At the Supreme Court Sitting as the High Court of Justice

HCJ 7444/03

Before:	**Honorable President D. Beinisch** **Honorable Justice A. Procaccia** **Honorable Justice S. Joubran**
The Petitioners:	1. **Belal Mas'ud Dakah** **2. Manar Rashed Dakah**
	v.
The Respondent:	**Minister of the Interior**
Petition for *Order Nisi*	
Representing the Petitioners:	Adv. Ronen Cohen
Representing the Respondent:	Adv. Yochi Genesin, State Attorney's Office

Judgment

Justice A. Procaccia:

1. In this petition we are requested to order the Minister of the Interior to retract his decision for the revocation of the approval of petitioners' family unification application which was given in the past, to re-issue to petitioner 2 a permanent residency permit in Israel and to prevent her expulsion from Israel.

The factual background of the petition

2. Petitioner 1 was born in Israel and is an Israeli citizen. Petitioner 2 was born in Syria and was a resident of the Area before she moved to Israel. In January 1996 the petitioners married, and following their marriage they submitted a family unification application and an application for the grant of a permanent residency permit in Israel to petitioner 2. The spouses have a number of children who were born in Israel and who are Israeli citizens. In 1988 petitioners' family unification application was approved, and the 'graduated procedure' was applied to petitioner 2's matter. In the beginning, petitioner 2 was given DCO permits for twelve month periods, and thereafter, in November 1999 she was granted an A/5 temporary residency permit. The permit was valid until November 14, 2001. On November 4, 2001 the petitioners submitted an application to extend the validity of the permit. They were informed that they should provide documents to prove their center of life. On February 18, 2003 the documents were submitted on their behalf. On March 12, 2003 security agencies advised that they objected to the extension of petitioner 2's residency permit

in Israel. Thereafter, on April 24, 2003 the respondent informed the petitioners that their application to renew petitioner 2's residency permit was denied for security reasons, and hence the petition before us.

The arguments of the parties

3. The petitioners request that we order the respondent to revoke his decision to discontinue the approval granted to petitioner 1's family unification application and grant petitioner 2 a permanent residency permit in Israel. According to them, the respondent acted in an extremely unreasonable and disproportionate manner when he revoked the family unification approval which was granted by him in the past, and refused to renew petitioner 2's temporary residency permit. They argue that the minister was empowered, and was even obligated, to balance between interests while making a decision in these issues. He is entitled, and even required, to consult with experts, and consider, among the gamut of the considerations, security concerns, and balance them against each other. In this case, the minister disavowed his obligation to make a decision in their matter, and has, in fact, transferred the decision to the security agencies. According to the petition, the considerations of the respondent in making a decision to revoke a residency permit or to retract an approval of a family unification application, are different from the considerations that he should consider in making an initial examination of a family unification application, as required by the proportionality principle and in view of the damage caused to the applicants in the different scenarios. When the case concerns a family unification application which was approved in the past, only very significant and weighty findings, based on solid evidence, will constitute reasonable cause for the revocation of a family unification approval and residency permit which have already been granted.

According to the petitioners, under the circumstances of the case at hand, no security threat is posed by petitioner 2 to the state of Israel. She settled down with her husband in Israel, she learnt Hebrew, she was trained to be a cosmetician and optician and was authorized by the Ministry of Labor and Social Welfare to engage in her profession as an optician. Her studies involved considerable costs which were borne by Mr. and Mrs. Dakah. In the past, she was hired and even worked, in practice, as the secretary of the president of the Sharia court of appeals, a position from which she was laid off following the intervention of respondent's counsel. Recently, petitioner 2 completed a community leadership course initiated by the Shatil Association. She is a social activist and member of Zemer Women Council, a position she was appointed to by the Head of Zemer Council. Petitioner 1 has been a state employee for many years and acts as the secretary of the Regional Planning and Building Committee, East Hasharon. Based on the approval of the family unification application and the residency permit which was granted to petitioner 2, the petitioners have changed their position, laid down roots in Israel, settled down and established their home and family herein. The petitioners argue that the revocation of the family unification approval and the failure to renew petitioner 2's residency permit at this time are unreasonable, disproportionate, and that they will result in the dissolution of their family and in the violation of their legitimate expectation to realize their right to family life, equality and protection against discrimination based on national origin or religion.

In response to respondent's arguments, which will be specified below, the petitioners reject the claim that petitioner 2's continued stay in Israel puts public safety at risk in view of the involvement of her three brothers in terror activity. It is alleged that no risk is posed by petitioner 2. They point out that the family unification application was approved and petitioner 2's temporary residency permit was renewed while her father was holding a senior security position with the Palestinian Authority, and acted as the Head of the Tulkarm Police, and even after one of her brothers was arrested by the Israeli security forces, and after another brother, according to information provided by the state, underwent military training in Afghanistan. Nevertheless, no suspicion ever arose that petitioner 2 herself was involved in any hostile activity against Israel, or

supported such activity. Furthermore, petitioner 2's father, who served in recent years as the Tulkarm Home Front Assistant Commander, has recently retired, and she does not maintain ongoing relations with her brothers, despite the fact that she visited one of them when he was incarcerated in Israel, and despite the fact that she maintains telephone contact with her parents.

The petitioners expressed their willingness to assume upon themselves a host of restrictions, as a condition for petitioner 2's continued stay in Israel, including an undertaking to sever any contact with her father and brothers, in order to alleviate the concern expressed by the State that her family members, who were involved in terror, would try to recruit her to activity against the State of Israel. They have also proposed to undertake not to enter the Territories at all, to notify the security agencies of an intention to exit Israel and inform them of the particulars of the planned trip, to undertake not to take action, either by act or omission, against the security of the State of Israel or public safety, or to assist another to do so.

4. The respondent, on his part, claims that security reasons, which indicate that there is a substantial concern to state security and public safety, reasonably and pertinently underlie his decision not to renew petitioner 2's residency permit in Israel under a family unification procedure. According to him, the main reason for his decision is based on information according to which petitioner 2's father maintains relations with the heads of the Palestinian national security forces, and her three brothers are involved in terror activity, two of them within the framework of organizations which operate in the Palestinian Authority's territories, and the third one in the 'International Jihad' organization. The brothers are involved in high risk terror activity which is directed against the security and existence of the State of Israel. As a result of such involvement, risk is also posed by petitioner 2 as a family member, whose presence in Israel may be exploited by parties that pose risk to the public in Israel.

5. Respondent's counsel emphasized again in her arguments, that the discretion vested in the Minister of the Interior for the purpose of examining the application of a foreign resident to receive a residency permit in Israel was broad, and that the scope of judicial intervention therewith – was narrow. In exercising his discretion, the Minister is entitled and required to consider, *inter alia*, the risk posed to public safety in Israel, state security or other vital interests thereof, which an approval of the application entails. For the purpose of assessing this risk, it is the obligation of the Minister of the Interior to consult with experts on the matter. If, according to the experts' assessment, the potential for such risk is substantial, the Minister of the Interior may take this assessment into consideration among the gamut of his considerations, and give it a substantial weight.

6. The respondent argues that the accumulated experience of the security agencies indicates, that terror organizations locate family members of activists among residents of the Territories who reside in Israel and carry Israeli certificates following a family unification procedure, and recruit them for the promotion of their purposes. These family members constitute an attractive target for terror organizations due to their freedom of movement throughout Israel, and in view of the fact that they are familiar with the area, and these family members may become victims of exploitation by terror organizations even innocently and unknowingly. Therefore, the risk posed by these family members to the security is not less than the risk posed by a person who is directly involved in terror activity. The nature of the family relations of status applicants in Israel by virtue of family unification is a relevant concern among the considerations of the competent authority, and they should be given proper weight. The relevant issue which should be considered is – whether the status and freedom of movement in Israel granted to the status applicant may put public safety at risk in view of his family relations with terror activists. Respondent's position is that the mere fact that such relations exist is sufficient for the formulation of risk to public safety, especially when the case concerns a number of family members who are involved in terror, and that it is not necessary that direct negative intelligence information be accumulated against the status applicant himself.

According to the respondent, the reasonableness of this position is reinforced by the severe security condition of Israel, and the substantial risk posed to public safety and State security as a result of the contacts maintained between Israeli residents and terror activists.

7. The State specifies that the main risk posed by petitioner 2 stems from her relations with her three brothers who are involved, in practice, in terror activity, both in fundamentalist organizations within the territories of the Palestinian Authority, as well as within the framework of the International Jihad abroad.

Petitioner 2's brother, *Wael Dakah*, born in 1974, an International Jihad activist, currently stays in the Emirates and maintains contacts with various terror activists including within the Al-Qaeda terror organization. He is a member of a military cell of the organization. Wael maintains contacts with his family members and maintains contacts with other terror activists who come to visit him abroad.

