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

HCJ 8099/03
Hearing date: 9 November 2003

In the matter of: **The Association for Civil Rights in Israel**
represented by attorney Sharon Abraham-Weiss et al.
The Association for Civil Rights in Israel
Tel. 03-560 8185; Fax 03-560 8165

The Petitioner

v.

- 1. The Minister of the Interior**
- 2. IDF Commander in Judea and Samaria**
- 3. IDF Commander in Gaza Strip**

all represented by the State Attorney's Office,
The Justice Ministry, Jerusalem

Respondents

Response on behalf of the Respondents

1. The petitions at hand address the constitutionality of the Nationality and Entry into Israel Law (Temporary Order) 2003 (hereinafter: The Temporary Order), which stipulates the following:
 1. In this Law –
 - “Region” – includes Judea and Samaria and the Gaza Strip;
 - “Citizenship Law” – Citizenship Law, 5712 – 1952;
 - “Entry into Israel Law” – Entry into Israel Law, 5712- 1952;
 - “Commander of the Region” – the commander of forces of the Israel Defence Force in the Region;
 - “Resident of the Region” – includes those who live in the Region but are not registered in the Region’s Population Registry, and excludes those who are residents of Israeli communities in the Region.

2. During the period in which this Law shall be in effect, notwithstanding the provisions of any law, including Section 7 of the Citizenship Law, the Minister of the Interior shall not grant citizenship to a Resident of the Region pursuant to the Citizenship Law and shall not give a Resident of the Region a permit to reside in Israeli pursuant to the Entry into Israel Law, and the Commander of the Region shall not give such Resident a permit to stay in Israel pursuant to the security legislation in the Region.

3. Notwithstanding the provisions of section 2 –

(1) The Minister of the Interior or the Commander of the Region, as the case may be, may grant a Resident of the Region a permit to reside in Israel or a permit to stay in Israel, for purposes of work or medical treatment or other temporary purposes, for a fixed period of time, and for a cumulative period that shall not exceed six months; and a permit to reside in Israel or a permit to stay in Israel, in order to prevent the separation of a child under twelve years of age from his parent who is lawfully staying in Israel.

(2) The Minister of the Interior may grant citizenship or give a permit to reside in Israel to a Resident of the Region if he is convinced that the said resident 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; in this paragraph, “family members” means spouse, parent, child.

4. Notwithstanding the provisions of this Law –

(1) The Minister of the Interior or the Commander of the Region, as the case may be, may extend the validity of a permit to reside in Israel or of a permit to stay in Israel that was held by a Resident of the Region prior to the commencement of this Law;

(2) The Commander of the Region may give a permit allowing temporary stay in Israel to a Resident of the Region who submitted an application to become a citizen pursuant to the Citizenship Law, or an application for a permit to reside in Israel pursuant to the Entry into Israel Law, prior to 1 Sivan 5762 (12 May 2002) and who, on the day of the commencement of this law, has not yet been given a decision, provided that the said Resident shall not be given, pursuant to the provisions of this paragraph, citizenship pursuant to the Citizenship Law or a permit for temporary or permanent residence pursuant to the Entry into Israel Law.

5. This Law shall remain in effect for one year from the day of its publication; however, the government may, with the approval of the Knesset, extend its validity by order, from time to time, for a period that shall not exceed one year each time.

It is the respondents' position, in a nutshell, that the Temporary Order restricts the immigration of a population that is currently in armed conflict with the State of Israel. The purpose of this restriction is to protect the Israeli public and uphold its safety and security. In view of the above, the Temporary Order is consistent with the provisions of Basic Law: Human Dignity and Liberty. Alternatively, even if the Temporary Order violates the rights protected by the Basic Law, this violation serves a proper purpose and the extent of the violation is no greater than required.

To support this legal argument, we shall first present the background for the government's resolution and the enactment of the Temporary Order.

A. Introduction

2. The petitions at hand address the constitutionality of the Temporary Order, which originated in a government resolution dated 12 May 2002, regarding the treatment of illegal aliens and the policy of family reunification in the case of residents of the Palestinian Authority and other aliens of Palestinian descent (hereinafter: The Government Resolution). It is common knowledge that the character of the Israeli-Palestinian conflict changed as of September 2000, when it developed into a brutal terror attack orchestrated by Palestinian terror organizations that is broadly supported by the Palestinian population. This armed conflict is directed by the Palestinian

leadership, following the failure of political negotiations regarding a permanent status agreement.

3. These terror attacks take place both in Judea, Samaria and the Gaza Strip (hereinafter: The Territories, or The Region) and inside Israel itself. They are directed against civilians and soldiers, men and women, the elderly and children and ordinary people and public figures, and are carried out in all places, including public transportation, shopping centers and markets, coffee shops and restaurants, and so on. The terror organizations use various means to carry out these attacks, but the common denominator is that they are all deadly and cruel. The methods employed include shootings, suicide bombings, mortar shells, rockets, car bombs, etc. This armed conflict has so far taken the lives of more than 800 Israeli citizens and residents, and caused the injury of more than 5,100 others, including some extremely serious injuries.

Supreme Court President Aharon Barak referred to the unique attributes of this conflict in H CJ 7015/02, *Kifah Mohammad Ahmad Ajuri v. IDF Commander, Takdin Elyon* 2002(3) 1021:

Since the end of September 2000, fierce fighting has been taking place in Judea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle. Within this framework, approximately 14,000 attacks have been made against the life, person and property of innocent Israeli citizens and residents, the elderly, children, men and women. More than six hundred citizens and residents of the State of Israel have been killed. More than 4,500 have been wounded, some most seriously. The Palestinians have also experienced death and injury. Many of them have been killed and wounded since September 2000. Moreover, in one month alone - March 2002 - 120 Israelis were killed in attacks and hundreds were wounded. Since March 2002, as of the time of writing this judgment, 318 Israelis have been killed and more than 1,500 have been wounded. Bereavement and pain overwhelm us.

2. Israel's fight is complex. The Palestinians use, *inter alia*, guided human bombs. These suicide bombers reach every place where Israelis are to be found (within the boundaries of the State of Israel and in the Jewish villages in Judea and Samaria and the

Gaza Strip). They sow destruction and spill blood in the cities and towns. Indeed, the forces fighting against Israel are terrorists; they are not members of a regular army; they do not wear uniforms; they hide among the civilian Palestinian population in the territories, including in holy sites; they are supported by part of the civilian population, and by their families and relatives. The State of Israel faces a new and difficult reality, as it fights for its security and the security of its citizens. This reality has found its way to this court on several occasions...

It is the estimate of the defence establishment that as of now security considerations require that none of the residents of the Region be allowed into Israel since *their entry into Israel with Israeli permits and their free movement inside the country is liable to substantially threaten the safety and wellbeing of Israel's citizens and residents*. This estimate was one of the factors underlying the Government Resolution – on which we will elaborate below – and the Temporary Order addressed in this petition. The law provides for several exceptions, which we will elaborate below.

4. Generally, the Respondents assert that granting a permit to stay in Israel to a resident of a state or political entity that is in conflict with Israel involves an inherent security risk, since that person's loyalties might be with the state or entity that is in conflict with Israel.

This general position is reinforced by the escalation of the armed conflict with the Palestinians in September 2000. The existence of an ongoing Israeli-Palestinian conflict is common knowledge, and no evidence is required to substantiate this fact. It is also true that the character of the conflict has changed as of the end of September 2000. In this conflict, which has become an armed conflict, the Palestinian side uses all available means against Israel's citizens and residents. *Unfortunately, in some cases the Palestinians also use Arab citizens of the State of Israel, and especially people who were formerly residents of the Territories and have received legal status in Israel following family reunification processes*. Consequently, Israeli citizens and public security are facing serious dangers; these dangers have multiplied since the start of the armed conflict in September 2000. The comments made above are general and naturally do not apply to the entire Arab community in Israel.

