

**SUMMARY OF THE RULING ON THE CITIZENSHIP LAW – HIGH COURT OF JUSTICE
7052/03 ET AL.**

An 11-judge panel of the High Court of Justice handed down its ruling today on the petitions submitted to it against the constitutionality of the *Citizenship and Entry into Israel Law (temporary provision) 5763 – 2003*. It was decided to reject the petitions by a majority decision.

A number of opinions were voiced in the ruling. One main opinion was written by the chief justice of the Supreme Court, Aharon Barak. He took the position that the Citizenship Law violates the constitutional right to family life and equality to an unnecessary extent, and that consequently, the law should be repealed. Four judges completely concurred with Chief Justice Barak's position: Judges Dorit Beinish, Ayala Proccacia, Salim Joubran, and Esther Hayut.

The second major opinion was written by now retired Judge Mishael Cheshin. His position was that the law does not infringe on constitutional rights, and even if it did, such infringement is proportionate. He therefore concluded that the law is constitutional. He was joined in this opinion by four judges. Judge Miryam Naor agreed with all parts of Judge Cheshin's opinion. Judge Asher Grunes was willing to accept the assumption that the law violates the constitutional right to family life, but took the position that this injury was proportionate; Judge Yonatan Adiel opined that the law indeed violates the constitutional right to family life, but that this injury is proportionate; and Judge Eliezer Rivlin's view was that the Citizenship Law indeed violates constitutional rights to family life and equality but that this injury is proportionate. He additionally took the view that there was no need to decide on the petitions because the law would expire out within a short time.

Justice Edmund Levy took the view that the law indeed violates the constitutional right to family life and equality and that the injury is not proportionate. Nevertheless, because he was convinced that the state should be allowed a period of nine months to formulate an alternative legislative arrangement, he took the position at this time to reject the petitions.

Summary of the ruling and the judge's positions:

The facts and claims

The *Citizenship and Entry into Israel Law* prevents Palestinians living in the area of Judea, Samaria and Gaza from entering Israel. In so, it prevents family reunification in Israel between an Israeli spouse and a spouse from among the residents of the area of Judea, Samaria and the Gaza Strip. The law contains a number of qualifications. For example, the commander of the Israel Defense Forces in Judea, Samaria and Gaza may grant the wife of an Israeli man, if she is over the age of 25, and the husband of an Israeli woman, if he is over the age of 35, a permit to reside in Israel. The law additionally allows for the granting of a temporary residence permit for the purpose of work or health, and allows permits to be given to spouses who submitted their application for family reunification before the law was passed. The law in its current form was published on August 8, 2005, and will remain in force until July 16, 2006. The government, with the endorsement of the Knesset, may extend the law for up to 12 months.

The principal argument put forth by the petitioners was that the law violates the constitutional right to family life and equality. The petitioners maintained that the law violates the right to family life in that it prevents the reunification of families of Arab-Israeli spouses with Arab spouses from Judea, Samaria and Gaza (subject to the age exceptions). The law also imposes restrictions on the relationship between an Israeli parent and his or her children registered in the area. The law violates the right to equality in that the injury it causes targets Arab-Israeli citizens, because they are the ones that marry Palestinians from the area. The petitioners added and maintained that this violation of constitutional rights does not meet the conditions of the Restrictive Clause [Section 8 of the Basic Law: *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.*]. Their claim is that the very essence of the Citizenship Law is invalid because it is based on demographic considerations. They additionally claim that the serious injury that the law causes to basic rights is not proportionate; that the law sweepingly prevents the possibility of family reunification from all those couples that do not meet the age conditions; and that the state should have determined mechanisms involving individual security checks and should bar family reunification only to those that pose a danger to state security.