Basel Dakah, another brother, is a military Hamas activist in Tulkarm and a member of an extreme religious movement. He underwent military training in Afghanistan, and admitted in his interrogation that he was recruited to the Al-Qaeda organization and that the training that he underwent was intended to realize the Jihad war by the organization. Following his release from prison he continues to be active in the Hamas organization in the Area, and maintains ongoing contacts with Wael and other Hamas activists.

Another brother, *Walid Dakah*, is a military Hamas activist who was detained and admitted in his interrogation that he was recruited to the Hamas organization, participated in an examination of a route in preparation for a terror attack, received weapon, used a handgun, acquired materials for the preparation of bombs and for the planning of terror attacks, including a plan to poison the water of an Israeli community. He was convicted of a host of offenses against area security as Hamas member. After his release from prison in 2004, he continued with his activity in the Hamas organization.

Petitioners 2's father served as a high ranking officer, and held a senior position with the Palestinian Authority. Until recently he served as the home front commander in Tulkarm, and maintained contacts with the heads of the Palestinian national security forces.

The family members maintain ongoing relations with each other, and according to the respondent, petitioner 2 maintains ongoing relations with the members of her immediate family, and even visited Basel when he was in prison. The respondent claims that petitioner 2 lied when she informed the court that she had severed any contact with her family.

The respondent argues that against the backdrop of the above described family relations, high security risk is posed by petitioner 2. In view of the severe information concerning her brothers, based on their positions and activity in the different terror organizations, and in view of the distrust in petitioner 2's statements concerning her relations with them – respondent's decision to prohibit her from staying in Israel has proper grounds. The State further notes, that since the respondent has refused to renew petitioner 2's residency permit in April 2003, she has been staying in Israel unlawfully, and has even sought employment with the Ministry of Justice for the purpose of which she used several identification cards which were no longer valid.

The Hearings in the petition

8. Several hearings were held in this petition over a long period of time, during which attempts were made to find practical solutions which would be acceptable to the parties. Unfortunately, these attempts were unsuccessful. We have consequently ordered on July 8, 2008, that an *Order Nisi* be

issued in the petition, and requested the respondent to show cause why he should not approve petitioner 1's family unification application, and grant petitioner 2 permanent residency permit in Israel. In this context, we have also requested the respondent to consider the possibility to reach a proportionate arrangement under which a temporary residency permit such as a DCO permit would be granted to petitioner 2, which would be renewed from time to time, and, if necessary, would consist of additional conditions, which would enable to supervise the conduct of petitioner 2 and her family members. We added that with the passage of time, it may be possible to reconsider and reassess the re-issuance of an A/5 residency permit to petitioner 2, to the extent justified. The respondent rejected the proposed arrangement. Consequently, we have heard the parties' complementary summations both orally and in writing, and we have even reviewed, *ex parte*, with petitioners' consent, the privileged information presented by the State concerning petitioner 2's matter.

Decision

The issue in question

9. The question in which a decision should be made in this case is – whether, and under what circumstances, the competent authority may revoke a family unification approval and a residency permit in Israel, which were granted in the past to a spouse, resident of the Area, due to kinship between the spouse and terror activists, where there is no security information concerning a direct involvement in hostile activity against Israel on his part. This question involves a constitutional aspect concerning the fundamental human right to a family – and in this case the right of an Israeli citizen to establish his home in Israel together with a spouse from the Area, *vis-à-vis* a public interest which mainly concerns the protection of the security of the citizens of Israel. The examination of these conflicting interests, and the manner they should be reconciled for the purpose of exercising respondent's powers, are at the center of this petition.

We shall examine the general issue, and thereafter, the manner by which the general principles should be applied to the case at bar.

The constitutional layer

10. It is a fundamental principle that constitutional human rights, despite the superior status given to them in a constitutional regime, cannot be applied by absolute means. The scope of their protection is relative, resulting from their balancing with general conflicting interests or conflicting constitutional rights. The balancing between fundamental rights and conflicting interests requires, first and foremost, a general balancing, in which all relevant interests are conceptually balanced, and in which their relative weight on the moral level is established. Following the general balancing, a specific balancing is required, in which the application of the moral balancing to the unique circumstances of the matter, is examined.

The conceptual balancing

11. Israeli jurisprudence recognizes the right to family life as a fundamental human right; the right of each Israeli spouse to maintain a family unit in Israel in terms of equality with other Israeli couples constitutes part of human dignity. The right to family life in terms of equality constitutes a protected constitutional right under the **Basic Law: Human Dignity and Liberty**.

The **Citizenship and Entry into Israel (Temporary Order) Law, 5763-2003** (hereinafter: the "**Temporary Order Law**") severely violates the right to family life of the Israeli spouse, who is deprived of the ability to realize his right to family life in Israel with his spouse from the Area. The

Temporary Order Law, denies the right of thousands of Arabs, citizens of Israel, to realize their right to family life in Israel, and thus violates their right to human dignity (HCJ 7052/03 **Adalah, Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior (**not reported**,** May 4, 2006)(hereinafter: **Adalah**)).

12. In **Adalah,** an extended panel of eleven Justices of this court, discussed a host of petitions which were filed against the constitutionality of the Temporary Order Law. In that case, the Law was examined from the viewpoint of the limitation clause set forth in the **Basic Law: Human Dignity and Liberty**, and the question whether the Law was intended for a proper purpose, and whether it satisfied the proportionality test and its different aspects, was thoroughly examined. Said examination was made against the backdrop of the collision between the constitutional human rights to family and equality, and the security concern, under the harsh political and security circumstances with which the Israeli society must cope. Eventually, it was decided by one vote, to accept the position according to which the Law satisfied the constitutionality test, at that time, and that the petitions should be rejected. The constitutionality of the Temporary Order Law was brought up again for discussion by this court, and it is currently pending before an extended panel and has not yet been decided (HCJ 466/07 **MK Zehava Gal-On – Chair of Meretz-Yahad Party v. Attorney General**).

13. Under these circumstances, and assuming that the Law satisfies the constitutionality test under the current legal situation, we must interpret the Temporary Order Law and implement its provisions in a manner which would properly reflect the collision between the right to family afforded to each and every Israeli citizen and resident and state security concerns. For this purpose, a proper constitutional weighing should be made between a fundamental human right, which has a superior status in the hierarchy of human rights, and the conflicting public interest. The interpretation and implementation of the provisions of the above Law derive from the constitutional obligation to protect to the right to a family as a superior right to the extent permitted by the Law, giving a proper and proportionate weight to security interest to the extent required by the circumstances, and only to the necessary extent. The proper balancing between a fundamental human right and the security value is required not only for the examination of the constitutionality of the Temporary Order Law. It is also required, to the same extent, for the actual interpretation of the Law and the implementation of its provisions.

Indeed,

> A violation of a human right will be recognized only where it is essential for the realization of a public interest of such strength that it justifies, from a constitutional viewpoint, a proportionate infringement on the right (**Adalah**, my judgment, paragraph 4).

14. The weightier the violated human right, and the more severe the violation thereof, the stronger the conflicting public interest must be to justify the violation, otherwise, the violation may be considered disproportionate. A correlation should exist between the strength of the fundamental right and the weight of the conflicting public interest to justify the violation of the right. The severity of the injury should also be integrated in this equation:

> 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:
>
> 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' (Justice Zamir in HCJ 6055/95 **Tzemah v. Minister of Defence**, IsrSC 53(5) 241, 273 (1999)(hereinafter: **Tzemach**)).

The case before us concerns the proper balancing between the right of an Israeli spouse to realize family life with his spouse, resident of the Area, under equal conditions, and the interest of protecting public safety. This balancing requires implementation of relative standards. It cannot be achieved by absolute values. It is based on a probability test of the degree of the risk to the safety of life, on the one hand, as opposed to the strength of the human right to family, on the other. In determining the relativity between these two conflicting values, we must evaluate, on the one hand, the strength of public interest from the viewpoint of the likelihood of the risk posed to public safety which is involved in realizing the human right to family. On the other hand, we must evaluate the severity of the injury caused to the family as a result of the limitation the omposition of which is requested for security reasons. In the required balancing we must examine whether there is a correlation between the strength of the fundamental right on the general and specific levels and the strength of the security interest, and whether the requested violation of the fundamental right is proportionate under the circumstances of the matter.

15. A person's right to have a family is one of the foundations of human existence; its realization is a condition for making the most out of life and it is the essence of life; it is a condition for self realization and for a person's ability to share his life and fate with his spouse and children. It reflects the essence of a person's being and the embodiment of his desires. The right to have a family is situated at the highest level of human rights. An infringement on this right is possible only when it is balanced against a conflicting value of special power and importance. In the existing tension between the value of security of life and other human rights, including the right to have a family, the security consideration prevails only where there is high probability, almost reaching certainty, that if appropriate measures involving the infringement of human rights are not taken, public safety may be materially injured.

