

Summary of Supreme Court Judgment in the Citizenship Law Case:¹ HCJ 466/07 MK Zahava Gal-On (Meretz-Yahad) v. Attorney General

Translated from the Hebrew original to English by Adalah

Four petitions [were submitted] challenging the constitutionality of the Citizenship and Entry to Israel Law (Temporary Order) – 2003 (hereinafter: the Citizenship Law). The law, in practice, prohibits the family unification of Arab citizens of Israel with their spouses who are residents of the territories or, as a result of an amendment to the law (as noted below), with spouses who are residents or citizens of four “enemy states” – Iran, Lebanon, Syria and Iraq – out of concern that this would pose a security threat to the state. It should be noted that this was the second time the court has examined the constitutionality of the Citizenship Law in an expanded panel. The initial petitions were heard in the framework of **HCJ 7052/03** in a case filed by Adalah (hereinafter: the previous ruling), where it was also argued that the Citizenship Law violates the right to family life and the right to equality of the Arab citizens of Israel. **HCJ 7052/03** was rejected by only one vote. **Most of the justices who heard the petitions at that time concurred that the law violates these rights. However, Justice E. E. Levy, who also thought that the law violates these rights, ruled that the petitions should be rejected and the existing law upheld in order to permit the state nine months to present a better solution that would mitigate the violation of these rights. The current ruling considers the question of whether the law is now constitutional after amendments were made in the wake of the previous ruling.**

The Supreme Court, in a majority opinion of six of the 11 justices (Vice President E. Rivlin, Justices A. Grunis, M. Naor, E. Rubinstein, H. Melcer and N. Handel versus the dissenting opinions of President D. Beinisch, Justice (retired) E. E. Levy, and Justices E. Arbel, S. Jubran and E. Hayut), **rejected the petitions** for the following reasons:

The majority justices recognize that there is a constitutional right to family life, which derives from the right to human dignity, but **ruled that this right does not extend to necessarily being exercised within Israel. It was also ruled that if there is a violation of constitutional rights, including the right to equality, then this is a violation that meets the requirements of the limitation clause.**

The minority justices believe that the constitutional right to family life of the Israeli spouse also extends to exercising the right and raising a family in Israel, and that the violation of the right does not meet the conditions of the limitation clause. The minority justices also determined that the constitutional right to equality is violated in a way that does not meet the conditions of the limitation clause in light of the fact that the law imposes restrictions on family unification that apply almost exclusively to Arab citizens of Israel.

¹ This summary of the case was released by the Supreme Court of Israel.

The positions of the majority justices:

The ruling of the vice president, Justice E. Rivlin, addresses the difficulty stemming from the fact that the legislature has yet to formulate rules for immigration to Israel in a comprehensive and all-inclusive law. As a result of the legislature's failure to resolve this issue, the court must adjudicate questions that are a matter of public controversy. Vice President E. Rivlin notes the importance of judicial review as a core function of the judiciary in a democratic society. When addressing questions that touch upon the essence of the judicial role, on the one hand, and involve issues of public controversy, on the other hand, consideration must be given to the values that lie at the foundation of the judicial perspective and at the foundation of the concept of dignity. In examining the question under deliberation here, Vice President E. Rivlin found that the violation is intended for a worthy purpose and is not excessive. Therefore, his conclusion is that the law is constitutional and that the petitions should be rejected.

Justice A. Grunis cites at the beginning of his ruling the following saying: "Human rights are not a recipe for national suicide." These words summarize what he writes in his opinion. According to Justice Grunis, the societal benefit of the Citizenship Law must be weighed against the damage caused to the citizens of Israel who are unable to bring into the country the Palestinian partners with whom they wish to marry. This analysis must include an examination of the possibility of error, whether on the part of those who advocate revoking the law or on the part of the others, who believe that the law is valid. If it becomes apparent in the future that those who advocate revoking the law erred in underestimating the danger, it would be impossible to rectify the mistake. The injury to human life would be impossible to rectify. Revoking the status of Palestinians in Israel who entered the country lawfully and were subsequently involved in acts of terror (even if this entails a very small number of people), would not undo the results of their actions. On the other hand, if those who believe that the law should not be revoked are in error, the damage resulting from their error is the inability of citizens of Israel to establish families with Palestinians or separation between the Israeli partner and the Palestinian partner. Of course, this damage should not be belittled. However, this damage to family life must be weighed against the certain damage, based on past experience, to the lives and limbs of Israelis. Based on this balance, Justice Grunis believes that there is no need to revoke the law.

