security?

Collective punishment for the actions of others

The bill includes a far reaching amendment to the section regarding security preclusions. According to the amendment bill, the Minister of the Interior may determine that a resident of the Territories or any other status applicant poses a security threat based only on a determination that activity which may pose a threat to the security of the State of Israel or its citizens is taking place in the country or area where he resides. In so doing, the authors of the bill set a new standard for the meaning of “collective punishment”. Consider a case where the wife of an Israeli resident, who seeks status in the country, lives in Bethlehem. Is it conceivable that any sort of activity taking place in **her city** which may threaten state security would automatically deny the possibility of granting her status? Is it conceivable that such activity taking places in the **Bethlehem district** lead to the same result? What of activity in the **whole of the West Bank**?

One of the harshest criticisms of the temporary order, shared by HaMoked: Center for the Defence of the Individual, is that it involves a blanket denial of the Interior Minister’s discretion with respect to the possibility of **granting status** in Israel. Yet, miraculously, when it comes to **refusing applications for status**, the minister’s discretion is not in the list bit restricted. Note, the amendment bill, as well as the original bill, both originated in the minister’s office. When he wishes, the minister restricts his discretion to a minimum, and when he wishes, expands it indefinitely.

The coup de grâce delivered by this section is another substantive expansion of the minister’s ability to refuse an application for status based on an alleged security threat posed by the applicant’s **family member**. The authors of the bill were not satisfied with the current ability to refuse an application due to an alleged security threat posed by the applicant’s **spouse, parent, child, sibling, brother-in-law or sister-in-law**. The amendment adds the applicant’s **grandchildren, nieces, nephews, sons-in-law and daughters-in-law** to this list. One wonders where it ends. How far can one stretch the possibility of punishing a person for actions (or suspected actions) which he did not commit himself?

Even today, cases which have accumulated at HaMoked’s offices indicate that the Ministry of Interior already makes broad use of the ability to refuse applications based on this section in its existing version. Sometimes, a person is denied the opportunity to obtain status in Israel because of information alleging a security threat posed by a relative with whom he has no contact at present and has had no contact in the past. Sometimes, information such as this leads to a refusal of the application even when the applicant is already deep into the process of family unification and has already established his center of life in Israel in every possible sense, based on recurrent approvals from the security agencies.

The amendment to the law will make denial of applications possible in many additional absurd cases:

Thus for example, **an 80-year-old resident of the Territories** who is married to a resident of Israel and has had temporary status in Israel for many years (it should be noted that a similar case was handled by HaMoked) will be denied his status if security officials determine that his **grandchild** may pose a security threat.

Thus for example, the draconian section would also apply to **a 14-year-old son of a resident of Israel who lives with her in Israel**, if, for example, the child has an older brother who lives in the West Bank and he, his wife, or his child are suspected security threats – this 14-year-old would not be able to receive **even a temporary stay permit for Israel**. As a result, the child would be separated from his mother and younger siblings who are residents of Israel, even if he has no contact with his older brother's family.

For an illustration of the possibility of denying a stay permit for Israel due to security threats emanating from applicants' **family members** see the annexed charts.

Two year extension – in contrast with the temporary nature of the law

In the final section of the amendment bill, we are notified of the intention to extend the validity of the temporary order for two more years; this, in contrast with the current situation where the law may be extended for no more than a year at a time. This is yet another conflict with the alleged security purpose of the law. If the law was in fact enacted for security reasons, these constantly change. How can one foresee that the law will be necessary, certainly in its current version, two years from now?

On this issue, Justice Emeritus Cheshin, who led the majority opinion in the **Adalah case** (which, as recalled, rejected the petitions against the law) ruled:

Security reasons are reasons that change from time to time, and determining that a law is a temporary law means a reduction in the harm caused by it merely to the areas where security reasons so demand. Moreover, this temporary nature of the law requires the government and the Knesset to consider the provisions of the law and the consequences of applying them on a frequent basis, and to continue to balance from time to time the rights that have been violated against the security needs of the state.

