HCJ 3648/97

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HCJ 2355/98

HCJ 2567/98

HCJ 3533/98

HCJ 4019/98

HCJ 4110/98

HCJ 4623/98

HCJ 5188/98

Petitioners in HCJ 3648/97	1. Yisrael Stamka
	2. Bijelbahan Fatel
	3. Miriam Gorodetsky
	4. Peter Pobi
	5. Zohar Yifat
	6. Steven Wally Adeniji
Petitioner in HCJ 8016/96	Jorge Arnulf
Petitioner in HCJ 343/97	Anita Rantzer
Petitioners in HCJ 604/97	1. Ido Idan
	2. Tatiana Wodenski
Petitioner in HCJ 924/97	1. Yitzhak Friedman
	2. Davina Dragomir
Petitioners in HCJ 2147/97	1. Baruch Semo
	2. Zion Azav Tespazag

Petitioners in HCJ 2180/97	1. Abdullah Yildiz 2. Natalia Kadoshvitz
Petitioners in HCJ 3533/97	1. Tatiana Ivanovna Valchok 2. Boris Sapozhnikov
Petitioners in HCJ 4514/97	1. Webeto Warko Imer 2. Semelvit Vladias
Petitioners in HCJ 4696/97	1. Alexander Diachenko 2. Alexandra Gorlov
Petitioners in HCJ 7187/97	1. Boris Srebrenic 2. Alicia Vasiliadi 3. Yuri Vasiliadi
Petitioners in HCJ 7218/97	1. Skub Renata 2. Agponikov Igor
Petitioners in HCJ 7346/97	1. Simona Wilf 2. Jugen Hosano 3. Einat Primo 4. Prince Hays Amlalo

Petitioners in HCJ 7353/97	1. Yevgeny Stramovsky 2. Larissa Shevetz
Petitioners in HCJ 7604/97	1. Hannah Yisraeli 2. Frederick Kuamina Wilson
Petitioners in HCJ 19/98	1. Ashmei Ichelhum Tespai 2. Abeba Pishah
Petitioner in HCJ 92/98	Mesfin Matheus Bakela
Petitioner in HCJ 151/98	Mazalach Peretz
Petitioners in HCJ 468/98	1. Garda Gamaliel 2. Godwin Iheanacho Ugwu
Petitioners in HCJ 588/98	1. Moshevitz Igor 2. Kozayev Oksana
Petitioners in HCJ 2125/98	1. Kuznezov Maxim 2. Vasiliev Irina
Petitioners in HCJ 2355/98	1. Miriam Yanai 2. Joseph Uchenna Dike

Petitioners in HCJ 2567/98	1. Yagudaev Inesa 2. Bobriniov Vaceslav
Petitioners in HCJ 3533/98	1. Dimitri Sendekov 2. Nina Lookout
Petitioners in HCJ 4019/98	1. Dov Holzberg 2. Rosalia Chipai
Petitioners in HCJ 4110/98	1. Genadi Lifschitz 2. Valentina Ovchinkova 3. Leah Hazzan
Petitioners in HCJ 4623/98	1. Ella Elizabeth Shunia 2. Ade Juwon Ajifolawe Ojomo
Petitioners in HCJ 5188/98	1. Semion Rabinikov 2. Irina Rabinikov (Rastborchev)

v.

Respondents:	1. Minister of the Interior 2. Head of the Visas and Aliens Department in the Ministry of the Interior

3. Head of the Population Authority

Respondent in HCJ 604/97

4. Head of the Consular Section – Ministry of Foreign Affairs

Attorneys for the Petitioners in HCJ 3648/97: Anat Scolnicov, Adv.; Anat Ben-Dor, Adv.; Nicole Maor, Adv. (Center)

Attorney for the Petitioner in HCJ 8016/97: Rami Amir, Adv.; Nir Amoday, Adv.; Eyal Akunis, Adv.

Attorney for the Petitioners in HCJ 343/97 and HCJ 604/97: Shmuel Mintzer, Adv.

Attorney for the Petitioners in HCJ 924/97, HCJ 2124/97, HCJ 2180/97, HCJ 4514/97, HCJ 19/98, HCJ 3533/98, HCJ 4019/98: Yosef Ben-Menashe, Adv.

Attorney for the Petitioners in HCJ 3522/97: Arnon Shotland, Adv.