Justice M. Naor rules that the petitions should be rejected and that the Citizenship Law should not be revoked. Justice Naor reiterates her positions as stated in the previous ruling, noting that the impact of the law has been mitigated with the passage of time. This is because the number of families that married before the government decision and law who do not meet the age requirements stipulated in the law has greatly decreased, and those who married after the government decision and law did so while aware of the legal situation. Justice Naor reiterates her stance regarding the scope of the constitutional right to family life. In this context, Justice Naor notes that the right to family life is very broad, with many derivatives, and the constitutional defense does not apply to the option of realizing family life with a foreign partner in Israel necessarily, which is only one of the derivatives of the right. Justice Naor emphasizes that in other democratic countries there

is also no recognition of a constitutional right of a citizen or resident to bring a foreign partner to his country of residence and to choose the country in which to fulfill family life. Justice Naor notes that even if one assumes that it is a constitutional right, it is accepted that there is no obligation to allow the right to be exercised at any time and under any condition. Justice Naor provides a number of examples from Supreme Court rulings that allowed the delay of the exercise of a constitutional right in consideration of the public interest, and she ruled that this is also the path that should be pursued in this case, and that in light of the special and weighty public interest underlying the law, the law meets the tests of proportionality and is certainly within what is called “the bounds of proportionality.”

In her ruling, Justice Naor devotes a separate chapter to the petition pertaining to minors who are residents of East Jerusalem. In this matter, it was determined that in light of the clarification the state provided and which was included in the ruling, there is no risk (and subject to a security or criminal interdiction) of separating minors from their parents or even those who were previously minors (and are now adults) from their parents. Therefore, the right to family life is not violated vis-à-vis this group either. In regard to the minors' other rights, and particularly their social rights, the petitioners did not make clear what comprises the constitutional basis for the claimed entitlement to these rights, and in any event this issue is being adjudicated in the framework of another petition that was submitted after the submission of the petitions under deliberation here and for which an order nisi was issued (HCJ 2649/09).

Justice E. Rubinstein concurs with the position presented by Vice President Cheshin and Justice Naor in the previous ruling. In his view, the constitutional right to family life, which derives from the general right to dignity, does not include – on the constitutional level – the right to conduct a marriage with a partner who is a resident of a hostile state (or state-like entity) in Israel necessarily; and this is despite the obvious human emotion and regret over the significant difficulties that are liable to result. This is anchored, *inter alia*, in comparative law. Justice Rubinstein also emphasizes that the emergency order does not revoke the right to live as a couple in Israel. Rather, it postpones this in accordance with the age limitations stipulated in the emergency order. Justice Rubinstein also believes that although discrimination is also generally examined in terms of its consequences, the argument of discrimination cannot be applied here to a case of an Israeli citizen choosing to engage in spousal relations with a resident of a hostile state (or state-like entity); this, when weighed against the right to life and security.

Although Justice Rubinstein does not believe that there is a violation of rights on a constitutional level here, he goes on to discuss the question of whether the emergency order meets the tests of the limitation clause. In his view, although the difficult ramifications of this legislation (mainly for the Arabs of Israel) should not be belittled, this arrangement meets the conditions of proportionality. In his opinion, the question of proportionality should be examined “in a broad perspective.” And in this framework, other means that Israeli society adopts to defend against terror threats should be examined, and the extent of their distribution between parts of the society. Such an examination indicates, according to Justice Rubinstein, that all parts of Israeli society are

required to relinquish rights that are anchored on the constitutional level in order to ensure the security of the public at large (including military service and economic costs), and that against this backdrop, the infringement here is proportional. Finally, Justice Rubinstein demands that the authorities keep their “fingers on the pulse” and continually examine whether a change in circumstances would enable the use of measures that impose less of an infringement – such as checking requests for family unification on an individual basis, which would reduce the infringement and difficulty.