B. The purpose of the law: upholding the right to life, physical integrity and personal security

5. The Temporary Order is meant to minimize the risk to public security and reduce the chances of violating the most basic right of any individual in Israel – the right to life.
6. This right is constitutional and is an inalienable right of any person in Israel. The constitutional status of this right and of the principle of the sanctity of life is anchored in the Basic Law: Human Dignity and Liberty (hereinafter: The Basic Law).

(a) Section 1 of the Basic Law, entitled *Basic Principles*, reads:

Fundamental human rights in Israel are founded upon recognition of **the value of the human being, the sanctity of human life**, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Israel's Independence (Emphasis added)

(b) Section 2 provides:

There shall be no violation of the **life, body** or dignity of any person as such. (Emphasis added)

(c) Section 4 of the Basic Law translates this basic principle into the basic right of all individuals to the protection of their lives:

All persons are entitled to protection of their **life, body**, and dignity. (Emphasis added)

See also Leave to LCA 5587/97 *Attorney General v. Ben Akar (minor), represented by parents and guardians*, *Piskei Din* 51(4) 830, p. 848; CA 506/88 *Yael Shaefer, minor, v. the State of Israel*, *Piskei Din* 48(1), 87, p. 104.

7. It should be noted that prior to the enactment of Basic Law: Human Dignity and Liberty, the value of the sanctity of life constituted an integral part of the Israeli legal system, which absorbed this value from the basic values of Judaism. On page 1333 of LCA 461/62 *Zim Israel Navigation Company et al v. Maziar*, *Piskei Din* 17 1319, Justice Zilberg explained:

Judaism has always glorified the value of human life. The Torah is not a philosophic theory comprising opinions and beliefs; it is a way of life and for life ...

... Within the organized framework of social life and subject to the priorities set by the Torah, life is the holiest of assets ...

Similarly, Deputy President of the Supreme Court, Justice Elon, said in CA 506/88 *Yael Shaefer, minor, v. the State of Israel* (*ibid*, p. 117):

God created man in his own image" – this is the theoretical, philosophical foundation of the special attitude of Jewish law toward the supreme value of the sanctity of human life – the sanctity of the image of God ...

8. The right to life of every individual in society coexists with the recognized right of the State to defend itself. The State is responsible for the protection of the life and wellbeing of its residents, and may take action against those who seek to harm them, in order to prevent any attack upon their lives.
9. The right to life is thus a basic right held by all individuals in Israel. As mentioned, the sanctity of life is a basic principle underlying our perception of the upholding of human rights in the State of Israel. The right to life is the most basic right, without which no other right can exist. All persons in Israel are entitled to protection of their **lives** (Section 4 of the Basic Law), and it is the State that is responsible to protect the life and wellbeing of its residents.

The foundation underlying the law:

10. **The professional opinion of the security establishment is that a policy that would allow an almost uninterrupted immigration and flow of residents of the Region into Israel, through marriage, would increase the danger to public security in Israel and increase the risk of a violation of the right to life and physical integrity of Israeli citizens and residents.** This position is based exclusively on the unique attributes of the current armed conflict, which are:

11. **(a) Involvement of the civilian population in the violent conflict:**

The forces fighting against the State of Israel are not part of a regular army; they are civilians. In this context it should be noted that the age range of Palestinians taking an active part in the conflict with Israel and that of Palestinians seeking permits to stay in Israel and gain legal status in this country through marriage are almost identical. The age of Palestinians seeking family reunification in Israel is almost the same as that of the typical terrorist, ranging, in most cases, between 18 and 40.

Moreover, the civilian Palestinian population in the Region largely supports the violent struggle against Israel, including suicide bombings that target innocent Israeli civilians. This extensive support amplifies the danger presented by the civilian population in the Region for public security in Israel.

Regrettably, the involvement of the civilian Palestinian population in the armed conflict, whether by actively participating in the conflict or by supporting it, makes it

necessary to impose certain restrictions on the civilian Palestinian population in general and on those Palestinians in the age range of most terrorists in particular.

12. **(b) Abuse of Israel immigration policy by means of family unification procedure for the purpose of the armed conflict**

Investigations conducted by the defence establishment, mainly in the last two years, produced increasing evidence that Residents of the Region who received legal status in Israel through marriage have been involved in terror attacks in Israel both as terrorists and as accessories who helped bring terrorists into Israel from the Territories. Operations in which Residents of the Region with legal status in Israel include:

- Personal involvement in terror attacks, including as suicide bombers;
- Bringing suicide bombers into Israel from the Territories or from Palestinian villages on the Palestinian side of the seam line and transporting them to their destination inside Israel;
- Collection of intelligence regarding attractive sites for terror attacks, designed to make the attack as deadly as possible;
- Performance of logistical missions for terror organizations, such as renting safe houses that serve as bases for launching terror attacks, smuggling the weapons, etc.;
- Recruitment of terrorists and accessories among Israeli Arabs with whom they establish connections.

The involvement of these residents in terror operations is a direct outcome of the interest that terror organizations in the Territories and abroad have in these individuals, which has dramatically grown since the start of the armed conflict.

13. This growing interest emanates primarily from the fact that people who have official Israeli certificates, including a driving license, can move freely inside Israel and have access to and are familiar with Israeli targets, including security targets. The attractiveness of such former Residents of the Territories to terror organizations grew in direct proportion to the difficulty of independently transporting terrorists across the Green Line, in part because of the progressing construction of the separation fence. Since the start of the armed conflict and in the last year in particular, after the IDF entered the Territories in Operation Defensive Shield, terror organizations have faced increasing logistical problems, because of the closures and encirclements and because of IDF presence in the Territories. The defence establishment consequently found that

Palestinians who acquired such certificates thanks to family reunification, as well as a few Israeli Arabs, were involved, mainly as accessories, in a large portion of the suicide bombings carried out inside the Green Line.

14. In addition, concurrently with integration into Israeli society, Residents of the Region who receive legal status in Israel maintain firm ties with their families in the Territories and with institutions and "organizations" there. The loyalty that some of these individuals maintain for the Palestinian cause and the Palestinian Authority is clear. Furthermore, some of them even continue to live in the Territories intermittently; their Israeli certificates enable them free passage between the Territories and Israel, as they please.
15. Moreover, their integration into Israeli society and familiarity with the Israeli way of life, while maintaining strong ties in the Territories, makes these individuals the perfect link. Thanks to this situation, they can gather intelligence about targets and transfer this information to the Territories, and can also personally transport terrorists from the Territories into Israel. For the terror organizations, Israeli IDs and yellow Israeli license plates are a "**power multiplier**" for terror.
16. **(c) The limitations of individual screening and the inability to rule out security risks as a result of the entrance of Residents of the Region in the current situation**

Obviously, the main objective of the defence establishment is to thwart the violent operations of Palestinian terror organizations, or in plain language – to save lives. Naturally, most of the resources the State can allocate to the defence establishment are dedicated to fighting this murderous terror; the scant resources available to the defence establishment are stretched to the brink.

Ever since the establishment and transfer of authorities to the Palestinian Authority, and even more so since the start of the armed conflict, the ability of Israel's defence forces to individually analyze the risk posed by each Resident of the Region seeking legal status in Israel and wishing to enter it has declined.

Starting in 1994, when the steady increase in the number of applications for family reunification between Israeli residents and citizens and Residents of the Region began, until the Government Resolution, the percentage of applications denied based on specific security information about a foreign spouse who is a Resident of the Region, was only 8% on average.

