HCJ 7052/03

Adalah Legal Centre for Arab Minority Rights in Israel and others

v

1. **Minister of Interior**
2. **Attorney-General**
3. **Jewish Majority in Israel**
4. **Victims of Arab Terror**
5. **Shifra Hoffman**

HCJ 7102/03

MK Zahava Gal-On and others

v

Attorney-General and others

HCJ 7642/03

Shama Mahmud Musa and another

v

Minister of Interior and others

HCJ 7643/03

Ibrahim Alyon others

v

Minister of Interior and others

HCJ 8099/03

Association for Civil Rights in Israel

v

Minister of Interior and others

HCJ 8263/03

Rami Mohammed Askafi and others

v

Minister of Interior and others

HCJ 10650/03

Mirfat Taysir Abed Al Hamid and others
v
Minister of Interior and others

The Supreme Court sitting as the High Court of Justice
[14 May 2006]
Before President A. Barak, Vice-President Emeritus M. Cheshin and Justices D. Beinisch, E. Rivlin, A. Procaccia, E.E. Levy, A. Grunis, M. Naor, S. Joubran, E. Hayut, Y. Adiel

Petition to the Supreme Court sitting as the High Court of Justice

Facts: Since September 2000, Palestinians have mounted a barrage of terror attacks on the State of Israel and its citizens and residents. The intensity of these attacks led the government to adopt various measures to protect the security and safety of Israeli citizens and residents. Because some of the terror attacks were perpetrated with the assistance of persons who were originally Palestinians living in the occupied territories and had received permission to live in Israel within the framework of family reunifications, the government decided in 2002 to stop giving permits to Palestinians from the occupied territories to live in Israel. This decision was subsequently passed by the Knesset into legislation in the form of the Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003 ('the law'); the law was valid for one year and was extended several times.

Petitions were filed in the High Court of Justice against the constitutionality of the law. In the course of the legal proceedings, the Knesset amended the law and introduced various concessions. These mainly allowed Palestinians from the occupied territories to apply to live in Israel within the framework of family reunifications, if the applicant was under the age of 14 or over the age of 35 (for a man) or 25 (for a woman).

The main question raised by the petitions is whether a constitutional right has been violated by the law, which, even in its amended, more lenient form, contains a blanket prohibition against allowing Palestinians between the ages of 14 and 35 (for a man) or 25 (for a woman) from entering Israel for the purposes of family reunifications.

The court was therefore called upon to consider whether the blanket prohibition of family reunifications (with Palestinians of certain ages) violates constitutional rights, and if it did, whether the violation of those rights satisfies the conditions of the limitations clause in the Basic Law: Human Dignity and Liberty, and was therefore constitutional. The blanket prohibition in the law was considered with reference to the position that prevailed before the law was enacted, whereby applications of Palestinians to live in Israel were considered on an individual basis, with a view to whether the applicant presented a risk to the security and safety of the Israeli public.

Held: (Minority opinion — President Barak, Justices Beinisch, Joubran, Hayut, Procaccia) The law violates two constitutional basic rights. It violates the right to family life, which is a derivative of human dignity, since the right to family life means the right of an Israeli citizen or resident to live with his family in Israel. The law also violates the right to equality, since only Israeli Arabs marry Palestinians from the occupied territories and therefore the only persons harmed by the law *de facto* are Israeli Arabs. These violations of constitutional rights lead to the law being unconstitutional, since the law does not satisfy the last condition of the limitations clause in the Basic Law: Human Dignity and Liberty, namely that the violation of the constitutional rights should not be excessive. The blanket prohibition in the law against all Palestinians between certain ages provides somewhat more security than the system of individual checks, but it increases the violation of constitutional rights considerably. In view of the small increase of security and the large increase in the violation of rights, the law is disproportionate in adopting a blanket prohibition rather than a system of individual checks. It is unconstitutional and therefore void.

(Majority opinion — Vice-President Cheshin, Justices Grunis, Naor) Like other countries around the world, Israel does not recognize a constitutional right that a person may have foreign members of his family immigrate to Israel. Such a right exists only to the extent that statute grants it. Therefore the law does not violate a constitutional right to human dignity. The law also does not violate the constitutional right to equality. The fact that the Palestinian Authority is *de facto* waging a war or quasi-war against Israel makes the residents of the territories enemy nationals. The law, in prohibiting family reunifications with enemy nationals, makes a permitted distinction between family reunifications with persons who are not enemy nationals, and family reunifications with persons who are enemy nationals. This is a permitted distinction in view of the current circumstances, and therefore the law is not discriminatory. The law was therefore constitutional. Nonetheless, the state should consider adding to the law a provision allowing exceptions in special humanitarian cases.

(Majority opinion — Justice Adiel) The law violates the constitutional right to family life which is a part of human dignity, but not the constitutional right to equality. Notwithstanding, in view of the bloody conflict between the Palestinians and Israel, the violation of the constitutional right is proportionate. Therefore the law is constitutional.

(Majority opinion — Justice Rivlin) There is no need to consider the petitions since the law is about to expire and it cannot be known in what format, if at all, the Knesset will re-enact it. The question is therefore moot. Subject to this, the law does violate a constitutional right to family life. However, the conflicting national security interest is really, in this case, made up of the rights of all the individual members of the public to life and security. In view of this, the law satisfies the proportionality test, and is therefore constitutional.

(Majority opinion — Justice Levy) The law violates both the right to family life and the right to equality. With regard to the conditions of the limitations clause, the main problem lies in the requirement that the law should adopt the least harmful measure. The blanket prohibition will have to be replaced by an individual check of each applicant for family reunification. In this check, in view of the clear hostility of the Palestinian Authority, applicants should be regarded to have a presumption of dangerousness, which they must rebut. The applicant should not be present illegally in Israel while the application is pending and he should be required to declare his loyalty to the state of Israel. Notwithstanding, since declaring the law void would create a void in security arrangements, the law should be allowed to stand, but if changes are not made, the law will be unlikely to satisfy judicial scrutiny in the future.

Petition denied, by majority opinion (Vice-President Cheshin and Justices Rivlin, Levy, Grunis, Naor and Adiel), President Barak and Justices Beinisch, Procaccia, Joubran and Hayut dissenting.

Legislation cited:

Basic Law: Human Dignity and Liberty, ss. 1, 1A, 2, 3, 4, 5, 6(a), 7(a), 8, 12.

Basic Law: the Government, ss. 50, 50(d).

Basic Law: the Knesset, s. 38.

Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003, ss. 2, 3, 3A, 3A(1), 3A(2), 3B, 3B(2), 3B(3), 3D, 3E, 4, 5.

Citizenship and Entry into Israel (Temporary Provision) (Extension of the Validity of the Law) Order, 5764-2004.

Citizenship and Entry into Israel (Temporary Provision) (Extension of the Validity of the Law) Order, 5765-2005.

Citizenship and Entry into Israel (Temporary Provision) (Extension of the Validity of the Law) Order (no. 2), 5765-2005.

Citizenship Law, 5712-1952, ss. 4, 4A(1), 4A(2), 5(a), 7.

Entry into Israel Regulations, 5734-1974, r. 12.

Law of Return, 5710-1950, ss. 2(b)(3), 4A.

Prevention of Terror Ordinance, 5708-1948.

Providing Information on the Effect of Legislation on Children's Rights Law, 5762-2002.

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[2] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.

[3] HCJ 3239/02 Marab v. IDF Commander in Judaea and Samaria [2003] IsrSC 57(2) 349; **[2002-3] IsrLR 173**.

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[6] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.

[7] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.

[8] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.

[9] HCJ 6055/95 *Tzemah v. Minister of Defence* [1999] IsrSC 53(5) 241; **[1998-9] IsrLR 635**.

[10] HCJ 1030/99 *Oron v. Knesset Speaker* [2002] IsrSC 56(3) 640.

[11] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.

[12] HCJ 4128/02 *Man, Nature and Law Israel Environmental Protection Society v. Prime Minister of Israel* [2004] IsrSC 58(3) 503.

[13] HCJ 2334/02 *Stanger v. Knesset Speaker* [2004] IsrSC 58(1) 786.

[14] HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* **[2005] (1) IsrLR 340**.

[15] CrimApp 5934/05 *Malka v. State of Israel* [2005] IsrSC 59(2) 833.

[16] HCJ 316/03 *Bakri v. Israel Film Council* [2003] IsrSC 58(1) 249; **[2002-3] IsrLR 487**.

[17] CA 238/53 *Cohen v. Attorney-General* [1954] IsrSC 8 4; **IsrSJ 2 239**.

[18] CA 337/62 *Riezenfeld v. Jacobson* [1963] IsrSC 17(2) 1009; **IsrSJ 5 96.**

[19] CA 488/77 *A v. Attorney-General* [1978] IsrSC 32(3) 421.

[20] HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [1993] IsrSC 47(1) 749.

[21] LFA 377/05 *A v. Biological Parents* (not yet reported).

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[23] CFH 7015/94 *Attorney-General v. A* [1996] IsrSC 50(1) 48.

[24] HCJ 3648/97 *Stamka v. Minister of Interior* [1999] IsrSC 53(2) 728.

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[27] HCJ 98/69 *Bergman v. Minister of Finance* [1969] IsrSC 23(1) 693; **IsrSJ 8 13.**

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[30] HCJ 10026/01 *Adalah Legal Centre for Arab Minority Rights in Israel v. Prime Minister* [2003] IsrSC 57(3) 31.

[31] HCJ 7111/95 *Local Government Centre v. Knesset* [1996] IsrSC 50(3) 485.

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[45] CA 333/85 *Aviel v. Minister of Labour and Social Affairs* [1991] IsrSC 45(4) 581.

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[62] HCJ 5394/92 *Hoppert v. Yad VaShem Holocaust Martyrs and Heroes Memorial Authority* [1994] IsrSC 48(3) 353.

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[82] HCJ 4676/94 *Meatreal Ltd v. Knesset* [1994] IsrSC 50(5) 15.

[83] HCJ 212/03 *Herut National Movement v. Chairman of Central Elections Committee* [2003] IsrSC 57(1) 750.

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[151] CA 1212/91 *LIBI The Fund for Strengthening Israel's Defence v. Binstock* [1994] IsrSC 48(3) 705; **[1992-4] IsrLR 369**.

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[154] ADA 8607/04 *Fahima v. State of Israel* [2005] IsrSC 59(3) 258.

[155] HCJ 2320/98 *El-Amla v. IDF Commander in Judaea and Samaria* [1992] IsrSC 52(3) 346.

[156] HCJ 7862/04 *Abu Dahar v. IDF Commander in Judaea and Samaria* [2005] IsrSC 59(5) 368; **[2005] (1) IsrLR 136**.

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For the petitioners in HCJ 7642/03 and HCJ 7643/03 — Tz. Sasson.
For the petitioners in HCJ 8099/03 — D. Yakir, S. Avraham-Weiss.
For the petitioners in HCJ 8263/03 — M. Halila.
For the petitioners in HCJ 10650/03 — A. Lustigman
For the State — Y. Gnessin, D. Marks.
For Jewish Majority in Israel — Z. Ferber

JUDGMENT

President A. Barak

The Citizenship and Entry into Israel Law (Temporary Provision), 5753-2003, provides that the Minister of the Interior shall not grant citizenship to a resident of Judaea, Samaria or the Gaza Strip (the ‘area’ or the ‘territories’), nor shall he give him a permit to live in Israel. The law also provides that the area commander shall not give such a resident a permit to stay in Israel. This provision does not apply to Israelis who live in the territories. It has several qualifications. It prevents, inter alia, the possibility of family reunification between an Israeli Arab and his or her Arab spouse who lives in the territories (where the husband from the territories is under the age of 35 or the wife from the territories is under the age of 25). This provision also imposes restrictions on the contact between a parent who is an Israeli resident and his child who is registered in the population register in the territories. The purpose underlying these provisions is security. It is intended to prevent the realization of the danger, which has occurred in the past, that a man from the territories, who was given the possibility of living in Israel with his Israeli wife, may assist persons involved in hostile terror activity.

The law is not based on any 'demographic' purpose of restricting the increase of the Arab population in Israel. Against this background, the question arises whether the provisions of the Citizenship and Entry into Israel Law unlawfully violate the right of the Israeli spouses and children. The question is not what is the right of the foreign spouses in the territories. The question is whether the provisions of the law, in so far as they apply to the reunification of families between an Israeli Arab spouse and his or her Arab spouse living in the territories, and to the contact between parents who are Israeli residents and their children registered in the territories, are constitutional. Do they violate the human dignity of the Israeli spouse or parents? Is the violation lawful? These are the questions before us.

A. The security and normative background

(1) The security background

1. In September 2000, the second intifada broke out. An intense barrage of terror descended upon the State of Israel. Most of the terror attacks were directed against civilians. They harmed men and women, the elderly and children. Complete families lost their loved ones. The attacks were intended to harm human life. They were intended to sow fear and panic. They sought to disrupt the way of life of Israeli citizens. The terror attacks are carried out inside Israel and in the territories. They take place everywhere. They hurt people on public transport, at shopping centres and markets, at cafés and inside homes and towns. The main target of the attacks is town centres in Israel. The attacks are also directed at Israeli towns in the territories and at traffic arteries. The terror organizations make use of various methods, including suicide attacks ('live human bombs'), car bombs, placing explosive charges, throwing Molotov cocktails and grenades and shooting firearms, mortars and rockets. Several attempts to attack strategic targets failed. From the beginning of the acts of terror until January 2006, more than 1,500 attacks were made within the State of Israel. More than one thousand Israelis lost their lives within the State of Israel. Approximately six thousand and five hundred Israelis were injured. Many of the injured were severely disabled. On the Palestinian side also the armed conflict has caused many dead and injured. The bereavement and suffering overwhelm us (for a description of this situation, see, inter alia, HCJ 7015/02 Ajuri v. IDF Commander in West Bank [1], at p. 358 {87}; HCJ 2056/04 Beit Sourik Village Council v. Government of Israel [2]).

2. The State of Israel took a series of steps to protect the lives of its residents. Inter alia, military operations were carried out against the terror organizations, including the 'Protective Wall' operation (March 2002) and the 'Determined Path' operation (June 2002) (see HCJ 3239/02 Marab v. IDF Commander in Judaea and Samaria [3]; HCJ 3278/02 Centre for Defence of the Individual v. IDF Commander in West Bank [4]). It was decided to build a separation fence that would make it harder for terrorists to carry out attacks against Israelis, and would facilitate the struggle of the security forces against the terrorists (see Beit Sourik Village Council v. Government of Israel [2]; HCJ 7957/04 Marabeh v. Prime Minister of Israel [5]).

3. Among these steps, restrictions were imposed on the entry of residents of the territories into the State of Israel, because, according to the assessment of the security establishment, the entry into Israel of residents of the territories, and their unrestricted movement within it, significantly endangers the safety and security of the citizens and residents of the State of Israel. Against this serious security reality, and in view of these security arrangements, the Citizenship and Entry into Israel Law (Temporary Provisions), 5763-2003, (hereafter — 'the Citizenship and Entry into Israel Law' or 'the law') was also enacted. Subject to qualifications, the law prevents residents of the territories from entering the State of Israel. Within this framework, restrictions were also imposed, inter alia, on the reunification of families where one spouse is an Arab with Israeli citizenship or a permanent resident in Israel (mainly in Jerusalem) and the other is a resident of the territories. What underlies this arrangement is the concern that allowing residents of the territories to take up residence in Israel by means of marriage and reunification of families would be abused for the

purposes of the armed conflict. This concern was based, inter alia, on the actual involvement of residents of the territories, who received a status in Israel by virtue of their marriage to Israelis, in acts of terror that were perpetrated within the State of Israel. The respondents claim that twenty-six of the residents of the territories who received a status in Israel as a result of marriage were involved in terror activity. Some of these were involved in carrying out the attacks themselves. Some assisted in bringing terrorists into Israel. Some assisted in gathering intelligence about targets for attacks. This concern was also based on the future risk arising from the contacts which the residents of the territories who become residents of Israel maintain with their relations and other residents of the territories, including persons involved in terror activity. So the background that led to the enactment of the Citizenship and Entry into Israel Law is the serious security reality that has prevailed in Israel in recent years, and the security threat to the citizens and residents of the State of Israel from the acts of terror organizations. An element of this threat is the involvement of Palestinians, who are residents of the territories and acquired a status in Israel as a result of their marriage and family reunification, in acts of terror that were committed inside the State of Israel, and the future threat deriving from these persons, according to the State. The Citizenship and Entry into Israel Law is intended to contend with these threats.

(2) The normative background

4. At first, restrictions were imposed on the reunification of families by virtue of a government decision. In 2002 the government determined (decision no. 1813) a new procedure for dealing with the 'policy of family reunifications concerning residents of the Palestinian Authority and foreigners of Palestinian origin.' The decision (of 12 May 2002) said:

> 'B. Policy concerning family reunifications
>
> In view of the security position, and because of the ramifications of immigration processes and the residency of foreigners of Palestinian origin in Israel, including by means of family reunifications, the Ministry of the Interior, together with the relevant government ministries, shall formulate a new policy for dealing with applications for family reunifications. Until this policy is formulated and finds expression in new procedures and legislation, as necessary, the following rules shall apply:
>
> 1. Dealing with new applications, including applications in which no decision has yet been made
>
> a. A resident of the Palestinian Authority — no new applications shall be accepted from residents of the Palestinian Authority for a residency status or any other status; an application that has been submitted shall not be approved, and the foreign spouse shall be required to live outside Israel until any other decision is made.
>
> b. Others — the application shall be considered with reference to the origin of the person concerned.
>
> 2. Applications that are in the staged process
>
> During the interim, a permit that was given shall be extended, subject to the absence of any other impediment. There shall be no upgrading to a higher status.'

According to this procedure, the regular treatment of applications for family reunification was stopped, in so far as residents of the Palestinian Authority were concerned. Several petitions were filed in the High Court of Justice against this procedure (see, for example, HCJ 4022/02, HCJ 4608/02, HCJ 7316/02, HCJ 7320/02). No decision was made with regard to these petitions, since while they were pending, the Citizenship and Entry into Israel Law was enacted.

5. On 6 August 2003, the Citizenship and Entry into Israel Law was published. In essence, it enshrined government policy. The law is valid for one year. It provides that the government may, with the approval of the Knesset, extend its validity in an order, for a period that shall not exceed one year each time (s. 5). When the year ended, the law was extended for six months (until 5 February 2005: see Citizenship and Entry into Israel (Temporary Provision) (Extension of the Validity of the Law) Order, 5764-2004, and the decision of the Knesset on 21 July 2004). At the end of this period, the validity of the law was extended for four additional months (until 31 May 2005: Citizenship and Entry into Israel (Temporary Provision) (Extension of the Validity of the Law) Order, 5765-2005, and the decision of the Knesset on 31 January 2005). At the end of this period, the law was extended for three additional months (until 31 August 2005: Citizenship and Entry into Israel (Temporary Provision) (Extension of the Validity of the Law) Order (no. 2), 5765-2005, and the decision of the Knesset on 30 May 2005). At the same time, the government prepared drafts for amendments to the law which extended the qualifications to the law's application (see the draft law in HatZaot Hok (Draft Laws) 5765 (2004-5) no. 173, at p. 560). The amended law was published on 1 August 2005. It stated that it was valid until 31 March 2006. By virtue of s. 38 of the Basic Law: the Knesset, the validity of the law was extended for an additional three months.

6. The Citizenship and Entry into Israel Law contains five sections. It is set out below in its entirety:

'Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003

Definitions

1. In this law —

'area' — any of the following: Judaea, Samaria and the Gaza Strip;

'Citizenship Law' — the Citizenship Law, 5712-1952;

'Entry into Israel Law' — the Entry into Israel Law, 5712-1952;

'area commander' — for Judaea and Samaria — the IDF commander in Judaea and Samaria, and for the Gaza Strip — the IDF commander in the Gaza Strip or whoever is authorized by the Minister of the Interior, with the consent of the Minister of Defence;

'resident of an area' — whoever is registered in the population register of the area, and also whoever is living in the area even without being registered in the population register of the area, except for a resident of an Israeli town in an area.

Restriction on citizenship and residency in Israel

2. As long as this law is valid, notwithstanding what is stated in any law including section 7 of the Citizenship Law, the Minister of the Interior shall not grant citizenship under the Citizenship Law to a resident of an area nor shall he give him a licence to reside in Israel under the Entry into Israel Law, and the area commander shall not give a resident as aforesaid a permit to stay in Israel under the security legislation in the area.

Permit for spouses

3. Notwithstanding the provisions of section 2, the Minister of the Interior may, at his discretion, approve an application of a resident of the area to receive a permit to stay in Israel from the area commander —

(1) with regard to a male resident of an area whose age exceeds 35 years — in order to prevent his separation from his spouse who lives lawfully in Israel;

(2) with regard to a female resident of an area whose age exceeds 25 years — in order to prevent her separation from her spouse who lives lawfully in Israel.

Permit for children

3A. Notwithstanding the provisions of section 2, the Minister of the Interior, at his discretion, may —

(1) give a minor under the age of 14 years, who is a resident of an area, a licence to live in Israel in order to prevent his separation from his custodial parent who lives lawfully in Israel;

(2) approve an application to obtain a permit to live in Israel from the area commander for a minor under the age of 14 years, who is a resident of the area, in order to prevent his separation from his custodial parent who lives lawfully in Israel, provided that such a permit shall not be extended if the minor does not live permanently in Israel.

Additional permits

3B. Notwithstanding the provisions of section 2, the area commander may give a permit to stay in Israel for the following purposes:

(1) medical treatment;

(2) work in Israel;

(3) a temporary purpose, provided that the permit to stay for the aforesaid purpose shall be given for a cumulative period that does not exceed six months.

Special permit

3C. Notwithstanding the provisions of section 2, the Minister of the Interior may grant citizenship or give a licence to live in Israel to a resident of an area, and the area commander may give a resident of an area a permit to stay in Israel, if they are persuaded that the resident of the area identifies with the State of Israel and its goals and that he or a member of his family has made a real contribution to promoting security, the economy or another important interest of the State, or that the granting of citizenship, giving the licence to

live in Israel or giving the permit to stay in Israel, as applicable, are a special interest of the State; in this paragraph, 'family member' — spouse, parent, child.

Security impediment

3D. A permit to stay in Israel shall not be given to a resident of an area under section 3, 3A(2), 3B(2) and (3) and 4(2), if the Minister of the Interior or the area commander, as applicable, determines, in accordance with an opinion from the competent security authorities, that the resident of the area or his family member are likely to constitute a security risk to the State of Israel; in this section, 'family member' — spouse, parent, child, brother, sister and their spouses.

Transition provisions

4. Notwithstanding the provisions of this law —

(1) the Minister of the Interior or the area commander, as applicable, may extend the validity of a licence to live in Israel or of a permit to stay in Israel, which were held by a resident of an area prior to the commencement of this law, while taking into account, inter alia, the existence of a security impediment as stated in section 3D;

(2) The area commander may give a permit for a temporary stay in Israel to a resident of an area who filed an application to become a citizen under the Citizenship Law or an application for a licence to live in Israel under the Entry into Israel Law, before the first of Sivan 5762 (12 May 2002) and with regard to which, on the date of commencement of this law, no decision had been made, provided that a resident as aforesaid shall not be given citizenship, under the provisions of this paragraph, nor shall he be given a licence for temporary residency or permanent residency, under the Entry into Israel Law.

Validity

5. This law shall remain valid until the second of Nissan 5766 (31 March 2006), but the government may, with the approval of the Knesset, extend its validity in an order, for a period that shall not exceed one year each time.'

B. The petition and the hearing thereof

(1) The petitioners and the respondents

7. Some of the petitioners before us are married couples to whom the Citizenship and Entry into Israel Law applies. Thus the second petitioner in HCJ 7052/03 is an Arab citizen of

Israel, a resident of Kefar Lakia in the Negev, who is a lawyer by profession. He became acquainted with the third petitioner, a Palestinian resident of Bethlehem, who is a social worker by profession and a university lecturer, in 2000, when they studied together at a university in Canada. After they completed their education, and when the relationship between them became stronger, they decided to marry. They became engaged on 20 February 2003, and on the same occasion they made a marriage agreement that was given validity by the Sharia Court in Jerusalem. Their application to give a status in Israel to the third petitioner (which was filed on 19 March 2003) was rejected (on the basis of government decision no. 1813). The marriage ceremony took place on 11 July 2003. For the purpose of the ceremony, the third petitioner was permitted to stay in Israel for one week only. Since then she has not been allowed to enter Israel. The fourth petitioner in HCJ 7052/03 is an Arab woman who is an Israeli citizen living in Shefaram and whose profession is teaching literature, which she does at the Sahnin Technological High School. After an acquaintance of one year, on 6 November 1999 she married the fifth petitioner, a Palestinian from Shechem, who is an electrician by profession and worked in Nazareth and whose stay in Israel was lawful. The spouses live in Shefaram and they have two daughters (the sixth and seventh petitioners). The fourth petitioner applied to the Ministry of the Interior in the area where she lives in order to obtain a residency licence for her husband. The fifth petitioner was given a temporary licence to stay in Israel. As a result of the government's decision, the process in which the fifth petitioner was becoming a citizen was stopped, and since then he has been staying in Israel by virtue of temporary permits that are renewed from time to time, at the discretion of the Minister of the Interior. The first petitioner in HCJ 8263/03 is an Arab citizen of Israel who lives in Haifa. On 12 July 2002, he married the second petitioner, a Palestinian from the Hebron area, and they have a son. The petitioners' application for the second petitioner to be given a status was rejected on the basis of the government's decision, and now the Citizenship and Entry into Israel Law prevents the possibility of them entering into the staged process in order to obtain a status for the second petitioner. The petitioners claim that they cannot go to live in the territories, inter alia, in view of the danger that threatens the life of the second petitioner. The first petitioner in HCJ 7082/03 is an Arab citizen of Israel, who lives in Beit Tzafafa in Jerusalem. On 21 December 2002 he married the second petitioner, a Palestinian from nearby Beit Sahour. At the beginning of 2003, their application was filed to obtain a status for the second petitioner in Israel. The application was rejected in view of the government's decision, and subsequently the Citizenship and Entry into Israel Law came into effect. The first petitioner in HCJ 10650/03 was born in Jerusalem and is a resident of the State of Israel. In 1988 she married a resident of Ramalla and went to live with him. In 2000 the petitioner returned to live in Jerusalem. The couple have seven children. The oldest of these is sixteen and the youngest is three. Four of the children were born while she was living in the territories, and they were registered in the population register there. After she returned to live in Jerusalem, she applied, in 2002, for her children to be given the status of residents. Her request was rejected in view of the government's decision, and subsequently the Citizenship and Entry into Israel Law came into effect.

8. We therefore have before us various kinds of petitioners who are injured by the law. The petitioners with a personal interest in the clarification of the petitions are married couples, where one of the couple is an Israeli Arab and the other is a Palestinian Arab who is a resident of the territories. Some of them have children. The cases of some of the couples were not dealt with in view of the government's decision and the Citizenship and Entry into Israel Law that incorporated it into legislation. The cases of other petitioners are undergoing the staged process, but the law prevents the process from being completed and it prevents the Palestinian spouse from being given Israeli citizenship. In addition to the petitioners with a personal interest, we have many public petitioners, including Knesset members (MK Taleb El-Sana, MK Mohammed Barakeh, MK Azmi Bishara, MK Abdulmalik Dehamshe, MK Jamal Zahalka, MK Wasil Taha, MK Ahmad Tibi, MK Issam Makhoul, MK Zahava Gal-On and MK Roman Bronfman), Knesset factions (the Meretz faction), the Supreme Monitoring

Committee for Arab Affairs in Israel and human rights organizations (Adalah, the Association for Civil Rights in Israel, the Centre for the Defence of the Individual). The respondents are the Minister of the Interior and the attorney-general.

(2) The claims of the petitioners

9. The petitioners claim that the Citizenship and Entry into Israel Law is unconstitutional, since it unlawfully violates rights that are enshrined in the Basic Law: Human Dignity and Liberty, on the basis of ethnic and national groupings. The petitioners claim that the law violates the right of citizens of the State who wish to be united with their spouses or their children in order to have a family life in their country. They claim that this violation breaches the right of the Arab citizens of Israel to equality, and the discrimination in this violates human dignity. The Citizenship and Entry into Israel law prevents the spouse of an Israeli citizen from becoming a citizen, if the spouse lives in the territories and is not a resident of an Israeli town there. Since the vast majority of those persons who are married to residents of the territories (who do not live in an Israeli town) are Arab citizens, it follows that the law mainly injures the Arab citizens of Israel. Therefore, this is a case of a discriminatory denial of rights, on an ethnic basis or a national basis. Against this background, the petitioners claim that the Citizenship and Entry into Israel Law should not be regarded as applying merely to immigration policy, but one should also focus on the injury that it causes to Israeli citizens and residents. They claim that the law besmirches a whole sector of the public with the suspicion of disloyalty to the State and classifies it as being a security risk. The petitioners claim that all of these involve a serious and mortal blow to the right of equality and the right to human dignity. The petitioners claim that the law violates additional basic rights enshrined in the Basic Law: Human Dignity and Liberty. Thus they claim that it violates the private life of Arab citizens who are married to residents of the territories that do not live in Israeli towns. The right to personal freedom is also violated. Furthermore, the natural right of a parent to have contact with his child and the right to build a family are violated. In all these respects, the petitioners claim that the Citizenship and Entry into Israel Law violates the provisions of international law that recognize the rights of marriage, family life and the reunification of families. In addition, the petitioners claim that the law applies retroactively to couples whose cases were pending, and so it also violates the right of due process.

10. The petitioners further claim that the violation of the basic rights that they indicate does not satisfy the limitations clause in the Basic Law, and therefore the Citizenship and Entry into Israel Law should be declared void. In so far as the purpose of the law is concerned, their claim is that it is an improper one. They claim that the sections of the law have no internal logic, and this indicates that the purpose of the law is not a security purpose at all. From the provisions of the law it appears that the legislature is prepared to allow the entry of Palestinian workers into Israel, but it is not prepared to permit the entry of parents and spouses so that they may have a family life. Therefore the purpose that appears from the Citizenship and Entry into Israel Law is to prevent the persons who are requesting visas for family purposes from entering or staying in Israel. The petitioners point to the desire of the Ministry of the Interior, which was already apparent in 2002, to reduce the phenomenon of the reunification of families with Palestinian spouses for demographic reasons. They also deduce the demographic purpose from the chart that was presented to the government before it made its decision (on 12 May 2002), which concerned this factor, and from the remarks of those participating in the Knesset debates before the Citizenship and Entry into Israel Law was enacted. In view of this, the petitioners claim that the purpose of the law is improper and does not befit the values of the State of Israel. The petitioners further claim that the severe violation caused by the law to human rights is disproportionate. According to them, it is possible to examine the security concern inherent in the Palestinian spouses on an individual basis, and there is no basis for denying the possibility of family reunification for a whole sector of the public because of the wrongdoing of individuals. This is especially the case when, from the respondents' figures, it can be seen that the involvement of those who became citizens in terror activities, notwithstanding the severity with which this should be regarded, is

very marginal. According to the petitioners, the purpose of the staged process followed by the Ministry of the Interior was, inter alia, to allay security concerns. Therefore, there is no basis for cancelling it and replacing it with a law that creates an absolute prohibition against the possibility of family reunification.

11. In addition to the substantive claims against the contents of the law, the petitioners further claim that defects occurred, according to them, in the legislative process of the Citizenship and Entry into Israel Law. Thus, when the draft law was considered, it was alleged that there was a security need for enacting it, in view of the increasing involvement in terror attacks on the part of Palestinians who received a status in Israel by virtue of family reunifications. But no exact data was provided about the number of the persons who received a status in Israel, how many of these were children and how many adults, and what was the extent of their involvement in terror. Moreover, the effects of the Citizenship and Entry into Israel Law on the rights of children were not considered, although this was required by the provisions of the Providing Information on the Effect of Legislation on Children's Rights Law, 5762-2002. The petitioners also claim that the Internal Affairs Committee was not given an opportunity to hold a debate with regard to objections made regarding the constitutionality of the law. According to them, these defects go to the heart of the legislative process, to an extent that justifies the voidance of the law.

(3) The claims of the respondents

12. The respondents reject the claims of the petitioners. According to them, the Citizenship and Entry into Israel Law is constitutional. They focus on the security background that led to its enactment, and its security purpose. The Israeli-Palestinian conflict underwent a change in September 2000, and the terror activity component in it increased significantly. Many Israelis lost their lives as a result of this activity. Within the context of the armed conflict between the Palestinians and Israel, the Palestinian side avails itself, in some cases, of Arab citizens of the State of Israel, and especially persons who were residents of the territories and received a status in Israel as a result of the family reunification process. To the best of the knowledge of the security authorities, since 2001, twenty-six residents of the territories who received a status in Israel as a result of family reunifications were involved in real aid and assistance to terror attacks against Israelis. In these attacks, fifty Israelis were killed and more than a hundred were injured. Therefore, the assessment of the security forces is 'that there is a security need to prevent, at this time, the entry of residents of the territories, as such, into Israel, since the entry of residents of the territories into Israel and their free movement within the State by virtue of the receipt of Israeli documentation is likely to endanger, in a very real way, the safety and security of citizens and residents of the State' (para. 3 of the respondents' response of 3 November 2003). The respondents' position is that giving a permit to stay in Israel for the purpose of permanent residence in Israel to a resident of a state or a political entity that is waging an armed conflict with Israel involves a security risk, since the loyalty and commitment of that person is to the state or the political entity that is involved in a conflict with Israel. The respondents' position is that 'within the context of the loyalty and commitment of that person, and his close ties to the territory where and whence the terror against the State of Israel originates, it is possible to exert pressure on someone whose family continues to live in such a place so that he will help the terror organizations, if he does not want any harm to come to his family' (para. 13 of the state's response dated 6 November 2005).

13. The respondents emphasize that the purpose of the law is to reduce the danger of harm to the lives of Israeli citizens and residents. It is the duty of the State to protect its citizens. It is also its right to act in self-defence. Preventing persons from the territories from entering or staying in Israel is based upon a security concern, which is not theoretical, of an almost certain risk to public security and safety. The respondents reject the claim that the Citizenship and Entry into Israel Law suffers from a lack of internal logic; admittedly, the law retains the possibility of allowing Palestinian workers from the territories to enter Israel, but the entry of these is restricted to periods of calm, and it is easy to supervise their stay in Israel, unlike

Palestinian spouses who stay in Israel on a permanent basis. A large-scale entry of residents of the territories into Israel is dangerous. Their free movement in Israel is likely to endanger significantly the safety and security of the citizens and residents of Israel.

14. The respondents claim that the law does not violate the human rights enshrined in the Basic Law: Human Dignity and Liberty. First, in so far as we are concerned with the rights of foreigners who wish to immigrate into Israel, there is no constitutional right that a foreigner may immigrate into Israel for any reason, including marriage. Moreover, our law, like the law practised around the world, recognizes a wide discretion given to the state in determining its immigration policy. As a rule, the state is not required to give reasons to a foreigner as to why it refuses to allow his entry into it. Second, the respondents are of the opinion that the law also does not violate the rights of the Israeli citizens enshrined in the Basic Law: Human Dignity and Liberty. Their fundamental position is that the Basic Law should be interpreted in accordance with the social consensus that prevailed at the time it was enacted. According to this consensus, the right of human dignity should be given its basic meaning that includes protection against blatant violations of human dignity — physical and emotional violations, humiliation, degradation, etc. — and there is no basis for including in it the whole scope of the right of equality or the right to family life. According to them, both constitutional history and the objective and subjective intention of the constitutive authority support this conclusion. Third, the respondents' claim is that there is no need at all to consider the question of the circumstances in which a violation of equality will amount to a violation of the constitutional right to dignity, since the law does not violate the right to equality. The distinction that the law makes is an objective and justified distinction in the circumstances of the case, namely that a person belongs to a political entity that is in an armed conflict with the State of Israel. The respondents' view is that improper discrimination exists only where citizens are treated differently because of an irrelevant difference (such as sex, religion, race and nationality). But the law does not make any distinctions on the basis of the characteristics of the Israeli spouses, only a distinction based on certain characteristics of the foreign spouse. Therefore, there is no basis for the claim of discrimination and the claim of a violation to the constitutional right to equality. Fourth, the respondents further claim that the law does not violate any other basic rights enshrined in the Basic Law: Human Dignity and Liberty. Thus, as they understand it, the right of the petitioners to freedom is not violated, since there is no violation of the right to freedom by means of imprisonment, arrest, extradition or the like. The right of privacy is also not violated, since the law denies benefits in the field of immigration only, and it does not affect the individual's freedom to choose a spouse. In so far as the right to family life is concerned, the respondents claim that the temporary provision 'does not prevent family life, nor does it limit the autonomy of choosing a spouse, nor does it deny the right to family life in principle, but it does not allow the realization of the right specifically in the State of Israel' (para. 35 of the response dated 3 November 2005). If so, the law does not prevent the choice of spouse, but merely does not allow the realization of the right specifically in Israel. This realization is not protected by the Basic Law: Human Dignity and Liberty. With regard to the international conventions to which the petitioners refer, the respondents claim that these are not a part of internal Israeli law, and that even on the merits their provisions are subject to restrictions of national security. According to them, international law protects the right of a person who is staying in a country to leave it and to move freely within it, but the right of entry into the state is reserved for the citizens of the state only. Contractual international law, which concerns the protection of the family unit, does not provide an obligation on the part of the state to allow the entry of the foreign spouse into its territory for the purpose of living there. Moreover, the Basic Law: Human Dignity and Liberty allows every person to leave Israel (s. 6(a)), but allows only a citizen to enter Israel (s. 6(b)). Against this background, the respondents claim that there is, in this case, no violation of the rights enshrined in the Basic Law.

15. Finally, the respondents claim that even if the law violates rights under the Basic Law, these violations still satisfy the requirements of the limitations clause. First, the respondents

emphasize that we are dealing with temporary provisions that are of a transient nature. Second, they claim that the right to life of the persons living in the State of Israel and the interest in protecting their security is a proper purpose that befits the values of the State of Israel. The fact that the purpose of the law is to protect the right to life, which is a basic right, should affect the examination of the law in accordance with the tests of the limitations clause. Taking this into account, their third claim is that the law also satisfies the requirement of proportionality. The respondents point to the difficulty inherent in their being able to examine the cases of persons requesting a status in Israel on an individual basis. In the case of many applicants, and especially those that live in the areas of the Palestinian Authority (areas A and B), there is no security information. The fact that there is no negative security information concerning an applicant does not mean that he is not involved in activity harmful to security. In addition, even someone who has already received a permit to stay in Israel may be recruited by terror activists. The respondents are of the opinion that the provisions of the law are not retroactive. The law does not apply to requests that were filed or approved before it came into effect. In addition, the respondents refer to the transition provisions that allow the extension of the validity of a licence to live or stay in Israel. Finally, the respondents claim that the legislative process was proper and that the provisions of the law were considered carefully, and even underwent important changes in the course of the deliberations that were held with regard to it.

(4) The hearing of the petitions

16. The petitions against the Citizenship and Entry into Israel Law were filed shortly after it was enacted. After we heard the arguments of the parties, an order nisi was made (on 9 November 2003). Interim orders were also made to prevent the deportation of the Palestinian petitioners staying in Israel. Other applications for interim orders, and an application for an interim order that would prevent the law from coming into effect, were denied. It was decided that the petitions would be heard before an extended panel of the court. We also decided to join as a respondent to the petitions the 'Victims of Arab Terror' association, which emphasized the right of Israeli citizens to a quiet and safe life. We also decided to join as a respondent the 'Jewish Majority in Israel' association, which emphasized the demographic consideration according to which the Jewish majority in Israel should be preserved. Before we had time to make a decision on the petitions, a year passed from the date on which the law was published, and the Citizenship and Entry into Israel (Temporary Provision) (Extension of the Validity of the Law) Order, 5764-2004, was published; this extended the validity of the law by an additional six months. Together with the decision to extend the validity of the law by half a year, the government adopted a decision to prepare an amendment to the law that would make changes to it, and in particular expand the qualifications to the application of the law. In view of this, we were of the opinion (in a decision on 14 December 2004) that our judgment should be given on the basis of the new normative reality that was about to be created. Before the process of amending the law was completed, the six months expired, and the Citizenship and Entry into Israel (Temporary Provision) (Extension of the Validity of the Law) Order, 5765-2005, was published; this extended the validity of the law for an additional four months, for the purpose of completing the legislative process. In view of the restricted period of the extension of the law's validity, we decided (on 1 March 2005) that we ought to allow the legislator to complete the complex legislative process. The legislative process was completed. The amended law was published. After the amendment, we again (on 14 February 2006) heard the arguments of the parties and studied the supplementary arguments. The time has come to decide the petitions on their merits.

C. The questions that require a decision and the methods of deciding them

(1) The questions that require a decision

17. The focus of the petitions before us is the Israeli spouse. The main question before us is whether the constitutional rights of the Israeli spouse have been violated unlawfully. The question is whether rights that were given to him in the Basic Law: Human Dignity and

Liberty have been violated unlawfully. In view of the centrality of the right of the Israeli spouse and in view of my conclusion that the right of the Israeli spouse has been violated, I see no reason to consider the rights of the non-Israeli (foreign) spouse), whether under international law concerning human rights (such as the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966, and the International Convention on the Elimination of All Forms of Racial Discrimination, 1965) or under humanitarian international law that applies to him because he lives in Judaea and Samaria, which are subject to a belligerent occupation (in this regard, see Marab v. IDF Commander in Judaea and Samaria [3] and A. Rubinstein & L. Orgad, 'Human Rights, Security of the State and the Jewish Majority: the Case of Immigration for the Purposes of Marriage,' 48 HaPraklit 315 (2006)). Indeed, even if the rights of the foreign spouse have been violated under international human rights law and humanitarian human rights law — and even if the rights of the Israeli spouse to the extent that they are enshrined only in those laws were violated — this violation was made by virtue of the Citizenship and Entry into Israel Law. Express local legislation is capable, from the internal viewpoint of Israeli law, of violating rights given in international law. No matter how much the latter constitutes customary international law, it is unable to overcome Israeli legislation that expressly violates it. This is not the case with the Israeli spouse under the Basic Law. In so far as he has rights under the Basic Law: Human Dignity and Liberty, an ordinary law (such as the Citizenship and Entry into Israel Law) cannot violate it lawfully, unless it satisfies the requirements of the limitations clause. This is the clear expression of Israel's constitutional democracy. We adopted this approach with regard to the rights of the Israelis who were compelled to leave the Gaza Strip (see HCJ 1661/05 Gaza Coast Local Council v. Knesset [6]). According to the same normative system we should examine the constitutional rights of the Israeli spouses, in so far as the Citizenship and Entry into Israel Law violates them. Naturally, we cannot ignore the foreign spouse. We should recognize his rights and the effect of those on his life and the life of his Israeli spouse. Nonetheless, from the viewpoint of legal analysis, we will focus on the Israeli spouse, because he can call upon the Basic Law: Human Dignity and Liberty to support his case.

(2) The constitutional scrutiny

18. According to the petitioners, the two main rights that this law violates are the right to family life and the right to equality. Their position is that these rights are enshrined in the Basic Law: Human Dignity and Liberty, and they are violated in defiance of the conditions set out in the limitations clause. The scrutiny of a claim against the constitutionality of the Citizenship and Entry into Israel Law is done in three stages (see CA 6821/93 United Mizrahi Bank Ltd v. Migdal Cooperative Village [7]; HCJ 1715/97 Israel Investment Managers Association v. Minister of Finance [8]; HCJ 6055/95 Tzemah v. Minister of Defence [9]; HCJ 1030/99 Oron v. Knesset Speaker [10]; HCJ 4769/95 Menahem v. Minister of Transport [11]; Gaza Coast Local Council v. Knesset [6]). The first stage examines whether the law — in our case the Citizenship and Entry into Israel Law — violates a human right enshrined in the Basic Law. If the answer is no, the constitutional scrutiny ends, since an ordinary law, which contains an express provision, may violate a human right that is enshrined in an earlier ordinary law or in Israeli common law (see, for example, HCJ 4128/02 Man, Nature and Law Israel Environmental Protection Society v. Prime Minister of Israel [12]). If the answer is yes, the legal analysis passes on to the next stage. In the second stage, we examine the question whether the violation of the right satisfies the requirements of the limitations clause. Indeed, not every violation of a human right is an unlawful violation. Sometimes a law violates a constitutional human right, but the constitutionality of the law is upheld, since the violation satisfies the requirements of the limitations clause (see, for example, HCJ 2334/02 Stanger v. Knesset Speaker [13]; HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs [14]). If the violation of the constitutional arrangement is lawful, the constitutional examination ends. If

the violation is unlawful, the analysis continues on to the next stage. This third stage examines the consequences of the unconstitutionality. This is the relief or remedy stage.

(3) Is there a basis for constitutional scrutiny in times of war?

19. It may be argued that the cases before us deal with the prevention of terror in a time of war. They are not usual cases of preventing family reunification. We are dealing with an exceptional case of family reunification, where the spouse or child of the person claiming his constitutional right to family reunification is situated in an area which is in a state of war with the State of Israel. In such circumstances — so the argument would continue — the ordinary laws concerning the three-stage constitutional scrutiny should not be applied. This situation falls outside the normal framework. It is a matter of existence. À la guerre comme à la guerre; the security need prevails over the right of the individual.

20. I cannot accept this argument. The Basic Laws do not recognize two sets of laws, one that applies in times of peace and the other that applies in times of war. They do not contain provisions according to which constitutional human rights recede in times of war. Thus, for example, section 50 of the Basic Law: the Government, which authorizes the government to enact emergency regulations, states expressly that 'Emergency regulations are incapable of… permitting a violation of human dignity' (subsection (d)). The Basic Law: Human Dignity and Liberty further provides that 'It is permitted to enact emergency regulations… which will contain a denial or restriction of rights under this Basic Law, provided that the denial or restriction are for a proper purpose and for a period and to a degree that are not excessive' (s. 12). Indeed, Israeli constitutional law has a consistent approach to human rights in periods of relative calm and in periods of increased fighting. We do not recognize a clear distinction between the two. We do not have balancing laws that are unique to times of war. Naturally, human rights are not absolute. They can be restricted in times of calm and in times of war. I do not have a right to shout 'fire' in a theatre full of spectators (see the analogy of Justice Holmes in Schenck v. United States [184], at p. 52, which was cited in CrimApp 5934/05 Malka v. State of Israel [15], at p. 843). War is like a barrel full of explosives next to a source of fire. In times of war the likelihood that damage will occur to the public interest increases and the strength of the harm to the public interest increases, and so the restriction of the right becomes possible within the framework of existing criteria (see HCJ 316/03 Bakri v. Israel Film Council [16], at p. 283 {523-524}). Indeed, we do not have two sets of laws or balances, one for times of calm and the other for times of terror. This idea was well expressed by Lord Atkin more than sixty-five years ago, during the Second World War, in a minority opinion where he said:

> 'In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which… we are now fighting, that the judges… stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law' (*Liversidge v. Anderson* [224], at p. 361).

21. Moreover, there is no possibility of making a clear distinction between the status of human rights in times of war and their status in times of peace. The dividing line between terror and calm is a fine one. This is the case everywhere. It is certainly the case in Israel. There is no possibility of maintaining it over time. We must treat human rights seriously both in times of war and in times of calm. We must free ourselves from the naïve belief that when terror ends we will be able to put the clock back. Indeed, if we fail in our task in times of war and terror, we will not be able to carry out our task properly in times of peace and calm. From this viewpoint, a mistake by the judiciary in a time of emergency is more serious than a mistake of the legislature and the executive in a time of emergency. The reason for this is that the mistake of the judiciary will accompany democracy even when the threat of terror has passed, and it will remain in the case law of the court as a magnet for the development of new and problematic rulings. This is not the case with mistakes by the other powers. These will be

cancelled and usually no-one will remember them. This was well expressed by Justice Jackson in Korematsu v. United States [185], where he said:

> 'A judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty… A military order, however unconstitutional, is not apt to last longer than the military emergency… But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need… A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image' (*Korematsu v. United States* [185], at p. 245).

22. Thus we see that there is only one track within which framework the petitions before us should be examined. This track is — with regard to any claim against the constitutionality of a statute — the track of the Basic Laws. Within the framework of this track, we should follow the well-trodden path of examining the constitutionality of the law. There is no parallel track; there is no alternative route. There is one path that applies at all times. It applies in times of calm. It applies in times of war.

D. *Stages of the constitutional scrutiny: 1. Has a constitutional right been violated?*

(1) *The problems presented*

23. It was argued before us that the Citizenship and Entry into Israel Law violates the right of the Israeli spouse to human dignity. This violation, so it is claimed, is two-fold: *first*, the right of the Israeli spouse to human dignity is violated, since his right to family life is violated; *second*, the right of the Israeli spouse to human dignity is violated, since his right to equality is violated. This argument presents us with *three* fundamental questions: *first*, are the right of the Israeli spouse to family life and his right to equality recognized in Israel? This question concerns the very existence of the right to family life and the right to equality. *Second*, are these human rights to family life and equality included within the scope of the constitutional right to human dignity, which is enshrined in sections 2 and 4 of the Basic Law: Human Dignity and Liberty? This question concerns the existence of the right to family life and equality as a constitutional right, within the scope of the Basic Law: Human Dignity and Liberty. *Third*, does the Citizenship and Entry into Israel Law violate the constitutional right to human dignity (with respect to family life and equality) of the Israeli spouse? We will begin with the first question, by considering separately the right to family life of the Israeli spouse and his right to equality.

(2) *Does Israeli law recognize the right of the Israeli spouse to family life and equality?*

(a) *The right of the Israeli spouse to family life*

24. Is the right of a person to family life recognized in Israel? Within the context of the petitions before us, we do not need to decide all the aspects of this question. We can focus mainly on two specific aspects of family life: *first*, do we recognize the right of the Israeli spouse to live in Israel together with the foreign spouse? *Second*, do we recognize the right of the Israeli spouse to live together with his children in Israel and the right of Israeli children to live together with their parents in Israel?

Other aspects of the fundamental question, including the definition of family for this purpose, can be left undecided at this time (see Y. Marin, 'The Right to Family Life and (Civil) Marriage — International and Local Law,' *Economic, Social and Cultural Rights in Israel* (Y. Rabin and Y. Shani eds. (2004) 663).

25. The right to family life, in the broad sense, is recognized in Israeli law. It is derived from many statutes, which provide arrangements whose purpose is to preserve, encourage and nurture the family unit. Spouses are given social rights, tax, accommodation and housing benefits. They enjoy rights of medical and pension insurance. They have visitation rights in hospitals and prisons. They have privileges and defences in the laws of evidence. The criminal law protects the family; spouses have rights of inheritance, maintenance and mutual support during the marriage, and rights to a division of property when the marriage ends. Although the various statutes deal with specific aspects, it is possible to deduce from them that the family unit is recognized in Israel law and protected by it. Indeed, the family unit is 'the basic unit… "of Israeli society"' (*per* Justice S.Z. Cheshin in CA 238/53 *Cohen v. Attorney-General* [17], at p. 53}). 'Human society cannot exist unless we protect with our lives its basic unit, which is the family unit' (*per* Justice M. Silberg in CA 337/62 *Riezenfeld v. Jacobson* [18], at p. 1021 {107}). It is 'an institution that is recognized by society as one of the basic elements of social life' (*per* President Y. Olshan, *ibid*. [18], at p. 1030 {118}). 'It is our main and basic duty to preserve, nurture and protect the most basic and ancient family unit in the history of mankind, which was, is and will be the element that preserves and ensures the existence of the human race, namely the natural family' (*per* Justice M. Elon in CA 488/77 *A v. Attorney-General* [19], at p. 434). 'Protecting the institution of the family is a part of public policy in Israel. In the context of the family unit, protecting the institution of marriage is a central social value… there is a supreme public interest in protecting this status and in regulating… the scope of rights and duties that formulate it' (HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [20], at p. 783). Indeed, the family relationship, and the protection of the family and its basic elements (the spouses and their children) lie at the basis of Israeli law. The family has an essential and central purpose in the life of the individual and the life of society. Family relationships, which the law protects and which it seeks to develop, are some of the strongest and most significant in a person's life.

26. Protection of the family unit finds special expression when the family unit includes a minor. This protection is required both by the right of the parents to raise their children, and by the rights of the child himself. Indeed, 'the right of the parents to raise their children is a natural, basic right, whose importance can hardly be exaggerated' (P. Shifman, *Family Law in Israel*, vol. 2, 1989, at p. 219). 'The connection between a child and his parents who gave birth to him is one of the fundamentals on which human society is based' (LFA 377/05 *A v. Biological Parents* [21], at para. 46). As my colleague, Justice A. Procaccia, said:

> 'The depth and strength of the parental bond, which contains within it the natural right of a parent and his child to a bond of life between them, has made family autonomy a value of the highest legal status, and a violation of this is allowed only in very special and exceptional cases. Every separation of a child from a parent is a violation of a natural right' (LCA 3009/02 *A v. B* [22], at pp. 894-895).

And in the words of my colleague Justice M. Cheshin:

‘It is the law of nature that a mother and father naturally have custody of their child, raise him, love him and care for his needs until he grows up and becomes a man… this bond is stronger than any other, irrespective of society, religion and country… the law of the state did not create the rights of parents vis-à-vis their children and vis-à-vis the whole world. The law of the state adopts what already existed, and seeks to protect the innate instinct within us, and it turns an “interest” of parents into a “right” under the law, namely the rights of parents to have custody of their children’ (CFH 7015/94 *Attorney-General v. A* [23], at p. 102).

27. The right to family life is not exhausted by the right to marry and to have children. The right to family life means the right to joint family life. This is the right of the Israeli spouse to lead his family life in Israel. This right is violated if the Israeli spouse is not allowed to lead his family life in Israel with the foreign spouse. He is thereby forced to choose whether to emigrate from Israel or to sever his relationship with his spouse. This was discussed by Justice M. Cheshin in HCJ 3648/97 *Stamka v. Minister of Interior* [24]. In that case, the court considered the policy of the Minister of the Interior with regard to granting citizenship to a foreign spouse in Israel. Justice M. Cheshin recognized the ‘basic right of an individual — every individual — to marry and establish a family’ (at p. 782 [24]). In his opinion, Justice M. Cheshin says:

‘The State of Israel recognizes the right of the citizen to choose for himself a spouse and to establish with that spouse a family in Israel. Israel is committed to protect the family unit in accordance with international conventions… and although these conventions do not stipulate one policy or another with regard to family reunifications, Israel has recognized — and continues to recognize — its duty to provide protection to the family unit also by giving permits for family reunifications. Thus Israel has joined the most enlightened nations that recognize — subject to qualifications of national security, public safety and public welfare — the right of family members to live together in the place of their choice’ (*Stamka v. Minister of Interior* [24], at p. 787).

Against this background, it was held that this protection extends not only to married spouses, but also to recognized couples who are not married. My colleague Justice D. Beinisch wrote that the state recognizes:

‘… that the family unit, which is not based on a formal bond of marriage, is also worthy of protection, and the partners who comprise it should be allowed to live together and to continue to live in Israel, provided that it is a real, genuine and established relationship. This policy gives expression to the commitment of the state to the right to family life, which includes the right of the individual to choose his partner and to establish a family with him. This right is recognized in our law and is also protected in international law’ (AAA 4614/05 *State of Israel v. Oren* [25], at para. 11 of the opinion of Justice D. Beinisch).

Indeed, this right of the Israeli spouse to family life in Israel together with the foreign spouse finds expression in s. 7 of the Citizenship Law, 5712-1952 (hereafter — ‘the Citizenship Law’), which makes it easier for the foreign spouse to become a citizen. This right also finds expression in the discretion of the Minister of the Interior with regard to immigration to Israel. Admittedly, the right to family life in general, and the right of the Israeli spouse to realize it in Israel in particular, is not an absolute right. It can be restricted. Nonetheless, these restrictions are not capable of restricting the actual existence of the right. The right exists in Israel. It is recognized by Israeli law. It constitutes a general purpose of all legislation (see *Efrat v. Director*

of Population Registry, Ministry of Interior [20], and thus assists in the interpretation of legislation (see Barak, 'General Principles of Law in Interpretation of the Law,' *Weisman Book* 1 (2002)). It constitutes a part of Israeli common law, from which it is possible to derive rights and duties.

28. The right to family life is also the right of the Israeli parent that his minor children will grow up with him in Israel and the right of an Israeli child to grow up in Israel together with his parents. Israeli law recognizes the importance of making the civil status of the parent equal to that of the child. Thus, s. 4 of the Citizenship Law provides that a child of an Israeli citizen shall also be an Israeli citizen, whether he is born in Israel (s. 4A(1)) or he is born outside it (s. 4A(2)). Similarly, r. 12 of the Entry into Israel Regulations, 5734-1974, provides that 'A child who is born in Israel, to whom s. 4 of the Law of Return, 5710-1950, does not apply, shall have the same status in Israel as his parents.' Even though this regulation does not apply, according to its wording, to children of residents who were not born in Israel, it has been held that the purpose for which r. 12 was intended applies also to the children of permanent residents who were born outside Israel. Thus, for example, it was held that:

> 'As a rule, our legal system recognizes and respects the value of the integrity of the family unit and the interest of safeguarding the welfare of the child, and therefore we should prevent the creation of a difference between the status of a minor child and the status of his parent who has custody or is entitled to have custody of him' (*per* Justice Beinisch in HCJ 979/99 *Carlo (a minor) v. Minister of the Interior* (not yet reported), at para. 2 of the opinion of Justice D. Beinisch).

Respect for the family unit has, therefore, two aspects. The *first* aspect is the right of the Israeli parent to raise his child in his country. This is the right of the Israeli parent to realize his parenthood in its entirety, the right to enjoy his relationship with his child and not be severed from him. This is the right to raise his child in his home, in his country. This is the right of the parent not to be compelled to emigrate from Israel, as a condition for realizing his parenthood. It is based on the autonomy and privacy of the family unit. This right is violated if we do not allow the minor child of the Israeli parent to live with him in Israel. The *second* aspect is the right of the child to family life. It is based on the independent recognition of the human rights of children. These rights are given in essence to every human being in as much as he is a human being, whether adult or minor. The child 'is a human being with rights and needs of his own' (LFA 377/05 *A v. Biological Parents* [21]). The child has the right to grow up in a complete and stable family unit. His welfare demands that he is not separated from his parents and that he grows up with both of them. Indeed, it is difficult to exaggerate the importance of the relationship between the child and each of his parents. The continuity and permanence of the relationship with his parents are an important element in the proper development of children. From the viewpoint of the child, separating him from one of his parents may even be regarded as abandonment and affects his emotional development. Indeed, 'the welfare of children requires that they grow up with their father and mother within the framework of a stable and loving family unit, whereas the separation of parents involves a degree of separation between one of the parents and his children' (LCA 4575/00 *A v. B* [26], at p. 331).

(b) *The right of the Israeli spouse to equality*

29. The right to equality constitutes an integral part of Israeli law. It is a central element of Israeli common law (see I. Zamir and M. Sobel, 'Equality before the Law,'

5 *Mishpat uMimshal* 165 (1999); F. Raday, 'On Equality,' 24 *Hebrew Univ. L. Rev. (Mishpatim)* 241 (1994); A. Bendor, 'Equality and Executive Discretion — On Constitutional Equality and Administrative Equality,' *Shamgar Book* (Articles, vol. 1, 2003) 287; A. Rubinstein, 'On Equality for Arabs in Israel,' *Paths of Government and Law: Issues in Israeli Public Law* 278 (2003); A. Rubinstein and B. Medina, *The Constitutional Law of the State of Israel* (fifth edition, vol. 1, 1997), at p. 271). Since the establishment of the State, the Supreme Court has repeatedly held that equality is the 'soul of the whole of our constitutional system' (*per* Justice M. Landau, in HCJ 98/69 *Bergman v. Minister of Finance* [27], at p. 698 {17}). It is 'a basic constitutional principle, which runs like a golden thread through our basic legal conceptions and constitutes an integral part thereof' (Justice M. Shamgar in HCJ 114/79 *Burkan v. Minister of Finance* [28], at p. 806). Equality lies at the basis of social existence. It is the cornerstone of democracy (see HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [29], at p. 415; HCJ 10026/01 *Adalah Legal Centre for Arab Minority Rights in Israel v. Prime Minister* [30], at p. 39). A violation of equality is 'worse than anything' (Justice M. Cheshin in HCJ 7111/95 *Local Government Centre v. Knesset* [31], at p. 503). I discussed this in HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [32]:

> 'Equality is a basic value for every democratic society… The individual is integrated within the overall fabric and takes his part in building society, knowing that the others are also acting as he is. The need to ensure equality is natural to man. It is based on considerations of justice and fairness. Someone who wishes his right to be recognized must recognize the right of others to seek similar recognition. The need for equality is essential to society and to the social consensus on which it is based. Equality protects government from arbitrariness. Indeed, there is no more destructive force to society that the feeling of its members that they are treated unequally. The feeling of a lack of equality is one of the worst feelings. It undermines the forces that unite society. It harms a person's identity' (*Poraz v. Mayor of Tel-Aviv-Jaffa* [32], at p. 332; see also HCJ 104/87 *Nevo v. National Labour Court* [33], at p. 760 {150}).

Indeed, 'discrimination erodes relationships between human beings until they are destroyed. The feeling of discrimination leads people to lose their self-restraint and leads to the destruction of the fabric of inter-personal relationships' (*per* Justice M. Cheshin in *Local Government Centre v. Knesset* [31], at p. 503). 'Discrimination is an evil that undermines the basis of democracy, penetrates and shakes its foundations, until it finally brings about its collapse and destruction' (HCJ 2618/00 *Parot Co. Ltd v. Minister of Health* [34], at p. 52). Within this framework, religious or race discrimination is harsh and cruel; such generic discrimination inflicts a 'mortal wound' (*per* Justice M. Cheshin in HCJ 2671/98 *Israel Women's Network v. Minister of Labour and Social Affairs* [35], at p. 658; A. Barak, 'General Principles of Law in Interpretation of the Law,' *supra*, at p. 142). It has therefore been held, in a long line of cases, that discrimination against Israeli Arabs merely because they are Arabs violates the equality that is enjoyed by all Israelis (see HCJ 392/72 *Berger v. Haifa District Planning and Building Committee* [36]; HCJ 328/88 *Avitan v. Israel Land Administration* [37]; HCJ 6698/95 *Kadan v. Israel Land Administration* [38]; HCJ 1113/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [39]; HCJ 6924/93 *Association for Civil Rights in Israel v. Government of Israel* [40]; HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [41]; see also I. Zamir, 'Equality of Rights vis-à-vis Arabs in Israel,' 9 *Mishpat uMimshal* 11 (2006); A. Saban, 'The Palestinian Arab

Minority and the Supreme Court: Not a Black and White Picture (and Forecast),' 8 *Mishpat uMimshal* 23 (2005)). This was well expressed by Justice I. Zamir, who said:

> 'A violation of the principle of equality in the narrow sense is considered particularly serious… this is also the case with discrimination against an Arab because he is an Arab, and it makes no difference whether the discrimination is based on religion or on nationality. This is a breach of the principle of equality in the narrow sense. Therefore it is particularly serious. The principle of equality in this sense is the soul of democracy. Democracy demands not merely one vote for each person when there are elections, but also equality for every person at all times. The real test of the principle of equality lies in attitudes to a minority, whether religious, national or any other. If there is no equality for the minority, there is also no democracy for the majority… in a practical sphere, there is special significance in the State of Israel to the question of equality for Arabs. This question involves a complex relationship that has developed between Jews and Arabs in this country over a long period. Notwithstanding, or perhaps for this very reason, we need equality. Equality is essential for co-existence. The welfare of society, and, when considered properly, the welfare of each member of society, requires that the principle of equality is nurtured between Jews and Arabs. In any case, this is the requirement of law, and therefore it is the duty of the court' (*Association for Civil Rights in Israel v. Government of Israel* [40], at pp. 27, 28).

(3) *Is the right of the Israeli spouse to family life and equality a part of human dignity?*

(a) *The right to family life as a part of human dignity*

30. The right to family life is a part of Israeli common law. Notwithstanding the importance of common law, a statute is capable of violating a right enshrined in common law, provided that the statute is phrased in clear, unambiguous and express language (see HCJ 122/54 *Axel v. Mayor, Council Members and Residents of the Netanya Area* [42], at pp. 1531-1532; HCJ 200/57 *Bernstein v. Bet-Shemesh Local Council* [43], at p. 268; HCJ 337/81 *Miterani v. Minister of Transport* [44], at p. 359; CA 333/85 *Aviel v. Minister of Labour and Social Affairs* [45], at p. 596; CA 524/88 *Pri HaEmek Agricultural Cooperative Society Ltd v. Sedei Yaakov Workers Settlement Ltd* [46], at p. 561). The Citizenship and Entry into Israel Law is phrased in clear, unambiguous and express language. Constitutional review of its clear, unambiguous and express provisions is possible only if the right to family life is protected in a Basic Law. The relevant Basic Law for our purposes is the Basic Law: Human Dignity and Liberty. Is the right to family life enshrined and protected in it?

31. The Basic Law: Human Dignity and Liberty does not contain an express provision with regard to the right to family life. The question is whether it is possible to include this right within the framework of the right to human dignity. Is the right to family life a 'right without a name' that is derived from the right to dignity (see H. Sumer, 'Unmentioned Rights — On the Scope of the Constitutional Revolution,' 28 *Hebrew Univ. L. Rev. (Mishpatim)* 257 (1997))? Note that the question is not whether in addition to the rights set out in the Basic Law: Human Dignity and Liberty it is possible to include additional human rights that are not expressly stated in it. The question is whether within the framework of the rights stated expressly in the Basic Law — in our case, within the framework of the right to human dignity — there is also included an aspect of human dignity which concerns family life. Indeed, the question is not whether there is a 'lacuna' in the Basic Law: Human Dignity and

Liberty with regard to the right to family life, and whether it is possible to fill this lacuna. The question is whether the interpretation of the right to human dignity leads to a conclusion that within the framework of this express right there is also included the aspect of the autonomy of individual will that is directed towards having a family life and realizing it in Israel. Indeed, the right to human dignity is, by nature, a 'framework' or 'general' right. The nature of such a right is that, according to its wording, it does not give explicit details of the particular types of activity to which it applies. It is open-ended (see A. Barak, *Legal Interpretation: Constitutional Interpretation* (1994), at p. 357; CA 2781/93 *Daaka v. Carmel Hospital* [47], at p. 577 {463}). The situations to which it applies are derived from the interpretation of the open language of the Basic Law against the background of its purpose. These situations can be classified, for convenience, into categories and types, such as the right to a dignified human existence (see LCA 4905/98 *Gamzu v. Yeshayahu* [48]; HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* [49]); the right to physical and emotional integrity (*Man, Nature and Law Israel Environmental Protection Society v. Prime Minister of Israel* [12], at p. 59); the right to a name (*Efrat v. Director of Population Registry, Ministry of Interior* [20]); the right of an adult to be adopted (CA 7155/96 *A v. Attorney-General* [50]), and similar 'specific' rights that are derived from the general right. In constitutional literature they are called derivative constitutional rights norms (see R. Alexy, *A Theory of Constitutional Law* (2002), at p. 35). Naturally the scope of application of the derivative rights raises difficult questions of interpretation. As long as they have not been separated by the Knesset from human dignity and stated independently, there is no alternative to interpretational activity that focuses on human dignity and seeks to determine the scope of this right, while attempting to formulate the types of cases included in it. Naturally, this categorization will never reflect the full scope of the right to human dignity, nor does it intend to do so. It is intended to assist in understanding the framework provision concerning human dignity (see Y. Karp, 'Several Questions on Human Dignity under the Basic Law: Human Dignity and Liberty,' 25 *Hebrew Univ. L. Rev. (Mishpatim)* 129 (1995); Sumer, 'Unmentioned Rights — On the Scope of the Constitutional Revolution,' *supra*; H.H. Cohn, 'The Values of a Jewish and Democratic State: Studies in the Basic Law: Human Dignity and Liberty,' *HaPraklit Jubilee Book* 9 (1994); D. Statman, 'Two Concepts of Dignity,' 24 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 541 (2001); O. Kamir, *Question of Dignity* (2005). We discussed the scope of the right to human dignity in HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [51]:

> 'The right to human dignity constitutes a collection of rights which must be safeguarded in order to uphold the right of dignity. Underlying the right to human dignity is the recognition that man is a free entity, who develops his person and his abilities as he wishes in the society in which he lives; at the centre of human dignity is the sanctity of human life and liberty. Underlying human dignity are the autonomy of the individual will, freedom of choice and freedom of action of the person as a free entity. Human dignity is based on the recognition of the physical and spiritual integrity of man, his humanity, his value as a human being, all of which irrespective of the extent of his usefulness' (*Movement for Quality Government in Israel v. Knesset* [51], at para. 35 of my opinion; see also HCJ 5688/92 *Wechselbaum v. Minister of Defence* [52], at p. 827; HCJ 7015/94 *Attorney-General v. A* [23], at p. 95; HCJ 4330/93 *Ganem v. Tel-Aviv District Committee, Bar Association* [53], at p. 233; HCJ 205/94 *Nof v. Ministry of Defence* [54], at p. 457 {9}; *Daaka v. Carmel Hospital* [47], at p.

577 {463}; *Gamzu v. Yeshayahu* [48], at p. 375; HCJ 7357/95 *Barki Feta Humphries (Israel) Ltd v. State of Israel* [55], at p. 783; *Man, Nature and Law Israel Environmental Protection Society v. Prime Minister of Israel* [12], at p. 518; CA 5942/92 *A v. B* [56], at p. 842; *Gaza Coast Local Council v. Knesset* [6], at p. 561; *Commitment to Peace and Social Justice Society v. Minister of Finance* [49]; HCJ 3512/04 *Shezifi v. National Labour Court* [57]).