16. The burden to prove the probability of a security risk to an extent which justifies an infringement of human rights lies on the state (**Adalah**, paragraph 9 of my judgment; HCJ 6427/02 **The Movement for the Quality Government in Israel v. The Knesset**, paragraphs 21-22 and 49 of the judgment of President Barak (not reported, May 11, 2006) (hereinafter: **The Movement for Quality Government**); Justice Zamir in **Tzemach,** pages 268-269). The State must prove that the probability of a threat to public safety is at the highest level, reaching, at least near certainty, and that it is impossible to defend against it without violating human rights.

17. It has been stated more than once, that the "security need" argument, made by the State, had no magical power such that once raised it must be accepted without thought. Although, as a general rule, the court is cautious in examining the security considerations of the authority, where the implementation of a security policy violates human rights, the reasonableness of the considerations of the authority and the proportionality of the measures that it wishes to take must be thoroughly examined (HCJ 7015/02 **Ajuri v. IDF Commander**, IsrSC 56(6) 352, 375-376 (2002) (hereinafter: **Ajuri**); HCJ 9070/00 **Livnat v. Chairman of Constitution, Law and Justice Committee**, IsrSC

55(4) 800, 810 (2001)). For the purposes of this examination, the court is required to assess the strength of the security risk, based on probability criteria, as opposed to the strength of the violated right of the individual confronting it, and the proportionality of the violation of the right for the realization of public interest. The security consideration is examined in a two-stage process. Firstly, the **credibility** of the claim concerning 'security needs' is examined; Thereafter, the **strength** of the security concern is examined from the viewpoint of the probability that the security risk will be indeed realized (**Adalah**, paragraph 11 of my judgment).

18. The constitutional balancing is firstly made on the general level, and requires, thereafter, a specific-individual examination of each case. A sweeping injury inflicted by the authority on individuals who wish to realize their fundamental rights, without making an individual constitutional balancing, which is based on the unique specific data of the case, contradicts constitutional principles, which require that both general and individual balancing be made. Such a sweeping injury effaces, to a certain degree, the obligation imposed on the administrative authority to attribute relative weight to all data relevant to the administrative decision, and make a decision which is based on a proper balancing between them. It may attribute decisive weight to a certain interest without justification, and disproportionately discriminate a human right of major importance. It may severely impinge on the values of life and culture, and violate the principles of the democratic regime which is based on the protection of human rights.

Indeed,

> 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 trust in our values and in the protection of human rights. We must beware of the erosion of human rights against a security argument, without maintaining the proper proportion between them. In the absence of this proportionality, the constitutional approach which protects human rights may be eroded; consequently, cracks may appear in the foundations of the constitutional regime; democratic patterns of life in Israel may be prejudiced and the recognition of human dignity and the right for self realization may be undermined. We must beware of blindly following a security argument, where doing so leads to a violation of a human right. We must examine its credibility and strength based on reliable figures, and assess it in accordance with the tests of logic, common sense and the rules of probability.
> (**Adalah**, paragraph 22 of my judgment).

The above principles are relevant for the examination of the constitutionality of a law of the Knesset. They are also relevant to the actual interpretation and implementation of the law, where the law itself satisfies the constitutionality test.

Background and the main principles of the policy underlying the Temporary Order Law

19. On May 12, 2002 government resolution number 1813 was adopted which enshrined a new procedure for the handling of family unification applications of Israeli spouses with their spouses, residents of the Area (hereinafter: the **government resolution**). Commencing from August 6, 2003 the government policy was entrenched in the Temporary Order Law, which is extended from time to time. With the adoption of the government resolution and the enactment of the Temporary Order Law, Israel's policy concerning family unification which was in effect until that time, has changed. In the past, the prevailing premise was that an Israeli citizen would be allowed to unite with his spouse from the Area, provided that there was no cause which prevented it – such as a criminal or security preclusion. This underlying premise was changed, and as of the change of policy which was entrenched in the Law, family unification applications are denied, subject to exceptions specified in the Law.

20. The application of the government resolution and the Temporary Order Law, have severely violated the constitutional rights of Arabs, residents of Israel, to maintain the integrity of the family unit with their spouses, residents of the Area, within the State of Israel. According to the prevailing legal situation, this violation was recognized by this court, in its judgments, as a proportionate violation according to constitutional principles, in view of considerations arising from state security and the need to protect the safety of the citizens of Israel against a potential risk posed by terror organizations in the Area. The conflicting values involved in the right to a family on the one hand, and the security interest on the other, are the underlying values of the policy against the backdrop of which the Temporary Order Law was formulated, and this conflict of values projects on the proper interpretation of its provisions. In view of this reality, in which a fundamental right of spouses, Israeli citizens and residents, to unite with their spouses from the Area, is violated, a purposive interpretation of the Temporary Order Law is required, which restricts the scope of said violation only to such extent which is required for the realization of the security interest. In view of the strength of the fundamental right to family, which is a person's constitutional right of the first degree, only a security interest of a substantial strength can justify a violation thereof. A remote and vague security interest cannot justify such violation. In addition to having the legitimacy of the violation of the right to family conditioned upon the existence of a powerful security interest, the margin of possible violation of the right to a family requires a restrictive interpretation, and the exceptions specified in the Temporary Order Law, which enable, within narrow limits, a deviation from the general policy which prohibits family unification, require a liberal interpretation. Under these exceptions, the right to a family may be realized by the issuance of residency permits in Israel to spouses from the Area, under certain conditions. The requirement that a substantial security interest exists as a condition for the violation of the right to a family, and a wide interpretation of the exceptions of the Law, which enable, under certain conditions, to realize this right, arise from the constitutional conflict of values which is involved in the implementation of the Law.

The interpretation and implementation of the Law should reflect the deep constitutional tension created by the sharp conflict between the value of the right to a family and the importance of the security concern under the circumstances of life which characterize the society in Israel.

The transitional provisions of the Temporary Order Law

21. As a result of the implementation of the new policy, which prohibits, as a general rule, family unification, transitional arrangements were required for situations in which a resident of the Area held, on the eve of the commencement of the Law, a residency or stay permit in Israel under a family unification procedure. A transitional arrangement was also needed for a resident of the Area

who submitted a family unification application before the date on which the government resolution which prohibited family unification, was adopted on May 12, 2002 (hereinafter: the **effective date**).

22. The transitional provisions provide as follows:

> 4. Notwithstanding the provisions of this Law –
>
> (1) The Minister of the Interior or the Area Commander, as the case may be, may extend the validity of a license to reside in Israel or of a permit to stay in Israel, **which were in the possession of a resident of the Area on the eve of the commencement of this Law, taking into account, among other things, the existence of a security preclusion as specified in section 3D**;
>
> (2) The commander of the Area may grant a temporary permit to stay in Israel to a resident of the Area who submitted an application for citizenship according to the Citizenship Law or an application for a residency permit in Israel according to the Entry into Israel Law, before the 1st of Sivan 5762 (12 May 2002) and in whose matter a decision has not yet been made on the day of commencement of this Law, and provided that the aforesaid resident shall not be awarded, under the provisions of this paragraph, citizenship according to the Citizenship Law or a permit for a temporary or permanent residency, according to the Entry into Israel Law (emphasis added).

23. The transitional provisions constitute part of the exceptions adopted by the Law, which allow, under certain conditions, the grant of a residency or stay permit to a spouse from the Area for family unification purposes after the effective date. In view of the fact that that the exceptions, including the transitional provisions, promote and integrate in the realization of the constitutional right to a family, they should be widely interpreted and implemented, within the context of legislation which violates a person's fundamental right to a family. The purpose of the transitional provisions is to uphold the right of the Israeli spouse to a family under factual circumstances which give rise to a legitimate interest of reliance and expectation thereto. However, whereas with respect to new family unification applications the legislator instituted a sweeping ban based on security considerations, the transitional provisions maintain a certain nexus between the right to family life and security considerations on an individual basis. The balance which the legislator considered appropriate for the transitional arrangement involves, firstly, the possibility to extend the validity of the residency permit in Israel of a person whose stay in Israel was allowed before the effective date by virtue of family unification. The same rule applies to a person who submitted a family unification application before the effective date, and no decision has yet been made therein prior to said date. However, the grant of permits under the transitional provisions is subject to the absence of an individual security preclusion of the permit applicant, which may justify a refusal to grant or renew a permit. The transitional provisions also provide that the extension of the validity of a residency permit which was granted will not make it possible to upgrade the status of the applicant, and that the grant of a permit for the first time would be limited to a temporary stay permit which

would not be upgraded to a permit of a higher level for as long as the arrangements of the Temporary Order Law are in force (HCJ 2208/02 **Salama v. Minister of the Interior**, IsrSC 56(5) 950 (2002)).