Attorney for the Petitioners in HCJ 4696/97: Grigori Geiman, Adv.

Attorney for the Petitioners in HCJ 7187/97: Ilya Waisberg, Adv.

Attorney for the Petitioners in HCJ 7218/97: Rami Mashinsky, Adv.

Attorney for the Petitioners in HCJ 7346/97, HCJ 7604/97, HCJ 468/98, HCJ 2355/98, HCJ 4110/98, HCJ 4623/98: Theodor Schvarcberg, Adv.

Attorney for the Petitioner in HCJ 92/98: Avinoam Ashkenazi, Adv.

Attorney for the Petitioners in HCJ 2125/98: Vadim Strovichovsky, Adv.

Attorney for the Petitioners in HCJ 2567/98: Lora Maxic, Adv.

Attorney for the Petitioners in HCJ 5188/98: Dayana Har-Even, Adv.

Attorney for the Respondents: Yochi Gnessin, Adv. (Director of the High Court of Justice Affairs in the State Attorney's Office); Dana Brickman, Adv.; Aner Helman, Adv.; Udit Corinaldi-Sirkis, Adv.; Orit Koren, Adv.

Abstract:

For many years, the Ministry of the Interior interpreted the Law of Return, 5710-1950, such that a non-Jew who married a Jewish Israeli citizen was entitled – upon marriage – to the status of a Jew under the Law of Return, and to the status of an *oleh* [Jewish immigrant] under the Nationality Law, 5712-1952. In 1995, the Ministry of the Interior changed its view. According to the new interpretation, that non-Jewish partner would not fall within the scope of the Law of Return, and consequently, would not be entitled to the rights granted a Jew, including the right to automatic Israeli citizenship upon request.

In their petitions, the Petitioners – who are "intermarried", such that one of the partners is Jewish and the other is not – challenged the Ministry of the Interior's new interpretation. They also challenged the Ministry of the Interior's policy requiring the non-Jewish spouse to leave the country until the Ministry of the Interior had completed its examination of whether the marriage was bona fide or fictitious.

The Supreme Court held:

A. (1) An agency that understood its authority in one way – even over a long period of time – and eventually reached the conclusion that it had erred in its interpretation, and that its authority differed from what it previously thought, is not only permitted to change its erroneous conduct, but is required to do so. Therefore, there are no grounds for a claim that the authority is estopped from retracting its mistaken interpretation.

(2) Past acts and decisions made in light of the incorrect interpretation will stand, if only because individuals acquired interests and rights, and it would be improper to change their situation for the worse.

B. (1) In accordance with the principle of the separation of powers, the authority and responsibility for interpreting the law are granted to the judiciary. Therefore, the Court will grant only very limited weight to the interpretation of the administrative authority acting thereunder. Moreover, it is the Court that is the expert in the matter of interpreting laws.

(2) In this regard, a distinction should be drawn between laws intended to establish behavioral norms and laws of a purely professional or technical nature. In the case of the latter, the Court should properly be aided by the interpretation of the administrative agency possessing the technical knowledge and expertise in the concrete matter.

(3) In the instant case, the Law of Return is a normative law that constitutes one of the foundational laws of the State. Therefore, the interpretation given to the law by the Ministry of the Interior has minimal, if any, influence on the Court in the interpretation of this law.

C. (1) The primary characteristic of the right of return is that is almost an absolute right. Every Jew, wherever he may be, can and is entitled – at his volition alone – to realize the right of return, except in those limited, exceptional cases listed in sec. 2(b) of the Law of Return. In light of sec. 2(a) of the Nationality Law, a Jew who falls within the purview of the Law of Return becomes a citizen of the State upon arriving in Israel, without any waiting period.

(2) As opposed to this, the entry of a non-Jew to the State of Israel, and his presence in the country, are subject to the Entry into Israel Law, 5712-1952, which establishes a regime of permits, and grants the Minister of the Interior and his appointees broad discretion as to whether or not to grant a permit to enter and stay in Israel.

D. (1) The provisions of sec. 4A of the Law of Return – which grant the rights of return to the non-Jewish family members of Jews – was intended for intermarried families in the Jewish Diaspora, in order to preserve family unity and encourage their immigration to Israel. The legislature sought to realize this purpose by granting the rights of return to a family member of a Jew, even without recognizing that person as a Jew.