This conception of the right to dignity is based on the conception that the right to dignity 'should not be restricted merely to torture and degradation, since thereby we will miss the purpose underlying it. We should not extend it to include every human right, since thereby we will make redundant all the other human rights provided in the Basic Laws' (*Man, Nature and Law Israel Environmental Protection Society v. Prime Minister of Israel* [12], at p. 518). This leads to the conclusion that the scope of the derivative rights deriving from the general right of human dignity will not always be identical to the scope of the derivative right had it been provided as an express and independent right in the Basic Law. I discussed this in *Commitment to Peace and Social Justice Society v. Minister of Finance* [49], where I said:

'In deriving rights that are not mentioned expressly in the Basic Laws that speak of rights, but are included within the concept of human dignity, it is not always possible to comprehend the full scope that the "derivative" rights would have if they were independent rights… Deducing the rights implied by human dignity is therefore done from the viewpoint of human dignity, and in accordance with this perspective. This approach determines the scope of the implied rights. This is the case with regard to the implied civil rights… and it is also the case with regard to the implied social rights' (*ibid*. [49], at p. 28).

Against this background the following question arises: is the right of the Israeli spouse to family life in Israel included within the right to human dignity provided in ss. 2 and 4 of the Basic Law: Human Dignity and Liberty?

32. The answer to this question is complex. Not all aspects of family life are derived from human dignity. We must focus on those aspects of family life that are incorporated within the scope of human dignity. The premise is that the family is a 'constitutional unit' (see CA 232/85 *A v. Attorney-General* [58], at p. 17). It is entitled to constitutional protection. This protection is found in the heart of the right to human dignity. It also relies on the right to privacy (see s. 7(a) of the Basic Law: Human Dignity and Liberty). Indeed, the right to live together as a family unit is a part of the right to human dignity. It falls within the scope of the essence of the right to dignity (see CA 5587/93 *Nahmani v. Nahmani* [59], at p. 499 {14}). One of the most basic elements of human dignity is the ability of a person to shape his family life in accordance with the autonomy of his free will, and to raise his children within that framework, with the constituents of the family unit living together. The family unit is a clear expression of a person's self-realization. This was discussed by Justice D. Beinisch, who said:

'In an era when "human dignity" is a protected constitutional basic right, we should give effect to the human aspiration to realize his personal existence, and for this reason we should respect his desire to belong to the family unit of which he regards himself to be a part' (CA 7155/96 *A v. Attorney-General* [50]; see also CFH 6041/02 *A v. B* [60], at p. 256; CA 2266/93 *A v. B* [61]).

The family ties of a person are, to a large extent, the centre of his life (see *Roberts v. United States Jaycees* [186], at pp. 618-619). There are few decisions that shape and affect the life of a person as much as the decision as to the person with whom he

will join his fate and with whom he will establish a family. This is also the case with regard to the right of parents to raise their children. 'The law regards the relationship between a parent and his child as a natural right of constitutional dimensions' (*per* Justice A. Procaccia in LCA 3009/02 *A v. B* [61], at p. 894); 'the right of parents to have custody of their children and to raise them, with all that this implies, is a natural and basic constitutional right as an expression of the natural relation between parents and their children. This right is reflected in the privacy and autonomy of the family' (*per* President M. Shamgar in CA 2266/93 *A. v. B* [61], at p. 235).

33. The right to family life enjoys constitutional protection in the internal law of many countries. It is provided as a constitutional right in the constitution of European countries, such as France (the preamble of the constitution of 1958), Ireland (article 41 of the Constitution of 1937), Spain (article 18 of the Constitution of 1978), Germany (article 6 of the Basic Law), Sweden (article 2 of the Constitution of 1975) and Switzerland (article 14 of the Constitution of 2000). Even in American law, notwithstanding the absence of an express right to family life in the constitution, the right to marry and to have a family life has been recognized as a constitutional right derived from the constitutional rights to liberty and privacy (see *Griswold v. Connecticut* [187]; *Loving v. Virginia* [188]; *Lawrence v. Texas* [189]). We should mention that the family also enjoys protection in international law (see article 16 of the Universal Declaration of Human Rights, 1948; article 23 of the International Covenant on Civil and Political Rights; article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

34. Thus we see that from human dignity, which is based on the autonomy of the individual to shape his life, we derive the derivative right of establishing the family unit and continuing to live together as one unit. Does this imply also the conclusion that realizing the constitutional right to live together also means the constitutional right to realize this in Israel? My answer to this question is that the constitutional right to establish a family unit means the right to establish the family unit in Israel. Indeed, the Israeli spouse has a constitutional right, which is derived from human dignity, to live with his foreign spouse in Israel and to raise his children in Israel. The constitutional right of a spouse to realize his family unit is, first and foremost, his right to do so in his own country. The right of an Israeli to family life means his right to realize it in Israel. In this regard, the remarks of Justice M. Cheshin in *Stamka v. Minister of Interior* [24] are apposite, and in view of their importance I will cite them once again:

> 'The State of Israel recognizes the right of the citizen to choose for himself a spouse and to establish with that spouse a family in Israel. Israel is committed to protect the family unit in accordance with international conventions… and although these conventions do not stipulate one policy or another with regard to family reunifications, Israel has recognized — and continues to recognize — its duty to provide protection to the family unit also by giving permits for family reunifications. Thus Israel has joined the most enlightened nations that recognize — subject to qualifications of national security, public safety and public welfare — the right of family members to live together in the place of their choice' (*Stamka v. Minister of Interior* [24], at p. 787).

Indeed, the constitutional right of the Israeli spouse — a right that derives from the nucleus of human dignity as a constitutional right — is 'to live together in the place of their choice.'

35. The question of the relationship between human dignity as a constitutional right and the right to family life in general, and the right to realize this right by means of living together in a family unit in particular, arose in the case of *Dawood v. Minister of Home Affairs* [242]. The judgment was given by the Constitutional Court of South Africa. The constitution of South Africa (in article 10) includes an express right concerning human dignity ('Everyone has inherent dignity and the right to have their dignity respected and protected'). The constitution does not include an express provision concerning the right to family life. An 'ordinary' statute (the Aliens Control Act 96 of 1991) imposed restrictions on the entry into South Africa of a foreign spouse of a South African citizen. The question arose whether the provisions of the statute violated the right to dignity. The Constitutional Court replied (unanimously) that it was. Justice O'Regan analyzed human dignity as a constitutional value and as a constitutional right, and went on to say:

> 'The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfillment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity' (*Dawood v. Minister of Home Affairs* [242]).

A year later, the question arose in South Africa whether a provision in the statute (the same Aliens Control Act), which provided that foreigners who want a work permit must submit their application while they are still outside South Africa, and which restricted the areas of professions for which a work permit may be requested, was constitutional. The High Court of South Africa, Cape of Good Hope Provincial Division, held that it was an unconstitutional provision, since it restricted the ability of spouses to live together, and therefore violated human dignity (*Makinana v. Minister of Home Affairs* [243]). The Constitutional Court confirmed this ruling unanimously (*Booysen v. Minister of Home Affairs* [244]).

36. The right to family reunification is also recognized as a component of the right to family life in international law and in the constitutional law of many countries. Thus, article 8 of the European Convention on Human Rights was interpreted by the European Court of Human Rights as including the right of family members to live together, and therefore as imposing restrictions on the validity of the European Union's policy in the field of immigration. It was held, in a long line of judgments, that decisions concerning immigration that harm the relationship between spouses or the relationship between a parent and his child are likely to violate rights under article 8 of the Convention (see, for example, *Berrehab v. Netherlands* [230]; *Moustaquim v. Belgium* [231]; *Ciliz v. Netherlands* [232]; *Carpenter v. Secretary of State* [233]).

37. Following the Treaty of Amsterdam (which came into force in 1999), issues of immigration were also transferred to the authority of the European Community. In consequence, the Council of the European Union issued a directive concerning immigration in 2003 (2003/86/EC), which binds all the member states of the Union (except for Denmark, the United Kingdom and Ireland, which were excluded from this directive). This directive is based, *inter alia*, on article 8 of the European

Convention on Human Rights and Fundamental Freedoms, and provides in the preamble that: 'Family reunification is a necessary way of making family life possible.' It grants a broad right to the reunification of families for all citizens of the European Union, whether the foreign spouse is a citizen of a member state in the Union or not (see mainly para. 5 of the preamble, articles 2 and 3, and art. 7 which provides a right of family reunification, on the conditions provided there).

38. The right to family reunification is also regarded as an element in the constitutional right to family life in the internal law of many countries. Thus, in 1978, the Conseil d'État in France ruled that an immigration policy that violated the right of citizens of France to live in their country together with their spouse was unconstitutional, since it violated the undertaking of the State, which is provided in the preamble to the Constitution of 1946, to act in order to promote and develop the family (Arrêt GISTI (C.E.) of 8 December 1978). The Constitutional Court (Conseil Constitutionnel) followed this ruling and even extended it. It was held that the constitutional right to family reunification extended also to persons who had a right of residency in France:

> 'Considérant que le dixième alinéa du préambule de la Constitution de 1946 dispose que: "La Nation assure à l'individu et à la famille les conditions nécessaires à leur développement";
>
> Considérant qu'il résulte de cette disposition que les étrangers dont la résidence en France est stable et régulière ont, comme les nationaux, le droit de mener une vie familiale normale ; que ce droit comporte en particulier la faculté pour ces étrangers de faire venir auprès d'eux leurs conjoints et leurs enfants mineurs sous réserve de restrictions tenant à la sauvegarde de l'ordre public et à la protection de la santé publique lesquelles revêtent le caractère d'objectifs de valeur constitutionnelle;…' (Décision n° 93-325 DC du 13 août 1993).

'The tenth paragraph of the Preamble to the 1946 Constitution states that: "The Nation shall provide the individual and the family with the conditions necessary to their development;"

As a result of this provision aliens who have resided ordinarily and legally in France have the right to lead a normal family life in the same way as French nationals; this right specifically allows these aliens to send for their spouses and children who are minors on condition of restrictions relating to preserving public order and protecting public health which are constitutional objectives;…' (Decision 93-325 DC of 13 August 1993).

The right to family reunification has also been recognized in German law as an element of the constitutional protection to the institution of the family that is enshrined in article 6 of the German Basic Law. It has been held that the right to family life does not mean merely the right of each individual to marry, but also the right of the married spouses to have a family life, to live together and to raise their children. For this reason, the constitutional right to family life extends also to the foreign spouse of a German citizen:

> 'Denn es gibt im Hinblick auf Ehepartner und Familienangehörige nur eine einheitliche Ehe oder Familie. Dem Leitbild der Einheit von Ehe und Familie und der durch Art. 3 Abs. 2 GG verbürgten Gleichberechtigung der Ehegatten liefe es im Kern zuwider, wenn der Schutzbereich des Art. 6 Abs. 1 GG in persönlicher Hinsicht gegenüber einem dem sachlichen Schutzbereich der Norm unterfallenden Hoheitsakt materiell — wie verfahrensrechtlich auf ein bestimmtes Ehe — oder Familienmitglied beschränkt bliebe.'

> ‘With respect to spouses and family members, there is only one joint marriage or family. It would be contrary to the essence of the ideal of unity of marriage and family and the equal rights of spouses set down in Art. 3(2) of the Basic Law if the scope of protection afforded by Art. 6(1) were to be substantively and procedurally restricted to a certain marital partner or family member with regard to a sovereign act falling within the norm’s material scope of protection’ (BVerfGE 76, 1 [238]).

The same is the case in the Republic of Ireland, where it was held that the constitutional right of a minor who is a citizen of Ireland to family life may render the state liable to provide permanent residency or citizenship to his parents, even if they entered Ireland unlawfully and they are staying there unlawfully. Justice Finlay wrote:

> ‘… there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that *prima facie* and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State’ (*Fajujonu v. Minister of Justice* [1990] 2 IR 151; see also S. Mullally, ‘Citizenship and Family Life in Ireland: Asking the Question “Who Belongs?”,’ 25 *Legal Studies, The Journal of the Society of Legal Scholars*, vol. 25, (2005), 578).

In the United States it has also been held that the right to family reunification is protected within the framework of the constitutional protection given to the right to family life. This subject arose in *Fiallo v. Bell* [190]. The Immigration and Nationality Act of 1952 that was in force at that time enshrined the right of United States citizens and residents to family reunification. It was provided, *inter alia*, that United States citizens or residents were entitled to bring their foreign spouses and children into the country. ‘Child’ for the purpose of this law was defined as a legitimate child, step-child or adopted child. In addition, the law allowed an illegitimate child to be brought into the country for the purpose of his reunification with his American mother. No similar right of the father of such a child was recognized. It was alleged that this law was unconstitutional. The Supreme Court accepted the position that a violation of the right of family reunification was a violation of a protected constitutional right, and therefore the statute under consideration was, in principle, subject to judicial scrutiny. Opinions differed as to the question of the level of scrutiny. The majority opinion was that the proper level in this case was the lowest level (rational basis). On this basis, the majority justices held that the statute was constitutional. Justices Marshall, Brennan and White, in the minority, held that the level of judicial scrutiny for the violation of the right to family unity was the most strict level (strict scrutiny), which was applied in cases where a basic constitutional right was violated. On this basis, the minority held that the arrangement was unconstitutional, since it violated the constitutional right of the citizens and residents of the Unites States to equality and family life, in that the right of fathers to be reunited with their (illegitimate) children was denied, whereas such a right was given to mothers. Justice Marshall wrote:

> ‘…the statute interferes with the fundamental “freedom of personal choice in matters of marriage and family life” … The right to live together as a family belongs to both the child who seeks to bring in his or her father and the father who seeks the entrance of his child’ (*Fiallo v. Bell* [190] , at p. 810). See also J. Guendelsberger, ‘Implementing Family Unification Rights in American Immigration Law: Proposed Amendments,’ 25 *San Diego L. Rev.* 253 (1988)).

In summary, we have seen that the right to family life is not merely a basic right in common law, but a constitutional right enshrined in the right to human dignity.

(b) *The right to equality as a part of human dignity*

39. The right to equality was always an integral part of our common law. The Basic Law: Human Dignity and Liberty did not include an express provision with regard to equality. In the past the question arose whether it is possible to derive the right to equality from the general right to human dignity. On this question, various opinions were expressed in case law and legal literature (see HCJ 5394/92 *Hoppert v. Yad VaShem Holocaust Martyrs and Heroes Memorial Authority* [62]; CA 105/92 *Re'em Contracting Engineers Ltd v. Upper Nazareth Municipality* [63], at p. 201; *Nof v. Ministry of Defence* [54], at p. 460 {13}; HCJ 726/94 *Klal Insurance Co. Ltd v. Minister of Finance* [64], at p. 461; HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz* [65]; HCJ 453/94 *Israel Women's Network v. Government of Israel* [66]; HCJ 4541/94 *Miller v. Minister of Defence* [67]; HCJ 4806/94 *D.S.A. Environmental Quality Ltd v. Minister of Finance* [68], at p. 204; HCJ 1074/93 *Attorney-General v. National Labour Court* [69]; *Local Government Centre v. Knesset* [31], at p. 485; HCJ 1113/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [39]; see also Y. Karp, 'Basic Law: Human Dignity and Freedom — A Biography of Power Struggles', 1 *Law and Government*, 1992, 323, at pp. 347-351; Sumer, 'Unmentioned Rights — On the Scope of the Constitutional Revolution,' *supra*; L. Shelef, 'Two Models for Guaranteeing Human Rights — American Model versus possible Israeli Model,' 16 *Mehkarei Mishpat* 105 (5761), at p. 138; Rubinstein & Medina, *The Constitutional Law of the State of Israel*, *supra*, at p. 921; Cohn, 'The Values of a Jewish and Democratic State: Studies in the Basic Law: Human Dignity and Liberty,' *supra*; Karp, 'Several Questions on Human Dignity under the Basic Law: Human Dignity and Liberty,' *supra*, at p. 145; D. Dorner, 'Between Equality and Human Dignity,' *Shamgar Book* (Articles, vol. 1, 2003) 9). This dispute was decided by the Supreme Court in *Movement for Quality Government in Israel v. Knesset* [51], at para. 40 of my opinion. It was held that the right to human dignity includes the right to equality, in so far as this right is closely and objectively connected with human dignity (see *ibid* [51], at para. 33). It should be noted that the right to equality is not an 'implied' constitutional right: it is not recognized outside the rights expressly provided in the Basic Law. The right to equality is an integral part of the right to human dignity. Recognition of the constitutional aspect of equality derives from the constitutional interpretation of the right to human dignity. This right to human dignity is expressly recognized in the Basic Law. Notwithstanding, not all aspects of equality that would have been included, had it been recognized as an independent right that stands on its own, are included within the framework of human dignity. Only those aspects of equality that are closely and objectively connected to human dignity are included within the framework of the right to human dignity.

40. Does the right of the Israeli spouse to have a family unit in Israel, by virtue of equality with the right of other Israeli couples to have a family unit in Israel, constitute a part of the right of the Israeli spouse to human dignity? The answer is yes. Both the protection of the family unit in Israel, and the protection of the equality of this family unit with the family units of other Israeli couples, fall within the essence of human dignity. The prohibition of discrimination against one spouse with regard to having his family unit in Israel as compared with another spouse is a part of the protection of the human dignity of the spouse who suffers that discrimination.

E. *Does the Citizenship and Entry into Israel Law violate a constitutional right?*

(1) *The problem*

41. The right to human dignity grants every Israeli spouse a constitutional right to have his family life in Israel, thereby enjoying equality with other Israeli spouses. Does the Citizenship and Entry into Israel Law violate this right of the Israeli spouse? The Basic Law: Human Dignity and Liberty provides that 'One may not violate a person's dignity in as much as he is a human being' (s. 2). Only if the Citizenship and Entry into Israel Law violates human dignity does a constitutional question arise in this case. Against this background, the question is whether the right of the Israeli spouse to family life is violated by the provisions of the Citizenship and Entry into Israel Law, and whether this law violates the right of the Israeli spouse to equality. Let us examine each of the questions separately.

(2) *The violation of the right to family life*

(a) *The injury to the Israeli spouse*

42. Human dignity as a constitutional right extends to the right of an Israeli to establish a family unit and realize it in Israel. Does the Citizenship and Entry into Israel Law violate this right? Certainly the Citizenship and Entry into Israel Law does not prevent the Israeli spouse from marrying the spouse in the territories. The freedom to marry is maintained. Moreover, usually the Israeli spouse is not prevented from moving to the territories ('Every person is free to leave Israel:' s. 6(a) of the Basic Law: Human Dignity and Liberty). Thus he is entitled, of course, to realize his right to have the family unit outside Israel. I assume — without having had all the details submitted to us in this regard — that in most cases the Israeli spouse will receive a permit from the military commander to enter the territories. With regard to the Palestinian authorities, we have not been told that they present any difficulties in this regard. It follows that the main question before us is the question of realizing the life of the family unit in Israel. It concerns s. 2 of the Citizenship and Entry into Israel Law, which states:

> '2. As long as this law is valid, notwithstanding what is stated in any law including section 7 of the Citizenship Law, the Minister of the Interior shall not grant citizenship under the Citizenship Law to a resident of an area nor shall he give him a licence to reside in Israel under the Entry into Israel Law, and the area commander shall not give a resident as aforesaid a permit to stay in Israel under the security legislation in the area.'

Does this section violate the constitutional right of the Israeli spouse to have a family life and to realize it in Israel?

43. My answer to this question is yes. The right of the spouse to form a family unit is seriously violated if he is not allowed to form this family unit in Israel. The right to have the family unit is the right to realize the family unit in the country of the Israeli spouse. That is where his home is, that is where the rest of his family is, that is where his community is. That is where his historical, cultural and social roots are. The family unit does not exist in a vacuum. It lives in a specific time and place. The law violates this right. Indeed, it is the right of the Israeli spouse that his family should live with him in Israel; it is his right to plant the family roots in the soil of his country; it is his right that his child will grow up, be educated and become an Israeli in Israel. In *Stamka v. Minister of Interior* [24] the Supreme Court did not say to Israel Stamka: 'Why are you complaining? Your right to have a family unit with your non-Jewish wife can be realized in the country of the wife.' The court recognized the right of 'family members to live together in the place of their choice' (*ibid*. [24], at p. 787). That is how a civilized state behaves. This right is violated by the Citizenship and Entry into Israel Law. Indeed, s. 2 of the Citizenship and Entry into Israel Law

violates the right of the Israeli spouse to realize his family life in Israel. When the foreign spouse is in the territories, he is prevented from entering Israel. The area commander is not authorized to give the spouse a permit to stay in Israel. The Minister of the Interior is not authorized to give him a licence to enter Israel. None go out and none come in. The family unit is injured.

(b) *The injury to the Israeli minor*

44. A similar injury befalls the child of the Israeli spouse, in so far as he is himself an Israeli (i.e., that his Israeli parent is a citizen or resident, and the minor lives with him). This minor cannot live with his second parent in Israel. He must decide to remain with his Israeli parent in Israel or to go to his other parent in the territories. This is a heartrending decision according to everyone, and it seriously injures the Israeli minor. It also injures the Israeli parent. If the minor is not Israeli and he is living with one of his parents in the territories, the Citizenship and Entry into Israel Law recognizes (see s. 3A of the law) the possibility of giving him — but not the parent with whom the minor lives in the territories — a permit to enter and a licence to stay in Israel (while distinguishing between minors up to the age of 14 and minors over the age of 14). Even in this case a heartrending decision must be made, which is based on the assumption that the family unit does not live together in Israel.

45. Thus we see that the right of the Israeli spouse and the Israeli child to realize family life in Israel with the foreign spouse is violated. Their right to dignity is violated. In view of these violations caused by the Citizenship and Entry into Israel Law to the human dignity of the Israeli spouse, we must turn to the second stage of constitutional scrutiny, which is the stage of the limitations clause. Before we do so, let us consider whether the Citizenship and Entry into Israel Law violates an additional aspect of human dignity, namely the right of the Israeli spouse to equality. Let us turn now to examine this question.

(3) *The violation of the right to equality*

(a) *The nature of the violation*

46. Human dignity as a constitutional right also extends to the right of the Israeli spouse to equality. Does the Citizenship and Entry into Israel Law violate this aspect of human dignity? My answer to this question is yes. The law violates the ability of Israelis who marry spouses who are Palestinians living in the territories to realize their right to family life in Israel. Who are these Israelis? The vast majority of the Israelis who marry Palestinians living in the territories are Arabs who are citizens or residents of Israel. The focus of the violation caused by the law is therefore Israeli Arabs. Admittedly, Israelis who are not Arabs are also not allowed to live in Israel together with Palestinian spouses who are residents of the territories. But the number of these is negligible. The conclusion is that the Citizenship and Entry into Israel Law *de facto* restricts the right of Israeli Arabs, and only Israeli Arabs, to realize their right to family life. The number of these cases is many thousands. From the figures given to us it appears that between 1993-2001, before the government adopted the new policy (on 15 February 2002) and before the Citizenship and Entry into Israel Law was originally enacted (on 6 August 2003), more than sixteen thousand applications for family reunifications with Arab spouses from the territories were granted in the sense that the spouses from the territories received permits to stay or licences to live in Israel. This is a significant percentage of all the Arab spouses who married in Israel in those years. My conclusion is, therefore, that the Citizenship and Entry into Israel Law results in depriving thousands of Arabs — and only Arabs — who are citizens of Israel of the possibility of realizing their right to family life. A law that has this result

is a discriminatory law. A law that causes an injury that focuses almost exclusively on the Arab citizens of Israel violates equality.

(b) *Prohibited discrimination or permitted distinction*

47. Against this argument, the State raises two lines of defence. The *first* line of the State's defence is the argument that the difference in the outcome between the Jewish Israeli couple and the Arab Israeli couple is not prohibited discrimination but a permitted distinction. This argument is based on the classic (Aristotelian) definition of discrimination. According to this, prohibited discrimination is treating equals differently and treating persons who are different equally (see HCJ 678/88 *Kefar Veradim v. Minister of Finance* [70], at p. 507). According to this approach, equality is explained on the basis of a conception of relevance. This was discussed by Justice S. Agranat:

> 'In this context, the concept of "equality" therefore means "relevant equality," and it requires, with regard to the purpose under discussion, "equality of treatment" for those persons in this state. By contrast, it will be a permitted distinction if the different treatment of different persons derives from their being, for the purpose of the treatment, in a state of relevant inequality, just as it will be discrimination if it derives from their being in a state of inequality that is not relevant to the purpose of the treatment' (FH 10/69 *Boronovski v. Chief Rabbis* [71], at p. 35).

According to this approach, equality does not require identical treatment. Not every distinction constitutes discrimination. 'Equality between persons who are not equal is sometimes merely an absurdity' (Justice T. Or in *Avitan v. Israel Land Administration* [37], at p. 299). Sometimes, 'in order to achieve equality, one must act by treating people differently' (HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* [72], at p. 11 {30}**)**; 'discrimination is, of course, a distinction between persons or between matters for irrelevant reasons' (Justice M. Cheshin in HCJ 6051/95 *Recanat v. National Labour Court* [73], at p. 311). Indeed, 'the principle of equality does not rule out different laws for different people. The principle of equality demands that the existence of a law that makes distinctions is justified by the type and nature of the matter. The principle of equality assumes the existence of objective reasons that justify a difference' (HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [74], at p. 236; see also *El-Al Israel Airlines Ltd v. Danielowitz* [65], at p. 779 {519}).

48. Against the background of this classic definition of equality, the state argues that the law's violation only of the right of Israeli Arab spouses to family life is based on a relevant difference. This difference is that only the Arab Israeli spouses wish to bring into Israel spouses who constitute a security risk, when they request to bring into Israel their Arab spouses from the territories. According to the State, 'there is an objective justification that is based on the professional assessment of the security establishment concerning the risk to Israeli citizens and residents in view of the patterns of how residents of the territories have become residents in Israel by virtue of marriage during the active armed conflict (para. 56 of the closing arguments of February 2006).

49. Indeed, the law would support the state if the Citizenship and Entry into Israel Law provided that an Israeli spouse (whether Jewish or Arab) is not entitled to realize family life in Israel where the foreign spouse presents a security risk. In such a case, a difference would be created, *de facto*, between the Jewish-Israeli spouses (whose right to realize married life would not be violated by the law) and the Arab Israeli spouses

(who would be prevented from realizing their married life in Israel with their Arab spouses from the territories who constitute a security risk). Notwithstanding, this difference would be relevant to achieving the purpose underlying the arrangement.

50. The provisions of the Citizenship and Entry into Israel Law say otherwise. The law does not prohibit the entry into Israel of a spouse who presents a danger to security. The law prohibits the entry into Israel of every Palestinian spouse from the territories, whether he presents a security danger or not. The State did not argue before us that of the sixteen thousand spouses from the territories who entered Israel in order to realize family life in Israel, all or most or even a significant number constitute a security risk. The State argued before us that the number of spouses who constitute a security risk and who are known to the State is small. It is clear, therefore, that even according to the State's argument, most of the spouses from the territories, whose entry into Israel is being requested by their Israeli spouses, do not constitute a security risk. The distinction on which the Citizenship and Entry into Israel Law is based is therefore not the distinction between the Israeli spouses who wish to bring into Israel foreign spouses that constitute a security risk and Israeli spouses who wish to bring into Israel foreign spouses who do not constitute a security risk. Such a distinction — even if in practice it leads to an outcome that distinguishes between Jewish Israeli spouses and Arab Israeli spouses — is relevant, and its consequences do not involve a violation of equality (discrimination). But the Citizenship and Entry into Israel Law is based on a different distinction, and that is the distinction between foreign spouses of Israelis who are Palestinian residents of the territories, and foreign spouses of Israelis who are not. This distinction is not based on the security risk presented by the Palestinian spouse from the area, since even if there is no information with regard to the risk that he presents, and even were it proved *de facto* that he presents no danger, his entry into Israel is prohibited. My conclusion is, therefore, that the serious violation of the realization of the right of Israeli Arab spouses — and them alone — caused by the Citizenship and Entry into Israel Law is not based on a relevant distinction.

(c) *The violation of equality in the absence of an intention to discriminate*

51. The state's *second* line of defence is the argument that the purpose of the law was not to discriminate between Jewish-Israeli spouses and Arab-Israeli spouses. The purpose of the law is merely a security one. It was not designed to create a difference between Jewish-Israeli spouses and Arab-Israeli spouses. This argument cannot stand. We accept that the purpose of the Citizenship and Entry into Israel Law is a security one, and that it does not conceal any intention to discriminate against the Arab-Israeli spouse as compared with the Jewish-Israeli spouse. Notwithstanding, the absence of an intention to discriminate has no effect on the existence of the discrimination. Indeed, it is an established case law principle with regard to the rules of equality that the violation of equality (or discrimination) is not examined merely in accordance with the purpose of the allegedly discriminatory norm. According to the law accepted in Israel, the violation of equality (or discrimination) is examined also according to the unintended impact resulting from it (see *Nevo v. National Labour Court* [33], at p. 759 {149}; *El-Al Israel Airlines Ltd v. Danielowitz* [65], at p. 759 {487}). A golden thread that runs through the case law of the Supreme Court is the outlook that 'discrimination is wrong even when there is no intention to discriminate' (Justice E. Mazza in *Israel Women's Network v. Government of Israel* [66], at 524 {450}); 'the principle of equality looks to the outcome; no matter how pure and innocent a person's intention, if the outcome resulting from his action is a discriminatory outcome, his act will be declared void *ab initio*' (Justice M. Cheshin in *Israel*

Women's Network v. Minister of Labour and Social Affairs [35], at p. 654; see also *Nof v. Ministry of Defence* [54], at p. 463 {19}; *Miller v. Minister of Defence* [67], at p. 116 {200}); 'the question is not merely what is the motivation of the decision-makers; the question is also what is the outcome of the decision. The decision is improper, not only when the motivation is to violate equality, but also when there is another motivation, but equality is violated *de facto*' (*Poraz v. Mayor of Tel-Aviv-Jaffa* [32], at p. 333). I discussed in one case, where I said:

> 'The existence or absence of discrimination is determined, *inter alia*, in accordance with the effect that a piece of legislation achieves *de facto*… Therefore a law whose wording is "neutral" may be discriminatory if its effect is discriminatory. Indeed, discrimination may be unintentional… Even if the purpose of a legal norm is not to create discrimination, if discrimination is created *de facto*, the norm is tainted with discrimination' (HCJ 1000/92 *Bavli v. Great Rabbinical Court* [75], at pp. 241-242; see also *Kadan v. Israel Land Administration* [38], at p. 279).

In *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [41] I added:

> '… prohibited discrimination may also occur without any discriminatory intention or motive on the part of the persons creating the discriminatory norm. Where discrimination is concerned, the discriminatory outcome is sufficient. When the implementation of the norm created by the authority, which may have been formulated without any discriminatory intent, leads to a result that is unequal and discriminatory, the norm is likely to be set aside because of the discrimination that taints it. Discrimination is not determined solely according to thought and intention of the creator of the discriminatory norm. It is determined also in accordance with the effect that it has *de facto*… The test for the existence of discrimination is an objective test that focuses on the outcome of realizing the norm that is under scrutiny. It is not limited to the subjective thinking of the creator of the norm. The question is not whether there is an intention to discriminate against one group or another. The question is what is the final outcome that is created in terms of the social reality' (*ibid.* [41], at para. 18 of my opinion).

In the case before us, the impact of the Citizenship and Entry into Israel Law is solely to restrict the right of Arab citizens and residents of Israel to family life. This is a discriminatory outcome. This discrimination is not based on a relevant distinction. If we accept it, 'we will carry out a serious act of discrimination, and we see no proper purpose for the act' (*per* Justice M. Cheshin in *Stamka v. Minister of Interior* [24], at p. 759; see also the remarks of Justice A. Procaccia in HCJ 2597/99 *Rodriguez-Tushbeim v. Minister of Interior* [76], at pp. 450-451). The conclusion is that the law violates the constitutional right to equality.

(d) *Lawful violation of equality*

52. Naturally, the discriminatory result vis-à-vis the Arab-Israeli spouse that is caused by the Citizenship and Entry into Israel Law does not automatically lead to the conclusion that the law is unconstitutional. There are many constitutional violations of rights protected under the Basic Laws. This constitutionality exists notwithstanding the violation of human rights. It becomes possible by satisfying the conditions of the limitations clause. This is the law with regard to all human rights. It is also the law with regard to the right to realize family life in Israel. It is also the law with regard to the right to equality. Not every violation of equality — i.e., not every act of

discrimination — is unconstitutional. There are constitutional acts of discrimination. These are those acts of discrimination that satisfy the requirements of the limitations clause. I discussed this in one case:

> 'Within the sphere of the right to equality, the sole distinction is no longer between equality or a distinction (which are lawful) and discrimination (which is unlawful). Now we must distinguish between the right of equality and the constitutional possibility of violating this right when the requirements of the limitations clause are satisfied. In such circumstances, the executive act is discriminatory: it does not involve a distinction and it violates equality. Notwithstanding, the discrimination is proper, because it befits the values of the State, it is for a proper purpose, and the violation of equality is not excessive' (HCJ 3434/96 *Hoffnung v. Knesset Speaker* [77], at p. 67).

And in another case I added:

> '… the right to equality, like all other human rights, is not an "absolute" right. It is of a "relative" nature. This relativity is reflected in the possibility of violating it lawfully, if the conditions of the limitations clause are satisfied' (*Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [41], at para. 22 of my opinion).

Thus we see that the response of the state with regard to the security risk presented by the foreign spouse who wishes to realize his family unit with the Arab-Israeli spouse is a response that is not capable of ridding the Citizenship and Entry into Israel Law of its discriminatory nature. The law violates the right of the Arab-Israeli spouse to equality. Notwithstanding, the state can still make the argument that this violation of equality — as well as the violation of the right of the Israeli spouse to realize his family life in Israel — is constitutional, since it satisfies the requirements of the limitations clause. Nonetheless, we ought to understand the effect and 'geometric' position of the state's argument. Its effect is not to rid the Citizenship and Entry into Israel Law of its discriminatory nature. Its position in the first stage of the constitutional scrutiny is therefore ineffective. Despite this, the state may still make the argument — the validity of which we must examine — that this discrimination is lawful, since it satisfies the requirements of the limitations clause. The proper position of this claim is in the second stage of the constitutional scrutiny. Let us now turn to this scrutiny, both with regard to the violation of the right of the Israeli spouse to realize his family life in Israel, and with regard to the violation of his right to equality.

F. *Stages of the constitutional scrutiny: 2. Is the violation of the constitutional right lawful?*

(1) *The purpose, importance and elements of the limitations clause*

(a) *The transition from the stage of the violation of the right to the stage of justifying the violation*

53. We have reached the conclusion that the Citizenship and Entry into Israel Law violates the human dignity of the Israeli spouses. This violation is two-fold. *First*, the law violates the right of the Israeli spouse to realize his family life in Israel; *second*, the law violates the right of the Arab-Israeli spouse to realize his right to family life in Israel by virtue of the principle of equality. This conclusion is serious, but it is not fatal to the validity of the law. It does not follow from it that the Citizenship and Entry into Israel Law is not constitutional. Notwithstanding, the constitutionality of the law is in doubt, since a constitutional human right is violated. Now we must turn to the justification stage. It must be shown that the violation of the constitutional right is lawful. We have found that it is not possible to stop the constitutional scrutiny at the

first stage (has a constitutional right been violated?), and we must turn to the second stage of constitutional scrutiny (is the breach of the right lawful?). Indeed, there are many laws that violate constitutional human rights, without being unconstitutional (see *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [14], at para. 11 of the judgment). This is because there are constitutional reasons that justify the violation. These reasons are enshrined in the limitations clauses. Some of these clauses are enshrined in the express language of the Basic Law, and some are the product of case law (see *Hoffnung v. Knesset Speaker* [77], at pp. 70, 75, 76; EA 92/03 *Mofaz v. Chairman of the Central Elections Committee for the Sixteenth Knesset* [78], at p. 811; see also the decision in LCA 9041/05 *Imrei Hayyim Registered Society v. Wiesel* [79]). Moreover, usually the right does not include its own special limitations clause. In such circumstances, that right will be subject to the general limitations clause that provides the conditions for a violation of all the provisions in that Basic Law, whether it is a statutory limitations clause or a judicial limitations clause (see A. Barak, *A Judge in a Democracy* (2004), at p. 350). But sometimes a specific limitations clause is provided, and this stipulates the conditions for the violation of a specific right or constitutional provision. In these circumstances, the right or constitutional provision is subject to several limitations clauses simultaneously. This is the case because a violation of a right of this kind requires both the conditions of the specific limitations clause and the conditions of the general limitations clause to be satisfied. In the petitions before us, what is relevant is the general limitations clause provided in the Basic Law: Human Dignity and Liberty. Let us now move on to an examination of this.

(b) *The general limitations clause in the Basic Law: Human Dignity and Liberty*

54. The general limitations clause in the Basic Law: Human Dignity and Liberty is provided in s. 8 of the Basic Law:

> ‘Violation of rights
>
> 8. The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive, or in accordance with a law as aforesaid by virtue of an express authorization therein.’

Similar provisions exist in comparative law (see s. 1 of the Canadian Charter of Rights and Freedoms; s. 36 of the Constitution of South Africa; art. 29 of the Universal Declaration of Human Rights). A limitations clause has a two-fold purpose: *on the one hand*, it guarantees that the human rights provided in the Basic Law may only be violated when the conditions provided therein are satisfied. *On the other hand*, it guarantees that if the conditions provided therein are satisfied, the violation of the human rights provided therein is constitutional (see *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [14], at para. 11 of the judgment; HCJ 9333/03 *Kaniel v. Government of Israel* [80], at p. 17; *Gaza Coast Local Council v. Knesset* [6], at p. 545).

(c) *The centrality of the limitations clause in the constitutional structure*

55. The limitations clause is a central element in our constitutional structure (see D.M. Beatty, *The Ultimate Rule of Law* (2004)). It reflects the idea that the constitutional validity of human rights is based on an overall balance between the rights of the individual and the needs of society as a whole (*United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 433; *Israel Investment Managers Association*

v. Minister of Finance [8], at p. 384; *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [14], at para. 11 of the judgment). 'It is the foothold on which the constitutional balance between society as a whole and the individual is based' (*Movement for Quality Government in Israel v. Knesset* [51], at para. 45 of my opinion). The limitations clause reflects the idea that human rights are not absolute; that they are relative; that it is possible to violate the right of one individual in order to uphold the right of another individual; that it is possible to violate the right of the individual in order to uphold a right belonging to society as a whole. This was discussed by my colleague, Justice A. Procaccia:

> 'The limitations clause reflects a balance between the constitutional interests reflected in the basic rights and the needs reflected in the legislation under scrutiny. The basic rights, even though they are supreme rights of a constitutional nature, are not absolute, but they arise from a reality that requires balances to be struck between the duty to uphold important rights of the individual and the need to provide a solution to other worthy interests, whether of an individual or of the public. Finding a harmonious arrangement between all these interests is a condition for a proper social life and for preserving a proper constitutional system… the limitations clause is intended to delineate the boundaries within which primary legislation of the Knesset can be enacted even where it contains a violation of human rights, provided that this violation is found in the proper sphere of the balances between the protection of the right and the need to achieve other important purposes that are involved in violating it' (LCA 3145/99 *Bank Leumi of Israel Ltd v. Hazan* [81], at p. 405).

Indeed, 'the existence of human rights assumes the existence of society and the existence of restrictions on the free will of the individual' (*Movement for Quality Government in Israel v. Knesset* [51], at para. 45 of my opinion).

56. The Basic Law: Human Dignity and Liberty gives a constitutional status to several rights. They are defined in broad terms. Their wording is open. The scope of the application of each one of the rights is not unlimited. The boundaries of each right will be determined in accordance with its constitutional interpretation. This interpretation will determine the boundary between the various rights. It will also determine the areas where several constitutional rights apply and the relationship between them. A change in the scope of application of the constitutional rights requires a constitutional change. It is possible to do this only by means of a Basic Law (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 407; HCJ 4676/94 *Meatreal Ltd v. Knesset* [82], at p. 27; HCJ 212/03 *Herut National Movement v. Chairman of Central Elections Committee* [83], at pp. 755-756; HCJ 1384/98 *Avni v. Prime Minister* [84]). In all of these the limitations clause has no application. It does not determine the scope of the constitutional rights. Its role is different. It constitutes a part of the Basic Laws themselves, and its status is constitutional. It is intended to uphold the constitutional validity of ordinary legislation that violates constitutional human rights. It is a constitutional umbrella that provides constitutional protection to 'ordinary' pieces of legislation that violate human rights. Indeed, the role of the limitations clause is not to be found in the realm of the scope of the constitutional right. The limitations clause does not give constitutional validity to ordinary legislation that seeks to change the scope of the constitutional right. Ordinary legislation cannot determine that a certain matter does not fall within the scope of the constitutional right. The limitations clause acts in a different sphere. Its field of operations is that of ordinary law (as opposed to constitutional law). Ordinary law

cannot change human rights. Notwithstanding, this law includes a comprehensive set of laws that are created by the organs of the State. These laws sometimes realize human rights, and in doing so they violate other rights. Sometimes they are intended to achieve the interests of society as a whole, and in doing so they violate the rights of the individual. The limitations clause is intended to give constitutional validity to violations caused by the ordinary law to constitutional human rights. Thus it also determines the extent of the realization of constitutional human rights. Indeed, the role of the limitations clause is to determine the validity of ordinary legislation that violates human rights. The sphere of activity of the limitations clause is the scope of the constitutional right and the limits of its application. The activity of the limitations clause is the realization of the constitutional right by means of the ordinary laws and the degree to which it is protected.

57. The limitations clause is an integral part of the Basic Law: Human Dignity and Liberty. The human right and the constitutionality of the violation of that right are derived from the Basic Law itself. Both the human rights and the limitations clause should be interpreted in accordance with the basic principles and basic purposes of the Basic Law (ss. 1 and 1A of the Basic Law). I discussed this in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], where I said:

> 'The constitutional right and its lawful violation derive from a common source… both the constitutional right and the limitation on it are subject to the basic principle on which the Basic Law: Human Dignity and Liberty (s. 1) and its purposes (ss. 1A and 2) are built' (*ibid*. [7], at p. 433).

Indeed, human rights and the possibility of violating them derive from the same source. They reflect the same values. Admittedly, human rights are not absolute. It is possible to restrict their realization. But there are limits to the restriction of the realization of human rights (see HCJ 164/97 *Conterm Ltd v. Minister of Finance* [85], at p. 347 {71}; *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [14], at para. 11; *Gaza Coast Local Council v. Knesset* [6], at p. 545). These limits are enshrined in the limitations clause.

58. The restrictions on the realization of constitutional human rights are of various kinds. One of the accepted and well-known kinds is national security and public safety. These are public interests that justify legislation that contains restrictions on human rights. 'Indeed, security is a fundamental value in our society. Without security, it is not possible to protect human rights…' (Justice D. Dorner in HCJ 5627/02 *Saif v. Government Press Office* [86], at p. 76 {197}). I discussed this in one case:

> 'A constitution is not a recipe for suicide, and civil rights are not a platform for national destruction… civil rights derive nourishment from the existence of the State, and they should not become a means of bringing about its destruction' (EA 2/84 *Neiman v. Chairman of Elections Committee for Eleventh Knesset* [87], at p. 310 {161}).

And in another case I said:

> 'There is no alternative — in a freedom and security seeking democracy — to balancing liberty and dignity against security. Human rights must not become a tool for denying public and national security. We require a balance — a delicate and difficult balance — between the liberty and dignity of the individual and national security and public security' (CrimFH 7048/97 *A v. Minister of*

Defence [88], at 724; see also *Ajuri v. IDF Commander in West Bank* [1], at p. 383 {120}).

Indeed, 'human rights are not a prescription for national destruction' (*Conterm Ltd v. Minister of Finance* [85], at p. 347 {71}). 'The needs of society and its national goals may allow a violation of human rights' (*Gaza Coast Local Council v. Knesset* [6], at para. 59). It is possible to violate the right of an Arab-Israeli spouse to realize his family life in Israel, and it is possible to discriminate against him if security needs justify this. For this purpose, the law containing the violation must satisfy the conditions of the limitations clause. Let us now turn to examine these conditions.

(d) *The conditions of the limitations clause*

59. The limitations clause provides four conditions which must all be satisfied in order to allow a constitutional violation of a human right provided in the Basic Law: Human Dignity and Liberty. The four conditions are: (a) the violation of human rights should be enshrined 'in a law… or in accordance with a law… by virtue of an express authorization therein;' (b) the violating law should be one that 'befits the values of the State of Israel;' (c) the violating law should be 'intended for a proper purpose;' (d) the law should violate the constitutional human right 'to an extent that is not excessive.' Everyone agrees that the first condition is satisfied in the petitions before us. We have not heard any argument with regard to the second condition, and I will leave it undecided. Aspects of it will be considered within the framework of the third ('proper purpose') and fourth ('to an extent that is not excessive') conditions. These two conditions are interrelated. One provides the proper purpose, The other provides the proper means of achieving it. As long as we do not know what the purpose is and as long as it has not been established that the purpose is a proper one, we cannot know what are the proper means of realizing it. Let us now turn to each of these two conditions, and let us begin with 'a proper purpose.'

(2) *'Proper purpose'*

(a) *Determining the 'purpose'*

60. This condition of the limitations clause focuses on the purpose whose realization justifies a violation of the constitutional right. Therefore it is necessary to identify the 'purpose' of the legislation. It is also necessary to determine whether this 'purpose' is a 'proper' one. These actions are governed by normative criteria. They sometimes raise significant difficulties. Thus, for example, sometimes the question arises as to how to examine the purpose of a law that has several purposes. In this regard, it has been held that one should focus on the dominant purpose (see *Menahem v. Minister of Transport* [11], at p. 264). Serious problems also arise with regard to determining the level of abstraction of the purpose, where the law has several purposes at different levels of abstraction. Questions also arise with regard to the criteria for determining the purpose. The question is whether the purpose of a piece of legislation is only its subjective purpose, which focuses on the motive that underlies the legislation; or perhaps the 'purpose' of the legislation is only the objective purpose, which focuses on the purpose at the time of deciding the question of constitutionality; or perhaps the 'purpose' is determined — as it is with regard to the interpretation of legislation – in accordance with both its objective and subjective purpose together (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 435). These questions become more intense when a significant period of time has passed between the date of the legislation and the date of determining the constitutionality. The petitions before us do not require us to provide an answer to these questions, if only because of the short time that has passed between the date of

enacting the Citizenship and Entry into Israel Law and the date of determining its constitutionality.

(b) *The 'proper' purpose*

61. A law that violates a constitutional human right must be enacted for a 'proper purpose.' A purpose may be proper in various contexts. With regard to the limitations clause, whether a purpose is proper is examined within the context of the violation of human rights. I discussed this in one case where I said:

> 'Examining the question whether the purpose is "proper" is done within the context of the violation of the human right that is protected in the Basic Law. The question that must be answered is whether it is possible to justify the violation of human rights with the proper purpose of the legislation… it follows that the legislation that violates human rights will satisfy the requirement concerning a "proper purpose" if the purpose of that legislation provides a sufficient justification for that violation of human rights' (*Gaza Coast Local Council v. Knesset* [6], at para. 63 of the majority opinion).

(c) *Characteristics of the proper purpose*

62. What are the characteristics of the proper purpose? It has been held that the purpose of a law that violates human dignity is proper if it is intended to realize social purposes that are consistent with the values of the state as a whole, and that display sensitivity to the place of human rights in the overall social system (see *Movement for Quality Government in Israel v. Knesset* [51], at paras. 51 and 52 of my opinion, and also *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 434; HCJ 5016/96 *Horev v. Minister of Transport* [89], at p. 42 {194}; *Oron v. Knesset Speaker* [10], at p. 662; HCJ 4140/95 *Superpharm (Israel) Ltd v. Director of Customs and VAT* [90], at p. 100; *Menahem v. Minister of Transport* [11], at p. 264; *Gaza Coast Local Council v. Knesset* [6], at p. 801 *per* Justice E. Levy).

(d) *The need for realizing the purpose*

63. To what degree must the purpose need to be realized for it to be 'proper'? The answer to this question varies in accordance with the nature of the right that is violated and the extent of the violation thereof. 'The more important the right that is violated, and the more serious the violation of the right, the stronger must be the public interest in order to justify the violation' (*per* Justice I. Zamir in *Tzemah v. Minister of Defence* [9], at p. 273 {672}; see also *Menahem v. Minister of Transport* [11], at p. 258; *Horev v. Minister of Transport* [89], at p. 52 {205}). When the violation is of a central right — such as a violation of human dignity — the purpose of the violating law will justify the violation if the purpose seeks to realize a major social goal, or an urgent social need. It is possible that violations of less central rights will justify a lower level of need.

(3) *'To an extent that is not excessive'*

(a) *Proportionality of the violation*

64. The requirement that the purpose of the violating law should be a 'proper' one focuses on the purpose of the legislation that violates the constitutional human rights. The requirement that the violation of the legislation shall be 'to an extent that is not excessive' focuses on the means that the legislator chose. A law that violates a constitutional human right is proportionate only if it maintains a proper relationship between the proper purpose that the law wishes to realize and the means that it adopts to realize that purpose. We are dealing with a 'dosage test' (*per* Justice E. Goldberg in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 574). The main principle that emerges from this condition of proportionality is that 'the end does not

justify the means' (*per* Justice T. Or in *Oron v. Knesset Speaker* [10], at p. 665). 'Proper purposes do not justify all means' (*Movement for Quality Government in Israel v. Knesset* [51], at para. 47 of my opinion). It is not sufficient that the purpose is a 'proper' one; the means must also be proper (*Movement for Quality Government in Israel v. Knesset* [51], at para. 57 of my opinion). A proper means is a proportionate means. A means is proportionate if the law's violation of the protected right is to an extent that is not excessive. Indeed, the principle of proportionality is 'intended to prevent an excessive violation of the liberty of the individual. It provides that the executive measure should be determined precisely in order to suit the realization of the purpose. This gives expression to the principle of the rule of law and lawful government' (HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [91], at p. 12).

(b) *Proportionality subtests*

65. In Israeli law — following comparative law — an attempt has been made to concretize the requirement of proportionality (for Israeli and comparative sources, see *Movement for Quality Government in Israel v. Knesset* [51], at para. 57 of my opinion). This concretization 'is intended to guide constitutional thinking, but not immobilize it' (*Israel Investment Managers Association v. Minister of Finance* [8], at p. 385; see also P. Craig, 'Unreasonableness and Proportionality in UK Law,' in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (1999) 85, at p. 99). It has been held that the existence of proportionality is conditional upon satisfying three subtests simultaneously. The borderline between the tests is not precise. Sometimes there is significant overlap between them. The application of the subtests themselves is influenced by the nature of the violated right. 'All three subtests should… be applied and implemented with a view to the nature of the right whose violation is being considered' (*per* Justice D. Dorner in *Israel Investment Managers Association v. Minister of Finance* [8], at p. 430). The application of the subtests is also affected by the degree of the violation, and the importance of the values and interests that the violating law is intended to realize (see *Menahem v. Minister of Transport* [11], at p. 280, and also D. Dorner, 'Proportionality,' *Berinson Book* (vol. 2, 2000) 281, at p. 288). 'In applying the test of proportionality, we should remember that the strength of our scrutiny of the authority on the grounds of proportionality will correspond with the strength of the violated right or the strength of the violation of the right' (*Stamka v. Minister of Interior* [24], at p. 777). The three subtests are: the rational connection test (or the appropriateness test); the least harmful measure test (or the necessity test); the proportionate measure test (or the test of proportionality in the narrow sense).

(4) *The first subtest: rational connection*

(a) *The nature of the rational connection*

66. The *first* test is the 'rational connection test' or the 'appropriateness test.' This requires a rational connection between the proper purpose and the measure chosen. Rationality is not technical. It sometimes requires the proof of causal relationships, which are the basis for the rational connection. With regard to these connections, *on the one hand* we do not need absolute certainty that the measure will achieve the purpose, but *on the other hand* we will not be satisfied with a 'slight and theoretical' possibility (*Saif v. Government Press Office* [86], at p. 78 {198}). We require the degree of likelihood that is appropriate, taking into account the nature of the right, the strength of the violation thereof and the public interest that the violation is intended to realize. 'We do not require absolute certainty that the measure will achieve its

purpose. It is sufficient that there is a serious likelihood of achieving the purpose by means of the measure that violates the right. The degree of likelihood required will be determined in accordance with the relative importance of the right that is violated and the purpose of the violation' (*per* Justice Dorner in *Israel Investment Managers Association v. Minister of Finance* [8], at p. 420): thus, for example, in *Stamka v. Minister of Interior* [24] we considered the policy of the Ministry of the Interior, according to which a foreign spouse was required to leave Israel until the application of the Israeli spouse to regulate the status of the foreign spouse was considered on its merits. The court held that this policy was disproportionate. With regard to the rational connection test, Justice M. Cheshin said:

> 'The Ministry of the Interior has not furnished us with any relevant statistics, either with regard to the number of fictitious marriages or with regard to the ratio between these and all the marriages between Israeli citizens and non-Jewish foreigners. Let us assume that we are speaking of a fictitious marriage in one out of every ten cases. Can we find a rational connection between the measure and the purpose? Is it a proper rational connection that nine persons should suffer because of one?' (*ibid*. [24], at p. 778).

(b) *Finding a basis for the rational connection*

67. Sometimes the court requests that the 'social facts' (or the 'constitutional facts') that indicate the rational connection should be presented to it (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 439, and also A. Lamer, 'Canada's Legal Revolution: Judging in the Age of the Charter of Rights,' 28 *Isr. L. Rev.* 579 (1994), at p. 581). Often —

> 'An examination is required of the social reality that the law is seeking to change. What characterizes these cases is that the assessment of the correspondence or the rational connection lies to a large extent in the realm of predicting the future. These are cases in which there are several variables that can affect the final correspondence between the measure and the purpose and the rational connection between them. The appropriateness or the rational connection are then examined in accordance with the "results test"' (*Movement for Quality Government in Israel v. Knesset* [51], at para. 58 of my opinion).

In many cases it is possible to base the rational connection on experience and common sense. On this basis, it is possible to show that the legislation is not arbitrary, but based on rational considerations. The mere fact that the factual assumptions and social assessments are not realized over the years does not necessarily lead to the conclusion that the measure chosen, when it was chosen, was irrational. Notwithstanding, a measure that was rational at the time of the legislation may become irrational in the course of time.

(5) *The second subtest: the least harmful measure*

(a) *The necessity test*

68. The *second* subtest of the proportionality of the violation is the 'least harmful measure test' or 'the necessity test.' The assumption is that the *first* subtest recognizes several measures that satisfy the rational connection between the proper purpose and the measure chosen. Of these measures, the measure that least violates the human right should be chosen. According to this test, it is required that the violating law does not violate the constitutional right more than is necessary in order to achieve the proper purpose (see *Menahem v. Minister of Transport* [11], at p. 279; HCJ 6226/01 *Indor v. Mayor of Jerusalem* [92], at p. 164). 'The legislative measure can be compared to a ladder, which the legislator climbs in order to achieve the legislative

purpose. The legislator must stop at the rung on which the legislative purpose is achieved and on which the violation of the human right is the least' (*Israel Investment Managers Association v. Minister of Finance* [8], at p. 385; see also *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 414). The obligation to choose the least harmful measure does not amount to the obligation to choose the measure that is absolutely the least harmful. The obligation is to choose, of the reasonable options that are available, the least harmful. One must therefore compare the rational possibilities, and choose the possibility that, in the concrete circumstances, is capable of achieving the proper purposes with a minimal violation of human rights. 'The Knesset is not required to choose, on any terms and at any price, the measure that allows the achievement of the purpose without violating the right at all or the measure that violates the right to the smallest degree' (*per* Justice Dorner in *Israel Investment Managers Association v. Minister of Finance* [8], at p. 420; *Menahem v. Minister of Transport* [11], at p. 280; see also *R. v. Sharpe* [215]). A balance must always be made between the purpose and the objective; the options available must always be considered (see *Israel Investment Managers Association v. Minister of Finance* [8], at p. 388); the nature of the right being violated must always be considered (see HCJ 490/97 *Tenufa Manpower Services and Holdings Ltd v. Minister of Labour and Social Affairs* [93], at p. 454; *Stamka v. Minister of Interior* [24], at p. 782). The degree of the violation must always be considered, as must the purpose that the chosen measure seeks to achieve.

(b) *Individual consideration*

69. The need to adopt the least harmful measure often prevents the use of a blanket prohibition. The reason for this is that in many cases the use of an individual examination achieves the proper purpose by employing a measure that violates the human right to a lesser degree. This principle is accepted in the case law of the Supreme Court (see *Ben-Atiya v. Minister of Education, Culture and Sport* [91], at p. 15; *Stamka v. Minister of Interior* [24], at p. 779). In one case we considered a blanket prohibition against candidates over the age of thirty-five joining the ranks of the police. It was held that this arrangement did not satisfy the requirement of adopting the least harmful measure in the proportionality test. In my opinion I said that:

> '…the employer will find it difficult to satisfy the "least possible harm test" if he does not have substantial reasons to show why an individual examination will prevent the attainment of the proper purpose that he wishes to achieve' (HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Public Security* [94], at p. 367 {11}).

In another case, a provision that press cards would not be given to Palestinian journalists was disqualified. In her opinion, Justice D. Dorner said:

> 'A refusal to give a press badge without any examination of the individual case, because of the danger inherent in all Palestinian journalists who are residents of Judaea and Samaria — including those entitled to enter and work in Israel — is the most prejudicial measure possible. This measure is strongly prejudicial to the interest of a free press, and could be prevented by individual security checks that are justified in order to mitigate the individual security risk presented by the residents of Judaea and Samaria, in so far as such a risk exists with regard to residents who have successfully undergone the checks required in order to receive permits to enter and work in Israel' (*Saif v. Government Press Office* [86], at p. 77 {198}).

Naturally, there may be cases in which the individual consideration will not realize the proper purpose of the law, and a blanket prohibition should be adopted. Notwithstanding, before reaching this conclusion, we must be persuaded, on the basis of proper figures, that there is no alternative to the blanket prohibition. Sometimes the choice of the blanket prohibition results from a failure to determine the form of the individual consideration and not because such a consideration is ineffective. In *Stamka v. Minister of Interior* [24], Justice M. Cheshin held — with regard to the policy of the Ministry of the Interior that required the foreign spouse who was staying in Israel to leave it for a period until his application for a status in Israel was examined — that:

> 'The clear impression is that the weakness in the supervision of the Ministry of the Interior was one of the main factors… for the creation of the new policy; and instead of strengthening the effectiveness of the supervision, the Ministry of the Interior took the easy path of demanding that the foreign spouse leave Israel' (*ibid*. [24], at p. 770).

70. A blanket prohibition of a right, which is not based on an individual check, is a measure that raises a suspicion of being disproportionate. This is the case in our law. It is also the case in comparative law (see N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, 1996, at pp. 30, 99). This is the accepted approach in the European Court of Human Rights. Thus, for example, in *Campbell v. United Kingdom* [234], it was held that a Scottish regulation that provided a sweeping authority to examine the mail received by prisoners from their lawyers violated the right to privacy set out in art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It was held that, for the purpose of realizing the security purpose underlying the regulation, it was sufficient to carry out inspections based on individual concerns. This is also the case in the law of the European Union. The European directive that enshrines the right of citizens of the member states to family reunification (Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) allows, in certain circumstances, a departure from its provisions, but this is only on the condition that the violation of the right is proportionate and is based on a real and tangible individual threat (art. 27(2)):

> 'Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned…
>
> The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.'

71. United States constitutional law recognizes the requirement of proportionality in the sense of the least harmful measure as a condition for the constitutionality of a violation of a human right. Violations of constitutional human rights (such as freedom of expression, freedom of religion, freedom of movement and the prohibition of discrimination) may be constitutional, provided that they satisfy the requirements of 'strict scrutiny.' One of the components of this scrutiny is the requirement that, of the possible ways of achieving the public purpose, the state should choose the measure that leads to the least restrictive violation of the right (see L. Tribe, *American Constitutional Law*, second edition, 1988, at pp. 1037-1038, 1451-1482; E. Chemerinsky, *Constitutional Law*, 1997, at p. 532). In interpreting this requirement, the Supreme Court of the United States has held that a condition for satisfying the requirement of the least restrictive measure is that the violation of the human right is based on individualized considerations, and is not based on a blanket prohibition. In the words of Justice O'Connor, strict scrutiny —

'… at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim' (*Employment Div., Ore. Dept. of Human Res. v. Smith* [191], at p. 899; see also *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* [192].

Thus, for example, *Aptheker v. Secretary of State* [193] considered a law that was enacted in the United States at the time of the Cuban Missile Crisis and that prohibited members of the Communist Party from holding a passport. This law was explained by the security risk presented by the members of the party. The Supreme Court held that the law was unconstitutional. The court recognized the fact that the purpose for which the law was enacted was a proper one, but it held that the blanket prohibition was unconstitutional. After citing the remarks of Justice Black in *Schware v. Board of Bar Examiners* [194], at p. 246:

'Assuming that some members of the Communist Party… had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct.'

Justice Goldberg later went on to say:

'The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel. The section therefore is patently not a regulation "narrowly drawn to prevent the supposed evil"… yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms' (*Aptheker v. Secretary of State* [193], at p. 514; see also *Sugarman v. Dougall* [195] at p. 647; *Regents of Univ. of Cal. v. Bakke* [196]; *City of Richmond v. Carson* [197]; *Johnson v. City of Cincinnati* [198]; *Gratz v. Bollinger* [199]; *Grutter v. Bollinger* [200]).

(c) *Exceptions to the blanket prohibition*

72. Even in cases where there is no alternative measure to a blanket prohibition of rights, the need to choose the least harmful measure may make it necessary to provide a mechanism that will allow exceptions to the blanket prohibition, such as humanitarian exceptions. The reason for this is that even if there is no alternative, for the purpose of achieving the proper purpose, to a blanket restriction of rights, there may be circumstances where, *on the one hand*, the violation of the right is very severe, and *on the other hand*, an exceptional protection of the right will not impair the realization of the proper purpose. The creation of a mechanism for exceptions is intended to provide an answer to such circumstances. The exceptions mechanism may reduce the law's violation of the rights, without impairing the realization of the proper purpose. Therefore, the creation of such a mechanism is required by the second subtest concerning the choice of the least harmful measure. Indeed, just as every person with administrative authority is liable to exercise discretion on a case-by-case basis and to recognize exceptions to rules and fixed guidelines when the circumstances justify this (see Y. Dotan, *Administrative Guidelines*, 1996, at pp. 157-158; HCJ 278/73 *Horeh v. Mayor of Tel-Aviv-Jaffa* [95], at pp. 275-276; HCJ 6249/96 *Israel Contractors and Builders Federation v. Sasson* [96], at pp. 47-48; HCJ 552/04 *Guzman v. State of Israel* [97], at para. 7 of my opinion), so too is it the duty of the legislature, when it makes an arrangement that results in a sweeping violation of rights, to consider providing an arrangement for exceptional cases that will allow a solution to be found in special cases that justify one.

73. The need to determine exceptions to blanket prohibitions that restrict human rights is also recognized in comparative law. This is the law in Germany. In a case that dealt with the sentence imposed on a woman who had murdered her husband after being abused by him over a long period, it was held that a section in the criminal code that provided a mandatory life sentence for the offence of murder was disproportionate, since it did not leave any room for discretion in the individual case, and it did not permit a lighter sentence in circumstances where justices so required (BVerfGE 6, 389 [239]). Another case considered a law that provided that persons who had been indicted and might escape or pervert the course of

justice, and also persons indicted on an offence of murder, would be held under arrest for the duration of their trial. In view of the provisions of this law, a man aged 76, who was suspected of an offence of murder during the Second World War, was arrested even though the suspect presented himself for interrogation on every occasion when he was asked to do so throughout the five years of the police investigation, and there was no real concern that he would escape justice. The court ordered his release. It was held that an exception should be recognized to the law in circumstances where the liberty of the accused was violated without this violation serving any proper purpose (BVerfGE 19, 342 [240]; and see Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, *supra*, at p. 546). The need to recognize exceptions is also recognized in United States constitutional law. It has been held that general laws that restrict a constitutional right are unconstitutional, even if they are intended to realize a proper purpose, if the State does not show why it is not possible to recognize exceptions to the general prohibition in special circumstances. As Chief Justice Roberts said in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* [192]:

> 'RFRA [the Religious Freedom Restoration Act], and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" — the particular claimant whose sincere exercise of religion is being substantially burdened… this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants… The Court explained that the State needed "to show with more particularity how its admittedly strong interest… would be adversely affected by granting an exemption…" (*Wisconsin* v. *Yoder* [201], at p. 236)' (*Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* [192], at para. IIIA).

Thus, in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* [192], it was held that a law that absolutely prohibits the use of drugs is unconstitutional, since it does not include an exemption that allows the use of a particular drug by the members of a religious group who use that drug for the purposes of religious worship. In another case, the United States Supreme Court held that Wisconsin's compulsory school-attendance law, which did not allow an exemption for a recognized religious sect (the Amish) that wanted to educate its children privately, was unconstitutional (*Wisconsin* v. *Yoder* [201]).

(6) *The third subtest: proportionality in the narrow sense*

(a) *The proportionate measure test*

74. The *third* subtest of the proportionality of the violation is the 'proportionate measure test' or the 'proportionality test in the narrow sense.' This test examines the proper relationship between the benefit arising from achieving the proper purpose and the violation of the constitutional right. It concerns 'the benefit arising from the policy as compared with the damage that it brings in its wake' (*per* Justice M. Cheshin in *Stamka v. Minister of Interior* [24], at p. 782). It examines whether there is a 'proper correspondence between the benefit that the policy creates and the damage that it causes' (*ibid.* [24]). This is a balancing test. It gives expression to the concept of reasonableness (see HCJ 6268/00 *Kibbutz HaHoterim Agricultural Cooperative Society v. Israel Land Administration* [98], at p. 668; *Indor v. Mayor of Jerusalem* [92], at p. 164; HCJ 6893/05 *Levy v. Government of Israel* [99], at p. 890). It requires a contrast between conflicting values and interests and a balance between them according to their weight. I discussed this in *Beit Sourik Village Council v. Government of Israel* [2]:

> 'This subtest examines the benefit as compared with the damage… According to it, a decision by an administrative authority must strike a reasonable balance between the needs of the public and the damage to the individual. The purpose of the examination is to consider whether the seriousness of the harm to the

> individual and the reasons that justify it stand in due proportion to one another. This assessment is made against the background of the general normative structure of the legal system…' (*ibid.*, at p. 850 {309-310}; see also *Marabeh v. Prime Minister of Israel* [5], at para. 110 of my opinion).

This principled balancing between the benefit arising from realizing the proper purpose and the degree of the violation of the right of the individual is not new in Israel. It has been accepted in the case law of the Supreme Court since the founding of the state (see A. Barak, *The Judge in a Democracy*, 2000, at p. 262). By means of this, a balance should be struck between the extent of the violation of the right and the extent to which the public interest is advanced. With regard to the right, we must take into account the nature of that right, and the scope of the violation thereof. The more basic the right that is being violated, and the more severe the violation thereof, the greater the weight that will be required of the considerations that justify that violation. With regard to the public interest, we must take into account the importance of the interest, and the degree of benefit arising from it by means of the violation of human rights. The more important the public interest, the greater the justification of a more serious violation of human rights (see J. Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality,' 21 *MULR 8* (1997)).

(b) *The nature of the test*

75. When operating the *third* subtest, we assume that the purpose which the law that violates the constitutional human right wishes to achieve is a 'proper' one. We also assume that the means chosen by the law are suitable (according to the rationality test) for achieving the proper purpose. We further assume that it has not been proved that there are measures that are capable of realizing the proper purpose while violating human rights to a smaller degree. In this normative situation, the limitations clause demands that the violation caused to the human right by the arrangements in the law will be proportionate to the benefit achieved by the realization of the proper purpose. Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper purpose, and are derived from the need to realize it, the test of proportionality (in the narrow sense) examines whether the realization of this proper purpose is commensurate with the violation of the human right. 'The relationship between the measure and the purpose must be proportionate, i.e., it must not be out of due proportion' (I. Zamir, 'Israeli Administrative Law as Compared with German Administrative Law,' 2 *Mishpat uMimshal* 109 (1994), at p. 131). A proper purpose, a rational connection between it and the provisions of the law and the minimization of the violation of human rights that is capable of realizing the proper purposes are essential conditions for the constitutionality of the violation of human rights. But they are not sufficient in themselves. A constitutional regime that wishes to maintain a system of human rights cannot be satisfied only with these. It determines a threshold of protection for human rights that the legislature may not cross. It demands that the realization of the proper purpose, through rational measures that make use of the lowest level for realizing the purpose, will not lead to a disproportionate violation of human rights. In the words of Chief Justice McLachlin in *R. v. Sharpe* [215]:

> 'The final proportionality assessment takes all the elements identified and measured under the heads of Parliament's objective, rational connection and minimal impairment, and balances them to determine whether the state has proven on a balance of probabilities that its restriction on a fundamental *Charter* right is demonstrably justifiable in a free and democratic society' (*R. v. Sharpe* [215], at p. 99).

This subtest therefore provides a value test that is based on a balance between conflicting values and interests (see Alexy, *A Theory of Constitutional Law*, at p. 66). It reflects the approach that there are violations of human rights that are so serious that a law cannot be allowed to commit them, even if the purpose of the law is a proper one, its provisions are rational and there is no reasonable alternative that violates them to a lesser degree. The

assessment of the balance between the extent of the violation of the human right and the strength of the public interest that violates the right is made against a background of all the values of the legal system.

(c) *Beit Sourik Village Council v. Government of Israel*

76. The case of *Beit Sourik Village Council v. Government of Israel* [2] demonstrates the nature of the test of proportionality (in the narrow sense). The construction of the separation fence in the area of the village of Beit Sourik was determined to be a proper security purpose. A rational connection was proved between the construction of the fence in that place and the achievement of the security purpose. It was held that there was no other route that would harm human rights less but would still achieve the proper purpose in full. Notwithstanding this, it was decided that the route of the fence was unlawful. This was because the security purpose achieved by the route of the fence that was determined was not commensurate with the serious violation of the human rights of the residents of Beit Sourik. We held in that case that 'a proportionate correlation between the degree of harm to the local inhabitants and the security benefit arising from the construction of the separation fence with the route determined by the military commander does not exist' (*ibid.* [2], at p. 850 {310}). We pointed out that we had been shown alternative routes that would provide security for Israel, albeit to a lesser degree than the route that the military commander chose. These alternative routes would violate the human rights of the local inhabitants to a far smaller degree. Against this background we held:

> 'The real question before us is whether the security benefit obtained by accepting the position of the military commander… is proportionate to the additional injury resulting from his position… Our answer to this question is that the military commander's choice of the route for the separation fence is disproportionate. The difference between the security benefits required by the military commander's approach and the security benefits of the alternate route is very small in comparison to the large difference between a fence that separates the local inhabitants from their lands and a fence that does not create such a separation or that creates a separation which is small and can be tolerated' (*ibid*. [2], at pp. 851-852 {311}).