The security preclusion in the transitional provisions

24. The existence of a security preclusion may thwart the implementation of the exception included in the transitional provisions, which enables, under certain conditions, to extend the validity of an existing residency permit which was granted to a spouse from the Area within the framework of family unification, or the grant of a new permit to a person who submitted his application before the effective date and a decision in his matter has not been made prior to such date. In the implementation of the transitional arrangement, the competent authority is required to balance between the legitimate expectation of the Israeli spouse to realize his right to unite with his spouse from the Area as a derivative of his constitutional right to a family, and the scope and force of the security preclusion which exists in connection with the spouse from the Area. The term "**security preclusion**" is not absolute, and may change from case to case, *inter alia*, in view of the nature and power of the conflicting values. The term "security preclusion" is a general term, the content and weight of which are affected by the specific context within which it arises. The stronger the specific interest of the Israeli spouse for the realization of his right to family, the greater the weight of the security preclusion must be, to justify the denial of the family unification application within the context of the transitional provisions, either for the extension of an existing residency permit, or for the approval of a permit application which was submitted before the effective date and with respect of which a decision has not yet been given as of that date.

    The specific expectation for the realization of the right to a family where a family unification permit had been granted in the past and its renewal is requested, is not similar in force to the expectation for a permit when such permit has not been granted in the past.

25. Out of the two situations referred to in the transitional provisions, it is obvious that the expectation of spouses for the renewal of a residency permit, where they had been granted a family unification permit in the past, is very powerful. This power is greater than the power of the expectation of spouses who have not yet been granted a unification permit in the past, and whose family unification application has not yet been decided prior to the effective date. In addition, with respect to a family the unification of which had been permitted in the past, a difference may exist between the power of the expectation of a family which has been residing in Israel for many years and laid down roots in Israel, which has a number of children who are raised and educated in Israel, and a young couple who has just received a unification permit, who has been living in Israel for a short period of time, who has not yet established a complete family unit and who has not yet integrated into the Israeli labor market and society. A correlation must exist between the strength of expectation for a permit under the transitional provisions and the specific weight of the security preclusion: the weightier the expectation for family unification in view of the specific circumstances of the case, the stronger the security interest must be to justify a violation of such expectation.

26. The Temporary Order Law refers to the security preclusion in section 3D as follows:

    Security Preclusion

> A permit to stay in Israel or a license to reside in Israel shall not be granted to a resident of the Area, in accordance with sections 3, 3A1, 3A(2), 3B(2) and (3) and 4(2) and license to reside in Israel shall not be granted to any other applicant who is not a resident of the Area, if the Minister of the Interior or Area commander, as the case may be, has determined, pursuant to the opinion of authorized security agencies that the **resident of the Area or the other applicant or family member are liable to constitute a security risk to the State of Israel; in this section, "family member" – spouse, parent, child, brother and sister and their spouses.** For this purpose, the Minister of the Interior may determine that a resident of the Area or any other applicant is liable to constitute a security risk to the State of Israel, among other things on the basis of an opinion by the authorized security agencies according to which within the domiciled state or residential Area of the resident of the Area or of any other applicant, activity was carried out which is liable to put at risk the security of the State of Israel or its citizens (emphasis added).

This provision empowers the authority not to grant a permit under the exceptions established in the Law – including for the purpose of the transitional provisions concerning an application for a **new** permit under section 4(2) of the Law, if the permit applicant or his family member may pose a security threat to the State of Israel. The term **"family member"** for this purpose is widely defined and includes various kinships within the immediate family circle and in the more distant circle – spouse, parent, child, brother and sister and their spouses. Hence, the legislator defines the term "security preclusion" widely, and includes therein not only a direct risk posed by the permit applicant himself (hereinafter: a **direct security preclusion**), but also an indirect risk which arises from his close family members (hereinafter: an **indirect security preclusion**).

The security preclusion in the two alternatives of the transitional provision

27. The Law, in its content and wording, drew a certain distinction between the manner by which a security preclusion is applied to an applicant who wishes to **renew** a residency permit which was granted to him in the past under the first transitional provision in section 4(1) of the Law (hereinafter: the **first transitional provision**) and the manner by which it is applied to a person who requests a permit for the first time and a decision in his matter has not been made before the effective date, according to the transitional provision set forth in section 4(2) of the Law (hereinafter: the **second transitional provision**).

28. The provision set forth in section 3D of the Law concerning a "security preclusion" applies directly, according to the wording thereof, to the **second transitional provision** set forth in section 4(2) of the Law – namely: an applicant of a new permit whose application has not yet been approved before the effective date. For this purpose the first part of section 3D provides that "**A permit to stay in Israel or a license to reside in Israel shall not be granted to a resident of the Area, in accordance with section… 4(2)**" if the competent authority determined that there was a security preclusion, in the sense that a security risk is posed by the permit applicant or his family member. With respect to an applicant of a new permit whose entry into Israel has not yet been approved, but whose permit application was pending prior to the effective date, the Law provides categorically that "**A permit… shall not be granted**" in the event of a security preclusion, as defined therein.

29. The first transitional provision set forth in section 4(1) of the Law, which concerns the **extension of an existing residency permit** held by a spouse from the Area who resides in the Israel there-under, is drafted differently; In that regard, section 4(1) of the Law provides as follows:

> The Minister of the Interior or the Area Commander, as the case may be, may extend the validity of a license to stay in Israel or of a permit to stay in Israel, which was in the possession of a resident of the Area on the eve of the commencement of this Law, **taking into account, among other things, the existence of a security preclusion as aforesaid in section 3D** (emphasis was added).

30. The different wording of the Law in these two situations is not accidental. It attests to the fact that the consideration of security preclusion is relevant to both the first and second transitional provisions. However, the manner of its application in these two situations is different in terms of the required balancing between the security risk and the severity of the impingement inflicted on the legitimate interest to realize the right to a family. With respect to the second transitional provision, which concerns a applicant of a new permit whose entry into Israel has not yet been approved and his family unification application was pending and has not yet been decided on the effective date, section 3D provides that **a permit shall not be given** if a security preclusion exists; on the other hand, with respect to an applicant who wishes to extend the validity of a family unification permit which was granted to him in the past, the Law provides that the competent authority **may** extend the validity of the permit " **taking into account, among other things, the existence of a security preclusion as aforesaid in section 3D**". It seems that this wording indicates that within the required balancing between conflicting values, greater weight would be given to the expectation interest of the spouses whose unification in Israel has already materialized, and who wish to further extend this unification, as compared to spouses whose unification application has not yet been approved prior to the effective date. For the purpose of the first transitional provision, a violation of the right to a family when a family unification permit was granted in the past and the extension of which is sought, is constitutionally justified if a security interest having a special strength exists. With respect to a person whose entry into Israel has not yet been approved prior to the effective date, a security preclusion of a lesser strength may be required in order to justify a denial to grant a permit under the second transitional provision.

31. Consequently, according to the wording of the Law and its objectives, and in view of constitutional principles based on which it is implemented, a person who applies for a permit for the first time pursuant to the second transitional provision set forth in section 4(2), is subject directly to the provisions of section 3D of the Law concerning the security preclusion. In the event that the Minister of the Interior determined that such an applicant, a resident of the Area, or his family member, may pose security risk to the State of Israel, then, according to this provision, permit "**shall not be given**" to him for a temporary stay in Israel. The use of this power involves the exercise of discretion, but in the balancing of the various considerations greater weight is given to the security concern. On the other hand, a person whose family unification application has already been approved in the past, and who resides in Israel by virtues of said permit, his application to extend the residency permit is subject to the first transitional provision in section 4(1) of the Law. According to this provision, the security preclusion described in section 3D of the Law, constitutes only one of the gamut of the considerations which the Minister of the Interior should take into account for the purpose of deciding whether to extend the validity of an existing residency permit in Israel. According to this provision, within the framework of his authority and the discretion exercised by him, **the Minister of the Interior is** authorized and **entitled to extend the validity of an existing residency permit, even if a security preclusion exists, as specified in section 3D**

of the Law, all in view of the entire circumstances of the case, and the relative weight which should be attributed to each one of the relevant considerations within the framework of the specific constitutional balancing, which is also derived from the reasonableness which is required of an administrative decision.