(2) Therefore, although by its language, sec. 4A would appear to apply to the non-Jewish spouse of a Jewish Israeli citizen who wishes to benefit from the Law of Return and the Nationality Law, the main purpose of the law was not intended for such cases.

(3) The necessary conclusion is that the right of return is granted exclusively to the family members of Jews prior to their immigration to Israel. The right is not afforded to the Petitioners, inasmuch as their spouses are Jewish Israeli citizens – whether by birth or by realizing their right of return prior to their marriage – and they do not enjoy the power to grant the right of return to their spouses.

E. An alien who marries an Israeli citizen does not acquire a right to naturalization by the very fact of the marriage, and the Minister of the Interior holds the authority to grant or deny an application for naturalization submitted by that alien spouse. Therefore, by virtue of sec. 13 of the Naturalization Law, the Minister of the Interior holds the authority to issue a deportation order to such a spouse who is neither an Israeli citizen nor an *oleh* under the Law of Return if he is in Israel without a residence permit.

F. (1) An administrative agency that establishes internal directives that affect individual rights has a duty to bring those directives to the knowledge of the concerned parties by means of publication to the general public or by some other means. This duty is a precondition to the establishing and implementation of the directives.

(2) The Ministry of the Interior's policy requiring a non-Jewish spouse who married an Israeli to leave the country until the completion of an examination of the legitimacy of the marriage was not published in an orderly manner by the Ministry of the Interior, except for a one-time, general notice in the daily newspapers. Such a situation borders upon illegality.

(3) The fact that some of those affected by the lack of publication of the policy reside in Israel unlawfully would not appear to prevent raising the argument that the administrative agency failed to fulfill its duty to publish under the legality principle.

G. The Minister of Justice's authority to deport an alien under the Entry into Israel Law is very broad, but it is not absolute. The exemption from stating reasons – granted to the Minister by virtue of sec. 9(b) of the Administrative Procedure Amendment (Statement of Reasons) Law, 5719-1958 – denies the possibility of effective judicial review of the deportation authority.

H. (1) The proportionality requirement – which applies to the exercise of discretion of every authority – requires that there be a rational connection between the means chosen by the authority and the objective it seeks to achieve, and that the harm that the administrative policy causes to the individual not be inordinately greater than the benefit of the policy.

(2) The Ministry of the Interior's desire to combat the phenomenon of "fictitious marriages" is a "proper purpose", however, the question is whether the means that it chose – requiring that the non-Jewish spouse of an Israeli citizen leave the country until the end of the examination of the legitimacy of the marriage – exceeds its contribution to advancing its objective.

(3) First and foremost, real doubts arise in regard to the existence of a rational connection between the said policy and promoting the objective of reducing the number of fictitious marriages, for a number of reasons. First, it would appear, on its face, that the demand that the non-Jewish spouse leave the country until the conclusion of the examination may, on the one hand, not deter a person who has decided to acquire Israeli citizenship by means of a fictitious marriage, while on the other hand, it may severely harm legitimate marriage relationships as a result of the separation imposed by the policy.

(4) Second, although the Ministry of the Interior has followed this policy for a number of years, it did not show that it actually contributes to a reduction in the number of fictitious marriages. The Ministry of the Interior did not present any relevant data as to the effect of the policy upon fictitious marriages.

(5) Third, it would appear that removing one spouse (or both together) from the country until the conclusion of the examination may actually make it more difficult to conduct some of the examinations required in assessing the legitimacy of a couple's relationship, and primarily, to enquire into whether the couple live together and maintain a common household.

(6) The further requirement of proportionality – that there be a proper relationship between the public benefit achieved by the policy and the harm inflicted thereby upon the individual – is not met in the instant case. The policy adopted by the Ministry of the Interior severely and painfully harms many couples by ripping them from one another for a period of months, in addition to the economic and other burdens it imposes upon the couple, in order to achieve what would appear to be a purely speculative, unproven objective.

(7) Therefore, the necessary conclusion is that the Ministry of the Interior's policy in regard to aliens married to Israelis while residing in Israel without a permit does not meet the proportionality test and is unlawful and void. The policy is also inconsistent with fundamental principles of a democratic regime that is concerned for civil rights.

