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Senat 290 on Policy Issues:

The High Court of Justice on Israel's Citizenship Law: Will the Prohibition against Family Reunification be Sustained?

Main Conclusion:

- The fundamental legal question before Israel's High Court of Justice regarding the amendment *Nationality and Entry into Israel Law (1952) (Temporary Order 2003)* was whether the sweeping prohibition against family reunification and the accompanying injury to the human right to a family life was indeed justified.
- The majority opinion, led by Justice Mishael Heshin, was convinced that the insignificant number of terrorists likely to infiltrate Israel under the cover of family reunification was sufficient cause to warrant some injury to human dignity and the right to family life.
- The minority opinion, led by the President of the HCJ Justice Aharon Barak, declared that in the presence of every country's duty to allow the conduct of family life, the minor number of cases in which family unification might be exploited for terrorist activity did not justify such a comprehensive prohibition against family reunification.
- Passage of *Temporary Order 2003* – commonly known as the Citizenship Law – represents a major watershed in Israel's history. This law redefines, in effect, what was considered to be the appropriate relationship holding between democracy, security and the existence of a nation-state having a ruling Jewish majority.

A person's right to family life is a human right recognized in international as well as comparative law, anchored as it is in the legal systems of countries such as Ireland, Germany, France and the United States. A crucial question regarding this right is whether a sovereign state is duty-bound to thwart the reunification of families when only one of the spouses is a citizen of the receiving country. The Israeli legislature (the Knesset) adopted a negative attitude toward this issue when it passed *Temporary Order* to the *Nationality and Entry into Israel Law (1952)* in 2003. In the framework of the original law, the Knesset had mandated the government to sanction reunification of families if one of the spouses was an Israeli citizen. However, the 2003 amendment to the law, which came to be known as the "Citizenship Law," stated that in all but extraordinary circumstances, such as reasons of health, it would not permit family reunification between Palestinians residents of the West Bank and Arab-Palestinians citizens of Israel.

Article 2 of the Citizenship Law states, among other things, that as long as the law was in force, the Minister of the Interior is to deny permanent residence permits to West Bank residents. In addition, the area's regional commander is to deny temporary residence permits according to the criteria enumerated in regional security legislation.

During the debate preceding passage of the Citizenship Law, the Attorney General argued that with war being waged between Israel and the Palestinians in the Occupied Territories, the state has no legal duty to reunite families. As explicated by the state, the Citizenship Law was fully justified for straightforward reasons of security and the need to prevent any Palestinian intent on committing a terrorist act from infiltrating into Israel under the pretence of family reunification. During those same debates, several Knesset members argued that the law also contributes to preventing the "demographic threat" posed by the rise in population of Israeli Arabs. To contest these opinions, seven petitions were filed with the High Court of Justice (hereinafter HCJ) by Knesset members and Israeli civil rights organizations. These petitions requested the HCJ to nullify the Citizenship Law due to the serious injury it caused to the right to family life and the statutory equality between Arabs and Jews (in their suits, the petitioners argued that the Citizenship Law was directed solely against the Arab Israeli community).

The fundamental legal issue before the HCJ was whether the sweeping restrictions on family reunification and the injury to the right to family life were warranted; that is, whether the amendment complied with the exceptions attached to *Basic Law: Human Dignity and Liberty* in light of the unique security-related circumstance engendered by the gruelling military conflict waged between Israel and the Palestinians in the West Bank. The petitioners' main argument was that even during periods of unrest, the state has a legal duty to abstain from intervening in the enjoyment of the basic human right to family life; furthermore, this intervention indicated, in itself, the deterioration of the equal status before the law of Israel's Jewish and Arab citizens. The petitioners also noted that in the presence of a security threat posed by one or another specific individual, he or she can be prevented from entering the state. They likewise requested a clear court decision stating that the Citizenship Law represents an illegitimate mechanism for the prevention of natural population growth among Israel's Palestinian minority. On another, related level, the petitioners added that the prohibition against family reunification was damaging to the minor children belonging to families whose reunification was being prevented.

In contrast, the state argued that security sources had contended that the reunification of Palestinian families presented opportunities for the infiltration of dangerous elements over the Green Line and thereby facilitated execution of a serious terrorist attack. In such circumstances, it is impossible to argue that the state has a legal duty to allow family reunification. It follows that although the right to family life is recognized in international and comparative law, such recognition has no precedence over the principle of national sovereignty and the state's duty to protect its citizens to the maximum feasible. Because the security forces claim that no method has been devised enabling prior differentiation between a terrorist and an innocent person, no alternative exists to the legislated law.