32. While exercising his authority under the transitional provisions, the Minister of the Interior must comply with the principles of administrative law. Therefore, the decision of the Minister of the Interior must be adopted within the framework of a proper administrative procedure, and it must be free from extraneous considerations, arbitrariness and violation of the rules of natural justice. The decision must be reasonable. Within the demand of reasonableness, the decision must be based on a proper factual infrastructure, it must rely on all relevant considerations and on them only, and it must be made based on a proper balancing between them within the realm of reasonableness. In view of the fact that the decision may involve a possible violation of a fundamental constitutional right of the first degree, which is vested with the Israeli spouse, it must also satisfy the proportionality criteria set forth in the limitation clause (HCJ 2028/05 **Amara v. Minister of the Interior**, paragraphs 9-17 of the judgment of President Barak (not reported, July 10, 2006)(hereinafter: **Amara**); HCJ 4541/04 **Miller v. Minister of Defence** , IsrSC 49(4) 94, 138 (1995); HCJ 5016/96 **Horev v. Minister of Transportation**, IsrSC 51(4) 1, 41 (1997); HCJ 6358/05 **Vaanunu v. GOC Home Front Command,** paragraph 12 (not reported, January 12, 2006); HCJ 11163/03 **Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel,** paragraph 22 of the judgment of President Barak (not reported, June 27, 2006)).

33. As a result of the competent authority's refusal to grant or renew the validity of a residency permit in Israel to spouses under the transitional provisions of the Temporary Order Law within the framework of a family unification procedure - the Israeli family members – the spouse and the Israeli minor children – are deprived of their right to maintain joint family life in Israel. Against this violation, stands the purpose of the Temporary Order Law, the protection of public safety in Israel. Although this case concerns a review of the administrative discretion which is exercised by the administrative authority, the criteria for the examination of said discretion are also drawn from the principles of constitutional law, since the exercise of the discretion involves violation of a fundamental human right, the right to a family. In view of the above, the manner by which the authority is exercised is conditioned upon the satisfaction of constitutional tests. The security purpose, underlying the exercise of the administrative authority must satisfy the tests of the limitation clause of the **Basic Law: Human Dignity and Liberty**, where the exercise thereof may violate fundamental rights to a family. As a general rule, a violation of a fundamental right for the purpose of protecting the safety of the State and of the citizens of Israel is for a proper purpose, which befits the values of the state as a Jewish and a Democratic state. The key question is whether the manner by which the authority is exercised under the Temporary Order Law, and which involves a violation of the fundamental right to a family for the purpose of realizing a security need, complies with the requirement of **proportionality**. For this purpose proportionality must be examined according to the sub-tests which were developed by case law. The rational connection test, the least injurious means test, and the proportionality test in the narrow sense - are the leading tests for the purpose of determining the proportionality of the violation of the constitutional right. For this matter, in the application of the security preclusion consideration to spouses who are subject to the transitional provisions, an appropriate link is required between the measure taken to prevent family unification and the purpose of securing state security and public safety; it is required that the security objective cannot be achieved by another least injurious means; and finally, it is required that a proper proportion exists between the nature of the violation of the right to a family and of the right to equality according to its strength, and the security advantage gained as a result of the denial of the requested unification (**Amara**, paragraph 11 of the President Barak's judgment). The scope of the security advantage which should be taken into account for the application of the

narrow proportionality test is not necessarily the entire scope of the possible security advantage as compared to a situation in which no other preventive measure was taken against the security threat; The advantage which should be taken into account is only the **marginal addition** to the security gained from the cessation of the family unification procedure, as compared to the possible use of alternative security means, such as the grant of temporary residency permits renewable on a short time basis, thus allowing a periodic supervision by the authority of the real danger posed by the spouse, resident of the Area, who resides in Israel; tightening the supervision over the spouse who resides in Israel, obtaining his undertaking to sever any connection he may have with hostile parties and putting such an undertaking to a test, and such similar means. In the application of the proportionality test as aforesaid, the relative weights which should be attributed to the violation of the right to a family as compared to the advantage to the security which stems from such violation, in case of refusal to renew a residency permit to an applicant whose family unification application has already been approved and who lawfully resides in Israel, may differ from the relative weights attributable in a case in which the applicant's unification application has not yet been approved, and whose application, which was submitted before the effective date, has not been decided on that date. We shall hereinafter shortly summarize each one of the values that the competent authority must take into account for in the application of the **transitional provisions**; There-after, we shall examine, whether there is room to interfere with the decision of the authority under the circumstances of this case.

The violation of the constitutional right to a family in the context of the transitional provisions of the Temporary Order Law

34. The refusal to grant an initial family unification permit, or a refusal to renew a permit which was granted in the past, severely violates the right to a family which impinges on a person's dignity, his personal autonomy and the *raison d'etre* which is intrinsically connected with his ability to realize full life within the framework of a family with a spouse and children. This violation cuts through the length and width of a person's life, and projects on his entire way of life and his ability to fully realize himself. It deprives a person from the ability to exhaust happiness in life, and condemns him to loneliness, separation and sad life during his best years. A refusal to extend the validity of a residency permit in Israel to a spouse, resident of the Area, who resides in Israel by virtue of family unification, is one of the most severe injuries inflicted on the fabric of family life and on the spouse who is an Israeli resident. As a general rule, it is even harsher than the impingement inflicted on spouses who have not yet been permitted to unite and live together in Israel (HCJ 59/83 **Cohen v. Jerusalem Municipality**, IsrSC 37(3) 318, 320 (1983); HCJ 237/81 **Da'abul v. Petch Tikva Municipality**, IsrSC 36(3) 365 (1982)). Following the grant of the initial family unification approval, the establishment of a family unit commences, and the united family starts to settle down in Israel. The spouse from the Area learns Hebrew, integrates in the labor market, children are born, they receive Israeli residency, they go to schools in Israel, and the family integrates into the fabric of Israeli society. The refusal to extend the validity of a residency permit in Israel to a person who complies with the conditions of the first transitional provision, forces the members of the united family in Israel to make a tragic choice. They must choose between the cut-off of the entire family from Israel, from the relatives, the extended family, the friends who live in Israel, from the culture and from the sources of employment on which they rely. This cut-off means a family, social, economic and cultural severance of a united family which lived and laid down its roots in Israel, sometimes for many years. The other option is a separation between the spouses. The Israeli spouse remains in Israel, the foreign spouse returns to the Area, and the children are severed from one of their parents. The split-up of the family under these circumstances has severe ramifications on all involved parties – the spouses and the children – and it involves the breaking up of the human, social, cultural and economic structures of the family.

35. The denial of an application of an Area resident to enter Israel for family unification purposes, in cases in which his entry has not yet been approved in the past, also entails severe consequences for the family, which has not yet experienced the establishment of a joint family unit. However, the severity of the impingement involved in said denial is not as harsh as the severity of the impingement inflicted on a person who has already been permitted to reside in Israel, and who has established full family life in Israel, with all that it entails. The difference between the scope of the expectation for family unification and the severity of the impingement thereof in these two situations is significant for the purpose of determining the proper balance between it and the severity of the required security preclusion within the context of the proportionality requirement. The Law, in its wording and purpose, attributed significance to said difference.

The security preclusion in the context of the transitional provisions of the Temporary Order Law

36. The obligation of the state to protect the life of its citizens puts the value of security on a very high level of importance. This value has two aspects: the social value, which projects on the obligation of the state to protect the security of its citizens; and an individual aspect, which projects on the right of the individual in society to have his life and safety properly protected, the grant of which is the responsibility of the government. The right to life is a person's constitutional right of the first degree, and it is situated at the top of the protected human rights in the **Basic Law: Human Dignity and Liberty**. However, the value of protection of the safety of life is not monolithic. Its relative weight changes from case to case, according to the probability level of the realization of the risk to life, which arises from the specific pertinent context of the matter. Sometimes, the value of security should be balanced against other values of a special importance, according to their relative weight.

37. The assessment of the risk posed by a certain person is a complex task. This task becomes especially difficult, when the assessment of the risk posed by a resident of the Area is required under the current security situation. The forces which fight Israel are forces of terror, which, not infrequently, are assisted by civilians for their needs. The source of the security risk may stem directly from the spouse resident of the Area, who applies for a permit or for an extension of a family unification permit. This is the case, when the permit applicant himself is engaged or involved with acts of terror. However, sometimes, it may stem not from the permit applicant himself, but rather from his relatives and family members who are engaged in terror activity; Under such circumstances, the concern is that said family members may use the family members of the unified family for the promotion of their dangerous actions (**Amara**, paragraph 14 of President Barak judgment, and **'Ajuri**). Therefore, in the assessment of the security risk posed by a resident of the Area who applies for a family unification, reference is made not only to the direct risk posed by the permit applicant himself, but rather, relative weight is also given to the family relations of the permit applicant with parties who are involved in terror, in view of the potential danger embedded in the abuse of these relations by parties that put the security of the citizens of Israel at risk. Hence, the definition of the security preclusion in section 3D refers not only to a **direct** security risk posed by the permit applicant himself, but also to an **indirect** security risk, posed by the family relations that the permit applicant has with parties that threaten Israel security.