Indeed, in *Beit Sourik Village Council v. Government of Israel* [2] a proper (security) purpose was the basis for the separation fence; there was a rational connection between it and the achievement of the security purpose; no alternative route was found that realized the security purpose in full. Notwithstanding, the route was disqualified because its violation of the rights of the local inhabitants was disproportionate. We pointed to an alternative route, which allowed security to be achieved to a lesser degree than the proper purpose required to be achieved in full, but which harmed the local inhabitants far less. We said that this correlation — which provided slightly less security and much more protection of rights — was proportionate.

(7) *The margin of proportionality and judicial review*

(a) *The margin of proportionality*

77. The proportionality test, with its three subtests, is not a precise test. There is sometimes a significant overlap between the subtests. Within each of these, there is room for discretion. The subtests do not always lead to one and the same conclusion (see *Menahem v. Minister of Transport* [11], at p. 280). They are not sufficiently precise as to allow such unambiguity. Several solutions may sometimes be adopted in order to satisfy proportionality. Sometimes the case is a borderline one (see *Ben-Atiya v. Minister of Education, Culture and Sport* [91], at p. 13). A margin of proportionality is created (similar to the margin of reasonableness). Any choice of a measure or a combination of measures within the margin satisfies the requirements of the limitations clause. The legislature has room to manoeuvre within the margin. The choice is subject to its discretion (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 438; *Local Government Centre v. Knesset* [31], at p. 496;

Tenufa Manpower Services and Holdings Ltd v. Minister of Labour and Social Affairs [93]; AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [100], at p. 815; *Gaza Coast Local Council v. Knesset* [6], at pp. 550, 812; *Movement for Quality Government in Israel v. Knesset* [51], at para. 61 of my opinion).

(b) *Judicial review*

78. What is the place and role of judicial review? It protects the limits of the margin of proportionality. It has the role of protecting the constitutional human right so that it is not violated by measures that depart from the margin of proportionality. This gives expression to the principle of the separation of powers. The legislature determines the measures that are to be taken in order to realize social objectives. That is its role. The judiciary examines whether these measures violate the human right excessively. That is its role. One power does not enter the sphere of the other power. The court does not decide for the legislature the purposes that it should realize and the measures that it should choose. These are questions of national policy within the province of the legislature. The court examines whether the purposes and the measures that were chosen by the legislature and that violate a constitutional human right satisfy the limitations that the Basic Law placed on the legislative power of the legislature. I discussed this in one case, where I said:

> 'The requirement of proportionality establishes a flexible test. Sometimes it is possible to point to several solutions that satisfy its requirements. In these circumstances, the judge should recognize the constitutionality of the law. Indeed, the basic premise is that the role of legislation was entrusted to the legislature. It is the faithful representative of the people who are sovereign. The national responsibility for enacting laws that will realize a proper purpose through proportionate measures rests, according to the principle of the separation of powers, with the legislature. It has the tools to identify the proper purpose and to choose the proportionate measure. The court does not aim to replace the discretion of the legislature with its own discretion. The court does not put itself in the shoes of the legislature. It does not ask itself what are the measures that it would have chosen had it been a member of the legislature. The court exercises judicial review. It examines the constitutionality of the law, not its wisdom. The question is not whether the law is good, effective, justified. The question is whether it is constitutional… What is therefore required is an act of comparing the ends with the means. In this comparison, we must recognize the legislature's room to manoeuvre or the "margin of appreciation" given to it, which allows it to exercise its discretion in choosing the (proper) purpose and the means (whose violation of human rights is not excessive) that lie on the edge of the margin of appreciation. Indeed, we must adopt a flexible approach that recognizes the difficulties inherent in the legislature's choice, the influence of this choice on the public and the legislature's institutional advantage' (*Israel Investment Managers Association v. Minister of Finance* [8], at pp. 386-387).

Thus we see that determining the national policy and formulating it into legislation is the role of the legislature. The scrutiny of the constitutionality of the legislation, in so far as it violates the human rights in the Basic Law is the role of the court. It realizes this role with great caution. It will act 'with judicial discipline, caution and restraint' (*per* Justice D. Beinisch in *Menahem v. Minister of Transport* [11], at p. 263). The judge should treat the law with respect (see *Local Government Centre v. Knesset* [31], at p. 496). He must ensure respect for the Basic Laws, by virtue of which the law was enacted, and the human dignity which is protected by them. Indeed, the tension is not between respect for the law and human dignity. Respect for the law means that the provisions of the Basic Law concerning human dignity and the possibilities of violating them are equally respected.

G. *Does the Citizenship and Entry into Israel Law satisfy the conditions of the limitations clause?*

(1) *Is the purpose of the law a proper one?*

(a) *The purpose of the Citizenship and Entry into Israel Law*

79. What is the purpose of the Citizenship and Entry into Israel Law? Opinions are divided on this question in the petition before us. Some of the petitioners and the fourth respondent (the 'Jewish Majority in Israel' Society) think that the purpose of the law is not merely a security purpose but also a 'demographic' one. According to them, the law is intended to restrict the increase of the Arab population in Israel by means of marriage to residents of the territories. The respondents, however, argued before us that the purpose of the law is merely a security one. I am of the opinion that the respondents are correct. In my opinion, the purpose of the Citizenship and Entry into Israel Law is a security one and its purpose is to reduce, in so far as possible, the security risk from the foreign spouses in Israel. The purpose of the law is not based on demographic considerations. This conclusion is based on the legislative history and the content of the provisions of the law. Indeed, the legislation was based on the security concern with regard to the involvement in terror activity of Palestinian spouses, who hold an Israeli identity card as a result of 'family reunifications' with Israeli spouses. The purpose of the law is to reduce this risk in so far as possible. This purpose arises from the explanatory notes to the draft law:

> 'Since the armed conflict broke out between Israel and the Palestinians, which led *inter alia* to dozens of suicide attacks being carried out in Israel, a trend can be seen of a growing involvement of Palestinians who were originally residents of the territories and who have an Israeli identity card as a result of family reunifications with persons with Israeli citizenship or residency, by means of an abuse of their status in Israel that allows them free movement between the areas of the Palestinian Authority and Israel. Therefore, and in accordance with a decision of the government… it is proposed to restrict the possibility of giving residents of the territories citizenship under the Citizenship Law, including by way of family reunification, and the possibility of giving the aforesaid residents licences to live in Israel under the Entry into Israel Law or permits to stay in Israel under the security legislation in the territories' (draft Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003 (Draft Laws 31, 2003, at p. 482).

This purpose also arises from the remarks of the Minister of the Interior, who presented the draft law at the first reading (see the minutes of the Knesset session on 17 June 2003). This was repeated by the Chairman of the Knesset Interior and Environmental Affairs Committee, who presented the draft law at the second and third readings (see the minutes of the Knesset session on 31 July 2003). A similar conclusion emerges from a study of the remarks made by Knesset members during the debate on the draft law. Admittedly, from time to time during the legislative process a claim was made that the law was being used by the state as a cover for advancing a 'demographic purpose' of restricting the increase of the Arab population in Israel. Government representatives denied this claim. In the arguments before us, the state repeatedly denied, most emphatically, that there was any 'demographic purpose' underlying the law. We were presented with details of 26 Palestinian spouses, who benefited from family reunifications and were involved in terror attacks. It was made clear to us that the information that was placed before the government and the Knesset was entirely of a security nature.

80. We can also see the security purpose of the Citizenship and Entry into Israel Law from its provisions. Thus, for example, the law is temporary (a 'temporary provision'). It does not purport to formulate a new long-term demographic policy. It was designed for the needs of the present. It can be seen from the language of the law and the nature of its provisions that it is based on a security necessity and not on a clear socio-political outlook. The amendments made to the law when its validity was extended in 2005 also indicate the security purpose of the law. Thus, for example, power was given to the Minister of the Interior to approve an

application of a spouse from the territories to receive a permit to stay in Israel, and thereby to avoid a separation from the Israeli spouse, if the foreign spouse is a male resident of the territories above the age of 35 or the foreign spouse is a female resident of the territories above the age of 25. This arrangement derives in its entirety from security considerations. It is based on a security assessment that the security risk presented by men over 35 and women over 25 is significantly lower than the risk presented by residents of the territories who do not meet the age criterion.

81. A doubt did arise in our minds with regard to the security purpose of the Citizenship and Entry into Israel Law in view of section 3B(2) of the law, which allows the entry of residents of the territories into Israel for work purposes. The petitioners argue that this section shows that the purpose of the law is not a security one at all, since there is also a security risk from the entry of workers into Israel. The petitioners' conclusion is that this section indicates the demographic purpose of the law. According to them, the purpose of the law is to prevent the immigration of residents of the territories into Israel for the purpose of family reunifications. The state's response is that giving citizenship or residency rights to Palestinians, who have an Israeli identity card, constitutes a security threat of a special and distinct kind, which does not merely involve coming into Israel. In view of the fact that the length of the period during which they can stay in Israel is unlimited, and that they have full freedom of movement both in Israel and between Israel and the territories (and this freedom of movement is not given to people holding temporary permits), there is a greater concern that they will take part in terror activity (see para. 180 of the respondents' closing arguments of December 2003). This response allayed our concerns. We have been persuaded that the distinction between the entry of workers by virtue of temporary permits and the entry of residents of the territories for the purpose of family reunifications is based on security concerns, and therefore it does not imply another purpose.

(b) *Are the characteristics of the purpose proper ones?*

82. Do the characteristics of the security purpose that underlies the Citizenship and Entry into Israel Law justify a violation of the right of the Israeli-Arab spouse to realize family life in Israel and equality? My answer is yes. The Citizenship and Entry into Israel Law is intended to guarantee security for Israel by reducing, in so far as possible, the security risk presented by Palestinian spouses who live together with their Israeli spouses. It is intended to protect the lives of everyone present in Israel. It is intended to prevent attacks on human life. These are proper purposes. They are intended to protect national security and thereby they protect human life, dignity and liberty. Indeed, just as without rights there is no security, so too without security there are no rights. We are dealing with a delicate balance between security and human rights. As we have seen, 'there is no alternative — in a freedom and security seeking democracy — to balancing liberty and dignity against security' (CrimFH 7048/97 *A v. Minister of Defence* [88], at 741). In order that this balance of 'liberty and dignity against security' will take place, we must recognize the legitimacy of liberty and dignity on the one hand, and security on the other. This legitimacy of both sides of the balance is what lies at the heart of the outlook of defensive democracy (see EA 1/65 *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [101], at p. 399; *Malka v. State of Israel* [15], at para. 16, and also A. Sajo (ed.) *Militant Democracy*, 2004). Democracy's defensiveness does not deprive it of its democratic nature. Its defensiveness is what protects its democratic nature. This is because of the proper balance that is found between security and human dignity and liberty. Indeed, the purpose of the Citizenship and Entry into Israel Law is a proper one, since it is intended to guarantee security that is intended to preserve human life and security.

(c) *Is the extent of the need for realizing the purpose a proper one?*

83. Does the violation of the right to realize family life in Israel of the Arab-Israeli spouse, and the resultant violation of his right to equality, constitute a major social objective? Is this an urgent social necessity? My answer to these questions is yes. Terror afflicts the inhabitants

of Israel. The murder of innocents and the wounding of many others characterize these acts of terror. Taking steps that reduce the risk of this terror in so far as possible is a major social objective. It is an urgent social need. So it follows that the requirement of the limitations clause that the purpose of the law should be a 'proper' one is satisfied. Is this proper purpose achieved proportionately? This is the main question presented by the petitions before us.

(2) *Proportionality: is there a rational connection between the purpose of the law and the measures chosen by it?*

(a) *The blanket prohibition satisfies the required rational connection*

84. The purpose of the Citizenship and Entry into Israel Law is a security one. The aim is to reduce the security risk presented by a spouse from the territories who lives permanently in Israel within the framework of family reunification. In the past, several cases (26 in number) have been revealed in which terror organizations abused the status of spouses who were originally residents of the territories and who, when they became Israeli residents or citizens, were entitled to move freely in Israel. In order to prevent this risk, a prohibition was imposed against the entry of foreign spouses into Israel. Does there exist a rational connection between the purpose of the law (reducing the risk presented by the foreign spouse who comes to live in Israel) and the purpose of the law (reducing the risk presented by the foreign spouse who comes to live in Israel) and the measures that were determined (preventing their entry into Israel)? In my opinion, the answer is yes. The prohibition against the entry of the foreign spouses into Israel eliminates the risk that they present. Someone who is not in Israel cannot bring a terrorist into Israel to carry out his 'designs.' The blanket prohibition satisfies, in the petitions before us, the existence of the rational connection required under the limitations clause.

(b) *The rational connection and temporary stays in Israel*

85. The petitioners concentrated their main arguments concerning the question of the rational connection on the provisions of the law that authorizes the commander in the territories to give a permit to stay temporarily in Israel. Section 3B of the law provides:

'Additional permits

3B. Notwithstanding the provisions of section 2, the area commander may give a permit to stay in Israel for the following purposes:

(1) medical treatment;

(2) work in Israel;

(3) a temporary purpose, provided that the permit to stay for the aforesaid purpose shall be given for a cumulative period that does not exceed six months.'

According to the petitioners, many thousands of residents in the territories receive work permits in Israel. If these are allowed to enter — so the petitioners claim — why is the entry of spouses from the territories prohibited? If the workers from the area do not constitute a security risk, why do the spouses from the territories constitute a security risk? If it is possible to overcome the risk presented by the workers coming from the territories by a security check of the individual (see s. 3D), why is it not possible to overcome the risk presented by the foreign spouse by such a security check?

86. These arguments do not raise any real question with regard to the rational connection between the prohibition that the law imposes on the entry of spouses from the territories and the purpose of the law. The fact that it possible to realize the purpose of the law by adopting additional measures that are not adopted does not necessarily indicate that the measure that was adopted is not rational. The condition of rationality does not demand that all the possible measures for achieving the purpose are exhausted. Refraining from adopting certain measures — where failing to adopt them does not affect the effectiveness of the measures that were adopted — does not make the measures that were adopted irrational. The requirement of

rationality does not offer a choice merely between exhausting all the possible measures or refraining from adopting any measures. A rational choice can satisfy itself with adopting several measures, and not adopting other measures. The Supreme Court of the United States rightly said — with regard to the rational connection test — that:

> 'It is no requirement… that all evils of the same genus be eradicated or none at all' (*Railway Express Agency v. New York* [202], at p. 110).

The margin of appreciation gives the legislature the possibility of choosing from among various different measures, and the fact that it departs from one of them does not always oblige it, from a rational viewpoint, to choose another. The legislature may, therefore, determine that in order to achieve the security purpose it will adopt the measure of a prohibition of family reunification, and at the same time determine that in order to achieve other purposes, such as those connected with the Israeli national economy or the conditions of life in the territories, it will not prohibit the entry of workers from the territories. As long as realization of the one purpose does not affect the realization of another purpose, we see no problem, from the viewpoint of the requirement of rationality, in adopting this policy.

(3) *Proportionality: was the least harmful measure adopted?*

(a) *The conflicting arguments*

87. The proper purpose of the Citizenship and Entry into Israel Law is to reduce the security risk presented by the spouse from the territories who has received a permit to live in Israel or Israeli citizenship. The measure adopted by the law is the prohibition of the entry into Israel of the foreign spouses. The petitioners claim that there is another measure, which realizes the security purpose and violates the human dignity of the Israeli spouse less. This is the measure of individual security checks. If such a check is sufficient for a wife aged 25, it should be sufficient also for a wife aged 24; if it is sufficient for workers from the territories who come into Israel each year in their tens of thousands, it should be sufficient also for those several thousand foreign spouses who wish to enter Israel every year, and if it is necessary to make these individual checks more stringent, that may be done, provided that the blanket prohibition is stopped. Administrative measures may also be adopted, such as methods of identifying the foreign spouses in Israel. In any case, there is no arrangement that guarantees consideration for special cases on a humanitarian basis. To this the State responds that the individual check does not reduce the security risk to the required degree, since sometimes the risk is created years after the spouse enters Israel. The various means of identification suggested are insufficient. Moreover, an individual check is impractical in a time of war, since significant difficulties prevent the investigators from entering the areas of the war in order to make the security check. The respondents say that even a wife aged 25 presents a security risk, but research show that the older the spouse, the smaller the security risk. The State is prepared to take upon itself this reduced risk, but nothing more.

(b) *The individual check in the scrutiny of the Citizenship and Entry into Israel Law*

88. Is the individual check, as the petitioners claim, the least harmful measure to the right of the Israeli spouse? Naturally, if the sole comparison that us taken into account is between the blanket prohibition and the individual check, it is clear that the harm caused by the blanket prohibition to the Israeli spouse is more severe than the harm caused by the individual check. On the scale of violations of the rights of the Israeli spouse, the individual check is located on a lower level than the blanket prohibition. But this comparison between the two levels is not the examination that is required at this stage of the constitutional scrutiny. The question is not whether the individual check violates the rights of the Israeli spouse less than the blanket prohibition. The question is whether it is possible to achieve the purpose of the law by use of a less harmful measure. If the less harmful measure achieves the proper purpose to a lesser degree, it is not the measure that the legislature is obliged to adopt. The requirement of choosing the least harmful measure applies to the measures that achieve the purpose of the law. So it follows that at this stage of constitutional scrutiny, the question is not whether the individual check violates the right of the Israeli spouse less than the blanket prohibition. The

question is whether the individual check achieves the purpose of the Citizenship and Entry into Israel Law to the same degree as the blanket prohibition. If the answer is yes — it does achieve the purpose to the same degree — then the legislature should choose this measure. But if the individual check does not achieve the purpose of the law, the legislature is not obliged to choose this measure. It must choose the measure that realizes this purpose and that violates the right of the Israeli spouse to a lesser degree.

89. We must return, therefore, to the proper purpose of the Citizenship and Entry into Israel Law. We have seen that the purpose of the law is a security one and not a demographic one. What is its security purpose? In this respect, we have seen that the purpose is to reduce, in so far as possible, the security risk presented by the foreign spouses coming to live in Israel. Against the background of this conception of the purpose, do the blanket prohibition and the individual check achieve the purpose to an equal degree? In this regard, we should compare the blanket prohibition, as it exists today, and the most comprehensive individual checks that can be made. But no matter how effective these can be, they cannot equal the additional security that the blanket prohibition provides. It follows that in view of the central value of human life that the law wishes to protect, it is clear that the blanket prohibition will always be more effective — from the viewpoint of achieving the goal of reducing the security risk as much as possible — than the individual check. Our conclusion is, therefore, that in the circumstances of the case before us, the individual check does not realize the legislative purpose to the same degree as the blanket prohibition. There is no obligation, therefore, within the framework of the least harmful measure, to stop at this level, and the legislature was entitled to choose the blanket prohibition that it chose.

90. It is of course possible to argue that the goal that we discussed — to reduce as much as possible the security risk presented by the spouse — is not the objective of the law, and that this objective is to reduce the security risk to some extent, and not as much as possible. According to this line of argument, the permit to stay in Israel given to the resident of the territories whose age is over 35 (for a man) or over 25 (for a woman) (s. 3 of the law) indicates that the purpose of the law was not to reduce the security risk as much as possible, and that the law was satisfied with a lesser reduction than that. It is also possible to point to the permit that is given to stay in Israel for work purposes. To this and similar arguments the state, in our opinion, provided a satisfactory answer. It pointed to the reduced security risk presented when the spouses are older, and also the reduced risk from the residents of the territories who work in Israel. We accept this reasoning. In the opinion of the state, the main risk is presented by young spouses staying in Israel on a permanent basis. This is a security assessment which we must assume as a basis for our decision (see *Beit Sourik Village Council v. Government of Israel* [2], at p. 842 {300-301}, and the references cited there). It may be argued that reducing the security risk as much as possible is not a ‘proper’ purpose; it is not sufficiently sensitive to human rights. The answer to this argument is that a desire to achieve security as much as possible — security that is intended to protect human life — cannot be regarded as an improper purpose. Notwithstanding, there is still a basis to examine whether this proper purpose is proportionate, since it does not take into account, to a proportionate extent, the violation of human rights. ‘The geometric place’ for examining this argument is not within the framework of the question whether the purpose is a ‘proper’ one, but within the framework of the question whether the means chosen is proportionate (in the narrow sense). Let us turn now to this question.

(4) *Proportionality: was the chosen measure proportionate (in the narrow sense)?*

(a) *Is the move from an individual check to a blanket prohibition proportionate?*

91. We have reached the decisive stage in the constitutional scrutiny of the petitions before us. The question is whether the blanket prohibition is proportionate (in the narrow sense)? Is the correlation between the benefit derived from achieving the proper purpose of the law (to reduce as much as possible the risk from the foreign spouses in Israel) and the damage to the human rights caused by it (a violation of the human dignity of the Israeli spouse) a

proportionate one? The criterion we must adopt is a value one. We must balance between conflicting values and interests, against a background of the values of the Israeli legal system. We should note that the question before us is not the security of Israeli residents or protecting the dignity of the Israeli spouses. The question is not life or quality of life. The question before us is much more limited. It is this: is the additional security obtained by the policy change from the most stringent individual check of the foreign spouse that is possible under the law to a blanket prohibition of the spouse's entry into Israel proportionate to the additional violation of the human dignity of the Israeli spouses caused as a result of this policy change?

92. My answer is that the additional security that the blanket prohibition achieves is not proportionate to the additional damage caused to the family life and equality of the Israeli spouses. Admittedly, the blanket prohibition does provide additional security; but it is achieved at too great a price. Admittedly, the chance of increasing security by means of a blanket prohibition is not 'slight and theoretical.' Notwithstanding, in comparison to the severe violation of human dignity, it is disproportionate. This was well expressed by Rubinstein and Medina when they said that 'the measure adopted is clearly not "proportionate," mainly because of its blanket nature' (Rubinstein and Medina, *The Constitutional Law of the State of Israel*, *supra*, at p. 1100). In the same vein, Davidov, Yovel, Saban and Reichman said:

> 'The violations and strictures that are compounded in the new law result in a severe violation, and maybe even a mortal violation, of rights that are close to the "nucleus" of human dignity, without a proper justification based on the conduct and concrete danger presented by the persons injured by the law. In such circumstances, it is difficult to see how any proportionate relationship exists between the serious violation inherent in the law and the hypothetical purpose that the law is intended to achieve. In these circumstances, when the ability of the law to achieve its purpose is uncertain, whereas the violation is certain and serious, the gap between the benefit and the violation in the new law is disproportionate. If there is one exceptional case in which the test of proportionality in the narrow sense is clearly required — this would appear to be that case' (G. Davidov, Y. Yovel, I. Saban, A. Reichman, 'State or Family? The Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003,' 8 *Mishpat uMimshal*, vol. 2, 643 (2005), at p. 679).

Admittedly, the amendments made to the Citizenship and Entry into Israel Law prior to the renewal of its validity somewhat reduced the scope of the disproportionality. Nonetheless, these amendments — as well as the temporary nature of the law — do not change the lack of proportionality to a significant degree. Thus, for example, we were told that s. 3 of the law, with regard to permits for a resident of the territories older than 35 (for a man) or 25 (for a woman) in order to prevent their separation from the Israeli spouses, reduces the number of injured spouses by approximately 20%. The significance of this is that the vast majority of the Israeli spouses who married spouses from the territories continue to be injured even after the amendments that were recently made.

(b) *Return to first principles*

93. Examination of the test of proportionality (in the narrow sense) returns us to first principles that are the foundation of our constitutional democracy and the human rights that are enjoyed by Israelis. These principles are that the end does not justify the means; that security is not above all else; that the proper purpose of increasing security does not justify serious harm to the lives of many thousands of Israeli citizens. Our democracy is characterized by the fact that it imposes limits on the ability to violate human rights; that it is based on the recognition that surrounding the individual there is a wall protecting his rights, which cannot be breached even by the majority. This is how the court has acted in many different cases. Thus, for example, adopting physical measures ('torture') would without doubt increase security. But we held that our democracy was not prepared to adopt them, even

at the price of a certain harm to security (see HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [102]). Similarly, determining the route of the separation fence in the place decided by the military commander in *Beit Sourik Village Council v. Government of Israel* [2] would have increased security. But we held that the additional security was not commensurate with the serious harm to the lives of the Palestinians. Removing the family members of suicide bombers from their place of residence and moving them to other places ('assigned residence') would increase security in the territories, but it is inconsistent with the character of Israel as a 'democratic freedom-seeking and liberty-seeking state' (*Ajuri v. IDF Commander in West Bank* [1], at p. 372 {105}). We must adopt this path also in the case before us. The additional security achieved by abandoning the individual check and changing over to a blanket prohibition involves such a serious violation of the family life and equality of many thousands of Israeli citizens that it is a disproportionate change. Democracy does not act in this way. Democracy does not impose a blanket prohibition and thereby separate its citizens from their spouses, not does it prevent them from having a family life; democracy does not impose a blanket prohibition and thereby give its citizens the option of living in it without their spouse or leaving the state in order to live a proper family life; democracy does not impose a blanket prohibition and thereby separate parents from their children; democracy does not impose a blanket prohibition and thereby discriminate between its citizens with regard to the realization of their family life. Indeed, democracy concedes a certain amount of additional security in order to achieve an incomparably larger addition to family life and equality. This is how democracy acts in times of peace and calm. This is how democracy acts in times of war and terror. It is precisely in these difficult times that the power of democracy is revealed (W. J. Brennan, 'The Quest to Develop a Jurisprudence in Times of security Crises,' 18 *Israel Yearbook of Human Rights* 11 (1988)). Precisely in the difficult situations in which Israel finds itself today, Israeli democracy is put to the test.

(c) *Increasing the effectiveness of the individual check*

94. Naturally, everything should be done to increase the effectiveness of the individual checks. Therefore we recognize the constitutionality of the provision of section 3D of the Citizenship and Entry into Israel Law. According to this provision, no permit will be given if it is determined in accordance with a security opinion that 'the resident of the area or his family member are likely to constitute a security risk to the State of Israel.' Moreover, the security checks must be treated with great seriousness. Therefore if it is not possible to carry them out because of the security position in one part of the territories or another, the individual check will be postponed until the check becomes possible. If it is necessary to allow the identification of the foreign spouses in Israel as persons who came from the territories, this should be allowed until they reach the age at which the danger presented by them is reduced. There are also grounds for considering additional measures. The severity of these, even if it would in normal circumstance be considered great, cannot compare to the permanent violation of family life and the violation of equality. At the same time, the team carrying out the checks should be increased in a reasonable manner. If this involves a reasonable financial investment, it must be made. 'The protection of human rights costs money, and a society that respects human rights must be prepared to bear the financial burden' (Barak, *Legal Interpretation: Constitutional Interpretation*, *supra*, at p. 528). 'When we are concerned with a claim to exercise a basic right… the relative weight of the budgetary considerations cannot be great' (Justice E. Mazza in *Miller v. Minister of Defence* [67], at p. 113 {197}); see also the remarks of Justice D. Dorner there at p. 144 {240}). This was well expressed by Justice I. Zamir:

> 'Society is judged, *inter alia*, according to the relative weight it affords to personal liberty. That weight should be expressed not just in lofty declarations nor just in legal literature, but also in the budget ledger. Protecting human rights generally has a cost. Society should be prepared to pay a reasonable price for protecting human rights' (*Tzemah v. Minister of Defence* [9], at p. 281 {683}, and see the references cited there).

This is the case generally, and also in times of war and emergency. Indeed, 'a society that wants both security and liberty must pay the price' (*Marab v. IDF Commander in Judaea and Samaria* [3], at p. 384 {217}).

(d) *The exception*

95. In view of our position with regard to the disproportionality of the blanket prohibition, we do not need to examine exceptions to the blanket prohibition. We will say only that their absence from the law greatly highlights the disproportionality (in the narrow sense) of the blanket prohibition. Why is it not possible to allow a permit to enter Israel in individual cases where there are humanitarian reasons of great weight? In this context, the remarks of President M. Shamgar concerning the reunification of families between foreigners from outside the territories and spouses in the territories should be cited. The President wrote:

> 'The respondent's aforesaid policy and mode of operation includes the weighing of each and every case in accordance with its circumstances, and each case will also be reconsidered if there are unusual humanitarian circumstances' (HCJ 13/86 *Shahin v. IDF Commander in Judaea and Samaria* [103], at p. 216).

(e) *Turning to questions concerning the consequences of the unconstitutionality*

96. Our conclusion is, therefore, that the provisions of the Citizenship and Entry into Israel Law violate the right of human dignity set out in the Basic Law: Human Dignity and Liberty. We have also held that this violation does not satisfy the provisions of the limitations clause. In so far as the proportionality of the violation is concerned, the disproportionality is reflected in the fact that the law provides a disproportionate relationship between the additional protection of security when changing over from the previous arrangement, which provided for an individual examination, and the additional violation to human dignity that the changeover to the blanket prohibition brings in its wake. In view of our conclusion, the question arises as to what is the consequence of this unconstitutionality. Let us now turn to consider this question.

H. *Stages of the constitutional scrutiny: (3) The relief or remedy*

97. The final stage in the constitutional scrutiny is the stage of the relief or remedy. We have reached the conclusion that a constitutional right enshrined in a Basic Law has been violated. We have determined that this violation does not satisfy the conditions of the limitations clause. Now we must determine the consequences of the unconstitutionality. The determination that the law unlawfully violates a constitutional right does not in itself mean that the law should be declared void, or that it should be declared void immediately. The court has discretion with regard to the proper relief in this situation (see *Israel Investment Managers Association v. Minister of Finance* [8], at pp. 413-414; the remarks of Vice-President E. Mazza in HCJ 9098/01 *Ganis v. Ministry of Building and Housing* [104]). This discretion extends both to the actual declaration that the law is void and to the date on which the voidance comes into effect. The court is not liable to order the voidance of the law in its entirety. It may order the law to be split, so that those provisions of the law that suffer from a constitutional defect are declared void, while the other provisions remain valid. This should be done when the remaining provisions have an independent reason, and the split does not lead to undermining of the purpose of the law (see Barak, *Constitutional Interpretation*, at pp. 736-737). The court is also entitled to order the date on which the voidance comes into effect to be deferred. This suspension of the declaration of voidance is essential where voiding the law on an immediate basis may result in serious harm to the public interest, and also in order to allow the legislature a suitable period of time to determine an alternative arrangement which will satisfies the demands of constitutionality (see *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [41], at para. 27; *Israel Investment Managers Association v. Minister of Finance* [8], at p. 416; *Tzemah v. Minister of Defence* [9], at p. 284 {686-687}). The proper relief in circumstances of this kind is therefore to suspend the declaration of voidance (in this regard, see Y. Mersel, '*Suspending the Declaration of Voidance*,' 9 *Mishpat uMimshal* 39 (2006)).

98. In our case, my opinion is that there is no alternative to determining that the Citizenship and Entry into Israel Law is void in its entirety. Section 2 of the law is the provision that creates the prohibited violation of the right. *Prima facie*, declaring s. 2 void would be sufficient, and the remaining sections could be left as they are. But the remaining sections of the law are merely exceptions to the blanket prohibition set out in s. 2. Therefore, in the absence of s. 2, the Citizenship and Entry into Israel Law is devoid of all content. What point is there to an exception when the rule is void? The conclusion is that the law should be declared void in its entirety.

99. Should the legislator be given time to examine the position that results from the voidance of the law, and to consider making an alternative arrangement, by way of a deferral of the date on which it commences? The answer to this question is yes. Determining an alternative arrangement in the sensitive matter before us requires a thorough reassessment of a range of factors with wide-ranging implications. A fitting period of time should be allowed for determining an alternative arrangement. Had the Citizenship and Entry into Israel Law not provided a date on which it ceases to be valid, I would say that the voidance of the law should be suspended for a period of six months. Since the validity of the law expires on 16 July 2006, the declaration of voidance should be suspended until that date. If the government and the Knesset require a limited amount of time, and it seeks, for this purpose, to re-enact the Citizenship and Entry into Israel Law without any change, then I determine that our decision is suspended for six months from the date on which the law comes into effect.

Comments on the opinion of the vice-president, Justice M. Cheshin

100. I have, of course, studied the opinion of my colleague, the vice-president, Justice M. Cheshin. In many respects we are in agreement. Indeed, I accept that every state, including the State of Israel, may determine for itself an immigration policy. Within this framework, it is entitled to restrict the entry of foreigners (i.e., persons who are not citizens or immigrants under the Law of Return) into its territory. The state is not obliged to allow foreigners to enter it, to settle in it and to become citizens of it. The key to entering the state is held by the state. Foreigners have no right to open the door. This is the case with regard to foreigners who have no connection with Israeli citizens. This is the case with regard to foreigners who are married to Israeli citizens and to their children. All of them need to act in accordance with the Citizenship Law, 5712-1952, and in accordance with the Entry into Israel Law, 5712-1952. According to these laws, the foreign spouse has no right to enter Israel, to settle in it or to become a citizen of it, other than by virtue of ordinary legislation. This immigration legislation can restrict entry into Israel, determine general quotas and impose other restrictions that are recognized in civilized countries.

101. My opinion is limited to the viewpoint of the Israeli spouse, who wishes to realize his family life with his foreign spouse or with their joint child in Israel. Here too I do not claim that the Israeli spouse has the power to compel the state to open its gates to the foreign spouse, to allow him to enter Israel, to recognize his residence in it or to grant him Israeli citizenship. As can be seen from my opinion, the state is entitled to enact laws, like the Entry into Israel Law, or the Citizenship Law, which restrict the right of Israeli spouses to a family reunification with their foreign spouses. By virtue of this provision, thousands of foreign spouses from the territories have been prevented from entering or staying in Israel. This leads to my self-evident approach that the Knesset is authorized to enact the Entry into Israel Law, which restricts the entry of spouses from the territories. Indeed, had the Entry into Israel Law provided that the entry of a foreign spouse could be prevented as a result of an individual check with regard to the security danger that he presents, which satisfies the requirements of the limitations clause, I would see no constitutional problem with that law.

102. What, therefore, is the difference of opinion in this case between my colleague's position and my position? At the basis of the difference of opinion lies the question whether the Israeli spouse has a super-legislative constitutional right to realize his family life in Israel with his foreign spouse and their joint child. My colleague is of the opinion that the Israeli

spouse does not have such a constitutional right. Consequently my colleague is of the opinion that legislation that violates the realization of this family life in Israel does not need to satisfy the conditions of the limitations clause, since a constitutional right has not been violated. By contrast, I am of the opinion that the Basic Law: Human Dignity and Liberty does give the Israel spouse this right, as a part of his human dignity. In order to prevent the realization of the right, the requirements of the limitations clause must be satisfied. In my opinion, the provisions of the Citizenship and Entry into Israel Law do not satisfy the conditions of proportionality in the limitations clause. My colleague is of the opinion that had he needed to resort to the provisions of the limitations clause, the Citizenship and Entry into Israel Law would satisfy its conditions. A second difference of opinion between us concerns the violation of equality. My colleague is of the opinion that the right of the Arab-Israeli spouse is not violated, since the Citizenship and Entry into Israel Law is based on a permitted distinction. By contrast, I am of the opinion that this law is based on a prohibited distinction. It should be emphasized that my opinion is not that the key for the foreign spouse to enter the state is in the hands of the Israeli spouse. My position does not lead to the conclusion that 'recognizing that the state has a constitutional obligation to allow the entry of foreign family members can only mean a transfer of sovereignty to each and every individual citizen' (para. 55 of my colleague's opinion). Certainly my position does not grant 'an automatic right of immigration to anyone who marries one of the citizens or residents of the state' (*ibid*.), nor does it therefore lead to the conclusion that 'every citizen holds the right to allow immigration into the state, without the supervision of the state' (*ibid*.). My position leads merely to the conclusion that a recognition of the constitutional right of an Israeli spouse to family reunification with the foreign spouse imposes on the state — which has the ability to determine immigration policy in accordance with its policy and has the power to supervise its policy – the obligation to enact a law that satisfies the requirements of the limitations clause. That was the position before the enactment of the Citizenship and Entry into Israel Law and that will be the position after the necessary amendments are made to this law. Did the state, before the enactment of the Citizenship and Entry into Israel Law, transfer sovereignty to each and every individual citizen? Did the state, before the enactment of this law, give an automatic right of immigration to anyone who married one of the citizens or residents of the state? Did every citizen previously have a right to allow immigration into the state, without the supervision of the state? Where was the Entry into Israel Law until now? And what happened, until now, to the Citizenship Law? Indeed, according to my approach, the key to entering the state remains with the state. It has the power to determine the criteria for immigration, and also to deny it utterly. All that it is required to do is that when it uses this key — in so far as this violates a constitutional right of an Israeli spouse — it should be used in a manner that is consistent with the values of the State of Israel, for a proper purpose and not excessively. No more and no less.

103. My colleague's position — which rules out the application of the limitations clause in this case — is based on his interpretation of the constitutional right to human dignity. The premise of my colleague and myself in this regard is the same. We both agree that human dignity gives rise to 'the right of an Israeli citizen to live with the members of his family in Israel, and the duty of the state to the citizen to allow him to realize his right to live with the members of his family in Israel' (para. 47 of my colleague's opinion). Therefore, if both of the spouses are Israeli, their right to realize family life in Israel is derived from the human dignity of each of them (para. 48 of my colleague's opinion). But what is the law when one of the spouses is Israeli and the other is foreign? Here our ways part. According to my position, the human dignity of the Israeli spouse is to live together with his spouse — whether Israeli or foreign — and their children in Israel. According to my colleague's position, there is a material difference with regard to human dignity between the case where the second spouse is also Israeli and the case where the second spouse is not Israeli. There are two considerations that underlie this approach of his: *one* is the strength of the constitutional right to have family life in Israel. According to my colleague's approach, the right to family life lies at the very

nucleus of human dignity, whereas the right to bring the foreign spouse to Israel in order to realize family life here lies on the margin or periphery (paras. 59 and 61 of my colleague's opinion). The *other* is the public interest in the obligation of the state to all of its citizens to determine the character and identity of the framework of communal life (para. 49 of my colleague's opinion), and the character of the state (para. 54). In my colleague's opinion, 'we ought to allow the public interest to have its say from the beginning, when the scope of the basic right is determined' (para. 56 of my colleague's opinion). In my opinion, these considerations of my colleague should not be accepted, and they are incapable of denying the Israeli spouse of his right — a right derived from human dignity that may, of course, be restricted when the conditions of the limitations clause are satisfied — to realize family life with the foreign spouse in Israel. I will discuss this approach of mine in brief, and I will begin with my colleague's 'strength' argument.

104. In my opinion, the right of the Israeli spouse to realize his family life with the foreign spouse in Israel lies at the very nucleus of the right to family dignity. Let us always remember that human dignity is the dignity of 'man as a human being' (s. 2 of the Basic Law: Human Dignity and Liberty). If the realization of family life in Israel is part of the nucleus of human dignity when both of the spouses are Israeli, then the realization of family life in Israel is part of the nucleus of human dignity when only one of the spouses is Israeli. From the viewpoint of the Israeli spouse, how is the case where the other spouse is Israeli different from the case where the other spouse is foreign? Human dignity — the nucleus of human dignity — is identical in both cases. In both cases, if the spouses do not live together (in Israel or outside Israel), they are unable to realize their family life. But this is not all; even if the right of the Israeli spouse to realize his family life with the foreign spouse in Israel lies on the margin or the periphery of the right to human dignity, it is still part of the human right, and it cannot be violated without satisfying the conditions of the limitations clause. Indeed, I am of the opinion that making a distinction between a violation of the nucleus of the right (which is subject to the limitations clause) and a violation of its periphery (which lies beyond the scope of the right and therefore is not subject to the limitations clause) violates the constitutional protection of human rights. This distinction excludes the marginal or peripheral cases from the scope of constitutional protection, and it thereby drains human rights of a significant part of its content, namely the marginal or peripheral cases.

105. My colleague holds that taking into account the public interest in determining immigration policy excludes from the constitutional right to family life the right of the Israeli spouse to realize his family life with the foreign spouse in Israel. In my opinion, taking the public interest into account — no matter how important it may be — must be done within the framework of examining the conditions of the limitations clause (the second stage of the constitutional scrutiny) and not within the framework of determining the scope of the constitutional right itself (the first stage of the constitutional scrutiny). This is the case with regard to the right to family life and it is also the case with regard to every other constitutional right (see Alexy, *A Theory of Constitutional Law*, *supra*, at p. 196; R. Dworkin, *Taking Rights Seriously*, 1977, at p. 90; C.S. Nino, *The Ethics of Human Rights*, 1991, at p. 29). The methodology adopted by my colleague will eventually reduce the constitutional protection given to human rights to a significant degree. It is likely to lead, for example, to an approach that taking into account the public interest, such as national security or public safety, with regard to the right to freedom of expression, should find its place in determining the scope of freedom of expression and not it determining the constitutional possibility of violating it. Changing the 'place' of the public interest is not a mere technical or methodological matter. It is a matter with deep implications for human rights in Israel. It involves a drastic reduction in the scope of human rights. Indeed, the system adopted by this court, according to which the place of the public interest lies within the framework of the limitations clause, may give constitutional protection to a law that violates a constitutional human right, while protecting the scope of the human right. By contrast, the role of the public interest within the framework of determining the scope of the human right, as my colleague holds, is likely to reduce the

right itself. According to my colleague's methodology, balances whose proper place is in the limitations clause — when examining the values of the State of Israel, the proper purpose of the legislation and its proportionality — are made within the framework of determining the scope of the right itself, by imposing the burden on someone whose right has been violated. Thus this approach departs from a whole host of decisions, in which it has been held that taking account of the public interest finds its place in the stage of examining the violation of the right (such as freedom of expression) and not in the stage of determining the scope of the right (see HCJ 806/88 *Universal City Studios Inc. v. Film and Play Review Board* [105]; CrimA 2831/95 *Alba v. State of Israel* [106], at pp. 303, 316; F. Schauer, *Free Speech: A Philosophical Enquiry* (1982)). This opens up a new constitutional path that raises questions concerning the various balancing formulae that should be used and their relationship to the balancing formulae in the limitations clause.

106. What is more, this approach amounts to 'an undermining of the constitutional balance' (CrimA 4424/98 *Silgado v. State of Israel* [107], at p. 550); it involves a dilution of the constitutional protection of human rights in Israel. It leads us, in my colleague's words, to place in 'doubt whether the Basic Laws were originally intended to give basic rights to the individual while directly influencing the other individuals in the state and the image of society' (para. 62 of my colleague's opinion; see also para. 39 of my colleague's opinion). But in my opinion there is no doubt in this regard. Basic human rights in Israel exist and are recognized precisely where they are capable of directly influencing 'the other individuals in the state and the image of society.' It is precisely then that we need them most in order to protect our values as a Jewish and democratic society. Our role as judges, at this stage of our national life, is to recognize in full the scope of human rights, while giving full strength to the power of the limitations clause to allow a violation of those rights, when necessary, without restricting their scope.

107. It should be noted that I do not hold that basic rights should be extended in every direction. I hold that they should be given a purposive interpretation. This interpretation is neither a restrictive nor an expansive one. It is an interpretation that reflects the way in which Israeli society understands the nature of human rights, according to their constitutional structure and according to the constitutional principles provided in the Basic Law, all of which while taking into account what is valuable and essential and rejecting what is temporary and fleeting (see *Efrat v. Director of Population Registry, Ministry of Interior* [20], at p. 780; *Man, Nature and Law Israel Environmental Protection Society v. Prime Minister of Israel* [12], at p. 518; *Commitment to Peace and Social Justice Society v. Minister of Finance* [49]). Moreover, I do not believe that giving a purposive interpretation to basic rights, while taking into account the public interest within the framework of the limitations clause, constitutes a violation of the principle of the separation of powers. There is nothing in the principle of the separation of powers to the effect that the court should give a restrictive interpretation to human rights, in order to limit the scope of judicial review of the constitutionality of a law. There is nothing in the principle of the separation of powers that leads to the conclusion that judicial review of the constitutionality of the law violates the separation of powers. On the contrary, this review protects the limits of the power of the various executive organs and protects human rights. This is also the function of the separation of powers. Finally, I do not think that my colleague's approach leads to 'a more comprehensive and careful scrutiny of legislation' (para. 42 of his opinion). On the contrary, the more the public interest is taken into account within the framework of determining the scope of the right, the smaller will be the role of the limitations clause, and the smaller will be the possibility of a comprehensive and careful scrutiny of legislation. Instead of focusing on the violating law, the analysis will focus on the violated right. Instead of a requirement that the legislature should enact laws that satisfy the limitations clause, there will be a requirement that the court should reduce the scope of human rights.

108. This position of mine with regard to the scope of a constitutional right (such as human dignity) and the restrictions on it (in the conditions of the limitations clause) applies

both in times of peace and calm and in times of war and terror. The armed conflict between Israel and the Palestinians in the territories does not change the scope of the human rights belonging to Israeli citizens. Our right to human dignity, privacy, property and freedom of occupation did not change when Hamas won the recent elections in the territories. Basic rights do not change according to the winds of peace or war that blow through our region. Taking the security position into account — which is of course essential and requisite — should be done within the framework of the limitations clause. For this reason, I accept my colleague's approach that 'even those who support the position that the Israeli citizen should have a right — a constitutional right or a legal right — to have his foreign family member enter Israel and reside in it will agree that reasons of national security and public security should qualify the right of the individual to have his family member enter the country and reside in it' (para. 77 of his opinion). Notwithstanding, it should be re-emphasized that the expression 'will qualify the right of the individual' does not mean that his constitutional right as determined in the Basic Laws has been changed and reduced. The meaning of this expression is that the realization of the right and the protection given to it in legislation has been restricted for reasons of national security and public security, as required in the limitations clause. When these pass — and we all aspire to this — no change will occur to the constitutional right itself. It will remain as it was. The change will occur to the possibility of realizing it. Therefore I agree with my colleague's approach that 'a time of war is not the same as a time of peace' (para. 82 of his opinion), and that 'things which are appropriate in a time of peace cannot be maintained in a time of war' (*ibid*.). Nonetheless, this change should find its full expression within the framework of the limitations clause. It should affect the realization of the right. This change is not capable of affecting the existence of the right and the scope of its application. Therefore, we cannot agree with his conclusion 'that in times of war there arise — or you may say, there awaken — considerations and interests that are unique to this time, considerations and interests that can restrict the spheres of application of the rights of the individual' (*ibid*.). The unique considerations and interests in times of war must act within the framework of the limitations clause, and within the framework of the constitutional right itself. They do not restrict 'spheres of application of the rights of the individual.' They restrict the possibility of realizing them.

109. Assuming that the Citizenship and Entry into Israel Law violates the constitutional right, is this violation proportionate? My colleague and I agree that the first two conditions of proportionality — the rational connection test and the least harmful measure test — are satisfied in our case. The difference of opinion between us concerns the third subtest (the test of proportionality in the narrow sense, or the 'value test,' as my colleague calls it). Even with regard to this subtest, we both agree that the blanket prohibition provided in the Citizenship and Entry into Israel Law provides more security to the citizens and residents of the State than the individual check. The framework of the doubts is therefore this: is there a proper proportion between the additional security obtained by changing over from the individual check (which was used in the past) to the blanket prohibition (which was introduced by the Citizenship and Entry into Israel Law) and the additional violation of the human dignity of the Israeli spouses caused by this change? My colleague's reply is that 'the additional security — security for life — that the blanket prohibition gives us as compared with the individual check that is limited in its ability [is] proper' (para. 122). By contrast, I am of the opinion that the additional security provided by the blanket prohibition is not proportionate in comparison with the additional damage caused to the family life and equality of the Israeli spouses.

110. My colleague puts on one pan of the scales life itself. 'We are concerned with life. Life and death. It is the right of the residents of the state to live. To live in security. This right of the individual to life and security is of great strength. It has chief place in the kingdom of rights of the individual, and it is clear that its great weight is capable of determining decisively the balance between damage and benefit' (para. 120 of his opinion). Against this he places on the other pan the right to have family life (*ibid*.). Indeed, I accept that if we weigh life against quality of life — life will prevail. But is this the proper comparison? Had

we posed the question in this way — life against quality of life — we would certainly have held that we are permitted, and perhaps even obliged, to torture a terrorist who constitutes a 'ticking bomb' in order to prevent harm to life; that we are permitted, and perhaps even obliged, to reassign the place of residence of an innocent family member of a terrorist in order to persuade him to refrain from terror and to prevent an injury to life; that the security fence should be placed where the military commander wished to place it, since thereby the lives of the citizens of the state are protected, and any harm to the local population, whatever its scope may be as long as it does not harm life itself, cannot be compared to the harm to the lives of the citizens of the state. But this is not how we decided either with regard to torture, or with regard to assigned residence or with regard to the harm caused by the separation fence to the fabric of the lives of the local residents (see, respectively, *Public Committee Against Torture v. Government of Israel* [102]; *Ajuri v. IDF Commander in West Bank* [1]; *Beit Sourik Village Council v. Government of Israel* [2]). In those cases and in many others we always put human life at the top of our concerns. We were sensitive to terror and its consequences in our decisions. Indeed, human life is dear to us all; and our sensitivity to terror attacks is as strong as in the past. We made the decisions that we made because we do not weigh life against the quality of life. In doing so, life always takes precedence and the result is to refrain from any act that endangers human life. Society cannot operate in this way, either in times of peace (such as with regard to road accident victims) or in times of war (such as with regard to victims of enemy attacks). The proper way of posing the question is by means of the level of the risks and the likelihood that they will occur, and their effect on the life of society as a whole. The questions that should be asked in our case are questions of probability. The question is what is the probability that human life will be harmed if we continue the individual check as compared with the likelihood that human life will be harmed if we change over to a blanket prohibition, and whether this additional likelihood is comparable to the certainty of the increase caused thereby to the violation of the rights of spouses who are citizens of the state.

111. Now that we have begun discussing the issue of risk, we must declare openly that democracy and human rights cannot be maintained without taking risks. Professor Sajo rightly said that 'liberty is about higher risk-taking' (A. Sajo (ed)., *Militant Democracy* (2004), at p. 217). Indeed, every democracy is required to balance the need to preserve and protect the life and safety of citizens against the need to preserve and protect human rights. This 'balance' simply means that in order to protect human rights we are required to take risks that may lead to innocent people being hurt. A society that wishes to protect its democratic values and that wishes to have a democratic system of government even in times of terror and war cannot prefer the right to life in every case where it conflicts with the preservation of human rights. A democratic society is required to carry out the complex work of balancing between the conflicting values. This balance, by its very nature, includes elements of risk and elements of probability (see, in this regard, C.R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (2005), at pp. 204-223; J. Waldron, 'Security and Liberty: The Image of Balance,' *The Journal of Political Philosophy*, vol. 11 (2003), at pp. 191-210; M. Freeman, 'Order, Rights and Threats: Terrorism and Global Justice,' in *Human Rights in the War on Terror* (R. Wilson, ed., 2005), at pp. 37-56). Naturally, we must not take any unreasonable risks. Democracy should not commit suicide in order to protect the human rights of its citizens. Democracy should protect itself and fight for its existence and its values. But this protection and this war should be carried out in a manner that does not deprive us of our democratic nature.

112. In this perception, the comparison in our opinion is not between life and family life. The comparison is between the risk to life and the likelihood that the right to life will be violated as compared with the certainty of the violation of family life. In my opinion, the additional security caused by changing from an individual check to a blanket prohibition of the entry of husbands up to the age of 35 and wives up to the age of 25 cannot be compared to the additional damage to the Israeli spouses as a result of the violation of their right to family

life. Indeed, if an individual check is proper, from the viewpoint of the risks that should be taken in our defensive democracy, when the husband reaches 35 and the wife reaches 25, why does it become improper, from the viewpoint of the risks, when they have not yet reached these ages? This question is asked mainly against the background of the state's position, which it repeatedly stated before us and which my colleague discussed in his opinion, that the concern is with regard to a change in the position of the foreign spouse after entering Israel. My colleague asks: 'who therefore is so wise that he does not suspect that a resident of the territories may become associated with a terror organization *after* receiving Israeli documentation? (para. 111 of his opinion). Indeed, the suspicion certainly exists. As the years pass, this concern may even increase. And yet, notwithstanding this concern, the state decided — rightly, in my opinion — that this concern is insufficiently serious in order to reject an individual check and in order to necessitate a blanket prohibition for husbands aged 35 or more and wives aged 25 or more. The same is true of the transition provisions included in the Citizenship and Entry into Israel Law, which my colleague discusses (in para. 123 of his opinion). These provisions provide that the Minister of the Interior or the military commander in the territories may give licences to live and permits to stay in Israel to residents of the territories who filed their application for family reunifications before 15 May 2002, subject to an individual check of the risk presented by him. My colleague calculates the number of those persons who may benefit from the transition provisions at approximately 16,000. So we see that with regard to these thousands the state remains satisfied to carry out individual checks, notwithstanding the risk involved therein. The violation that would be caused by applying the law retroactively appears to the state — and rightly so — too serious a violation of the rights, which ought to be avoided even at the price of the security risk involved therein. The same is true of residents of the territories who enter Israel for work purposes. Also with regard to them the state is satisfied to carry out an individual check, notwithstanding the risk inherent in this. The needs of Israeli society for the work of these people seems to the state — and in my opinion, rightly — to be creating a risk that should be taken. Against the background of all of these, it is difficult, very difficult, to give such great weight to the risk that arises from holding an individual check, which is right and proper for spouses over the age of 35 (for husbands) and over the age of 25 (for wives), for spouses who submitted their request before the effective date, and for workers from the territories, precisely in the case of the other foreign spouses who wish to enter Israel. Once again, were we to place before us human life only, we would be obliged to reach the conclusion that whatever the age of the foreign spouses, a blanket prohibition should be applied to them; we would also be liable to determine that family reunifications should not be allowed, irrespective of the question of when the application was filed; we would also be liable to determine that workers should not be allowed at all to enter from the territories. But this is not what the Citizenship and Entry into Israel Law provides. If the state is prepared to take the risks to human life that its policy — which refrains from a blanket prohibition and is satisfied with an individual check — causes with regard to spouses over the ages of 35 and 25, and if the state was prepared to take the risks of giving entry permits to spouses who filed their application before the effective date, and if the state was prepared to take the risks in allowing workers from the territories to enter Israel and is satisfied with an individual check, it is a sign that the risk presented by being satisfied with an individual check is not so large that it can justify the serious violation to the family life of the Israeli spouses.

113. Naturally, everything should be done in order to increase the effectiveness of the individual check. In this regard, the Citizenship and Entry into Israel Law contains provisions with regard to the individual check of those persons to whom the blanket prohibition does not apply (s. 3D of the law). It is possible, of course, to exercise these provisions with regard to everyone who undergoes an individual check. It is also possible to propose additional measures that can be taken. Thus, for example, it is possible to give weight to the fact that the Israeli spouse applied originally to the respondents and asked that an individual check should be made. Of course, if *de facto* there is no real possibility of receiving relevant information

from an individual check of a foreign spouse because of the security position, there is no alternative to deferring the decision concerning him until the individual check becomes possible. Where fighting is taking place checks are not carried out; where there is no possibility, because of the security conditions, of making a check, it should be deferred until the conditions change. All of these will be determined in accordance with the conditions of the time and place; they will be governed by a blanket prohibition. Therefore, with regard to those spouses for whom the individual check is possible, it should be made. In such situations the disproportionality of the blanket prohibition stands out. Why should the Israeli spouse not be allowed to have a family life in Israel with the foreign spouse, when a reasonable check shows that the foreign spouse does not constitute a security risk at the time of the check, and there exists little risk that this will change in the future? Even if the burden of proof is placed, in this regard, on the Israeli spouse, why should he be deprived of the possibility of proving that the burden has been discharged?

Conclusion

114. The decision in these petitions is difficult. 'We are members of Israeli society. Although we sometimes find ourselves in an ivory tower, that tower is in the heart of Jerusalem, which has on more than one occasion suffered from ruthless terror. We are aware of the killing and destruction that the terror against the state and its citizens brings in its wake. Like every other Israeli, we too recognize the need to protect the state and its citizens against the serious harm of terror. We are aware that, in the short term, this judgment of ours will not make the state's struggle against those that attack it any easier. But we are judges. When we sit in judgment, we ourselves are being judged' (*Beit Sourik Village Council v. Government of Israel* [2], at p. 861 {323}). As judges, we know that we must find a proper balance between human rights and security. 'In this balance, human rights cannot receive complete protection, as if there were no terror, and state security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the state. It provides a reason for its struggle' (*Ajuri v. IDF Commander in West Bank* [1], at p. 383 {120}). We discussed this in *Public Committee Against Torture v. Government of Israel* [102], which concerned the use of violence in order to save human life from a terrorist who was alleged to be a 'ticking bomb.' These remarks are also apposite in this case:

> 'We are aware that this decision does not make it easier to deal with that reality. This is the destiny of a democracy — it does not see all means as acceptable, and the ways of her enemies are not always open to it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of the individual constitute important components in its understanding of security. At the end of the day, they strengthen her spirit and this strength allows it to overcome its difficulties' (*ibid.* [102], at p. 845 {605}).

Were my opinion accepted, the result would be that the Citizenship and Entry into Israel Law is void. The declaration of the law's voidance is suspended until 16 July 2006.

Vice-President Emeritus M. Cheshin

When I received the opinion of my colleague, President Barak, I put my hand in his and allowed him to lead me along his path. So we followed paths that were paved with basic principles, we ascended mountains with summits of basic rights, we transversed doctrines, we descended into specific rules of law, and on our way we were continually accompanied by justice, truth, integrity and common sense. Towards the end of the journey, we boarded a ship and we reached an island in the middle of the ocean. We disembarked, and on the pier a dignified person greeted us.

‘Welcome,’ the man welcomed us with a kind expression.

‘Greetings,’ we replied, and added: ‘We are from Israel, from the Supreme Court of Israel. And who are you, sir?’ we asked.

‘My name is Thomas, Thomas More, also known as Thomas Morus.’

‘Very pleased to meet you. And what is this place?’ we asked.

‘You are in the state of Utopia,’ the man replied, and added: ‘The state of Utopia was established according to a plan that I outlined in a book that I wrote, which has the same name as the state, Utopia. By the way,’ the man added, ‘the word Utopia is from Greek, and it means “nowhere”.’

‘Interesting, very interesting,’ we said, ‘And as persons of the law, let us also ask you this: what is the legal system in Utopia? Is it similar to the legal system in Israel?’ (Our assumption was, of course, that this wise man knew the Israeli legal system).

Mr More immediately answered: ‘I am sorry, but there are vast differences between the two legal systems, and it will be a long time before Israel reaches the level of Utopia. At this time, you are fighting for your lives, for the existence of the state, for the ability of the Jewish people to have a communal and national life like all peoples. The laws of Utopia — in the position you find yourselves in at present — are not for you. Not yet. Take care of yourselves, do the best you can, and live.’ Thus spoke the man, and he said no more.

Then I awoke, and it was a dream.

* * *

The Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003 (‘the law’ or ‘the Citizenship and Entry into Israel Law’) tells us that, subject to various exceptions — which are extensive — Israeli citizenship shall not be given to a resident of Judaea, Samaria or the Gaza Strip (the territories), nor shall a licence to live in Israel be given to such a person. The law does not apply to the residents of Israeli towns in the territories. On this occasion, we are concerned with the question whether the law satisfies — or does not satisfy — the constitutionality tests set out in the Basic Law: Human Dignity and Liberty.

2. I have read carefully the opinion of my colleague, President Barak. The opinion is broad in scope and excellently presented, from beginning to end. I read it, but I was unable to agree. My path in the law is, in its essence, different from my colleague’s path. My thinking is different from my colleague’s thinking.

First of all, I believe that the State of Israel — like any country in the world — is entitled to restrict by law the immigration of foreigners into Israel, including the spouses of Israeli citizens. I do not accept that the citizens of the State have a constitutional right — i.e., a right by virtue of which it is possible to declare a statute of the Knesset void — that their foreign spouses may immigrate into Israel by virtue of marriage. Admittedly, I too, like my colleague the president, recognize the lofty status of the right to marriage and family life, but a disagreement divides us with regard to the secondary rights that derive from that right. Unlike my colleague, I doubt whether the right to marriage and family life implies a constitutional duty that is imposed on the state to allow foreign citizens who married citizens of the state to enter Israel.

Secondly, in times of war the state — any state — may refuse entry to citizens of an enemy of the state, even if they are married to citizens of the state. The State of Israel, as we all know, is at war — or at least a quasi-war — which is cruel and hard, against the Palestinian Authority and the terror organizations that act from within it. The residents of the Palestinian territories are *de facto* enemy nationals, and as such they are a group that presents a risk to the citizens and residents of Israel. The state is therefore entitled, in order to protect its citizens and residents, to enact a law that prohibits the entry of residents of the territories — enemy nationals — into the state, as long as the state of war or quasi-war continues. The basic right to marriage and family life is a basic right that we all recognize as a right derived from human dignity. But I doubt whether it implies, in itself, a duty imposed on the state to allow the entry

into Israel of enemy nationals merely because they married persons who are residents or citizens of Israel. This is an enemy that is sponsoring a prolonged and murderous attack against the state and its residents. Here we will also find the answer to the claim of discrimination, since a distinction made by the law — a distinction that concerns the residents of the territories and not the citizens of the state — is a permitted distinction between the citizens of the state who married foreign citizens that are enemy nationals and citizens of the state who married foreign citizens that are not enemy nationals.

Third, even had I agreed with my colleague's approach with regard to the constitutional status of the right to family life with persons who are foreign to the state, I still would not agree with his conclusion that the test of proportionality ('in its narrow sense') undermines the law and dooms it to destruction. Unlike my colleague, I am of the opinion that the advantage and benefit that the Citizenship and Entry into Israel Law contributes to the security and the lives of Israeli residents overrides the violation that the law inflicts on some of the citizens of Israel who have married — or who intend to marry — residents of the territories and who wish to live with their spouse in Israel. Indeed, when we place on one side of the scales the right of the citizens of Israel to life and security and on the other the right of some of the citizens of Israel to marry residents of the territories and live in Israel, the first side has greater weight. This should be the law where security is undermined to a significant degree, when life is in constant risk. And we all know that when we speak of risks to life and preserving life, we are not speaking metaphorically. It is life that we are seeking to protect, and no less. So when the Knesset — the supreme body in Israeli democracy — decided that the provisions of the Citizenship and Entry into Israel Law, a temporary law that is qualified with considerable restrictions, constitutes an effective and proper tool for protecting the lives of the citizens of the state and for the war against the serious risks to life and security, I find it difficult to accept that from the viewpoint of Israeli society the law commits the sin of disproportionality.

3. The Citizenship and Entry into Israel Law is a law that was enacted against a difficult security background in which the State of Israel finds itself. Against this difficult background, since we know from past experience that some of the residents of the territories — residents who by virtue of their marriage were given Israeli citizenship, with permits to move freely within Israel and between the areas of the Palestinian Authority and Israel — aided the terror attacks of suicide bombers that plague Israel, our opinion is that the petitioners are not entitled to the voidance of the law. We should always remember: Israel is not Utopia. Israel finds itself in a difficult armed conflict with the Palestinians. An authority against a state. One collective against another. And this armed conflict has become like a war. Not like the War of Independence; not like the Six Day War; not like the Yom Kippur War. But it is a war nevertheless. And a state that finds itself in a state of war with another state usually prohibits — and is entitled to prohibit — the entry of the residents of the enemy state into its territory. This is also the case here. As to the relationship between the state and its residents and citizens, its internal relations, the state is entitled, in order to protect its citizens and its residents, to forbid the residents of the area that is waging an armed conflict with it — to forbid the residents of the 'enemy state' — to enter Israel.

4. When it became clear that some of the residents of the territories who live in Israel were involved in the activity of suicide bombers who came from the Palestinian Authority, and when it became clear to the security establishment that they were unable to distinguish with a reasonable level of accuracy between the residents of the territories who are likely to aid terror and the residents of the territories who are not likely to aid terror, even if only for the reason that the terror organizations seek the help of those residents *after* they receive the coveted Israeli documentation, we are of the opinion that the arrangement provided by the Knesset in the Citizenship and Entry into Israel Law — a law whose validity is limited in time and whose application is qualified by reservations — according to which Palestinian residents from the territories, in the age groups stated in the law, will not be given citizenship or a licence to live in Israel, is a constitutional and proportionate law.

5. We all know that the provisions of the law harm some of the citizens of Israel who wish to marry Palestinian spouses and live with them in Israel. As human beings, we can only identify with the pain of those innocent persons whose right to have a family life in Israel has been violated. But there are two sides to the coin. Thus, as long as the Palestinian-Israeli armed conflict continues, as long as the Palestinian terror continues to strike Israel and Israelis indiscriminately, as long as the security services find it difficult to distinguish between those who aid our enemies and those who do not aid our enemies, the right of the few to have a family life in Israel should yield to the right of all the residents of Israel to life and security. Indeed, it is the right — more, it is the duty — of a state, of every state, to protect its residents against those who wish to harm them, and from this it can be derived that the state may prevent the immigration of enemy nationals into it — even if they are merely the spouses of Israeli citizens — while it is waging an armed conflict with that enemy.

Concerning the armed struggle that the Palestinians are waging against Israel and Israelis

6. In September 2000, a murderous terror onslaught began to afflict the State of Israel and its residents. Its origins were in the territories of Judaea, Samaria and the Gaza Strip. The onslaught is planned and executed almost entirely by Palestinians who are residents of the territories. The armed struggle of the Palestinians against the State of Israel and its residents has not stopped, and while we write this judgment the citizens of Israel continue to live under the threat of the murderous terror that is directed against them. We already know that we are speaking of one of the most serious onslaughts that we have undergone. Tens of thousands of terror attacks originating in the territories have struck children, the elderly, women and men indiscriminately and mercilessly. The vast majority of these are innocent citizens who are engaged in their normal day-to-day activities. This has led to the death of more than one thousand Israelis and the wounding of thousands more. Much property has been damaged and destroyed. The economy of the State of Israel has been seriously undermined. Daily life in the country has been disrupted. Many citizens have become fearful of everyday occurrences, such as travelling on buses, visiting shopping malls and eating out in restaurants. In the eyes of the world Israel is pictured as a country afflicted with terror that should not be visited.

7. Let us briefly mention the facts that can be called ‘plain facts,’ but in truth they are stained and discoloured with much blood. Since September 2000 the Palestinian have carried out 26,448 terror attacks, in which they have murdered 1,080 Israeli citizens and wounded 7,416 citizens. The number of terror attacks includes all the terror attacks that were carried out in Israel and the territories, and it includes various types of enemy terror activity, such as huge explosions with many victims inside Israel, shooting attacks in the territories and the firing of Kassam rockets and light firearms into Israel. For our purpose, we will focus on the attacks that are carried out inside Israel, i.e., attacks whose execution usually requires the help of persons who live legally in Israel and are able to avoid obstacles that Israel places in the path of terrorists who come from the territories. Inside the State of Israel — literally in the home — the Palestinians have carried out 1,596 terror attacks, including 148 suicide attacks. 626 Israeli citizens were murdered near their homes, while they were sitting in restaurants, travelling on buses, shopping at malls or waiting to cross a pedestrian crossing with small children. 6,446 Israelis — men and women, children and the elderly — have been wounded, some with very serious injuries that will leave them scarred all their lives. In the suicide attacks alone the Palestinians have murdered 505 Israelis and wounded thousands. This is the reality in which we live. These are the results of the war that the Palestinians are waging against us. And at this time we do not know what tomorrow will bring.

8. To protect the residents of the state, Israel is fighting terror to its utmost. But this war is not simple at all. It is also not like previous wars, those wars which shaped the norms of war accepted in international law. The Palestinian war of terror is not carried out by an organized army wearing uniforms, nor is it waged on the battlefield. This is a war of terrorists who do not wear a tag to distinguish themselves from the other inhabitants of the territories and who direct their attacks against civilians who are going about their daily lives. The

terrorists hide and mingle among the Palestinian population so that it is impossible to know who is an innocent Palestinian resident, who is a terrorist and who is a Palestinian resident who is likely to aid terror. This hiding of the terror organizations among the civilian population is not a coincidence. The terrorists hide deliberately among the civilian population, and they sometimes make use of the innocent population as 'human shields' against the operations of the IDF. Moreover, the terrorists are given support and assistance by parts of the civilian population. Indeed, not only do the inhabitants of the territories do nothing to stop the terror, but many of them even support it and assist it. A large number of terrorists receive the encouragement and assistance of those around them and their families. Many regard the perpetration of acts of terror and aiding terror as a means of ensuring the future livelihood of the family. Others act because of threats, and they aid the terror organizations out of a fear that if they do not do so they or their families will disappear. The Palestinian Authority itself also does not do enough to subdue terror, and in several cases it has been found that the Palestinian Authority or persons who were members in its agencies aided acts of terror or took part in them directly. This support is, *inter alia*, a result of the extreme and rabid incitement that calls for acts of violence to be carried out against Israel and its residents. This incitement has continued for many years, and it is clear that it has penetrated all sectors of Palestinian society. This court has been called on in the past to consider the difficult and complex security reality in which we find ourselves. Let us cite remarks made by President Barak three and a half years ago (on 3 September 2002) in *Ajuri v. IDF Commander in West Bank* [1], at p. 358 {87}:

> '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 Judaea and Samaria and the Gaza Strip). They sew 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.'

In another case, the court considered the attitude prevailing in Palestinian society and the encouragement given by some of the Palestinian population to the war of the terror organizations against the State of Israel (CrimA 2131/03 *Saadi v. State of Israel* (unreported), *per* Justice Levy):

> '… It is sufficient to point to the large number of attacks that have been perpetrated and the many others that were prevented, and it is especially appropriate to point to the exultations and joy following the killing of Jews, and the "days of feasting" announced by the families of those who are declared to be "martyrs" after their families are told of the death of their sons. In my opinion, these are capable of clarifying to what extent the population of the territories occupied by Israel encourage the suicide bombers, and we can therefore understand the growing number of persons who are prepared to act as "live bombs." In this situation, the need to search for deterrents in order to reduce the cycle of killing is an existential need that knows no parallel…'

Someone who has not seen a mother praising her son who killed himself as a 'live bomb' in order to murder Israelis — and who among us has not seen these scenes of horror on the television screen — has never seen anything surreal in his life. Such are the enemies of Israel.