Because the HCJ dismissed the petitions filed against the Citizenship Law by majority vote, the law remained intact. The six majority votes were cast by justices M. Heshin, E. Rivlin, E. Levy, A. Grunis, M. Naor and Y. Adiel whereas the five minority votes were cast by A. Barak, D. Beinisch, A. Procaccia, S. Jubran and E. Hayut. Each of the ten justices assumed that the core issue before them was whether the Citizenship Law contradicted *Basic Law: Human Dignity and Liberty* so palpably as to necessitate its nullification, or whether it was possible to revise the law within the framework of the *Basic Law's* exceptions. Another basis for the entire court's decision was the claim, presented by security forces, that between 1994 and 2003, 26 of the 130,000 Palestinians who had acquired citizenship on the basis of the original nationality law had either committed a terrorist act or been involved as an accomplice.

The majority, led by Justice Heshin, were convinced that even if an insignificant number of terrorists were to infiltrate Israel as a result of family reunification, such a possibility was sufficient cause to allow some level of injury to human dignity and the right to family life. That is, the majority opinion expressed the conviction that the injury inflicted to the right to family life was justified by the need to safeguard the nation's residents and that such an action, being commensurate with the threat, was reasonable given its objective. Although the majority recommended the introduction of an exception to the prohibition on family reunification for humanitarian purposes, the Citizenship Law was in essence confirmed as written. In the decision's summary, Justice Heshin noted

that the international community does not generally recognize the existence of an absolute, basic right to the entry (migration) of a citizen's foreign-born spouse to that citizen's home country. Such a right is legislated according to a country's respective interests; hence, a state is entitled to restrict and even nullify the right of entry by means of legislation. It follows that in the absence of the right of entry, a person is automatically denied the right of immigration to a country (p. 118 of the original decision).

The minority opinion, led the President (Chief Justice) of the HCJ, Justice Aharon Barak, argued that in the presence of every state's duty to allow for family life, the minor number of cases in which family reunification has been exploited for purposes of terror provides no justification for such a broad prohibition on family reunification. Therefore, the minority found the prohibition on family reunification to be unjustified and unreasonable due to its being incommensurate to its declared objective: safeguarding the public. As Justice Barak noted in his conclusion, the additional security delivered by a sweeping prohibition against family reunification is negligible when compared to the injury such a law might cause to family life and the equality to be enjoyed by the Israeli spouses. Recognition of the costly price of the security bought by a prohibition of this scope is called for (p. 67, the original decision).

The majority of the court identified the main cause for the prohibition against family reunification to be interests of security and consequently found the Citizenship Law to be a fitting response; the minority reached a polar conclusion. Nevertheless, with the exclusion of Justice Procaccia, all the judges ignored the discrimination against Arabs on an ethnic-national and demographic basis – what is commonly referred to in Israel as the "demographic problem" – embedded in the law. The issue of the law's exploitation for purposes of discrimination was overtly raised by the petitioners who, in the course of their argumentation, delivered a presentation on the subject that had been previously seen by the government (2002). Yet, this subject was barely mentioned in the decision.

The debate surrounding the Citizenship Law and the HCJ's decision invites some conclusions regarding Israeli public policy as it has evolved on the level of the government as well as the Knesset. First, the Knesset, like the government, is required to take the Citizenship Law's stipulations into account because the law's constitutionality depends on the margin of its restraints. It would therefore be fitting for the Knesset to nullify the existing law or at least significantly limit its scope and content. Irrespective of the legal debate over the degree to which the state is duty-bound to ensure the right to family life, it is clear that the marginal number of cases in which the law was exploited by Palestinian terrorists does raise a serious question regarding the degree to which the sweeping prohibition found in the Citizenship Law meets the criteria of a democratic state.

Second, research conducted by Gad Barzilai, a professor of political science and law at the universities of Tel Aviv and of Washington, has revealed the demographic considerations resting at the foundations of the law's passage. During the Knesset deliberations over the law, senior politicians and security officials argued in favour of the law on the basis of demographic as opposed to purely security-related considerations. A senior security official was convinced, for instance, that the Law was a fitting response to the "seepage" of Palestinians from the West Bank across the Green Line. In light of these findings, it appears appropriate to request that the government and the Knesset voice their views regarding the use of legal instruments to solve demographic challenges. Their views should likewise be heard regarding whether the assumed legitimacy of those instruments will stand the test of Israeli democracy and international standards. Third, a public debate should be initiated over the question of whether important security objectives such as the prevention of terrorist attacks might be achieved by more limited legal instruments than the global prohibition of a right, a prohibition that will cause considerable harm to thousands of innocent people.

To conclude, passage of the *Nationality and Entry into Israel Law (Temporary Order 2003)* represents a crucial watershed in Israel's history because it demands that we all re-evaluate the appropriate relationships to hold between democracy, security, the existence of a state in which Jews represent the ruling majority. Everyone would agree that the preservation of a Jewish and democratic state is a weighty legal as well as political challenge. The HCJ's decision in this matter does not represent a finale but only the beginning of a broad public campaign targeted at searching for solutions to security problems without jeopardizing the equality expected of a democratic regime, especially in Israel.