38. However, it should be emphasized: the subject matter of the security preclusion under the Law is, in any event, a security threat posed **by the permit applicant himself** – either **a direct threat**, which stems from the concern that he is directly involved in terror activities, or an **indirect threat**, which stems from the concern that he would be inappropriately used by family members who are involved in terrorism. The purpose of the security preclusion is not to prevent a threat posed by a family member of the permit applicant, as such. It is concerned with the extent such threat projects on the security threat posed by the permit applicant due to his possible exploitation by terrorists for

destructive purposes ('**Ajuri**, pages 371-370; HCJ 1730/96 **Sabih v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 50(1) 353, 364 (1996)). The explanatory comments of section 3D of the Law explicitly state, that weight is given to the risk posed by a family member of the resident of Area, in view of the fact that it may, indirectly, point at the risk posed by the resident of the Area himself, all against the backdrop of the general professional assessment of security agencies according to which "**the relations that a resident of the Area has with a family member as aforesaid, who poses a security risk, may be abused, as has been proved more than once in the past**" (the explanatory comments to section 3D, Government Bills 173, 7 Iyar 5765 (May 16, 2005), page 626). In view of the fact that the risk posed the family member is only a possible indication of the risk posed by the resident of the Area who applies for family unification, it is only natural, that for the purpose of the implementation of section 3D of the Temporary Order Law, a **direct** security threat posed by a resident of the Area, which justifies a denial of an application for a residency permit in Israel due to direct security preclusion, cannot be compared to an indirect security threat which concerns the threat posed by the potential influence of the family member on the foreign spouse. It is only natural, that the strength of the direct preclusion is clearly greater than strength of the indirect preclusion, and the gap between them in the two situations should be taken into consideration in the balancing made by the competent authority between the security threat posed by the spouse, resident of the Area, relative to the severity of the violation of the right to a family embedded in the refusal to grant the permit.

Weighing the relevant values in the application of the transitional provisions

39. The competent authority which is required to make a decision in the application for a residency permit under the transitional provisions of the Law, must base its decision on principles of reasonableness and proportionality. Reasonableness is the criterion used to review the administrative discretion; whenever this discretion involves a possible violation of fundamental rights, it must also satisfy the proportionality test in connection with constitutional principles and the limitation clause in the Basic Laws.

40. In making its decision on the issue of the grant of a residency permit in the context of the transitional provisions, the competent authority must reasonably and proportionately weigh the different relevant values which compete in this matter. On the one hand, it must weigh the severe violation of the right to a family caused to an Israeli resident or citizen should the application be denied. In this context it must take into consideration the violation of equality caused as a result thereof, and the severity of the human ramifications for the spouses and children as a result of the inability to realize and maintain the integrity of the family unit in Israel, the permanent place of residence of one of the spouses. In the context of this consideration, and in view of the policy which was entrenched in the Temporary Order Law, a difference in weight and severity may exist between an impingement of an existing family unit which has already been unified in the past, and its further existence is requested, and an impingement of a family which has not yet been unified, and the unification application thereof was pending and has not yet been determined on the effective date. The severity of the impingement in the first case is greater since it entails the dissolution of a family unit which has already been established, the severance of the family from the familial, social and economic roots which have meanwhile been laid down, and the infliction of a great crisis on the fabric of the family's life which has been created over the years. In the assessment of the severity of the injury caused to the fabric of family life of the person who wishes to extend a residency permit which was granted in the past for family unification purposes, one should take into account, *inter alia*, the number of years during which the applicant who holds a permit in his possession has been residing in Israel, the extent of his integration into life in Israel, the size of his family, the chances of the Israeli spouse, in case of separation, to bear the family burden should his spouse be compelled to leave Israel, and the entire effect of the separation

between the spouses on the future existence of the family and the children. With respect to a unification application which has not yet been approved, one should take into consideration the severity of the injury caused by the mere deprivation, *ab initio*, of the spouses from jointly establishing a family unit, and the ramifications of said impingement on them and their children.

41. Against the violation of the right to a family, the competent authority should weigh the existence of a security preclusion against the permit applicant – a **direct preclusion** concerning the permit applicant himself, or an **indirect preclusion** which may be created as a result of his relations with family members who pose a security threat. Naturally, there is a difference in weight and severity between a direct security preclusion and an indirect security preclusion. The existence of a real direct security preclusion justifies the denial of a family unification permit, despite the severe violation of the right to a family, either a family which has already been granted a unification permit in the past, or a family which has not yet been granted a unification permit. This is not the case as far as an indirect preclusion is concerned. The threat posed by the permit applicant, which derives in its entirety, from his family relations with parties involved in terror, is a complex matter, which concerns assessment of probabilities, and requires a careful exercise of discretion. The indirect threat should be carefully assessed, and attributed its proper relative weight only, nothing more than that. A sweeping conclusion that each and every permit applicant, who has family ties with a person involved in terrorist activity, is disqualified, *a priori*, from family unification, should be avoided. In each particular case, the probability that the permit applicant himself would be subject to influence and pressure by family members, thus becoming a source of direct security threat, should be examined. For this purpose, objective information should also be used, to the extent possible, such as information regarding the long presence in Israel, for years, of the foreign spouse, against whom not even the slightest piece of information has been obtained associating him with any activity against Israel, despite having family relationships with terrorists. Such information may refute, at least *prima facie*, a presumption of an indirect security preclusion; When the case concerns women from the Area who live in Israel for years within the framework of family unification, who raise a number of children and share the burden of providing for the family, the concern that the potential risk of getting involved in terrorist activity would be realized by them in view of family ties to relatives involved in terrorist activity may be small; one should neither take lightly the meaning of the statistical data concerning the rate of cases in which it has been proved that such family relations, in fact, lead to the involvement of said residents of the Area in hostile activities against Israel. Such statistical data were not presented to the court. It should be further noted, that the strength of the family connection maintained by the permit applicant with his family members who are involved in hostile activities, as a factor which indicates, in and of itself, of a potential risk, should not be necessarily attributed a decisive weight, although the weakening of the connection or its total severance may be required to reduce the concern of the existence of an indirect security threat.

42. Against the direct or indirect security preclusion, the authority must assess, in the specific case, the weight of the violation of the right to a family, taking into account all relevant data to that matter. The greater the impingement on the right to a family, the greater the weight of the risk posed by the permit applicant, either a direct risk or an indirect risk, must be. To the same extent that the severity of the violation of the right to a family is not homogeneous when an extension of a formerly granted family unification application is concerned as compared to an application for a new permit which has not yet been granted in the past, so is the severity of the security threat which is not homogeneous when a direct security threat is concerned as compared to an indirect security threat which is posed by the permit applicant. The proper weighing of conflicting values should be made very carefully. A proper balancing thereof may justify, in appropriate cases, the taking of **proportionate measures to achieve the security purpose which do not involve the total denial of family unification,** and facilitate the maintenance thereof subject to certain conditions such as –

the grant of short term temporary permits which enable the exercise of continuous supervision over the conduct of the spouse and the family, the imposition of restrictive conditions concerning the maintenance of ongoing relations with family members who are involved in terror, the prevention of visits in the Area, the exercise of continuous supervision and surveillance by the authorities, etc.

The burden of proof

43. The burden to prove the probability that a security risk exists to a degree that justifies an impingement of a human right rests with the state (**Movement for Quality Government in Israel** paragraphs 21-22 and 49 of the opinion of President Barak; Aharon Barak, **Constitutional Interpretation**, third volume 477 (1994); HCJ 6821/93 **United Mizrahi Bank Ltd v. Migdal Cooperative Village**, IsrSC 49(4) 221, 428-429 (1995); Justice Zamir in **Tzemah**, pages 268-269). The state must prove that the need to protect the public against a real security risk necessitates a substantial violation of a human right, and that the public need cannot be addressed without such a violation, or, at least, without a more moderate violation which does not prevent a family unification altogether. It must prove that the probability of the security risk is so high that it requires the taking of measures to protect life and safety despite the fact that they violate human rights which are situated at the highest level of the constitutional hierarchy. Where the probability that the risk to life is at a level almost reaching certainty, even the most exalted of constitutional human rights will recede from it. Where the probability that the risk will be realized is lower, it is possible that the value of security will not justify any violation of human rights, or it may justify a moderate violation only. The strength of the probability that a risk exists is always balanced against the weight of the impinged values, all in accordance with the entire unique circumstances of the relevant case.

From the general to the particular – the specific balancing

44. Against the backdrop of the general criteria for the implementation of the transitional provisions of the Law, the question arises whether the refusal of the Minister to extend the residency permit of petitioner 2 in Israel, satisfies judicial review.