17. However, the involvement of holders of Israeli certificates in terror organizations and deadly attacks inside Israel since the start of the armed conflict, in the various forms detailed above, indicates that many of those to whom Israel has agreed, in the absence of specific security information about them, to confer legal status in Israel in the process of family reunification, have at one stage or another after their entry into Israel reunited themselves with the Palestinian cause and aided and carried out deadly terror attacks.
18. The factors making individual screening impossible for the defence establishment:
 - a. Information gaps – Under the circumstances, the defence forces obviously have information gaps regarding the activity of Residents of the Region, particularly those residing in zones A and B. Therefore, the fact that no negative security intelligence exists regarding a particular individual does not necessarily mean that this person is not involved in prohibited security activities, and cannot rule out the possibility that the absence of such intelligence is only due to these information gaps.
 - b. The risk to Israel's security can materialize at any time without prior warning, since those for whom family reunification is sought reside where terror organizations operate freely, as do their family and friends. Terror organizations can thus easily and at any time make contact with the person seeking legal status in Israel and/or with their family or friends, and convince them – whether amicably or through threats – to cooperate. Therefore, even if a periodic evaluation of each applicant were practicable, such a screening process could not rule out the risk inherent to granting entry permits to Israel.
 - c. The risk is posed by individuals who can legally enter and move inside Israel – since the general closure was tightened and it became harder to enter Israel, terror organizations have sought ways to carry out terror attacks inside Israel. These organizations perceive holders of Israeli certificates, especially those who have strong ties with the Palestinian Authority, as an important and attractive asset in their armed struggle, due to these people's continuing links with their immediate family and childhood friends in the Region; their solidarity with the Palestinian cause; their access to both the Region and Israeli areas; and the organizations' ability to pressure the family of former Residents to convince these individuals to collaborate. In this context it should be noted that the security forces estimate that the establishment of the "buffer zone" or "seam line zone" and of the separation fence around

Jerusalem might have further adverse implications, since as it becomes harder to transport terrorists and explosives from the Territories into Israel, holders of Israeli certificates will become even more attractive to terror organizations.

- d. The past is not indicative of the future – The fact that a certain person was in the past permitted entry into Israel and/or that at present there is no concrete intelligence about him does not, in and of itself, mean that *in the future* this person will not be a threat to Israel's security, whether because of his solidarity with and active participation in the armed conflict currently waged by the Palestinian side, or because he will not be able to ward off threats made by the terror organizations against his close relatives in the Region.
 - e. The favorite candidates for terror organizations are individuals about whom Israel has no prior intelligence.
19. We shall now offer several examples, according to the categories provided above, of individuals who, following family reunification, received Israeli certificates and then aided and carried out terror attacks.

One such case is that of **I. I.**, who gained legal status in Israel following his marriage in 1991. I. has two brothers – one is a Hamas activist and another a Tanzim activist. His brothers convinced him to transport a terrorist with a bomb into Israel and to recruit two Israeli Arabs from Umm al Fahem to help him transport the cargo. (March 2001)

M. A. H., originally from An Nuseirat Camp in Gaza, married a resident of Ramla and received Israeli papers. He was arrested in September 2002 when it was discovered that he belonged to a cell of Israeli Arabs from Ramla and Lod that was run by senior Hamas operatives in the Gaza Strip. Abu Hubeiza was recruited in March 2002, and in turn recruited two other residents of Ramla and Lod, including his brother-in-law, for the purpose of carrying out terror attacks in Israel. The members of the cell were instructed to kidnap and murder a soldier. They gathered intelligence about the home of an IDF officer in the Modi'in area who was targeted for assassination, and transferred this information to their handlers in the Gaza Strip.

N. H., originally from Kafr Ra'i in Samaria, received Israeli papers following an application for family reunification with an Israeli citizen from Elut. He was recruited by an Islamic Jihad cell in Jenin. He personally, together with an operative from Jenin, went on a mission of planting a bomb in the Haifa area. (August 2001)

M. M., originally from Tulkarm, received Israeli papers after he married a resident of Jisser al Zarqa. He was recruited by Hamas in the West Bank in order to transport a suicide bomber into a busy site in Israel. (February 2002)

A. B., originally from Qalqiliya, received Israeli papers after he married a resident of Jaljulia. He was recruited by Fatah-Tanzim in the West Bank in order to carry out a suicide bombing in a busy site in Israel. (February 2002)

M. A. J., born in Rafah, lived in Israel for two years after he married a resident of Rahat. He received Israeli papers after he applied for family reunification. A. J. was recruited by Hamas operatives in the West Bank in order to transport two suicide bombers from the West Bank into Israel; their target was the central bus station in Beer Sheva. The attempt to enter Israel was thwarted in April 2002, and A. J. was arrested in May 2002.

These are only a few examples. According to information gathered by the defence agencies, since 2001 twenty-one residents of the Region who received legal status in Israel in the process of family reunification contributed substantially to acts of hostility against Israel's security. Terror attacks abetted by Residents of the Region, as mentioned above, have taken the lives of 45 Israelis and injured 124. These statistics concerning the involvement in terror attacks of Residents of the Region who received legal status in Israel indicate a dangerous trend that has developed over the last few years among the population discussed in this petition.

20. Conclusions

Israel, like many other Western countries, is forced today to handle immigration-related problems, including problems that originate from marriage-induced immigration. One way to deal with these problems is to stipulate more stringent criteria and additional preconditions for legal status. However, the most important point in our context is that **Israel is also forced to deal with unique issues due its geopolitical situation and the conflict between Israel and the Arabs and Palestinians – issues that are unparalleled anywhere else in the world.**

An application for legal status in Israel for an individual from the Region who is the spouse of an Israeli cannot in any way be compared to an application by a foreign spouse from another country (that is not high-risk or in conflict with Israel), since Israel and the Palestinian Authority are in an armed conflict that revolves around *national and political issues*.

These unique problems, as explained above, have given rise to a special threat to the safety and wellbeing of the Israeli public. Large-scale immigration of the Palestinian population into Israel, concurrent to a bloody conflict between Israel and the Palestinian Authority, has given rise to a special threat to the safety and wellbeing of the Israeli public. It is this threat that the Knesset has sought to reduce, in the given period, through the Temporary Order addressed in this petition.

21. It should be noted that the considerations detailed above regarding the purpose of the law, namely, the intention and duty to uphold State security and protect the lives of Israeli residents, are also expressed in the Government Resolution that preceded the Temporary Order:

Faced with the security situation, and because of the implications of the immigration and settling of aliens of Palestinian descent in Israel, including through family reunification, the Ministry of Interior, together with the other relevant ministries, will define a new policy for family reunification. In the relevant cases, until such a policy is defined and until the necessary new procedures and legislation are in place, the following rules will prevail...

The explanations for the language of the Temporary Order state:

Since the outbreak of armed conflict between Israel and the Palestinians, which among other things has led to dozens of suicide attacks on Israeli territory, there has been increased involvement in this conflict of Palestinians who are originally residents of the Region and carry Israeli identity cards following family unification with Israeli citizens or residents, and who took advantage of their status in Israel, which enables them to move freely between Palestinian Authority territory and Israel.

Therefore, and in accordance with Government Decision 1813, of 12 May 2002 (hereafter – the government decision), it is proposed to limit the granting to residents of the Region citizenship pursuant to the Citizenship Law, including through family unification, and to limit the giving of permits to such residents to reside in Israel pursuant to the Entry into Israel Law or of permits to stay in Israel pursuant to the security legislation in the Region.