Justice H. Melcer reaches the conclusion that the order nisi issued in this case should be canceled. The main reason for this is that he was convinced by the position presented by the respondents, according to which there is no place for the High Court to intervene here for the familiar reasons because the measures adopted in the legislation being challenged here are, at this time, the lesser of the evils and it is better to take precautions than harbor regrets. (This rule is expressed in English with the phrase: Better safe than sorry.) His reasoning is based on the precautionary principle. This legal principle is customarily applied in the world when the society faces large-scale and uncertain dangers, and Justice Melcer suggests applying it to this case too. In this context, he emphasizes that alternatives proposed by the petitioners in place of the legislation being challenged, including an individual review of those seeking to enter Israel due to marital relations – do not provide a solution for the security challenges that arise on the whole, and the proposed individual review is not realistic for reasons specified in Justice Melcer's opinion.

Justice Melcer also emphasizes that comparative law does not recognize the right of a citizen to secure citizenship for the person with whom he seeks to live (whether in marital relations or in another way), or another status of residency in the country where the former holds citizenship. Justice Melcer also contends that the law being challenged serves a worthwhile purpose: to protect the security of the state; and that it meets the demands of the “constitutional limitation clause,” which allows an infringement of a constitutional right if, and as long as the clause's conditions are met by the offending law. At the conclusion of his ruling, Justice Melcer focuses attention on the fact that the precautionary principle also has a basis in Hebrew law, in the viewpoint based on the saying: Blessed is the man who fears always (Proverbs 28:14). And he noted that in the Talmud (Gittin 55b-56a), in the story of Kamtza and Bar Kamtza, the destruction of Jerusalem is attributed, among other reasons, to the failure to observe this saying.

Justice N. Handel rules that there is no intrinsic constitutional right for every citizen in Israel to bring his foreign spouse, who resides in the region of Judea and Samaria, to establish family life in Israel. In addition, Justice Handel determines that not every infringement of equality constitutes a violation of a constitutional right. In the current case, he rules, the infringement is two-fold – that is, a combination of the sweeping prohibition on bringing a foreign spouse, together with the consequential discrimination, even if not explicit, which affects a specific group of Arab citizens of the State of Israel – and amounts to a constitutional infringement. After determining this violation of constitutional rights, Justice Handel examines the tests of the limitation clause. Justice Handel rules that the purpose of the amended legislation – the security of the state – is

worthy in the State of Israel as a Jewish and democratic state. In regard to the test of proportionality, he states that the infringed right should be ranked in a hierarchy of constitutional rights and the protected public interest should be ranked relative to various interests. This is indicated by rulings in Israel and by the American constitutional approach, which ranks such rights, each one relative to another.

In regard to the Citizenship Law, Justice Handel rules that the infringement of the constitutional right of a group of Israeli spouses is harsh due to the historical, geographic and cultural connection between the Arabs of Israel and the residents of the region. However, he states, this infringement is not ranked highly on the hierarchy of constitutional rights. The state is entitled to define immigration laws and the citizen cannot dictate the state's immigration policy according to the spouse he chooses. The foreign spouse, unlike the Israeli spouse, does not have a connection to the state. Moreover, this situation occurs against the background of the public interest in protecting the state's security, which is of the foremost interest. Also noted was the approach of Hebrew law, according to which the human being was created as an individual in order to teach us that when one saves a single soul it is as if one is saving an entire world.

In the framework of the secondary examination of proportionality in the narrow sense, Justice Handel examines the age exception in the revised law and determines that the exception is comprehensive – applying to a male resident of the region over the age of 35 and a female resident of the region over the age of 25, and thus reduces the constitutional infringement. The exception of the humanitarian committee also reduces the infringement to some extent, though Justice Handel notes that there is room for expanding the consideration of the humanitarian committee. Justice Handel adds that there are cases that involve constitutional issues and that the current case is one of them. In the framework of such cases, there is a constitutional range that allows for more than one answer. In the overall calculation of benefit to the state's security versus the infringement of a constitutional right, the legislature's decision that the public interest must be preferred falls within the constitutional range, and therefore there is no reason to order the revocation of the Citizenship Law. Justice Handel notes that the legislature would do well to resolve the issue of immigration in law. The state's representative announced that the legislative branch is working in this direction. If this issue is not resolved – a condition for extending the law will be an in-depth and thorough discussion, with an emphasis on the factual basis, as was conducted in this case. If the reality changes, there might be room for considering the possibility of revising the law.