(8) This does not mean that there are no possible cases in which the Ministry of the Interior is authorized to demand that a non-Jewish spouse leave the country until the conclusion of the examination of the legitimacy of the marriage. This would be the case where the fictitious nature of the marriage is facially obvious on the basis of clear evidence obtained in the course of the preliminary examination, or where the marriage certificate is a manifest forgery. In such cases, the said means may be employed after granting the couple an opportunity for a hearing of their arguments.

(9) However, in the usual case, the very fact that the non-Jewish spouse resided in Israel unlawfully at the time of the celebration of the marriage does not permit the Ministry of the Interior to condition addressing an application for naturalization upon the spouse's leaving the country. The proper solution in such situations would appear to be that the unlawful residence at the time of the marriage would place a heavier-than-normal evidentiary burden upon the couple for proving the legitimacy of the marriage.

9. (1) There are no grounds for intervening in the Ministry of the Interior's policy to apply the same arrangement for granting permanent residency to the spouses of Israeli citizens that it applies to the spouses of Israeli residents in regard to the waiting period required of the alien spouse prior to receiving permanent residency.

(2) It would be proper that the waiting-period requirement for an alien spouse be established in regulations, or at least in internal administrative directives published to the public at large.

10. (1) Section 7 of the Nationality Law authorizes the Minister of the Interior to grant citizenship to the spouse of an Israeli citizen even if that spouse does not meet the general criteria for citizenship detailed in sec. 5(a) of that law. However, the Minister holds broad discretion in this regard. Just as the Minister can waive the criteria set forth in sec. 5(a), he may decide not to waive them, and insist that some of them they be met. However, in the framework of his discretion, the Minister cannot ignore the provision of sec. 7 permitting leniency for the spouses of Israeli citizens requesting Israeli citizenship.

(2) In this regard, the burden is upon the Minister to explain why he does not exempt such a spouse from the criteria under sec. 5(a) in whole or in part. Only in very exceptional cases would it possible to accept the Minister's decision to require a spouse to meet all the criteria under sec. 5(a).

(3) In practice, the Minister of the Interior's policy, as presented to the Court, shows that there are not real differences between the naturalization requirements for spouses of citizens and persons seeking naturalization who are not spouses of Israeli citizens. This is particularly true in regard to the lengthy waiting period of nearly six years before the Minister is willing to begin to process an application for the naturalization of a spouse of an Israeli citizen. In this regard, the Minister's policy is not consistent with the legislature's directive under sec. 7 of the Nationality Law to show leniency to spouses of citizens in the naturalization process. The requirement also does not meet the reasonableness and proportionality tests.

(4) Therefore, the Minister must establish and publish a policy by which the spouse of a citizen will be granted citizenship at the conclusion of a reasonable period of time, as shall be established, and upon meeting the prerequisite criteria. This policy must also relate to exceptional cases. Refraining from addressing all naturalization applications on their merits is prohibited.

The Supreme Court sitting as High Court of Justice

Before: Justice M. Cheshin, Justice D. Dorner, Justice D. Beinisch.

Judgment

Justice M. Cheshin:

1. Twenty-eight petitions stand before the Court, in the matter of thirty-one married couples. Just as no two people are entirely alike, so the matter of each of those thirty-one couples is not identical to that of any of the others. However, each in its own way, all of the petitions (except one) raise the same legal questions that require resolution. That being the case, we decided to address all of the cases together, and we shall hand down one decision in them all. What follows is that one decision.

2. "A', a Jewish man and an Israeli citizen, marries "B" abroad – whether by a proxy "Paraguay marriage", or by a marriage in which both are present in a foreign state – and "B" is non-Jewish woman who is not an Israeli citizen. Similarly, "C", a Jewish woman and an Israeli citizen, marries "D", who is not Jewish and not an Israeli citizen, in a foreign marriage. Both are "mixed marriages". Thirty-one couples are petitioning us, and all but one (HCJ 604/97 *Ido Idan v. Minister of the Interior*) are mixed couples according the model we described – a couple in which the man is a Jewish, Israeli citizen and the woman is a foreign non-Jew, or a couple in which the woman is a Jewish, Israeli citizen and the man is a foreign non-Jew. In the *Ido Idan* case (HCJ 604/97), both partners are not Jewish – the man is an Israeli citizen, and the woman is a citizen of Uzbekistan – and so the petition raises only some of the questions that we will address. For the sake of simplicity, we will address below the model of a couple in which the man is a Jewish Israeli citizen and the woman is a foreign non-Jew. Needless to say, the solutions that we will propose will also apply to couples in which the woman is a Jewish Israeli citizen and the man is a non-Jewish foreigner. As for couples in which one partner is Israeli (non-Jewish) and the other partner is not Israeli (and non-Jewish), the same rule will apply, except in regard to the Law of Return, which applies only to Jews and their non-Jewish family members (as we shall further explain below).