9. We received clear and explicit evidence of the prevailing attitude of the Palestinian public in the elections that took place in the Palestinian Authority on 25 January 2006. In these elections the Hamas organization won a majority of the seats in the Palestinian parliament, and as a result of this win it also formed the government of the Authority. I think that there is no need to expand on the nature of the Hamas organization that, already on 22 June 1989, seventeen years ago, was declared by the government of Israel to be a terror

organization, in accordance with the definition of this term in the Prevention of Terror Ordinance, 5708-1948. Hamas is a murderous terror organization, one of the most extreme and dangerous of the terror organizations, whose declared and clear purpose is to fight a war of Jihad that will wipe Israel off the face of the earth. The beliefs of the Hamas organization can be learned from the organization's charter, which gives clear expression to the ideology that governs it. This charter, which is the basic constitution of Hamas, reveals an extreme outlook that calls for an uncompromising war of Jihad against Israel and Zionism. The Hamas organization regards itself as a link in a holy war against the Zionist invasion, and it calls upon the whole Moslem nation, and especially the Palestinian people, to take a part in this war which will lead to the destruction of the State of Israel. The charter of the Hamas organization numbers many pages, and we will cite (from the translation which the state submitted for our study) only some of the main points in brief. At the beginning of the charter, there is the following quote that is attributed to Hassan Albana, the founder of the Moslem Brotherhood movement in Egypt:

'Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it.'

This is the beginning of the charter and this is the evil and cruel spirit that permeates it.

Further on, the Hamas charter states that 'Palestine is land belonging to the Islamic Wakf,' and in consequence of this 'it is forbidden to relinquish it or any part of it or to concede it or any part of it.' Since the Hamas organization rules out any solution that involves conceding Palestinian lands — i.e., rules out any solution that does not involve the destruction of the State of Israel — the charter states openly and expressly that the Hamas organization rules out any peaceful solution whatsoever, since a peaceful solution means a concession of holy Palestinian lands. Hamas believes that the one and only solution to the 'theft of Palestine by the Jews' is a solution of war: not merely any war, but a holy Islamic war that will wipe the State of Israel off the face of the earth. In this spirit, the Hamas organization calls upon Moslems in general and Palestinians in particular to join the ranks of the Jihad warriors (the Mujadeen) in their war on Israel, and it also calls upon Islamic religious scholars to disseminate the spirit of Jihad and nurture Islamic consciousness among the whole people (paras. 14 and 15 of the charter):

> '… The freeing [of Palestine] is a personal obligation on every Moslem wherever he is. It is [solely] on this basis that one should address the problem [of Palestine], and every Moslem should understand this well.
>
> …
>
> When the enemies steal a part of Moslem lands, *the Jihad becomes a personal duty of every Moslem*. With regard to dealing with the theft of Palestine by the Jews, *there is no alternative to raising the banner of Jihad, something which requires the spreading of Moslem consciousness among the masses on a local, Arab and Moslem level, and there is no alternative to spreading the spirit of Jihad among the [Islamic] nation, fighting the enemies and joining the warriors of the Jihad [the Mujadeen]*.'

It should be stated that further on the charter levels against Israel and the Jews serious and fantastic anti-Semitic accusations, including the accusation that 'they were behind the French Revolution, the Communist Revolution and most of the revolutions of which we have heard and of which we hear in various places'; it is the Jews who caused the First World War which was intended to destroy the Ottoman Caliphate; the Jews have set up secret organizations throughout the world and they control them; the Jews set up the United Nations — which replaced the League of Nations — in order that they might control the world; the Jews use money and resources in order to control the world and to ensure the foundation and existence of the State of Israel (para. 22 of the charter). Indeed, the Protocols of the Elders of Zion have worthy progeny.

10. These, then, are the beliefs of the Hamas organization, these are its purposes, and to our sorrow Hamas has acted and continue to act in order to realize its beliefs and purposes. Since it was founded, Hamas has fought a cruel and murderous war of terror against Israel and it strikes Israeli citizens without mercy. Hundreds have been killed and thousands have been wounded in suicide attacks inspired by the organization, and this *modus operandi* has spread to other Palestinian organizations and from them to Moslem organizations throughout the world. Much blood has been spilt, and Hamas continues on its path.

11. And yet, despite its extreme positions, Hamas has benefited and the Palestinian public elected it to lead them. The Palestinian public elected the Hamas organization to power, and as a result of this election Hamas has formed a government in the Palestinian Authority. Hamas members hold office as the prime minister and as ministers in the government, they control the Authority's budget and they decide its policy. Members of the Hamas organization are the Authority's spokesmen, they control the media and they implement their policy vis-à-vis the world and the State of Israel. The Hamas organization and the Palestinian Authority — at least the organs of government in the Palestinian Authority — have become one.

12. An armed conflict has been taking place between Israel and the Palestinians for many years. This conflict has reaped a heavy price on both sides, and we have seen the massive scale of the harm caused to Israel and its inhabitants. The Palestinian public plays an active part in the armed conflict. Among the Palestinian public there is enmity to Israel and Israelis. Large parts of the Palestinian public — including also persons who are members of the organs of the Palestinian Authority — support the armed struggle against Israel and actively participate in it. The terror organizations and their operatives are well placed in all parts of Palestinian society and they receive its assistance, at least by its silence and failure to prevent terror operations. The Palestinian public chose the Hamas terror organization to rule it, and we know what are the character and the beliefs of the party that controls the Palestinian Authority. All of these are facts that are not in dispute, and the conclusion that follows from them is that the Palestinian Authority is a political entity that is hostile to Israel. It follows from this that the residents of the territories — Judaea, Samaria and the Gaza Strip — are enemy nationals. Admittedly, between Israel and the Palestinian Authority there is a complex and intricate relationship which is not merely a relationship of war, and it is clear that many of the residents of the territories do not take part in terror and even denounce it. But we are concerned with the rule, and when we are speaking of the rule — in the Palestinian Authority and the Palestinian public — the picture that we obtain is a picture of hostility and enmity. The Palestinian Authority is hostile to Israel. From the places under its control, and with its knowledge — possibly even on its initiative and with its encouragement — an armed struggle is being waged against Israel and its residents, and human bombs from the territories sew death and destruction in Israel. The relationship of Israel and the Authority is similar to the relationship between states that are at war with one another.

The security background to the enactment of the Citizenship and Entry into Israel Law

13. The State of Israel and the security forces have done all they can to defeat the wave of terror that has overwhelmed the state, and they have adopted wide-ranging measures, some of which have led, regrettably and as an inevitable consequence, to harm to the Palestinian population. Thus, *inter alia*, military operations have been conducted, some on a large scale, in the territories under the control of the Palestinian Authority. These operations involved infantry, heavy weapons — tanks and armoured personnel carriers — helicopter gunships and airplanes. The army entered Palestinian towns and villages, engaged in fierce fighting there and arrested many suspects. The army imposed curfews and sieges in various areas and several cities in Judaea and Samaria. Roadblocks were set up on highways and roads in the territories. The State of Israel initiated a policy of targeted attacks — on the land and from the air — and in several cases it accidentally caused harm to the civilian population among whom the terrorists who were being targeted by the operation were hiding. Alongside these military operations, when it was found that they did not provide a satisfactory solution to the terror

onslaught, the State of Israel began building the security fence, which was intended to be a physical barrier that would prevent terrorists from entering the State of Israel.

14. Almost all of the military activities of the State of Israel were attacked in the court, on the grounds that they harm citizens who are not involved in terror, but the opinion of the court was consistent and clear: it is the right of the State to protect itself and its residents against the terror onslaught, and this is true even at the price of the accidental and unintentional harm to a civilian population that does not wish to harm the State of Israel. The right to life and existence — the life and existence of the residents of Israel, the life and existence of the state — therefore overrode other important rights, and the voice of the court was heard loud and clear. See, for example, *Beit Sourik Village Council v. Government of Israel* [2]; *Marabeh v. Prime Minister of Israel* [5]; *Marab v. IDF Commander in Judaea and Samaria* [3]; *Centre for Defence of the Individual v. IDF Commander in West Bank* [4]; HCJ 8172/02 *Ibrahim v. IDF Commander in West Bank* [108]; HCJ 4764/04 *Physicians for Human Rights v. IDF Commander in Gaza* [109]; HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* [110]. Those cases admittedly concerned the activity of the state in an area held under belligerent occupation, and thus they were different from the case before us. At the same time, we can learn from those cases how to balance rights, which we are also required to do in this case, when on the one side there are rights of the individual and on the other said there is the duty of the state to prevent terror activities and to protect the lives of the residents of the state.

15. Notwithstanding all the activities and efforts of the state of Israel, the terror onslaught was not stopped, and whenever a method of reducing the ability of the terrorists to harm Israel was found, the terror organizations made great efforts to overcome that method. This is what happened after the building of the security fence. The terror organizations encountered a method of defence that they found difficult to overcome, and in order to avoid it they began to avail themselves of residents of the territories who had undergone processes of ‘family reunifications’ and were given permits to enter Israel and move around in it freely. ‘The Israeli identity cards that were given to residents of the territories [as a result of marriage to citizens or residents of Israel] allowed them free movement between the areas of the Authority and Israel, and made them the preferred group of terror organizations for carrying out hostile activity in general, and inside Israel in particular’ (explanatory notes to the draft Citizenship and Entry into Israel (Temporary Provision) Law (Amendment) 5765-2005, *Hatzaot Hok (Draft Laws)*, 5765, at p. 624). Thus a new reality was created ‘in which there is increasing involvement in the conflict on the part of Palestinians who were originally residents of the territories and who have Israeli identity cards as a result of the process of family reunification with persons having Israeli citizenship or residency, and who abused their status in Israel for the sake of involvement in terror activity, including aiding the perpetration of suicide attacks’ (*ibid*.).

The law and the security reasons underlying it

16. The residents of the territories who have documents that permit them to stay in Israel have therefore become a target for recruitment by the terror organizations because of their ability to aid in the perpetration of terror attacks in Israel. And indeed, the security forces of Israel have found that the efforts of the terror organizations have borne fruit, and that the involvement of the residents of the territories carrying Israeli identity cards in terror activity has increased. We should further point out that on more than one occasion the terror organizations contacted a resident of the territories *after* he passed all the required checks — including a check of the lack of a security risk — and he received a permit to stay in Israel. In other words, when he received the permit, the resident of the territories had no connection whatsoever with the terror organizations and therefore the security establishment did not find that he presented a security danger, but after receiving the documentation the terror organizations recruited him into their ranks to aid in terror activity.

17. Against the background of this difficult security reality, the government of Israel decided, on 12 May 2002, to determine a general policy with regard to the 'treatment of illegal aliens and the policy of family reunifications with regard to the residents of the Palestinian Authority and foreigners of Palestinian origin' (decision no. 1813). The government set out rules and principles for that new policy, adding that until a new policy was formulated, no residents of the territories would be entitled to documentation that allowed them to stay in Israel, including licences to live in Israel by virtue of the Entry into Israel Law, 5712-1952. In the language of the decision: 'No new applications of residents of the Palestinian Authority to receive a status of resident or any other status will be accepted; an application that has been filed will not be approved, and the foreign spouse will be required to stay outside Israel until the decision is made.'

18. The government's decision and the policy that the decision was intended to put into effect were enshrined in the Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003. This is the law whose constitutionality (after its amendment) is the subject of the case before us. The law restricted, subject to certain exceptions, the right of residents of the territories to receive Israeli documentation that will permit them to stay in Israel, and according to section 2:

> 'Restriction on citizenship and residency in Israel
>
> 2. As long as this law is valid, notwithstanding what is stated in any law including section 7 of the Citizenship Law, the Minister of the Interior shall not grant citizenship under the Citizenship Law to a resident of an area nor shall he give him a licence to reside in Israel under the Entry into Israel Law, and the area commander shall not give a resident as aforesaid a permit to stay in Israel under the security legislation in the area.'

19. As we have explained above, the reasons for this law are security ones, and we are also told this in the explanatory notes to the draft Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003 (*Hatzaot Hok (Draft Laws)*, 5763, at p. 482):

> 'Since the armed conflict broke out between Israel and the Palestinians, which led *inter alia* to dozens of suicide attacks being carried out in Israel, a trend can be seen of an increasing involvement in this conflict on the part of Palestinians who were originally residents of the territories who carry an Israeli identity card as a result of family reunifications with persons with Israeli citizenship or residency, by means of an abuse of their status in Israel that allows them freedom of movement between the areas of the Palestinian Authority and Israel.
>
> Therefore, and in accordance with decision no. 1813 of the government… it is proposed to restrict the possibility of giving residents of the territories citizenship under the Citizenship Law, including by way of family reunifications, and the possibility of giving the aforesaid residents licences to live in Israel under the Entry into Israel Law or permits to stay in Israel under the security legislation in the territories.'

At the same time, on the basis of the assumption that the security reasons that led to the enactment of the law may change as time passes, it was decided that the law would be enacted in the format of a 'temporary provision' for a year, and that at the end of that year, after the ramifications of the temporary provision and the security position were examined, the government would be entitled, with the approval of the Knesset, to extend the validity of the law for an additional period that would not exceed an additional year, and so on. See *Hatzaot Hok (Draft Laws)*, 5763, at p. 483. According to the wording of s. 5 of the law (as it was at the time of its enactment):

‘Validity

5. This law shall remain valid until a year has passed from the date of its publication, but the government may, with the approval of the Knesset, extend its validity in an order, from time to time, for a period that shall not exceed one year each time.’

Extending the validity of the law and reducing its personal application

20. The law was enacted on 6 August 2003, and according to s. 5 it was valid until 5 August 2004. But the government exercised its power in s. 5 of the law, and with the approval of the Knesset it extended the validity of the law three times, for three short periods: once until 5 February 2005, a second time until 31 May 2005 and a third time until 31 August 2005. During this period, there was no change in the professional assessment of the security establishment that the terror organizations were doing their best to recruit to their ranks residents of the territories who held Israeli documentation by virtue of marriage to Israeli citizens. Moreover, it was found that the temporary provisions served the purpose for which it was intended, and that it was an effective tool in reducing terror and preventing security risks to the residents of the state. At the same time, the government considered the remarks that were made by the court within the framework of the hearings in petitions filed against the constitutionality of the law, namely that it should address the violation caused by the law to the rights of Israeli citizens who married residents of the territories, and that it should consider whether it was possible to balance the security purpose and the violation of those rights in a more lenient manner.

21. The government addressed the security considerations, the danger to public security and the violation of the rights of citizens, and after it weighed the conflicting interests against one another, it decided to recommend to the Knesset that it extend the validity of the law, and at the same time amend it in two respects: *one*, by broadening the group that might be entitled to licences to live in Israel, and *two*, by giving the Minister of the Interior discretion to give a permit to stay in Israel to groups that according to the security forces posed a (relatively) smaller potential security risk. This broadening of the exceptions to the law, so the government thought, would give a proper expression to the considerations of proportionality provided in statute and in case law, and it would therefore reduce the violation caused by the law to Israelis citizens without significantly prejudicing the security purpose. In the government’s opinion, the amendment of the law will lead to a reduction of approximately a third of the number of cases to which the law originally applied. We can see the reasons that formed a basis for the amendment and the nature of the amendment from the explanatory notes to the Citizenship and Entry into Israel (Temporary Provision) Law (Amendment) 5765-2005 (*Hatzaot Hok (Draft Laws)* 5765, at p. 624):

> ‘The professional position of the security establishment is that there has been no change in the security reality that was the basis for the enactment of the temporary provision, in so far as concerns the intention of the terror organizations to carry out major attacks, as much as possible, inside the State of Israel, and in so far as concerns the potential for exploiting the aforesaid population in carrying out these attacks, and even now attempts to carry out such attacks are continuing all the time.
>
> It was also found that as the building of the separation fence progressed, members of the Palestinian population that hold an Israeli identity card became a higher priority for the terror organizations as aforesaid.
>
> … The professional assessment of the security establishment is that the temporary provision is an effective tool for reducing the free passage of residents of the territories between the areas controlled by the Authority and Israel, and for preventing the potential for a serious security risk on the part of that population.

> It is therefore proposed that the validity of the temporary provision should be extended for an additional period.
>
> Notwithstanding, in accordance with decision no. 2265 of the government… and in view of the remarks of the High Court of Justice in petitions that were filed with regard to the temporary provision [the petitions that are before us], it is proposed that alongside the extension of its validity, the temporary provision should be amended so that the exceptions to the application of the restrictions therein should be broadened. This broadening of the exceptions should be made with regard to population groups who, according to the assessment of the security authorities, are of a reduced security risk potential, so that the purpose of the temporary measure is achieved, on the one hand, and we ensure that this purpose is achieved in a more proportionate manner, on the other.'

22. The Knesset debated the draft law and finally the draft was formulated into an amendment of the law that was published in *Reshumot* on 1 August 2005. We will not expand upon all the amendments that were made to the law, but we will recall once again that notwithstanding the general prohibition provided in s. 2 of the law, the Minister of the Interior was authorized, at his discretion and subject to the fulfilment of certain conditions, to give approval for residents of the territories to live in Israel. Thus, for example, it was provided, *inter alia*, in s. 3 of the law that notwithstanding the prohibition provided in s. 2 of the law — the prohibition against granting a resident of the territories citizenship or a licence to live in Israel — the Minister of the Interior may, at his discretion, approve an application of a resident of the territories to be given a permit to stay in Israel, if the age of the applicant is over 35 for a man or over 25 for a woman, provided that it is done in order to prevent a separation of spouses who are legally in Israel. This more lenient approach was adopted after the security establishment found that the expected risks from these age groups were (relatively) low. It was also determined (in s. 3A) that in order to prevent the separation of a minor from his custodial parent who is lawfully in Israel, the prohibition in the law shall not apply to a minor of up to 14 years of age, and that with the approval of the Minister of the Interior and the military commander, the stay in Israel of a minor who is a resident of the territories and who is up to 14 years of age will be allowed, here too in order to prevent his separation from his custodial parent. It should be emphasized that the provisions of section 3A of the law only concern minors who are residents of the territories, were not born in Israel and wish to join their custodial parent who lives in Israel. A minor who was born in Israel to a citizen or resident of Israel is entitled to receive the status of his parent, according to the provisions of s. 4A(1) of the Citizenship Law, 5712-1952, and r. 12 of the Entry into Israel Regulations, 5734-1974. It was also provided — in s. 3B of the law — that the military commander may give a permit to stay in Israel (for our purposes, to a resident of the territories who is a parent of a minor) 'for a temporary purpose, provided that the permit to stay for the aforesaid purpose shall be given for a cumulative period that does not exceed six months.' At the same time, in order not to harm the main purpose of the law — the security purpose — it was provided expressly (in s. 3D) that notwithstanding the concessions added to the law, no approval would be given for the stay in Israel of a resident of the territories if the security establishment thinks that he or a member of his family may constitute a security risk to the state. Let us look at the current wording of the law — at the main changes and concessions made in the amendment — against the background of the general prohibition in s. 2 of the law:

‘Restriction on citizenship and residency in Israel

2. As long as this law is valid, notwithstanding what is stated in any law including section 7 of the Citizenship Law, the Minister of the Interior shall not grant citizenship under the Citizenship Law to a resident of an area nor shall he give him a licence to reside in Israel under the Entry into Israel Law, and the area commander shall not give a resident as aforesaid a permit to stay in Israel under the security legislation in the area.

Permit for spouses

3. Notwithstanding the provisions of section 2, the Minister of the Interior may, at his discretion, approve an application of a resident of the area to receive a permit to stay in Israel from the area commander —

(1) with regard to a male resident of an area whose age exceeds 35 years — in order to prevent his separation from his spouse who lives lawfully in Israel;

(2) with regard to a female resident of an area whose age exceeds 25 years — in order to prevent her separation from her spouse who lives lawfully in Israel.

Permit for children

3A. Notwithstanding the provisions of section 2, the Minister of the Interior, at his discretion, may —

(1) give a minor under the age of 14 years, who is a resident of an area, a licence to live in Israel in order to prevent his separation from his custodial parent who lives lawfully in Israel;

(2) approve an application to obtain a permit to live in Israel from the area commander for a minor under the age of 14 years, who is a resident of the area, in order to prevent his separation from his custodial parent who lives lawfully in Israel, provided that such a permit shall not be extended if the minor does not live permanently in Israel.

Additional permits

3B. Notwithstanding the provisions of section 2, the area commander may give a permit to stay in Israel for the following purposes:

(1) medical treatment;

(2) work in Israel;

(3) a temporary purpose, provided that the permit to stay for the aforesaid purpose shall be given for a cumulative period that does not exceed six months.

Special permit

3C. Notwithstanding the provisions of section 2, the Minister of the Interior may grant

citizenship or give a licence to live in Israel to a resident of an area, and the area commander may give a resident of an area a permit to stay in Israel, if they are persuaded that the resident of the area identifies with the State of Israel and its goals and that he or a member of his family made a real contribution to promoting security, the economy or another important interest of the State, or that the granting of citizenship, giving the licence to live in Israel or giving the permit to stay in Israel, as applicable, are a special interest of the State; in this paragraph, 'family member' — spouse, parent, child.

Security impediment

3D. A permit to stay in Israel shall not be given to a resident of an area under section 3, 3A(2), 3B(2) and (3) and 4(2), if the Minister of the Interior or the area commander, as applicable, determines, in accordance with an opinion from the competent security authorities, that the resident of the area or his family member are likely to constitute a security risk to the State of Israel; in this section, 'family member' — spouse, parent, child, brother, sister and their spouses.

The law therefore restricted itself to the residents of the territories aged between 14 and 35 for men and between 14 and 25 for women. The meaning of this is — so the explanatory notes to the draft law state (*ibid*., at p. 625) — that 'adding the proposed qualifications… can restore approximately 28.5% of all the applications for family reunifications to the list of those applications that can be processed…'. The law also restricted (in s. 3A) the harm to the children of Israeli citizens and residents, by making it possible for minors who are residents of the territories to be reunited with the custodial parent who lives in Israel. Nonetheless, the foreign parent, who is a resident of the territories, is neither able nor entitled to receive a status by virtue of his being a parent of a child who lives in Israel. It is also provided, in the spirit of proportionality, that the law will remain valid until the second of Nissan, 5766 (31 March 2006), but the government may, with the approval of the Knesset, extend its validity in an order, for a period that shall not exceed one year each time (s. 5).

The Citizenship and Entry into Israel Law — interim summary

23. This, then, is the law that the Knesset enacted, and its purpose is to restrict the ability of Palestinians who are residents of the territories to come to live inside Israel as long as the armed conflict continues between the State of Israel and the Palestinian Authority and its inhabitants. The law, we should emphasize, does not speak of Israeli citizens and it does not address the rights of Israeli citizens. At the same time, there is no doubt that the law directly affects the rights and status of all citizens of Israel; some citizens whose spouses are residents of the territories cannot live with their Palestinian family members in Israel, whereas all the residents of Israel enjoy, presumably, a reduction in terror.

24. Everyone will agree that the purpose of the law is a security purpose, a purpose of protecting the lives and security of the residents of Israel — all the residents of Israel — against Palestinian terror. The background to the enactment of the law is also clear. An armed struggle is taking place between Israel and the Palestinian entity in which the Palestinian public is playing an active role. Some of the inhabitants of the territories who received permits to stay in Israel by virtue of their marriage to citizens or residents of Israel aided acts

of terror in Israel. The security establishment is of the opinion that they cannot distinguish between an inhabitant of the territories who regards himself as belonging to the terror organizations and his neighbour who does not regard himself as belonging to the terror organizations. The terror organizations are making efforts to recruit persons who have already passed the security checks and have received permits to stay in Israel. An additional investment of resources cannot prevent the security risks to the residents of the state. Therefore, in order to protect the lives and security of the residents of the state, it was decided not to give permits to stay in Israel to anyone who is included in the population groups that past experience has shown to constitute a high risk (relatively speaking) of becoming involved in terror. At the same time, it became possible to give permits to stay in Israel to those groups that are not regarded as dangerous (relatively speaking).

25. The prohibition in the law is a prohibition that is limited in time and by several qualifications, and its purpose is to provide a solution to specific security risks that were revealed within the framework of the armed struggle that the Palestinians are conducting against Israel. The professional assessment of the security establishment with regard to the security risks has not changed, and they have also found that the law is an effective tool for reducing those risks. The government and the Knesset addressed the violation that the law causes to some citizens of the state who wish to live in Israel with their Palestinian family members, but they thought that in the prevailing security reality this violation was a necessity. Nonetheless, the government and the Knesset — at their discretion — acted in order to reduce the violation caused by the law. The government and the Knesset therefore reached a formula that balances, in their opinion, the various considerations in a proportionate manner, and this led to the format of the law.

A synopsis of the arguments of the petitioners and our brief response

26. The following is a synopsis of the petitioners' arguments: the Citizenship and Entry into Israel Law violates the right to marriage and family life of Israeli citizens, men and women, who have married residents of the territories, since it prevents them from having a proper family life in Israel. If this is not enough, the violation of these rights of Israeli citizens is tainted also with inequality, since it mainly concerns Arab Israelis who marry persons from the territories. Both the violation of family life and the violation of equality each amount to a violation of the dignity of Arab Israeli citizens who are married to residents of the territories, and it follows that they are contrary to the value of human dignity in the Basic Law: Human Dignity and Liberty. As to the criteria in the limitations clause, the petitioners' claim is that the violations are not intended for a proper purpose, and in this respect they hint that the security purpose argued by the state was only intended for the purposes of legal argument, whereas the real purpose of the law is the demographic purpose. The petitioners also claim that the violation of their rights is not proportionate — in all aspects of the requirement of proportionality — since it seriously harms thousands of citizens whereas in practice only several dozen cases have been uncovered in which residents of the territories who received Israeli documentation aided terror.

27. We do not accept the petitioners' claims, with regard to the content and scope of the violated right, the purpose of the law and the proportionality of the violation. Our brief and simple response is that as long as an armed conflict — a state of quasi-war — continues between Israel and the Palestinians, as long as Palestinian terror continues to strike Israel and murder Israelis, the state does not have any legal duty (to its citizens) to allow residents of the territories who married citizens of the state to enter and stay in Israel. The residents of the territories are enemy nationals. Their loyalty is to the Palestinian side. There are many ties that bind them to the Palestinian Authority. And in a time of war, they are presumed to be a risk group to Israel and its citizens. We agree, of course, that not all the residents of the territories wish to harm the State of Israel, but the general trend, the prevailing wind, is directed by the leadership, and its philosophy is that the name of Israel should be obliterated from among the nations. If this does not suffice, then in view of the fact that it is not possible to distinguish between those persons who constitute a security risk to the residents of the state

and those who do not, I find it difficult to understand how the state can be rendered liable to take a risk and permit the entry into Israel of the former together with the latter.

Immigration into Israel — in general and as a result of marriage and family reunification

28. Let us first consider the question of the right to marriage and to have a family life in Israel, where we are speaking of a marriage between someone who is an Israeli citizen and someone who is not an Israeli citizen. We shall first address this issue on the level of ordinary legislation and afterwards discuss it on the level of the Basic Laws. We are not speaking of the right to marriage and have a family life between spouses who are both Israeli citizens.

29. The law in Israel is that someone who is not an Israeli citizen or an immigrant under the Law of Return does not have a right to enter Israel or to live here unless he receives a permit from the authorities. As it has been said elsewhere: 'A person who is not an Israeli citizen or an immigrant under the Law of Return does not have a right to enter Israel or a right to stay in it without permission' (HCJ 482/71 *Clark v. Minister of Interior* [111], at p. 117). This is the law concerning an unmarried foreigner and this is the law concerning a foreigner who is married to an Israeli citizen. The starting point for the interpretive voyage is therefore this: that the law of the state does not give the foreign spouse of an Israeli citizen a right to enter Israel, to live in it permanently or to become a citizen of the state by virtue of marriage. It is admittedly true that Israel recognizes – in principle — the right of the individual to marry and to have a family life. It follows from this that the state will permit — in general — the foreign spouses of Israeli citizens to enter and live in Israel, and thus it will enable Israeli citizens to realize their right to marry and to establish a family in Israel. At the same time, notwithstanding the recognition of the right to marry and to family life, the state has refused to grant the individual a constitutional and express right to 'family reunification' in Israel. Moreover, where there is a concern of harm to public interests, which include a concern as to security risks, the entry of the foreign family member into Israel will not be allowed, whatever his family status. We extensively discussed all of this and more in *Stamka v. Minister of Interior* [24], at p. 787:

> 'The State of Israel recognizes the right of the citizen to choose for himself a spouse and to establish with that spouse a family in Israel. Israel is committed to protect the family unit in accordance with international conventions… and although these conventions do not stipulate one policy or another with regard to family unifications, Israel has recognized — and continues to recognize — its duty to provide protection to the family unit also by giving permits for family unifications. Thus Israel has joined the most enlightened nations that recognize — subject to qualifications of national security, public safety and public welfare — the right of family members to live together in the place of their choice.'

We should note and emphasize: the recognition that it is right and proper to give protection to the family unit is subject to 'qualifications of national security, public safety and public welfare.' These qualifications are required by the very nature of the subject under discussion, but since they were stated, we saw fit to mention them. All of this is relevant to the claim concerning the duty of the state not to prevent the individual from establishing and maintaining in Israel a family unit as he chooses.

With regard to the right — or absence of a right — of a foreign spouse to enter and stay in Israel, see also HCJ 754/83 *Rankin v. Minister of Interior* [112], at p. 116; HCJ 4156/01 *Dimitrov v. Minister of Interior* [113], at p. 293; HCJ 2527/03 *Assid v. Minister of Interior* [114], at p. 143; cf. also cases concerning children and parents: HCJ 758/88 *Kendall v. Minister of Interior* [115]; HCJ 1689/94 *Harari v. Minister of Interior* [116]; HCJ 9778/04 *Alwan v. State of Israel* [117]; *Dimitrov v. Minister of Interior* [113], at p. 293.

30. The decision of the legislature not to give a right of entry and residence in Israel, even to the foreign family members of Israeli citizens, was a deliberate choice — a choice made with considered purpose. Thus, for example, we find that in the early days of the state, a

possibility was considered of stating in the law that a foreign national who married an Israeli citizen would become an Israeli by virtue of marriage (s. 6 of the draft Citizenship Law, 5712-1951; *Hatzaot Hok (Draft Laws)* 5712, at p. 22). This proposal was rejected. By contrast, where the legislature wanted to give a foreign national or members of his family a right to immigrate to Israel, the legislature knew how to do so expressly. This is the effect of the Law of Return, 5710-1950, which gives every Jew, as such, and his family members, a right to immigrate to Israel, and in consequence to be given Israeli citizenship. This right that was given to the family members of a Jew who is entitled to immigrate to Israel was not given to the spouses of local residents, whether Jews or non-Jews. Their cases were made subject to the discretion of the Minister of the Interior, and they are subject to the same law as all other foreign nationals. See and cf. *Stamka v. Minister of Interior* [24], at pp. 757-760. The entry and stay in Israel of foreign spouses who married Israeli citizens is therefore subject to the discretion of the Minister of the Interior, according to the policy that he has formulated and subject to statute and the rules of administrative law. See *Kendall v. Minister of Interior* [115]; HCJ 282/88 *Awad v. Prime Minister* [118], at p. 434; HCJ 100/85 *Ben-Israel v. State of Israel* [119], at p. 47; cf. HCJ 740/87 *Bentley v. Minister of Interior* [120], at p. 444. If this is the case with regard to entering and staying in Israel, it is certainly the case that the foreign spouse does not have a right to Israeli citizenship by virtue of marriage. Admittedly, the foreign spouses of Israeli citizens have been accorded a certain degree of leniency in terms of the conditions that allow them to become Israeli citizens — see s. 7 of the Citizenship Law, 5712-1952 — but everyone agrees that the spouses do not have a substantive right to receive citizenship. As stated in *Stamka v. Minister of Interior* [24], at p. 766:

> 'A foreigner who marries an Israeli citizen does not acquire — by virtue of his marriage — a right to become a citizen, and the Minister of the Interior has the power to grant or not to grant the application for citizenship submitted to him by that foreign spouse.'

See also *Rankin v. Minister of Interior* [112], at p. 116; *Dimitrov v. Minister of Interior* [113], at pp. 292-293.

31. Marriage to an Israeli citizen does not, therefore, automatically grant a right to the foreign spouse to be an Israeli citizen. The Minister of the Interior has the power to decide whether to grant the citizenship application of the foreign spouse of an Israeli citizen, and no one will argue that the foreign spouse, as well as the Israeli spouse, has a right that the Minister of the Interior should grant his application. Even the leniency to which the foreign spouse is treated in accordance with s. 7 of the Citizenship Law does not derogate from the power of the Minister of the Interior — from his power and his duty — to consider whether to grant the citizenship application or to refuse it. Moreover, s. 7 of the Citizenship Law also does not restrict the scope of the discretion of the Minister of the Interior, and it has been held in the past that, notwithstanding this provision, the Minister of the Interior is authorized to determine a policy that will make the granting of the foreign spouse's application for citizenship conditional on the fulfilment of some of the conditions provided in s. 5(a) of the law. See HCJ 576/97 *Scharf v. Minister of the Interior* [121].

32. We should also mention in this context that it is a case law rule that a foreigner is not entitled to receive a status in Israel by virtue of his minor child, if he does not request in the same breath to be part of a family unit in Israel with the Israeli spouse. The court held in those cases that, notwithstanding the strength of the connection between parents and their children, a parent does not have a right to 'family reunification' with his child in Israel merely because he is a parent, if he is not a part of a family unit with the Israeli spouse. The following was stated by President Barak in *Dimitrov v. Minister of Interior* [113], at p. 294:

> '… The petitioner does not base his claim for the status of a permanent resident on the bond of marriage. His claim is that he is entitled to this right because of his minor daughter, who is an Israeli citizen. Even though the three-member

family unit has broken up, his relationship with his daughter is a good and warm one, and he wants this relationship not to be harmed. Is this a valid argument?

The respondent's position is that only in exceptional cases, in which there are extraordinary humanitarian circumstances, does the fact that a foreigner is the parent of a minor who is an Israeli citizen justify his being given a status of a permanent resident (see *Harari v. Minister of Interior* [116]). In the respondent's opinion, these special circumstances do not exist in the case before us. Notwithstanding, the respondent is prepared to allow the petitioner, if he so wishes, "generous" visiting visas in order that he may visit his daughter from time to time. Is this consideration lawful? In my opinion, the answer is yes. Already in *Kendall v. Minister of Interior* [115] it was held that "the place of a minor is with his parents. Where they live, there he should live, and not *vice versa*. A minor is dependent on his parents, and parents are not dependent on him" (*ibid*., at p. 518). Therefore, in principle, the citizenship of the daughter is insufficient to grant a status of a permanent resident to her foreign parent, but there may of course be humanitarian cases that will require a departure from this principle. I am satisfied that in the case before us these special circumstances do not exist.'

This case law rule that was made with regard to parents of minors who live in Israel is stricter than the rule made with regard to spouses. Indeed, in both cases the foreign spouse (in the one case) or parent (in the other case) does not have a recognized right to enter Israel by virtue of their family connections in Israel. At the same time, whereas with regard to spouses a policy allowing the foreign spouse, as a rule, to enter Israel has been approved — subject to criminal and security checks — in the case of a foreign parent a policy was adopted that does not allow (subject to exceptional humanitarian cases) the parent to receive any status in Israel. See also *Kendall v. Minister of Interior* [115], at p. 518; HCJFH 8916/02 *Dimitrov v. Minister of Interior* [122]; *Alwan v. State of Israel* [117]; HCJ 6708/04 *Badar v. Minister of Interior* [123]; HCJ 8986/04 *Riash v. Minister of Interior* [124]; HCJ 8030/03 *Samuilov v. Minister of Interior* [125]. With regard to family reunifications between parents and foreign children who are not minors, see *Harari v. Minister of Interior* [116]; HCJ 3403/97 *Ankin v. Minister of Interior* [126].

33. A summary of what has been said up to this point is therefore that the law in Israel does not give the foreign (non-Jewish) spouse of an Israeli citizen, nor a parent of a minor living in Israel, a right to enter Israel, to live in Israel or to be an Israel citizen. The power to permit entry into Israel or residency in Israel, or to grant Israeli citizenship, is held by the state authorities, and these should act in accordance with their power and their discretion, in accordance with the laws of the state and subject to principles and doctrines that prevail in administrative law. The case law of the Supreme Court is one of these. Indeed, on several occasions the court has ordered the state authorities to grant an application that was submitted to it with regard to entering Israel or receiving a permit to live in Israel, but in all these cases no one cast any doubt on the provisions of the law, and the intervention of the court was restricted to the discretion of the competent authority. Against this background, the provisions of the Citizenship and Entry into Israel Law should be understood and analyzed. This law informs us that, notwithstanding powers that were given to the Minister of the Interior, first in the Citizenship Law, with regard to citizenship, and again in the Entry into Israel Law, with regard to entry into Israel and living in it, the minister does not have power to grant residents of the territories citizenship nor does he have power to allow them to live in Israel. The law therefore does not rule out an express legal right that is given to Israeli citizens or their foreign spouses. All it does is to reduce the powers of the Minister of the Interior under the Citizenship Law and under the Entry into Israel Law. The two are not the same. The question that should now be asked is whether the legislature was permitted in this way to reduce the scope of the discretion of the Minister of the Interior? This question, as phrased above, raises us to the level of the Basic Laws, and we will address the Basic Laws below.

Immigration by virtue of marriage and establishing a family — the constitutional right — general

34. The Israeli legislature did not give Israeli citizens a right in statute that their foreign family members may enter Israel, live in it and become Israeli citizens. But have Israeli citizens acquired this right from another source, namely the value of human dignity in the Basic Law: Human Dignity and Liberty? The petitioners' argument, in brief and in general, is that the right of the individual to marriage and family life derives from the value of human dignity in the Basic Law, and in consequence of this the state has a duty to permit the foreign family members of an Israeli citizen to live with him in Israel. Moreover they also claim that the provision of the law concerning 'residents of the territories' is a provision that discriminates against the Arab citizens of the state and it violates equality between the citizens of the state, since only Arab citizens (except in a handful of cases) marry residents of the territories. Since the duty of treating the citizens of the state with equality is also derived from human dignity, it follows that the provision of the law that relates solely to residents of the territories also seriously violates human dignity. This implies that the law, which relates only to 'residents of the territories,' is afflicted by two maladies that seriously violate human dignity: *first*, it violates the right of Israeli citizens to family life, and *second*, it violates equality between Israeli citizens. The conclusion that follows from all of the above is, according to the petitioners' argument, that the law should be declared void because it seriously undermines the Basic Law: Human Dignity and Liberty.

35. The arguments of the petitioners are weighty arguments. They are arguments that come from the depths of the hearts of Arab citizens of the state who married residents of the territories and wish to live with their spouses in Israel. Let us translate these arguments into our language, the language of the law, and the question that presents itself to us in all of its force is this: does the state have a duty under the Basic Law: Human Dignity and Liberty — or, to be more precise, by virtue of the value of human dignity in the Basic Law — to allow the foreign spouses of Israeli citizens, whether Jewish or non-Jewish, to immigrate into Israel, to establish their permanent place of residence in Israel. Note that we are not talking of the limitations clause and the balances required by the conflict between human dignity and interests that conflict with it. We are speaking now of the scope of human dignity in the Basic Law: Human Dignity and Liberty *in principle*. Alternatively, even if we say that the value of human dignity gives an Israeli citizen a right that his foreign spouse can make his permanent home in Israel, an additional question is whether he retains this right even in times of war and armed conflict, or whether this right of the citizen is limited by the power of the state not to allow 'enemy nationals' to enter Israel and live here permanently. Here too, we should emphasize, we are speaking of the scope of the right to dignity *in principle*.

36. This question concerning the scope of human dignity in its aspect of the right to marry and to have a regular family life in Israel can be divided into two sub-questions, that should be asked sequentially: the *first sub-question* is whether the right to marry and to have a regular family life falls within the scope of human dignity within the meaning thereof in the Basic Law: Human Dignity and Liberty. If the answer to this sub-question is no, the matter ends and there is no need to ask the second sub-question. But if the answer to the first sub-question is yes, then we must ask the *second sub-question*, which is whether the concept of human dignity implies not only a right to marry and to have a regular family life but also an inherent right of an Israeli citizen not merely to marry a foreign spouse but in addition to establish the permanent residence of the couple specifically in Israel. In this context, the question also arises as to whether a minor, who is a citizen or a resident and lives in Israel with his Israeli parent, has an inherent right that a status is given in Israel also to his foreign parent. At a later stage, we will also ask whether the value of human dignity gives an Israeli citizen who married a resident of an entity that is at war with Israel a right to live with his Israeli spouse, and similarly whether it gives a minor, who lives in Israel with his Israeli parent, a right to bring to Israel his foreign parent who is a resident of an entity that is at war with Israel. Let us consider these questions separately, in order, but first we should make a

few remarks on the limits of the scope of basic rights — constitutional rights — in Israeli law, including establishing the boundaries of rights that derive from the value of human dignity in the Basic Law: Human Dignity and Liberty.

On determining the scope of basic rights and rights deriving therefrom

37. Determining the scope of application of the basic rights and the relationship between the basic rights *inter se* and between them and other interests that seek to limit them from within or to restrict them from without, by applying the limitations clause, is not an easy task at all. My colleague President Barak argues for extending the scope of the basic rights, since he thinks that the place for restricting those rights is in the limitations clause (see A. Barak, *Legal Interpretation*, vol. 3, *Constitutional Interpretation* (1994), at p. 385). Thereby, of course, my colleague reduces the scope of the power of the legislature. Personally, I am not at all sure that public interests that seek to limit, detract from or violate basic rights should always — or even usually — find their place only in the limitations clause as opposed to the determination of the scope of the basic right in principle.

38. First of all, before we consider the relationship and balance between rights and interests, we ought to be aware that a determination that a certain right is a constitutional right means that it is a right that derives its force and strength from the Basic Law: Human Dignity and Liberty. The concept of a constitutional right tells us that it is a right superior to statute, a right that the legislature — as a legislator — does not have the right and power to violate other than in accordance with an exception that was permitted in the constitution itself, which in Israel should be in the Basic Law itself. For this purpose, there is no need to consider the question whether all the Basic Laws are really a constitution. It is sufficient for our purposes that everyone agrees that the rights in the Basic Law before us, the Basic Law: Human Dignity and Liberty, have been substantially entrenched against the intervention of the Knesset. See *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7]. Thus, when we decide that a certain right has taken on the form of a constitutional right — or of a basic right — it is as if we are saying to the legislature: take care and keep away. This sphere is a constitutional sphere. So when we extend the scope of the basic rights — as my colleague the president wishes to do — we necessarily restrict the scope of the legislature's power and we prevent it, subject to the conditions set out in the limitations clause, from enacting laws that violate the arrangement provided in the constitution in that sphere. Is it right that we should restrict the power of the legislature in this way? In this respect, we should distinguish some rights from others. Indeed, there are rights and values — universal rights and values — by which the power of the legislature should be restricted. Such, for example, are the values of equality and personal liberty. But an excessive expansion of the basic meaning of the rights, and applying constitutional protection to all the derivative rights, means a restriction of the power of the Knesset that was elected to enact laws. Thus, the more we extend the scope of the basic laws, the more we restrict the power of the Knesset to enact laws. Justice Zamir rightly pointed out that:

> 'The Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation were not intended to make the statutes of the Knesset easy prey for anyone who was not pleased by a statute. A statute of the Knesset retains its position of dignity: the statute still reflects the will of the sovereign, which is the people, and therefore the statute is what leads the people, including the court… human dignity should not replace the dignity of statute' (*Local Government Centre v. Knesset* [31], at p. 496).

See also *Hoffnung v. Knesset Speaker* [77], at pp. 67-68, and the disagreements that arose in *Silgado v. State of Israel* [107].

39. Admittedly, in countries where there is a formal constitution the constitutive authority is entitled and authorized to include in the constitution specific arrangements that grant rights that in general we will find it difficult to call 'basic rights.' These constitutional arrangements do not concern universal basic values — values that everyone agrees ought to override an

ordinary statute — and their purpose is to regulate life in the country in a specific manner, according to its special (and changing) needs. The normative status of these constitutional arrangements is the same as that of all other constitutional arrangements: the law of the state will be overridden by them and the power of the legislature will not stand up against them. At the same time — and for this reason that they do not reflect universal basic values — those arrangements may be cancelled or changed when times change and the needs of the state change. We can illustrate our remarks by means of two of the arrangements in the United States constitution: *one* is the constitutional prohibition introduced in 1919 (in the Eighteenth Amendment to the Constitution) against the manufacture, sale, or transportation of intoxicating liquors within the territory of the United States (known as 'Prohibition'). It is doubtful whether this prohibition reflected universal basic values; it was perhaps correct and desirable in its time, but when the need ceased, the prohibition was also repealed (in 1933, in the Twenty-First Amendment to the Constitution). The *other* arrangement is found in the constitutional right of the individual to bear arms (the Second Amendment to the Constitution in 1791). This arrangement has its origin in years past, when the young state required an armed militia to ensure its independence. This constitutional arrangement is a specific and unique arrangement, and it is doubtful whether there is a similar arrangement in the constitutions of other countries of the world. On the contrary, most countries — including Israel — actually forbid their citizens to bear arms. See and cf. *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 516.

Until now we have spoken of formal constitutions and countries where they have established formal constitutions. Now we turn to countries — such as Israel — where there is no formal and detailed constitution. In such countries, the basic rights of the individual are derived from the basic values themselves, and naturally they are restricted to basic values and do not extend to specific arrangements that are not universal, but might find their way into formal constitutions. In other words, where there is no formal constitution, the court, which is the competent organ for reviewing the constitutionality of statutes, has only the basic values themselves to rely upon, and it does not have power to 'establish' specific arrangements, i.e., to give arrangements that do not reflect universal basic rights a normative status of a constitution. In Israel, we have not had the fortune to have a constitutive authority establish for us constitutional arrangements, and although some basic rights have been given a special normative status in the Basic Laws, it is doubtful whether we are competent to derive from those rights — and in our case, from the right to human dignity — specific rights that will also enjoy the normative protection of the Basic Laws. The court does not have the power to give a normative status of a basic right — a right that enjoys the normative protection of a Basic Law — to specific rights which by their very nature do not have a normative status of a 'constitution,' unless the constitutive authority in the state included them expressly in the constitution of the state.

40. We are now concerned with the interpretation of the concept of human dignity in the Basic Law: Human Dignity and Liberty — with the interpretation of the concept and determining its scope of application. The constitution of the state — for our current purposes, human dignity in the Basic Law: Human Dignity and Liberty — constitutes a fundamental norm for coexistence in Israel of its citizens and residents. A necessary conclusion is that in determining the scope of a basic right, we must survey our environment panoramically, and when determining the boundaries of a basic right it is our obligation to take note not merely of the individual who has rights but, at least, of his close environment and the social and other ramifications that are implied by giving the right a greater or lesser scope. Indeed, a basic right — every basic right — does not exist in a vacuum. The basic rights exist within a human society, among human beings, and are supposed to express the recognition of human dignity, the autonomy of free will, the freedom of a person to shape his life as he wishes in the society in which he lives. Man is a social creature, and his existence, development and advancement are all dependent on the existence of a human society in which there is a minimum of order, security and safety. A basic right affects its surroundings and is affected by its surroundings.

Determining the scope of its application is a function of its internal strength and those wide-ranging influences. It would not be right, in my opinion, to channel the question of those influences merely into the limitations clause and the issue of the violation of the basic right. There are strong forces that are capable of affecting the determination of the boundaries of the basic right in principle, and every interest ought to find its proper place.

41. Stretching basic rights in every direction — up, down and to the sides — while referring the interests that are capable of affecting their boundaries to the limitations clause is likely to have a detrimental effect on constitutional debate, and this is likely to lead eventually to a reduction in the constitutional protection of human rights. But we seek to create a balanced and proper constitutional process that is intended to prevent contempt for the constitutional debate. This was discussed by Justice Zamir in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at pp. 470-471, when he considered the question of the scope of property rights:

> '… I want to be very careful not to make rigid determinations on the question of what is property and what is a violation of property. Does the Basic Law give protection against any new law that adversely affects, even indirectly, the value of the property or pecuniary income? For example, does the protection of property extend also to restrictions that the law imposes on employment contracts, such as a provision concerning a minimum wage, or to requirements in property relations between spouses, such as a provision concerning a liability for maintenance? If everything that adversely affects the value of a person's property, including any kind of pecuniary liability, is a violation of property rights, it will be found that the laws that violate property rights are innumerable; the court may founder in its efforts to examine the constitutionality of every such law, in case, *inter alia*, it violates property rights excessively; and the legislature will find it difficult to carry out its role properly. The more the scope of property rights as a constitutional right is widened, so it is to be feared that the strength of the protection of those rights will be weakened. Of such a case it may be said: the higher you aim, the lower you fall.'

See also the remarks made by Prof. Hogg, as cited by President Shamgar in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 330 (the emphases were supplied by President Shamgar):

> 'The reason that generosity should give way, rather than the stringent standard of justification, concerns the policy-making role of the courts. If the scope of the guaranteed right is wide, and the standard of justification is relaxed, then a large number of *Charter* challenges will come before the courts and will fall to be determined under section 1. Since section 1 requires that the policy of the legislation be balanced against the policy of the *Charter*, and since it is difficult to devise meaningful standards to constrain the balancing process, judicial review will become even more *pervasive*, even more *policy-laden*, and even more *unpredictable* than it is now. While *some judges will welcome such extensive powers*, most judges will be concerned to stem the wasteful floods of litigation, to limit the occasions when they have to review the policy choices of legislative bodies, and to introduce meaningful rules to the process of *Charter* review. These purposes can be accomplished only by restricting the scope of *Charter* rights' (P.W. Hogg, 'Interpreting the Charter of Rights: Generosity and Justification,' 28 *Osgoode Hall L.J.* (1990) 817, at pp. 819-820).

42. The public interest — that interest that seeks to restrict or violate a basic right — is in fact a collection of interests, which are different in their nature and different in their strength,

and it is not right and proper that we should speak of *the* public interest as if we are speaking of one composite interest. We must closely examine and inspect each strand of those interests that together make up the general public interest, and we should treat it according to its measure. See and cf. CFH 7325/95 *Yediot Aharonot Ltd v. Kraus* [127], at p. 78.

Interspersing the strands of the collective public interest — according to the strength of the relevant strand — between the task of determining the boundaries of a basic right and the limitations clause is consistent with the principle of the separation of powers and the decentralization of power, since it is capable of leading to a more comprehensive and careful scrutiny of legislation. We should recall the remarks uttered by this court only recently in *Gaza Coast Local Council v. Knesset* [6], at p. 553:

> '… When declaring a statute void because of unconstitutionality, we are concerned with the voidance of legislation enacted by a body that was elected by the people. This results in the approach that a clear and substantial violation of a constitutional human right is required in order for a statute to be unconstitutional (see *Hoffnung v. Knesset Speaker* [77], at p. 68); this leads to the approach that a "permanent" law is not the same as a "temporary" law when scrutinizing the constitutionality of the law (see *Klal Insurance Co. Ltd v. Minister of Finance* [64], at p. 486; *Local Government Centre v. Knesset* [31], at p. 494; HCJ 24/01 *Ressler v. Knesset* [128]). Indeed, with regard to the constitutional scrutiny "… the less, the better".'

43. It follows that when we are about to scrutinize the scope of the application of a basic right, we are obliged to cast a glance from side to side, above and below. Concentrating our gaze on the individual tree, while ignoring the forest around it, is tantamount to ignoring reality. By protecting the individual tree we may harm the forest, and thus we unintentionally harm the tree itself, since the tree exists only within the limits of the forest. We should emphasize that this scrutiny should be made — if only in part — at the source of the right, when the basic right comes into existence and is shaped. The reason for this is that extending the right *ab initio* into remote areas — areas for which it may not be intended — will inevitably lead to its restriction at the stage of the limitations clause. This process, as we have said, may lead to contempt for the constitutional debate.

44. In the process of shaping and moulding a basic right, when establishing its boundaries and determining the scope of its application, we must distinguish between the nucleus of the right and the area close to the nucleus, on the one hand, and other parts that are more remote from the nucleus, on the other; between ripples of water that are close to the place where the stone struck the water and ripples of water that are further away and become weaker as they go (see and cf. Y. Karp, 'Several Questions on Human Dignity under the Basic Law: Human Dignity and Liberty,' *supra*, at p. 136); between the right's centre of gravity and areas that are remoter from the centre of gravity. The closer we find ourselves to the nucleus, the centre of gravity, or to the area close by it, so the strength of the protected values will be greater, and the further we move away from the nucleus, from the centre of gravity, so the strength of the right will be weaker, and the strength of other interests that also compete in the arena of the law — public interests and interests of other individuals — will become (relatively) stronger. When we realize this, we will also realize that the protection afforded to the centre, to the nucleus, is not the same as the protection afforded to the areas that are remoter from the nucleus. And sometimes the area being scrutinized is so remote — remote nor merely in physical terms but remote in that it is subject to the influence of other considerations and interests — that it is possible that we will reach the conclusion that those areas do not fall within the gravitational pull of the right at all.

45. Thus, both in general and also when examining the scope of the application of human dignity, we ought to scrutinize the nature of the protected values carefully to see whether they are central values or marginal ones.

The right to marriage and to have a family life as a constitutional right

46. We all agree — how could we do otherwise? — that a person, any person, has a right to marry and to have a family life. The covenant between a man and a woman, family life, was created before the state existed and before rights and obligations came into the world. First came the creation of man, and man means both men and women. 'And God created man in His image, in the image of God He created him, male and female He created them' (Genesis 1, 27 [245]). Thus Adam and Eve were created. A man needs a woman and a woman needs a man; 'Wherefore a man shall leave his father and his mother and cling to his wife, and they shall be one flesh' (Genesis 2, 24 [245]). Thus a covenant is made between a man and a woman, and when children are born the extended family comes into existence. In the course of all this, love develops. Thus, in so far as the family is concerned, the state found it ready made and extended its protection to what nature had dictated to us. Society and the state sanctified the covenant of the man and the woman in marriage, and thus the right to marriage and to have a family life came into existence. Philosophers and thinkers may say what they wish; in the final analysis — or to be precise, in the initial analysis — the existence of the family comes from God above, from nature, from man's genetic makeup, from the very existence of life. Such is the relationship between a man and a woman and such is the relationship between parents and their children. And as we have said elsewhere (CFH 7015/94 *Attorney-General v. A* [23], at p. 102):

> 'It is the law of nature that a mother and father naturally have custody of their child, raise him, love him and provide for his needs until he grows up and becomes a man. This is the instinct for existence and survival inside us… "the blood ties," the primeval yearning of a mother for her child — and it is shared by man, beast and fowl. … This tie is stronger than any other, and it goes beyond society, religion and state. The conditions of place and time — they and the persons involved — will determine the timing of the separation of children from their parents, but the starting position remains as it was. The law of the state did not create the rights of parents vis-à-vis their children and vis-à-vis the whole world. The law of the state found this ready made; it proposes to protect an innate instinct within us, and it turns an "interest" of parents into a "right" under the law — the rights of parents to have custody of their children.'

It is important to make these remarks, since they may act as our guide in determining the boundaries of human dignity.

47. The right to marry and to have a family life, including the right of a minor to be with his parents, is the basis for the existence of society. The family unit is the basic unit of human society, and society and the state are built on it. It is not surprising, therefore, that the right to a family life has been recognized in the international community as a basic right. This is also the law in Israel. See and cf. *Stamka v. Minister of Interior* [24], at p. 787; A. Rubinstein, 'The Right to Marriage,' 3 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1973) 433; see also art. 16(1) of the Universal Declaration of Human Rights, 1948; art. 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art. 2.23 of the International Covenant on Civil and Political Rights, 1966. Even though this right, the right to marry and to have a family life, has not been expressly included among the basic rights that have been expressly recognized in the Basic Laws, we will all agree — agree and declare — that it is derived from the highest right of all, from human dignity. The right to marry and to have a family life implies, from the context, 'the right of an Israeli citizen to live with the members of his family in Israel, and the duty of the state to the citizen to allow him to realize his right to live with the members of his family in Israel' (*Stamka v. Minister of Interior* [24], *ibid*.). This is the position with regard to the right to marry and the fundamental right of the Israeli citizen to live with his family in Israel.

Immigration by virtue of the right to marry and to family life as a constitutional right

48. Now we turn to the second sub-question, which derives from the first sub-question. Does the basic right of an Israeli citizen to have a normal family life in Israel — a basic right

derived from human dignity — concern only Israeli citizens and permanent Israeli residents, *inter se*, or perhaps we should say that it extends also to a spouse who is a foreign citizen or resident and who has married an Israeli citizen and wishes to immigrate into Israel and live with him on a permanent basis? An Israeli citizen enters into a bond of marriage with a spouse who is not an Israeli citizen or resident. Does the Israeli citizen have a right in the Basic Law that the foreign spouse should be given the right to immigrate into Israel and to live here on a permanent basis? An additional question in this respect is whether the right to dignity of a minor who is living in Israel extends also to his foreign parent who wishes to immigrate to Israel to be with him? And since the right of a citizen — a right in a Basic Law — implies a duty of the state towards him, we must ask whether the human dignity of an Israeli citizen *obliges* the state, as a constitutional obligation, to allow the foreign spouse to immigrate into Israel, and whether the human dignity of a minor who lives in Israel obliges the state to allow his foreign parent to immigrate into Israel? We must ask these questions in general, and also in particular — as in our case — when the foreign spouse or parent is a resident of an entity that is involved in an armed conflict with the State of Israel.

49. My colleague President Barak is of the opinion that the right to have a family life in Israel is a constitutional right of the Israeli citizen even if the spouse is a foreigner. In his words (in para. 34 of his opinion):

> '… the constitutional right to establish a family unit means the right to establish the family unit in Israel. Indeed, the Israeli spouse has a constitutional right, which is derived from human dignity, to live with his foreign spouse in Israel and to raise his children in Israel. The constitutional right of a spouse to realize his family unit is, first and foremost, his right to do so in his own country. The right of an Israeli to family life means his right to realize it in Israel.'

I find this normative determination problematic. I understand my colleague's thinking in his desire to apply the value of human dignity to its derivatives — in our case, to the right of the Israeli citizen to have his family life in Israel even if his spouse is a foreigner — as extensively as possible, and to restrict the rights only by means of the limitations clause. But it seems to me that when we scrutinize the whole picture, we must address both sides of the coin. We are obliged to examine not only the rights of the individual — the citizen of the state — vis-à-vis the state, i.e., the duties of the state vis-à-vis the individual. We are obliged, at the same time, to examine the duties of the state to all of its individuals, or if your prefer, we are obliged to examine closely what obligation the recognition of the right of the individual citizen places on all the residents and citizens of the state, on the *other individuals* for whom the state is a framework for living together. This all-embracing examination will show, in my opinion, that a broad application of the basic right as my colleague proposes may seriously harm other individuals to such an extent that it is doubtful whether it is right and proper to impose on the state an obligation on the level of a basic right. If this is the case with regard to an individual citizen, it is certainly the case with regard to the impending immigration of tens of thousands of foreigners — in our case, tens of thousands of enemy nationals — who married Israeli citizens while Israel has been engaged in an armed struggle against that enemy.

50. The premise is — we discussed this in our remarks above — that a state, any state, is not obliged to allow foreigners to enter it, and certainly it is not liable to allow foreigners to become permanent or temporary residents in it. We derive this from the supreme principle of the sovereignty of the state, a principle from which we derive the right of the state to determine who may enter it and who may become its citizens or receive a right to live in it. This has also been held on several occasions in Israel. 'A state, any state, is authorized and entitled to determine which foreigners may enter it and which foreigners may stay in it' (HCJ 4370/01 *Lipka v. Minister of Interior* [129], at p. 930); 'in principle, the state does not owe any duty whatsoever to foreigners who wish to become residents in its territory' (*Conterm Ltd v. Minister of Finance* [85], at p. 381 {120}); 'this gives expression to the principle — which is accepted in modern democratic countries — that the state has broad discretion to prevent

foreigners from taking up residence in it. The foreigner does not have a right to come to Israel either as a tourist or as a resident' (*Dimitrov v. Minister of Interior* [113], at p. 293). Cf. also *Kendall v. Minister of Interior* [115], at p. 520; HCJ 1031/93 *Pesaro (Goldstein) v. Minister of Interior* [130], at p. 705. See also *Clark v. Minister of Interior* [111], at p. 117 (*per* Justice Berinson):

> 'As a rule, every country reserves for itself the right to prevent foreign persons from entering it or to remove them from its territory when they are no longer wanted, for one reason or another, and even without any reason…'

Incidentally, in *Clark v. Minister of Interior* [111] Justice Berinson reviewed the decisions of the courts in England and the United States, and he cited a judgment of the Supreme Court of the United States in *Knauff v. Shaughnessy* [203], in which a decision of the immigration authorities not to allow a foreign woman who married a soldier during the period of his service in the Second World War to enter the United States was upheld.

51. This principle is a basic principle in the law of the countries of the world. Every state has the natural right — a right deriving from the sovereignty of the state over its territory — to determine who will be its citizens and who will be entitled to enter it. See, for example, *Halsbury's Laws of England*, vol. 18 (fourth edition, 1977), at para. 1726:

> 'In customary international law a state is free to refuse the admission of aliens to its territory, or to annex whatever conditions it pleases to their entry.'

See also the judgment of the European Court of Human Rights in *Abdulaziz Cabales and Balkandali v. U.K.* [235]:

> 'As a matter of well established international law and subject to its treaty obligations a state has the right to control the entry of non-nationals into its territory.'

In this spirit, the countries of the world, including Israel, have adopted a rule that it is the natural right of every sovereign nation to determine the identity of the persons who may enter it and become its residents. This is what was held by the Supreme Court of the United States, as long ago as 1892, in *Ekiu v. United States* [204], at p. 659:

> 'It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.'

Indeed, even today no foreign citizen has a right — and certainly not a constitutional right — to enter and stay in the United States, even if he is a family member of a United States citizen:

> 'An alien has no constitutional right to enter, or to stay in, the United States' (3B *American Jurisprudence 2d*, Aliens and Citizens, § 2291).

See also, for example, *Knauff v. Shaughnessy* [203], *Fiallo v. Bell* [190]; *Landon v. Plasencia* [205].

This has also been held by the Court of Appeal in England, when it ruled that a foreigner may not enter the country except in accordance with the laws of the country. In the words of Lord Denning in *R. v. Governor of Pentonville Prison* [225], at p. 747:

> '… no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason…'

52. A foreigner, therefore, is not entitled to enter the state, and certainly not to immigrate to it, unless it is in accordance with the laws of the state, and many countries of the world have indeed enacted strict immigration laws that place before someone who wishes to immigrate conditions and restrictions that are based on the needs of the state and its policy from time to time. Thus, for example, we find arrangements that distinguish between candidates for immigration on the basis of economic position, profession, age, family status, state of health, biography, etc.. Ethnic origin, nationality and country of origin have also been

used to distinguish between candidates for immigration, and it has also been found that many countries even stipulate a quota that restricts the number of persons immigrating to it. The arrangements are unique to each country, and they change from time to time in accordance with the spirit of the times and the needs of the state. With regard to the position in the United States, see, for example, 3A Am. Jur. 2d, Aliens and Citizens, §1:

> 'The history of the immigration laws of the United States is one of evolution from no restrictions to extremely narrow qualitative restrictions, to additional qualitative restrictions, and later to more extensive qualitative restrictions, including ethnic ones, and eventually to quantitative restrictions.'

For changes that have occurred over the years in the attitude of European countries to immigration in general, and to immigration for reasons of marriage in particular, see, for example: S. Castles et al., *Migration and Integration as Challenges to European Society*, Assessment of Research Reports Carried Out for European Commission Targeted Socio-Economic Research (TSER) Programme (Oxford, 2003); *Family Reunification Evaluation Project* (Final Report, The European Commission: Targeted Socio-Economic Research, Brussels, 2004), at pp. 21–22. These articles are also mentioned in the article of Prof. Amnon Rubinstein and Liav Orgad, 'Human Rights, National Security and the Jewish Majority — the Case of Immigration for the Purpose of Marriage,' 48 *HaPraklit* (2006) 315, at pp. 330 (note 54), 341 (note 108).

53. So we see that a state may impose restrictions on immigration into it in accordance with the immigration policy that it deems fit and appropriate for its needs, without taking into account the concerns and wishes of the foreign nationals who wish to immigrate to it. All of this is the case with regard to the foreign relations of the state, vis-à-vis other countries and vis-à-vis persons who are not its citizens or residents. But what about the relations of the state vis-à-vis its own citizens and residents? Does the state also have the power to restrict the entry of foreigners into the state in its internal relations, even if the foreigners concerned are family members of citizens and residents? The answer to the question is yes. The rule of state prerogative is valid with regard to the immigration of foreign citizens or residents, even if they are family members of its citizens or residents. A state is entitled to refuse to allow the foreign family members of its citizens to enter the state, and certainly to refuse to allow them to immigrate to it, and a citizen of the state is not entitled to demand that the state permits his foreign family members to immigrate into the state other than in accordance with the laws of the state. Indeed, although international law recognizes the right of the individual to marriage and family life, it does not recognize the right of the individual to realize this right specifically in his country of citizenship. In other words, the right of the individual to marriage and to family life does not necessarily imply a constitutional right to 'family reunifications' in the state. The prevailing legal position in this sphere was recently considered by Rubinstein and Orgad, 'Human Rights, National Security and the Jewish Majority — the Case of Immigration for the Purpose of Marriage,' *supra*, at p. 340. In their words:

> 'The rules of international law also do not give rise to a right to immigrate for the purposes of marriage. International law admittedly recognizes the importance of the right to establish a family, as well as the importance of the right of a family not to separated by deportation, but *there is no express and concrete right in international law that creates a positive duty that a state should allow immigration into its territory for the purpose of marriage, even in times of peace*' (emphasis in the original).

A similar conclusion was reached by the Supreme Court in *Shahin v. IDF Commander in Judaea and Samaria* [103], which considered a similar case to ours. Cf. Y. Dinstein, 'Family Reunifications in the Occupied Territories,' 13 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (1989) 221, at p. 223. See also, for example, the research published by the European Union in 2004 with regard to the legal arrangements prevailing in the European Union until

the year 2004: *Family Reunification Evaluation Project* (Final Report, The European Commission: Targeted Socio-Economic Research, Brussels, 2004), at p. 22:

> 'Although international documents endorse family rights, none of the declarations establishes an explicit right to family reunification. Likewise, although the Convention on the Rights of the Child demands that applications by a child or parents to enter or leave the State for the purpose of family reunification be handled in a "positive, humane and expeditious manner… there is no specification that the provision provides the basis for legal claims to family reunification … The second area of international law, which may be conflictual with the principle of universal family reunification, refers to the precedence of State sovereignty.'

Incidentally, following the rule in international law, the European Union enacted a directive in 2004, in which some of the states of the Union took upon themselves the obligation to enact internal — qualified — arrangements according to which the foreign spouses of residents would be allowed to immigrate into the state. Before the directive existed, the spouses had no such right other than under the internal law of each individual state.

54. A state is made up of its residents. The residents of the state are the persons who shape the image of the society, and the 'state' serves as a framework for the society and its residents. The entry of a foreign national into the state as a permanent resident thereof means a change of the *status quo ante* in the relationship of the citizens and residents *inter se*. Accepting a resident or a new citizen into Israeli society makes his status equal to that of the residents and citizens of the state, and in this way the image of the society and the state changes. Where we are speaking of an individual resident or citizen, the change is infinitesimal. But this is not the case with a massive incursion of foreign residents and citizens whose joint influence on the state may significantly change its image. Giving an individual a right to bring with him to Israel a foreign spouse is therefore capable of changing the image of society, and the question that arises is whether it is right and proper that we should entrust to each and every citizen and resident of the state a constitutional key that makes the doors of the state wide open to foreigners. The basic rights of the individual are, mainly, rights vis-à-vis the state; if we recognize a constitutional right of a citizen, of every citizen, to bring to Israel, as he wishes, a foreign spouse or parent, we will find that the recognition of the innate right of a citizen to have a family life with foreigners in Israel does not merely determine the right of the Israeli citizen. In the very same breath, it limits and restricts the rights of other citizens whose opinion has not been heard. In this regard I say that it would appear that the human dignity of Israeli citizens — of *all* Israeli citizens — demands that each citizen is not given a free hand, on the level of a constitutional right, to change the social *status quo ante* by bringing foreigners to Israel, even as spouses. The 'state' is the authorized spokesperson of Israeli citizens and residents, and it would appear that even a state would not be prepared to open up its borders by entrusting to every citizen the key that opens the gates of the state, even for the immigration of a spouse or parent into the state. The power to determine who will be the citizens and residents of the state is entrusted to the laws of the state, and it is the state that will decide who will be entitled to immigrate into it.

55. Moreover, the state has a duty to maintain a balanced immigration policy, a policy that befits the needs of the state and its basic values. The state may not discharge this duty by transferring to its citizens the power to determine who will immigrate into it. Someone who wishes to immigrate into the state must apply to the organs of the state and not to one of its citizens, and it is the organs of the state who will decide the application. Recognizing that the state has a constitutional obligation to allow the entry of foreign family members can only mean a transfer of sovereignty to each and every individual citizen, and this inevitably harms the ability of the state to formulate its policy and respect its heritage. In other words, giving an automatic right of immigration to anyone who marries one of the citizens or residents of the state means that every citizen holds the right to allow immigration into the state, without

the supervision of the state, and it is clear that no government in the world will allow not only the functioning but even the sovereignty of the state itself to be harmed in this way. See, for example, A. John, *Family Reunification for Migrants and Refugees: a Forgotten Human Right?* (2004), at p. 10:

> 'No Government wished to find itself shackled to a precise and enforceable standard of family reunification rights that would impede on the State's sovereign right to control who entered and settled on its territory.'

It is not surprising that the author of this research reaches the conclusion that, notwithstanding all the rights in the law, including the right to family life, the countries of the world have consistently refused to recognize the existence of a right to family reunifications on the grounds of marriage, since this right violates the sovereignty of the state and its power to determine who will immigrate into it (*ibid*., at p. 6):

> '… in all the international instruments adopted, States have opposed any recognition of a right to family reunification that might be considered to substantially curb States' sovereign right to control who may enter or settle in its territory.'