The positions of the minority justices:

President D. Beinisch reiterates the position she expressed in the previous ruling on the Citizenship Law and determines that the law, also in its amended version, does not meet the test of constitutionality. The president believes that amendments made to the law have expanded the presumption of danger, and that no effort was made to include in the law an individual review of the danger posed by the spouse, his family or his immediate surroundings. The legislation also failed to adopt other measures that would mitigate the damage, including, for example, a mechanism for reversing the presumption of danger by

transferring the burden to the person seeking family unification in order to prove that he poses no security threat. President Beinisch also notes that the Citizenship Law, which was enacted via an emergency order that was supposed to remain in effect for only one year, has since been extended 12 times and has been in the book of statutes for eight years. The enactment of legislation via an emergency order, President Beinisch states, prevents an in-depth and comprehensive discussion of the law's ramifications. The president also addresses the state's announcement about its intention to enact a comprehensive immigration law, saying that she hopes that this process will indeed be pursued.

President Beinisch criticizes the use of the "precautionary principle," as proposed by Justice H. Melcer. In her view, the use of this principle enables minimizing, to an absolute extent, the risks a society is ready to take upon itself. Adopting an approach of "better safe than sorry" poses a significant danger not only of infringing upon constitutional rights, but also of hindering decision-making processes. Therefore, President Beinisch notes, even given the demands of security – which no one disputes – it must be ensured that the arrangements defined are proportional and do not excessively infringe upon basic rights. It is necessary to be vigilant not only vis-à-vis the danger avoided by applying the precautionary principle, but also vis-à-vis the danger that this principle itself creates.

Justice E. E. Levy believes that the legislature missed the opportunity it was given in the previous ruling to amend the law so that it would meet the constitutionality test. In his view, the amendments made to the law following the first ruling did not reduce the sweeping arrangement stipulated in the law and even expanded it. In his current ruling, unlike his stance in the previous proceeding, Justice Levy believes that the Citizenship Law – which violates the aforementioned constitutional rights – does not meet the first stages of the constitutionality test, particularly the stage of corresponding to the values of the State of Israel as a Jewish and democratic state. In his view, in order for a law to have "a worthy purpose" it must meet three conditions: It must be aimed at achieving societal objectives and serving a real public interest; the interest must be sufficiently important to justify an infringement of a protected basic right; and finally, the law must be consistent with a constitutional regime that protects human rights and shows sensitivity for the right of the injured party. In Justice Levy's view, a law that severely violates a protected right or that does not allow real space for its existence does not show sensitivity for the right and, therefore, its purpose is not worthy. The Citizenship Law is such a law, according to Justice Levy. Justice Levy believes that the Citizenship Law serves a real public interest of protecting the security of the residents of Israel, but the sweeping arrangement it defines does not allow for any individual review of those seeking family unification [and thus fails] to meet the conditions of the limitation clause.

Justice E. Arbel joined the discussion of the petition in its second round, and follows the paths paved in the first ruling on the Citizenship Law; she explains her stance and reasoning, while emphasizing the difficulty of the decision. The starting point of the discussion should be that the purpose of the law is security-related. In principle, the state is entitled, for its security needs, to prohibit the entry into its territory of anyone who

comes from places where there is great hostility toward Israel and where activity is conducted against Israel and its security. However, even in this situation, the law must meet the constitutional criteria for its review. The right to family life includes two levels – the essential right to marry a foreigner and the right to exercise married life in Israel. The distinction between the essential right and the right to exercise it is artificial because without the ability to exercise the right you do not possess the right. For the Arab citizens of Israel, the residents of the territories, who are members of their nation, comprise a potential group for establishing family relations and, consequently, they are the ones who are primarily hurt by the law's restriction. Therefore, the law violates the right to family life and, in its broad sense, the right to equality. In Justice Arbel's view, the principal difficulty the law raises in its updated version is in the stage of examining its proportionality in the narrow sense, which is one of the tests of the limitation clause in Article 8 of the Basic Law: Human Dignity and Liberty. The test indicates that the law is not proportional. This contention is based on two foundations. The first is the infringement's lack of proportionality from the perspective of time. The use of an emergency order for objectives that pertain to the core of constitutional rights, as in our case, raises difficulties, especially when imposing a severe infringement of basic rights. The second is the nature of the infringement of basic rights. The potential gain of security from the restriction under the law cannot stand up against the certain addition of damage caused by this restriction to the right to family life and equality.