3. We are presented with four primary questions, as follows:

(1) Is the non-Jewish partner entitled to the rights granted by the Law of Return, 5710-1950, and the Nationality Law, 5712-1952, to a Jew who immigrates to Israel? Is that partner entitled to Israeli citizenship as if she were a Jew who immigrated to Israel?

(2) In most of the petitions, the non-Jewish, foreign partner has been asked to leave the country for a period of months until the Ministry of the Interior can investigate the marriage, primarily to ascertain whether it is bona fide or fictitious. Is that policy justified, and should the Ministry of the Interior be permitted to continue to act in accordance with that policy, as it has until now?

(3) On the assumption that the answer to the first question is negative – in other words, that the non-Jew is not entitled to the rights granted a Jew under the Law of Return, 5710-1950 – what is her status under the Nationality Law, 5712-1952? Does she enjoy preferred rights under this law, or is she the same as any immigrant?

(4) Most of the Petitioners further request that their marital status be registered in the Population Registry, and the question is whether the Ministry of the Interior is justified in refusing that request?

We will address each of these questions in order.

The Right of a Non-Jewish Spouse to Return

The Administration's longstanding Interpretation of the Law

4. As we stated at the outset, this is the model upon which we will base our opinion: A Jewish, Israeli citizen marries a woman – who is not Jewish and not an Israeli citizen – in a foreign marriage ceremony. Most of the couples before us were married by means of "Paraguay marriages", which are performed by correspondence with the competent authorities in Paraguay. Each of the partners appoints a proxy in Paraguay, and those proxies celebrate the marriage on

behalf of the partners without the partners leaving the borders of the State. Some of the couples married in a foreign state in a regular marriage ceremony.

5. For many years, and until just recently, the Ministry of the Interior interpreted the Law of Return such that the non-Jewish partner of a Jew who was an Israeli citizen at the time of the marriage was entitled – upon marriage – to the status of a Jew under the Law of Return, and to the status of an *oleh* [Jewish immigrant] under the Nationality Law, as if he were a Jew. In other words, the non-Jewish partner was entitled to "return" like any Jew. (See and compare, for example: HCJ 1850/93 *Chima Eduares Oniolo v. Ministry of the Interior* (unpublished); HCJ 3680/95 *David Teveria v. Ministry of the Interior* (unpublished)). In 1995, the Ministry of the Interior changed its view, and began to interpret the law differently. According to the new interpretation, the non-Jewish partner would not fall within the scope of the Law of Return, and consequently, would not be entitled to the rights granted a Jew, including the right to be granted automatic Israeli citizenship upon request. The latter interpretation is the one that the Respondents are advancing before us.

Against the background of this alternative reading, the Petitioners argue that – after a generation of acting otherwise – the authorities of the Ministry of the Interior are estopped from reconsidering and reinterpreting the law in a different manner than they have over the years. In other words: Once the Ministry of the Interior stated its position in the past, it should not be permitted to recant and state otherwise. The interpretation given in the past has rooted itself, as it were, in the law itself: the interpretation "shall become one" [Ezekiel 37:17], and none shall separate "between the joints" [I Kings 22:34]. That being the case, the Petitioners further argue that they are, in consequence, entitled – by the original interpretation – to what is theirs, and to be granted Israeli citizenship on the basis of their request, alone. This argument raises a serious question in regard to the rules interpretation in all its force, and it is this: when a law is brought before the Court for interpretation and for establishing its scope, can the Court take into consideration – as a valid factor – the interpretation that the administrative agency employed, sometimes over the course of many years? The competent agency has conducted itself in some way or another in interpreting the law. In coming to interpret that very same law and its scope, would it be proper for the agency's interpretation, in and of itself, to influence the Court's discretion to any extent? This is not a new question, and we will say a few things about it.