56. Indeed, a state — any state — will not agree to give its individuals, or any one of them, a basic right to change the *status quo ante* in the society and the state. Even states that recognize an express constitutional right to marriage and to family life will find it difficult to permit free immigration by virtue of this right, and indeed it has been found that many of these states '… repudiate the principle that marriage itself (or its breakdown) results in an automatic change in the citizenship of the spouses' (*Rankin v. Minister of Interior* [112], at p. 116). Moreover, even when they grant a right of immigration for family reasons, the countries of the world have tended to restrict this right by imposing restrictions on the realization of the right. Every state has its own arrangement: an arrangement that suits its basic values, the immigration policy it determined and its economic and political needs, and no one arrangement is identical to another. At the same time, there are general lines of similarity between the arrangements. Thus, for example, it has been found that many states impose age restrictions on immigration for reasons of marriage, and they allow the foreign spouse to immigrate into the state only if one or both of the spouses have reached a minimum age. When there are no means of subsistence — sometimes for a lengthy period — the immigration of the foreign spouse into the state will not be allowed. Some states require the foreign spouse to have various ties with the state absorbing them. Receiving citizenship in the state absorbing them usually requires a lengthy stay in the absorbing state, requirements of knowing the language of the absorbing state, being familiar with its culture and heritage and taking an oath of allegiance to the state. Not infrequently the foreign spouse is also required to waive his original citizenship as a condition for receiving his new citizenship. For a comprehensive survey of the requirements imposed in the countries of the world, see: Rubinstein and Orgad, 'Human Rights, National Security and the Jewish Majority — the Case of Immigration for the Purpose of Marriage,' *supra*. Thus, for example, Rubinstein and Orgad tell us at the beginning of chapter 3 of their work (at p. 328):

> 'In recent years, the trend in European countries is to make the conditions for immigration on the basis of marriage stricter. In a significant number of countries, laws have been enacted in recent years to restrict the possibility of immigrating for the purpose of marriage. Thus, for example, the economic conditions required of the spouses who wish to immigrate for the purposes of marriage have been made stricter, basic cultural requirements (such as learning a language) that the immigrating spouse must satisfy before he immigrates have been introduced, restrictions on the age for immigration have been imposed, ties have been required with the state to which the spouses wish to immigrate and the burden for proving the genuine nature of the marriage has been made stricter.

The European Court of Human Rights has usually given its approval to the stringent legislation that has come before it.'

Indeed, it may be argued that all these restrictions should be examined within the framework of applying the limitations clause, but we say that this subject-matter is extremely sensitive, and in the case of a fundamental public interest, such as the interest that underlies the issue before us, we ought to allow the public interest to have its say at the outset, when determining the scope of the basic right. This is the panoramic view to which we refer, a view that allows us to see the individual and the society in which he lives as integral parts of one whole.

57. In summary let us therefore say this: the countries of the world do not recognize in general the existence of an absolute right, a basic right that the citizen has to have a foreign spouse immigrate into the state. The right of the spouse to enter the state is a right that may be given by virtue of laws determined on the basis of the needs of the state; the laws of the state may restrict the right and even deny it entirely, and where there is no right the entry of the foreign spouse into the state, and certainly his immigration to it, will not be allowed.

The struggle and the balance

58. Against the background of all the rights and interests that compete against one another, this is a struggle of giants. On one side there is the right of the state not to allow foreigners to enter its territory, and on the other side is the right of the citizen — a basic right, a constitutional right derived from human dignity — to live together with his family members in Israel. The question that arises is what is the law where an Israeli citizen wishes to have a family life in Israel with his foreign spouse or parent — a spouse or parent who is neither a citizen nor a resident of Israel? Does the basic right to have a family life in Israel also apply to a couple where one of them is a foreigner, or perhaps we should say that the basic right applies only to a couple where both of them are Israeli citizens or residents? Does the basic right to family life in Israel apply also to minors who live in Israel with the Israeli parent and wish that the foreign parent should also be given a status? Note than the question being asked here merely concerns the scope of the basic right of human dignity. Thus, even if we determine that human dignity does not imply a basic right of the citizen to have a family life in Israel with a foreigner, our consideration of the citizen's rights will not have ended, since it is possible that the citizen has an ordinary right that is not a basic right.

59. In our case, the question before us now is whether the Citizenship and Entry into Israel Law violates a constitutional basic right of Israeli citizens. My colleague President Barak holds that the value of human dignity, as expressed in the Basic Law: Human Dignity and Liberty, gives rise to a constitutional right to have a family life in Israel, even where one of the spouses is a foreigner, even where a foreign parent wishes to receive a status by virtue of his child (which, as aforesaid, is completely contrary to the case law rule that prevailed hitherto), and that the provisions of the law violate this constitutional right. But there may be persons who claim that this scrutiny of the right to have a family life in Israel — a scrutiny that focuses solely on an Israeli citizen and his family life in Israel — is not complete. This is because, in order to examine the scope of the right of an Israeli citizen to have a family life in Israel with a foreigner, we must examine closely the following two values and weigh the one against the other: *one* value is the strength of the right to have a family life in Israel as derived from the values which the right seeks to express in the law. There are many sides to the right to family life, and as we have said in our remarks above, the protection of the nucleus of the right is different from the protection of the periphery of the right. The *other* value is that we must examine whether recognition of a constitutional right as proposed violates other values or interests; and if it violates other values or interests, is the strength of those values or interests on the level of a basic right — a strength that is capable of defining boundaries for the basic right — or should they be located only in the second stage of the scrutiny, when examining the conditions of the limitations clause?

60. I placed all the values and considerations into one pot, and my conclusion is that the value of human dignity — in principle — does not give an Israeli citizen a constitutional right to bring a foreign spouse into Israel. This conclusion is implied equally by an examination of the strength of the right to have a family life, by the conflicting values and interests and by the conflict between the aforesaid right with the aforesaid values and interests.

61. With regard to the strength of the constitutional right to have a family life, I do not nor shall I deny the constitutional right of an Israeli citizen to have a family life. This right, as we have noted, is required by nature, and it is right and proper for the law to encompass the natural instinct in man and protect it in statute. In the words of the Roman poet Horace (Quintus Horatius Flaccus, *Epistles* 1, 10: *naturam expelles furca, tamen usque recurret* ('you expel nature with a pitchfork, but it always comes back'). But the strength of this constitutional right, which is derived from the value of human dignity, becomes weaker the further we distance ourselves from the nucleus and approach the periphery. We are not concerned now with the nucleus, with the right of a person to marry. We are not concerned with the essence, with the right of a person to establish a family and to live together with that family. We are concerned with an *addition* to all of these, with the question of the right of an Israeli citizen to bring with him to Israel a foreign spouse, and by so doing to change the *status quo ante* of Israeli society. This right, no matter how much it may be a desirable right, is not necessarily a part of the nucleus and we may not necessarily recognize it as a constitutional right.

62. But the values and interests that conflict with the argument concerning the constitutional right of the citizen to bring a foreign spouse to live in Israel are fundamental. The conflicting values and interests are found in the prerogative of the state to decide from time to time the immigration policy that it deems appropriate, a policy that can shape the image of the state and the image of the society in it. This prerogative of the state has a constitutional status, and it therefore is capable of affecting the scope of the right to have a family life. This prerogative of the state is not required — nor should it be required — to bow its head and enter the constitutional debate within the framework of the limitations clause. Its place is on the first page of the constitution, when the values and the basic rights of the individual are being shaped. The strength of this interest in our case is so strong that it can affect the scope of application of the right to have a family life. In other words, the strong and decisive interest of the state in protecting the identity of society in Israel is capable of overriding — and, it should be emphasized, on the constitutional level, as opposed to the legislative level — the strength of the right to family life in so far as the immigration of a foreign spouse into Israel is concerned. The state, it should be recalled, is merely a collection of individuals and groups that live together, and the meaning of this for our purposes is that the state's prerogative constitutes an expression of the protection that the citizens of Israel need. A constitution is created, first and foremost, for the people of the land and to regulate life for the residents and citizens of the land *inter se*. The constitution of the United States is for the people of the United States, the German constitution is for Germans and the Basic Laws in Israel are for Israelis and for regulating relations between them and the state and among them *inter se*. But when a foreign element comes into the system — in our case, a foreign spouse — I doubt whether the Basic Laws were originally intended to give basic rights to the individual while directly influencing the other individuals in the state and the image of society. I very much doubt it.

63. Moreover, let us be mindful and not forget: immigration arrangements, by their very nature, are specific arrangements; they are arrangements that change from time to time in accordance with the needs of the state (see *supra*, at para. 39). Even if these arrangements are included in the constitutions of various states, nothing in the fact that they are placed in the constitution can change their nature and substance as specific arrangements. And since they are such, we will have difficulty in finding an analogy between the arrangements of one constitution and the arrangements in another constitution, and between the arrangements of a

foreign country and Israeli law. As President Shamgar said in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 329:

> 'But it should be understood that the consideration of other constitutions and their implementation is merely comparative. Every constitution reflects in the protection of rights that are granted therein the social order of priorities that is unique to it and the outlooks that have been adopted by its society. It need not be added that there is also a whole range of political considerations that accompanies the formulation of a constitution. Thus, for example, in Canada it was decided not to include a prohibition against the violation of property in the Charter of Rights.'

Take the case of Ruritania, a country in the centre of Europe. Its inhabitants are growing old and it wishes to stimulate the life cycle in the country and revive its economy. Such a country will tend to encourage immigration, and naturally it will also extend the right of immigration to family members. After some time, when Ruritania finds that immigrants who came into it have changed the image of the state — and possibly even threaten the hegemony of the original citizens — Ruritania may change the law and stop immigration, even for family reasons. But Zenda, the neighbour of Ruritania, is different. The population density in Zenda is high, the birth rate is high, and naturally it will tend to limit immigration, including immigration for family reasons.

64. The same criteria apply to the question whether a minor living in Israel with his Israeli parent has the right to bring to Israel his foreign parent. I cannot accept that the minor has an inherent constitutional right to this, namely a right that imposes a duty on the state to allow into Israel a foreigner merely because of his family ties. We have seen that an Israeli citizen cannot impose on the state a duty to allow a foreigner to enter it, and certainly he does not have the power to grant the foreigner a status under the law. The same applies to a minor who lives in Israel with his Israeli parent; he cannot impose such a duty on the state. It is in the interest of the state and its individuals that the state should be the one to decide who will enter it, who will join Israeli society and what will be the image of this society. This interest is sufficiently great and strong to qualify the interest in recognizing a constitutional right to bring a foreign parent to Israel.

65. I will add to this that the harm caused by the Citizenship and Entry into Israel Law to children is limited. We should recall that the law, in s. 3A, provided a special exception for the cases of children, as follows:

> 'Permit for children
>
> 3A. Notwithstanding the provisions of section 2, the Minister of the Interior, at his discretion, may —
>
> (1) give a minor under the age of 14 years, who is a resident of an area, a licence to live in Israel in order to prevent his separation from his custodial parent who lives lawfully in Israel;
>
> (2) approve an application to obtain a permit to live in Israel from the area commander for a minor under the age of 14 years, who is a resident of the area, in order to prevent his separation from his custodial parent who lives lawfully in Israel, provided that such a permit shall not be extended if the minor does not live permanently in Israel.'

Thus we see, according to s. 3A(1) of the law, that minors up to the age of 14 are entitled to receive a status in Israel in order to prevent their separation from a custodial parent who lawfully lives in Israel. In other words, the right of these minors to live with the custodial

parent is not harmed at all. With regard to minors over the age of 14, these can, according to s. 3A(2), receive a permit to stay in Israel in order to prevent their separation from the custodial parent. Such a permit will be extended only if the minor lives permanently in Israel.

This is the case with regard to the right of children to live with the custodial parent in Israel. This arrangement is satisfactory, and the legislature did well to provide an exception that allows children to stay if only with one of their parents in Israel. It should be admitted that the Citizenship and Entry into Israel Law in its original version harmed children considerably by preventing them from living with the custodial parent in Israel. But after the law was amended by adding the arrangement in s. 3A, the position has improved greatly, both with regard to minors under the age of 14 and minors above the age of 14. According to the law in its current form, I see no proper justification to declare it void in this respect.

66. With regard to the interest of a minor who is living with his custodial parent in Israel to have his foreign parent also live with him in Israel, and, in consequence, the interest of the foreign parent to live with his minor child and with his family members in Israel — these are interests that my colleague the president addresses. I too agree with my colleague's position that the separation of the foreign parent from the minor is not desirable, but I am of the opinion that even in this case the minor does not have a protected basic right that his foreign parent will live in Israel merely because he is his parent. In this case, the immigration considerations that we have discussed make themselves heard — and they do so loudly — and the first of these is the right of the state to decide who will be its residents and citizens (to these considerations we will also add below considerations of a special kind — considerations of the state in a time of war). This was the approach of case law in Israel even in times of peace. Before the Citizenship and Entry into Israel Law was enacted, a foreign parent was not entitled to receive a status in Israel by virtue of his minor child who lived in Israel. In the words of President Barak in *Dimitrov v. Minister of Interior* [113]: '… in principle, the citizenship of the daughter is insufficient to grant a status of a permanent resident to her foreign parent…' (*ibid*., at p. 294; for additional references, see para. 32 above). We should also add that s. 3B(3) of the Citizenship and Entry into Israel Law provides that the area commander may give a resident of the territories a permit to stay in Israel 'for a temporary purpose, provided that the permit to stay for the aforesaid purpose shall be given for a cumulative period that does not exceed six months.' It is possible and right to interpret this provision of statute as granting power to the area commander to allow the entry of the foreign parent into Israel to visit his minor child temporarily. We should also remember that the restriction is temporary — until the parent reaches the age mentioned in the law, which is 25 for a woman and 35 for a man, at which age it will be possible to give the parent a permit to enter Israel.

67. This, then, is the position: the harm to minors living in Israel with the custodial parent is currently limited in comparison to the law which prevailed before the enactment of the amendment to the Citizenship and Entry into Israel Law. The law does not apply at all to a child who was born in Israel to an Israeli parent, since such a child receives the same status as his Israeli parent. In addition, the law allows a minor who is a resident of the territories and was not born in Israel to live in Israel with his Israeli parent (s. 3A of the law). With regard to the foreign parent, who is a resident of the territories, it is true that he is not entitled to enter Israel. Has any constitutional right of the minor who lives in Israel with his custodial parent been violated as a result? The answer to this must be no, both because the violation is (relatively) limited and because of the very powerful interest that conflicts with it. In any case, we do not know from where a minor acquired a basic right that his foreign parent will follow him and also obtain a right to live in Israel.

Comments regarding the scope of application of the constitutional right to family life

68. Before I consider the question whether an Israeli citizen has a constitutional right — a basic right — to bring to Israel his foreign spouse, a national of an enemy entity, in a time of war, I would like to make two comments that concern the remarks made by my colleague the

president with regard to the constitutional right of an Israeli citizen to bring his foreign spouse into Israel. *One comment* concerns remarks which I made in *Stamka v. Minister of Interior* [24]. The *other comment* concerns reliance on constitutional arrangements in foreign countries.

a. *Concerning remarks that I made in Stamka v. Minister of Interior*

69. My colleague the president did me the honour of citing — twice, in para. 27 and in para 34 of his opinion — remarks that I made in *Stamka v. Minister of Interior* [24], at p. 787, in which I said:

> 'The State of Israel recognizes the right of the citizen to choose for himself a spouse and to establish with that spouse a family in Israel. Israel is committed to protect the family unit in accordance with international conventions… and although these conventions do not stipulate one policy or another with regard to family reunifications, Israel has recognized — and continues to recognize — its duty to provide protection to the family unit also by giving permits for family reunifications. Thus Israel has joined the most enlightened nations that recognize — subject to qualifications of national security, public safety and public welfare — the right of family members to live together in the place of their choice.'

After citing these remarks (in para. 34 of his opinion), my colleague the president goes on to make the following remarks: 'Indeed, the constitutional right of the Israeli spouse — a right that derives from the nucleus of human dignity as a constitutional right — is "to live together in the place of their choice".' I do not retract the remarks that I made, but I do not think that it is possible to deduce from them that an Israeli citizen has a constitutional right that his foreign spouse can enter Israel and take up residence in it.

First, the continuation of the remarks that I wrote (*ibid*.) should be read. They state:

> 'This is the case here too. The respondents recognize the right of spouses — an Israeli citizen and someone who is not an Israeli citizen — who were genuinely married to live together in Israel, and the right of the foreigner to an arrangement at the end of which he will receive a permanent status in Israel: permanent residency and citizenship. What then is the complaint? It concerns the length of that "staged arrangement" and the inflexibility of the arrangement.'

The explanation of this is that when I spoke about the 'right of the citizen to choose for himself a spouse and to establish with that spouse a family in Israel' — and certainly when I spoke of 'the right of the foreigner to an arrangement' — I was describing a policy that is practised by the state. Indeed, I regarded this policy as a proper policy, but I did nothing more than describe the legal position that prevailed at that time. I should add that this policy — in so far as I am aware — has not changed in principle. The policy is still in force, except with regard to residents of the territories. The question is merely whether the change that took place in the policy with regard to residents of the territories is a lawful change.

Second, and this is the main point, the judgment in *Stamka v. Minister of Interior* [24] was written on 4 May 1999. The serious armed conflict between the Palestinian Authority and Israel — which is a quasi-war — began more than a year later, in September 2000, and it utterly changed the relationship between the Palestinian Authority and Israel. We have discussed above the difficult position of Israel since the armed conflict broke out, and nothing needs to be added. Against this background, the Knesset enacted the Citizenship and Entry into Israel Law, as it sought to protect the residents and citizens of Israel against those who seek to harm it. The *Mejellah*, in its wisdom, taught us (in s. 39) that: 'It cannot be denied

that, when the times change, the laws also change with them.' This is what happened in our case. The times changed — and they changed radically — and therefore it was decided to make a change in policy.

Third, my remarks are qualified automatically by 'qualifications of national security, public safety and public welfare.' With regard to these qualifications there is no need to add anything except for this, that they are inherent to the subject-matter and their existence would not be in doubt even had they not been written expressly.

70. We therefore return to the beginning, and the question is whether there is any flaw or defect in the Citizenship and Entry into Israel Law. My answer to this question is, as aforesaid, no.

b. *The interpretation of a constitution and arrangements from comparative law*

71. In his opinion, my colleague President Barak surveys legal arrangements that are practised in various countries around the world, including the European Union, and his conclusion is that 'the right to family life is… a constitutional right enshrined in the right to human dignity' (para. 38 of his opinion). I am prepared to accept that this is the law in the legal systems of those countries mentioned in my colleague's opinion, just as I accept that the right of a person in Israel to have a normal family life is a right that derives from human dignity. This is what we are taught by natural law, and the state merely embraces what is already there by wrapping natural law in the garb of law and constitution. But we are speaking of the creation and existence of the family unit between members of the state and within the framework of the state. This is not the case when a citizen of the state wishes to marry a foreign national and establish a family unit in the state. This kind of situation gives rise to the question of immigration in all its force, including immigration by virtue of the right to marry and to establish a family, and this issue is special and unique to each country, and what is more, it changes from time to time. Constitutional and legislative arrangements that are in force within the territory of a state are, admittedly, derived from basic values that a state wishes to foster in its midst, but to the same degree they are also built on the needs of the state and the reality of life with which it is required to contend. It is not surprising, therefore that the case law of the court in every country is context-dependent on the positive normative arrangement adopted in the constitution of the state, the prevailing law, basic principles and the reality of life. From a factual viewpoint, the use of comparative law in our case — like in every case — must be made sensitively and carefully, after thorough examination as to whether the legal arrangements practised in one country or another are compatible with the law in Israel and the reality of life with which we contend. This was discussed by my colleague President Barak with regard to legislative and constitutional arrangements concerning the environment, and I will cite some of his remarks that are apt also in our case (*Man, Nature and Law Israel Environmental Protection Society v. Prime Minister of Israel* [12], at p. 514):

> 'In comparative law there is much discussion of the environment. Many laws addressing the environment have been enacted in many countries… sometimes the environment has been given a constitutional status. In a large number of constitutions, a constitutional right to have a suitable environment has been recognized…'

And further on (at pp. 515-516):

> 'This comparative law — whether in the international sphere or in the national sphere — is of great importance… Nonetheless, each country has its own problems. Even if the basic considerations are similar, the balance between them reflects the uniqueness of every society and what characterizes its legal

arrangements… Indeed, this is the power and these are the limits of comparative law. Its power lies in extending the interpretational horizon and field of vision. Its power lies in guiding the interpreter with regard to the normative potential inherent in the legal system… Its limits lie in the uniqueness of every legal system, its institutions, the ideology that characterizes it and the manner in which it deals with the individual and society. Indeed, comparative law is like an experienced friend. It is desirable to hear his good advice, but this should not replace one's own decision.'

See also LCrimA 8472/01 *Maharshak v. State of Israel* [131], at p. 474:

'… It is a burden that is imposed on us to take care not to follow foreign legal systems blindly, and especially to know how to distinguish between principles and doctrines and ways of thinking and techniques for arriving at a solution, from which it is possible to derive inspiration and wisdom, and between details and specific solutions which we should ignore. Indeed, comparative law is capable of extending one's thinking, enriching knowledge and wisdom, freeing us from provincialism, but at the same time we should not forget that we are dealing with our own system and our own country, and we should avoid the imitation of assimilation and self-deprecation.'

72. We should remember that we are Israeli judges, we judge in Israel and we dwell among our people. Although in general it is proper for us to take a look at foreign legal systems, to learn and to receive inspiration, we should always remember that normative arrangements that were created and exist in other places were created and exist against a background of a reality that prevails in those countries and that exist within legal systems that give expression to that reality, and therefore we should not follow blindly — in the manner of assimilation and self-deprecation — normative arrangements that are practised in those places. This is true both of legislation and of the constitution. As President Shamgar told us in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 329:

'But it should be understood that the consideration of other constitutions and their implementation is merely comparative. Every constitution reflects in the protections of rights that are granted therein the social order of priorities that is unique to it and the outlooks that have been adopted in its society. It need not be added that there is also a whole range of political considerations that accompanies the formulation of a constitution. Thus, for example, in Canada it was decided not to include a prohibition against the violation of property in the Charter of Rights.'

The more a normative arrangement is influenced by the reality and the specific needs of the country where it prevails, the harder it will be to learn from it and to make an analogy between it and the State of Israel in which we live. This is true in general and it is also true in this case. The attitude of each state to immigration arrangements — including immigration arrangements by virtue of the right to marry and to family life — originates not only in the legal system and its characteristics in each different place but also, mainly, in the reality with which the state is required to contend. It is therefore not surprising that the countries of the world have adopted and continue to adopt, each for itself, arrangements that are suited to its needs from time to time, and moreover they tend to change from time to time the immigration arrangements prevailing in them according to the reality — a changing reality — with which the state is required to contend. See the remarks that we cited above (in para. 52) with regard to the position prevailing in the United States and changes in immigration arrangements in that country.

73. With regard to us, we doubt whether among all those countries, from which my colleague the president seeks to derive an analogy, there is another country that is contending with a reality similar to the reality with which Israel is contending. Of the many differences between Israel and all those countries — whether considered individually or all together —

we should remember most of all that extremely hostility exists between the Palestinian Authority and Israel; the declared intention of the body that controls the Palestinian Authority — Hamas — to destroy Israel and to wipe its name off the face of the earth; the sad fact that our time is a time of armed conflict — a time of quasi-war — between us and the Palestinian Authority. We should add to the organization that controls the Palestinian Authority the fact that the population in the territory of the Palestinian Authority, in general, is hostile and inimical to Israel, and I think that we can be cured of the need to derive an analogy from the legal systems of other countries whose position and geo-political status is more different than similar to the position and geo-political status of the State of Israel. Is there any other country that is being asked to allow in its territory the establishment of a family unit in which one of its members is an enemy national? On all of this, and more besides, see Rubinstein and Orgad, 'Human Rights, National Security and the Jewish Majority — the Case of Immigration for the Purpose of Marriage,' *supra*.

74. For our purposes, we should say that even were we to adopt general basic principles that guide the paths of cultured countries of the world, we would have difficulty following specific arrangements that were chosen by the various countries, whether within the territory of the European Union or in any other place. The status and way of life of those countries, and especially the security position in them, are so different from the status of Israel, its way of life and the security position that prevails in our country that an analogy from the legal systems practised there — legal systems that reflect what is happening in those countries — is out of place.

Interim remark

75. Hitherto we have considered the question whether Israeli law gives an Israeli citizen — or does not give him — a constitutional right, a basic right, to bring to Israel his foreign family member for permanent residence or even for temporary residence. Our answer to the question was, as we have explained, that he does not. Let us now turn to discuss an additional matter that arises in our case, which is whether the Israeli citizen has a constitutional right to bring to Israel his foreign family member when that family member is a resident of a hostile entity that is involved in an armed conflict with Israel.

Immigration in times of war

76. Does the constitutional right to family life, a right that is derived from the value of human dignity, imply an innate right of the citizens and residents of Israel to bring to Israel their foreign family member (a spouse or parent) who is a resident of a hostile entity that is involved in an armed conflict with the State of Israel? My answer to the question is no. In this case too I think that the strength of the right to family life is confronted by another strong and very powerful interest: the lives and security of the citizens and residents of Israel and the security and stability of the State. These latter interests are capable of preventing, in my opinion, a recognition of the existence of a constitutional right in times of war to allow the entry of a resident of an enemy state into the territory of the State of Israel. The balance is between the right of individuals to family life and the right of others to life. In this context, we find apt the remarks that were made with regard to the way in which Canadian legislation concerning the war on terror should be scrutinized as legislation whose purpose is to protect all liberties:

> 'The configurative analysis of the Bill in terms of national security versus civil liberties may be as misleading as it is inappropriate in its framing of the issues. It appears to suggest — however inadvertently — that those who are against the legislation are the true civil libertarians, while those in favour of it are somehow indifferent to, if not insensitive to, civil liberties. The point is that there are good civil libertarians on both sides of the issue — and the civil libertarian issue should be considered on the merits and not as a function of the labeling of one's positions as being for or against the legislation.

> The better approach from a conceptual and foundational point of view is to regard the legislation as human security legislation, which seeks to protect both national security — or the security of democracy if not democracy itself — and civil liberties. As the United Nations puts it, terrorism constitutes a fundamental assault on human rights and, as such, a threat to international peace and security, while counter-terrorism law involves the protection of the most fundamental of rights, the right to life, liberty, and the security of the person, as well as the collective right to peace' (I. Cotler, 'Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy,' in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (R.J. Daniels, P. Macklen and K. Roach, eds., 2001) 111, at pp. 112-113).

77. I believe that even those who support the position that the Israeli citizen should have a right — a constitutional right or a legal right — to have his foreign family member enter Israel and reside in it will agree that reasons of national security and public security should qualify the right of the individual to have his family member enter the country and reside in it. Thus, if the state authorities discover that a foreign national presents a specific security risk to national security and public security, that foreign national will not be allowed to enter Israel, whatever his family status may be. See, for example, *Stamka v. Minister of Interior* [24], at pp. 787-788; HCJ 2208/02 *Salama v. Minister of Interior* [132]; AAA 9993/03 *Hamdan v. Government of Israel* [133]; HCJ 2455/95 *Dragma v. Minister of Interior* [134]; HCJ 7206/96 *Mansour v. Minister of Interior* [135]. Cf. s. 2(b)(3) of the Law of Return. Cf. also HCJ 1227/98 *Malevsky v. Minister of Interior* [136]; HCJ 442/71 *Lansky v. Minister of Interior* [137]. This is the law where the foreign national himself is suspected of being dangerous to national security, and it is also the law where the foreign national is associated with persons who endanger public safety and may influence him. See, for example, HCJ 7061/05 *A v. Minister of Interior* [138]:

> 'Someone who wishes to obtain permanent residency in Israel cannot be associated with persons active in hostile activity and terror. Residency in Israel and an association with such persons is a contradiction in terms…'

78. This natural and simple rule, that a foreign national who presents a risk to national security will not be allowed to enter the state, leads almost automatically to the conclusion that in times of war hostile nationals will not be allowed to enter the state, since they are presumed to endanger national security and public security. Indeed, it will not be difficult to understand and realize that a foreign family member who is not an Israeli citizen has strong ties with his family and his place of birth, and that these ties are not severed even if the person leaves his home and comes to live in Israel. This feeling of loyalty of a person to his people and his place of birth is a natural feeling, a feeling of great strength, and it is much stronger where a person leaves behind him — and this is the usual case — parents, brothers, sisters, other family members, friends and companions. And so, when the two peoples — the people of the family member's place of birth and the people among whom he now lives — become involved in an armed conflict with one another, a person is likely to be required to decide where his loyalties lie and whom he will aid. Often he will support his place of birth and seek to assist it in one way or another. The risk and the danger will increase greatly in a case where the family member has left behind him family members and friends who may be subject to harm and threats from the regime in his place of birth or from gangs in that country. The risk and the danger will increase even more where the person belongs to a people that seeks to destroy the state that absorbed him and that is waging against it a bloody struggle that has continued for many years.

79. The premise in international law is that in times of war the citizens of the warring states become hostile to one another, and that every citizen will regard himself as loyal to his country and place of birth and hostile to the enemies of his place of birth. It is natural,

therefore, that a state that is in a situation of conflict may determine special arrangements concerning enemy nationals, including, of course, an arrangement that prevents them from entering its territory. See J.G. Ku, 'Customary International Law in State Courts,' 42 *Va. J. Int'l L.* (2001) 265, at p. 322:

> 'Because the declaration of war between sovereigns transforms every individual subject and citizen of those sovereign nations into enemies, the traditional law of nations naturally require that enemy aliens be accorded different legal status than alien subjects hailing from friendly powers. In particular, the treatise writers found that the law of nations imposed severe restrictions on the nature of the contacts between subjects of sovereigns at war with each other.'

80. In our times — unlike in the past — we no longer make formal declarations of war; and wars — again, unlike in the past — are not necessarily between states. But the rules and principles that were intended to protect the citizens and residents of the state are valid and logical even where an armed conflict is being waged not between states, but between a state and an entity, like the Palestinian Authority, which is not a state. In such circumstances, and in other similar ones, the presumption of hostility exists in full strength. See and cf. E. Gross, *The Struggle of Democracy against Terror — Legal and Moral Aspects* (2004), at pp. 70 *et seq.*; Rubinstein and Orgad, 'Human Rights, National Security and the Jewish Majority — the Case of Immigration for the Purpose of Marriage,' *supra*, at p. 317, and see the references cited there.

81. On the basis of this logical deduction, a deduction that is common to all human beings and to all human peoples, it has been determined in international law that when there is a dispute between nations, a nation may prohibit the nationals of the foreign nation, as such, from entering or immigrating to it. The reason for this is that because of the strong and special ties that they have to their place of birth, people and family members, enemy nationals, as such, constitute a special risk group. Admittedly, not all enemy nationals are actually enemies, but in the heat of an armed conflict there arises a quasi-presumption that enemy nationals — all enemy nationals — are enemies of the state, and the state has no legal duty to rebut the presumption and distinguish between an enemy national who is likely to endanger the state and its residents and an enemy national who is unlikely to endanger the state and its residents. There is a presumption that enemy nationals, because they are enemy nationals, are the enemies of the state and that they endanger the safety and the security of the public in the state that is at war with their state; and the state is entitled — and is even obliged by virtue of its duty to protect its citizens and residents — to refuse the application of enemy nationals to immigrate to its territory. This rule, a rule in times of war and conflict, is valid also with regard to the case of persons who wish to immigrate by virtue of the right to marry and raise a family, since even these are likely to endanger the security of the state and the security of the residents of the state. See Rubinstein and Orgad, 'Human Rights, National Security and the Jewish Majority — the Case of Immigration for the Purpose of Marriage,' *supra*, at pp. 320-321:

> 'The accepted norm of not allowing enemy nationals to enter in times of war or in times of armed conflict applies also to immigration for the purposes of marriage (marriage migration). International law and the relevant conventions impose various duties on the state with regard to family reunifications. Thus, for example, a state that is a party to an armed conflict is required to facilitate meetings of families that were compelled to separate during the fighting (even though the duty is to assist the renewal of the connection and, in so far as possible, family meetings, there is however no duty to allow family reunifications or to allow immigration for the purposes of marriage). A state that is a party to an armed conflict is also required to make an effort in order not to separate existing families during the armed conflict. But the state has no legal or moral duty in international law to allow immigration for the purposes of

marriage from state A to state B, as long as the two states are involved in an armed conflict, and even when they are completely at peace.'

82. We tend to the outlook — which we have explained in detail above — that the state has no constitutional or legal obligation to allow family reunifications in its territory. But even if in times of peace the state is accustomed to allow foreign family members of its citizens to immigrate into the state (see *Stamka v. Minister of Interior* [24]), the state may in times of war suspend this practice and prevent the entry of foreign family members who are enemy nationals notwithstanding the harm to the individual who married an enemy national or to a minor who lives with his Israeli parent only. A time of war is not the same as a time of peace. Although we all know that 'even when the trumpets of war sound, the rule of law will make its voice heard' (*Sabiah v. IDF Commander in Judaea and Samaria* [110], at p. 369), we also know that things which are appropriate in a time of peace cannot be maintained in a time of war. In the words of the wisest of men (Ecclesiastes 3, 1; 3, 8 [246]) 'For everything there is a time and for every desire there is an occasion under the heavens… A time to love and a time to hate, a time of war and a time of peace.' I agree with my colleague the president that the state does not have two systems of law, one for times of calm and one for times of war. The basic rights of the individual are alive and well even in times of security risks. At the same time, we cannot deny 'that in times of war there arise — or you may say, there awaken — considerations and interests that are unique to this time, considerations and interests that can restrict the spheres of application of the rights of the individual,' or at least stop their realization (the limitations clause). We cannot deny that in times of war a state may restrict the individual in the realization of his rights, provided that this restriction is done for a proper purpose — i.e., in order to maintain public interests of great weight — for a restricted period and to a degree that is not excessive. Cf. s. 12 of the Basic Law: Human Dignity and Liberty. This (at least) is the case before us.

83. Human rights stand firm, with their full force, even in times of war and emergency, but the situation of war and emergency can affect the restrictions that can be placed on their realization. The question is one of dosage; the dosage in times of peace is not the same as the dosage in times of war. In times of peace, the right will blossom and spread its scent all across the land. But this is not the case in times of war or in times when security risks are constantly lying in wait for the residents of the state.

Let us remember that rights that are given to the individual in a democracy will not exist if there is no state or there is no life for the citizen. We are accustomed to exalting — and rightly so — the basic rights of the individual, human dignity, the principle of equality and with them other basic values on which our legal system prides itself. These rights and principles are of supreme importance. They are exalted above all else. Without them we would have no democracy worthy of the name. But the very existence of the state and the right of the individual to life are more exalted and important than all of these. Without a state, the rights of the individual would have no existence, and the basic rights of the individual must not become a spade to be used for undermining the existence of the state. Cf. *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [101], at pp. 388, 390; *Neiman v. Chairman of Elections Committee for Eleventh Knesset* [87]. Such is the existence of the state and the risks to the life of its citizens. 'Without security, it is not possible to protect human rights' (*per* Justice D. Dorner in *Saif v. Government Press Office* [86], at p. 77 {197}). Therefore, 'human rights should not become a spade for denying public and national security' (CrimFH 7048/97 *A v. Minister of Defence* [88], at p. 741). Safeguarding the lives and security of the public may necessitate a certain erosion of the rights of the individual — some might say, may justify a restriction of the scope of application of rights, and at least necessitate a suspension of the realization of the rights of the individual — and this erosion, if it is done proportionately, is a permitted violation in our constitutional system. In the words of my colleague President Barak, in *Conterm Ltd v. Minister of Finance* [85], at p. 347 {71}:

> ‘We cannot protect human rights without infringing on human rights. A democracy is not characterized by the fact that it never violates human rights. Human rights are not a recipe for national destruction.’

84. The state has a duty to its citizens and its residents — and this is a duty of the first order — to protect their lives and security, even at the price of violating the right of some citizens to realize, within the territory of the state, their right to family life with their spouses who are enemy nationals. In a time of armed conflict a sovereign state is therefore not required to allow enemy nationals to immigrate, even if they have first-degree family members in the state. The concern, and it is a reasonable concern, is that at the crucial moment the enemy nationals will be loyal to their people and place of birth, and at the least they will be subject to various pressures — because of family and other ties — to help the enemy. This is sufficient to create a presumption that all enemy nationals are dangerous and to justify a prohibition against their entering the state. This is the rule, and it has its logic and reasons. We should add in this context that rules formulated in international law usually concern individual and exceptional cases, because naturally the citizens of enemy states do not marry each other, and in times of armed conflict they do not immigrate in their thousands from their state to the enemy state. Our case, we should remember, is completely different, since we are talking of residents of the territories who wish to immigrate to Israel in their thousands. And when we are considering the case of thousands of immigrants — and not merely a few immigrants — those concerns that gave rise to the accepted norm in international law are automatically magnified.

85. So we see that here too we are confronted by rights and interests that conflict with one another: on one side there is the right of the state not to allow residents of an enemy state to enter its territory in times of war, and on the other side there is the right of the citizen — a basic right, a constitutional right derived from human dignity — that he will be allowed to live together with his family members and to have a normal family life in Israel. The question is whether the basic right to have a family life in Israel also applies to family members when one of them is a resident of a hostile entity that is involved in an armed conflict with the State of Israel? In order to answer this question, we ought to consider closely these two values and weigh them against one other (see also para. 59, *supra*): the *one* is the strength of the right to have a family life in Israel as derived from the values that the right is supposed to express in the law; the *other* is the strength of the conflicting value, which in our case is the lives of citizens and residents and national security. When we place these conflicting values before us, we must clarify and weigh up to what extent the right to family life as aforesaid detracts from the values of life and security, and *vice versa*: to what extent do the values of life and security detract from family life. In this case, we say that recognizing the right of the citizen to include a right to bring into Israel, in a time of war, a family member who is an enemy national causes harm in two ways: *first*, it violates the right of the organized society in Israel to decide who will live in Israel and who will be its citizens and residents, i.e., it impairs the ability of the state to determine its identity and character; *second*, it harms — or at least it is likely to harm — national security.

86. Once again I placed all the values and considerations into one pot, and my conclusion is that the value of human dignity — in principle — does not give rise to a constitutional right to realize in Israel a marriage with a foreign spouse, or to bring a foreign parent into Israel, when that spouse or parent is a national of a state that is in a state of war — or a state of quasi-war — with Israel. This conclusion is implied both by an examination of the strength of the right to have a family life, and by the values and interests of the state and its residents to life and security, as well as by the conflict between the former and the latter.

As we have already said (see para. 61 above), I do not nor shall I dispute the constitutional right of an Israeli citizen to have a family life. But here too the main issue is the values and interests that conflict with the argument concerning the constitutional right of the citizen to have a family member live in Israel when that family member is a national of an entity that is involved in an armed conflict with the State of Israel (cf. para. 62, *supra*). We are speaking of

a concern that hostile parties will enter Israel, and the state is asking us to allow it to prevent the entry of Palestinians who wish to live here. The strength of this interest is so strong in my opinion that it is capable of influencing, *ab initio*, the scope of the application of the right to have a family life in Israel. The state, we should recall, is merely the organization of society to live together, and the meaning of this for our purposes is that the state's prerogative is merely an expression of the protection that Israeli citizens require even in times of peace, but particularly in times of war.

Indeed, we should not ignore the conflicting interests and values, both those of the state and those of its individuals. Human rights live and endure also in times of war, but there is no doubt that a change occurs in the process of balancing them against the interests that conflict with them, with regard to the value of human dignity, personal autonomy and human liberty. The war harms everyone: soldiers on the battlefield and citizens on the home front. The economy of the state is harmed. The realization of social goals are postponed to a later date. And when the reality changes, the balance may also change. Indeed, the nucleus of the rights will not change. The piccolo will continue to pipe its clear notes. But the remoter we are from the nucleus and the more we approach the periphery — and in our case we are speaking of the right of the citizen to bring a foreign national to live in Israel in a time of war — so the influence and strength of other elements and values will increase.

87. In summary, in times of war Israeli citizens and residents do not have a constitutional right to bring into Israel a family member who is a citizen of an entity that is involved in an armed conflict or war with the State of Israel.

Immigration by virtue of marriage and the right to family life — interim summary

88. The conclusion that we arrive at is therefore this, that the right of the individual to family life does not imply a constitutional or legal obligation that is imposed on the state to allow the foreign family member of the individual (a spouse or parent) to immigrate into the territory of the state. Such immigration — if and to the extent that it is allowed — will be allowed if the state so wishes, and in accordance with its laws. The state has no obligation to allow immigration for reasons of marriage — except in accordance with its laws — and the state may impose restrictions on immigrations into its territory for the purpose of marriage. If this is the case in general, it is certainly the case in times of war, when the persons who wish to immigrate into the state are enemy nationals.

The question of the violation of equality — the right (and duty) of a state to restrict the immigration of enemy nationals in times of war

89. We all agree (for how could we not?) that the Citizenship and Entry into Israel Law mainly harms the Arab citizens of the state. It is true that the law does not address Israeli citizens at all, and therefore it does not distinguish between Jews and Arabs, but it is also true that *de facto* it is Arab Israeli citizens who are harmed by the law, since it is only they — with the exception of isolated cases — who find a spouse among the residents of the territories. From the viewpoint of the end result, there is no equality between the Arab citizens of the state and the Jewish citizens of the state. Cf. *Israel Women's Network v. Minister of Labour and Social Affairs* [35], at p. 654; *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [41]. Does this inequality in the end result have any legal significance?

90. Everyone agrees that an immigration restriction should be applied democratically and equally. The state should not discriminate against one population group by preventing their foreign spouses from immigrating into the state, while at the same time allowing the foreign spouses of another population group to immigrate into it. We discussed this in *Stamka v. Minister of Interior* [24], where we explained that the principle of equality demands that the laws of immigration by virtue of marriage should be applied equally to Jews and non-Jews (*ibid*., at pp. 758-759):

> '… We do not find any justification for preferring a Jew who lives securely in his land to someone who is not a Jew, such that the former should be able to acquire citizenship for a non-Jewish spouse whereas the latter cannot. Although

> we agree, wholeheartedly, with the right possessed by every Jew, as such, to immigrate to Israel, with his family, we shall find it difficult to agree to a greater right being given to a Jew who is a citizen of Israel — to him, but not to the Israeli citizen who is not Jewish — to be entitled to citizenship for a non-Jew who became his spouse while he is a citizen of Israel. When we recognize the right of a Jewish citizen of Israel to obtain citizenship for his non-Jewish spouse, but at the same time we deny this right to the non-Jewish citizen, we commit a serious act of discrimination, and we have found no proper purpose in this.'

The meaning is that the citizens of Israel, whether Jews or non-Jews, have not acquired a right that their foreign spouses can immigrate into Israel. In this, they are different from Jews who are not citizens of Israel, who are entitled to have their family members immigrate to Israel (s. 4A of the Law of Return), and the absence of the right will apply equally to Jews and non-Jews. If a right is given to Israelis to have their foreign spouses immigrate to Israel, this right should be given equally to all Israelis, to Jews and non-Jews alike. Once we realize this, the question that we must ask now is whether the Citizenship and Entry into Israel Law is a law that discriminates against Arab Israelis, and whether for this reason it should be declared void as a law that violates the principle of equality. We will now consider this claim.

91. It is well known that not every inequality leads to the voidance of a legal norm, and certainly it does not lead to the voidance of a law of the Knesset. Not every distinction between persons is an improper distinction. The same is true of a violation of human dignity. A distinction that is based on relevant considerations does not violate human dignity nor does it violate the right to equality. In other words, the right to equality does not apply to every distinction but only to prohibited distinctions. Not every different treatment is discriminatory treatment. Discrimination is, it is well known, a distinction between persons or between matters for reasons that are irrelevant, but when there is a difference that is relevant, the authority may, and sometimes must, treat the persons or the matters differently. This was elucidated by President Agranat: '…it will be a permitted distinction if the different treatment of different persons derives from their being, for the purpose of the treatment, in a state of relevant inequality…' (*Boronovski v. Chief Rabbis* [71], at p. 35). It follows from this, so President Barak told us, that: 'In order to establish a claim of discrimination that allegedly constitutes a violation of the constitutional right to equality, one must point to the existence of an unjustified discrimination in the offending law. Discrimination between groups that is based on a relevant difference does not in itself constitute discrimination' (HCJ 5304/02 *Israel Victims of Work Accidents and Widows of Victims of Work Accidents Association v. State of Israel* [139], at 141). See also: *Kefar Veradim v. Minister of Finance* [70], at pp. 507-508; *El-Al Israel Airlines Ltd v. Danielowitz* [65], at p. 761 {489}; *Recanat v. National Labour Court* [73], at p. 312; HCJ 6845/00 *Niv v. National Labour Court* [140], at p. 680. And as we have said elsewhere (*Local Government Centre v. Knesset* [31], at p. 502), the concept of equality — the concept of substantive equality — is a concept that is synonymous with justice and fairness; and discrimination between equals (from a substantive point of view) means an act of injustice and unfairness.

92. In our case, are Arab Israeli citizens discriminated against in comparison with Israelis who are not Arabs? Does the Citizenship and Entry into Israel Law discriminate improperly between Arab Israeli citizens and non-Arab Israeli citizens? Our answer is no. The Citizenship and Entry into Israel Law was enacted against the background of the armed conflict and state of war between Israel and the Palestinians, and therefore there is a proper and permitted distinction between persons who married foreigners, who are Palestinian 'enemy nationals' that are presumed to constitute a potential security risk to the residents of the state, and persons who married foreigners

who are not 'hostile nationals.' Moreover, in times of war the state — every state in the world — may categorically prevent the immigration of enemy nationals into its territory out of a concern that their loyalty will be given to their place of birth — i.e., to the enemy — and not to the state that absorbs them. Even if in times of peace the state is accustomed to allow foreign spouses of citizens of the state to immigrate to it, in times of war the state may suspend this practice, at least in so far as concerns foreign spouses who are enemy nationals. Admittedly a citizen of the state who married an enemy national will be hurt by the state's decision, and it is possible that he will even feel discriminated against in comparison to his neighbours who married foreign citizens who are not enemy nationals and their spouses are permitted to come to Israel. But can we seriously say that someone who married an enemy national has been discriminated against? With regard to our case we will say that as long as the armed conflict between Israel and the Palestinians continues, the state is entitled to prevent the immigration of Palestinians who are residents of the territories to Israel. This ban does indeed harm a minority group of which the vast majority are Arabs, but this harm derives from the marriage to enemy nationals who are likely to endanger the public in Israel and not from the fact that they are Arabs. The decisive factor is national security and the lives of the residents of the state, and this factor outweighs the others.

93. After realizing all of the above, we reject the claim of discrimination that the petitioners raised before us.

Immigration by virtue of the right to marry and raise a family and the principle of equality — summary

94. The right to marry and raise a family, and likewise the right to equality, are both rights that do not imply that the state has any duty — neither a constitutional duty nor a legal duty — to allow immigration to Israel by virtue of marriage. The individual — every individual — does not have a right that his foreign spouse will be allowed to immigrate to Israel. This is the law in times of peace and it is certainly the law in times of war, when the persons wishing to immigrate are members of an enemy people that is involved in an armed conflict with the state and its citizens. Israel does not therefore have any duty to allow residents of the territories who married Israeli citizens to enter Israel, and Israeli citizens who married residents of the territories do not have a constitutional right — a right that is allegedly capable of causing the voidance of a law of the Knesset — to have their foreign spouses immigrate to Israel. Admittedly, the Citizenship and Entry into Israel Law harms some of the citizens of Israel, the vast majority of whom are Arabs, that married residents of the territories and wish to realize their right to family life in Israel. But this harm is a necessary evil brought about by reality, the security reality in which we find ourselves. The State of Israel is entitled to prevent the entry of enemy nationals into its territory during an armed conflict, and in a time of war it does not have a legal obligation to allow immigration to Israel for the purpose of marriage and as a result of marriage. The citizen of the state does not have a right that in a time of war the state should allow his foreign spouse who is an enemy national to immigrate to Israel. And even if in times of peace the citizen of the state has a right vis-à-vis the state that it should allow his foreign spouse to immigrate to Israel, the state is entitled to suspend this right in a time of war.

95. Our opinion is therefore this, that the Knesset had the power to enact the Citizenship and Entry into Israel Law in its amended form. There remains, *prima facie*, a question as to whether it was right to enact a blanket provision of law that applies to a whole group of the population within certain ages, without any distinction between the individuals in the group, or whether the enactment of the blanket provision undermines the validity of the law, like a law that is contrary to principles in the Basic Law: Human Dignity and Liberty. The answer to this question is somewhat complex. As we have seen in our remarks above, it is possible to

classify the relationship between Israel and the Palestinian Authority in two ways: *one*, as a relationship of armed conflict that is equivalent, for our purposes, to a state of war, and *two*, alternatively, or maybe additionally, as a relationship that creates serious security risks to the residents of Israel on the part of the Palestinian Authority or terror groups that operate from within it.

96. It would appear that in so far as we are speaking of the armed conflict — which is tantamount, in our opinion, to a state of war — the blanket prohibition on the entry of a certain population group into Israel may well be required by the state of the conflict. And if a blanket prohibition of the entry of enemy nationals is a proper and lawful prohibition, at a time of war or armed conflict, then a partial prohibition as we find in the law is certainly proper and lawful. The same is true according to the alternative classification, according to which the relationship between the Palestinian Authority and Israel creates serious risks to the lives of Israeli residents. This is especially the case when the security services are unable to distinguish between immigrants who constitute a danger to security and immigrants who do not constitute a danger to security.

97. In summary, the Citizenship and Entry into Israel Law harms Arab citizens of the State of Israel who wish to marry spouses who are residents of the territories, but this harm does not amount to a constitutional violation of a provision of the Basic Law: Human Dignity and Liberty. This is the case with regard to the constitutional right to family life, which is a right that does not extend to the request of an Israeli citizen to bring his foreign spouse to Israel, and this is also the case with regard to the constitutional right to equality, which is not violated since the effect of the law on Arab citizens and residents is based on relevant considerations at this time, a time of war. Now that we have said what we have said, our voyage is complete. Nonetheless, in order to avoid doubt, and on the basis of the assumption that the Citizenship and Entry into Israel Law does violate a basic right of the citizen, I would like to go on to consider whether that violation satisfies the tests of the limitations clause.

The Citizenship and Entry into Israel Law — purpose and proportionality

98. The premise for our deliberations from this point will be that the purpose underlying the Citizenship and Entry into Israel Law, and I am speaking here only of the purpose, is a proper purpose. The question is merely whether the measure determined by the law to achieve the purpose is a proper and proportionate measure. The purpose of the law is to protect the security and lives of Israeli citizens, and it is clear that this purpose is a proper purpose that befits the values of the State of Israel as a Jewish and democratic state. The State of Israel is required to contend with terror, and it is entitled — or rather it is obliged — to adopt measures that will protect the lives and security of the residents of the state. The state is entitled therefore to prevent the terror organizations from exploiting the basic rights of the individual — which in our case means the right to marry and to family life, and, in consequence, the right to live in Israel — in order to make it easier to commit acts of terror against the citizens of Israel. Everyone accepts, therefore, that in principle the state is entitled to adopt proper measures in order to prevent the foreign spouse of an Israeli citizen from coming into Israel where there is a concern that such a person will be involved in terror activity or will assist terror. The question that is being asked is simply whether the state was entitled, within the framework of the law, to impose a blanket prohibition on the residents of the area, who married Israeli citizens and are of a certain age, against entering Israel and living in it.

The limitations clause — values of the state and purpose of the law

99. Assuming that the Citizenship and Entry into Israel Law violates one of the basic rights given to the citizen in the Basic Law: Human Dignity and Liberty — although I personally doubt that this is true in our case — the question that must be asked is whether that violation satisfies the test of the limitations clause and passes it safely, or whether the violation fails the test of the limitations clause and in consequence the law is doomed — in

whole or in part — to be declared void. Let us recall what the limitations clause in s. 8 of the Basic Law: Human Dignity and Liberty says:

> ‘Violation of rights
>
> 8. The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose and to an extent that is not excessive, or in accordance with a law as aforesaid by virtue of an express authorization therein.’

We are speaking of a law of the Knesset that the petitioners are seeking to have declared void, and in this respect the limitations clause provides us with several tests: the law must befit the values of the State of Israel; the law must be intended for a proper purpose; and the violation of the basic right must be to an extent that is not excessive. The petitioners raised no argument before us with regard to the first condition (the law must befit the values of the state of Israel). With regard to the condition of the proper purpose, my colleague President Barak considered this in detail, and his conclusion is that the law satisfies this requirement. I agree with my colleague’s remarks and I will find it hard to add anything to them. It is clear that the purpose of protecting the security and life of residents and citizens of the state is a proper purpose.

The limitations clause: proportionality

100. There remains one more hurdle for the Citizenship and Entry into Israel Law to overcome, and that is the proportionality hurdle; or in the language of the law, the violation of the basic right must be ‘to an extent that is not excessive.’ This test, as distinct from the first two tests, places on the agenda the measure that the law chose for achieving the proper purpose, and the question is whether this measure is a ‘proportionate’ measure. The test of proportionality is divided, as is well known, into three subtests, and now we will consider these tests one by one. See also: *Ben-Atiya v. Minister of Education, Culture and Sport* [91]; HCJ 6971/98 *Paritzky v. Government of Israel* [141], at p. 779; *Oron v. Knesset Speaker* [10], at p. 665; *Stamka v. Minister of Interior* [24], at pp. 776-778. Since my colleague the president went into detail in his analysis of these tests, we will be brief although we too could have gone into detail.

The first subtest — making the measure correspond to the purpose

101. Does the blanket prohibition against the entry of residents of the territories of certain ages into Israel constitute a proper measure for realizing the purpose of the law? Does this prohibition rationally serve the security purpose that underlies the law? My colleague the president says that the answer to this question is yes. This is also my opinion. The purpose of the law is to prevent terror organizations from receiving aid from residents of the territories who hold Israeli documentation, which allows them to enter Israel and to move freely in Israel. The following was stated in the explanatory notes to the draft Citizenship and Entry into Israel (Temporary Provision) Law (Amendment), 5765-2005 (*Hatzaot Hok (Draft Laws)* 624):

> ‘The temporary provision was enacted... in view of the security reality since the beginning of the armed conflict between Israel and the Palestinians, in which we have seen increasing involvement in this conflict of Palestinians that were originally residents of the territories, who have Israeli identity cards as a result of family reunification processes with persons who have Israeli citizenship or residency, and who abused their position in Israel in order to become involved in terror activity, including aiding the perpetration of suicide attacks.
>
> The Israeli identity cards that were given to the residents of the territories as aforesaid allowed them free movement between the territories of the Palestinian Authority and Israel, and they made them a preferred target group of terror organizations for perpetrating hostile activity in general, and inside the territory of the State of Israel in particular.’

Because of their ability and readiness to aid the perpetration of terror attacks inside Israel, the residents of the territories who hold Israeli documentation became a recruitment target for the terror organizations, and the security establishment in Israel did indeed find that the efforts of the terror organizations were successful and that the involvement of residents of the territories who have Israeli identity cards in terror activities increased. We will consider this matter further in our remarks below.

Thus, when it was discovered that the residents of the territories who have Israeli identity cards by virtue of family ties were involved in terror by means of their abusing their right to move freely within Israel and between the territories and Israel; that the involvement of these persons in terror was increasing along with the progress in building the security fence which constitutes a physical obstacle to terrorists who wish to harm Israel; that the terror organizations are making great efforts to recruit into their ranks residents of the territories who have Israeli documentation, and it is possible that they also threaten the family members who are left behind; and that it is impossible to predict who will become involved in terror; it was also discovered that the restriction that the state imposed in the law on entering Israel served the purpose of the law in a rational and direct manner. Thus, the following was stated in the explanatory notes to the draft Citizenship and Entry into Israel (Temporary Provision) Law (Amendment), 5765-2005 (*Hatzaot Hok (Draft Laws)* 624):

> '… The professional assessment of the security establishment is that the temporary provision is an effective tool for reducing the free passage of residents of the territories between the areas controlled by the Authority and Israel, and for preventing the potential for a serious security risk on the part of that population.'

102. In paras. 85 and 86 of his opinion, my colleague the president examines the effect of the temporary permits to stay in Israel which the law allows — mainly for the purposes of employment — on the blanket prohibition against certain age groups staying and living in Israel, and his conclusion is that these permits do not sever the rational connection between the purpose of the law and the prohibitions therein. I accept my colleague's conclusion. Indeed, the case of an employee who enters Israel for a limited time and subject to restrictions cannot be compared to the situation of a person who has an identity card that permits him to move freely, without hindrance, from the areas of the territories to Israel and within Israel itself.

103. The first test of proportionality — the rational connection test — is therefore satisfied in full: the measure chosen to implement the purpose of the law corresponds from a rational viewpoint with the purpose of the law.

The second subtest — the least harmful measure

104. According to this test, the measure determined by the law, which violates a constitutional human right, is a proper measure if it is not possible to achieve the purpose of the legislation by adopting another measure that violates the human right to a lesser degree. Here we must make a clarification: when applying the second test of proportionality, the law is not compelled to choose absolutely the least harmful measure. Were we to say otherwise, then we would allow the court to dictate to the legislature which measure to choose, and in this way we would be undermining the discretion of the legislature and seriously violating the principle of the separation of powers and the decentralization of power. Moreover, in a case of this kind, the court is likely to undermine the effective implementation of the purpose of the law. The concept of proportionality for our purposes here means that the law chose a measure that falls within the spectrum of measures whose violation of a human right corresponds appropriately to the purpose of the law. The remarks of Justice Beinisch in *Menahem v. Minister of Transport* [11], at p. 80, are apposite to our case. She said:

> 'The requirement that the legislature should choose a measure that violates the constitutional right to an extent that is not excessive in order to achieve the purpose of the law does not mean that the legislature must always choose the lowest level at the bottom of the ladder. Such a determination would make things

> too difficult for the legislature, which would not be able to penetrate the barrier of judicial review... There may be cases where the choice of an alternative measure that violates the constitutional right a little less is likely to lead to a significant reduction in the extent of realizing the purpose or in the extent of the benefit that will accrue from it, and therefore it will not be right to compel the legislature to adopt this measure. As a result, this court has recognized a "constitutional room to manoeuvre" which is also called the "margin of appreciation." The limits of the constitutional room to manoeuvre are determined by the court in each case on its merits and in accordance with its circumstances, while taking into account the nature of the right that is violated and the strength of the violation thereof in relation to the nature and character of the competing rights or interests.'

See also *Israel Investment Managers Association v. Minister of Finance* [8], at pp. 387-389.

105. The question in our case is whether it was possible or it was not possible to achieve the purpose of preventing attacks carried out with the assistance of family members who are residents of the territories, by means of a lesser violation of the right to family life. We are mainly speaking of the creation of a mechanism of an individual check for every resident of the territories who is a spouse or parent of an Israeli citizen, instead of imposing a blanket prohibition on all the residents of the territories who are of certain ages. My colleague the president reached the conclusion that the provisions of the law satisfy the second test of proportionality, because in his words '… in the circumstances of the case before us, the individual check does not realize the legislative purpose to the same degree as the blanket prohibition. There is no obligation, therefore, within the framework of the least harmful measure, to stop at this level, and the legislature was entitled to choose the blanket prohibition that it chose' (para. 89 of his opinion). Let us further point out already at this stage, by jumping ahead to some extent, that when he discusses the third test of proportionality — the benefit-damage test — my colleague reaches the conclusion that the violation engendered by the blanket prohibition is greater than the benefit that it causes; that the advantage that the law generates is significantly less than the damage that it inflicts on the right of the citizen; and consequently, the state ought to have adopted an arrangement of an individual check while increasing its effectiveness in so far as possible (paras. 91-94 of his opinion).

106. I too am of the opinion that the Citizenship and Entry into Israel Law passes the second test of proportionality, and I will add nothing to the remarks of my colleague the president. The main disagreements between my colleague and me are restricted to the third subtest of the test of proportionality — the test of benefit as compared with damage — and we will now turn to this subtest.

The third subtest — the value subtest — benefit versus damage

107. Before we enter the arena to discuss and debate rights and duties, we would like to make an introductory remark concerning nomenclature: there are three subtests in the test of proportionality, and for reasons that I do not understand the third subtest is called by the name of the test of proportionality 'in the narrow sense.' This name is a mystery to me. The test of proportionality 'in the narrow sense' is, in my opinion, actually the second subtest, since it is a test whose beginning, middle and end all concern proportionality (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 437). But the third subtest before us, the test in which we place on each pan of the scales the values that conflict with one another, the benefit values against the damage values, ought to be called the test of proportionality 'in the value sense.' This test is concerned with values, and therefore it should be given that name. See and cf. *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at pp. 345-347; I. Zamir, 'Israeli Administrative Law as Compared with German Administrative Law,' *supra*, at pp. 131-132.

108. In the first two subtests, my colleague President Barak and I went hand in hand, and our conclusions were similar. But this is not the case with the third subtest, a test that concerns the proper relationship or the correlation between the benefit that the law engenders and the extent of the violation of the right of the individual. My colleague does agree that the provisions of the Citizenship and Entry into Israel Law contribute to public security, but his opinion is that the violation of the right of Israeli citizens who wish to marry residents of the territories and live with them in Israel is greater and outweighs the benefit. In his words (at para. 92 of his opinion): 'Admittedly, the blanket prohibition does provide additional security; but it is achieved at too great a price. Admittedly, the chance of increasing security by means of a blanket prohibition is not "slight and theoretical." Notwithstanding, in comparison to the severe violation of human dignity, it is disproportionate.' In consequence, my colleague wishes to compel the state to carry out an individual check of the spouses from the territories, a check which is supposed to reduce the violation of the rights of the citizen and reach a proportionate balance between public security and the violation of the rights. Cf. *Beit Sourik Village Council v. Government of Israel* [2], at pp. 840, 850-852 {297-298, 309-312}.

109. At this point I will part from my colleague and take my own path. In my opinion, an individual check of the persons included in those population groups who have a proven potential for endangering security and life may reduce the violation of the ability to have a family life in Israel, but it will not properly guarantee public security, and it will disproportionately violate the security of the individual and the public. It is not merely that there is an inherent difficulty in examining *ab initio* the positions and beliefs of the resident of the territories, to find out whether he supports our enemies or not; we also cannot ignore a real concern, which has been proved in the past, that the terror organizations will recruit the spouse who is a resident of the territories into its ranks only *after* he has been given a permit that allows him to enter Israel and to move freely in Israel. The investment of greater resources or more concentrated efforts will also not guarantee the security of Israeli residents, and the meaning of this is that cancelling the blanket prohibition in the law and replacing it with an arrangement of an individual check is likely to lead to quite a high probability of an increase in terror activities in Israel; to the killing and wounding of residents of the state; to a real and tangible weakening of the feeling of stability; and as a result of all of these to the undermining of democracy itself. In the task of balancing between a reduction of the killing, safeguarding life and guaranteeing the stability of the system of government, as compared with the damage caused to some of the citizens of Israel who wish to live with their foreign family members in Israel — and we should remember that the amendment to the law reduced the scope of the violation significantly — the benefit is, in my opinion, greater than the damage.

110. We have spoken at length about the armed conflict between Israel and the Palestinians and about the difficult reality — a difficult security reality — in which we live. We also spoke of the great difficulty that Israel has encountered in its war against the terror organizations, a difficulty that originates, *inter alia*, in the strong connection between the terror organizations and the Palestinian civilian population. We discussed at length the position of the Palestinian people in this dispute, the attitude of the Palestinian public, the great hostility that many Palestinians feel towards Israel and Israelis and the support of the armed conflict waged by the terror organizations among large parts of the Palestinian public. This support is often expressed by actually taking part in terror activities or aiding terror. The danger to the Israeli public, to its security and to its life is a clear and present danger, and we see evidence of this every day. Whoever lives in Israel today knows this well. The source of the danger, it should be remembered, is not merely the Palestinian Authority but — and perhaps mainly — the terror organizations and the Palestinian public in its entirety. Even if we agree that not all Palestinians wish to harm Israel, in general the Palestinian public and its members are hostile to the State of Israel. In such circumstances, an individual check of every resident of the territories who wishes to immigrate to Israel is an impractical mission — I will go further and say, an impossible mission — and even if at a particular moment it is possible

to determine that a specific resident from the territories does not associate himself with the supporters of terror, who can guarantee that tomorrow or the day after, after he has received the much-desired permit, he will not change his opinion and his actions? The state says in this regard (in paras. 25 and 27 of the state's response dated 7 February 2006) (all the emphases are in the original):

> '*The forces fighting the State of Israel are not members of a regular army and they are not necessarily recognized as terror activists by the security forces; a substantial part of the Palestinian civilian population of certain ages are partners in the armed conflict, in one way or another*. Because of this, and as has also been explained in detail in the past, *it is not possible to predict* the involvement in terror (whether it is clandestine involvement or assistance or financial support) of a resident of the Palestinian Authority, who is not recognized by the security establishment as a terror activist.
>
> …
>
> … The involvement of persons that have Israeli documentation since the armed conflict began, with regard to all the characteristics set out above, in aid to terror organizations and in carrying out bloody attacks inside the State of Israel indicates that many of those persons who, in the absence of concrete security intelligence against them, were granted a status in Israel by the state within the framework of applications for family reunifications, associated themselves with the Palestinian cause at one stage or another, after they entered Israel, and aided or committed murderous terror attacks.'

111. Against the background of these facts — facts that constitute a basis for our consideration and deliberation — the limitations of the individual check arise as if with a will of their own, and we discover that the security establishment has no real capacity to identify who are those residents of the territories who are likely to endanger the security of the public in Israel. Thus, for example, it is clear that the security services have difficulty in collecting intelligence — whether favourable or unfavourable — about residents of the territories who live in enemy territory. Moreover, terrorists do their best to recruit residents of the territories who have Israeli documentation, whether by means of ideological persuasion, whether by economic means or whether by putting pressure on their family members who live in the territories. Who therefore is so wise that he does not suspect that a resident of the territories may become associated with a terror organization *after* receiving Israeli documentation? It is clear that the security services are unable to carry out a continuous and uninterrupted check of all the residents of the territories who have received a permit to stay in Israel. In their arguments, the state explained at length the reasons that make the individual check impracticable, and we will quote some of its arguments (para. 28 of the response dated 7 February 2006; see also para. 16 of the closing arguments dated 16 December 2003):

> 'The reasons that underlie the *limitations of the individual check* on the part of the security establishment are as follows:
>
> a. *Intelligence gaps* — in the circumstances of time and place, obviously the security establishment has intelligence gaps with regard to the activity of the residents of the territories, especially those who live in areas A and B. In these circumstances, *the fact that there is no unfavourable security intelligence about a particular resident does not indicate that this person is not involved in prohibited security activity, and it cannot rule out the possibility that the lack of intelligence is a result of intelligence gaps that exist today.*
>
> b. The risk to the security of the State of Israel can be created and realized at any time, without prior warning, since someone on behalf of whom an application for a family reunification in Israel is submitted lives in a place where terror organizations operate without hindrance, and so too do his family members

and his close friends. The terror organizations can therefore, without any difficulty and at any time, make contact with a person who is requesting a status in Israel and/or with his family members or his social circle, and persuade them, either in an amicable manner or by threats, to cooperate with them. Therefore a current examination of every applicant — even were it practicable — would not be able to rule out the existence of the risk arising from giving permanent entry permits into Israel.

c. *The risk comes from anyone who can enter Israel permanently by means of Israeli documentation that makes it possible also to stay in Israel overnight, and to move lawfully throughout the state* — since the general closure was tightened, and the difficulty in entering Israel was increased, the terror organizations are seeking every possible way that will help them carry out terror activities inside Israel.

The terror organizations regard the holders of Israeli documentation and especially persons who have a strong connection to the Palestinian Authority as an attractive and very important asset, from their point of view, for aiding the terror organizations within the framework of the armed struggle. This is because of the continued existence of a *strong connection with the close family* and childhood friends in the territories, the *continuing identification* with the Palestinian cause, the *extensive accessibility to the territories and to the State of Israel simultaneously*, and *the ability to exert pressure* through the close family which is left in the territories to obtain the cooperation of the former resident of the territories. It need not be said in this context that the professional assessment of the security establishment is that *in order to establish a "separation barrier" or in other words a "barrier area" or a "border area," as well as constructing a "Jerusalem bypass road," there may be serious future implications,* in this respect, since these will increase even more the attractiveness of persons who receive the status in Israel for the various terror organizations, because of the difficulty in crossing into Israel and/or sending terrorists and weapons from the territories into Israel.

d. *The past is no indication of the future* — the fact that someone was permitted in the past to enter Israel and/or that there is no current concrete security intelligence about him, cannot, in itself, predict that he does not present a *future risk* to national security, whether because of his identification with the armed struggle being carried out today by the Palestinian side, of which he is a part himself, or because of the fact that he cannot withstand threats against him and his close family that live in the territories that are made by the terror organizations.

Thus, for example, it is possible to bring examples from recent months of participants in terror activity who were not regarded as persons likely to become involved in terror activity… In addition, *from the viewpoint of the terror organizations, there is a preference for using someone with regard to whom the terror organization thinks that Israel has no adverse intelligence.*'

112. The concerns raised by the state in its arguments are not unfounded. As we said in our remarks above, past experience has proved that residents of the territories who received a permit to stay in Israel by virtue of family ties have indeed associated themselves with terror organizations, and have made use of the permits which allowed them to move freely from the territories to Israel and within Israeli itself to carry out terror acts in Israel. In its arguments before us, the state included figures of known cases, and it appears that at least twenty-six residents of the territories — men and women, who receive a permit to stay in Israel by virtue of family ties were involved in terror or were known from intelligence sources to be involved in terror. The involvement of these residents in terror began, or at least became known to the

state, only *after* those residents received the Israeli documentation (see para. 31 of the state's response dated 7 February 2006):

> 'Twenty-six residents of the territories who received a status in Israel as a result of a process of family reunification were involved in carrying out murderous terror attacks in Israel… Another forty-two residents of the territories who are in the process of the staged process were found, according to intelligence information, to be involved in terror activity… *In all these cases, those persons received a status in Israel without it being possible to predict the security risk that they presented… obtaining a status in Israel is what allowed these residents of the territories to act as an essential link* in carrying out murderous attacks that led to the deaths of dozens of innocent citizens.'