Underlying the Government Resolution and Knesset legislation are the unique circumstances that Israel is facing: an ongoing conflict with the Palestinians that has now turned into an armed conflict. **From the Legislature's perspective, in view of the duty of the State to protect the lives and physical integrity of its citizens and residents, the state is entitled to establish special suitable arrangements that guarantee that marriage with an Israeli citizen will not at any point undermine Israel's national security and the wellbeing of its citizens and residents.**

22. *A professional opinion of security matters*, emanating from an unbearable security situation, constitutes a factual professional foundation that any responsible Government and Legislature must take into account.
23. To conclude, the escalation of the armed conflict has increased the threat to public security, including to the right to life and physical integrity of every individual. The increased threat to the right to life and the change in the nature of this threat call for an adaptation of the existing legal tools to the new circumstances. The enactment of the Temporary Order at hand constitutes such adaptation of the legal infrastructure to the needs created by the nature of the current armed conflict. In other words, the purpose of the legislation – both the objective and the subjective purpose – is to protect the right of the public to life, personal safety and physical integrity.

This law must therefore be seen as puts into practice the legal obligation of the authorities to protect the most basic of all rights, which is anchored in the Basic Law – the right to life and physical integrity.

C. Granting legal status to aliens – the legal framework

24. The status of an alien who marries an Israeli citizen or resident is regulated by law and administrative regulations. The common denominator underlying these arrangements is that the granting of legal status to the alien is intended to benefit the Israeli spouse, not the foreign one. These arrangements protect the best interests of the local spouse, not those of the foreign spouse.

The authority to confer legal status upon the spouse of an Israeli citizen under Section 7 of the Law of Nationality is discretionary, and all the more so in the case of the spouse of a resident who is not a citizen. **The foreign partner is not automatically entitled to gain legal status in Israel by force of marriage.** Regarding the discretionary nature of this authority and the importance of naturalization, Justice Barak (now the President of the Supreme Court) said in H CJ 754/83 *Renkin v. Minister of Interior, Piskei Din* 48(4) 113:

Naturalization is an important step. Citizenship creates an ongoing legal relationship between a person and his country (see A. Rubinstein, Israeli Constitutional Law (Schocken, 3rd edition, 1981) 401). This relationship has implications in many legal fields, including both international law and domestic law. Citizenship imposes duties on the State in terms of foreign relations. From the perspective of the individual, citizenship confers upon him rights, gives him powers, imposed on him duties and recognizes his immunity in various matters. Citizenship has to do with the right to vote for the Knesset, the capacity to serve in various public offices, the jurisdiction of the courts, extradition and many other matters. **Citizenship implies loyalty.** (*ibid*, p. 117, emphasis added)

In the *Renkin* case it was therefore stated, regarding the right of a foreign spouse of an Israeli citizen to become naturalized, that:

This provision does not dismiss the need for the Interior Minister to exercise discretion under Section 5(b) of the Law of Nationality. Indeed, the Naturalization Bill of 1951 proposed that marriage would [automatically] make the spouse a citizen as of the date of the marriage [Section 6]. The Knesset did not accept this proposal and instead set forth a mechanism by which marriage makes the requirements more lenient, but does not make the discretion of the Minister of Interior redundant. (see Knesset Proceedings 11 (1952) 1688-1700, and 82 (M.D. Gouldman, Israel Nationality Law, Jerusalem 1970). Israel has thus joined many other countries that do not accept the premise that marriage (or the dissolution thereof) in and of itself automatically changes the citizenship of the spouse; Israel recognizes the principle of the independence of citizenship, according to which a spouse can become naturalized on an individual basis, with the marriage granting him preferential treatment in certain respects ... ***The Minister of the Interior is thus given the discretion ("if he sees fit") to confer Israeli citizenship upon the spouse of an Israeli citizen.***" (*ibid*, p. 116, emphasis added)

The Court again held in HCJ 3648/97 *Stamka et al v. Minister of the Interior et al.*, *Piskei Din* 53(2), 728:

An alien who marries an Israeli citizen does not acquire, by marriage alone, the right to become an Israeli citizen himself. The Minister of the Interior has the authority to grant or refuse an application submitted by such spouse. (ibid, pp. 767-768, emphasis added)

25. The arguments regarding discretion in the conferral of legal status upon a foreign spouse are reinforced when the local spouse is not an Israeli citizen but only a permanent resident. This is due not only to the difference in the legal status of the local spouse, but also in the different legal infrastructure underlying the conferral of legal status upon the foreign spouse. The criteria for granting a permit to stay or reside in Israel to an alien are not stipulated in law or regulations. This absence is not an oversight – rather, it stems from the basic understanding that the discretion as to whether to permit an alien to reside in Israel must be very broad.
26. This Court has repeatedly asserted that it is the sovereign right of the State to decide whom to let enter, and that the discretion of the authorities in this respect is extremely broad. This position is a leitmotif in Court rulings in the distant and near past alike (see for example HCJ 482/71 *Clark v. Minister of Interior*, *Piskei Din* 27(1), 113; HCJ 9723/01 *Levy v. Employment Service*, not published.)
27. Let it be stated that the position of the Court is consistent with that of international law and with the laws of most countries of the world, according to which each country reserves the absolute discretion to decide which aliens to let enter; generally, a country is not obligated to offer any explanation to an alien as to why it refused to let said alien enter.

This Court has interpreted the discretion of the Minister of the Interior to grant permits or any other legal status under the Law of Entry into Israel as very broad. In HCJ 431/89 *Kendal Richard et al v. Minister of Interior*, *Piskei Din* 46(4) 505, p. 520, the Court held:

Under Section 1(b) of the Law of Entry into Israel, "the presence in Israel of persons who are not Israeli citizens and who do not have an immigrant certificates shall be subject to a permit to reside in Israel granted under this law." It is the respondent, the Minister of the Interior, who has the authority to grant such permits and the discretion as to whether to grant them. The law

and the regulations enacted under it ... do not define the criteria for granting such permits. The respondent has broad discretion in the matter, and is not obligated to provide any explanation for his decision.

Regarding the imposition of restrictions on the entry of aliens into Israel, the Court said in HCJ 1031/93 *Eliau (Hava) Passero (Goldstein)*, *Piskei Din* 49(4) 661, p. 705:

Because of these public ramifications, all countries have imposed restrictions on the entry of aliens and further restrictions on those seeking to become residents or citizens. ***The restrictions are meant to preserve the unique culture, identity and common denominator of the residents, to protect their economic interests and uphold public order and ethics. There are two types of restriction: restrictions on entry into Israel and restrictions on naturalization and residency.*** Regarding restrictions on entry, each country reserves the absolute power to control the flow of aliens that enter it.

28. For the prevention of entry of any specific alien into Israel, it is not necessary to prove the existence of a verisimilar fear for public safety, nor even a substantial one: it is enough to have concerns that are not unfounded in order to bar a person from entering Israel. This was the ruling at times of relative calm, and it therefore holds with even greater force at times of armed conflict.

In the case at hand, it is the professional opinion of the defence forces that the entry of Palestinians into Israel is a threat to public and State security. This is not merely a remote concern, which in and of itself would have been sufficient to bar entry into Israel; the Honorable Court surely knows, as part of its judicial knowledge, that the general danger to Israeli citizens and residents posed by the entry of Residents of the Region into Israel is real and extremely serious.

Under these circumstances, the presence of Residents of the Region in Israel – whether temporary or permanent – poses a general threat to State security and a threat to the security, life and physical integrity of each of Israel's citizens and residents. Unfortunately, this danger constantly translates into fact in the shape of murderous terror attacks.

29. The threat created by the presence of any Resident of the Region in Israel might surface suddenly, without prior warning and without any ability to predict or evaluate whether any given resident is liable to collaborate with a terror organization. It is

impossible to ascertain whether pressure was applied to him by terror organizations during a visit to his family's village in the Region; the fact that ostensibly, this individual has a clean record cannot guarantee that he poses no threat.