6. On the claim of estoppel – raised gently and half-heartedly – we will comment only briefly. An agency that understood its authority in one way – even over a long period of time – and eventually reached the conclusion that it had erred in its interpretation, and that its authority differs from what it previously thought, is not only permitted to change its erroneous conduct, but is required to do so. The legislature's word is law, and the law stands unchanged, unless the agency misunderstood it. Needless to say, we are speaking of the agency's prospective acts and decisions. As for past acts and decisions – acts and decisions made when the law was incorrectly interpreted – the rule may, at times, be different, if only because individuals acquired interests and rights, and it would be improper and incorrect to change their situation for the worse.

7. The question of the weight that should be attributed to the agency's conduct when the Court addresses the interpretation of the law is separate and distinct from the question of estoppel. What weight should be given to the specific conduct of the authority competent to interpret it when the Court addresses the interpretation of the law? Put differently: when the Court finds that its interpretation of the law is different from the practice of the agency authorized to interpret the law – a practice that it adopted for many years – should the Court grant weight to the agency's interpretation simply because that is how it interpreted the law for a long time? Needless to say, this question will arise when a law has two – or more – possible interpretation, which is not commonly the case. The author Aharon Barak addresses this in his book INTERPRETATION IN LAW, vol. II (1994) 791*ff*. (Hebrew) in which he describes three schools of interpretation: "the ignoring approach", "the zone of legality approach", and "the judicial discretion approach", and we will not reiterate was has already been written there.

8. To my own way of thinking, I believe that the recognized weight of an agency's interpretation -- whatever it may be – is a light as feather: as light as a feather, and at the same time, as heavy as a feather. First and foremost, we would say that we cannot ignore the recognized psychological influence of an agency's interpretation. Until the question was brought before the Court, the interpretation of the competent authority was the interpretation that was firmly rooted in reality, and the Court cannot ignore – even if only subconsciously – the interpretation that held sway for many years. Therefore, whatever the rhetoric may be, it would seem to me that as hard as it may try to free itself of the agency's interpretation, at the very least, the Court will be influenced by that interpretation that has infiltrated its consciousness. However,

and bearing that in mind, I am of the opinion that the agency's interpretation of a law – as such – should be afforded minimal weight. In any case, we can distinguish among different types of laws, and that minimal weight may differ from law to law. We will now begin with the first things first.

The first principle – first and foremost – is that the authority to interpret laws is given to the Court. That authority brings with it the responsibility to interpret the law. Here, then, is the principle of the separation of powers – or perhaps: the principle of the distribution of powers among the authorities – and the division of work among them: the Legislature legislates, the Executive executes, and the Judiciary judges – it interprets and establishes the scope of the law's application. Thus, once the legislature has enacted a law, the authority to interpret it falls to the Court, and to it alone. In LCrimA 1127/93 *State of Israel v. Yossi Klein*, IsrSC 48 (3) 485, 500-501, we wrote:

> The authority to enact laws is given to the legislative branch – to it and it alone. Or as Justice Silberg so poetically expressed it in CrimA 53/54 *Eshed, Temporary Transportation Center v. Attorney General* [IsrSC 8 785] at p. 819: "There is no legislature but the Legislature, and by it laws are measured".[1] However, once the child has come into the world, its cord severed from its mother, the legislature has completed its task (for that time) – like a *functus officio* – and from then it is the authority of the court to interpret the law, decide its force, the scope of its incidence, and its content. That is the law of the separation of powers between the Legislature and the Judiciary on one foot, the rest is commentary, go and learn …
>
> Once the legislative act is completed, the law leaves the legislature's court. It lives as if on its own, and its interpretation – in the broad sense of the term – is, at the end of the process, given to the courts, and to them alone.
>
> And see: HCJ 4031/94 *Betzedek et al. v. Prime Minister*, IsrSC 48 (5) 1.