The state emphasizes the security background and aims underlying the law. The law was passed on the background of the onslaught of terror that Israel has been subject to in recent years. In a number of cases, terror organizations were aided by Palestinians that had received residency status in Israel in the context of the family reunification process. The terror organizations have continued their efforts to recruit activists from among those that have attained residency status in Israel. Moreover, Palestinians tend to be loyal and committed to the Palestinian Authority, which is at conflict with Israel. The law was passed on the background of these fears and in order to prevent the security risk. The state maintained that the law does not infringe on basic constitutional rights; that the term “human dignity” should be given a restrictive interpretation and that the full scope of the right to family life and the right to equality should not be included in it. Even if the law infringes on certain rights, that infringement is for a proper purpose, which is to protect the lives of the people of Israel. Nor is the infringement to an extent greater than is required. The state pointed out the problem involved in individually screening all those applying for family reunification in light of the difficulty in collecting information and finding out whether any of those that have already received a residence permit in Israel will not be recruited in the future to carry out terrorist activity.

Supreme Court Chief Justice Barak’s ruling

At the center of Chief Justice Barak’s ruling is the Israeli couple. He does not concern himself with the rights of foreign couples. The chief justice of the Supreme Court discusses the security background on which the law was passed and describes the severe onslaught of terror with which Israel has had to contend. However, even at a time of war, there is room for judicial review of laws. Human rights should be defended both in wartime and peacetime. The Chief Justice then reviewed the constitutionality of the law. This is done in three stages. First, are basic rights violated? Second, if such injury is caused, does it meet the conditions of the Restrictive Clause (Section 8 of the Basic Law)? Third, if there injury is caused by the law that does not meet the conditions of the Restrictive Clause, what is the proper remedy?

First, Chief Justice Barak determines that the right to family life and the right to equality are included among the constitutional right of human dignity, established in sections 2 and 4 of *Basic Law: Human Dignity and Freedom*. The right of an Israeli spouse to family life means the right to realize family life with his or her spouse in Israel. That is where his or her home, community, historical, cultural and social roots are. It is also the right of an Israeli parent that his or her minor children live with him or her in Israel. This injury targets Arab-Israeli citizens. In this way, the law causes resultant injury to the rights to equality of Arabs who are citizens of Israel.

Second, Chief Justice Barak examines the conditions of the Restrictive Clause. The purpose of the law is proper. Its goal is related to security and is designated to address the security risks stemming from the involvement in terrorist activity on the part of some of those granted residency status in Israel in the context of family reunification. As for the requirement of proportionality: The law meets both of the first two conditions. There is a rational connection between the law and its goal because the prohibitions it contains indeed fulfill its security goals. The law also fulfils the requirement of “a means causing lesser injury.” While the individual screening that the petitioners demand represents a lesser violation of human rights, it cannot guarantee the same level of security as the sweeping ban against family reunification. However, is the additional security attained by the sweeping ban proportionate to the additional violation of human dignity embodied in the sweeping ban? That is the third test, that of proportionality. Chief Justice Barak’s answer to this question is negative. Security goals cannot justify all means used to attain them. The proper goal of increasing security does not justify the serious injury caused to the lives of many thousands of Israeli citizens. A democracy and human rights cannot be maintained without taking risks. Taking into consideration the fact that the legislator was willing, in the context of the exceptions to the law, to take the security risk involved in carrying out individual screenings of workers and the granting of permits to spouses that meet the age condition or that submitted their application before the law was passed, the state should have been required accept individual screenings for the other couples too. This is especially so if we bear in mind that there are various ways in which the effectiveness of the individual screenings can be increased.

Third, Chief Justice Barak then moves on to ask the question of constitutional remedy. His position was that the court should order the voiding of the law, and that the declaration of that position should be postponed until July 16, 2006. At the same time, if the state requests some additional time to consolidate its position, and seeks to pass the law as it stands, the declaration to void the law will be suspended for an additional six months.