The data concerning petitioner 2's family

45. Petitioner 1 is an Israeli citizen and resident. He married petitioner 2, a resident of the Area, in 1996 and in 1998 their family unification application was approved. Their children were born in Israel and are Israeli citizens. Since their marriage and until the decision of the Minister not to renew petitioner 2's residency permit, about seven years have passed. To date, almost fourteen years have passed from the marriage and the commencement of the family's life in Israel. Over the years the family laid down roots in Israel. Petitioner 2 learnt Hebrew, studied a profession and is involved in public activity. Petitioner 1 is employed as a public servant by the planning and building committee. The children of the spouses were born, and they are raised and educated in Israel. Israel is the natural environment of the children, and petitioner 1's home land, and the family, as a unified and complete unit, wishes to continue to maintain its life in Israel.

This case falls within the first transitional provision – namely, an application to extend a residency permit which was granted in the past for the purpose of extending petitioner 2's stay in Israel within the framework of family unification. Section 4(1) applies to this case, which gives significant weight to the expectation of the permit applicant to have it renewed, and relates to the security

preclusion as a barrier which prevents the renewal of the permit, as one of a host of considerations which should be taken into account for this purpose.

The data concerning the security risk

46. The State specified in detail the substantial security risk posed by petitioner 2's family members who reside outside Israel, and who are involved in activities of terror organizations at a very high level of risk. The State mentioned for this purposes petitioner 2's father, who has meanwhile retired, who was employed by the security forces of the Palestinian Authority, and mainly – the association of her three brothers with Palestinian and international terror organizations, who pose a very high level of risk.

    The State argued that a potential risk was posed by petitioner 2, in view of the fact that her close relatives, who are involved in terror, may influence her and recruit her for their purposes, thus causing the State security damage. The indirect security preclusion posed by petitioner 2 was of a significant level in view of the nature of the involvement of several family members in terror activity of a wide scope.

47. We have reviewed the privileged information that the State provided to us for our perusal. The only thing which may be said following this review is that the risk posed by the family members – particularly the accumulation thereof in view of the number of the persons involved – is high. However, at the same time it may be said that petitioner 2 herself, is not directly involved in any anti-Israeli activity and that throughout the years she has been staying here – which currently amount to fourteen years – no real direct information was gathered against her. The mere family relations she maintains with her family members cannot be regarded as a direct involvement, on her part, in anti-Israeli activity, and her visit of her incarcerated brother does not necessarily indicate that she identifies with his activity, but may rather reflect a natural family connection she has towards him. In any event, nothing to the contrary has been proved. Therefore, the security threat which pertains to petitioner 2 focuses mainly on the **indirect threat** posed by her family members and from the potential risk that her family members would use her to promote actions which are intended to harm the security of the State of Israel and its citizens.

Balancing the conflicting interests

48. This case is complex in view of petitioners' powerful right to continue with the unification of the family, opposed by an indirect security preclusion concerning petitioner 2, which has a substantial weight, in view of the deep involvement of petitioner 2's three brothers in terror activities of a wide and dangerous scope.

49. The severity of the impingement of the right to a family as a result of respondent's refusal to grant petitioner 2 renewable residency permits in Israel is extremely high in this case. It means that the entire family, as one unit, must leave to another country, despite the fact that the father of the family and the children are Israeli citizens, the family has been well rooted here for fourteen years, and maintains its center of life in Israel. Alternatively, it entails the separation of the spouses from each other, and the split of the family unit between one spouse and the children, and the other spouse. Needless to say that the dissolution of the family unit in this manner inflicts a heavy blow on the integrity of the family, its welfare and the children's best interest, and a particularly weighty reason is required to justify it.

50. On the other hand, one should not take lightly the existence of a potential security threat which derives from the involvement of close family members of petitioner 2 in terror activity. One cannot

rule out the possibility that within the framework of their activity, they may try to use the family of their sister in Israel for the promotion of their purposes. This possibility indeed exists and cannot be disregarded, but the probability thereof is unclear, in the absence of any direct data which indicate that potentially, a real threat is posed by petitioner 2 in that regard. The interests of petitioner 2 and the interests of her brothers are not identical, and the potential risk posed by them is not identical to the potential of the indirect risk posed by her. During the fourteen years of the presence of petitioner 2 in Israel, no security information which relates directly to her was gathered – beyond family relations with her parents and brothers, who have been involved in terrorism for many years.

51. Under these circumstances, the balancing of the powerful right to a family which characterizes petitioners' family in this case, against the potential **indirect** security risk which derives from petitioner 2 due to her family relations with her father and brothers who are involved in terrorism, the severity of which and the probability that it may be realized, are merely hypothetical, indicates that there is no justification, at this time, for a general revocation of the residency permit in Israel which was granted to petitioner 2 within the framework of family unification. Even if there is a certain margin of risk which is posed by petitioner 2, the existence of which cannot be disregarded, this margin is tolerable, and this risk should be taken in order to prevent the dissolution of the family or its severance from its environment, as part of the price which we are required to pay for the purpose of maintaining a constitutional regime which protects human rights.

Nevertheless, a proportionate balancing between the conflicting interests, which attributes a proper weight to the security concern along the right to a family, justifies the imposition of various conditions on petitioner 2's continued stay in Israel which would forestall the security danger posed by her. These conditions are intended to deter and warn petitioner 2 from continuing to maintain family relations with her family members in the Area, some of whom are involved in terrorism, on the one hand, and to provide the security agencies with efficient means of control and supervision over petitioner 2's conduct in view of the potential indirect risk posed by her. In this manner, a correlation may be created between the strength of the right to a family and the weight of the existing security risk by finding a solution which properly weighs the conflicting considerations in this matter.

Conclusion

52. The following are the results which arise from the required balancing between the conflicting considerations:

As it has not been proved that petitioner 2 poses a security risk at a level which justifies the severe impingement involved in the cancelation of the residency permits which were granted to her within the framework of the family unification, the decision of the Minister of the Interior not to renew petitioner 2's residency permit is Israel within the framework of family unification should be revoked.

53. Nevertheless, in view of the indirect security preclusion posed by petitioner 2, her current status in Israel will be according to DCO permits valid for six months, renewable from time to time, provided that no new circumstances occur which would justify the cancelation thereof.

The grant of DCO permits as aforesaid will be conditioned upon petitioner 2's execution of a declaration before the competent authority, in which she will undertake to uphold the following conditions:

a. To refrain from maintaining any contact whatsoever – direct or indirect – with all her family members in the Area, and with other friends and acquaintances in the Area;

b. To refrain from entering the Area for any purpose and at any time;

c. To advise the competent authority, in advance, of her intention to exit Israel, and provide full details concerning her planned trip;

d. To refrain from any act or omission which may, either directly or indirectly, impinge state security or public safety.

The respondent may add additional conditions to the above undertakings as he may deem fit.

After a passage of time, subject to the changing circumstances, and at his discretion, the respondent may consider reinstating the A/5 residency permit which was in the possession of petitioner 2 before the refusal to renew it, or alleviating the conditions of the above undertaking, as he may deem fit.

Needless to say, that if petitioner 2 breaches any of the conditions included in the undertaking it may constitute cause for the revocation of the residency permit in Israel granted to her.

54. The petition is therefore accepted, and the *order nisi* becomes absolute, subject to the above specified conditions.

Justice

Justice S. Joubran

I join the opinion of my colleague, Justice **A. Procaccia**, and the conclusion reached by her in her judgment. Indeed, as my colleague describes, even the respondent does not claim that petitioner 2 poses a direct security risk, but merely argues that her family relations raise the concern that she may be detrimentally used by others. Indeed, this concern may not be disregarded, but in and of itself it cannot justify such a severe impingement of petitioner 2 in the form of the revocation of the residency permits which were granted to her within the framework of her joint life with petitioner 1. The concern that others may use petitioner 2 as means for the realization of their evil purpose indeed justifies the grant of measures to the security agencies to prevent the danger embedded in this situation, by extending the restrictions imposed on petitioner 2's presence in Israel and the subordination thereof to conditions. However, it should not cause petitioner 2 to pay the price of the deeds of her family members, by the infliction of such a severe impingement on her and her spouse, petitioner 1.

Justice

President D. Beinisch

I agree with the conclusion reached by my colleague, Justice **A. Procaccia,** under the circumstances of petitioners' matter. I also agree with her position according to which a distinction should be drawn between a person who applies for an extension of a residency permit and a person who has not yet been

granted such permit, a distinction which I shall elaborate on below. Nevertheless, I find it necessary to emphasize some aspects of my own which mainly relate to the guiding principles concerning the exercise of judicial review over the decisions of the Minister of the Interior to prohibit the extension of the presence in Israel of a resident of the Area who is married to an Israel, against the backdrop of security reasons which derive from a close family member.