The motivation of terror organizations to continue operating, the continued involvement of large portions of the civilian Palestinian population in the armed struggle and the continued access of former Residents of the Region to terrorists in the Region create a very real risk. Under present circumstances, there is no justification to assume such a risk.

30. **As mentioned, the Temporary Order was born of a reality in which former Residents of the Region who obtained Israeli certificates, following family reunification with relatives who are Israeli citizens or residents, had been found to play an ever-growing role in terror operations. This reality creates a near-certain danger to the security and wellbeing of the Israeli public.**

D. Regarding the alleged violation of protected rights

31. The petitioners in the various petitions argue that the Temporary Order violates their rights to equality, privacy and personal liberty, as well as the right to a family life. The position of the respondents – as detailed below – is that the Temporary Order is consistent with the provisions of the Basic Law. The Temporary Order implements the duty to protect the basic right to life. We shall now distinguish between the various rights that the petitioners allege have been violated.

32. **(a) The right to liberty**

Section 5 of the Basic Law protects personal liberty:

There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.

Section 5 is designed to protect physical liberty against violation in the form of imprisonment, arrest, extradition, etc. This section, which aims to protect physical liberty, is not the suitable instrument with which to protect individual autonomy in the selection of a spouse. The petitioners' arguments on this basis are therefore unfounded.

33. **(b) The right to privacy**

Section 7 of the Basic Law protects the right to privacy:

- (a) All persons have the right to privacy and to intimacy.

- (b) There shall be no entry into the private premises of a person who has not consented thereto.
- (c) No search shall be conducted on the private premises or body of a person, nor in the body or personal effects.
- (d) There shall be no violation of the confidentiality of conversation, or of the writings or records of a person.

Section 7(a) protects the principle of the right to privacy, without offering any definition for the concept of privacy. The other clauses define the prohibited types of violations to this protected principle. All prohibited violations are positive acts ("there shall be no entry", "no search shall be conducted" and "there shall be no violation"). This type of protection, namely, the prohibition of active violations, is consistent with the nature of the right to privacy, which is in fact an individual's right to a private space to which the access of all others is limited. This space can be physical (a home) or abstract (information).

The Temporary Order at hand does not lead to the violation of the private space in which a person chooses his spouse, since it does not restrict the right of such individual to choose. Because of the armed conflict that has taken many lives, the Temporary Order sets forth an immigration policy that limits the benefits attached to the formation of a family unit.

The legal argument presented by the Respondents is that since the individual is still free to choose his or her spouse and since State merely refrains from granting the foreign spouse immigration benefits attached to the creation of a family unit – there is no violation of the right to privacy.

34. **(c) The right to equality**

The Respondents maintain that in this petition there is no need to answer the question under which circumstances a violation of the right to equality indeed amounts to a violation of the constitutional right to dignity that is protected by the Basic Law, since in the case at hand the principle of equality is not violated at all.

In order to support the argument that the right to equality is not violated, let us state again that the discretion granted to the Minister of the Interior as to whether to permit aliens into Israel is extremely broad, and that in fact the humanitarian exception under which aliens are granted legal status in Israel by force of family reunification has the best interests of the Israeli spouse in mind, and not that of the foreign spouse. This means that prohibited discrimination exists when the law gives different treatment to

Israeli spouses between whom exist no relevant differences. Obviously, in view of the broad discretion that the Minister of the Interior has and in view of the purpose of the humanitarian exception, **a foreign spouse has no standing to seek a Court decision voiding a Knesset law based on an argument regarding prohibited discrimination.**

Prohibited discrimination exists when Israeli spouses are treated differently because of traits or characteristics that do not justify different treatment (such as gender, religion, race or nationality). In this petition, the distinction made by the law is not based on the characteristics of the Israeli spouse, but on those of the foreign one. This fact negates the basis of the argument concerning prohibited discrimination of the local spouse.

Let it be stressed that the restriction in the Temporary Order is based on *affiliation with a state-like entity that is in armed conflict with the State of Israel* (a Resident of the Region, as defined in the Temporary Order). This is the distinction made by the Legislature, on which basis legal status shall at this time not be granted to this population; it is not a distinction based on nationality, religion, race or gender. Under these circumstances there is no room for concern that the distinction based on the characteristics of the foreign spouse in fact conceals prohibited discrimination based on the nationality of the local spouse, for several reasons:

Firstly, the distinction based on the characteristics of the foreign spouse is founded upon relevant considerations that according to the defence forces are imperative under the circumstances. In short, these circumstances are the increased threat to public safety presented by granting legal status to a spouse who is a Resident of the Region, against the backdrop of the armed conflict between the Palestinians and the State of Israel. The material justification for a distinction based on the characteristics of the foreign spouse dispels all concerns that this distinction might in fact conceal unlawful considerations.

Secondly, the Temporary Order applies to all Israeli spouses, regardless of personal characteristics such as nationality, religion, etc.

Therefore, since the distinction made by the Temporary Order is based on the characteristics of the foreign spouse and since this distinction is based on the relevant consideration of protecting the right to life, there is no violation of the local spouse's right to equality.

Moreover, this distinction is not based on ethnic considerations as such, but on security considerations. Therein lies the difference.

35. **(d) The right to a family life**

It should first be noted that the Temporary Order does not prevent family life or autonomous selection of spouses; nor does it nullify the right to a family life; it merely rules out the possibility of exercising this right in the State of Israel, of all places.

Moreover, the Petitioners base their petition on international treaties that are not part of domestic Israeli law and at most can be used as an instrument in interpreting the law. In the context of referring to international law as an interpretive tool for demarcating the right to family life granted under domestic Israeli law, the Respondents will seek to elucidate two main issues:

Firstly, the various international treaties do not interpret the protection of the right to family life as including an unlimited obligation to permit the foreign spouse enter the country.

Secondly, international law recognizes – as we show below – a primary exception in the international treaties, which the Petitioners failed to mention even though it is relevant to the case at hand, especially under the current circumstances.

- The **Convention on the Nationality of Married Women**, which Israel ratified in 1957, and which stipulates that special arrangements are to be made to facilitate the naturalization of a foreign wife who is married to a national of a member state, also stipulates expressly in article 3 that this right is subject "to such limitations as may be imposed in the interests of national security or public policy."
- In articles 17 and 23, the **International Covenant on Civil and Political Rights** refers to the family institution, but contains no provision compelling member states to grant legal status to alien partners.

Article 17 provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23 (1) provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The right to family life and to state protection of the family unit is interpreted as a relative right whose implementation is also contingent upon other parameters and interests.

In this context it is important to mention Article 4 of the Covenant, which provides that in an officially declared state of emergency that endangers the life of the nation, a member state may take measures that violate their undertakings under the Covenant, as required under the circumstances:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

It should be stressed that Subsection 2 of Article 4 prohibits any derogation from certain specific articles to be made under this provision, but stipulates no such prohibition regarding Articles 17 and 23.

□ **The European Convention on Human Rights**, to which the petitioners also refer even though Israel has not signed it and is therefore not obligated by it, stipulates both duties imposed on a member state (articles 8 and 12) regarding the right to family life, and a **main exception** stipulated in subsection 2 of article 8:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

...

Article 15 further provides that in time of war or other public emergency threatening the life of the nation, any contracting party may take measures derogating from its obligations under the Convention (except for certain articles, not including Article 8).

It should be noted that the international standard is not fully binding unless the legislature passes it into domestic law. In effect, various countries have established mechanisms that differ from those stipulated in the treaties. For example, addressing Article 8 of the European Convention on Human Rights, the European Court of Human Rights held in *Abdulaziz v. United Kingdom*:

The duty imposed by Article 8 (art. 8) cannot be considered as extending to a general obligation on the part of Contracting States to respect the choice of married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.