113. This is the reality in which we live. Regrettably, it has been found that residents of the territories who have a permit to stay in Israel aided terror and that their substantial aid claimed the lives of dozens of residents of the state. 'Because of their free movement within the State of Israel and by virtue of their good knowledge of the terrain, these residents of the territories are an *essential component in the infrastructure of terror and in planning and perpetrating attacks*' (para. 24 of the response dated 7 February 2006). '*Some of the residents of the territories, who received a status in Israel by virtue of family reunifications, were involved in the perpetration of suicide attacks, whether by carrying them out themselves or by aiding them. Others were involved in carrying out car bomb attacks, kidnappings, assassinations and detonating explosive charges*' (para. 37 of the response dated 6 November 2005). '*Their essential involvement… in the perpetration of suicide attacks led to very serious harm to national security and the safety of Israel's citizens*' (para. 30 of the response dated 7 February 2006). Indeed, residents of the territories who have Israeli documentation by virtue of marriage were involved in at least twenty-five major attacks and attempted attacks in Israel (para. 24 of the response dated 7 February 2006), in which at least forty-five Israelis were killed and at least one hundred and twenty-four were injured (para. 17 of the closing arguments dated 16 December 2003).

114. Thus we see that the damage to the security of Israel and the security of its residents is great, and preventing that damage is not possible by means of an individual check of each of the residents of the territories who wishes to immigrate to Israel. At the same time, it is precisely the method adopted by the law that has been proved effective, in that it averts the threat presented by those population groups that according to past experience are most likely to endanger the security of the public in Israel. In other words, the measure chosen to realize the legislative purpose has proved itself by its results. It has been proved that the law, in its present format, is an effective tool for reducing security risks, increasing stability and preventing damage to the system of government itself. As we saw in the remarks cited above from the explanatory notes to Citizenship and Entry into Israel (Temporary Provision) Law (Amendment), 5765-2005 (*Hatzaot Hok (Draft Laws)* 624):

> '… The professional assessment of the security establishment is that the temporary provision is an effective tool for reducing the free passage of residents of the territories between the areas controlled by the Authority and Israel, and for preventing the potential for a serious security risk on the part of that population.'

115. There are some who claim that the blanket prohibition in the Citizenship and Entry into Israel Law constitutes a collective injury to all the Arab population in Israel because of the crimes of a few whose place of residence was in the past within the territories and who today live in Israel. We agree, of course, that a collective injury has a serious and injurious result, and a democracy ought to refrain from adopting it. But I think that there are cases where we cannot avoid it. Sometimes, the harm caused by a few persons is so evil and extreme that it may justify collective restrictions; this is especially the case where it is not possible to identify and locate those few who wish to cause harm, and the harm that can be anticipated from those people is very serious and dangerous. Indeed, the preventative

measures required are commensurate with the estimated harm. With regard to our case we will say that the cumulative harm anticipated from terror attacks is very serious and destructive: people are murdered, many others are injured and hurt and the feeling of stability which is essential to the existence of a society in general and a democracy in particular is undermined. It is to be regretted that these circumstances are likely to make it necessary — in times of war like the present time — to impose restrictions that are capable of harming some of the collective of Arab Israeli citizens.

116. The benefit of the Citizenship and Entry into Israel Law in its present format has been clearly proved. The significant superiority of the blanket prohibition over the individual check has also been proved. But together with the benefit that the law engenders, there is the harm to those citizens of the state who wish to bring to Israel their family members who are residents of the territories. We do not take this harm lightly, but I have difficulty in accepting the position of my colleague the president that the weight of this harm is greater than the weight of the benefit engendered by the law in its present format. *First*, let us recall that in order to reduce the harm to Israeli citizens the state reduced the prohibition provided in the original law, by applying it only to population groups who were shown by past experience to present (relatively) high security risks. Thus men over the age of 35 and women over the age of 25 were excluded from the prohibition, as well as minors under the age of 14. The possibility of giving minors over the age of 14 a permit to stay in Israel was increased. In addition, a possibility was provided to give a permit to stay in Israel for temporary purposes. The figures that underlie the determination of the age limits in the law were discussed by the state in para. 37 of its response dated 6 November 2005:

> 'The assessment of the security establishment is that *approximately 90% of those involved in terror attacks are between the ages of 16 and 35, and also that approximately 97% of the suicide bombers are of those ages.* Twenty-two residents of the territories who received a status in Israel as a result of family reunifications and who were involved in terror attacks against Israeli targets were between the ages of 18 and 35. With regard to *women, the vast majority of those involved in terror attacks are between the ages of 17 and 30. It should be pointed out that in the year 2004, 36 women were involved in terror attacks as aforesaid, a number that constitutes a significant increase in comparison to the years 2002 and 2003.*
>
> It is well known that minors are also involved in the armed conflict between the Palestinians and the State of Israel. *In recent years, more than 30 minors between the ages of 12 and 15 were involved in terror attacks.* Of these ten minors were involved in suicide attacks. Nonetheless, it should be noted that *24 of the minors who were involved in terror attacks were between the ages of 14 and 15, seven of them between the ages of 13 and 14, and two of them were between the ages of 12 and 13.*'

117. The effect of the prohibition in the law was therefore reduced to those population groups who constitute, according to the assessment of the security establishment, a relatively high potential for being security risks. Within those population groups who have a high risk potential, it is impossible to predict who will constitute and who will not constitute a risk to the state, and for this reason a blanket prohibition was imposed on all the members of those age groups mentioned in the law. At the same time, population groups that do not usually present a risk to security were excluded from the prohibition, subject to specific risks to national security (s. 3E of the law). This reduction of the blanket prohibition — so we are told by the state — is likely to reduce the scope of the population injured by the law by nearly 30 per cent, and as stated in the Citizenship and Entry into Israel (Temporary Provision) Law (Amendment), 5765-2005 ((*Hatzaot Hok (Draft Laws)* 624), at p. 625:

> '… adding the proposed qualifications to the restrictions in the temporary provision can restore approximately 28.5% of all the applications for family

reunifications of residents of the territories to the list of those applications that can be processed…'

The petitioners seek in their arguments to challenge this percentage presented by the state, and to replace it with an amount of 12.3% of the applicants. This percentage is deduced by the petitioners from general statistics concerning the average marriage age in Moslem society. Without more substantiated figures, we find it difficult to accept the position of the petitioners and prefer it to the position of the state. Moreover, even if we accepted the position of the petitioners with regard to the amount by which the harm caused by the law has been reduced, we would still be unable to accept their claim that the harm caused by the (amended) law is greater than its benefit.

118. We should also address the fact that the Citizenship and Entry into Israel Law was enacted in the format of a temporary provision whose validity was determined for one year, and that it is possible to extend it, from time to time, for a period that does not exceed a year each time. This temporary nature of the law has importance. Our case law has established a rule that 'a "permanent" law is not the same as a "temporary" law when engaging in a constitutional scrutiny of the law' (*Gaza Coast Local Council v. Knesset* [6], at p. 553), and the less we declare temporary laws void, the better. See and cf. *Klal Insurance Co. Ltd v. Minister of Finance* [64], at p. 486; *Ressler v. Knesset* [128]. The reasons for this rule are pertinent in the case before us. Security reasons are reasons that change from time to time, and determining that a law is a temporary law means a reduction in the harm caused by it merely to the areas where security reasons so demand. Moreover, this temporary nature of the law requires the government and the Knesset to consider the provisions of the law and the consequences of applying them on a frequent basis, and to continue to balance from time to time the rights that have been violated against the security needs of the state.

119. The changes made in the amendment law of 5765-2005 significantly reduced the harm to the right of Israeli citizens, but my colleague President Barak is of the opinion that '… these amendments — as well as the temporary nature of the law — do not change the lack of proportionality to a significant degree' (para. 92 of his opinion). The reason for this is that '… the vast majority of the Israeli spouses who married spouses from the territories continue to be injured even after the amendments that were recently made' (*ibid*.). My opinion is different. When striking a balance as required by the third subtest in the test of proportionality — a balance between the benefit and the damage — we are required to examine, first and foremost, whether the legislature struck a reasonable balance between the needs of the individuals in the whole public and the harm to the individual. In other words, is the balance struck by the law between the conflicting interests such an improper balance that it calls upon the court to intervene in an act of legislation?

Here — like in the second subtest — the legislature has room to manoeuvre, which can be called a 'margin of proportionality' or a 'margin of legislative manoeuvre,' in which it may 'choose, at its discretion, between a (proper) purpose and (proportionate) measures' (*Gaza Coast Local Council v. Knesset* [6], at p. 551). Moreover, 'the court will intervene only when the measure chosen significantly deviates from the boundaries of the margin, and it is clearly disproportionate' (*Menahem v. Minister of Transport* [11], at p. 280). 'We should also remember that the court will not rush to intervene and declare void a provision of statute enacted by the legislature. Even if we find that there is a preferable solution to the one chosen by the legislature, the court will not intervene unless the legislature deviated from the margin of proportionality' (HCJ 4915/00 *Communications and Productions Network Co. (1992) Ltd v. Government of Israel* [142], at p. 466). The court does not replace the discretion of the legislator with its own discretion, and it does not become involved in the choice and examination of measures that were unacceptable to the legislature. The role of the court is to identity the boundaries of the scope of operation given to the legislature — under the constitution or the Basic Laws — and to examine whether a measure chosen by the legislature falls within this margin. In determining the boundaries of that scope of operation given to the legislature, the court will examine the strength of the conflicting rights and interests — rights

and interests that give life to the law, on the one hand, and rights that are violated by the law, on the other — and also the circumstances and interests that are involved in the case under review. As it has been said: 'In applying the principle of proportionality we should remember… [therefore] that the degree of strictness with the authority will be commensurate with the strength of the violated right or the strength of the violation of the right' (*Stamka v. Minister of Interior* [24], at p. 777). See further HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [143], at p. 452; *Israel Investment Managers Association v. Minister of Finance* [8], at pp. 387-389; *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [100], at pp. 812-813.

120. In our case, we are speaking of the right to have a family life, and it is a right of great strength and strong radiation (*Stamka v. Minister of Interior* [24], at p. 782). Conflicting with this powerful right, there is a right that is also of great strength, namely the right of all the residents of Israel to life and security. In truth, arguments concerning 'life' and 'security' do not override others as if by magic, and we are obliged to examine and check them thoroughly and closely. But past experience has shown that we are really speaking about life, that we are concerned with life. Life and death. It is the right of the residents of the state to live. To live in security. This right of the individual to life and security is of great strength. It has chief place in the kingdom of rights of the individual, and it is clear that its great weight is capable of determining the balance between damage and benefit decisively. This right to life, which is the purpose of the legislation, is capable of telling us that the scope for making the balancing will be quite broad.

121. Moreover, we should remember that we are not speaking of a violation of the essence of the right to marry and to have family life. The citizens of the state may marry residents of the territories as they see fit. No one has deprived them of that right. No one has even deprived them of living together with their family members and children. The right to marry and have a family life in the narrow and main sense has not been violated, and a person who wishes to live with his wife and children can do so. But at this time — a time of war — for reasons of public security, the realization of the right inside the State of Israel has been restricted. The spouses can realize their right to marry and establish a family in a place that does not present any danger to the residents and citizens of Israel. They can and may realize their right to family life in Israel if they are included in the age groups permitted in the law, but they cannot have a family life in Israel if they are included in the age groups that present a considerable potential risk to the lives and security of Israeli citizens. It is clear that restricting the ability to realize a right to have family life in Israel harms the Israeli citizen, but this harm is a limited harm and it is overridden by the right of Israeli citizens and residents to life and security.

122. The right of some of the citizens of the state to realize their right to marriage and family life in Israel therefore conflicts with the right of all the residents of Israel to life and security. Let us consider the forty-five families who lost their beloved relations; let us also consider the one hundred and twenty-four families who are caring for their injured sons and daughters; let us consider these carefully and ask: is the contribution of the law not a worthy one? Is the additional security — security for life — that the blanket prohibition gives us, as compared with the individual check that is limited in its ability, not proper? Let us remember that figures from the past concern years before the security fence, and we know that the building of the security fence constitutes one of the main incentives for the terror organizations to recruit residents of the territories who hold Israeli documentation — documentation that allows them to move freely within Israeli and between the territories and Israel.

123. It will not be redundant if we mention and emphasize that the Citizenship and Entry into Israel Law — both in its original version and after it was amended — contains transition provisions that were intended to treat with some leniency those residents of the territories who began the process of obtaining a status in Israel before the law was enacted and before

decision no. 1813 (of 12 May 2002) that preceded the law was made by the government. In the language of s. 4 of the law (as it is today):

> 'Transition provisions
>
> 4. Notwithstanding the provisions of this law —
>
> (1) the Minister of the Interior or the area commander, as applicable, may extend the validity of a licence to live in Israel or of a permit to stay in Israel, which were held by a resident of an area prior to the commencement of this law, while taking into account, inter alia, the existence of a security impediment as stated in section 3D;
>
> (2) The area commander may give a permit for a temporary stay in Israel to a resident of an area who filed an application to become a citizen under the Citizenship Law or an application for a licence to live in Israel under the Entry into Israel Law, before the first of Sivan 5762 (12 May 2002) and with regard to which, on the date of commencement of this law, no decision had been made, provided that a resident as aforesaid shall not be given citizenship, under the provisions of this paragraph, nor shall he be given a licence for temporary residency or permanent residency, under the Entry into Israel Law.

These transition provisions are capable of reducing the harm caused by the law to some Israeli citizens who married residents of the territories before the government decision, in reliance on the policy that preceded it. Thus, for example, an Israeli citizen whose spouse, a resident of the territories, was given a status in Israel before the decision of the government, will continue to live in Israel with his foreign spouse despite the provisions of the law (subject to security grounds; subsection (1)). Even his neighbour, an Israeli citizen who married a resident of the territories who submitted an application to live in Israel before the policy changed, can, in principle, continue to stay in Israel, even though he cannot be granted citizenship in Israel, by virtue of a permanent residency licence or a temporary residency licence (subsection (2)).

In its response of 7 February 2006, the state told us that at the time of the government's decision (of 15 May 2003) there were 16,007 applications to receive a status in Israel pending. It follows that the transition provisions can resolve, if only partially, the cases of more than sixteen thousand couples, subject, of course, to security considerations. So we see that the transition provisions significantly reduce the harm to Israeli citizens who married before the change in policy and relied on the previous policy. With regard to Israeli citizens who married residents of the territories after the government's decision or after the enactment of the Citizenship and Entry into Israel Law, they can be presumed to have known that their spouses who are residents of the territories would not be allowed to enter Israel, and their cases are not similar to the cases of persons who married before the law was enacted.

124. My opinion is therefore that the law satisfies the proportionality test in the value sense, just as it satisfies the other two proportionality tests.

Summary

125. The end result is therefore that the Citizenship and Entry into Israel Law is a law that does not contain a defect or flaw, and it follows from this that the petitions should be denied.

Provision for humanitarian cases

126. Notwithstanding the remarks we made above, we would like to add that we were disturbed by the absence of a provision designed for special humanitarian cases. In other words, the law lacks a provision for exceptions where the Minister of the Interior will be allowed — if he finds there is a special humanitarian need and when any suspicion of a security risk has been allayed — to consider granting a permit for a resident of the territories to enter Israel. This omission admittedly is not capable of resulting in the voidance of the law, but I think the state ought to consider adding an exception of this kind to the law, in one form or another. As the court said in *Stamka v. Minister of Interior* [24], at p. 794: 'A policy that does not allow for exceptions is like a ball bearing machine without any lubrication oil. Just as the latter will not work and will soon explode, so too will the policy.'

Conclusion

127. My opinion is therefore that the petitions should be denied.

Postscript

128. I have studied carefully the response of my colleague President Barak to my opinion, and I certainly will not surprise anyone by saying that my opinion remains unchanged. In his main opinion my colleague explained his position well, and even if he has now honed and polished various aspects — important aspects — of his outlook, a little here and a little there, the main points remain unchanged. The same is true of the main points on which I built my opinion.

129. The disagreements between my colleague the president and me revolve around the following issues: does an Israeli citizen have a constitutional right — a right deriving from the Basic Law: Human Dignity and Liberty — to live a family life in Israel with his spouse who is not an Israeli, including with their child or children? My colleague is of the opinion that an Israeli citizen derives this right from the constitution. Unlike my colleague, I am of the opinion that this right to family life, in so far as it exists, comes from the law — from the law and not from the constitution. From these different opinions of ours we have each reached our own conclusions, and everything has been said and written at length, perhaps even at greater length than was necessary.

130. The main theoretical disagreements between my colleague and myself concern the scope of application of the concept of human dignity in the Basic Law: Human Dignity and Liberty, and the relationship between this basic right and the provisions of the limitations clause. My colleague wishes to extend the basic rights listed in the Basic Law almost endlessly, while he throws the burden of restraint on the limitations clause, whereas my opinion is that even at the first stage of determining the scope of application of the basic rights, we must take into account fundamental social factors that are capable of affecting the limits of the basic right. Thus we see that my colleague says (in para. 107 of his opinion):

> 'I do not hold that basic rights should be extended in every direction. I hold that they should be given a purposive interpretation. This interpretation is neither a restrictive nor an expansive one. It is an interpretation that reflects the way in which Israeli society understands the nature of human rights, according to their constitutional structure and according to the constitutional principles provided in the Basic Law, all of which while taking into account values and essentials, and rejecting what is temporary and fleeting…'

But I will stand up and ask: what is the source of my colleague's knowledge that the 'understanding of Israeli society' is that the Israeli spouse has a constitutional right — and note, a *constitutional* right, not merely a legal right — to have a family life in Israel with a spouse who is not Israeli, i.e., that it is a *constitutional* right for Israeli citizens to bring with them spouses from foreign countries and have them settle with them in Israel? You may say that my colleague thinks that this *ought* to be the case, and since nothing is stated to the

contrary, what ought to be is also what is. But I say that fundamental principles, universal principles that are common to all peoples of the world, together with principles that are characteristic of Israel and distinguish it from all other peoples, are capable of determining boundaries also for the right of the individual to have a family life in Israel with a foreign spouse, at least in so far as a *constitutional* right is concerned. In our time and place, I think that it is proper that this question should be decided, according to the principles of law and the principles of the constitution, by the body that is competent to give Israel a constitution.

131. With regard to the risks that led the Knesset to enact the Citizenship and Entry into Israel Law: even if we said — and we do say — that the existence of democracy and protecting human rights involve risks, I do not agree, and it is not in my opinion reasonable that I should be asked to agree, that we should take upon ourselves risks to life of such magnitude and with such significant chances of their materialization as in our case. Whoever destroys one life is regarded as if he has destroyed a whole world, and we know that many lives have been lost as a result of risks that the state took upon itself prior to the enactment of the Citizenship and Entry into Israel Law.

My colleague says (in para. 111 of his opinion):

> 'A society that wishes to protect its democratic values and that wishes to have a democratic system of government even in times of terror and war cannot prefer the right to life in every case where it conflicts with the preservation of human rights. A democratic society is required to carry out the complex work of balancing between the conflicting values. This balance, by its very nature, includes elements of risk and elements of probability…'

With regard to these remarks of my colleague I would like to say the following: I agree that a democratic society is required to make balances and to consider risks and the probabilities that risks will materialize. But this is exactly what happened in our case, when the Knesset — the legislature — was required to carry out the complex task of balancing between the conflicting values, a balance which took into account risk factors and probability factors, which in the opinion of the security establishment are not at all negligible. The Knesset — the legislature of the State of Israel — therefore struck a balance, as it is authorized to do, between the right to life and other rights, and after it examined risks and probabilities, it reached the formula set out in the law and determined who would be allowed to enter Israel, notwithstanding the risk and probability that residents of the state would be harmed, and who would be prevented from coming into Israel because the probability that he would harm residents was too high. This is what the Knesset decided, and I do not think that we ought to overturn its decision.

Moreover, the 'right to life' is so exalted that in the task of balancing and considering risks it has a very great weight. This is certainly the case where the lives of many are at risk, and the harm to life can undermine the feeling of stability and security in Israel. When we weigh the proven risks to life against other rights — in our case the (alleged) right of an Israeli to have a family life in Israel with a foreign spouse — the latter right will prevail only if the violation thereof is a very serious and weighty one while the probability of an injury to life is insignificant. This is not the case here.

132. With regard to fixing a minimum age of 35 for a man and 25 for a woman in order to grant a permit to enter Israel subject to an individual check, my colleague says (in para. 112):

> 'Indeed, if an individual check is proper, from the viewpoint of the risks that should be taken in our defensive democracy, when the husband reaches 35 and the wife reaches 25, why does it become improper, from the viewpoint of the risks, when they have not yet reached these ages?'

And further on:

> '…were we to place before us human life only, we would be obliged to reach the conclusion that whatever the age of the foreign spouses, a blanket prohibition should be applied to them; we would also be liable to determine that family

> reunifications should not be allowed, irrespective of the question of when the application was filed; we would also be liable to determine that workers should not be allowed at all to enter from the territories. But this is not what the Citizenship and Entry into Israel Law provides. If the state was prepared to take the risks to human life which its policy — that refrains from a blanket prohibition and is satisfied with an individual check — causes with regard to spouses over the ages of 35 and 25, and if the state was prepared to take the risks of giving entry permits to spouses who filed their application before the effective date, and if the state was prepared to take the risks in allowing workers from the territories to enter Israel and is satisfied with an individual check, it is a sign that the risk presented by being satisfied with an individual check is not so large that it can justify the serious violation to the family life of the Israeli spouses.'

I dispute this line of argument, since it is always possible to improve the proportionality of the violation with the argument that determining sweeping boundaries makes the violation of the right too broad. Thus, for example, we could ask, in the manner of my colleague: if the state is prepared to take upon itself risks to life by allowing driving at a speed of 90 kilometres per hour, why should it not determine a limit of 91 kph? 92? And so on. The same is true of other matters, such as the statute of limitations, the age of majority, etc.. 'But this is the nature of times, measures, weights, distances and similar measurable concepts, that in determining their limits the boundaries are somewhat arbitrary. This is well known' (CrimA 3439/04 *Bazak (Bouzaglo) v. Attorney-General* [144], at para. 24 of the judgment). Indeed, the determination of measurable concepts is a part of the experience of the law, and the question is merely one of reasonableness in the circumstances of one case or another, and in the case before us, mainly also questions of risks and probabilities. With regard to our case, we have received a thorough explanation as to why the ages of 25 and 35 were chosen for the entry of foreign spouses into Israel, and these matters have been explained at length above (see para. 116 *supra*). In any case, if the state is prepared to take certain risks on itself, are we to come with an argument and ask why it did not take on itself greater risks? With regard to all this, the Knesset and the government thought, in accordance with the advice of the security service, that Israeli democracy ought to be prepared to take upon itself some risks to human life in order to protect the basic rights of the individual, whereas it should not take upon itself other risks to human life. Does the court — after considering, *inter alia*, the principle of the separation of powers — have a proper reason for overturning this decision of the law? The answer to this question is, in my opinion, no.

133. Meanwhile I have received the opinions of my colleagues Justice Procaccia and Justice Joubran, and I would like to devote a few remarks to these opinions.

134. My colleagues, each in his own way and style, hint in their opinions that it is possible that the purpose of the law was not a security one, or at least was not only a security one; that at the time of enacting the law, it is possible that the legislature also considered the purpose of demography (see para. 14 of the opinion of Justice Procaccia and para. 24 of the opinion of Justice Joubran). My colleague Justice Joubran does not draw any conclusion from these remarks, whereas my colleague Justice Procaccia is of the opinion that 'even if there is nothing [in the demographic consideration] to reduce the credibility of the security consideration, it is possible that it reflects to some extent on its weight and strength.'

135. This position of my colleagues was rejected utterly in the opinion of my colleague the president and in my opinion, and even now I have difficulty accepting the position of my colleagues. The draft law, the provisions of the law, the amendments to the law, and in addition to all of these — the arguments of the state before us, all of these point to the fact that the purpose of the laws is a security purpose. The remarks uttered in the Knesset at the time of the enactment of the law cannot change this purpose. Moreover, the demographic issue was not considered at all by us and we were in any event not required to decide it. For what reason, therefore, do my colleagues mention this matter in their opinion? What reason was there for my colleagues to consider the matter in a non-committal way and cast a shadow

on our deliberations? And if we did not hear full argument on the question of the demographic factor, how can we know what was the weight of this consideration among all the considerations? Indeed, if one day the Knesset enacts an immigration law which has as one of its purposes the preservation of the Jewish majority in the State of Israel, it is possible that the court will be required to consider in depth the demographic factor. And the court will consider the matter and decide it. But that is not the position in this case, since we were not requested to consider that issue.

136. Moreover, my colleague Justice Procaccia discusses at length the ruling of the Supreme Court of the United States in *Korematsu v. United States* [185], and after she describes the ruling in that case as a ruling 'that is considered by many one of the darkest episodes in the constitutional history of western countries,' she goes on to say that 'the wind that blows in the background of the constitutional approach that was applied there by the majority opinion is not foreign to the arguments that were heard from the state in the case before us,' and that 'we must take care not to make similar mistakes.' We should remember that the arguments of the state were accepted by me and also by some of my colleagues as well. Human history provides much scope for someone who wishes making comparisons, some of which are appropriate and some inappropriate. But as a court we are obliged to learn from history and to refrain from the mistakes of the past. But in this learning we are required to be somewhat particular to consider the circumstances of each case on its merits, lest we fail to see the truth and the complex reality of life before us. With regard to our case, the distance between that difficult and sad historical episode and our case is a distance of light years, and in this context I accept the position of my colleague Justice Naor. It is sufficient if we mention that *Korematsu v. United States* [185] concerned the denial of liberty to more than one hundred thousand citizens of the United States without it being proved that they presented any security risks. Our case, we should remember, concerns preventing the entry of foreign nationals when security risks have been proved and many Israeli citizens have been murdered and injured. The difference between the cases is so deafening that there is no need to explain it further.

Justice D. Beinisch

1. The decision in the petitions before us is one of the most difficult decisions that have been brought before us in recent years. In their extensive opinions, my colleagues President A. Barak and Vice-President Emeritus M. Cheshin follow different paths in the process of the constitutional scrutiny of the Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003 (hereafter: the law or the Citizenship and Entry into Israel Law), and each of them reaches, according to his approach, a different terminus at the end of the journey.

2. I will say already at the beginning that with regard to the method of the constitutional scrutiny of the law, I do not see any route other than the one outlined and detailed by President Barak in his opinion, with all the stages of this route. In order to clarify my opinion, I will tread again the path of the legal progression as briefly as possible. In the first stage of the constitutional scrutiny, the existence of the right to family life is examined from the viewpoint of the Basic Law: Human Dignity and Liberty. The question that is asked at this stage is whether there indeed exists in our legal system a basic right to family life as a part of the right to human dignity. After we have recognized the existence of the right, which was already recognized in our case law in a series of decisions, we march on to the second stage of the constitutional scrutiny, in which the violation caused by the law, which is the subject of the petition, to the protected right of the Israeli citizen, is scrutinized in accordance with the criteria of the limitations clause.

My conclusion with regard to the outcome that is implied by following this path is that the law, in its present format, with its all-embracing and comprehensive scope, cannot stand

because of the disproportionate violation therein of the right to family life and because of the violation of the right to equality.

In reaching the aforesaid legal conclusion, we have not ignored the difficult struggle of the State of Israel against terror that knows no bounds. As judges and as citizens of the state, we live in the very heart of the reality and the difficult experience of terror, and we do not close our eyes to this reality, even for a moment. We wish to protect the democratic values of the State of Israel in the light of the reality with which the state is contending, not by ignoring it.

3. In the petitions before us, we are required to examine whether the Citizenship and Entry into Israel Law unlawfully violates the right of Israeli citizens who wish to have a family life with a foreign spouse who is a resident of the territories. It should first be said that I agree with the premise of Justice Cheshin in his opinion that every state is entitled to restrict and regulate the laws of immigration into the state and even spouses of citizens of the State of Israel do not have an automatic right to immigrate to Israel and to receive a status by virtue of marriage. It would appear that none of us questions the fact that the key to giving a status to foreigners in Israel is held by the state and not by any of its citizens. Notwithstanding, our case law has already in the past recognized the right of the citizen that his application to be reunited in Israel with his foreign spouse and to have a family life with his spouse will be examined and considered favourably in the absence of any security, criminal or other impediment. I do not see any conflict between the aforesaid premise and the conclusion that we have reached with regard to the constitutionality of the law that has come before us for judicial review. The law is not based on the immigration policy of the State of Israel, nor on its interest and ability to absorb foreigners, but on its security needs alone. The purpose of the law, as made clear to us also in the extensive arguments of counsel for the state, is based on a security need, at this time, to prevent a risk arising, according to the state, from the entry into Israel of residents of the territories, including those with whom their Israeli spouses wish to have a family life. The law is based on a general and blanket assumption that the entry of Palestinian spouses into Israel and the possibility that they will be given a status in Israel presents the state with a security danger. Therefore, the law provides that the entry of spouses from the territories should be prohibited even without an individual check as to whether such a risk exists and even without an examination of the potential risk in a concrete manner. The question before us is, therefore, whether the provisions of the law that were enacted on the basis of this assumption satisfy the test of constitutionality, or whether they involve a disproportionate violation of human rights, which does not satisfy constitutional scrutiny.

4. In view of the security purpose of the law, it would appear that once again this court is required to consider what is the proper point of balance between the clear security interest of protecting the lives of Israeli citizens and residents and the protection of human rights. An examination of the proper balance between these two poles is a difficult task to which this court has become accustomed throughout the years of its existence. Since the founding of the state, the organs of state and the government have been faced with the need to protect the security of the state and its citizens, a need which sometimes requires a violation of basic human rights in order to provide security and the protection of life. For years our case law has contended with the conflict between these two poles and dealt with it successfully. This tension has increased in recent years for reasons arising from the difficult security position, on the one hand, and from reasons based on the enshrining of basic human rights as constitutional super-legislative rights, on the other. But the strength of the tension cannot exempt us from the need to exercise our judicial review and examine the constitutionality of the law even when the factual position is complex.

Indeed, since September 2000 Israel has been subject to a cruel barrage of terrorism that has claimed a heavy price in blood. This terrorism has not passed by innocent citizens, families, women and children, the elderly and the young, and it has claimed many victims. The horrors of terrorism still endanger human life in Israel and hover like a heavy shadow at all times and in every place. With this fact in mind, we have not flinched from examining and deciding questions concerning the proper balance and deciding the proportionality of

measures adopted by Israel in its struggle against terror, including the interrogation methods of the General Security Service, the legality of arrests and conditions of arrest, assigning a place of residence to families of terrorists, building the security fence and many other matters. All our decisions are founded on the basic outlook that human rights exist in times of war as in times of peace. The proper balancing point for protecting them is what moves and changes in times of war and combat.

5. As stated, an additional difficulty when making our decision derives from the fact that the basic rights are today enshrined in the Basic Law: Human Dignity and Liberty, and our judicial review in the matter before us extends not only to the acts of the government but also to the legislation of the Knesset. The boundaries of this review are of course restricted only to cases where the legislature has violated a right protected in the Basic Law and that is why the question whether the right to have a family life is indeed included among these rights, as a derivative of the right to dignity, is a central one. In exercising the judicial review of the legislation of the Knesset, we are taking into account the proper restraint and caution that we are obliged to adopt with regard to the legislation of the Knesset. Since the law was enacted as a temporary provision, we waited several times to see whether, when the validity of the law expired, its extension or format would be reconsidered, if and when it was renewed. We expected that the legislature would determine a new balancing point, even if it would decide again to leave the law restricting the entry of spouses of Israelis in force. The law was indeed extended, and it was also amended recently on 1 August 2005 in such a way that the approach towards residents of the territories over the age of 35 for men and 25 for women was changed. Unfortunately, the aforesaid amendment was insufficient to spare us the need to exercise our judicial review. The basic format of the law remained as it was before: general, sweeping and without a mechanism for conducting a specific check on an individual basis, and the possibility that the validity of the law would be extended once again was not removed. In these circumstances, the decision was left to us, and now that we have set out the principles that form the framework of our deliberations, we must examine the question requiring a determination while taking these principles into account.

6. The disagreement between my colleagues concerns, first and foremost, the fundamental question whether the provisions of the Citizenship and Entry into Israel Law violate a protected basic right. As stated, only a determination that this is the case will lead us to proceed along the path of constitutional scrutiny of the law, in accordance with the limitations clause.

It seems to me that there is no real disagreement as to the actual existence of the right to have a family life in its main and limited sense of the basic right of a person to choose his partner in life and realize the existence of the family unit. The question is, of course, whether this right is derived from the right to human dignity. In this respect, we have already adopted in the past the position that the right to marry and have a family life is a basic right of the Israeli citizen which is derived from the right to dignity. Since President Barak set out in his opinion a summary of this position, I would like, merely as a reminder, to refer to Stamka v. Minister of Interior [24] and the remarks made there by Justice Cheshin at page 787 of the judgment, and also to the remarks that I made in State of Israel v. Oren [25], at para. 11 of the judgment, as well as the remarks made in CA 7155/96 A v. Attorney-General [50], at p. 175. As stated, I agree with the comprehensive legal analysis of the president in this matter.

As we see from the president's opinion, and from the position of our case law until now, even if not all aspects of the right to family are included within the framework of human dignity, the right to realize the autonomy of free will by establishing a family unit in accordance with individual choice and realizing it by living together is derived from human dignity and shared by every Israeli citizen. Thus I accept that the right of an Israeli spouse to establish a family unit is implied also by the implementation of the principle of equality between him and other Israeli couples with regard to whom we have determined in the past that the protection of their right to a family unit is derived from their right to human dignity.

7. The basic human right to chose a spouse and to establish a family unit with that spouse in our country is a part of his dignity and the essence of his personality, and this right is seriously violated in the provisions of the Citizenship and Entry into Israel Law. The blanket prohibition denies Arab Israeli citizens their right to have a family life in Israel with a resident of the territories, whether the spouse presents a security risk or not. This is the disproportionate violation of human rights. Moreover, the violation is a sweeping violation of a whole population group, without any distinction between its individual members. The persons wishing to marry Palestinians as a rule come from the Arab population in the State of Israel. The law therefore discriminates between the rights of Arab citizens of the state to establish a family unit in Israel with a foreign spouse and the right of other Israelis to establish a family unit with a foreign spouse. Even according to the outlook that regards the value of equality as not being a part of human dignity in all of its aspects, the discrimination that applies to the Arab population in its entirety, merely because they belong to that population group in Israel, is certainly discrimination that is clearly included in the nucleus of human dignity. It should be noted that the existence of the right given to the Israeli citizen to have a family life in Israel does not necessarily give the foreign spouse a right to receive a status in Israel. The right is the right of the Israeli spouse, and the State of Israel may determine in its laws strict criteria for examining the foreign spouse before it grants his request for a status in Israel. It should be emphasized that the examination of the foreign spouse should be carried out by considering the rights of the Israeli spouse, on the one hand, and the public interest adapted to the concrete circumstances that must be decided by the authority, on the other.

8. It is self-evident that even when we have said that the basic right of Arab citizens of the State of Israel has been violated, by preventing the entry into Israel of their spouses who are residents of the territories, we have not said that the law is unconstitutional. The human right to have a family life, like other rights, is not an absolute right. The determination that there is a violation of a protected basic human right is only the starting point for a deliberation as to the constitutionality of the law, and it is followed by the process of scrutiny in accordance with the limitations clause. In this respect also I accept the scrutiny carried out by President Barak in his opinion and I also accept his conclusion that the violation in the law is disproportionate, according to the third proportionality subtest and for the reasons that he gives.

Indeed, none of us disputes the proper purpose of the law. There is also no doubt that the State of Israel is compelled to take harmful measures in order to protect the lives of its residents against the cruel and unrestrained terror with which it is contending. Similarly, there is without doubt a rational connection between preventing the entry of Palestinians who are residents of the territories into Israel and achieving the purpose of additional security for the residents of the State of Israel. Moreover, there is also no doubt that the blanket prohibition of the entry of Palestinian spouses into Israel is capable of providing additional security to Israeli citizens to a greater extent that a prohibition involving an individual check of person requesting family reunifications which naturally involves taking risks. If, notwithstanding this, I am of the opinion that the taking of risks is an insufficient reason for leaving the blanket prohibition intact, this is because the basic principles of our democratic legal system are built on finding proper balances between the protection of the public interest and the protection of human rights, and the violation of the basic right in the case before us is disproportionate, in view of the character and scope of the risk, as we discovered from the figures submitted to us for this purpose.

9. The protection of life is, of course, the protection of the most important basic human right. This supreme value gives rise to the important status of the security interest, which we are charged with giving its full weight. This has been the case in the Israeli reality throughout all the years of the state’s existence and this is certainly the case in a time of a war against terror. Regrettably, it appears that the conflict between the value of security and the extent of the violation of human rights in order to maintain security will be with us for many years to

come. It is precisely for this reason that we must be careful to balance violations of rights against security needs properly and proportionately. A system of government that is based on democratic values cannot allow itself to adopt measures that will give the citizens of the state absolute security. A reality of absolute security does not exist in Israel or in any other country. Therefore an enlightened and balanced decision is required with regard to the ability of the state to take upon itself certain risks in order to protect human rights.

10. The Citizenship and Entry into Israel Law itself provides a framework of taking risks and it is right that it should do so. Taking such a risk exists for example in s. 3 in the amended wording of the law, which authorized the Minister of the Interior to approve, at his discretion, an application of a resident of the territories to receive a permit to stay in Israel in order to prevent the separation of spouses, when the resident of the area is a man who is more than 35 years of age or a woman who is more than 25 years of age. This is of course taking a certain risk, and therefore even giving such a permit is contingent upon the discretion of the minister and an individual check. This is also the case with regard to entry permits given for the purposes of work or visits. I am also prepared to accept the argument of the state that the level of risk presented by a person with a status in Israel is, as a rule, higher than the level of risk presented by a person who enters Israel with a temporary permit in order to work. But all of these involve, of course, a calculated risk that Israeli society can take upon itself.

11. During the hearing of the petitions, we were given detailed figures that show the existence of a potential risk in giving a possibility to residents of the territories to receive a status in Israel under the Entry into Israel Law or under the Citizenship Law. It should be emphasized that the figures presented to us indicate a very small — negligible — percentage of the spouses who abused their status in Israel in order to become involved in terror activity. These figures do not put us in the position of the need to decide upon a direct conflict between the risk to life and the violation of the right to live in dignity by realizing the right to have a family. When there is a direct confrontation and there is a concrete risk to security and life, the public interest indeed overrides protected human rights, and the same is the case where there is a concrete likelihood of a risk to life. But the aforesaid likelihood must be more concrete that the mere fact that the applicant for the entry permit is a Palestinian who is a resident of the territories. Not carrying out an individual check and determining a blanket prohibition gives too wide a margin to the value of security without properly confronting it with the values and rights that conflict with it. In my opinion, any permit given to a foreigner to enter Israel for family reunification with his Israeli spouse, whether the citizen is Jewish or Arab, is likely to involve a potential risk to some degree. But there are certain levels of risk which Israeli society is prepared to take and with which it is prepared to contend, by adopting security measures. There is no doubt that in the current security situation permitting the entry of residents of the territories for the purpose of family reunifications with their Israeli spouses involves a greater risk than permitting the entry of other foreigners. Therefore, a strict and detailed check must be made of every application submitted by an Israeli to realize his right to have a family life with a resident of the territories. On the other hand, a blanket prohibition against the possibility of entering Israel from the territories that prevents the entry of a spouse of an Israeli citizen, without providing any possibility of an individual check, no matter how strict, does not give proper weight to the correlation between the degree of the security risk and the extent of the violation of human rights, a correlation that is required by the democratic principles of our system.

12. Our life in Israel follows the pattern of the life of a civilized society, which aims to live like a free society that respects human rights and maintains an equality of rights, even in times of emergency and war, which we have endured since the founding of the state. Of this we have been proud all these years. If we do not insist that the image of our society is that of a society that respects the rights of its individuals in times of war, we will pay a heavy price in times of calm.

Every day the citizens of Israel take risks with regard to national security, public order and personal security, albeit to a limited degree. Thus, we conduct ourselves in such a way that we

do not violate the rights of suspects and the human rights of persons who may serve as a potential focus for a risk to society without a proper factual and legal basis. This is the secret of the power of Israel as a democracy that seeks to maintain a just society that respects human rights even in difficult conditions. Carrying out an individual check on the scale required in order to consider the application for family reunifications does not constitute a significant and exceptional risk, even though there is a basis to the state's claim that assembling intelligence and carrying out an individual check, in the conditions that prevail today, is likely to present not a few practical difficulties. It is possible to find solutions to these difficulties and even to take them into account when determining the check procedure. Nonetheless, we cannot dispense with the duty of carrying out checks merely because it is complex and involves effort. There is a price to protecting rights and in the circumstances of our case we are speaking of a proper price.

13. In view of the conclusion that we have reached, according to which the blanket prohibition that was determined in the Citizenship and Entry into Israel Law violates human rights disproportionately and therefore does not satisfy the conditions of constitutionality, we must ask what is the remedy that is required by this determination. There is no doubt that the legislature was aware of the problematic nature of the law and for this reason the law was enacted as a temporary measure and was even amended by introducing various concessions that were intended to make it more flexible, even though we have not found that these concessions allow the law to overcome the constitutional hurdle. The validity of the law will expire soon and therefore I see no need for us to give any relief beyond a declaration that this law in its current format is unconstitutional and therefore void.

We do not know whether the government intends to propose an extension of the law to the legislature. It is clear that should there be new legislation, it should contain a proper balance between the security need and the extent of the permitted violation of the right to have a family life. Within the framework of my opinion, I do not see fit to propose criteria that the legislature should adopt in order to make the new law constitutional. I should also add that I too agree that should the government require a limited period of time, which should not exceed six months, in order to prepare for new legislation in the spirit of our judgment, it will be given a possibility of a limited and single extension of the existing law, which will be like a period of suspension for the law that we have declared to be void.

Justice S. Joubran

I agree with the opinion of my colleague President A. Barak, according to which the petitions should be granted. Nonetheless, because of the seriousness of the question before us, I would like to add some remarks on this issue, in so far as the scope of the right to family life and the right of equality are concerned, and with regard to the violation to these rights that results from the Citizenship and Entry into Israel Law (Temporary Measure), 5763-2003 (hereafter — 'the law').

The right to family life

1. It is the nature of man, literally the nature of his creation, to seek for himself a partner with whom he will live his life and with whom he will establish his family. This has been the case throughout the ages and this is the case today, notwithstanding many changes that have occurred to human customs and the human family. Both in the past and also today it can be said that 'it is not good for man to be alone' (Genesis 2, 18 [245]), and we recognize the strong desire of man to find a 'help mate', so that their fate may be joined.

2. So much has been written about the search of man for his 'help mate,' the meaning of the relationship between him and the object of his love, that it may well seem that most of human creativity is devoted to the study of this relationship. It would appear that the remarks of the ancient comic dramatist Aristophanes concerning this relationship, which are quoted by Plato, are apposite:

φίλοι γὰρ γενόμενοι καὶ διαλλαγέντες τῷ θεῷ ἐξευρήσομέν τε καὶ ἐντευξόμεθα τοῖς παιδικοῖς τοῖς ἡμετέροις αὐτῶν, ὁ τῶν νῦν ὀλίγοι ποιοῦσι… λέγω δὲ οὖν ἐγωγε καθ' ἁπάντων καὶ ἀνδρῶν καὶ γυναικῶν, ὅτι οὕτως ἂν ἡμῶν τὸ γένος εὐδαιμον γένοιτο, εἰ ἐκτελέσαιμεν τὸν ἔρωτα καὶ τῶν παιδικῶν τῶν αὑτοῦ ἕκαστος τύχοι εἰς τὴν ἀρχαίαν ἀπελθὼν φύσιν. εἰ δὲ τοῦτο ἄριστον, ἀναγκαῖον καὶ τῶν νῦν παρόντων τὸ τούτου ἐγγυτάτω ἄριστον εἶναι· τοῦτο δ' ἐστὶ παιδικῶν τυχεῖν κατὰ νοῦν αὐτῷ πεφυκότων.

'For if we become friends of the god and are reconciled with him, we shall find and discover our own true beloveds, which few do at present… I am speaking of everyone, both men and women, when I say that our race will be happy, if we achieve love and each our own beloved, thus returning to our original nature. If this is best, the next best is to be as close to it as present circumstances allow: and that is to find a congenial object of our love' (Plato, Symposium, 193b-193d, translated by the editor).

3. In searching for a spouse, in living together with him, in creating a family, a person realizes himself, shapes his identity, builds a haven and a shield against the world. It would appear that especially in our turbulent and complex world, there are few choices in which a person realizes his free will as much as a the choice of the person with whom he will share his life.

4. This nature of man is reflected in the world of law, in the form of establishing the human right to have a family life as a basic right, which is protected against violation. Thus, the Universal Declaration of Human Rights, 1948, declares the family to be the basic unit of society and speaks of the need to protect it:

'Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) ….

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

(Universal Declaration of Human Rights, 1948)

Following on from this declaration, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, provides as follows:

'Article 8.

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) 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.'

(European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950)

Similarly, the International Covenant on Economic, Social and Cultural Rights, 1966, which Israel ratified in 1991, provides:

'Article 10.

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children…

(International Covenant on Economic, Social and Cultural Rights, 1966)

Thus the countries that are parties to the Convention on the Rights of the Child, 1989, including Israel, declare themselves to be:

'Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community…'

(Convention on the Rights of the Child, 1989).

Similarly, the International Covenant on Civil and Political Rights, 1966, to which Israel is a signatory, provides the following:

'Article 23.

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

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

…'

(International Covenant on Civil and Political Rights, 1966).

5. We can also learn about the human right to have a family life from the law of other countries, which have recognized the duty of the state to refrain from intervening and harming a person's family life. Thus, for example, the Supreme Court of the United States declared prohibitions against mixed marriages between whites and blacks, that were provided in the laws of several states, to be void, saying that:

'The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). See also *Maynard v. Hill*, 125 U.S. 190 (1888)' (*Loving v. Virginia* [188]; see also *Griswold v. Connecticut* [187]).

So too the Court of Appeal in England has said, with regard to a delay in the right of a person under arrest to marry someone who was supposed to be a witness in his trial, that:

'The right to marry has always been a right recognised by the laws of this country long before the Human Rights Act 1998 came into force. The right of course is also enshrined in art. 12 of the convention' (*R (on the application of the Crown Prosecution Service) v. Registrar General of Births, Deaths and Marriages* [226]).

6. The right to family life is a right that has also been recognized in Israeli law as one of the basic human rights, which the organs of state must refrain from violating without a proper reason. Thus, in a large number of cases, this court has addressed the need to preserve family autonomy and refrain, in so far as possible, from intervening in it. Thus, with regard to the relationship between parents and their children, it was held in CA 232/85 A v. Attorney-General [58], at p. 17, that 'in the eyes of the court, the basic unit is the natural family' (and see also CA 7155/96 A v. Attorney-General [50], at p. 175); likewise, with regard to the right to marry and to have a family, my colleague Justice M. Cheshin held in Stamka v. Minister of Interior [24], at p. 782, that:

> ‘Our case, we should remember, concerns a basic right of the individual — every individual — to marry and establish a family. We need not mention that this right has been recognized in international conventions that are accepted by everyone; see art. 16(1) of the Universal Declaration of Human Rights, 1948; art. 23(2) of the International Covenant on Civil and Political Rights, 1966. For more concerning the right, see A. Rubinstein, ‘The Right to Marry,’ 3 Tel-Aviv University Law Review (Iyyunei Mishpat) (1973) 433; I. Fahrenhorst, ‘Family Law as Shaped by Human Rights,’ 12 T.A. University Studies in Law (1994) 33.’

7. It would appear that in our time there are few choices in which a person realizes his free will as much as his choice of the person with whom he will share his life, establish his family and raise his children. In choosing a spouse, in entering into a bond of marriage with that spouse, a person expresses his personality and realizes one of the main elements of his personal autonomy. In establishing his family, a person shapes the way in which he lives his life and builds his private world. Therefore, in protecting the right to family life, the law protects the most basic freedom of the citizen to live his life as an autonomous person, who is free to make his choices.

In a similar spirit, the Supreme Court of the United States has held that:

> ‘When a city undertakes such intrusive regulation of the family… the usual judicial deference to the legislature is inappropriate. “This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 -640 (1974). A host of cases… have consistently acknowledged a “private realm of family life which the state cannot enter.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).’ (*Moore v. East Cleveland* [206], at p. 499).

Likewise, the European Court of Human Rights has held, with regard to the application of art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, that:

> ‘…the Court considers that the decision-making process concerning both the question of the applicant’s expulsion and the question of access did not afford the requisite protection of the applicant’s interests as safeguarded by Article 8. The interference with the applicant’s right under this provision was, therefore, not necessary in a democratic society’ (*Ciliz v. Netherlands* [232]).

And in the same respect, the Court of Appeals in England has also held that:

> ‘There is no evidence that the trust ever recognised, much less addressed, the interference with the appellant’s art 8 rights. In none of the documents generated by the trust's consideration of her case can any reference to art 8 be found. Mr Toner claims that what the trust officers were embarked upon in considering Mrs Connor’s case was “in essence” an art 8 exercise. We cannot accept that argument. The consideration of whether an interference with a convention right can be justified involves quite a different approach from an assessment at large of what is best for the person affected.’ (*Re Connor, an Application for Judicial Review* [227]).

8. Accordingly, any violation of the right of a person to family life is a violation of his liberty and dignity as a human being, rights that are enshrined in the Basic Law: Human Dignity and Liberty. The significance of this is that the right to family life and marriage should be regarded as a constitutional right that is protected in its entirety by the Basic Law.

9. Living together under one roof lies at the heart of the constitutional right to family life and marriage. In extensive and consistent case law, not only has this court regarded living together as a central component of family life and marriage, but it has even gone so far as to equate living together with having a conjugal relationship, so that it has held that by realizing the decision to have a relationship of living together, the couple create a bond of 'recognized partners,' which even without the formal act of marriage is often capable of serving as an equivalent of the marriage bond itself. As this court said in State of Israel v. Oren [25]:

> 'According to case law, the two main components requiring proof in order for persons to be considered recognized partners are living together as man and wife and having a joint household:
>
> > "There are two elements here: a conjugal life as man and wife and having a joint household. The first element is made up of intimacy like between a husband and a wife, founded on the same relationship of affection and love, devotion and loyalty, which shows that they have joined their fates together…
> >
> > The second element is having a joint household. Not merely a joint household for reasons of personal need, convenience, financial viability or an objective arrangement, but a natural consequence of the joint family life, as is the custom and accepted practice between a husband and wife who cling to one another with a joining of fates…" (CA 621/69 Nissim v. Euster [145], at p. 619). See also CA 79/83 Attorney-General v. Shukran [146], at p. 693; CA 6434/00 Danino v. Mena [147], at p. 691).
>
> It should be noted that these remarks were made with regard to the interpretation of the provision in s. 55 of the Inheritance Law, 5725-1965, which does not make use of the concept of "recognized partners," but addresses the inheritance rights of partners "who live a family life in a joint household but are not married to one another," but the court made it clear in Nissim v. Euster that there is no practical difference between this definition and the accepted concept of "recognized partners" (ibid., at p. 621).'

This approach concerning the centrality of living together as a part of family life can also be seen in comparative law. Thus, for example, the Constitutional Court of South Africa has said that:

> 'A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honor that obligation would also constitute a limitation of the right to dignity.' (*Dawood v. The Minister of Home Affairs* [242]).

And similarly the Supreme Court of the United States has also held that:

> 'Of course, the family is not beyond regulation. See *Prince v. Massachusetts*, *supra*, 321 U.S. at 166. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.' (*Moore v. East Cleveland* [206], at p. 499).

10. Thus we see that living together is not merely a characteristic that lies on the periphery of the right to family life but one of the most significant elements of this right, if not the most significant. Consequently, the violation of a person's ability to live together with his spouse is in fact a violation of the essence of family life; depriving a person of his ability to have a family life in Israel with his spouse is equivalent to denying his right to family life in Israel. This violation goes to the heart of the essence of a human being as a free citizen. Note that we are not speaking of a violation of one of the meanings of the constitutional right to have a

family life, but the denial of the entirety of this right, and it should be considered as such (see also Stamka v. Minister of Interior [24], at p. 787; State of Israel v. Oren [25]).

The rights of the child and his parents

11. A basic principle in our law, with regard to the relationship between children and their parents, is that:

> 'It is the law of nature that a child grows up in the home of his father and mother: they are the ones who will love him, give him food and drink, educate him and support him until he grows up and becomes a man. This is the right of a father and mother, and this is the right of the child' (CA 3798/94 A v. B [148], at p. 154 {268}; see also CFH 7015/94 Attorney-General v. A [23], at p. 65).

According to this principle, the raising of a child by his parents reflects simultaneously both the right of the child to grow up in his parents' home and the right of the parents to be the persons who raise him. This combination of interests embodies the nature of the parent-child relationship within the framework of family life, which the state should protect against any violation, unless it is required in the best interests of the child. As my colleague Justice A. Procaccia said in CFH 6041/02 A v. B [60]:

> 'Removing a child from the custody of his parent and transferring him to the welfare authorities or to an institution by its very nature touches on an issue of a constitutional nature that concerns the value of protecting the personal and family autonomy of the child and his parent and the important social value of preserving the natural family bond between parents and children and the complex fabric of rights and duties arising from that parental bond. It concerns the natural right of a child to be in his parents' custody, to grow up and be educated by them; it concerns the basic rights of a human being to life, dignity, equality, expression and privacy (Universal Declaration of Human Rights, 1948; Convention on the Rights of the Child; CA 6106/92 A v. Attorney-General [149], at p. 836; CFH 7015/94 Attorney-General v. A [23], at p. 100). It concerns the unique rights of children by virtue of the fact that they are children, including the right to grow up in a family and to preserve the connection with their parents (The Commission for Examining Basic Principles concerning the Child and the Law and their Application in Legislation, chaired by Justice Saviona Rotlevy, 2004, 'General Part,' at p. 26); it concerns the right of a parent by virtue of his blood relationship to raise and educate his child, as well as to carry out his duties to him by virtue of his being the child's parent. The rights of children to a connection with their parents, and the rights and duties of parents to their children create a reciprocal set of rights, duties and values that make up the autonomy of the family.'

12. In so far as the best interests of the child are concerned, art. 3(1) of the Convention on the Rights of the Child provides that:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Article 9(1) of the Convention on the Rights of the Child further provides that:

> 'States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child…'

No one disputes that enforcing a separation of a child from his parents constitutes a very serious violation of the rights of the child to grow up with his family and with his parents. This is of course the case as long as the family concerned is a functioning one, where the child is not harmed by being with it. It is perhaps apposite to add remarks made by this court in CFH 7015/94 Attorney-General v. A [23], at p. 102:

> ‘It is the law of nature that a child should be in the custody of his parents, grow up in his parents’ home, love them and have his needs taken care of by them. This law of nature is also absorbed by the law of the state, and thus an “interest” of children has become a “right” under the law. Parents have a right to raise their children and children have a right to be loved by their parents and to have their needs provided for by them. A right corresponding to a right and rights corresponding to duties (for both parties). The translation of these into the language of the law will be formulated, inter alia, by way of presumptions: it is a presumption under the law that the “best interests” of a child to be in his parents’ home; who can love their children and care for their needs like parents? Thus children will return their love and place their reliance on their parents.’

We are not speaking merely of harm to the ‘best interests of the child,’ but of a violation of a real ‘right,’ which is possessed by the child, to grow up with his family, and the state has a duty to refrain in its actions from violating this right (CA 2266/93 A. v. B [61], at pp. 234-235). By tearing asunder the family unit, by separating the child from one of his parents, there is a serious violation of the rights of the child, a violation that the state is obliged to avoid in so far as possible.

13. The same is true with regard to the right of the parent, who has a natural right, protected by the law, to raise his child with him and not to be separated from him, as long as this does not involve any harm to the best interests of the child. As my colleague Justice M. Cheshin said in CFH 7015/94 Attorney-General v. A [23], at p. 102:

> ‘It is the law of nature that a mother and father naturally have custody of their child, raise him, love him and provide for his needs until he grows up and becomes a man. This is the instinct for existence and survival inside us — “the blood ties,” the primeval yearning of a mother for her child — and it is shared by man, beast and fowl. “Even jackals offer a breast and feed their young…” (Lamentations 4, 3) (see also CA 549/75 A v. Attorney-General [150], at pp. 462-463). This tie is stronger than any other, and it goes beyond society, religion and state. The conditions of place and time — they and the persons involved — will determine the timing of the separation of children from their parents, but the starting position remains as it was. The law of the state did not create the rights of parents vis-à-vis their children and vis-à-vis the whole world. The law of the state found this ready made; it proposes to protect an innate instinct within us, and it turns an “interest” of parents into a “right” under the law — the rights of parents to have custody of their children. Cf. CA 1212/91 LIBI The Fund for Strengthening Israel’s Defence v. Binstock [151], at p. 723 {390}. It is apt that s. 14 of the Capacity and Guardianship Law provided that “The parents are the natural guardians of their minor children.” Nature is what created this guardianship, whereas the law of the state merely followed nature and absorbed into itself the law of nature.’

14. There is no doubt that separating a parent from his child, separating a child from one of his parents and splitting the family unit involve very serious violations of both the rights of the parents and the rights of their children. These violations are contrary to the basic principles of Israeli law and are inconsistent with the principles of protecting the dignity of parents and children as human beings, to which the State of Israel is committed as a society in the family of civilized peoples.

15. Therefore we must say that preventing the possibility of living together, as a family, violates the constitutional right of the Israeli spouse, parent and child to family life.

The right to equality

16. These serious violations of the right to family life do not stand alone, but are also accompanied by a serious violation of the right of the Arab citizens of the state to equality, since they are the main, if not the only, victims of this law. Between the Arab citizens of

Israel and the residents of the territories there are cultural, family, social and other ties, which naturally lead to the fact that most of the Israeli citizens who find spouses among the residents of the territories are Arab citizens of Israel. By preventing the possibility of marrying spouses who are residents of the territories, there is therefore a violation that focuses, first and foremost, on the Arab citizens of the state, and thus a violation of their rights to equality is added to the violation of their right to family life.

17. The importance of the right to equality, as expressing a basic principles in the Israeli legal system, has been recognized in a whole host of cases by this court. The remarks made recently by my colleague President A. Barak in Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister [41] are apt in this respect:

> 'The principle of equality applies to all spheres of government activity. Notwithstanding, it is of special importance with regard to the duty of the government to treat the Jewish citizens of the state and non-Jewish citizens equally. This duty of equality for all the citizens of the State of Israel, whether Arab or Jewish, is one of the foundations that make the State of Israel a Jewish and democratic state. As I have said elsewhere: "We do not accept the approach that the values of the State of Israel as a Jewish state justify… discrimination by the state between the citizens of the state… The values of the State of Israel as a Jewish and democratic state do not imply at all that the state should act in a manner that discriminates between its citizens. Jews and non-Jews are citizens with equal rights and obligations in the State of Israel" (see Kadan v. Israel Land Administration [38], at pp. 280-281). Moreover, "Not only do the values of the State of Israel as a Jewish state not require discrimination on the basis of religion and race in Israel, but these values themselves prohibit discrimination and require equality between religions and races" (ibid. [38], at p. 281). I added that "the State of Israel is a Jewish state in which there are minorities, including the Arab minority. Each member of the minorities that live in Israel enjoys complete equality of rights" (ibid. [38], at p. 282; see also EDA 11280/02 Central Elections Committee for the Sixteenth Knesset v. Tibi [152], at p. 23)'

(See also El-Al Israel Airlines Ltd v. Danielowitz [65]; Israel Women's Network v. Government of Israel [66]; Miller v. Minister of Defence [67]; Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs [39]).

I will also add the remarks that I made in Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel [41]:

> '… equality, more than any other value, is the common denominator, if not the basis, for all the basic human rights and for all the other values lying at the heart of democracy. Indeed, genuine equality, since it also applies to relations between the individual and the government, is one of the cornerstones of democracy, including the rule of law. It is essential not only for formal democracy, one of whose principles is 'one man one vote,' but also for substantive democracy, which seeks to benefit human beings as human beings. It is a central component not only of the formal rule of law, which means equality under the law, but also of the substantive rule of law, which demands that the law itself will further the basic values of a civilized state.'

18. The violation of the right to equality does not occur merely when the discretion of the authority is tainted with improper discriminatory considerations. We are speaking of a right that looks to the outcome, and it is violated whenever an executive act leads to a reality that discriminates between one citizen and another on a prohibited basis (see Israel Women's Network v. Minister of Labour and Social Affairs [35], at p. 654; Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs [39], at p. 176; Poraz v. Mayor of Tel-Aviv-Jaffa [32], at p. 334; Nof v. Ministry of Defence [54], at pp. 464-465 {19-20}).

In our case, the substantial outcome of the law, in practice, distinguishes between some Israeli citizens and other Israeli citizens on the basis of their ethnic origin. The position that is created by the law is a position in which the right of the Arab citizens of Israel to family life is violated in a very significant way, whereas the harm to other citizens of the state is merely theoretical. As stated, many of the marriages of Arab citizens of Israel with foreign residents are made with residents of the territories, because of the cultural ties between the two groups. Consequently, the right of the Arab citizens of the state to marry someone who is not a citizen is seriously violated, whereas this violation does not exist for the rest of the citizens of the state. Similarly, the rights of Arab citizens of the state as parents and children to have a family life are also violated. These violations go to the heart of the law, which, in its effect on the Israeli reality, creates a serious violation of the rights of the Arab citizens of the state to family life, a violation that is caused to them because of their ethnic origin.

The significance of the violation of the rights

19. Now that we have determined that the implementation of the law involves a serious and extreme violation of the constitutional rights of the citizens of the state to family life and equality, rights that are protected by the Basic Law: Human Dignity and Liberty, this law should be confronted with the tests of the 'limitations clause,' which is in s. 8 of the Basic Law: Human Dignity and Liberty, according to which 'The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose and to an extent that is not excessive, or in accordance with a law as aforesaid by virtue of an express authorization therein.' According to these tests it must be determined whether, despite the violation of the protected rights, the law will remain valid.

20. In this matter also I accept the analysis of my colleague President A. Barak and his determination that the law does not satisfy the test of proportionality (in the narrow sense). I cannot accept in this respect the determination of my colleague, Vice-President Emeritus M. Cheshin, that the various serious violations of the law lead to a difficult, but unavoidable, outcome of the permitted immigration policy of the State of Israel, as it is affected by the needs of the moment and security.

21. Indeed, no one disputes that the purpose of protecting the safety and security of all the residents of the state, which lies at the basis of the law, is an important and proper purpose, particularly in the difficult times in which we live. Likewise no one disputes the prerogative of the state to regulate its immigration laws and to prevent anyone whom it regards as a risk to its security from entering its territory.

Nonetheless, when it seeks to realize these proper purposes, the legislature must take into account the serious harm caused as a result of implementing the law. Notwithstanding the supreme importance of the right of all the citizens of the state to security, even within the framework of realizing this right it is not possible to allow the intolerable harm caused by the law, both in its violation of the right to family life and in its violation of the right to equality.

22. In these circumstances, it is not possible to say that the law, which provides a blanket prohibition against the possibility of Israeli citizens living together with residents of the territories and leaves no ray of hope for citizens of Israel to have a family life if their spouses, children or parents are residents of the territories, satisfies the test of proportionality.

As my colleague Justice M. Cheshin said in Stamka v. Minister of Interior [24], at p. 782:

> 'Indeed, the strength of the right and the strong radiation emanating from within it require, almost automatically, that the measure that the Ministry of the Interior chooses will be more lenient and moderate than the harsh and drastic measure that it decided to adopt. We will find it difficult not to conclude that the respondents completely ignored — or attributed only little weight — to these basic rights of the individual to marry and to raise a family. If this may be said with regard to a foreigner, it may certainly be said with regard to the Israeli citizen who is a partner in the marriage' (see also State of Israel v. Oren [25]).

23. Because of the possibility that some of the residents of the territories who receive Israeli citizenship as a result of their marriage to Israeli citizens will participate in terror activity against Israeli citizens, or will aid activity of this kind, the law provides a blanket prohibition against the possibility of marriage between Israeli citizens and residents of the territories. This involves not only serious and excessive harm to any Israeli citizen who wishes to have a family life together with his spouse, child or parent that is a resident of the territories, but also a generalization of all Arab Israeli citizens as persons with regard to whom there is a concern that they will aid, even indirectly, enemy activity against the State of Israel.

The blanket and discriminatory prohibition of the law, and its failure to include any individual check — no matter how stringent — with regard to the risk presented, in practice or in theory, by the person with whom an Israeli citizen wishes to have a family life, involves a serious violation of the rights of Israeli citizens to family life and equality, which is unacceptable.

24. Moreover, depriving the Minister of the Interior of discretion, ab initio, to examine the possibility whether citizenship should be given to any of the residents of the territories in order to realize the right of an Israeli citizen to family life, by ignoring the specific circumstances of the case, raises the concern whether the security consideration is not the only consideration underlying the enactment of the law and it raises questions with regard to the policy that this law wishes to achieve.

This concern is becomes even greater if we survey the legislative history that led to the enactment of the law, which, whether in a concealed or express manner, associates the law with the government's demographic policy. Thus, already in the government's decision of 12 May 2003, which is entitled "Treatment of illegal aliens and family reunification policy with regard to residents of the Palestinian Authority and foreigners of Palestinian origin' (government decision no. 1813), which formed the basis for enacting the law, the 'security position' and the 'ramifications of immigration processes and the residency of foreigners of Palestinian origin in Israel, including by way of family reunification' were associated (page 2 of the decision), all of which 'within the framework of the overall policy on matters concerning foreigners' (page 1 of the decision). Moreover, the decision goes on to state that 'the Ministry of the Interior will examine, within the framework of formulating the new policy, possibilities of determining quotas for giving approvals for family reunifications, and it will bring a proposal in this regard before the government' (page 3 of the decision). It need not be said that the fixing of quotas for approvals of family reunifications has no connection with security considerations, so it is possible to understand this paragraph in the decision as being based merely on demographic considerations. Similarly, throughout the legislation process, it is possible to find remarks made by Knesset members and members of various Knesset committees, from various parties, who address the demographic policy that the law implements (see, for example, the debate in the House on 17 June 2003). Notwithstanding, since I agree with the determination of my colleague President A. Barak, that even the security consideration does not justify such a severe violation of the right to family life and the right to equality, I see no need to discuss this matter.

25. In conclusion, if my opinion is accepted, we will grant the petitions, in the sense that the Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003, will be declared void, for the reasons of my colleague the president. A state that regards itself as a civilized state cannot accept as a part of its legislation laws that violate basic human values so seriously and so outrageously. It would have been better had the law not been enacted in the first place. Now that it has been enacted, we are unable, as guardians of the values of the State of Israel as a democratic state, to acquiesce in its continued existence on the statute book of the state.

Justice E. Hayut

1. The Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003 (hereafter — the Citizenship and Entry into Israel Law) expired on 31 March 2006, but because of the dissolution of the sixteenth Knesset, the validity of this law was extended by three months starting on 17 April 2006 (the date on which the seventeenth Knesset opened). This occurred by virtue of s. 38 of the Basic Law: the Knesset, which provides:

> 'All legislation whose validity would expire within the last two months of the term of office of the outgoing Knesset, or within four months after the Knesset decided to dissolve itself, or within the first three months of the term of office of the incoming Knesset, shall remain valid until the aforesaid three months have ended.'

It would have been possible to dismiss the petitioners before us by saying that the days of the law are numbered and they should wait to see what the legislator will do at the end of the extension period. But since my colleagues chose, because of the importance of the matter, to examine carefully the arguments that were raised in the petitions against the Citizenship and Entry into Israel Law, I too have seen fit to consider the merits of the matter. On the merits, the opinion of my colleague President Barak seems to me preferable to the opinion of my colleague Vice-President Emeritus Cheshin.

2. The Citizenship and Entry into Israel Law, as the state explained in its responses before us, was intended to contend with the risks involved in giving a status of citizenship or residency or a permit to stay in Israel to the residents of the territories as defined in the law. In its original format of 6 August 2003, the law included a blanket prohibition against giving such a status, apart from several limited exceptions. The law was extended three times in this format, and on 1 August 2005, before the period of the third extension ended, it was published in an amended form, in which the prohibition was reduced and was applied mainly to male residents of the territories between the ages of 14 and 35, and female residents of the territories between the ages of 14 and 25. According to the figures presented by the state, the applications submitted by Arab citizens who are residents of Israel for family reunifications with spouses from the territories were almost all blocked by the law in its original format, whereas the law in its amended format blocks approximately 70% of those applications. It can also be seen from the figures presented by the state that Palestinian spouses of Arab citizens who are residents of Israel that received a permit for family reunifications were involved throughout the years in hostile activity on a minimal level only, if at all (26 residents of the territories who received a status in Israel were interrogated on a suspicion of involvement and the permit of 42 additional residents to stay in Israel was not extended because of suspicious intelligence information that was received with regard to them). Against this background, President Barak determined that the prohibition in the Citizenship and Entry into Israel Law does not satisfy the third subtest of the tests of proportionality that are set out in the limitations clause in the Basic Law: Human Dignity and Liberty, since there is no proper correlation between the benefit involved in realizing the purpose underlying the law (protecting the security of Israeli citizens) and the violation of the constitutional rights of the Arab citizens of Israel to equality and to family life in their state. I agree with this determination.

3. The armed struggle waged by the Palestinian terrorist organizations against the citizens of Israel and its Jewish residents requires a proper response. It requires the adoption of all the measures available to us as a state, in order to contend with the security risks to which the Israeli public is exposed as a result of this terrorist activity. Enacting laws that will provide a response to security needs is one of those measures and this is the purpose of the Citizenship and Entry into Israel Law. From this viewpoint, we are concerned, as President Barak says, with a law that befits the values of the State of Israel and was enacted for a proper purpose. But this is not enough. In order that the Citizenship and Entry into Israel Law will satisfy all of the tests of the limitations clause, we must also consider whether the violation of the constitutional rights of the Arab citizens in the State of Israel to equality and family life that is caused as a result of the restrictions and prohibitions imposed on the residents of the

territories in the Citizenship and Entry into Israel Law satisfies the requirement of proportionality.