So it is in regard to the interpretation of subsidiary legislation and normative administrative acts, as well. In one case, a minister established criteria for subsidies for public

[1] Ed: See I Samuel 2:2-3.

institutions, and the Court was called upon to interpret those criteria. We said in that regard that the interpretation of the criteria is for the Court, and not the minister who established them, stating:

> The Minister was required to establish criteria … nothing will be done except in accordance with the criteria. They establish rights, and they withdraw rights. The Minister's intent is meant to be expressed in the published criteria, and the published criteria are the Minister's intent. Once they have been published, and until they are rescinded or changed, the Minister no longer exercises control over the criteria. They live on their own, and are no longer dependent upon the Minister. While the Minister fathered them, from the moment of their birth – the moment of their publication – the umbilical cord was cut, and they are meant to live their own lives and speak for themselves. The baker cannot testify as to [the quality of] his dough, and like him, the legislature cannot interpret laws (except by the manner that it enacts those laws). That is the rule of law, that is the separation of powers, that is the democratic process (HCJ 5290/97 *Ezra et al. v. Minister of Religious Affairs et al*., IsrSC 51 (5) 410).

The law is asked of the court, and the court may not excuse itself from its duty – and authority – to interpret the law by making recourse to experts or to the interpretation of the competent agency. The court is the "expert" in interpreting the law – for that it was prepared, and that is its mission – and it may not turn to any but itself. That is what I thought in the past, and that is what I think even now in regard to our intervention in the decisions of the Labor Court, particularly in regard to the comprehensive thesis that the labor Court's "expertise" may serve as a bar to our intervention in its decisions. Thus, in HCJ 1520/91 *Wilensky v. National Labour Court*, IsrSC 46(5) 502, 519, I wrote:

> This consideration of "expertise" and of "specialization" as a reason for the non-intervention of the High Court of Justice in the decisions of the Labor Court is beyond me. Thus, for example, the Civil Service (Pensions) Law treats of labor law, but I do not know or understand why the Labor Court is more "expert" than the High Court of Justice in interpreting and deciding its intended legislative

> purpose in any particular case. So it is in regard to that law, and all of labor law, as we are concerned with a corpus of norms that is part of the national law like any other legal area. The "expertise" and "proficiency" of a traffic court judge, for example, in traffic law is greater than the "expertise" of most of the justices of this Court, but it is unthinkable to say that that "expertise", in and of itself, carries weight in interpreting a statute that is a member of the traffic law family.

And I added in this regard in HCJ 3679/94 *National Association of Managers and Authorized Signatories of First International Bank of Israel Ltd v. Tel-Aviv Labour Court*, IsrSC 49 (1) 573, 592:

> We thus find that in addressing a particular matter, the Court considers the interpretation of some law, and concludes that the relevant, material considerations pulling to each side lead to a certain interpretation of the law. The Court then, so to speak, places all the interpretations that present themselves on the scales in a "correct interpretation competition", and at the end of the process it concludes that a particular interpretation is decisive. Now, having arrived at the "right interpretation", would it change its mind simply because the Labor Court – as an "expert" who "specializes" in labor law—thinks otherwise? The answer, in my opinion, is no.

And further on (*ibid*., p 593):

> …the decision of the Labor Court, as such – as distinct from its reasoning – cannot serve as a consideration, in and of itself, in the interpretation of a law. Our relationship to the law is direct, and our conversation with it is unmediated. A judge, each judge, is a lone knight in the fields of the law and justice. Indeed, the judge's heart will ever be open to the opinions of others, to hear voices from near and afar, but the fact that some person holds a particular opinion, as such, must never influence his discretion, be that person be as exalted and venerated as he may be (all subject to the express provisions of law like the provisions of binding precedent). The responsibility for the interpretation of law and precedent couches at our door, and we cannot shirk it off.

If that was said in regard to the Labor Court – presided over by judges like myself and my colleagues – would the same not hold true for the interpretation of an administrative agency, and even *a fortiori*? The question provides its own answer.

9. Thus far, the grounding principle: The Court's exclusive authority to interpret laws is its authority and its attendant duty to interpret the law. We would also note this: all laws are not the same. For example, when a law concerns a professional or technical subject, the practice of the competent agency – an agency that has professional or technical knowledge, or that is aided by advisors with the professional or technical knowledge – should be attributed weight when the Court addresses the interpretation of the law. The matter is different in regard to a normative subject, that is: a subject regarding which the legislature intends to establish behavioral norms, in order to direct the conduct of the general public and of individuals. The "expert" on the normative subject is the Court alone, and it is the Court that will establish the law and its scope. Moreover, as we climb higher up the normative pyramid, the responsibility of the Court for interpreting the law will increase, while the weight that will be given to the interpretation of the competent agency will approach zero.