<http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Htm1&X=1030120724&Notice=0&Noticemode=&RelatedMode=0>

In the matter of *Ahmut v. Netherlands* the European Court of Human Rights held:

Article 8 (art. 8) does not guarantee a right to choose the most suitable place to develop family life.

<http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/588.txt>

In light of the above, international law, which recognizes the right to family life, does not perceive this right as conferring a complementary right to receive legal status in any given country. In any case, this right is contingent upon various conditions, including national security and public order.

36. It is therefore the position of the Respondents that the Temporary Order does not violate any right protected by the Basic Law that in and of itself is sufficient to deny the petition.

E. The standards set forth in Article 8 of the Basic Law

37. Alternatively, the Respondents maintain that even if a protected right is violated, this violation is within the permissible scope provided in the Basic Law.

Before examining the standards set forth in Article 8 of the Basic Law, which defines the permissible scope of violations, let it be stressed that the Temporary Order at hand is a temporary one-year order, as stipulated in Section 5 therein:

This law shall be effective for one day as of publication;
however, the Government, subject to Knesset approval, may
extend its force from time to time, for a maximum of one year at
a time.

It is the position of the respondents that when the Court checks whether an alleged violation of a protected right is constitutional according to Section 8 of the Basic Law, the Court must take into account that this is a provisional order, and as such is temporary. See, for example, H CJ 24/01 *Ressler v. Knesset*, *Piskei Din* 56(2) 699, p. 713 and on:

There may be cases in which the Court decides, based on judicial policy, to accept the temporary nature of a provisional law as supporting a proportional violation of rights, and based on that to assume – *without making any ruling* – that the law complies with all other standards of constitutional review ...” (Emphasis in original)

Justice Goldberg said in H CJ 7111/95 *Union of Local Authorities v. Knesset*, *Piskei Din* 50(3) 485, p. 494:

... It must be noted that this is merely a transitional order that does not perpetuate inequality. Problems that emerge in the transition period of a law can be resolved in various ways and through various balances that can be struck, and it is up to the Legislature to select one of these alternatives. **The temporary character of the norm has bearing on the intervention of the Court in the Legislature's rationale and on the implementation of the section of the Basic Law – Human Dignity and Liberty in this case – that defines the scope of permissible violations.** [Emphasis added]

See also H CJ 726/94 *Clal Insurance Ltd. v. Finance Minister*, *Piskei Din* 48(5) 441, p. 486, in which Justice Strasberg-Cohen attributed exceptional weight to the provisional nature of the statute under review:

The new policy is consistent with public interest. In this conclusion I gave special weight to the temporary nature of the legislation. The normative status of laws enacted by the Knesset reflects on the seriousness of the intention of designing a new policy that will resolve problems emanating from the existing

situation. The transition period must naturally be short. While on one side of the scales we have an important social cause, on the other we have the violation of the petitioners' freedom of occupation, which under the circumstances must temporarily step back and make way to the social cause...

38. Section 8 of the Basic Law provides:

There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by such a law enacted with explicit authorization therein.

According to the Basic Law, a law violating protected rights can only be constitutional if the violation is made through a law or by an entity authorized to do so by a law that suits the values of the State of Israel and that is designed for a proper purpose. Another condition is that the extent of the violation be no greater than necessary. The Respondents maintain that even if some right of the Petitioners is violated, this violation is constitutional, since it meets the standards of Section 8, as explained below.

39. **A law suiting the values of the State of Israel:** There is a consensus that the right to life and a citizen's right to life and security, which are the reason for the enactment of the Temporary Order, are among the most important values of any democracy, let alone a Jewish one.

40. **A proper purpose:** There shall be no violation of rights except by a law designed for a proper purpose. As mentioned in the beginning of this response, the purpose of the Temporary Order, as well as the Government Resolution that preceded it, is to protect the right to life, which is a basic right of any individual in Israel. As noted, the sanctity of life is a basic principle and guideline in the upholding of human rights in Israel; the right to life, which is derived from the sanctity of life, is a basic right that receives extensive protection under the Basic Law.

The Respondents maintain that the fact that the purpose underlying the violation of the protected right is that of protecting the most important human right reflects on the implementation of the standards set forth in Section 8. We will expand on this issue below.

Indeed, in his book entitled *Interpretation in Law – Constitutional Interpretation* (vol. 3, 1995), pp. 518-522, Prof. A. Barak distinguishes between three main categories of

purpose. The first includes laws designed to promote human rights. The second includes laws designed to promote social goals, and the third includes laws whose purpose is to violate human rights – a purpose that is not proper and therefore fails the constitutional test.

The relevant category in our case is the first, which includes laws designed to protect human rights, including **the right to life**, which in Israeli constitutional law is, as mentioned above, a basic right. Legislation that falls into this category is characterized by a clash between competing rights. In the case at hand, there is no doubt that the purpose of the law, namely, protecting basic rights, is proper.

The Respondents nevertheless hold that even at this point the Court is required to evaluate the relative weight of the protected and violated rights. Such an evaluation is necessary at this time because it will impact on the implementation of the proportionality tests, as detailed below.

Assuming that some basic right of any of the petitioners has been violated, the case at hand is about balancing the right to life and the rights that have allegedly been violated. Clearly, the right to life is the most fundamental right without which no other right can exist. As mentioned, the Basic Law affords double protection to right to life, and the sanctity of life is a basic principle in Israeli society. The supreme importance attributed by the Legislature to the right to life is illustrated in the *Good Samaritan Act* of 1998, which followed the enactment of the Basic Law. This Act imposes a duty to lend assistance to anyone whose life, physical integrity or health are in clear and present danger.

It is therefore clear that when balancing the human rights at hand, the right to life weighs more. Thus, a statute protecting the right to life meets the standard of proper purpose, and in implementing the standards of proportionality should be given priority.

41. **Proportionality**: The standard providing that the violation shall be "to an extent no greater than required" determines the constitutionality of the measure employed. The proportionality test is comprised of three separate standards that must all be satisfied. The first is the suitability test, that is, that the violating act must be one that indeed accomplishes what the violating law sets out to achieve. The second is that the resulting violation is minimal, that is, that the measure adopted is one that violates the protected right as little as possible. The third is that of proportionality, that is, that any action that violates a protected right or interest will only be permitted if the violation caused is not disproportionate to the benefit accomplished by it (HCJ 1715/97

Association of Investment Managers in Israel v. Finance Minister, Piskei Din 51(4) 367, pp. 384-385).

However, measures are, naturally, connected to the purposes they are meant accomplish; therefore, the weight of the proper purpose in whose name the competing rights are violated has direct bearing on the test of proportionality, including its three constituent parts. As Justice Dorner noted in H CJ 6268/00 *Kibbutz Hahotrim v. Israel Land Administration*, 55(5) 639, p. 668:

The precision with which the various requirements should be implemented depends on the weight of the protected rights and interests on the one hand ***and of the purpose of the violating act on the other.*** (Emphasis added)

See also: D. Dorner, "Proportionality", *Bernson Book* (A. Barak, H. Bernson eds., vol. II, 2000, 281), which holds that the constituent parts of the proportionality test should be adapted as relevant to the different rights and interests protected by this principle, ***and that the constituent parts of the test should be interpreted as relative rather than absolute.*** (*ibid*, p. 289)

Assuming that the Temporary Order violates other basic rights, the purpose of this order is to protect a basic principle and supreme human right in Israeli constitutional law – the sanctity of life and the right to life. In implementing the constituent parts of the proportionality test, adequate flexibility must be employed, as explained below.

a. Suitability: This test requires a rational connection between the aim and the means. In the case at hand, this requirement is satisfied, since in these difficult times, in which major portions of the civilian Palestinian population are mobilized to the armed conflict – a serious and bloody conflict with the State of Israel - the restriction of entry and settlement of Residents of the Region in Israel is a suitable tool for reducing the threat to public security and to individuals' right to life.

b. Minimal violation: This test requires that the efficacy of the means employed be measured in light of the purpose that the violating law sets out to accomplish. The reason for this is that the nature and relative weight of this purpose impacts on the acceptability of error in the estimated efficacy of such means. In the case at hand, the purpose of the law is to protect the right to life; a mistake in evaluating alternative means by which this purpose could be accomplished could mean that lives will be lost. The certainty of the efficacy of any proposed alternative means of action must therefore be exceptionally high.