The fear of terror, like any fear, may be a dangerous guide for the legislature when it wishes to contend with those causing it. It may cause democracy to overstep its bounds and to be misled into determining 'broad margins' for security purposes, while improperly and disproportionately violating the human rights of citizens and residents who belong to a minority group in the state. This was discussed by Professor Sunstein in his book, Laws of Fear: Beyond the Precautionary Principle (Cambridge University Press, 2005):

> 'When public fear is excessive, it is likely to produce unjustified infringements on liberty. In democratic nations in the twentieth century, public fear has led to unjustified imprisonment, unreasonable intrusions from the police, racial and religious discrimination, official abuse and torture, and censorship of speech. In short, fear can lead to human rights violations of the most grotesque kind' (ibid., at pp. 225-226).

Professor Sunstein also discussed in his book the tendency to impose blanket prohibitions in legislation where the majority of the public is not harmed as a result:

> 'If the restrictions are selective, most of the public will not face them, and hence the ordinary political checks on unjustified restrictions are not activated. In these circumstances, public fear of national security risks might well lead to precautions that amount to excessive restrictions on civil liberties. The implication for freedom should be clear. If an external threat registers as such, it is possible that people will focus on the worst-case scenario, without considering its (low) probability. The risk is all the greater when an identifiable subgroup faces the burden of the relevant restrictions. […] if indulging fear is costless, because other people face the relevant burdens, then the mere fact of "risk," and the mere presence of fear, will seem to provide a justification' (ibid., at pp. 204-205, 208).

4. The Citizenship and Entry into Israel Law which is the subject of our deliberation does not include any individual criteria for examining the security danger presented by a resident of the territories, apart from a general criterion of age. In determining such a blanket prohibition against granting a status to the residents of the territories, the law draws wide and blind margins that unjustly and disproportionately harm many thousands of members of the Arab minority that live among us and wish to have a family life with residents of the territories. The right of a person to choose the spouse with whom he wishes to establish a family and also his right to have his home in the country where he lives are in my opinion human rights of the first order. They incorporate the essence of human existence and dignity as a human being and his freedom as an individual in the deepest sense. Notwithstanding, like any other basic right, we are not speaking of absolute rights, and a person as a social creature that lives within a political framework must accept a possible violation of rights as a result of legitimate restrictions that the state is entitled to impose. The legitimacy of these restrictions is examined in accordance with constitutional tests that are set out in our case in the limitations clause in s. 8 of the Basic Law: Human Dignity and Liberty.

Imposing restrictions on family reunifications with residents of the territories because of security needs is a necessity and it should not be denigrated. The difficulty in taking risks in matters of security and matters involving human life is clear and obvious and it increases in times of crisis and prolonged danger that necessitate making the security measures more stringent and inflexible. Notwithstanding, security needs, no matter how important, cannot justify blanket collective prohibitions that are deaf to the individual. Democracy in its essence involves taking risks and my colleague Vice-President Emeritus Cheshin also discussed this. He also discussed how 'the determination of measurable concepts is a part of the experience of the law.' But in his opinion the prohibitions imposed in the Citizenship and Entry into Israel Law are reasonable and therefore we should not intervene in the work of the

government and the Knesset that determined them. My opinion is different. I am of the opinion that an examination of the Citizenship and Entry into Israel Law in accordance with constitutional criteria leads to the conclusion that the prohibitions prescribed in the law do not satisfy the constitutional test since they harm the Israeli Arab minority excessively. In the complex reality in which we live, it is not possible to ignore the fact that the Palestinian residents of the territories have for many years been potential spouses for the Arab citizens of Israel. It should also not be ignored that according to past experience and according to figures presented by the state as set out above, the scope of the harm involved in the blanket prohibition in the Citizenship and Entry into Israel Law is not balanced and does not stand in a proper proportion to the extent of the risk presented to the Israeli public if the residents of the territories receive, after an individual check, a status or a permit to stay in Israel within the framework of family reunification.

5. One of the main arguments that the respondents raise to justify the blanket prohibition in the Citizenship and Entry into Israel Law is the argument that in many cases the security establishment does not have information with regard to the Palestinian spouses for whom a family reunification is requested. In such circumstances, and in view of the tense security position and the great hostility that prevails between Israel and the Palestinians at this time, there is no alternative, so the respondents argue, to applying an absolute presumption of dangerousness to every Palestinian spouse, at least at the ages that the law sets out in its amendment format. Indeed, against the background of the security reality that we have been compelled to contend with since September 2000 and perhaps even with greater intensity most recently, there is certainly a basis for a presumption of dangerousness that the respondents wish to impose in this matter of family reunifications between Arab citizens of Israel and residents of the territories. Notwithstanding, in order that the fear of terror does not mislead us into overstepping our democratic limits, it is proper that this presumption should be rebuttable within the framework of an individual and specific check that should be allowed in every case, and it is this that the law does not allow. This is the defect that blights the Citizenship and Entry into Israel Law from a constitutional viewpoint — a defect of a lack of proportionality.

6. The conflict between the basic rights in the case before us touches the most sensitive nerves of Israeli society as a democratic society. But no matter how much we wish to protect the democratic values of the state, we must not say ‘security at any price.’ We must consider the price that we will pay as a society in the long term if the Citizenship and Entry into Israel Law with its blanket prohibitions will continue to find a place on our statute book. One of the main roles of the High Court of Justice, if not the main role, is to protect the constitutional rights of the minority against a disproportionate violation thereof by the majority. Where such a violation finds expression in the provisions of a law of the Knesset, it is the role of the court to point to that violation and declare the provisions to be void, so that the Knesset can act in its wisdom to amend them. The provisions of the Citizenship and Entry into Israel Law suffer, as aforesaid, from such a disproportionate violation. Therefore we are obliged to declare them void, and the Knesset, so it is to be hoped, will act in order to formulate a proper and proportionate statutory arrangement in place of this law.

For these reasons I agree as aforesaid with the opinion of my colleague the president.

Justice A. Procaccia

1. I agree with the opinion of my colleague the president together with the constitutional analysis and his conclusions concerning the relief. I agree with the opinion that in the Israeli legal system the right of a person to family life is recognized as a part of human dignity; I also agree that the right of an Israeli spouse to have a family unit in Israel in conditions of equality with other Israeli couples is a part of human dignity. Therefore the right to family in conditions of equality constitutes a protected constitutional right under the Basic Law: Human

Dignity and Liberty. The Citizenship and Entry into Israel Law (hereafter — 'the law') violates the right of the Israeli spouse to family life, when it does not allow him to realize his right to family life in Israel with his Palestinian spouse from the territories. It is the right of the Israeli spouse that his family — his spouse and children — should live with him in Israel. The Citizenship and Entry into Israel Law, in a discriminatory manner, denies the right of thousands of Arabs, citizens of Israel, to realize their right to family life in Israel; it thereby violates their right to human dignity.

I also agree with the president's position that the violation caused by the law to the right to family, as a part of human dignity, does not satisfy the principles of the limitations clause in the Basic Law. Even though it is possible to say that the law is intended for a proper purpose, it does not satisfy the tests of proportionality. In this respect, I would like to focus on the test of constitutional proportionality in the narrow sense, in so far as it examines the proper correlation between the benefit accruing from realizing the policy that the law is intended to promote and the damage caused by it to the human right, and in so far as it seeks to make a value balance between the strength of the interest that the law seeks to achieve as compared with the violation of the right of the individual that ensues therefrom.

I agree also with the outcome reached by the president, his application of the test of proportionality in the narrow sense to the issue before us, and his conclusion that in the proper balance between the violation of the human right of the Israeli spouse to family life in conditions of equality, which arises from the blanket prohibition in the law (subject to certain exceptions in the amendment to the law) against the entry of the Palestinian spouse from the territories within the framework of family reunifications, and the benefit that accrues to the security interest of the Israeli public from such a blanket prohibition, the former prevails over the latter. The reason for this is that the marginal advantage in realizing the security purpose by means of the benefit in the blanket prohibition as compared with the benefit in the individual check of persons applying for family reunifications does not justify the extent of the violation of the constitutional right caused to the Israeli spouses by the blanket denial of the entry of the Palestinian spouses from the territories to be reunited with them. This is because 'the additional security that the blanket prohibition achieves is not proportionate to the additional damage caused to the family life and equality of the Israeli couples,' as the president says in his opinion (para. 92).

But I see a need to add some remarks of my own because of a certain difference that exists between the president's approach and my approach on the question of the initial weight of the security consideration in the equation of the balance between the conflicting values. Whereas the president accepts the security arguments of the state in full, both with regard to the credibility of the security consideration and also with regard to its strength, I have doubts in this regard. Although there is no basis, in my opinion, to deny the security ground entirely, I am not certain that this ground is the only one that really underlies the enactment of the law; moreover, I have objections to the strength of this consideration, with regard to the figures that the state presented and the analysis of these against the background of the policy of the government in related fields. The result that is implied by this is that in the equation of the balance for the purpose of examining the principle of proportionality (in the narrow sense) as it should be presented, the violated human right is on the highest level and its weight is considerable. Opposing this is the conflicting value of security, which in the circumstances of the case is on a low level and its weight is qualified and merely relative. The result of the balance therefore justifies, to an even greater degree, intervention in the sweeping violation of the right of the Israeli spouse to realize family life with his Palestinian spouse. It justifies making the realization of the human right conditional on the results of an individual security check to discover a potential risk in the person who wishes to enter Israel for the purpose of family reunification, and it is even possible that it justifies imposing various means of supervision on a Palestinian spouse whose entry and residence have been permitted, in accordance with criteria that will be determined after taking into account the strength of the security consideration.

Let me explain my reasons.

The constitutional scrutiny

2. The foundation of the constitutional system in Israel is the protection of human rights. Within the framework of this protection there is the conception that a person's constitutional rights are not absolute, and sometimes there is no alternative to a violation of them in order to achieve an essential public purpose, or in order to protect a constitutional right of another person. In circumstances where there is a tension between a human right and a conflicting public purpose, it is necessary to balance one against the other properly in order to find the optimal balancing point that will give expression to the proper correlation between the conflicting values, as derived from a constitutional outlook based on the principles of democracy.

> 'An "external balance" is therefore needed between the rights of the individual and the needs of the public. Even this balance is a result of the recognition that human rights are not absolute. It follows that the constitutional super-legislative nature of human rights does not lead to the conclusion that human rights are absolute. Super-legislative human rights are always relative rights' (A. Barak, Legal Interpretation: Constitutional Interpretation, at p. 361).

3. Within the framework of the constitutional scrutiny of a law that seeks to violate rights of the individual, the tests of the limitations clause serve as an essential tool for the proper balance between the violated right and the public interest, the realization of whose purpose involves a violation of the right. The limitations clause is the focus around which the constitutional balance between the individual and the public, and between individuals inter se, is formulated. It reflects a basic approach whereby the needs of society may even justify a violation of human rights, provided that the violation is for a proper purpose, and it is not disproportionate. This test reflects a balance between basic rights and other important values. It arises from a reality in which there are no absolute truths and no absolute values. It is built on a perspective of the relativity both of human rights and of social values. It is based on the assumption that achieving harmony between the rights of the individual and the needs of the public requires a compromise, and that the nucleus of the compromise is what underlies the harmonious arrangement between all the rights of the individual and the values of society. It is the condition for a civilized society and proper constitutional government.

4. The requirement of proportionality in the limitations clause is based on the principle of balancing between the violated human right and the conflicting value with which it contends. It involves an examination, inter alia, of whether the benefit achieved from the conflicting value is commensurate with the violation of the human right. The balance is affected by the relative weight of the values; in assessing the weight of the right, one should take into account its nature and its status on the scale of human rights. One should take into account the degree and scope of the violation thereto. With regard to the conflicting public interest, one should consider its importance, its weight and the benefit that accrues from it to society. There is a reciprocal relationship between the weight of the human right and the degree of importance of the conflicting public interest. The weightier the human right and the more severe the violation thereof, the more it is necessary, for the purpose of satisfying the test of proportionality, that the conflicting public interest will be of special importance and essentiality. A violation of a human right will be recognized only where it is essential for realizing a public interest of such strength that it justifies, from a constitutional viewpoint, a proportionate reduction in the right (Levy v. Government of Israel [99], at p. 890; Beit Sourik Village Council v. Government of Israel [2], at p. 850 {309}). According to the tests of the limitations clause, both the violated right and the public interest are examined in accordance with their relative weight, where the basic premise is:

> 'The more important the violated right, and the more serious the violation of the right, the stronger the public interest must be in order to justify the violation. A serious violation of an important right, which is merely intended to protect a

weak public interest, may be deemed to be a violation that is excessive' (per Justice I. Zamir in Tzemah v. Minister of Defence [9], at p. 273 {672}).

5. In the matter before us, the subject of our scrutiny is the balance between the right of the Israeli spouse to realize family life in Israel with the Palestinian spouse from the territories, on terms of equality, and the interest of protecting public safety. This balance is intended to achieve protection of life on the one hand, and the quality and meaning of human life on the other. The balance requires relativity. It cannot be achieved in absolute values. It is built on a probability test that rejects absolute values. The probability assessment of the degree of risk to life is what confronts the human right to family, and in determining the relativity between them we must evaluate the strength of the likelihood of danger to life that is involved in realizing the human right to family. In determining the aforesaid relativity, we will consider, inter alia, the place of this human right on the scale of human rights.

The right to family

6. The human right to family is one of the fundamentals of human existence. It is hard to describe human rights that are its equal in their importance and strength. It combines within it the right to parenthood and the right of a child to grow up with his natural parents. Together they create the right to the autonomy of the family.

> 'These are basic principles: the right to parenthood and the right of a child to grow up with his natural parents are rights that are interconnected and they jointly create the right to the autonomy of the family. These rights are some of the fundamentals of human existence, and it is difficult to describe human rights that are equal to them in their importance and strength' (LFA 377/05 A v. Biological Parents [21], at para. 6 of my opinion).

Alongside the human right to the protection of life and the sanctity of life, constitutional protection is given to the human right to realize the meaning of life and its raison d'être. The right to family is a raison d'être without which the ability of man to achieve self-fulfilment and self-realization is impaired. Without protection for the right to family, human dignity is violated, the right to personal autonomy is diminished and a person is prevented from sharing his fate with his spouse and children and having a life together with them. Among human rights, the human right to family stands on the highest level. It takes precedence over the right to property, to freedom of occupation and even to privacy and intimacy. It reflects the essence of the human experience and the concretization of realizing one's identity.

The value of security

7. In view of the special weight and strength of the right to family given to the individual, a reduction thereof is possible only where it is confronted by a conflicting value of special strength and importance. 'The degree of importance of the need that is required in order to justify a violation may change in accordance with the nature of the violated right… the purpose is proper if it is intended to realize "an essential need, or an urgent social need, or a major social interest' (Levy v. Government of Israel [99], at para. 15). The duty of the state to protect the lives of its citizens places the interest of security on the highest level of importance. This interest has two aspects: a social aspect, which casts light on the duty of the state to protect the security of its citizens; and an individual aspect, which casts light on the right of the individual in society to protection for his life. The right to life is a constitutional human right of the first order, and it is placed first in the order of human rights protected in the Basic Law: Human Dignity and Liberty. Notwithstanding, the value of the security of life is not a constant. It has different meanings and strengths in different contexts. Its relative weight changes from case to case according to the degree of probability that the danger to life arising from the relevant specific context will be realized.

8. In the tension that exists between the value of the security of life and other human rights, including the right to family, the consideration of security takes precedence where there is a certainty or almost certain likelihood that if an action that involves a reduction of a human right is not carried out, then human life will be harmed. The right to life takes

precedence over the right to realize the meaning of life, since without life nothing is left. But as a rule, in the balance between security and the human right we are not dealing with absolute values, and usually we do not assume a certainty of harm to life. We are dealing with a probability of the degree of danger, and it is this that we weigh against the violation of the human right.

What is the probability of the danger to human life in the circumstances of permitting the Palestinian spouses to enter Israel to be reunited with their Israeli spouses? Is the probability of danger so high that it justifies a blanket prohibition of the Israeli spouse's right to family? Or is the likelihood of the danger not on the level that justifies a blanket prohibition, and there is a proportionate response that will be expressed in adopting lesser security measures, which will satisfy the existing level of probability while causing a smaller reduction in the human right?

Burden of proof

9. The burden of proof with regard to the existence of a likelihood of a security risk to a degree that justifies a reduction of a human right rests with the state (Movement for Quality Government in Israel v. Knesset [51], at paras. 21-22 and 49 of the opinion of President Barak; Barak, Constitutional Interpretation, at p. 477; United Mizrahi Bank Ltd v. Migdal Cooperative Village [7], at pp. 428-429; the opinion of Justice I. Zamir in Tzemah v. Minister of Defence [9], at pp. 268-269 {665-666}). The state has the burden of proving that the need to protect the public against a real security risk necessitates a real violation of a human right, and that the public need cannot be addressed without such a violation. It must persuade the court that the probability of the security danger occurring is so high that it requires measures to be taken that violate rights as set out in the legislation that causes the violation. Where the probability of the danger is so high that it almost reaches a certain danger, even the most exalted of constitutional human rights will give way to it. Where the probability that the risk will be realized is low, it is possible that the value of security will not justify any violation of the human right, or it is possible that it will justify a lesser violation.

10. The 'security need' argument made by the state has no magical power such that once raised it must be accepted without inquiry and investigation. There were times in the past when the state's argument concerning a security need was accepted on the face of it, without any examination of its significance or weight. Those times have passed, and for many years now the arguments of the authorities concerning a security need have been examined on their merits by the courts in various contexts. Admittedly, as a rule, the court is cautious in examining the security considerations of the authorities and it does not intervene in them lightly. Notwithstanding, where the implementation of a security policy involves a violation of human rights, the court should examine the reasonableness of the considerations of the authorities and the proportionality of the measures that they wish to implement (Ajuri v. IDF Commander in West Bank [1], at pp. 375-376; HCJ 9070/00 Livnat v. Chairman of Constitution, Law and Justice Committee [153], at p. 810). For the purposes of this examination, the court is sometimes required to look at privileged material ex parte, and to assess the strength of the security risk in accordance with probability criteria concerning the strength of the violation of the rights of the individual as opposed to this probability (see, for example, with regard to administrative detention orders: ADA 8607/04 Fahima v. State of Israel [154], at pp. 263-264; HCJ 2320/98 El-Amla v. IDF Commander in Judaea and Samaria [155], at pp. 350, 360-361; with regard to preventing a meeting of a detainee with his lawyer: Marab v. IDF Commander in Judaea and Samaria [3], at pp. 381-382 {212-215}; with regard to protecting the home of the Minister of Defence: HCJ 7862/04 Abu Dahar v. IDF Commander in Judaea and Samaria [156], at paras. 13-14; with regard to assigning the residence of residents of the territories: Ajuri v. IDF Commander in West Bank [1], at pp. 370, 372, 376 {102-103, 105-106, 110-111}; with regard to restriction and supervision orders: HCJ 6358/05 Vaanunu v. Home Front Commander [157]). Sometimes, examining the strength of the security consideration requires examining specific material concerning the person involved; sometimes, when the security policy of the authorities concerns a whole

sector of the public, a general examination should be made on the basis of figures that have been presented, by means of criteria for an objective probability analysis. Such is the case before us.

Examining the security consideration in a two-stage process

11. An examination of the weight of the security consideration should be made in a two-stage process. First, we must examine the degree of credibility of the claim concerning 'security needs.' We must ascertain whether the security considerations that have been raised are not being used, in reality, as a cloak for other completely different purposes which are really the purposes that underlie the legislation containing the violation of the right. Second, assuming that we find that the security consideration is credible, we must assess, on the basis of the figures presented, what is the strength of the security consideration from the viewpoint of the extent of the probability that the risk underlying it will indeed be realized if the policy involving the violation of the right is not implemented, or if it is not implemented in full. The two-stage process for examining the security consideration is built, therefore, on two strata: examining its credibility in the first stage, and examining its strength in the second stage.

12. This two-stage examination of the state's argument concerning security needs was made by the court, when it was required to decide upon the constitutionality of the route of the separation fence in Beit Sourik Village Council v. Government of Israel [2] and Marabeh v. Prime Minister of Israel [5] (paras. 62-65 of the judgment). In Beit Sourik Village Council v. Government of Israel [2] the credibility of the security consideration was examined in the first stage in relation to the petitioners' claim that the real reason for building the fence was not security, as claimed by the state, but a political reason, and its purpose was to annex areas from the West Bank to Israeli territory on the western side of the green line. In this regard, the court held that it was proved that the building of the fence was a result of security considerations, not political ones (Beit Sourik Village Council v. Government of Israel [2], at pp. 830-831 {286-288}; Marabeh v. Prime Minister of Israel [5], at para. 62). It was held that the decision to build the fence did not arise as a political idea for the annexation of territory, but it derived from military-security needs, and as an essential measure for protecting the state and its citizens. In the second stage the court examined the strength of the security-military need to build the fence and the route chosen for it in relation to the degree of the violation of the rights of the local residents involved in realizing this need. Examining this strength of the public interest involves an act of balancing in which the public need is balanced against the violated right, and the court chooses a balancing point that does not attribute an absolute value to either of the competing values, but balances between them in accordance with their relative weight and importance as derived from a constitutional outlook that aims for harmony between the rights of the individual and the needs of the public. A two-stage examination of this kind should be made also in the case before us.

Credibility of the security consideration

13. The state bases the credibility of the security consideration on the general assessments of the security establishment. According to their approach, 'there is a security need to prevent, at this time, the entry of residents of the territories, as such, into Israel, since the entry of residents of the territories into Israel and their free movement within the State by virtue of the receipt of Israeli documentation is likely to endanger, in a very real way, the safety and security of citizens and residents of the State' (para. 4 of the respondents' closing arguments of 16 December 2003); and from a general perspective, 'giving a permit to stay, for the purpose of becoming a resident of Israel, to a resident of a state or a political entity that is involved in an armed conflict with the State of Israel involves a security risk, since the loyalty and allegiance of that person is likely to be to the state or political entity in conflict with Israel.' It was also argued that since the armed conflict between Israel and the Palestinian Authority changed at the end of September 2000, hostile Palestinian entities began to make increasing use of Arab citizens of the State of Israel, 'and especially' it is alleged 'of persons who were residents of the territories and received a status in Israel by virtue of the various

family reunification processes' (para. 5 of the closing arguments of the state of 16 December 2003). A synopsis of the state's security arguments is that, as a rule, enemy nationals that have a double loyalty constitute a security risk when they enter Israel; the residents of the territories who have undergone a process of family reunification are an example of this, and their entry into Israel and their free movement in Israel are likely to aid the armed struggle of the Palestinian side against the residents of the State of Israel; as proof, of the Israeli citizens and residents who aided the armed struggle of the Palestinians, most, according to the state, are residents of the territories who received their status as a result of a process of family reunification.

But there is a difficulty in reconciling the state's claim that the main security risk comes from Palestinian spouses who have become resident in Israel as a result of family reunifications with the statistical figures that the state itself presented. Since 1994, approximately 130,000 residents of the territories received one status or another in Israel (statement of the Attorney-General Mr Mazuz and the Director of the Population Register at the Ministry of the Interior at the meeting of the Interior and Environmental Affairs Committee of the Knesset on 14 July 2003 (minutes no. 47)). Out of this number of residents, we are told that 26 are undergoing investigation on a suspicion of involvement in terror activity. This contrasts with 247 persons involved in terror activities among Israeli Arabs. Moreover, no figures were presented with regard to possible persons involved in terror activity among the thousands of Palestinian workers who are permitted to enter Israel every day for the purpose of employment. These figures, in themselves, are inconsistent with the statement that the main security risk is presented by residents of the territories who received a status in Israel within the framework of the reunification of families. Notwithstanding, the assumption that there is a security risk of one strength or another from the entry of Palestinian spouses to live in Israel certainly cannot be denied, and it is proved also by the relatively small number of persons being investigated for involvement in terror activity among these residents. But this figure against the background of the other figures casts light upon the strength of the security risk.

14. In examining the credibility of the security consideration, we should also not ignore the fact that at various times during the legislative process of the law and its amendment, the demographic issue was raised and debated against the background of the blanket prohibition against the entry of Palestinian spouses from the territories into Israel. Admittedly, the state, when presenting the law, pointed to the security consideration as a sole consideration. Nonetheless, from the debates in the Knesset it can be seen that the demographic issue hovered over the legislative process the whole time, and was a major issue in the deliberations of the Interior Affairs Committee of the Knesset and the House. There were some members of the Knesset from various parties who thought that the demographic aspect was the main justification for the legislative arrangement that was adopted. There were some, such as Minister Gideon Ezra (Likud, the minister communicating between the government and the Knesset at that time) and Chairman of the Knesset Ruby Rivlin (Likud) who warned against family reunifications as a mechanism that was designed to implement de facto a right of return (see the minutes of session no. 276 of the sixteenth Knesset, on Wednesday, 20 Tammuz 5765 (27 July 2005), at p. 15; the meeting of the Interior Affairs Committee on 29 July 2003). Others, such as Knesset Member Zahava Gal-On (Meretz-Yahad), Chaim Oron (Meretz-Yahad), Nissim Zeev (Shas), Nissan Slomiansky (National Religious Party), Michael Ratzon (Likud) and Ehud Yatom (Likud) expressly mentioned the phenomenon that was given the name of 'the demographic danger' in the debate, and they pointed to the purpose of the law as if it was intended to put a stop to this danger also. Against this danger, some of them warned, the state should defend itself (see Proceedings of the Sixteenth Knesset of 23 May 20005, on pp. 3, 10-11; minutes no. 47 of the meeting of the Interior Environmental Affairs Committee of the Knesset of 28 June 2005, on p. 7). The Arab members of the Knesset claimed throughout the legislative proceeding that the purpose of the law was to further a demographic purpose. It is not superfluous to point out that the fourth respondent,

which was joined as a party in this proceeding, focused in its arguments on the demographic aspect of the law that is under scrutiny.

The state, within the framework of its arguments, was prepared to declare that even though the security consideration is the only one underlying the law, even if the demographic consideration was a basis for the policy that led to its enactment, it would still be a legitimate consideration that befits the values of the State of Israel as a Jewish and democratic state:

> 'Even if the predominant purpose of the law was demographic — which is not the case — this purpose would be consistent with the values of the State of Israel as a Jewish and democratic state…' (para. 169 of the closing arguments of the state of 16 December 2003).

Since the state, according to its declaration, did not rely on the demographic consideration as a basis for the legislation under scrutiny here, we are not required to place this consideration under constitutional scrutiny. Notwithstanding, the demographic consideration hovered in the background of the legislative process of the law, and it is difficult to escape the impression, despite the denial of the state in this regard, that it had a presence of some weight or other in the process of formulating the blanket prohibition against the entry of Palestinian spouses from the territories into Israel within the framework of family reunifications.

It can therefore be said that the security consideration, whose purpose is to prevent abuse of the process of family reunification in order to increase terrorist activity inside Israel is, in itself, a credible consideration, and it has a basis in the figures that were presented. Notwithstanding, the possibility of the existence of an additional motive in the background to the legislation of the law, even if there is nothing in this to reduce the credibility of the security consideration, may reflect to some extent on its weight and strength.

The strength of the security consideration

15. An examination of the strength of the security consideration should provide an answer to the question whether there is a justification for the blanket prohibition against the entry of Palestinians who are residents of the territories into Israel within the framework of family reunifications. This question is examined not only in accordance with the general assessments presented by the security establishment, but also in accordance with the factual figures that were presented, and the analysis of these with objective probability criteria. I will say already at this stage that in my opinion the figures as presented by the state do not justify a blanket prohibition against the entry of Palestinian spouses into Israel within the framework of family reunifications, which means a sweeping violation of the human rights of Israeli citizens and residents. The state has not succeeded in discharging the burden imposed on it to convince the court that, in the circumstances of the case, the strength of the security risk justifies the serious and sweeping violation of the right to family caused to those residents of Israel who are prevented from being reunited with their spouses. The following are the reasons for this conclusion.

The number of persons among the Palestinian spouses who are suspected of involvement in hostile activity

16. In its closing arguments, the state argues that 'in attacks carried out with the aid of residents of the territories… 45 Israelis were killed and 124 were injured.' Accordingly, '23 of the residents of the territories, who received a status in Israel as a result of family reunifications, were involved in real aid for hostile activity against the security of the state' (para. 17 of the closing arguments of the state of 16 December 2003). Out of 148 suicide attacks, in 25 cases residents of the territories who received a status by virtue of family reunifications were involved. In the state's reply of 7 February 2006, the number of persons being investigated for involvement in terror activity from among the residents of the territories who received a status by virtue of family reunifications was stated to be 26. Similarly, with regard to 42 additional residents of the territories, their permit to stay in Israel was not extended because of 'intelligence information that indicated their involvement in terror activity or regular contact with terrorists' (para. 29 of the state's response of 7 February

2006). Within the framework of those 26 persons that are suspected of involvement, the state presents details of the cases of six persons who hold Israeli identity cards and whose status was obtained within the framework of family reunifications, that are suspected of carrying out attacks or aiding attacks. These specific examples do not disclose what was the nature of the involvement of the six persons in the planning or perpetration of the attacks, and it is impossible to learn from what is written whether they were attacks that were actually carried out or foiled, and what happened to the six persons. With regard to the 20 other persons suspected of involvement in terror activity there is also no information with regard to the outcome of those investigations.

It is not superfluous to point out that since 1994 approximately 130,000 residents of the territories received one status or another in Israel, and, of all of these, 26 as aforesaid are under investigation with regard to involvement in terror activity. In view of the large number of Palestinians from the territories who acquired a status in Israel since 1994, the number of persons interrogated on a suspicion of some involvement or other in aiding terror activity is small, and moreover we do not have any clear information concerning the nature of the collaboration of those involved in the terror activity.

Palestinian workers entering Israel

17. According to the policy of the government, many thousands of Palestinian workers enter Israel from the territories each day. From the notice of the state of 16 December 2003 (para. 180), it transpires that permits are given to approximately 20,000 workers, but this quota changes from time to time in view of the circumstances. The state did not present us with any figures on the question of whether among these workers persons were found to be involved in terror activities. It does not require much convincing to realize that in searching for collaborators for terror activities, there is no special difficulty in using such workers, who enter Israel each day with a permit and return to the territories in the evening. If, as the state claims, the basis for effective aid to terror lies in someone being connected with the territories on the one hand, and his access to Israel on the other, these two elements exist with regard to many thousands of Palestinian workers who come to Israel from the territories each day. We have not found that the security risk involved in the entry of Palestinian workers into Israel each day has led the state to adopt a blanket prohibition against the entry into Israel of the workers, who satisfy economic and employment needs in which the state has an interest.

According to the state, one cannot compare the workers with the spouses since the security risk presented by these groups is completely different. The entry of workers into Israel is conditional upon calm in the security situation, since in times of increased risk, a general closure is imposed on the territories, and the entry permits into Israel are suspended automatically. Moreover, the various supervision measures that are imposed on the workers from the territories allow the security forces to negate, in so far as possible, the ability of the workers to become involved in terror activity. The fact that these workers do not stay the night in Israel helps this supervisory mechanism (para. 180 of the closing arguments of the state of 16 December 2003). By contrast, so it is claimed, Palestinian spouses who are allowed to enter Israel acquire a status here and stay here on a permanent basis. This status gives them a greater weight as potential collaborators for terror. This position is questionable for several reasons.

First, in the absence of figures regarding the number of persons involved in terror activity among Palestinian workers, it is difficult to accept as presented the premise that the risk from the Palestinian spouses who acquired residency in Israel exceeds what is expected from the Palestinian workers. The spouse who is involved in terror can expect a significant loss not only in the criminal sanctions to which he will be sentenced but also in the potential loss of his status in Israel and the ability to live with his family in Israel. The worker, by contrast, risks criminal sanctions and the loss of his place of work and a permit to enter Israel in the future. The risk of losing the status in Israel and the ability to realize family life here without doubt constitutes a deterrent for the spouse, and it is possible that this can explain the

relatively small number, over the years, of persons suspected of involvement in terror among the Palestinians who have a status in Israel by virtue of family reunifications.

Second, within the framework of the supervisory measures introduced in order to contend with the potential risk, it is possible to choose appropriate security measures and apply them also to Palestinian spouses who will not only be subject to an individual check before they enter Israel, but will also be subject to the supervision of the authorities when they are living in Israel, in order to make them less accessible and available to the terrorist organizations. Within the framework of the security measures it is also possible to include the cancellation of permits to stay in Israel where there is substantiated information about a risk anticipated from someone who received a permit to stay in Israel by virtue of family reunifications. Proportionate supervisory measures for the Palestinian spouses who wish to live in Israel within the framework of family reunifications can be implemented in a similar manner to those imposed on Palestinian workers, with the appropriate changes. Between a blanket prohibition of entry permits and giving a blanket permit to enter Israel there is a middle ground where it is possible to make stringent individual checks of those persons applying to enter Israel before they do so, and to impose on those whose entry is permitted various supervisory measures on a continuous basis in a manner that is commensurate with the likelihood of the risk.

Persons involved in terror among Israeli citizens

18. We should also not ignore the figures presented by the state, according to which 247 Israeli Arabs, citizens and residents, were found to be involved in terror activity against the Jewish residents of the state (para. 29 of the state's response of 7 February 2006). Citizens of Israel, both Jews and Arabs, enjoy the same human rights and liberties that are provided by Israel's constitutional system. The Arab population of Israel is a faithful and peace-seeking sector of the population, even if it contains a small minority that abuses its civil liberties and becomes involved in the struggle of murderous terror. Because of this small minority, it did not occur to anyone to violate the civil rights of the Arab population in Israel, even though according to the figures the number of Arab Israelis involved in terror activity is nine times greater in absolute terms that the involvement of Palestinian spouses who acquired a status by virtue of family reunifications. Just as it would not occur to anyone to assume that the risk anticipated from a small minority of local citizens should result in a sweeping injury of the complete population sector of Israeli Arabs, who are residents and citizens of the state, so too it is difficult to find a justification for a sweeping injury to parts of precisely the same population, the residents and citizens of Israel, when we are speaking of family reunifications with spouses from the territories. The individual check that is intended to locate a potential danger that is anticipated from someone, even if it does not remove the danger entirely, will certainly reduce its probability to such a level that it will deny a constitutional basis for a sweeping injury to the human rights to family life. We ought to achieve a genuine and balanced proportionality between the degree of the remaining security danger after exercising individual supervisory measures and the protection of human rights involved in a selective injury only, where a genuine risk potential is discovered in some person or other.

The strength of the security consideration — conclusions

19. The conclusion that follows from the aforesaid is that the state has not discharged the burden imposed on it to show that the sweeping violation of the constitutional human right satisfies the proportionality test of the limitations clause. The probability of the security risk from the entry of Palestinians into Israel within the framework of family reunifications is not of such a strength that it justifies the imposition of the blanket prohibition by means of a law that prevents family reunifications as a rule, apart from a few exceptions. The blanket prohibition is not commensurate with the strength of the violated human right to family life that is possessed by the Israeli spouse who is a resident or citizen of Israel. From the figures set out above, it is difficult to see a rational policy in the approach of the state to the existing security risk, which treats risk groups that have things in common differently. The state

accepts the existence of risks that exceed those anticipated from Palestinian spouses without imposing blanket prohibitions, but at the same time it imposes an almost total denial of family reunifications in a manner that is inconsistent with the relativity of the risk expected from them.

The focus of the law on the population of spouses from the territories is inconsistent with the policy of the state with regard to risk factors that are not smaller, and are perhaps even greater, than those presented by family reunifications. In other contexts, which give rise to significant risks, the state refrains from a sweeping violation. It seeks to spread the risk in as intelligent and proportionate manner as possible. This is not the case with regard to persons applying for family reunifications. This raises the concern that the real purpose of the law is not entirely identical with the alleged security purpose, and that the strength of the security consideration is not as significant as alleged. In view of the aforesaid, the criteria of the law are not consistent with the proper point of balance between the strength of the security interest and the extent of the violation of the human right (Davidov, Yovel, Saban and Reichman, 'State or Family? The Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003,' 8 Mishpat uMimshal, vol. 2, 643 (2005), at pp. 671-672; J. Tussman & J. tenBroek, 'The Equal Protection of the Laws,' 37 Calif. L. Rev. 341 (1949), at pp. 344-353).

20. In the circumstances of this case, in the equation of the balance required for examining the element of proportionality in the limitations clause, the human right of the Israeli spouse is on a higher level than the conflicting security interest. The strength of the security consideration does not justify a blanket prohibition of the right of the Israeli spouse to family life in Israel. Proportionality justifies taking the value of security into account, but only to a relative degree as implied by a consideration of the strength of the risk and the strength of the violated human right. Proportionality justifies only a relative violation of this right, relative to the existence of a concrete danger potential that will be discovered from an individual check, from specific information collected with regard to an individual and from imposing various supervisory measures that will guarantee, in so far as possible, the identification of the danger in time.

Indeed, the proportionality tests lead to the value decision that confronts the question, to what extent may the government of a democratic country violate human rights in the name of the national interest and national security; when do we cross the proper balancing point and give a blanket protection to society, while improperly violating the rights of the individual, and when does the social interest become an absolute value at the expense of the human right, rather than maintaining the proper proportionality between them. The tests of proportionality require a value balance in which the premise is that not every contribution to the general level of security justifies a sweeping violation of human rights. Where a sweeping violation reflects an improper proportion between the likelihood of the security risk and the strength of the violation of the right, a different, more rational and just proportion is required. This proportionality is built on a compromise between the general social value and the rights of the individual that deserve protection.

The sweeping violation

21. We must beware of the lurking danger that is inherent in a sweeping violation of the rights of persons who belong to a particular group by labelling them as a risk without discrimination, and of the concern involved in using the security argument as a ground for a blanket disqualification of a whole sector of the public. There are cases in history in which this happened, and later constitutional thought recognized the mistake in this, a mistake that is clear on the face of it. It is sufficient to mention one example of this from the well-known case of Korematsu v. United States [185], in which United States residents and citizens of Japanese origin, who lived in the United States, were placed in detention camps in their own country, during the Second World War, when the United States was at war with Japan. There were individuals in that population group who were suspected of disloyalty to the state. In consequence, a general sanction of being placed in detention camps was imposed on a whole

sector of the public. These sweeping measures were approved by a majority in the United States Supreme Court. The minority thought otherwise.

The justification for adopting these security measures was expressed in the majority opinion of Justice Black in terms that are reminiscent in their main aspects of the arguments of the state before us:

> 'We cannot reject as unfounded the judgment of the military authorities and of congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained… It was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground' (*Korematsu v. United States* [185], at p. 219).

And further on:

> 'There was evidence of disloyalty on the part of some [citizens of Japanese ancestry], the military authorities considered that the need for action was great, and time was short' (*Korematsu v. United States* [185], at pp. 223-224).

The minority judges, led by Justice Murphy, discussed the nature of the risk, as well as the need for a rational and proportionate correlation between the nature and scope of the risk and the measures adopted to guard against it:

> 'In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. *But the exclusion, either temporary or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways.*… no reliable evidence is cited to show that such individuals were generally disloyal…or had otherwise by their behavior furnished reasonable ground for their exclusion as a group' (*Korematsu v. United States* [185], at pp. 235-236).

Further on, the minority judges explained the nature of the great danger inherent in sweeping arrangements that involve whole sectors of the public indiscriminately:

> '… to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights… is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow' (*Korematsu v. United States* [185], at p. 240).

The ruling of the majority of justices of the United States Supreme Court in the case of Korematsu v. United States [185] is considered by many to be one of the darkest episodes in the constitutional history of western countries (see, for example, E.V. Rostow, 'The Japanese American Cases – A Disaster,' 54 Yale. L. J. 489 (1945); L. Braber, 'Comment: Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security,' 47 Villanova L. Rev. 451 (2002)).

The circumstances in that case are completely different from those in our case, but the wind that blows in the background of the constitutional approach that was applied there by the majority opinion is not foreign to the arguments that were heard from the state in the case before us. We must take care not to make similar mistakes. We must refrain from a sweeping injury to a whole sector of the public that lives among us; it is entitled to constitutional protection of its rights; we must protect our security by means of individual scrutiny measures even if this imposes on us an additional burden, and even if this means leaving certain margins of a probability of risk. We will thereby protect not only our lives but also the values by which we live (Saif v. Government Press Office [86], at p. 77 {198}).

Conclusion

22. No one will deny the seriousness of the security situation in which we find ourselves, and the supreme task imposed on the state to protect the lives of its citizens. At the same time, just as we must confront the danger to life and defend ourselves against it, so too we must protect ourselves against the danger of losing security in our values and in the protection of human rights. We must beware the erosion of human rights against the background of security arguments by not maintaining the proper proportion between them. Without insisting on this proportionality, the constitutional approach that protects human rights may be eroded; consequently, cracks may appear in the foundations of our constitution; democratic patterns of life in Israel may be prejudiced and the recognition of human dignity and the right to realize one's identity may be undermined. We must take care not to be carried away by security arguments like blind persons in the dark, where doing so leads to a violation of a human right. We must examine their credibility and strength in accordance with reliable figures, and assess it in accordance with the tests of logic, common sense and the rules of probability.

In this case, I do not agree with the view that the security need should be adopted to the degree and extent argued by the state. I see a significant gap between the strength of the security consideration as alleged by the state, and the strength of the violation of human rights of the first order which is caused by the law. Therefore I am most strongly of the opinion that the security consideration should yield to the human right. But even so, there is no basis for a balance in absolute values, but in relative values. Therefore, the change from a blanket prohibition (apart from a few exceptions) against the entry of Palestinian spouses into Israel, which is currently enshrined in the law, to a system of individual checks to locate an individual potential danger reflects the proper point of balance. The relative strength of the security consideration ought also to cast light on the measures for individual checks that should be put into operation for the purpose of providing entry permits to persons applying to be reunited with their Israeli spouses, and also on the supervisory methods that should be introduced with regard to Palestinian spouses whose entry is permitted, while they are living in Israel. The relative strength of the security consideration should also cast light on the relevant tests and criteria that should be made a necessity in these matters.

23. I agree with the president's conclusion concerning the voidance of the law, and the details of the relief proposed by him.

Justice A. Grunis

1. I agree on the whole with the opinion of my colleague Vice-President Emeritus M. Cheshin. From this it is clear that my opinion is different from that of my colleague President A. Barak. I will add certain emphases of my own that clarify the disagreements between my opinion and that of my colleague the president.

2. My colleague the president defines very broadly the constitutional right to family life (as a part of human dignity). He includes within it the right of the Israeli spouse to bring his foreign spouse into Israel, even if he is a national of an enemy state, in order that the couple can have a family life in Israel. After finding that the Citizenship and Entry into Israel Law

(Temporary Provision), 5763-2003 (hereafter — the law) violates the constitutional right, the president goes on to examine whether the conditions of the limitations clause are satisfied. The position of my colleague President Barak in the present case is consistent with his approach in other cases, in which a question arose as to the scope of the constitutional right (in general, with regard to the outlook of my colleague the president in this regard, see A. Barak, Legal Interpretation, vol. 3, Constitutional Interpretation (1994), at pp. 369-390). This is the case, for example, with regard to the scope of the right of property (s. 3 of the Basic Law: Human Dignity and Liberty) and freedom from imprisonment (s. 5 of the Basic Law: Human Dignity and Liberty). In the first case, the president apparently includes, within the scope of the right of property, every property interest (United Mizrahi Bank Ltd v. Migdal Cooperative Village [7], at p. 431); HCJ 5578/02 Manor v. Minister of Finance [158]). In the second case, the approach of my colleague the president leads to the result that every new criminal law that includes a penalty of imprisonment, and every case where legislation makes a penalty of imprisonment stricter, violates the basic right (Silgado v. State of Israel [107]). By contrast, my colleague the vice-president emeritus disputes the scope of application of the constitutional right under discussion. In his opinion, the right to family life does not include the right of an Israeli citizen to family reunification with the foreign spouse in Israel, especially not at a time of war or armed conflict with the country of the foreign spouse. The very broad definition of the constitutional right, according to the approach of my colleague the president, leads to the conclusion that many laws will be regarded as violating constitutional rights and will therefore be required to satisfy constitutional scrutiny, i.e., the conditions of the limitations clause. The outcome may be a degradation of constitutional rights. Moreover, a practical problem may arise with regard to the ability of the courts to deal on a daily basis with constitutional claims (United Mizrahi Bank Ltd v. Migdal Cooperative Village [7], at p. 332 (per President Shamgar), and at pp. 470-471 (per Justice I. Zamir); Israel Investment Managers Association v. Minister of Finance [8], at p. 419 (per Justice D. Dorner)). Even if we accept the broad approach of my colleague the president in so far as the right to family life is concerned, the argument may be raised that in the present case this right conflicts with another constitutional right, the right to life (s. 2 of the Basic Law: Human Dignity and Liberty). Then the question arises whether there is a justification for turning to a scrutiny of the law in accordance with the conditions of the limitations clause, or whether the conflict should be resolved without referring to the limitations clause, and certainly without referring to all of its constituent parts. The response to a conflict between two constitutional rights lies in what is sometimes referred to as a ‘horizontal balance.’ It is possible that within the framework of examining this conflict or contradiction, it will be necessary to refer to the proportionality tests. Of course, that scrutiny will necessarily lead to the restriction of one of the conflicting rights on account of the other. In any event, for the purposes of the present case I am prepared to assume, according to the approach of my colleague the president, that the law violates the Israeli spouse’s constitutional right to family life, because it does not allow him to bring the Palestinian spouse who lives in the territories into Israel.

3. My two colleagues, the president and the vice-president emeritus, find that the law does not raise any problem with regard to the first three conditions in the limitations clause, namely the requirement that the violation should be made in a statute or in accordance with statute by virtue of an express authorization therein; the requirement that the violating law should befit the values of the State of Israel; and the requirement that the law is intended for a proper purpose. They also agree that the law satisfies the first two subtests of the proportionality test that are included in the limitations clause. Thus, they find that there is a rational connection between the prohibition against the Palestinian spouse entering Israel, which is the measure adopted by the law, and the reduction of the security risk inherent in the entry into Israel of the foreign spouse, which is the purpose of the law. They also find that it is not possible to achieve the purpose of the law by adopting a less harmful measure. The issue in the concrete case before us is the blanket prohibition in the law against the entry into Israel of Palestinian spouses as opposed to an individual check of the foreigners who marry Israelis.

An individual check of each person will not achieve the same level of security that will be provided by a blanket prohibition.

4. The disagreement between my colleagues focuses on the implementation of the third subtest in the test of proportionality. Sometimes this test is referred to as that of proportionality in the narrow sense. This test examines the correlation between the social benefit of the law and the harm caused by the violation of the constitutional right. The President dissects the case with a surgeon's scalpel, or perhaps we should say with a laser beam, and says that 'the proper way of posing the question is by means of the level of the risks and the likelihood that they will occur, and their effect on the life of society as a whole' (para. 110 of his opinion). Further on, the test in the concrete case is presented in the following words: 'The question is what is the probability that human life will be harmed if we continue the individual check as compared with the likelihood that human life will be harmed if we change over to a blanket prohibition, and whether this additional likelihood is comparable to the certainty of the increase caused thereby to the violation of the rights of spouses who are citizens of the state (ibid.). The answer of my colleague the president is that the additional security is not commensurate with the additional violation of the right of citizens of the state to family life. By contrast, the opinion of my colleague the vice-president emeritus is that since we are dealing with the right to life, it should be given greater weight in relation to the constitutional violation. I disagree with my colleague the president in two respects, both with regard to the presentation of the question as a question of probability and in the implementation of the test.

5. There is no doubt that presenting the test of proportionality in the narrow sense as a test of probability contributes to the development of the law and our conception of the value conflict underlying the test. The test that the president presents is reminiscent of the well-known test formulated by Judge Learned Hand with regard to the tort of negligence (United States v. Carroll Towing Co. [207]). According to the equation developed by Judge Hand, negligence exists if the expectation of the damage (the amount the damage multiplied by the likelihood of its occurrence) is greater than the cost required to prevent the damage (the aforesaid test was mentioned in CA 5604/94 Hemed v. State of Israel [159], by President A. Barak, at pp. 510-511, and also by Justice E. Rivlin, who pointed to its application in the constitutional context as well, at pp. 517-521); see also A. Porat, 'Negligence and Interests,' 24 Tel-Aviv University Law Review (Iyyunei Mishpat) (2001) 275). The presentation of the question that requires a decision as a kind of mathematical equation has a great deal of sophistication and it advances the legal analysis. The use of imagery, such as 'equation,' 'balance,' 'weight,' etc., is common in legal writing. Metaphors help us understand better when we are dealing with abstract concepts. But let us not forget that we are dealing with law, and not mathematics. In any case, in the matter before us it is my opinion that no question of probability arises with regard to injury to human life. The figures that were presented to us show that twenty-six Palestinian spouses who entered Israel lawfully by virtue of the family reunification process were involved in terror attacks. In those attacks, dozens of people were killed and many others were injured. It should be noted that those twenty-six received a permit to enter Israel notwithstanding the security check that they underwent. This means that we have before us proof that the individual security check does not guarantee that it is possible to distinguish fully between those persons who constitute a security risk and others whose entry into Israel does not constitute a risk. On the basis of these figures, I believe that it can be said that there is a certainty that the entry of thousands of additional spouses will lead to harm to human life, even if a security check is carried out with regard to each individual. Of course, there is no way of saying what will be the scope of the harm, and with regard to this question of scope we are not dealing with probability but with a mere guess. The equation is not made up, therefore, of a probability on one side and a certainty on the other, but of two certainties: harm to human life as opposed to harm to family life. It is possible to summarize the approach of my colleague President A. Barak with the expression 'Where a certainty conflicts with a possibility, the certainty prevails.' By contrast, according to my approach the

situation is one of two certainties, and therefore a different response is required. We should admit that presenting the dilemma in such stark terms is somewhat misleading. There are various situations in which the value of human life conflicts with other values and interests, and notwithstanding this a decision is made, sometimes rationally and sometimes intuitively, to prefer the other value or interest. Thus, for example, there is no argument that a blanket prohibition against travelling by motorized vehicles on the roads and a return to the days of carriages will significantly reduce the number of persons killed and injured in road accidents. Nonetheless, it can be assumed that a proposal to this effect will not be adopted in a modern society.

6. Even if I accept the approach of my colleague the president according to which the equation has a probability component on one side, I cannot agree with the outcome that he has reached. According to the president, the additional security obtained from the blanket prohibition of the entry of spouses, as compared with the degree of security obtained from an individual check, is not commensurate with the additional damage to the Israeli spouses as a result of the violation of their right to family life (para. 112 of his opinion). Even if I use exactly the same test used by the president, my conclusion is that the additional security obtained from the blanket prohibition justifies the additional violation of family life. In this context it should be noted that disagreements on this point are an example of the situation in which different judges make use of the same verbal formula as a legal test but arrive at different results. The difference in the result derives, inter alia, from the different relative weight given to the conflicting values and from the different quantification of the figures. In mathematical terms, even if we agree upon all the variables of the equation, it is clear that there is no consensus on the 'numerical values' that should be attributed to those variables. And in addition to all this, we should mention the problematic nature of relying on probability, namely, estimating the likelihood of the occurrence of uncertain events (in this context, see, inter alia, D. Kahneman et al., Rationality, Fairness, Happiness — A Selection of Articles, M. Bar-Hillel, ed., 2005, especially in chapter 2).

7. Dealing with concepts such as probability, likelihoods and estimates necessarily raises the question of what is the constitutional margin of appreciation when scrutinizing the law. It would appear that anyone who is familiar with this margin will admit that it is not static with fixed limits. These limits are affected by various factors, including the subject-matter of the law and the degree of expertise of the court in the field (cf. HCJ 2533/97 Movement for Quality Government in Israel v. Government of Israel [160], at pp. 57-58). Thus, for example, with regard to economic issues we can say that the legislature and the executive have a relatively large margin of appreciation, inter alia because we are concerned with decisions that involve an element of uncertainty and professional considerations that are outside the expertise of the court (United Mizrahi Bank Ltd v. Migdal Cooperative Village [7], at p. 575 (per Justice Goldberg); Israel Investment Managers Association v. Minister of Finance [8], at pp. 388-389; Menahem v. Minister of Transport [11], at p. 263). The same is true with regard to a security assessment that is dependent on many factors and variables (Gaza Coast Local Council v. Knesset [6], at pp. 572-576). An additional factor that should be taken into account and that may affect the constitutional margin of appreciation is the fear of judicial error. I will now consider this issue.

8. My colleague the president is of the opinion that 'a mistake by the judiciary in a time of emergency is more serious than a mistake of the legislature and the executive in a time of emergency. The reason for this is that the mistake of the judiciary will accompany democracy even when the threat of terror has passed, and it will remain in the case law of the court as magnet for the development of new and problematic rulings. This is not the case with mistakes by the other powers. These will be cancelled and usually no-one will remember them' (para. 21 of his opinion). This implies that a determination that the law is valid and should not be removed from the statute book would be a mistake whose consequences will accompany the state in the future, possibly even after the period of war and terror ends. But we must consider the fear of judicial error from both sides, i.e., not merely from the viewpoint

of an error that concerns a determination that the law is constitutional, but also from the viewpoint of an error that concerns the opposite determination — that the law does not satisfy the constitutional test. Indeed, if the petitions before us are denied and it is held that the law remains valid, there will be a violation of the right to family life of an unknown number of Israeli citizens. On the other hand, if the petitions are granted and it is held that the law is not valid, there will be a violation of the right to life and physical and emotional integrity of an unknown number of persons. Since we are dealing with unknowns on both sides of the equation, there is no alternative to taking into account the possibility of error. In my opinion, greater weight should be attributed to a fear of error on the side of the equation containing the right to life. In the words of Dr G. Davidov:

> 'When the harm that would be generated by a judicial mistake is especially severe, courts should raise the bar before striking the legislation down' (G. Davidov, 'The Paradox of Judicial Deference,' 12 *Nat'l J. Const. L.* 133 (2001), at p. 161; see also *Irwin Toy Ltd. v. Quebec (Attorney General)* [217]).

9. In the present case, not only is there a fear of error that may cause serious harm, but the error is close to being irreversible. According to the figures provided by the state, over the years thousands of applications for family reunifications were approved in cases where the foreign spouse was a resident of the Palestinian Authority. It follows that until now many thousands of residents of the Palestinian Authority have come to live in Israel lawfully. If it is held that that law is void, it can be expected that many additional thousands will become, at the end of the process, citizens or permanent residents in Israel. Let us imagine that in several years it becomes clear that the court's declaration that the law is void was an error that caused serious harm. By this I mean that it will be found that the number of foreign spouses who were involved in terror activity is higher than was thought at the time of making the judicial decision. If, heaven forbid, this happens, it will be very difficult to turn the clock back. In other words, even if according to the approach of my colleague the president there will be a justification at that time for a blanket prohibition, it appears that it will be possible to apply it prospectively, whereas applying it to those persons who have already entered Israel lawfully will be very difficult, if not impossible. According to my outlook, since the mistake may cause serious harm and certainly because of the great difficulty in remedying it, such that it is almost irreversible, the law must be left to stand.

10. Even if the current relationship with the Palestinian Authority is not defined as a war, but as a quasi-war (in the language of my colleague Vice-President Emeritus M. Cheshin) or perhaps as an armed conflict between a state and a political entity, it is not possible to ignore the security dangers that are inherent in the entry of thousands of enemy nationals into Israel. We are not speaking of entering Israel for the purpose of employment, which is by nature temporary, and in any case this can be prevented in accordance with the circumstances. The entry of thousands of spouses into Israel, when the purpose is to take up residence in Israel and to receive, at the end of the process, citizenship or permanent residency, requires special consideration, in view of the background of the security position. Who was endowed with such an impressive prophetic ability that he foresaw, at the time of the first intifada, which was an intifada of stones, that we would reach a time when Palestinian suicide bombers would explode themselves in the streets of our cities? Who imagined, not so long ago, that the Hamas movement would come to power in the elections that took place in the Palestinian Authority? These two examples, and it is possible to give many more, indicate the need for great caution and restraint when scrutinizing legislation that is intended to deal with an acute problem, at a time of an armed conflict of the kind that is taking place between Israel and the Palestinian Authority. My colleague the president has repeatedly said that 'human rights are not a recipe for national suicide' (for example, Neiman v. Chairman of Elections Committee for Eleventh Knesset [87], at p. 310 {161}; CrimA 6696/96 Kahane v. State of Israel [161], at p. 580; LCA 6709/98 Attorney-General v. Moledet-Gesher-Tzomet List for Elections to

Upper Nazareth Local Authority [162], at pp. 360-361; see also Kennedy v. Mendoza-Martinez [208], at pp. 160-161, which is mentioned in HCJ 448/85 Dahar v. Minister of Interior [163], at p. 716). In my opinion, that statement is appropriate in this case.

11. The opinion of my colleague the president abounds, as usual, in citations from all parts of the world and is full of references to many thinkers and scholars. Notwithstanding, my colleague the president does not point to even one example of a country that has allowed the entry of thousands of enemy nationals into its territory for any purpose at a time of war or at a time of an armed struggle. Certainly there is no example of a court that ordered a state to allow the entry of thousands of enemy nationals into its territory. I shall conclude by citing the remarks of Lord Hoffmann (which were admittedly said with regard to an administrative decision and not with regard to the disqualification of a law, but which are apt in our case):

> '… In matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove' (*Secretary of State for the Home Department v. Rehman* [228]).

These words of warning ought themselves to be adopted with caution, in case the line is crossed in such a way that the court shrugs off the constitutional role that is placed on its shoulders. Giving excessive weight to security concerns may, indeed, result in a disproportionate violation of human rights. We are dealing with matters that cannot be measured accurately. In the final analysis, the question is one of taking risks. The decision in this case is very difficult, because it is not possible to reconcile the basic values in the concrete case. But since we are called upon to make a decision, we cannot avoid doing so. In my opinion, the risks that will result from disqualifying the law require the court to refrain from declaring it void even if the alternative is a violation of a human right.

12. It is therefore my opinion that the petitions should be denied.

Justice M. Naor

In my opinion, like that of Vice-President Emeritus M. Cheshin, the petitions should be denied.

Preliminary remarks

1. In recent years, terror has not only been the exclusive or almost exclusive possession of Israel. The beginning of the current century has been characterized by a terror barrage of great strength at various focal points in the world. On occasions, terror has hit democratic countries without prior warning. The events of September 11 in the United States will not be forgotten quickly. Many countries have taken action, adapted themselves to the new reality that was forced upon them, and within this framework changes have also been made to legislation. Let us mention, without being exhaustive, several examples from around the world: in the United States, the Patriot Act of 2001, or, in its full name, the Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001; in the United Kingdom, the Anti-terrorism, Crime and Security Act, 2001; in Australia, the Security Legislation Amendment (Terrorism) Act, 2002; and in Canada, the Anti-terrorism Act, 2001.

2. Following the events of September 11, the attitude of the United States to terror and the war on terror changed radically. As a result, many countries have been affected. There are some who believe that terror has led those countries to 'legislation that is a result of hysteria' (E. Gross, The Struggle of Democracy against Terror — Legal and Moral Aspects (2004), at p. 679). But, as my colleague the president said, 'Israel did not need the events of September 11, 2001, in order to formulate its position with regard to terror. We had terror on September 10, 2001, and on many previous occasions, and we had terror on September 12, 2001, and many other occasions since' (ibid., 'Introduction by Aharon Barak,' at p. 25). The Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003 (hereafter — the law) — whose constitutionality we are now scrutinizing — is a part of a series of measures that Israel has adopted to protect the lives of its residents, whose constitutionality it has scrutinized and is scrutinizing in this court. We have not said, nor will we, whether the legislation that we mentioned would pass the tests of constitutional scrutiny. Legislation that imposes restrictions in relation to the previous position, such as the war on terror legislation, is legislation that is by its very nature 'ripe' for judicial review of the constitutionality of the law. A good example of this can be found in the judgment of the House of Lords in A v. Secretary of State for the Home Department [229], in which the violation of the right to liberty did not pass constitutional scrutiny. Indeed, constitutional scrutiny in Israel is exercised equally in times of peace and in times of war. We must be aware, inter alia, of the fact that sometimes, because of the pressure of the times, the response to war or terror may be exaggerated. This was discussed by Lord Hoffmann (ibid. [229], at pp. 86), where he said that with the benefit of hindsight, measures that were adopted in the time of Napoleon and in the two world wars were found to have been cruelly and unnecessarily exercised.

3. All of us, both those who wish to declare the law void and those who (like me) oppose this, are aware of the warnings provided for us by history. It was not for nothing that my colleague Justice Beinisch said that the decision in the petitions before us are some of the hardest decisions that have been placed before us in recent years. We are making this decision with some unease. Indeed, the armed conflict presents significant challenges especially to the continuing protection of human and civil rights in a society that regards itself under threat and in real danger. The judicial scrutiny that we exercise with regard to the constitutionality of the law in our case, in the middle of an armed conflict between the State of Israel and the terror organizations originating in the areas of the Palestinian Authority, is the same judicial scrutiny that this court exercises with regard to the constitutionality of laws in times of calm and normality. As my colleague the president says, Israeli constitutional law has a consistent approach to human rights in times of relative quiet and in times of increased combat (for a similar position in the constitutional law of the United States, see and cf. Ex parte Milligan [209], at p. 120). At all times we remember that 'there is no security without law. The rule of law is a component of national security' (HCJ 428/86 Barzilai v. Government of Israel [164], at p. 622 {104}). At the same time, we remember that 'a constitution is not a prescription for suicide' (Neiman v. Chairman of Elections Committee for Eleventh Knesset [87], at p. 311 {162}). The rules of constitutional scrutiny are not absolute rules. Different judges are likely to reach different conclusions. The case before us (and other cases) prove that. My position is, as aforesaid, that there is no basis for declaring the law void. I will now clarify my position.

(1) Constitutional scrutiny — first stage: does the Citizenship and Entry into Israel Law violate a constitutional right

(a) The right to family life

4. The key question in dispute here is whether the Israeli spouse has a constitutional right, as a part of human dignity, to realize family life with a foreign spouse in Israel? On this question our opinions differ. In my opinion, the Israeli spouse does not have a constitutional right, as a part of human dignity, to realize family life with the foreign spouse particularly in Israel. We are concerned with the interpretation that should be given to human dignity as a constitutional right. Even according to my approach, the right to family life is a constitutional right derived from the constitutional right to human dignity. But it does not include the

additional derived right — namely the right to realize family life particularly in Israel. The right to family life is not an independent and express right in the Basic Law: Human Dignity and Liberty, and the additional derived right as aforesaid does not have a close objective connection to human dignity. The interpretation of 'human dignity' should not be stretched beyond endurance. In my opinion, it is not possible to determine that there is international recognition of a right of the citizen or the resident — as a constitutional right — to bring his foreign spouse to his country. From comparative law such a recognition of a constitutional right cannot be deduced.

5. My colleague the president in practice reinterprets art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in accordance with the interpretation that seems to him appropriate. In my opinion, there is great importance to the question whether European countries de facto regard the right to family reunification in the country of the European spouse as a constitutional right. The answer to this question is, in my opinion, no. Thus, for example, the European Court of Human Rights held that art. 8 of the Convention had not been breached in a case where an application of a Dutch citizen (born in Morocco) to receive a permit for his son who was born in Morocco was refused, and it was held that the state should not be held to have a general duty to allow 'family reunifications' as aforesaid:

> 'Where immigration is concerned, Article 8… cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory' (*Ahmut v. The Netherlands* [236], at para. 67).

In another case, the European Court of Human Rights discussed how a state should not have a duty imposed upon it to allow 'family reunifications' in its territory:

> 'As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory … Moreover, where immigration is concerned, Article 8… cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory' (*Gül v. Switzerland* [237], at para. 38).

In that case, the European Court of Human Rights discussed the difficulty of defining what are the duties imposed on the state within the framework of art. 8 of the Convention and the right to family life, and it also discussed the need to find a balance within the framework of the article between the interest of the individual and the interest of the community, while holding that the state should be given a 'margin of appreciation:'

> 'The Court reiterates that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision (art. 8) do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation' (*ibid.* [237]).

In practice, already in Abdulaziz Cabales and Balkandali v. U.K. [235], which was discussed by my colleague the vice-president, the European Court of Human Rights held that art. 8 of the Convention does not oblige a state to allow the foreign spouse into its territory:

> 'The duty imposed by Article 8 (art. 8) cannot be considered as extending to a general obligation on the part of a Contracting State to respect the

> choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country' (*Abdulaziz, Cabales and Balkandali v. United Kingdom* [235], at p. 28).

In the United States also the desire to bring in the foreign spouse does not have constitutional protection and it is not capable of compelling the state to allow family reunifications ('… Americans have no constitutional right to compel the admission of their families' (Fiallo v. Bell [190], at p. 807)). What is more, the court in the United States does not intervene anyway in legislation concerning immigration, as it said in that case:

> 'At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. "This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens' (*ibid.* [190], at p. 792).

As Rubinstein and Orgad have said: 'There is no express and concrete right in international law that creates a positive obligation for the state to allow immigration into its territory for the purposes of marriage, even in times of peace' (A. Rubinstein and L. Orgad, 'Human Rights, Security of the State and the Jewish Majority: the Case of Immigration for the Purposes of Marriage,' 48 HaPraklit 315 (2006), at p. 340). Rubinstein and Orgad discuss in their article the work of Arturo John, which was devoted to a survey of this issue in international and European law. They pointed out that 'the author give examples of how any international document that prima facie grants this possibility immediately qualifies it or provides conditions and restrictions that empty it of content. It is the prerogative of states and within the framework of their sovereignty. It is an ideal and humanitarian aspiration more than a legal duty' (ibid., at p. 340, note 107). With regard to the European directive of 2004, which is mentioned in the opinion of the president, it is stated that it admittedly increased the possibility of immigrating to the European Union for the purposes of marriage, but at the same time it allowed 'broad discretion for states to determine conditions and restrictions around this possibility' (ibid., at p. 332). Rubinstein and Orgad also say that 'the European Court of Human Rights has given its backing over the years to the right of states to restrict immigration as a result of marriage; its case law reflects an approach according to which sovereign states may manage their immigration policy in accordance with their discretion and by determining various restrictions and conditions' (ibid., at p. 338). And all of this is even in the absence of an armed conflict or national dispute in the background.

In my opinion, there has been no broad recognition in the countries of the democratic world to the effect that the citizen or resident has a right to bring to his place of residence the other spouse. It is possible that this amounts to an aspiration that may be realized in the future.

6. In Israel too, the scope of the right to realize family life particularly in Israel, in so far as such a right is recognized, involves a question of the scope of the duty imposed on the state (cf. with regard to the 'right to social insurance' and the 'right to health insurance,' the remarks of my colleague the president in HCJ 494/03 Physicians for Human Rights v. Minister of Finance [165]). In our case, my colleague the president holds that the state has a duty to allow the foreign spouse to enter and live in Israel together with his Israeli spouse. My opinion, like that of the vice-president, is that the proper interpretation of human dignity imposes a more limited duty on the state. I will now turn to this issue.

7. When an Israeli citizen wants to marry a foreign national and to establish a family unit in Israel the question of immigration necessarily arises, and this includes the question of immigration by virtue of the right to family life. When the spouses do not live in the same country, the question of the scope of the right to family life and questions from the sphere of immigration law are questions that cannot be separated from one another. My colleague the president wrote in the context of immigration law that 'the Minister of the Interior is the "doorkeeper" of the state' (HCJ 8093/03 Artmeyer v. Ministry of Interior [166]), and that 'the

state has broad discretion to prevent foreigners from settling in Israel' (Dimitrov v. Minister of Interior [113], at p. 293).

8. The interpretation proposed by my colleague the president with regard to the scope of the right to family, an interpretation that recognizes a constitutional right to realize family right in Israel, has far-reaching consequences. The interpretation will necessarily limit the power of the Minister of the Interior to be a 'doorkeeper.' How can the Minister of the Interior be a doorkeeper if the 'keys to the house' are in the possession of every citizen?

Indeed, my colleague the president examines the right, and correctly so, from the viewpoint of the Israeli citizen and not from the viewpoint of the foreigner. But the scope of the right as determined by my colleague the president, according to which there exists a right, and a corresponding duty of the state, to allow an Israeli to bring his foreign spouse to Israel creates a 'collision zone' between the right to family life (according to the president) and the right of the state to determine who will enter it (which is based on a host of cases, as mentioned by my colleague the vice-president in para. 50 of his opinion). Indeed, 'the right of states to determine selective and restrictive conditions for immigration is regarded as a part of its sovereignty' (Rubinstein & Orgad, 'Human Rights, Security of the State and the Jewish Majority: the Case of Immigration for the Purposes of Marriage,' supra, at p. 330), and it has been held that 'a person who wishes to enter a sovereign state must overcome one barrier: the absolute discretion of the immigration authorities in each place to approve or not to approve his entry and to determine the length of his stay in the state' (Pesaro (Goldstein) v. Minister of Interior [130], at p. 678).

9. Thus we see, from the determination of the scope of the right by the president, that in the 'collision zone' the right to realize family life in Israel necessarily prevails, de facto, over the sovereignty of the state. In my opinion, we must refrain from this collision. If we do not 'stretch' the interpretation of 'human dignity' as aforesaid, and derive from it the scope of the constitutional right to family life, we will indeed be able to avoid this collision. 'Human dignity as a constitutional right was not intended to make the other constitutional rights redundant. Not every human right, which is recognized in constitutions concerning human rights, is included in human dignity… We should refrain from extending human dignity in such a way that it will reflect Utopia or it will make specific human rights redundant' (A. Barak, 'Human Dignity as a Constitutional Right,' A Selection of Articles (2000) 417, at p. 437). In a similar vein Justice Zamir said:

> 'In case-law since the enactment of the Basic Law: Human Dignity and Liberty, various *obiter dicta* can be found that see many aspects in the Basic Law. This is particularly so with regard to the right to dignity. The same is true of legal literature. Some see in human dignity the principle of equality, some see in it the freedom of speech, and some see in it other basic rights that are not mentioned in the Basic Law. Someone compiling these statements could receive the impression that human dignity is, seemingly, the whole law in a nutshell, and that it is possible to apply to it the saying of the rabbis: "*Study it from every aspect, for everything is in it*"' (*Israel Women's Network v. Government of Israel* [66], at p. 536 {468}; emphases supplied).

10. It should be noted that this scrutiny, which I have considered above, considers the question whether there is in Israel a constitutional human right to bring the foreign spouse to Israel, irrespective of security considerations of the existence of an armed conflict with the country of the foreign national. But it is obvious that even when the state has no duty to allow family unifications, it may adopt a policy that allows it. This is how we have acted in Israel, as described in Stamka v. Minister of Interior [24]. However, the question is not how various states act de facto. The question is whether the state has a duty.