Justice Arbel reaches this conclusion in light of a more proportional alternative that includes three main components that are fundamentally similar to the outline proposed by Justice Levy in the first round of the ruling on the Citizenship Law: an individual review, as thorough as the circumstances allow; conditioning the processing of the family unification request on the fact that the foreign partner is not residing illegally in Israel and will not reside in Israel until receiving an entry permit; and also a requirement to declare loyalty to the State of Israel and its laws, abandoning loyalty to any other state or state-like entity. Justice Arbel suggests postponing the declaration of invalidity for one year from the date of issuing the ruling. During this year, the legislature could, if it deems appropriate, formulate a new legal arrangement, since this is its role and expertise.

Justice S. Jubran concurs with the position of Justice E. E. Levy that the law should be declared invalid. In his view, the law severely and disproportionately violates the constitutional rights to family life and equality. In regard to the violation of the right to equality, Justice S. Jubran emphasizes the fact that the restriction the law imposes on exercising the right to family life applies, in practice, to the Arab citizens of the State of Israel. Justice S. Jubran also rules that the complete denial of the possibility of receiving status for the partner who is a resident of the region, without any indication that he poses a security threat, is indicative of an illegal distinction. Justice S. Jubran adds that adopting this system of "labeling" is inherently unacceptable as it violates human dignity and it is therefore necessary and appropriate to avoid this. Justice S. Jubran also rules that the amendment to the law, and the passage of time since the previous ruling, have intensified and deepened the violation of the constitutional rights. In regard to the stages of the constitutional review, Justice S. Jubran disagrees with the view of Justice E. E. Levy, and rules that it is not necessary in this case to revoke the law because of its

inconsistency with the values of the State of Israel, or to determine that it is not for a worthy purpose. In his view, it should be ruled that the law does not meet the proportionality test in “the narrow sense” because it violates the proper balance between the needs of the public and the rights of the individual. Justice S. Jubran emphasizes the great importance of the security need underlying the law, but finds that the means chosen in this case for fulfilling this need exact an excessively heavy price, a price that a democratic and liberal state cannot pay. Therefore, the law is not proportional and fails the test of judicial review. Justice S. Jubran concludes his opinion by saying that one can only feel pained by this law, which increases the difficulty of preserving the integrity of the fragile fabric of Israeli society in all its groups and diversity, and that he hopes that the important words of the Declaration of Independence, according to which Israel will maintain “complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex,” will continue to guide those who are involved in the legislative process.

Justice E. Hayut believes that the Citizenship Law is consistent with the values of the State of Israel as a Jewish and democratic state and was enacted for a worthy purpose in that it was intended to provide a response to the security needs of the State of Israel in light of the armed struggle the Palestinian terror organizations are waging against it. However, since the collective prohibition stipulated in the law remains; and since the residents of the region who are spouses of Arab citizens of Israel are not given an opportunity to prove, on an individual basis, that they do not pose a security threat; and since the collective criteria that restrict family unification between the Arabs of Israel and spouses who reside in the region were expanded in the framework of the revised law – Justice E. Hayut believes that there is still a disproportional violation of the right to family life and equality. Therefore, the constitutional flaw still remains after the second amendment of the law. The opinion also notes that a proper balance between the security interest and the constitutional rights involved does indeed allow for a presumption of danger posed by the residents of the region, on the condition that together with this presumption an individual review is granted that provides each person seeking family unification an opportunity to refute it.

Justice E. Hayut also notes that the disproportional violation of equality created by the arrangements stipulated in the law, as well as their collective nature – which effectively erase the unique identity of the individuals who make up this group – are liable to generate the appearance of unacceptable “ethnic labeling” that should be avoided. For the reasons summarized here, Justice E. Hayut concurs with the conclusion reached by President D. Beinisch and Justices E. E. Levy, E. Arbel and S. Jubran that the law should be declared invalid. However, in her view, in the existing circumstances, this declaration should be postponed for a period of time not to exceed nine months in order to allow the legislature to formulate a comprehensive immigration arrangement or suitable interim arrangements until its enactment.