The bill's present absentees: the minor children of Israeli residents

The law, in its current version, prevents many children, those who have one parent with Israeli status and another who is a resident of the Territories, from obtaining permanent status in Israel. Children aged 14 to 18, who were born in the Territories, or merely registered in the Palestinian population registry, cannot receive status in Israel, even if they live within its territory with the resident parent. All they can be granted is a temporary stay permit for Israel. This permit is granted for short periods of time and does not confer any social rights whatsoever. The future status of these children is unclear and their fate once they reach age 18 is unknown – will their stay permit be extended, or will these children lose their right to a stay permit too? In this case, they will be forced to live their homes in Israel, or live under the constant threat of deportation to the Territories.

The severe ramifications of the law are also felt in the daily lives of these children. The law mostly affects their ability to move freely, as many are detained and harassed at the various checkpoints between the West Bank and Israel and the checkpoints at the entry and exit points from East Jerusalem. In addition, the discrimination between children of different ages created by the law and the Interior Ministry's policy lead to a situation where in many families there are

children with different legal status: some have permanent status, some temporary status and some have stay permits. This has a deleterious effect on family stability and on the relationships between members of the household.

The authors of the bill have entirely ignored these children's predicament. In fact, their matter was not brought up at all in the amendment bill. It should be noted, that in accordance with the principle of the best interest of the child, the state is obliged to regard the child's best interest as the supreme consideration in all decisions and policies affecting their lives under its jurisdiction. This principle requires allowing a child to grow up in a stable and supportive family environment. Not only have the authors of the bill ignored the best interest of these children, but they have also decided to preserve legislation which compromises another principle, that the status of a child should be the same as that of his custodial parent who is a resident of the country. This is a principle which was adopted in Israel, as a matter of social and legal policy and as part of the protection society must provide for the relationship between a custodial parent and his child. Arranging the presence of children of residents with temporary stay permits only, which do not confer social rights, certainly is not in the best interest of the children and does not provide them with the stability so sorely missing from their lives.

As stated, the amendment bill basks in the glory of its attempt to conform to the findings of the HCJ in the **Adalah case**, yet, in this context too, it fails in its mission. President Emeritus A. Barak expressly relates to the importance of upholding the aforesaid principles in his opinion (see §28 of his opinion). Moreover, in its deafening silence on the matter of these children, the amendment bill also ignores a clear statement by one of the majority justices in the ruling, Justice M. Naor, who found in her opinion that if the law is extended, a significant increase of the age of minors to whom the prohibition in the law does not apply should be considered.

Conclusion

Thus, we have seen that the amendment bill does not rectify the severe defects afflicting the temporary order. It preserves unconstitutional legislation under which the constitutional rights to family life and equality are severely violated.

It is difficult to ignore the timing of the bill's presentation. Just a few weeks ago, the Knesset began its debates on an equally harmful piece of legislation – **The Entry into Israel Law (Amendment No. 19) 5766-2006** (“the illegal alien law”). This is not the place to detail all the flaws of this bill, but we shall just state that the combination of these two bills leads to a situation where it is entirely impossible to grant status in Israel to the spouses of Israeli citizens and residents whose only sin is their ethnic origin.

Therefore, the Knesset would do well to remove this bill from its agenda and refrain from further staining Israel's law books.