(b) The right to equality

11. The key question in this context is whether the right of the Arab-Israeli spouse to equality has been violated?

The right to equality, in several aspects thereof, is a constitutional right that is included in human dignity (Movement for Quality Government in Israel v. Knesset [51]). It can be said that in our case the right to equality is violated prima facie; a Jewish citizen Moses is allowed to bring to Israel his wife who, for example, is a Romanian national (who is not Jewish and has no independent right to immigrate to Israel by virtue of the Law of Return), whereas an Arab citizen Musa is not allowed to bring to Israel his wife who is a resident of the territories under the age of 25. The result is, prima facie, that Moses and Musa are treated differently, and Musa is discriminated against. Notwithstanding, if it was Musa who married the Romanian national and Moses who married the resident of the territories, the positions would be reversed, and Moses would be the one discriminated against. To this my colleague the president responds that in general and subject to (negligible) exceptions it is Arab citizens who marry women from the territories (and Arab women citizens who marry men from the territories), whereas Jewish citizens do not marry women from the territories. Therefore, according to the end result, there is prima facie discrimination between Moses and Musa and a violation of the right to equality. The end result captivates the attention, but in my opinion there is in the final analysis no discrimination, because of the existence of a relevant difference. A distinction based on relevant reasons does not violate human dignity, since such a distinction does not, in itself, constitute discrimination. In this matter I accept the reasoning of my colleague the vice-president. In my opinion too the distinction on which the law is based is the security risk to citizens and residents of the state in giving a status in Israel to the foreign spouse who is a resident of the territories (as apposed to the foreign spouse who is not a resident of the territories), because of the armed conflict between Israel and the Palestinian Authority, and this distinction is a relevant distinction. This was also discussed by Rubinstein and Orgad, who pointed out that in the circumstances before us '… the usual rule that is accepted worldwide according to which a state may prohibit the entry of nationals of an enemy state into its territory' applies. Similarly, it is said there that:

> 'Clearly in practice not every citizen of an enemy state wishes to harm the state that he wants to enter, but it is accepted that the citizens of an enemy state, because of their connections with their state, their duty of loyalty to it and their dependence on its government, and well as those of their families, constitute a risk group that no state is liable to allow into its territory at a time of an active armed conflict between the two states. Serious prohibitions and restrictions — including a prohibition against marriage migration and family reunifications — are imposed on the entry of nationals of unfriendly countries even in the absence of war or combat… Admittedly, the Palestinian Authority is not a state… But it should be regarded, at least, as a "quasi-state" in view of its ability to harm the security of Israel and the lives of its residents on a large scale… When a "state on the way" begins an armed conflict, while it is "on the way" to independence and in the middle of negotiations concerning its establishment, with another state, it is treated, for this purpose, as an enemy state; its nationals, for this purpose, are treated as the nationals of an enemy state' (ibid., at pp. 317-318; emphases supplied).

12. The distinction is therefore a relevant distinction, and therefore the right to equality has not been violated. Likewise, we are not concerned, as alleged, with discrimination on the basis of origin or race. We are dealing with a relevant difference against a background of foreign nationality, within the framework of the struggle against terror (cf. Macabenta v. Minister for Immigration and Multicultural Affairs [214]). The law does not apply to an ethnic-national group but to the residents of the territories, from which hostile acts are being waged against Israel (Rubinstein & Orgad, ibid., at pp. 323-324). It should be noted that the law does not prevent Arabs who are Israeli citizens from having 'family reunifications' with

persons who are not residents of the territories. As P. Heymann and J. Kayyem say in their book, Protecting Liberty in an Age of Terror (2005):

> 'A distinction based on nationality also has some rational justification in terms of combating terrorism. It is not unreasonable to assume, that, with the possession of a passport from a certain country, the passport holder has a loyalty to that particular country. If such a state is a terrorist-supporting state, or at least tolerant of terrorism against the United States, then people holding its passport are more likely to be supporting terrorist groups' (at p. 102).

And they go on to say:

> 'In light of the danger of emigration for terrorist purposes, we would allow consideration of the original nationality where the newly adopted nation is less than vigorous in opposing terrorism' (at p. 103).

13. Beyond what is required in this matter, it should be noted that a violation of a constitutional right to family life in Israel (assuming that this exists) is not the same as a violation of a constitutional right to equality. If there is a constitutional right to family life in Israel, it can only be violated in accordance with the limitations clause. If, by contrast, the constitutional right to equality is violated, it is possible to remove the violation by comparing the status of the two groups: the group that is being discriminated against as compared with the comparative group (HCJ 4906/98 Free People Society for Freedom of Religion, Conscience, Education and Culture v. Ministry of Housing [167], at pp. 520-522). For our purposes, if the possibility of family reunifications is cancelled for all citizens and residents of Israel, there will be no further basis for the claim of a violation of equality. Therefore, even if we assume that the law contains a violation of the right to equality, the legislature can recreate equality between the groups in this way.

Interim summary

14. The conclusion that arises from all of the aforesaid is that in my opinion the law does not violate constitutional human rights that are enshrined in the Basic Law: Human Dignity and Liberty.

The scrutiny from this point onward will be based on the assumption that a constitutional human right has been violated. Even on this assumption I am of the opinion that in our case the conditions of the limitations clause have been satisfied. I will now turn to consider the second stage of the constitutional scrutiny.

(2) The constitutional scrutiny — second stage: is the violation of the constitutional right lawful (limitations clause)?

15. In the second stage of the constitutional scrutiny, the main dispute between the president and the vice-president concerns the question whether the violation of the constitutional right satisfies the fourth condition of the limitations clause — 'to an extent that is not excessive' ('the condition of proportionality), and the disagreement focuses on the third sub-condition of proportionality (the test of proportionality in the narrow sense). The President (in para. 109) presented the question in dispute as follows: is the additional security (ob'tained by changing over from the individual check to the blanket prohibition) proportionate to the additional violation of the human right (caused by this change)? According to the president, we are speaking of a question of probability. According to him, we must compare the probability of harm to life with the certainty of harm to family life. He determines that the risk arising from being satisfied with the individual check 'is not so large' that it can justify the serious and certain violation of the right to realize family life in Israel. Therefore, the law fails this test, and is disproportionate. This determination also is attractive. But in my opinion, in view of the facts before us, there is no real possibility, as opposed to a theoretical one only, of holding an effective individual check. In this regard, I disagree with the quantification of the strength of the security risk proposed by the president, and therefore I

do not accept his conclusion, according to which the individual check achieves 'slightly less security and much more protection to the rights.'

16. In the background we should constantly remember the painful figures presented by the state, according to which residents of the territories who hold Israeli documentation by virtue of marriage were involved in at least twenty-five major attacks and attempted attacks in which at least forty-five Israelis were killed and at least one hundred and twenty-four were injured (as set out in para. 113 of the opinion of the vice-president). It is well-known that 'in the centre of human dignity lies the sanctity of human life and liberty' (Movement for Quality Government in Israel v. Knesset [51], at para. 35 of the president's opinion; see also HCJ 680/88 Schnitzer v. Chief Military Censor [168], at p. 629 {90}; CrimApp 537/95 Ganimat v. State of Israel [169]; M. Landau, 'Law and Security,' Landau Book, vol. 1 (A. Barak and E. Mazuz, eds., 1995), 117, at p. 120; H. Cohn, 'The Values of a Jewish and Democratic State: Studies in the Basic Law: Human Dignity and Liberty,' HaPraklit Jubilee Book 9 (5754), at p. 25 (A. Gavrieli and M. Deutch eds., 1993)). We should give the sanctity of life substantial weight, as befits the most exalted of rights.

17. At the same time, the weight of the opposite pan of the scales, which carries the 'additional violation of human dignity' is reduced, because the violation of the right to family life (in so far as it exists), even if it is 'certain' as the president says, does not exist in my opinion in the nucleus of the right to human dignity, and this should be reflected in the weight of this pan of the scales.

18. I am of the opinion that the disagreements between us on the question of whether the conditions of the limitations clause are satisfied or not lie, to a large extent, in different attitudes to the requirement for an individual check of the residents of the territories with whom the citizens or residents of Israel wish to be reunited. Some of us are of the opinion that such a check will be possible if only the financial resources are allocated for it; others (and I am among them) are persuaded that a real individual check is not possible at this time.

19. I will not deny that the difficulty that arises in these petitions, in my opinion also, is the placing of many persons (the residents of the territories of certain ages) under suspicion of supporting (in practice or at least in potential) terror activities against Israel. It is clear to everyone that this suspicion has no basis with regard to the vast majority of the residents of the territories. The approach of the law is not an individualistic one (someone is suspected of being a terrorist) but a collective one (someone is included in a population group from which terrorists or at least potential terrorists come). This approach, even though its arrows are aimed at foreigners and only indirectly at Israeli residents and citizens, does indeed present a difficulty. It would certainly be preferable, if it were only possible, to carry out an individual check, separate foreigners who do create a security risk from foreigners who do not create such a risk, and allow the entry of the latter.

But the respondents explain to us that it is not possible to ascertain, at this time, details concerning residents of the territories with whom Israelis wish to be united. This is because of the security difficulties, the lack of cooperation of the Palestinian Authority in preventing security dangers, the dependence of the Palestinian population on the mechanisms of the Palestinian Authority and restrictions in the intelligence required by the security establishment in order to determine specifically the level of dangerousness presented by each resident of the territories who wishes to enter Israel. We are not speaking here of a problem of financial cost. We are speaking of an operational inability to obtain information. Notwithstanding this difficulty, within the framework of the amendments to the law, the state took upon itself a significant risk with regard to the relatively older ages. Unlike my colleague the president, I do not think that from this we can deduce that an individual check is possible. The conclusion is that with regard to relatively older ages, the level of risk is lower.

20. In principle, I do not dispute the importance of making an individual check, where this is possible (see and cf. Saif v. Government Press Office [86]; an application for a further hearing was denied in HCJFH 4418/04 Government Press Office v. Saif [170]).

I do not dispute the remarks of my colleague the president that 'a blanket prohibition of a right, which is not based on an individual check, is a measure that raises a suspicion of being disproportionate' (para. 70 of the president's opinion). As a rule I accept that a violation of a basic right will be suspected of being disproportionate if it is made on a sweeping basis rather than on the basis of an individual check. Notwithstanding, and I believe that my colleague agrees on this, there may be cases in which there is no alternative measure of an individual check. In our case, the state has shown substantial reasons to explain why if we require an 'individual check' to be carried out (in the absence of the possibility of obtaining information) this will lead to undermining the realization of the purpose of the law, which my colleague defined as a purpose 'to reduce as much as possible the security risk presented by the spouse' (para. 90 of his opinion). A substantial reason can sometimes make the measure chosen in the law pass the test of proportionality. As my colleague the president said in another case, with regard to determining a maximum age:

> 'Indeed, the employer will find it difficult to satisfy the "smallest possible harm test" if he does not have substantial reasons to show why an individual examination will prevent the attainment of the proper purpose that he wishes to achieve' (Association for Civil Rights in Israel v. Minister of Public Security [94], at p. 367 {11}; also see and cf. Shahin v. IDF Commander in Judaea and Samaria [103], at p. 214).

The substantial reasons in our case are, as aforesaid, that there is no practical possibility of carrying out an effective individual check. Rubinstein and Orgad say that it also is not 'practical to demand that a state that is involved in an armed conflict should employ measures to collect intelligence in enemy territory (measures that often involve a risk to human life and are an integral part of the conflict itself), in order to deal with administrative applications of residents of those territories who wish to enter the state' (ibid., at p. 323, note 33).

21. Even my colleague the president does not take the need for security checks lightly. He says (in para. 94 of his opinion) that if it is not possible to carry out the checks in one part of the territories or another 'the individual check will be postponed until the check becomes possible.' But the law in any case was enacted as a temporary provision. Indeed, during certain periods while the petitions were pending before us, it appeared that there was a reasonable chance of improving the relations between Israel and the Palestinian Authority. At the time of giving our judgment, this is not the case. It seems to me that the law in its current format as a temporary provision, and the possibility, to which my colleague the president agrees, of postponing the individual decision until the individual check becomes possible (para. 94 of his opinion) achieve, de facto, the same result.

In these circumstances, I agree with the determination of my colleague the vice-president that 'cancelling the blanket prohibition in the law and replacing it with an arrangement of an individual check is likely to lead to quite a high probability of an increase in terror activities in Israel… In the task of balancing between a reduction of the killing, safeguarding life and guaranteeing the stability of the system of government, as compared with the damage caused to some of the citizens of Israel who wish to live with their foreign family members in Israel — and we should remember that the amendment to the law reduced the scope of the violation significantly — the benefit is, in my opinion, greater than the damage' (para. 109 of his opinion).

22. At this stage, I feel myself bound to address some of the remarks of my colleague Justice Procaccia.

I accept, as aforesaid, that we should learn from history. In my opinion too, an individual check, when one is possible, is preferable to dealing with generalizations according to which a certain group (residents of the 'territories') is likely to produce terrorists or collaborators with terror.

But I am afraid that my colleague Justice Procaccia has gone too far. My colleague in her opinion issues a warning. She recalls the judgment in the case of Korematsu v. United States

[185], which is infamous in the history of the American people. My colleague says, admittedly, that 'the circumstances in that case are completely different from those in our case,' but she immediately goes on to say that 'the wind that blows in the background of the constitutional approach that was applied there by the majority opinion is not foreign to the arguments that were heard from the state in the case before us,' and she warns us that 'we must take care not to make similar mistakes.' The outcome implied by these remarks is that in our case we are likely to make a 'similar' mistake, i.e., a mistake on the same scale as in Korematsu v. United States [185]. In this respect I think I ought to differ.

In the case of Korematsu v. United States [185], approximately one hundred and twenty-thousand citizens and residents of the United States, who were of Japanese origin and lived along the Pacific coast ('the West Coast') were uprooted from their place of residence and livelihood and were placed in detention camps in the wildernesses of America. Most of them stayed there for more than four years (for a description of the injury to the citizens of the United States of Japanese origin, see A. Gottfeld, 'The United-States Versus its Citizens of Japanese Origin: the Detention Camps in the United States in the Second World War,' Introductions to the American Experience (2006) 127, at p. 130); for a description of the historical-legal context in the period of the Second World War, see also E. Gross, 'Constitution and Emergency: Use of Emergency Powers in American History,' American Democracy — The Real, the Imaginary and the False (2002, A. Gottfeld, ed.,) 197, at pp. 219-221). The liberty of citizens and residents of the United States of Japanese origin was violated, their dignity was trampled upon and they were robbed of their livelihood. How is it at all possible to compare these injuries to the injury to the Israeli citizen, as such, that at the present time he is not allowed — if his spouse is a resident of the territories between certain ages — 'family reunification' in Israel? The cases are light years apart. If we wish to make a comparison, we should ask the following: would Britain, during the Second World War, have allowed the entry of tens of thousands of Germans into Britain for the purpose of marriage with British citizens? Would the United States have allowed the entry of tens of thousands of residents of the Japanese Empire into the United States for the purpose of marriage with citizens of the United States after the attack at Pearl Harbour? Korematsu v. United States [185] considered entirely different questions. Korematsu v. United States [185] made a generalization, and everyone agrees that the treatment of the citizens of the United States of Japanese origin was improper, and that the United States Supreme Court made a mistake in its decision in this regard. But I cannot accept the argument to the effect that every time a generalization is made there must necessarily be a mistake, and not merely any mistake, but a mistake on the scale of the mistake in Korematsu v. United States [185]. Not every generalization is unjustified. This is a matter for judicial discretion.

23. In my opinion, where possible one should avoid generalizations. Indeed, the law implies a generalization that residents of the 'territories' of certain ages constitute a risk group and therefore their entry into Israel at this time should be prevented. But, as the state explained in its response, in view of the past, there is today no effective and practical way of isolating the dangerous persons from those who are dangerous by means of an individual check. Therefore, as I have explained, at this time we should not intervene in the generalization that the provisions of the law reflect.

(3) The constitutional scrutiny — third stage: the relief or remedy

24. Since I have reached the conclusion that no constitutional human right has been violated in our case, and even if one had, that violation would satisfy the conditions of the limitations clause, the result is that the law does not suffer from unconstitutionality. There is no basis for moving on to the third stage of constitutional scrutiny, which is the relief or remedy stage. Notwithstanding, I would like to join with the vice-president's exhortation, in para. 125 of his opinion, that the state should consider, if the validity of the law is extended, adding to the law an exception according to which the Minister of the Interior will be permitted — if he sees a special humanitarian need and if there is no suspicion of a security risk — to consider giving a permit for the entry of a resident of the territories into Israel. I

would add that the state should also consider, in my opinion, a significant increase of the age of minors to whom the prohibition in the law will not apply.

Conclusion

25. As stated above, my opinion is that the petitions should be denied.

Justice Y. Adiel

1. 'Voiding primary legislation whose purpose is the defence of national security, in the middle of an armed conflict, is an exceptional act that should be adopted only in exceptional cases requiring this' (A. Rubinstein and L. Orgad, 'Human Rights, Security of the State and the Jewish Majority: the Case of Immigration for the Purposes of Marriage,' 48 HaPraklit 315 (2006), at p. 327, note 43). In the case before us, I am not persuaded that there is a justification for adopting this exceptional step. The following are my reasons.

2. According to the petitioners, the Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003 (hereafter — the law) violates the constitutional rights to family life and equality.

3. With regard to the right to family law, in view of the proximity of this right to the nucleus of the right to dignity, its centrality in the realization of the autonomy of the individual to shape his life and the case law of this court which is mentioned in the opinion of the president, I accept that the right of the Israeli spouse to family life in Israel together with his foreign spouse is indeed included within the framework of the right to human dignity within the meaning thereof in the Basic Law: Human Dignity and Liberty (hereafter — the Basic Law). Since the law prevents the realization of this right, it violates the right to dignity under the Basic Law.

4. On the other hand, I do not think that the law violates the right of the Arab Israeli spouse to equality. Indeed, 'a violation of the principle of equality… is also discrimination of an Arab because he is an Arab' (Association for Civil Rights in Israel v. Government of Israel [40], at p. 27). But the refusal to grant a status in Israel to the foreign spouse is not based on the Arab origins of the Israeli spouse (nor on that of the foreign spouse). The logic of this refusal is that the foreign spouse is a resident of a political entity that is in a state of war or quasi-war with Israel, he is a member of a population that is hostile to Israel, and giving a permanent status in Israel to members of that population involves a real security risk to the Israeli public. Against this background, there is a relevant difference (see Israel Women's Network v. Minister of Labour and Social Affairs [35], at p. 654), which justifies the distinction between Israelis (who are admittedly usually Arabs) that want their spouses who are residents of the territories to be allowed to enter Israel and to be given a status here, and Israelis who do not want this. This was addressed by Rubinstein and Orgad in their aforesaid article:

> 'Preventing the entry of nationals of an enemy state or nationals of a hostile state is likely in many cases to harm legitimate and important interests of the citizens of the state that imposes the prohibition — whether we are speaking of the desire to create a bond of marriage and whether we are talking of other personal and economic relationships. This violation is likely to be more serious when it specifically affects certain groups of citizens. In most cases, the hostile state is not merely a national state, but it is often a neighbouring state. For this reason it is not at all uncommon that when a conflict is being waged between the two states. there are in the territory of one or both of them a population of citizens that has an ethno-cultural connection with the other state… In this situation, preventing the entry of nationals of the hostile state naturally injures the members of that group more than other groups. But this fact does not disqualify the prohibition against the entry of enemy nationals — a prohibition whose purpose is to protect the security of all the citizens of the state, whatever their

origin — and it cannot be considered to be improper discrimination against the members of that group on account of their origin; this is a necessary and unavoidable consequence of a dispute between two national states and the principle of self-defence' (ibid., at pp. 325-326).

5. Notwithstanding the law's violation of the right of the Israeli spouse to family life in Israel with the spouse who is a resident of the territories, I do not think that this violation is unconstitutional. This is because the law satisfies the conditions of the limitations clause in the Basic Law. In the disagreement that has arisen in this context between the justices of the panel concerning proportionality (in the narrow sense), which concerns the question of whether the contribution of the law in promoting the security purpose underlying it is commensurate with the injury arising from it to the Israeli spouses who wish to establish a family life with their spouses who are residents of the territories, my opinion is like that of Vice-President Emeritus Cheshin.

6. This position derives from the bloody conflict that has been taking place for several years between Israel and the Palestinian Authority, and the professional assessment of the security forces, against this background, that the permanent entry of residents of the territories into Israel and their free movement inside Israel that is facilitated by the receipt of Israeli documentation may endanger the safety and security of the citizens and residents of the state to a greater degree. This assessment is based, inter alia, on the nature of the conflict that is characterized by the deep involvement of the civilian Palestinian population, the fact that residents of the territories who received a status in Israel are an important component in the terror infrastructure and in the planning and perpetration of attacks, and the fact that these residents have become 'a preferred population of terror organizations for the perpetration of hostile activity in general, and inside the State of Israel in particular' (explanatory notes to the draft Citizenship and Entry into Israel Law (Temporary Provision) (Amendment), 5765-2005). This court also held in the past that the terror organizations 'are supported by part of the civilian population, and by their families and relatives' (Ajuri v. IDF Commander in West Bank [1], at p. 358 {87}). This assessment is supported by the existence of the de facto involvement of Palestinians that were residents of the territories who received a status in Israel as a result of the family reunification process, and abused this status in order to perpetrate or aid in the perpetration of terror attacks in which dozens of Israelis were killed. This involvement does not necessarily represent the entire risk to public security involved in giving a permanent status in Israel to residents of the territories. As can be seen from the explanatory notes to the draft law, the weight of this involvement may increase in the future as the building of the separation fence progresses. The professional position of the security establishment also holds that a specific check of the risk is not sufficiently effective at this time, and in the circumstances of the case, there exists no alternative that can be considered an effective measure for eliminating the aforesaid danger. These assessments of the security establishment were not disproved by the petitioners, and in accordance with the rules that we have adopted they should be given great weight (see Beit Sourik Village Council v. Government of Israel [2], at pp. 844-845 {301-303}; HCJ 258/79 Amira v. Minister of Defence [171], at pp. 92-93). Moreover, these assessments have been adopted by the legislature.

In this context, great weight should also be attributed to the 'international norm according to which no state is accustomed to allow into its territory persons who have connections with the side fighting against it in a time of an armed conflict,' a norm that applies also to immigration for the purposes of marriage (Rubinstein and Orgad, supra, at pp. 316 and 320).

At the same time, we should take into account the fact that we are speaking of a temporary law (Gaza Coast Local Council v. Knesset [6], at p. 553), and the qualifications that were recently added to the law, which have reduced the injury and allowed a status to be given in Israel to population groups who present a smaller security risk.

In view of all the considerations above, and in view of the degree of caution and self-restraint that the court should adopt when it considers the voidance of primary legislation (see Menahem v. Minister of Transport [11], at p. 263), I am of the opinion that the law satisfies the proportionality test provided in the limitations clause of the Basic Law (with its three subtests), and there are no grounds for declaring it void.

7. Therefore I agree with the conclusion of the Vice-President Emeritus, Justice M. Cheshin, that the petitions should be denied. I also join in my colleague's recommendation that the state should consider including in the law an exception that allows, in special humanitarian cases and in the absence of any suspicion of a security risk, giving a status in Israel.

Justice E. Rivlin

My colleague, President A. Barak, wishes to conclude his opinion with a determination that the Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003 (hereafter — the Citizenship and Entry into Israel Law) is void. There is no need today for this declaration.

'This law' — as the Citizenship and Entry into Israel Law states — 'shall remain valid until the second of Nissan 5766 (31 March 2006)' (with a fixed extension because of the elections that took place). This sunset provision in the law provides that it will be void when it expires. We have no further need to make an order to this effect. And if I do not end my opinion here, it is for the following two reasons: first, I assume that those who agree with the position of my colleague the president are of the opinion that if we do not do so now, we shall need to consider the constitutionality of the law if and when it is extended. Second, and no less important, I cannot avoid addressing the fundamental positions expressed by my colleague President A. Barak on the one hand, and my colleague Vice-President M. Cheshin on the other. This is because the approach adopted by each of them is different — each in different senses — from my approach.

As I shall clarify below, the first question, the automatic expiry of the law, is not unrelated to the other, the fundamental question of the constitutionality of the law. A consideration of one also has implications for the other.

2. My colleagues, who saw a need to resort to constitutional judicial scrutiny, were of the opinion, I assume, that 'what has been is what will be' (Ecclesiastes 1, 9). There is no assurance of this. Admittedly the law was extended in the past by the Knesset for limited periods, but from time to time important changes were made to it. Moreover the Knesset that enacted the Citizenship and Entry into Israel Law and extended its validity has been dissolved, and a new and different Knesset has replaced it. The government that initiated the law no longer exists and a new government has been formed in its stead. The parties that made up the previous government have changed almost unrecognizably. For all these reasons, constitutional review of the law, in so far as it is prospective, necessarily addresses a law that has not been enacted, a law whose provisions can hardly be predicted today. 'What has been' is not (necessarily) 'what will be' — if there will be anything at all.

3. The question of intervention here highlights the issue of judicial authority: judicial authority is limited to the questions in dispute. Indeed the court, when necessary, goes beyond its traditional and natural role of deciding a concrete dispute between litigants, and it is required to address ethical questions that underlie the substantive rule of law and whose implications extend beyond the specific case of those litigants. It is the duty of the court to protect the basic rights of the individual and of the whole public against a violation thereof by the executive and legislative branches. Moreover, constitutional judicial review is an essential tool for ensuring the protection of the substantive rule of law. Democracy is not merely the rule of law in its formal sense. Democracy is also substance. Its values, including dignity, liberty and the other human rights are its soul.

But even when the judge is required to depart from the nucleus of his authority and to make a contribution to the substantive rule of law, he does not remove his judge's gown. This gown is not the garb of power. It brings with it an advantage and limitations. Its advantage is that it isolates its wearer from foreign influences and it maintains his independence. But the gown also has a price. Its limitations are limitations that its wearer takes upon himself voluntarily, for his power lies in these too. The judge limits himself with rules. In his decisions he only addresses what the parties brought before him. He restricts himself to concrete questions of real substance on which a decision is essential. He does not give advisory opinions (see Rescue Army v. Municipal Court of Los Angeles [210]) nor does he decide questions that have not yet arisen or questions that are no longer relevant.

The court is required to adhere to these rules especially when it is empowered with the most drastic measure that it possesses, which is reserved for cases where it has no alternative — the measure of declaring a law passed by the legislature to be void. Indeed, in the United States the court has developed a series of rules that help it to refrain from considering constitutional questions that fall within its purview, when there is no need to do this. This was discussed by Justice Brandeis in Ashwander v. Tennessee Valley Authority [211]; see also United Mizrahi Bank Ltd v. Migdal Cooperative Village [7], at pp. 349-350; HCJ 5503/94 Segal v. Knesset Speaker [172], at pp. 548-550; HCJ 3267/97 Rubinstein v. Minister of Defence [173], at p. 524 {194-195}; Ganis v. Ministry of Building and Housing [104]). Only where it is strictly necessary to consider such questions — so the court thought there — should the judge consider them. In the words of President Barak, 'it is our judicial approach not to decide a question of the validity of a statute unless it is essential for the purpose of deciding the case' (Israel Investment Managers Association v. Minister of Finance [8]).

4. The court in Canada, like other common law courts, has formulated rules of standing that must be satisfied prior to its intervention (Canadian Council of Churches v. Canada [217]). These rules are considered there not merely as the floodgates that prevent an inundation of litigation but also as a means of conserving judicial resources and as a framework for limiting judicial intervention. A traditional view of the status of the courts leads the courts in Canada to insist upon the procedural structure that allows only the consideration of concrete constitutional disputes. Notwithstanding, the court in Canada does allow, in certain circumstances, a departure from the rules of standing in cases where significant and critical questions arise (for a comprehensive survey of the rules of standing in Canadian law, see T.A. Cromwell, Locus Standi (Toronto, 1986)).

The rule that does not permit the consideration of 'theoretical' questions is also applied in the courts of Canada with exceptions similar to those formulated in the United States. The considerations that the court takes into account, when it decides whether to consider a 'theoretical' question, concern the procedural framework in which the proceeding is conducted, the nature of the relationship between the judiciary and the legislature and the question whether it will be possible to consider the question in the future when a concrete question arises (New Brunswick (Minister of Health and Community Services) v. G [218]). The exceptions to this principle are implied by the very logic of the rule. Thus, for example, the likelihood that the improper legislation will have a deleterious effect in the future on the petitioner, or others in the group that he represents, and that this recurrence will adopt a form that prevents judicial review in the future, may justify constitutional review (Note, 'The Mootness Doctrine in the Supreme Court,' 88 Harv. L. Rev. 373 (1974-5), at p. 378). A tangible example of this occurred in Roe v. Wade [212], where the court was required to consider the constitutionality of a statute that provided that performing an abortion constitutes a criminal offence. There the nature of the dispute required a decision despite the fact that it had become moot; the length of pregnancy is a factor that may naturally prevent any concrete and practical clarification of a question in dispute, so that there is no alternative to holding an 'academic' consideration of the matter after the event. The appeal in that case was originally

filed in 1970 and it was only decided in 1973. This is an example of a recurring dispute that cannot be decided in real time.

5. Some of these 'filter' rules have not been adopted in Israeli law; we have relaxed the rules of standing for a litigant in constitutional matters, and the question of 'justiciability' has been answered in Israel in our own way. Notwithstanding, we do not usually consider 'theoretical' questions that have become moot or that do not yet require a decision. We do not consider these questions before they become relevant or after they have ceased to be so. We consider them at their proper time. A change in circumstances that occurs after the filing of a petition to declare a law void may affect whether we decide to consider the petition. A significant change, and certainly the expiry of the law, after the petition is filed and before the judicial decision, may make the decision redundant.

The rule that the court will not consider a petition if the question it raises has become moot was discussed by President A. Barak in HCJ 1853/02 Navi v. Minister of Energy and National Infrastructures [174]:

> 'The basic rule is that in general the court will not consider a petition, even if it was relevant, from the moment that it becomes theoretical (Tzemah v. Minister of Defence [9], at p. 250 {640}. This rule also applies to petitions that raise important and fundamental legal questions. When the late Mr Overkovitz died, this petition became moot. Admittedly we sometimes consider theoretical petitions despite the aforesaid rule. This will occur especially in a case where "from a practical viewpoint the court cannot make a decision… except when it is presented as a general question that is unrelated to a specific case" (ibid., at p. 250 {641}; see also HCJ 73/85 Kach Faction v. Knesset Speaker [175], at pp. 145-146). But the case before us is not of this kind.'

The rule, and the exceptions thereto, were also discussed by Justice M. Naor with respect to an appeal concerning the interpretation of a law that became theoretical after the appeal was filed. This is what she said in CA 7175/98 National Insurance Institute v. Bar Finance Ltd (in liquidation) [176]:

> 'The rule is that the court does not consider matters that have become academic and theoretical. This is the rule in civil matters: CA 506/88 Shefer v. State of Israel [177]. This is also the rule in the High Court of Justice: Kach Faction v. Knesset Speaker [175]; Attorney-General v. National Labour Court [69].
>
> Indeed, there is no rule that does not have an exception. The court may consider a matter that has become theoretical where the issue involved is likely to recur and its nature is such that it becomes theoretical before a judicial decision can be made with regard thereto (an issue that is "capable of repetition, yet evading review," in the words of Justice McKenna in Southern Pac.Terminal Co. v. Interstate Commerce Commission [213], cited in Roe v. Wade [212] and Shefer v. State of Israel [177]).
>
> A good example of the exception that the appellant mentions in his statement is Tzemah v. Minister of Defence [9], in which the question raised was whether a provision of the Military Jurisdiction Law, which states that a senior officer who is a military policeman may make an order to arrest a soldier for a period that does not exceed 96 hours, was contrary to the Basic Law: Human Dignity and Liberty. In this matter, which was of a recurring nature, it was impossible to make a fundamental decision before the matter became theoretical.'

See also Man, Nature and Law Israel Environmental Protection Society v. Minister of Interior (not yet reported) [178]; the remarks of Justice M. Naor in HCJ 7190/05 Lobel v. Government of Israel [179], with regard to denying a petition that could not be decided because of 'the absence of a concrete, clear and complete set of facts, which is essential for making a principled judicial decision.'

6. In our case, the petition concerns a temporary provision whose type and circumstances justify a finding that the petition is both too late and too early. A number of factors make this the case, and together they all lead to the conclusion that there is no reason to make a judicial declaration that the temporary provision is void: the new law has not yet been formulated, if indeed the incoming Knesset chooses to enact such a law, whereas the existing law is about to expire. In this sense, the dispute today is merely speculative and its consideration is 'theoretical.' A real dispute should exist at every stage of conducting the judicial review and not only when the petition is filed; the deliberation is fruitful when it takes place too early, before the dispute is not known, or where it has not crystallized. The approach that where there are no special circumstances to justify this, the legislature should not be called to account with regard to a law that is no longer valid, or a law that has not yet come into effect, is based on remedial considerations and the logic of exercising judicial discretion. Admittedly even a temporary provision may justify judicial review, where there are circumstances that justify intervention; but in our case no such circumstances exist (cf. Ressler v. Knesset [128]).

Even if the legislature once again extends the temporary provision for a limited period, we have no reason to assume that the new temporary provision will be identical to the one we are reviewing today. Experience shows that in the past the legislator made a significant change to the provisions of this law. The change was in the clear direction of reducing the restrictions applicable to foreigners who want to become residents of Israel, whether by way of reducing the categories of persons who are not entitled or by adding regulatory provisions that authorize the Minister of the Interior to allow the entry of foreigners who are in the original categories. As we have said, in addition to experience there is also the uncertainty of the future. In this uncertainty (which itself makes our judgment cross over into the territory of an advisory opinion) there is one important certainty: the legislator, whose actions we are trying to predict today, is different from the one whom we are seeking to address today. We are seeking to direct the weapon of judicial review at a concern that arises from past laws and whose nature we can only imagine.

My conclusion is therefore that there is no need to address the question of the constitutionality of the provisions of the law, which are changing and at this time are setting into the murky waters of the future. Indeed, in the circumstances of this case it would be wrong to do so.

The constitutional right

7. My colleagues saw fit to act differently, and the disagreement between them focuses on the opinion of my colleague President A. Barak, on the one hand, and the opinion of my colleague Vice-President M. Cheshin, on the other. Notwithstanding the different premise, I see no way to exempt myself from addressing the disagreement between them. The opinion of my colleague the president sets out a well-ordered thesis on the subject of constitutional judicial scrutiny. His opinion describes the legal issues precisely and with great clarity, each in its proper place. The opinion of my colleague the vice-president addresses the sensitivities of Israeli society. In his open and fluent manner, he describes the difficulties of our times admirably. He says (in para. 6 of his opinion):

> '…While we write this judgment the citizens of Israel continue to live under the threat of the murderous terror that is directed against them. We already know that we are speaking of one of the most serious onslaughts that we have undergone. Tens of thousands of terror attacks originating in the territories have struck children, the elderly, women and men indiscriminately and mercilessly. The vast majority of these are innocent citizens who are engaged in their normal day-to-day activities… Daily life in the country has been disrupted. Many citizens have become fearful of everyday occurrences, such as travelling on buses, visiting shopping malls, eating out in restaurants' (ibid.).

He describes the alarming manner in which the 'Protocols of the Elders of Zion' have made their way into the Hamas Charter. He speaks of the responsibility that rests with the

state to protect the lives of its citizens. Against this background, he seeks to determine the boundaries of the constitutional right to raise a family. In times of war, he says, it is questionable whether the basic right to marriage and family life 'implies, in itself, a duty imposed on the state to allow the entry into Israel of enemy nationals merely because they married persons who are residents or citizens of Israel. This is an enemy that is sponsoring a prolonged and murderous attack against the state and its residents' (ibid., at para. 2). Reality, the place and the time also indicate to my colleague the vice-president the nature of the principle of equality: he writes that —

> '… here we will also find the answer to the claim of discrimination, since a distinction made by the law — a distinction that concerns the residents of the territories and not the citizens of the state — is a permitted distinction between the citizens of the state who married foreign citizens that are enemy nationals and citizens of the state who married foreign citizens that are not enemy nationals.'

8. I too am of the opinion that the constitutional question should not be divorced from the reality that encompasses it. The question should not be posed with regard to a theoretical world on another planet. The constitutional question should be considered here and now, in a pain-stricken state that exists on a burning strip of land. The reality is an overall reality in which it is difficult to make theoretical distinctions, just as there is no basis for making a theoretical and artificial distinction between the interest of the Israeli spouse who wishes to marry and the interest of the foreigner whom he wishes to marry; we should not avert our eyes from seeing who the foreigner is, to which political entity he belongs, who are his elected leaders and what are the circumstances in which his case is being considered. This reality that my colleague the vice-president describes is the true picture. It has an effect on the legal outcome, but my approach with regard to the method of the legal scrutiny is different. I believe that this reality cannot change the definition and scope of the right. It should be taken into account when we consider, within the framework of the constitutional balance, the question of the constitutionality of the restrictions imposed on the basic rights. In this I agree with the position of President A. Barak. One should not extend the operation of the limitations clause by restricting the right itself. The right should be interpreted generously and liberally. Thus, for example, we held that the scope of the freedom of expression also includes obscene and slanderous expressions, so that all forms of expression prima facie enjoy constitutional protection:

> 'In examining the right of freedom of expression the point of origin in our legal system is that every expression, whatever its content may be, is "covered" by the constitutional protection' (per Justice D. Dorner, in HCJ 5432/03 SHIN, Israeli Movement for Equal Representation of Women v. Council for Cable TV and Satellite Broadcasting [180], at p. 81 {35}).

This is also true with regard to the right to family life. The right to realize family life is a basic right. Denying it violates human dignity. Denying it infringes the autonomy of the individual to marry whom he wants and to establish a family; it certainly infringes his liberty. This violation of liberty is no less serious than the violation of human dignity (on the restriction of the right to marry as a violation of liberty, see Justice Warren in the leading case of Loving v. Virginia [188]). It deals a mortal blow to a person's fundamental ability to dictate his life story. Israeli law recognizes the right of the Israeli citizen to family life. The right to family life also means the right to family life together under one roof. The right to family life is not merely the right of the parents. It is also the right of the child born to those parents. The right to family life is therefore protected in the provisions of the Basic Law as a part of the basic right to liberty and as a part of the basic right to dignity.

The definition of the right to have a family life should not be restricted. Even if we cannot allow its full realization, because of permitted constraints, we should not restrict its recognition. My colleague the vice-president says that the restrictions imposed on the

constitutional right here do not concern the 'nucleus' of the right and they are located on its periphery. He therefore seeks to define the right under dispute in a more focussed manner. My opinion is different. Even if we are speaking of a 'peripheral' aspect of the right, as he assumes, this cannot affect the definition of the right. The premise should be a generous definition. The restriction — which may take into account the location of the case in the periphery or the nucleus of the right — should be considered within the framework of implementing the limitations clause. The balance between rights of the individual and the public interest or between rights inter se should be made within the framework of the limitations cause.

9. Derogating from the constitutional right to family life has ramifications, in the circumstances of the case and in an indirect manner, on a defined and distinct sector of the population, which is also a minority group. It therefore includes a violation of equality. The right to equality is a part of human dignity. The violation of equality is improper whether it is a collective violation, an individual violation, a violation that diminishes human dignity because of the degradation and humiliation of the injured person or a violation that detracts from the right of every person to enjoy, in an equitable manner, the advantages of persons living in that specific society. 'This is a violation of the autonomy of the individual will — the freedom of choice and freedom of action of the human being as a free creature' (President A. Barak, in Movement for Quality Government in Israel v. Knesset [51]). We should also not detract from the right to equality unless the conditions specified in the limitations clause are fulfilled. A democracy is committed to substantive equality between the citizens living in it. This was discussed by President A. Barak in Kadan v. Israel Land Administration [38], at p. 282:

> 'The State of Israel is a Jewish state in which there are minorities, including the Arab minority. Each member of the minorities who lives in Israel enjoys absolute equality of rights. Admittedly, a special key to enter the house is given to members of the Jewish people (see the Law of Return) but once a person is inside the house as a lawful citizen, he enjoys equal rights like any of the other people in the house.'

We have held that discriminating against an Israeli Arab merely because he is an Arab violates equality. A discriminatory violation of social equality is a violation of equality. A direct or indirect violation of the right to education which involves manifest or latent discrimination against a certain sector of the population is a violation of the constitutional right to equality (see Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel [41]).

10. The Citizenship and Entry into Israel Law violates the possibility of realizing the constitutional right to family life and the constitutional right to equality. It reduces their scope. Albeit the law does not prevent the Israeli spouse from marrying the spouse from the territories, nor does it prevent the Israeli spouse from realizing his right to have a family life in the territories, or anywhere else outside Israel. But it derogates from the right of the Israeli spouse to realize the family unit in Israel in those cases where the foreign spouse is a resident of the territories and is included in those categories with regard to which the Minister of the Interior has been authorized to prevent their entry from the territories into Israel. The result of this is also a violation of equality, because most of the Israeli spouses who marry residents of the territories are Israeli Arabs. I tend towards the outlook of my colleague the president, that we are not speaking of a distinction which is, prima facie, a permitted distinction. At the same time, I am of the opinion that the law does not intend to discriminate against the Arab citizens of Israel because they are members of that sector of the population. De facto it applies also to Jewish spouses who marry residents of the territories (the number of which, however, is negligible). But this is not enough. The violation of equality is not examined solely in accordance with the purpose of the provision that is alleged to be discriminatory, but also in accordance with the unintended result that derives from it. Consequently, were the law to

remain valid we would need to consider the question whether the violation of the constitutional rights in this case satisfies the requirements of the limitations clause.

11. In my opinion, we should also not restrict the defined scope of human rights in times of emergency. We should also not adopt different balancing tests. The Basic Laws do not recognize two sets of laws, one that applies in times of calm and another that applies in times of emergency. Israeli constitutional law has a uniform approach to human dignity and liberty whether in times of calm or in times of danger. We do not interpret the statement of Justice Holmes in Schenck v. United States [184] that 'when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right' (ibid. at p. 52) as a call to depart from the constitutional tests themselves in a time of emergency. This is the case with regard to the freedom of speech and it is also the case with regard to other basic rights. The tests according to which we examine the restrictions on human rights because of various constraints are uniform tests at all times. The test is identical. But it should be remembered that its implementation is affected by reality. This was discussed by my colleague the president in his opinion here:

> 'War is like a barrel full of explosives next to a source of fire. In times of war the likelihood that damage will occur to the public interest increases and the strength of the harm to the public interest increases, and so the restriction of the right becomes possible within the framework of existing criteria' (at para. 20).

I agree, therefore, with the approach of my colleague the president that there is only one track for examining the petitions before us. This track is the path of the basic laws — the rights specified in it and the balancing tests prescribed in it.

The conditions for limiting the constitutional right

12. There are four conditions stipulated in the limitations clause: the violation of the basic right must be in statute or by virtue of statute; the law must befit the values of the State of Israel; it must be intended for a proper purpose; and it must violate the constitutional right to an extent that is not excessive. The disagreement in this case does not revolve around the question whether the first and second conditions are satisfied. It concerns the question whether the third and fourth conditions are satisfied, i.e., whether the law is intended for a proper purpose and whether it does not violate the constitutional right to an extent that is not excessive. The third condition concerns the purpose and the fourth concerns the proper means of realizing it.

With regard to the third condition, namely the question whether the law is intended for a proper purpose, a difficulty may arise that is inherent in the actual definition of the purpose. The violation of the constitutional right within the framework of a law of the Knesset may be intended to protect another right, and it may be intended to achieve a particular public interest. 'In principle, a purpose is a proper one if it serves an important social purpose that is sensitive to human rights. Therefore, legislation that is intended to protect human rights is certainly for a proper purpose. Also legislation that is intended to achieve general social purposes, such as a welfare policy or protecting a public interest, is for a proper purpose' (per Vice-President Barak in United Mizrahi Bank Ltd v. Migdal Cooperative Village [7], at p. 459). The question whether the value competing with the violated right in this case — the value that constitutes the purpose of the law — is a right of the individual or a public interest is a complex question. We shall return to this below.

The purpose of the law in this case, as my colleague the president determines, is a security purpose. It aims to reduce, in so far as possible, the security risk presented by foreign spouses in Israel. What underlies the legislation is the security concern that Palestinian spouses, who have an Israel identity card by virtue of their marriage to Israeli spouses, may be involved in terror activity. The concern is one of an abuse of their status in Israel — a status that allows them free movement between the territories of the Palestinian Authority and Israel.

The law, so my colleague the president determines, is intended to provide security for Israel by means of a reduction, in so far as possible, of the security risk presented by Palestinian spouses who live together with their Israeli spouses. 'It is intended to protect the lives of everyone present in Israel. It is intended to prevent attacks on human life. These are proper purposes' (para. 82 of the president's opinion).

The requirement of proportionality

13. The fourth condition listed in the limitations clause requires the violation of the constitutional right not to be excessive. It is not sufficient that the purpose is a proper one; it is necessary that the measures adopted to realize it will also be proper ones, i.e., proportionate ones. The phrase 'to an extent that is not excessive' has been interpreted in Israeli case law, following foreign case law, as referring to three subtests: the suitability test (the rational connection), the necessity test (the least harmful measure) and the test of proportionality in the narrow sense (the proportionate measure test). The first subtest requires the existence of a rational connection between the (proper) purpose and the measure chosen for realizing it. This is a test of common sense and life experience. Among the measures that satisfy the rational connection between the proper purpose and the measure, the measure that is least harmful should be chosen; this is the second subtest. The third subtest is the subtest of the total balance. It examines whether the correlation between the benefit arising from achieving the (proper) purpose and the damage caused (as a result of the violation of the constitutional right), achieves a proper balance between the needs of the public and the harm to the individual.

The third subtest of the requirement of proportionality therefore imposes on the court the task of making a balance, but this balance is not divorced from the test that the court makes within the framework of the first two subtests. Moreover, in many cases, when it has been proved that there is a rational connection between the purpose of the law and the means chosen by it (the first subtest) and when the court has been persuaded that the purpose of the law cannot be achieved, as it is, by adopting less harmful measures (the second subtest) the path to the conclusion that the proper overall balance (the third subtest) is also fulfilled is a short one. This natural path has led several persons to the conclusion that the third subtest is in fact a redundant stage in the constitutional scrutiny, and indeed the positive determination of the first two subtests has led frequently to a quick decision on the question of the third subtest (see, for example, R. v. Keegstra [219]; McKinney v. University of Guelph [220]).

Personally, I do not agree with the approach that the implementation of the third subtest is redundant. It seems to me that one should not reach a sweeping conclusion that when the first two subtests are satisfied, the question whether the condition of proportionality is satisfied will be answered in the affirmative. Admittedly the third subtest should not be divorced from the other two, and the answer given to each one of them inherently has an effect on the others. But one should not belittle the importance of the last subtest, just as there is no basis for exaggerating the importance of each of the subtests on its own. They should be applied while showing sensitivity to the circumstances of each case (see Libman v. Quebec (Attorney-General) [221]). We are not speaking merely of guidelines. The subtests as adopted outline the method of applying judicial scrutiny to the issue of the conditions of proportionality, and in certain senses also to the limits of the court's power. They allow a uniform and logical examination of the question whether the condition is satisfied.

Therefore the court will refrain from applying the proportionality tests mechanically or literally, when it is considering declaring a law void. This was well expressed by the Supreme Court of Canada when it held that:

> 'The impairment must be "minimal," that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can

conceive of an alternative which might better tailor objective to infringement' (see *RJR–MacDonald Inc. v. Canada (Attorney-General)* [1995] 3 S.C.R 199, at p. 342, and also *Libman v. Quebec (Attorney-General)* [221]).

The tests of proportionality combine to examine the correlation between the expected violation of the protected right, namely the strength of the violation and the likelihood of its occurrence, and the expected benefit inherent in the proper purpose of the law.

14. I agree with my colleague's determination that with regard to the conditions of proportionality the first two subtests are satisfied. First, this is because there is a rational connection between the purpose of the law and the measures chosen by it. 'The prohibition against the entry of the foreign spouses into Israel,' so the president says (in para. 84 of his opinion), 'eliminates the risk that they present. Someone who is not in Israel cannot bring a terrorist into Israel to carry out his "designs".' Even the fact that it was possible to realize the purpose of the law by means of additional measures that were not adopted does not necessarily indicate that the measure chosen is not rational.

With regard to the second subtest, my colleague the president says that a simple overall comparison between the harm caused by the 'blanket prohibition' against foreign spouses entering Israel, and the possibility of making an individual check with regard to the security risk presented by each of the spouses who wish to enter Israel will indeed show, necessarily, that the individual check is less harmful. But this is not the relevant comparison. 'The question,' the president clarifies, 'is whether it is possible to achieve the purpose of the law by use of a less harmful measure' (para. 88 of his opinion). This approach has also been adopted, for example, by the Supreme Court of Canada, which proposed that the harm does not need to be the least harmful possible, but the least harmful in view of the legislative purpose and other interests (see Edwards Books and Art Ltd. v. R. [223]). For the second subtest to be satisfied, it is sufficient for the state to clarify why an alternative measure would not be as effective as the measure in dispute in furthering the legislative purpose. In this respect, my colleague the president rightly says that the individual check does not realize the purpose of the law to the same degree as the blanket prohibition. '… in view of the central value of human life that the law wishes to protect, it is clear that the blanket prohibition will always be more effective — from the viewpoint of achieving the goal of reducing the security risk as much as possible — than the individual check' (para. 89 of his opinion). His conclusion is therefore that, in the circumstances of the case before us, the individual check does not realize the legislative purpose to the same extent as the blanket prohibition, and that there is therefore no obligation, within the framework of the least harmful measure, to stop at this level, and the Israeli legislature was entitled to choose the probation that it chose.

What remains undecided, therefore, within the procedural framework chosen by my colleagues, is the question concerning the third subtest of the conditions of proportionality, the question of proportionality 'in the narrow sense,' namely, whether the benefit arising from achieving the proper purpose of the law is proportionate to the damage caused by it. My colleague President A. Barak is of the opinion that the additional security that the 'blanket prohibition' provides is disproportionate to the additional harm caused to family life and equality. 'Admittedly,' the president says, 'the blanket prohibition does provide additional security; but it is achieved at too great a price. Admittedly, the chance of increasing security by means of a blanket prohibition is not "slight and theoretical." Notwithstanding, in comparison to the severe violation of human dignity, it is disproportionate' (para. 92 of his opinion). I do not agree with this conclusion.

Between an interest and a right

15. The balancing test between the adopted measure and the purpose underlying the law is derived from the question of the definition of the value competing with the violated right: a private right or a public interest. Even prior to the Basic Law, case law created a distinction between a vertical balancing test (between a right and a public interest) and a horizontal

balancing test (between rights of equal weight). But this distinction is sometimes problematic. The problem arises from the artificiality that is often inherent in defining the public interest as distinct from the right of the individual. It should always be remembered that the public, which has the interest, is composed of individuals. And when the public interest is divided up into its individual constituents, it reveals an accumulation of rights of the individual. Thus, for example, when we are speaking of public security, which is called a public interest, we are speaking of none other than the right of each member of the public to life and safety. This classification has great significance, since the balancing test depends upon it (and see in this respect also the various positions concerning the classification of rights and conflicting values in HCJ 6126/94 Szenes v. Broadcasting Authority [181] — a public interest or a personal right — and the various balancing tests adopted there accordingly). With regard to the purpose in the law, we are not required in this case to make that distinction, since we have before us a proper purpose, whether the competing value is classified as a general interest of public security or whether it is classified as a personal right to life, and no one disputes this. But this classification may have, in this case, a significance with regard to the balance underlying the requirement of proportionality.

16. In the case before us, the president seeks to describe the protected value as a public interest — public security; my colleague the vice-president sees before him the right to life, which, in itself, is a protected basic right within the framework of the Basic Law: Human Dignity and Liberty. This difference has great importance, as we have said, with regard to choosing the appropriate balancing test, a horizontal balance or a vertical balance. Indeed, the value of public security usually takes on a vague shape, and the tendency is to regard it as an interest of a non-specific public. Frequently the nature of the expected harm to public security is also intangible. The human right to life, however, is a concrete and tangible right. It is almost the ultimate right, the right of specific people — human beings, each of whom is a world in himself — to life. It seeks to protect specific people. As stated above, the distinction between the two — between the interest and the right — is sometimes difficult, and the case before us proves this. Prima facie we have here a value that is an interest, a public interest. But in this case the public image becomes clear and the danger is focused. We do not see before us an intangible public but the plaintive faces of persons who are likely to be harmed in the next act of terror. We see the horrors of the attack in our mind's eye. This is not the intangible fear for public safety that we have known in previous cases (see, for example, HCJ 73/53 Kol HaAm Co. Ltd v. Minister of Interior [182]; Universal City Studios Inc. v. Film and Play Review Board [105]; HCJ 2481/93 Dayan v. Wilk [183]. Public security is speaking here of the actual right to life, and it is this that the law seeks to protect. The attack that the law seeks to prevent is directed at specific people, individuals, Moslems, Jews, Christians and Buddhists, who live among us. Each and every one of these persons has the right to life. They are not standing before us today in person, since no one knows what the future holds in store for him. But their right is before us. The dividing line between the public interest and the right of the individual loses its strength in this case. With this distinction before us, let us turn to an examination of the overall balance, as the third subtest of the conditions of proportionality instructs us. It seems to me that there will then be no other conclusion possible than that the condition has been satisfied.

The overall balance

17. The side of the benefit in this balance was discussed in the opinion of my colleague the vice-president (at para. 109):

> '… an individual check of the persons included in those population groups who have a proven potential for endangering security and life may reduce the violation of the ability to have a family life in Israel, but it will not properly guarantee public security, and it will disproportionately violate the security of the individual and the public. It is not merely that there is an inherent difficulty in examining *ab initio* the positions and beliefs of the resident of the territories, to find out whether he supports our enemies or not; we also cannot ignore a real

concern, which has been proved in the past, that the terror organizations will recruit the spouse who is a resident of the territories into its ranks only *after* he has been given a permit that allows him to enter Israel and to move freely in Israel. The investment of greater resources or more concentrated efforts will also not guarantee the security of Israeli residents, and the meaning of this is that cancelling the blanket prohibition in the law and replacing it with an arrangement of an individual check is likely to lead to quite a high probability of an increase in terror activities in Israel; to the killing and wounding of residents of the state; to a real and tangible weakening of the feeling of stability; and as a result of all of these to the undermining of democracy itself. In the task of balancing between a reduction of the killing, safeguarding life and guaranteeing the stability of the system of government, as compared with the damage caused to some of the citizens of Israel who wish to live with their foreign family members in Israel — and we should remember that the amendment to the law reduced the scope of the violation significantly — the benefit is, in my opinion, greater than the damage.'

This is the position with regard to the benefit. With regard to the damage, the legislator has done much to reduce it. First, the restriction imposed in the temporary measure does not apply to marriages with Palestinians who live in countries that have ceased to be enemy states, Egypt and Jordan. It applies to those people who live in the territories that are today under hostile rule. It may become unnecessary if times change. The violation of the right to have a family life, although difficult, is first and foremost limited in time. This is a temporary provision, and it will be examined, if it is re-enacted, each time anew, and in accordance with the circumstances that will prevail at that time. The reconsideration in itself reduces the fear of a continuing disproportionate harm. The temporary measure merely postpones the realization of the right. It does not cancel it. Even my colleague President A. Barak recognizes the possibility that it will be necessary to postpone the realization of the right, if there is a difficulty in carrying out the individual checks. He says:

'… the security checks must be treated with great seriousness. Therefore if it is not possible to carry them out because of the security position in one part of the territories or another, the individual check will be deferred until the check becomes possible.'

Moreover, in the prevailing reality even my colleague the president recognizes the possibility of formulating presumptions of risk that naturally involve a generalization, including a presumption with regard to the age at which foreigners present a danger. 'If it is necessary to allow the identification of the foreign spouses in Israel as persons who came from the territories,' he says, 'this should be allowed until they reach the age at which the danger presented by them is reduced' (para. 94 of his opinion). This need also reflects the difficulty inherent in an individual check as a replacement for the measure adopted by the law. This need, to make the individual checks stringent, indicates the difficulty in achieving the purpose underlying the law by a different method. The difficulty is two-fold: the need to discover the character of persons who live outside the jurisdiction of the State of Israel and the need to predict the future with regard to the expected behaviour of foreigners who wish to enter the territory of the state even as we speak. Restricting the right of foreigners who are nationals of an enemy entity to live in Israel together with their spouses, during this war, is a consequence of the fear concerning the intentions of hostile parties to recruit them for terror activities, the fear that within this framework pressure will also be placed on persons who would personally prefer not to be involved in this, and past experience that shows that for the purpose of the struggle against the State of Israel use has been made of civilians.

Moreover, the legislature reduced the blanket prohibition prescribed in the original law. It applies the prohibition to population groups that present a relatively high risk, in accordance with past experience and the professional assessment of the security authorities. It adds to this

the possibility of giving permits to stay in Israel to additional groups and also giving a permit to stay in Israel for temporary purposes. The harm to the injured citizens has been reduced, thanks to these amendments, by approximately 30%, as can be seen from the explanatory notes to the draft law. Logic dictates that additional restrictions will be removed in the future so that the number of persons whose right is violated will decrease. In this regard, I add my voice to the remarks of my colleagues, that the law should also include a provision allowing the approval of an entry permit into Israel in specific cases where there are serious humanitarian reasons justifying this. This omission should be amended, if the legislature decides to enact a new provision that restricts the entry of foreigners into Israel in a similar manner. But such a law has not yet come into existence and the current law is already passing away. So here I return to the beginning: 'this law' — as the Citizenship and Entry into Israel Law states — 'shall remain valid until the second of Nissan 5766 (31 March 2006).' It is a temporary provision, and it is in its final moments. The harm of the provision is vague and this strengthens the conclusion that the overall balance is also unable to serve as a ground for intervention in the temporary provision.

Therefore I join with the position of my colleagues who wish to cancel the order nisi that was made and to deny the petitions.

Justice E.E. Levy

1. In this matter, which I believe is one of the most sensitive and complex ever brought before this court, we are charged with the difficult task of finding the proper balancing point between basic rights of the first order and the security needs of the State of Israel. At this time in particular there is no need to expound on the weight of these security needs. As for me, I will not hide the fact that the decision was accompanied by grave doubts, and that I wavered to and fro between the conflicting outlooks of my colleagues President A. Barak and Vice-President Emeritus M. Cheshin. In the end, I came to the opinion that the point of balance lies in the determination that the Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003, requires careful examination, and within this framework there is no alternative to making changes to it that will reduce the damage it causes. However, since the formulation of a proper draft law must be done intelligently and on the basis of complex teamwork, and since on the other hand there is a concern that there will be those who will seek to abuse the position in order to harm the security of the residents of the state, my position is that, until the work of legislation has been completed, because of the fear of a normative lacuna, the law and the arrangements that exist by virtue thereof should be left as they stand.

2. For more than half a decade the citizens and residents of Israel have been subject to a barrage of terror that is unprecedented in its intensity and the price it has extracted in blood. It is one of the most difficult periods that have befallen the state since it was established. The attacks make it difficult for the residents of the state to conduct their lives calmly and with security. It is this right to life and security, which every citizen or resident of any state around the world seeks for himself, that terrorism, with a cruelty that knows no equal, seeks to deny the residents of the State of Israel. I think that there is no clearer illustration that this danger still lies in wait for us, with ever-increasing intensity, than the tendencies to extremism in some parts of the Moslem world that threaten to become greater and stronger, and especially the deliberate choice of Palestinian society to place the reins of government in the hands of the Hamas movement, one of the leaders of the murderous terror against Israel.

3. It is not for nothing therefore that the serious events that we have witnessed since September 2000 have become a turning point. Just as their intensity was completely different from the patterns of terror known in previous decades, so too did it become clear that the measures and defences used to frustrate terror adopted until then were insufficient. A redeployment and the implementation of more drastic defensive measures, which hitherto there had been no need to adopt, became necessary. These include legal arrangements that

were capable of providing a normative basis for the war against terror. Thus, inter alia, the right of Israel to protect itself by means of a separation fence was recognized in principle (Beit Sourik Village Council v. Government of Israel [2]); it has been held that the military commander in the territories may order the place of residence of a person to be assigned for reasons of the security of the territories (Ajuri v. IDF Commander in West Bank [1]); the ability to impose severe restrictions on detainees in times of war (Marab v. IDF Commander in Judaea and Samaria [3]); and so on.

At the same time it became clear that the arrangements, by virtue of which it was possible for residents of the territories to acquire a status in Israel, could no longer stand in view of the drastic change in circumstances. I am speaking of the concern that by allowing the process of 'family reunifications' in the format that preceded the government decision of May 2002, there was a security breach that might play into the hands of the terror organizations. These, of course, rest neither night nor day in their attempts to find weaknesses in the defences of the State of Israel. Regrettably, from time to time they even succeed in doing so, and the suicide attacks that have plagued us only recently are sufficient to remind those persons, who wish to make light of the efforts of the security forces to prevent them, of how terrible and murderous are the consequences of a security breach of this kind.

4. My colleague Vice-President Cheshin is therefore right in explaining that especially at this time the weight of the public interest, which seeks to reduce the security danger and ensure protection for the lives and safety of the public, is very great. The Knesset and the government rightly sought, each with the means at its disposal, to realize this interest by means of an arrangement that would reduce the existing risk. And even if, as my colleague the president says, the existence of this risk does not reduce the weight of the basic rights of the individual, which are violated by the arrangements adopted, in my opinion the security risk is most certainly capable of influencing the scope of the protection given to these rights and the location of the balancing point between them and the competing values.

5. With regard to the nature of the arrangement under discussion in this case, I think that no one questions that the Knesset has the power to make legislative arrangements with respect to the immigration of persons who are not Israeli residents into its territory. This power is one of the cornerstones of every state, and my colleagues the president and the vice-president both discussed this extensively in their opinions. By means of arrangements of this kind, the state expresses its sovereign power of determining who may enter it, and naturally this involves making decisions concerning the composition of the population, the burden that the state is prepared to take on itself in absorbing new residents, the degree of benefit that this provides to the existing residents, and so on. And if this is the case in times of peace, it is certainly the case in times of war.

6. Indeed, the public interest has a central place in shaping legislation that regulates the issue of immigration. However, and this is the second principle on which my position is based, I believe that there is no subject that is regulated in legislation that is exempt from satisfying the normative balance test against competing rights and values. From the moment that these acquired constitutional status, the scrutiny is a constitutional scrutiny, and when the court is required to carry out this scrutiny, it can only avail itself for this purpose of the tools of constitutional scrutiny prescribed in the Basic Laws and developed in the case law of this court for almost a decade and a half. This is self-evident, since as long as the Knesset as the legislature wishes to determine arrangements in statute — as opposed to Basic Legislation — it is subject to those principles that it established for itself when it sat as a constitutive authority.

Thus, no matter how important they may be, the immigration laws are not immune to constitutional review. Therefore, and notwithstanding the natural and understandable concern that the public interest of protecting the security of the state and its residents may be harmed, we cannot regard the executive power to determine immigration arrangements as an absolute authority that cannot be challenged. Like any authority, the exercising of this one is also

subject to the rules and principles of constitutional scrutiny, and the first stage of this addresses the question whether basic rights of the individual have been violated by it.

7. Two constitutional rights of the Israeli spouse who wishes to be reunited here with his Palestinian spouse are violated by the legislative arrangement that is the subject of the petitions before us, and both of them are derived from the right to human dignity, which is enshrined in the Basic Law: Human Dignity and Liberty. One is the right of a person to family life, which incorporates two secondary rights, without which it would appear they are meaningless — the basic right of a person to marry whom he chooses, as he sees fit and in accordance with his outlook on life, and the right that he and the members of this family will be allowed to live together also from the viewpoint of the geographic location of the family unit, which they have chosen for themselves.

The second right that is clearly violated by the Citizenship and Entry into Israel Law (Temporary Provision) is the human right to equal treatment. Prima facie, the prohibition in the law does not distinguish between Arab residents of Israel and Jewish residents. But it is clear to everyone that from an ethnic and cultural point of view, it is only for the Arab citizens of Israel that Palestinian residents of the territories constitute a natural group for finding a partner for marriage. This is a relevant difference that makes the legislative arrangement, which ignores this, deficient. Notwithstanding, I will emphasize once again what we have emphasized time after time in the case law of this court, and that is that constitutional rights do not stand alone, and therefore they are not absolute. On the other pan of the scales there are public interests which, in our case, as I have already said, are unparalleled in their importance. In making the balance we use, as aforesaid, the tools of constitutional scrutiny that are familiar to us, namely the conditions of the 'limitations clause' in the Basic Law: Human Dignity and Liberty, and especially the question of the purpose of the harmful measures and the extent of the harm.

8. With regard to the purpose, as aforesaid, in the arrangement that is contained in the Citizenship and Entry into Israel Law, the legislature sought to provide a solution to the security risk presented by the spouse who is a resident of the territories, who wishes to make Israel the centre of his life. Notwithstanding, the language of the law shows that its purpose was not intended to provide a solution to every security risk that may arise from the entry of Palestinians into the State of Israel. This can be seen from the concessions, which are specific in their nature, that allow Palestinian residents of the territories to stay in Israel if they are spouses who satisfy the age requirements (s. 3 of the law), minors who are in the custody of a parent (s. 3A), and persons who are permitted to receive medical treatment in Israel or to work here (s. 3B). I believe that the rationale that underlies these concessions — that it is possible to neutralize the security danger that may arise from the persons falling into the concession categories — should cast light also on the cases of the other persons wishing to enter Israel in order to be reunited with their spouses.

9. We therefore find ourselves, and in this I am in agreement with the opinion of my colleague the president, in the last stage of the constitutional scrutiny, which is the stage of considering the question of proportionality. I agree with my colleague the president that in its present form the law is problematic, since I fear that it harms not only the spouses who wish to be married, but also the democratic character of the State of Israel and the delicate fabric of relations with a significant sector of the public that lives in it. Notwithstanding, I think that the centre of gravity lies particularly in the second test of proportionality, namely the existence of a less harmful measure that is still capable of fulfilling the purpose underlying the Citizenship and Entry into Israel Law, which is, as I have said, reducing the danger that the normative arrangement will be abused to harm the security of the state.

The premise for my position, which seeks to discover less harmful measures than the one adopted by the Citizenship and Entry into Israel Law, is based on the assumption that in the final analysis there will be no alternative to replacing the blanket prohibition in the law with an arrangement based on an individual check of the person wishing to be reunited with his

spouse. Naturally this arrangement must adapt itself to the security reality to the extent that this may change, and at this time I am of the opinion that the state ought to adopt measures of the kind that I will list below or ones like it, all of which at the discretion of the legislature:

a. At this time, in so far as concerns the residents of the Palestinian Authority, whose 'hostility' does not require proof, they shall be subject to a 'presumption of dangerousness,' which the person seeking to immigrate will be required to rebut. For this purpose, the respondents may make the consideration of the case of the Palestinian spouse conditional upon presenting various items of documentation, from which it will be possible to discover his family and social ties, and whether he presents a danger in the present or the future. It is clear to me that an examination of the dangerousness of the candidate is difficult even in times of calm, and even more so in times of a security deterioration, and therefore this check may take time, and sometimes it is possible that it will not be possible to complete it, such as when the security establishment does not receive cooperation from its counterparts in the Palestinian Authority, and there is a difficulty in obtaining the information.

b. It is a common phenomenon that a Palestinian who wishes to be united with his Israeli spouse first moves his place of residence to Israel, and thereby he presents the authorities with a fait accompli. Moreover, since the examination of applications for family reunification continues for a long time, sometimes also as a result of omissions on the part of the applicants themselves, the spouses become settled, acquire property, enter the work force and their children become a part of the local education system. This, in my opinion, is a situation that is unacceptable, since it involves offences against the Entry into Israel Law, and it is a basic principle that a person who wishes to immigrate to a foreign country must, first and foremost, obey its laws.

This leads to my conclusion that a consideration of an application of a Palestinian who wishes to be united with his Israeli spouse should be subject to the condition that as long as no decision has been made, he undertakes not to enter Israel. Conversely, entering and/or staying in Israel unlawfully should constitute sufficient grounds for denying the application for reunification.

c. I further think that it would be correct to require every Palestinian who wishes to be united with his spouse in Israel to declare his loyalty to the State of Israel and its laws, and to give up his loyalty to any other state or entity.

As stated, these are merely examples of measures that could be adopted in order to ensure that the individual check does not become a source of security danger, and I am convinced that creative thinking by all the parties concerned may find additional measures that will achieve the same goal. However, to do all this requires time, and I am of the opinion that stipulating a framework according to which the respondents will be required to provide an improved arrangement within nine months is reasonable. Until such an arrangement is presented, because of the urgent security requirements, and the fear that a void may be created in the law, my opinion is that the current arrangement should be allowed to stand, in so far as the Knesset decides to extend its validity. It is also self-evident that the state should consider including transition provisions within the framework of the amended arrangement, in so far as these are relevant.

10. Before concluding my remarks, I would like to add that I can only express regret at the fact that the terror organizations, who do not stop at anything in order to achieve their purpose, do not even hesitate, as has been proved in the past, to abuse the genuine desire of Arabs on both sides of the border to be united in the covenant of marriage. It would appear that just as those persons do not recoil from spilling the blood of men, women and children whose only 'sin' is that they are Jewish (and we should remember that non-Jews have also been hurt), it is doubtful if they give any weight to the fact that by their actions they cause great damage also to the interests of members of their own people.

11. In conclusion, I propose to my colleagues that, subject to the aforesaid, we dismiss the petitions in so far as they concern making an absolute order at this time that declares the

Citizenship and Entry into Israel Law to be void because it is unconstitutional. Notwithstanding, I should point out that if the respondents do not see fit to carry out what they have been asked to do, I doubt whether the law will continue to be capable of satisfying judicial scrutiny in the future.

Petition denied, by majority opinion (Vice-President Cheshin and Justices Rivlin, Levy, Grunis, Naor and Adiel), President Barak and Justices Beinisch, Procaccia, Joubran and Hayut dissenting.

16 Iyyar 5766.

14 May 2006.