It is the professional estimate of the defence forces, which is unfortunately based on experience, that under the current circumstances, as described above, individual risk assessment is inefficient and does not provide satisfactory prediction of the potential threat. Therefore, under the circumstances, no other alternative can be considered an *effective* means of action that would violate the ostensibly protected right to a lesser degree.

c. The extent of violation compared to its benefits: This test weighs the damage (the alleged violation to the right to family life) against the benefit (protection of the right to life). The supremacy and sanctity of the right to life leads to the conclusion that in the overall balance, the benefit justifies the alleged violation to the right to family life; all the more so since the violation to the basic right is **temporary rather than permanent**, as explained above in detail.

Let it be noted that as part of the leeway given to the Legislature in choosing the means of operation that least violates basic rights, and as part of the attempt to balance the severity of the danger to state and public security and the right to life on the one hand and the other rights on the other hand, the Legislature imposed the restricting Temporary Order temporarily, for one year only; the Order can only be extended subject to the approval of the Knesset, which must first discuss the need for such extension.

In addition, Section 3 of the Temporary Order includes several qualifications that limit the restrictions imposed in Section 2 therein. For example, the Minister of the Interior and the Commander of the Region are authorized to grant a Resident of the Region a temporary permit to stay in Israel, for a temporary purpose. Also, the Committee that reviewed the Order before the Knesset approved it, added to Section 3(1) the provision regarding children under the age of 12, as detailed above.

F. Time of application

42. The Temporary Order is effective as of its publication, 6 August 2003. Therefore, the application of the law is prospective, not retroactive.
43. The petitioners maintain that the Temporary Order is retroactive. They base this argument on Section 4 of the Temporary Order, entitled "Transitional Order":

Notwithstanding the provisions of this Law–

- (1) The Minister of the Interior or the Commander of the Region, as the case may be, may extend the validity of a permit to reside in Israel or of a permit to stay in Israel that was held by

a Resident of the Region prior to the commencement of this Law;

(2) The Commander of the Region may give a permit allowing temporary stay in Israel to a Resident of the Region who submitted an application to become a citizen pursuant to the Citizenship Law, or an application for a permit to reside in Israel pursuant to the Entry into Israel Law, prior to 1 Sivan 5762 (12 May 2002) and who, on the day of the commencement of this law, has not yet been given a decision, provided that the said Resident shall not be given, pursuant to the provisions of this paragraph, citizenship pursuant to the Citizenship Law or a permit for temporary or permanent residence pursuant to the Entry into Israel Law.

44. The transitional order is just that, and it stipulates the mechanism to govern applications submitted prior to the application of the Temporary Order. The two mechanisms set forth in the transitional order reduce the scope of the Temporary Order with regard to applications that were made or approved when the Temporary Order was implemented.
- (a) The first mechanism in the transitional order authorizes the Minister of the Interior or Commander of the Region to extend a permit to stay or reside in Israel that predated the Temporary Order. This partially qualifies the Temporary Order in the case of applications that had already been approved, and provides the means to maintain the situation preceding the Temporary Order without change. This qualification increases the proportionality of the Temporary Order, since it rules out a change in the position of persons holding a permit to stay in Israel.
- (b) The second mechanism in the transitional order authorizes the Commander of the Region to grant temporary permits to stay in Israel to persons who applied under the Nationality Law or Law of Entry into Israel prior to 12 May 2002 – the date of the Government Resolution.
45. The Petitioners argue that the Temporary Order is retroactive because the authority provided in the second mechanism only concerns applications made before the Government Resolution and not by the effective date of the Order. The Respondents maintain that under the circumstances the Petitioners have failed to establish the retroactivity of the Order. The period between the Government Resolution and the application of the Temporary Order is governed by the prior, not the latter. Since the

Temporary Order does not apply during this period, no argument about retroactivity can be made.

In fact, the Petitioners' real argument is that the Temporary Order does not apply retroactively to the period between the Government Resolution and the Temporary Order. In other words, the Petitioners are not complaining about a retroactive change in the legal situation, but about the fact that the Temporary Order does not provide such retroactive change. Conceptually, this argument cannot be disguised as an argument about a defect stemming from retroactivity. In practical terms such an argument is baseless since if the Temporary Order were retroactive, it would have rendered the Government Resolution useless, although the rationale behind this Resolution is strong and valid, and the reliance interest of an individual whose situation was changed for the worse by the Government Resolution cannot be a factor in balancing the rights at stake.

G. Adequacy of the legislative process

46. The respondents maintain that the petitioners have failed to present a factual or legal basis to support their argument, as though the legislative process were defective in a way that would allow the Court to disqualify a law passed by the Knesset.

47. The legislative process is a "norm-creating" process laid down in the Knesset bylaws. In the case of bills sponsored by the Government, the main elements in this process include three readings by the plenary and a discussion by the House Committee after the first reading (HCJ 975/89 *Nimrodi v. Knesset Speaker*, *Piskei Din* 45(3) 154).

The Court has never declared a law void because of a defect in the legislative procedure as stipulated in the Knesset bylaws, although the Court has recognized its power to do so in principle (HCJ 975/89 and HCJ 4513/97 *Alian Abu Ar'ar v. Knesset Speaker*, *Piskei Din* 52(4) 26, 37-38).

48. In HCJ 4513/97, in the context of the Court's power to declare Knesset laws void due to defects in adhering to the legislative procedure stipulated in the Knesset bylaws, Justice Or held that the Court will consider Knesset laws void **only rarely, if the defect goes to the heart of the matter:**

In my mind the general policy in this issue should be one that affords the Knesset its adequate weight as the legislature. In addressing arguments of this kind, the Court should work on a case-by-case basis with due care, and consider declaring Knesset laws void based on a defect in the legislative process **only**

rarely, if the defect goes to the heart of the matter. (HCJ 4513/97, pp. 37-38, paragraph 10)

49. The Respondents hold that the legislative process in the case at hand was flawless, and in any event did not involve a rare defect that goes to the heart of the matter.

Let us also state that the legislation of the order was preceded by a Government resolution that stipulated a more stringent policy for marriage-related immigration, due to the security risk presented by immigration of this kind. In fact, the Temporary Order translated the policy established the Government resolution into law, reducing its scope and qualifying it. Some of the qualifications – as detailed below – were added in the legislative process, which indicates that this process met all the required standards. The stages of the legislative process were as follows:

The Temporary Order was submitted to the Knesset for a first reading in June. On 14, 29 and 30 July 2003, the Internal Affairs and Environment Committee [hereinafter: The Committee] held lengthy discussions, and heard the Deputy Attorney General, Mr. Menahem Mazuz, the Population Administration Director, Mr. Hertzl Gadj, a representative of the Interior Ministry's legal department, Mr. Daniel Solomon, and representatives of nongovernmental organizations. The Committee's second meeting was attended by the Minister of the Interior himself, and the head of the Shin Bet explained – to the Committee members only – the professional position according to which granting entry permits to Residents of the Region increases the risk to public security in Israel. He also presented the statistics supporting this position.