Sincerely,

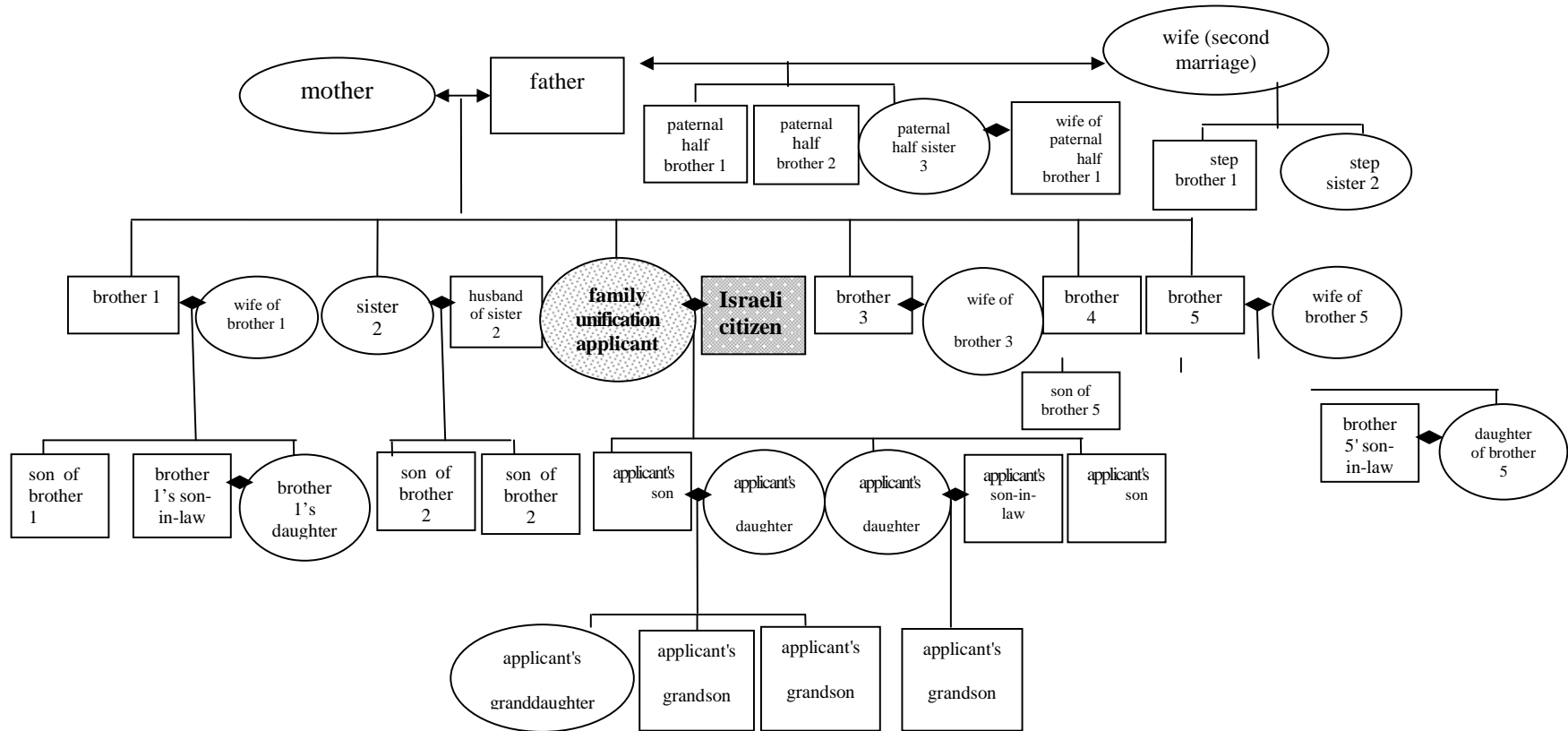
Yotam Ben Hillel, Att.
HaMoked: Center for the
Defence of the Individual

December 27, 2006

Attached, annexes A-B.

Annex A

This chart demonstrates how a stay permit for Israel may be denied due to concerns that a security risk is posed by a relative of a woman for whom her Israeli husband filed a family unification application, if **Amendment 2 of the Nationality and Entry into Israel Law (Temporary Order)** is passed: namely, if security officials decide that any one of the relatives listed in this chart may pose a security threat, it would be impossible to grant this woman even a stay permit for Israel.



Annex B

This chart details all the individuals who will not be able to obtain a stay permit for Israel due to a concern that their family member poses a security risk, if **Amendment 2 of the Nationality and Entry into Israel Law (Temporary Order)** is passed: namely, if security officials decide that any one person may pose a security threat, it would be impossible to grant all these family members even a stay permit for Israel.