1. The underlying premise for the examination of the issue before us in this petition, is that according to the majority opinion of the judgment of this court in HCJ 7052/03 **Adalah, Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior (**not reported**,** May 4, 2006)(hereinafter: **Adalah**), currently, the Temporary Order – with all arrangements established therein – satisfies the constitutionality tests.

2. In the aspect relevant to our matter, section 3D explicitly states that a security preclusion for the grant of a new permit or for the extension of an existing permit, may be based on a security risk to the State of Israel which stems from a resident of the Area or his family member, and for this purpose a family member is defined as "spouse, parent, child, brother and sister and their spouses". Thus, the legislator expressed the position of the security agencies as has also been broadly presented to us in the oral and written arguments, according to which state security may be at risk even in circumstances in which the risk derives from a close family member rather than from the foreign resident. In the words of my colleague, Justice **Procaccia**, this is an "indirect security preclusion". This determination is not new with us and in HCJ 2028/05 **Hassan Amara v. Minister of the Interior** (not reported, February 15, 2006) (hereinafter: **Amara**) President **Barak** (as then titled) held as follows:

> … A refusal to grant legal status in Israel due to "security preclusion" associated with the applicant himself, does not raise difficulty, provided that the refusal is based on proper factual infrastructure. The **Temporary Order Law** [emphasis appears in the original - D.B.] broadens the security preclusion exception to the applicant's family members as well. **Indeed, taking into consideration a risk posed by a close family member, is not generally improper**. In the current reality, in view of the severe security risks with which Israel copes, a security risk posed by a family member of a resident of the Area may also serve as a basis for the denial of an application for legal status in Israel… [Emphasis added – D.B.].

In view of the above, our underlying premise is that the decision not to allow the presence of a foreigner in Israel only because of the risk posed by his family members – is possible, and under certain circumstances satisfies the constitutional test (and see also paragraph 94 of the judgment of President **Barak** in **Adalah**). This leads to the conclusion that the **general** balancing arising from the provisions of section 3D and 4 of the Temporary Order between the realization of the constitutional right to family life and preserving the interest of public safety (in which additional constitutional rights are embedded) is possible but is subject to a specific examination of such applications, within the framework of the exceptions to the sweeping rule which was established in section 2 of the Temporary Order.

3. I will add further, that even if according to the majority opinion in the judgment of this court in **Adalah**, the general infrastructure underlying the relevant sections does not attest to an inherent constitutional difficulty, yet – and my collegue has broadly discussed this issue – one cannot disregard the fact that each decision not to allow the presence in Israel of a foreign spouse of an Israeli, severely violates the constitutional right to family life, as broadly discussed and established

in **Adalah** (and see for instance: paragraphs 6-7 of my judgment), and as such requires a careful examination of each such decision. In this context it was held in **Amara,** and this is also relevant to our case, that the Minister of the Interior must exercise his discretion according to the provisions of section 3D "according to the basic principles of Israeli administrative law. He must exercise powers which enable the violation of fundamental constitutional rights according to the criteria established in the limitation clause of the Basic Laws concerning human rights… a determination made by the Minister of the Interior under section 3D must therefore satisfy the proportionality requirement."

Thus, for instance, a decision not to extend a residency permit which was granted in the past due to a security preclusion which arises from a close family member of the applicant will satisfy the proportionally tests, if the Minister of the Interior fulfilled his obligation to conduct a thorough and rigorous examination of the entire administrative evidence presented to him, based on which he wishes to define the scope and extent of the potential risk posed by the foreigner for whom the status is requested, and prove by significant administrative evidence that a security threat is indeed posed by the status applicant **because of the threat posed by his family member** (and see also, paragraph 17 in **Amara).** In this context, I adopt the words of my colleague in paragraph 41 of her judgment concerning the gamut of the considerations which should be taken into account in the assessment of the risk posed by the applicant, and concerning the appropriate weight which should be attributed, in the assessment of severity of the risk, to security information regarding a direct security risk posed by the applicant as opposed to security information concerning an indirect risk posed by him, because of his family members. However, I would like to leave under advisement the issue concerning the probability test which my colleague wishes to adopt, as I do not find it necessary to decide in this matter in the case before us. In addition, there is no doubt that my colleague is correct in saying that a claim regarding a security need should not be blindly followed without questioning it, and it should be thoroughly examined on its merits according to the entire specific data. With respect to the two-phase test for the examination of the security concern presented by my colleague in paragraph 17 of her judgment, it seems that the examination standard of the first phase is merely ostensible, in view of the presumption of correctness enjoyed by the administrative authority. Under these circumstances, the main examination focuses on the examination of the strength of the security argument, since also sincere security considerations by which the authority is guided require review, in case they were attributed disproportionate weight due to excessive security margins taken by the security agencies. Anyway, this issue does not fully arise under the circumstances of the matter, since even my colleague agrees that we were presented with ample and significant security information, and there is no doubt that sincere security considerations were underlying the position of the security agencies, upon which the Minister of the Interior based his decision not to extend the residency permit of petitioner 2 in Israel.

On the other hand, and against the assessment of the risk embedded in the applicant of residency permit in Israel, the Minister of the Interior should also give, as aforesaid, a significant weight to the violation of the right to family life which is involved in the decision to reject the application. In this context, and I hereby join the opinion of my colleague, the Minister of the Interior is obligated to give significant weight to the status of the applicant and the type of application submitted to him, namely, whether it is the first time that the applicant requests a residency permit, or whether the application was submitted by a person who has already been granted a permit in the past according to prevailing tests and who currently wishes to renew same, which is the case in the matter at hand. My colleague bases her above determination, *inter alia*, on interpretation which draws a distinction between section 4(1) and section 4(2) – the transitional provisions of the Temporary Order Law. This distinction also arises from the basic principles of administrative law which differentiates between the refusal to renew a license as compared to the refusal to grant a new license. In addition to the above, I am of the opinion that in addition to the distinction drawn by my colleague between the provision of section 4(1) and section 4(2), there is a distinction which

pertains to another group which should be given weight in the examination of the application – which is the distinction between status applicants who submitted their applications before the adoption of the government resolution in May 2002 and a decision therein has not yet been made (whose matter is regulated by section 4(2) of the Temporary Order), and status applicants who submitted a new application for a residency permit after the effective date of the Temporary Order (and under the exceptions established therein over the years). Indeed, both groups have not yet been granted a permit, but *prima facie*, more weight should be given to the rights of those whose applications were submitted many years ago and remained unanswered merely because of a delay which occurred in the handling of their applications by the authority.

4. And from the general to the particular - under the circumstances before us, this is a difficult case the components of which are located on the two opposite ends of the scale. On the one hand, the ample information in the possession of the security agencies indicates that the father and brothers of petitioner 2 are involved in terror activity of a significant potential of risk. Thus, the States noted that the father of petitioner 2 was previously employed by the security forces of the Palestinian Authority and – most importantly - that the three brothers of petitioner 2 were involved in the activities of Palestinian and international terror organizations. This involvement of petitioner 2's family members indeed indicates of a real potential of risk which may be pose by petitioner 2, mainly due to the concern that either her family members or terror organizations may use her status in Israel and attempt to recruit her for their purposes. On the other hand, we are concerned with a petitioner who has been residing in Israel for many years, partly under a residency permit which was granted to her by the Ministry of the Interior, and during which she and her Israeli spouse had children who are Israeli citizens, who are being raised and educated in Israel. Over these years petitioner 2 learnt Hebrew, acquired professional skills and worked as the secretary of the president of the Sharia court of appeals. Currently, petitioner 2 is a social activist in the women council of Zemer. Hence, before us is a petitioner whose life is deeply connected with the State of Israel and who has been maintaining in Israel, together with her Israeli spouse, for many years a family unit, which may be dissolved as a result of respondent's decision, and cause severe harm to petitioner 2, her spouse and their children. Under these complex circumstances, I agree with my colleague that the proper balancing of all considerations requires the formulation of a solution which would enable to allow petitioner 2 to stay in Israel for the time being, and which would create a mechanism which would assist to reduce the potential of the indirect security risk embedded in her continued presence in Israel. The proposal of my colleague, according to which, for the time being, petitioner 2's presence in Israel would be permitted by residency permits (DCO permits) valid for six months, renewable from time to time subject to up-to-date examination, all subject to the host of conditions specified by my colleague in paragraph 53 of her judgment, reflects, in my opinion, a proper balancing under these complex circumstances.

Therefore, and in view of all of the above, I join the conclusion of my colleague that the petition should be accepted.

The President

Therefore, the conclusion is as stated in the judgment of Justice Procaccia.

Given today, 8 Adar 5770 (February 22, 2010).

The President Justice Justice