50. In these meetings, Committee members stated various reservations about the scope of the Temporary Order, which led to the addition of three qualifications to the original language of the bill. The bill submitted to the Knesset for a second and third reading incorporated these qualifications:

Firstly, the total length of permits to stay in Israel that the Minister of the Interior is authorized to issue under Section 3(1) of the Temporary Order was extended from three to six months.

Secondly, the provision regarding issuing permits to stay in Israel in order to prevent the separation of children under the age of 12 from a parent legally in Israel was added.

Thirdly, it was decided that approval by one of the Knesset committees is not sufficient and that the Temporary Order can only be extended by the Knesset plenum.

Once the Committee completed its sessions, the Knesset plenary held the second and third readings and passed the bill into law, including the revisions made by the Committee.

51. It is thus evident that the legislative process included a presentation, by senior officials from various government ministries, of the data required in order to make a decision. The argument that the process was flawed because no data was presented is therefore baseless.
52. The Petitioners further argue that the statute should be voided because it does not comply with the Law Regarding Information about the Impact of Bills on Children's Rights, 2002 (hereinafter: The Information Law), which provides the following:

The purpose of this law is to compel Knesset members and the Government to evaluate, in the course of preparing a bill for the first reading, the impact of such bill on the rights of children, in the spirit of the principles of the convention. (Section 2)

Section 4 of the Information Law provides:

- (a) The Justice Minister is responsible for implementing this law in the context of bills sponsored by the government, and may, subject to the approval of the Knesset's Constitution, Law and Justice Committees, issue regulations detailing the implementation of the law.
- (b) The Knesset Speaker is responsible for implementing this law in the context of bills sponsored by Knesset members, and may, subject to the approval of the House Committee, issue regulations detailing the implementation of the law.

Such regulations have not yet been issued, and there is a serious legal question as to whether the law can be implemented before such regulations are issued. The answer to this question is to be "derived from the language, structure and purpose of the law and from the impediment to the public in the absence of such regulations (H CJ 222/68 *National Circles v. Minister of Police*, *Piskei Din* 24(2) 141, p. 153, or in certain cases, from the inability to implement the law (H CJ 74/87 *Goldsmidt v. Minister of Religious Affairs*, *Piskei Din* 41(2) 711, pp. 715-716; H CJ 295q65 *Oppenheimer v. Minister of Interior and Health*, *Piskei Din* 20(1) 309; LA 3855/92 *Shilat v. Levy*, not published)" (H CJ 28/94 *Bezalel Tsarfati v. Health Minister and 10 others*, *Piskei Din* 49(3) 804, pp. 817-818).

53. It is important to note that the Legislature did not ignore the question of children. In the course of the Committee's discussions after the first reading of the bill, the Committee addressed this subject at length, and consequently added the qualification in Section 3(1). The rationale and purpose of the Information Law have therefore been accomplished.
54. Alternatively, even if the law should be implemented despite the absence of regulations, non-implementation of the law does not void the Temporary Order. By classifying a law as a guideline, the Court has refrained from voiding administrative acts that fail to comply with legislation. The purpose of this classification was explained by Justice Cheshin in CA 1842/97 *City of Ramat Gan v. Menahemi David Towers*, *Piskei Din* 54(5) 15, pp. 41-42:

This distinction between two types of statutes – statutes that on the surface have the same language – originates in English law, and is designed to prevent voiding certain acts (in most cases – administrative acts) merely due to non-compliance with a duty imposed by law. The distinction is motivated by the intention – which is good and worthy – to prevent acts and decisions from becoming void, due to the ostensibly unwelcome results caused by such voidness. The courts have therefore drawn this distinction, holding that the violation of a "guideline", as opposed to a "binding" instruction, does not void an act or decision. In other words, even though the language of a given law may seem to impose a duty, the courts have "translated" and classified given instructions in given contexts as "guidelines"; this was the tool they used so as not to declare an act or decision void.

It is important to note that "classification of an instruction that imposes a duty ... as a 'guideline' does not mean a priori that this instruction is not to be upheld or that it can be ignored ... such classification will be considered when the executive is unable to comply with the timetable set forth by the Legislature; this will mostly occur in retrospect, when weighing the validity of the administrative act performed in violation of the law." (HCJ 4513/97)

55. These rulings were handed down in cases where the instruction in the law was directed at an administrative authority that failed to comply with a Knesset law. The

rationale of this classification is even stronger when the instruction in the law is directed toward the Legislature itself, as is our case. There are two reasons for this:

Firstly, the Legislature routinely establishes binding instructions for administrative authorities, restricting the scope of their discretion. The discretion of the Legislature is not demarcated by the Legislature itself through regular statutes, but by the constitutive branch through Basic Laws. The constitutional problem emerging from old statutes that restrict the Legislature's authority is resolved by classifying such statutes as guidelines, so that failure to comply with such statutes does not necessarily void the new law.

Secondly, classification of the statute as one that imposes a duty would automatically void the new law, while classification of the statute as a guideline gives the Court more flexibility in providing remedies; such flexibility is welcome, considering the principle of separation of powers and the delicate relationship between the Legislature and the Executive branch.

56. The legislative process is therefore without flaw and arguments of this sort must be rejected.

H. The scope of judicial review

57. The point of departure is that "legislation is the job of the Legislature. The Legislature is the faithful representative of the sovereign – the people. In keeping with the principle of separation of powers, the overall responsibility for enacting laws that accomplish proper purposes with proportional measures is imposed on the Legislature. It is the Legislature that has the tools with which to identify the proper purpose and select the proportional measures. The Court is not meant to replace the Legislature's rationale and priorities with its own. The Court does not step into the shoes of the Legislature. The Court does not ask itself which measures it would have selected were the Court a member of the Legislature. Rather, the Court implements judicial review. The Court examines the constitutionality of the law, not the wisdom of it. The question is not whether the law is good, effective, or just. The question is whether it is constitutional." (HCJ 1715/97 *Association of Investment Managers in Israel v. Finance Minister*, *Piskei Din* 51(4) 367)

With reference to the restraint that the Court must practice when exercising judicial review and judging the legality [sic] of laws, the Court held in CA 6281/93 *Bank Hamizrahi v. Migdal Cooperative Village*, *Piskei Din* 49(4) 221:

The harmony between the branches of government calls for ... drawing a "red line" between judicial review, which the Court is authorized to exercise, and involvement in the legislative process. The Court must beware of losing sight of this boundary and exercising an authority that it does not have. The Court must bear in mind that it only has the authority to carry out judicial review – to check whether a law is constitutional, and that in exercising this authority it does not replace the Legislature. The Court does not substitute the Legislature's rationale and priorities for its own. It is the Legislature, and not the Court, that has the freedom to choose between alternative measures that strike a balance between the proper purpose and the violation of a protected right. The Legislature has the discretion to select the measures most suited to accomplishing the proper purpose of the law.

In H CJ 7111/95 *Union of Local Authorities v. Knesset*, *Piskei Din* 50(3) 485, p. 496, Justice Zamir also elaborated on the caution and restraint with which the constitutionality of a law must be reviewed:

The main point is, in my opinion, that Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation are not meant to make laws passed by the Knesset easy prey for anyone not pleased with these laws. Such laws still have full force: they still reflect the wishes of the sovereign, namely, the people. It is therefore the law that leads the way, including that of the Court ... Human dignity and the dignity of the law are not necessarily mutually exclusive.

58. The Respondents therefore hold that in the case at hand there is no justification for the court to intervene and void a law passed by the Knesset. It is therefore the position of the Respondents that the petition must be denied.

Today, 10 Heshvan 5764

5 November 2003

Yochi Genesin

Head, High Court of Justice Matters

State Attorney's Office