Deputy Chief Justice Mishael Cheshin’s ruling

Deputy Chief Justice Mishael Cheshin (now retired) disagreed with the position taken by Chief Justice Barak, stating that the *Citizenship and Entry into Israel Law (temporary provision) 5763 – 2003* need not be repealed in whole or in part. In his view, even though the law causes injury to Israelis that want to marry Palestinian partners and live with them in Israel, there are no constitutional grounds to repeal it. Judge Cheshin’s opinion is based on these three foundations:

1. The absence of a constitutional right: The citizens of the State of Israel do not have a constitutional right – a right warranting the voiding of a law passed by the Knesset – that their foreign spouses be allowed to immigrate to Israel in wake of marriage. The right to “human dignity” does not infer a constitutional obligation on the part of the

state to allow foreign nationals that are married to citizens of the state entry into Israel, and the State of Israel – like all other states in the world – is entitled to legally restrict the immigration of foreign nationals into Israel, including the spouses of Israeli citizens. This conclusion regarding the absence of a constitutional right to bring a foreign spouse into Israel is based on the consensus that a state, any state, is not required to allow foreign nationals to enter its borders; it is certainly not required to allow foreign nationals to settle in it permanently or temporarily. This is what can be understood from the overriding principle of state sovereignty. The face of the nation is the face of its residents. The residents of the state shape its society and the “state” serves as a shell for its society and inhabitants. Allowing a foreign national to enter the state as a permanent resident means changing the status quo ante in the relations between the citizens and residents, among themselves. Granting an individual the right to bring in his or her foreign spouse consequently means changing the face of society. The human dignity of Israeli citizens – each and every Israeli citizen – means that each citizen must not be given a free hand – on the level of a constitutional right – to change the social status quo ante by bringing in foreign nationals to Israel, even as spouses.

2. State of war: The state of Israel is at war — or at the least, near war — with the Palestinian Authority and the terror organizations operating from it, and during a time of war, the state is entitled to prevent the entry of enemy aliens into its borders, who, as such, are a group that poses a danger to the life and safety of the citizens and residents of Israel. Consequently, in order to protect its citizens and residents, the state is entitled to pass a law banning the entry of enemy aliens into the country. This is also the reason why the claim of discrimination and violation of equality is rejected, in view of the fact that the indirect distinction created by the law – which deals with residents of the area and not citizens of the state – between citizens of the state is a permitted distinction between citizens of the state that are married to foreign nationals that are enemy aliens and citizens of the state that are married to foreign nationals that are not enemy aliens.

3. The test of the Restrictive Clause: In the view of Judge Cheshin, the test of the Restrictive Clause (Section 8 of Basic Law: Human Dignity and Freedom) is met in this case. Judge Cheshin does not agree with Chief Justice Barak’s determination that the law does not pass the test of proportionality, because the benefit that the law brings to the safety and lives of the people living in Israel takes priority over the injury caused to those Israeli citizens that have married residents of the area and seek to live with them in Israel. The law was passed on the background of intelligence received by members of the security establishment according to which terror organizations are making efforts to recruit Palestinians that have already obtained Israeli residence permits into their ranks, and of the fact that the security services have difficulty distinguishing between Palestinians that are liable to collaborate with the terrorist organizations and those that are not liable to do so. The law was passed in the form of a temporary (emergency) provision; it contains broad limitations; and under these circumstances, it is difficult to accept that the balance decided on by the Knesset between the safety of the state’s population and the injury caused to those seeking to live with their foreign spouses in Israel is not proportionate.

The provision of law causes injury to those Israeli citizens that want to marry Palestinian partners and live with them in Israel, and as human beings we cannot but identify with the pain of those innocents whose right to maintain family life in Israel has been violated. However, as long as the armed Palestinian-Israeli conflict

continues; as long as the Palestinian terror continues to indiscriminately strike out against Israelis and take the lives of innocent Israelis; and as long as the security services continue to have difficulty distinguishing between those aiding our enemies and those that are not aiding our enemies – the right of all of Israel’s residents to life and safety should take precedence over the right of the few to maintain family life in Israel. This is their right; moreover, it is the duty of the state, of every state, to protect its people against those that seek to do them harm, and as a derivative of that, the state is entitled to prevent the immigration of enemy aliens into its borders – even if their spouses are Israeli citizens – for as long as conflict with that same enemy continues.

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