As for the matter before us, we will state emphatically: we are concerned with the interpretation of a provision of the Law of Return – the question of the incidence of one of the State's foundational laws. Not only does its interpretation not require "expertise", but given the law's exalted place on the Israeli normative scale, I do not have the slightest doubt that the governmental agency's interpretation of the law – even if over a period of many years – is of no importance whatsoever. If that is the general rule, it is all the more so the case when the agency has changed its approach, and has suggested an interpretation of the law that the Court considers correct.

10. We would conclude in adding in this regard that all that we have said – concerning an interpretation by the Court that quashes the interpretation of an administrative agency – as good and correct as it may be, is solely prospective, and the petitions that require our decision concern the future. Indeed, we cannot turn a blind eye to the consequences of a longstanding practice, and it would not be proper to harm – even indirectly – rights that were acquired by individuals on the basis of the agency's prior interpretation of the Law of Return. Our interpretation of the Law is

not retrospective, and we will not stir up the past, "for once an error has entered, it remains" [TB Pesachim 112a]. (And further see and compare: the *Klein* case, *ibid*., p. 504 and the references there; AHARON BARAK, INTERPRETATION IN LAW, vol. 3, p. 740 (Nevo, 1994)).

11. Now that we have found that the Ministry of the Interior's interpretation of the Law of Return is of no consequence – or in the view of some, only of minimal consequence – we will turn to the Court's interpretation of the Law. The model, as we recall, is of a man who is a Jewish Israeli citizen married a foreign woman who is not Jewish. And the question is: does the Law of Return grant the non-Jewish partner the same rights that it bestows upon a Jew?

The Right of Return of a Non-Jewish Partner

12. We are all acquainted with the Law of Return and its amendments, but it would not be superfluous to remind ourselves of its language. The fundamental provision calls out to us from its first section, which states:

> Every Jew has the right to come to this country as an *oleh*.[2]

A Jew becomes an "*oleh*" by virtue of an "*oleh's* visa" or an "*oleh's* certificate" (sec. 2(a) and 3(a) of the Law, respectively), and the right of *aliyah* can be denied only for the special reasons set out in sec. 2(b) of the Law (the *oleh* is engaged in an activity directed against the Jewish people; the *oleh* is likely to endanger public health or the security of the State; the *oleh* is a person with a criminal past, likely to endanger public welfare).

In 1970, the Law of Return was placed upon the operating table, and the Knesset changed the genetic code that directs its implementation. We are speaking of the Law of Return (Amendment no. 2), 5730-1970, which added secs. 4A and 4B to the Law. Those sections state as follows:

> *Rights of members of family*

[2] The Ministry of Justice translation (4 L.S.I. 114) notes: "*Aliyah* means immigration of Jews, and *oleh* (plural: *olim*) means a Jew immigrating, into Israel" [http://www.mfa.gov.il/mfa/mfa-archive/1950-1959/pages/law%20of%20return%205710-1950.aspx].

> 4A. (a) The rights of a Jew under this Law and the rights of an *oleh* under the Nationality Law, 5712-1952, as well as the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.
>
> (b) It shall be immaterial whether or not a Jew by whose right a right under subsection (a) is claimed is still alive and whether or not he has immigrated to Israel.
>
> (c) The restrictions and conditions prescribed in respect of a Jew or an *oleh* by or under this Law or by the enactments referred to in subsection (a) shall also apply to a person who claims a right under subsection (a).
>
> *Definition*
>
> 4B. For the purposes of this Law, "Jew" means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.

To these provisions we would add sec. 2(a) of the Nationality Law, which states as follows:

> *Nationality by Return*
>
> 2. (a) Every *oleh* under the Law of Return, 5710-1950, shall become an Israel national by return …

(Section 2 of the Nationality Law goes on to set out details, restrictions and expansions, but for our purposes, we are primarily concerned with the above). For our purposes, we are primarily concerned with the provisions of sections 4A and 4B of the Law of Return, and sec. 2(a) of the Nationality Law as a derivative therefrom.

13. By its language, sec. 4A of the Law of Return is intended to broaden the scope of those entitled to benefit under the Law of Return. Since the adoption of sec. 4A, the Law of Return

does not apply exclusively to Jews. Its incidence expands to include family members of a Jew who is entitled to immigrate to Israel as an *oleh*. Those family members – even if they are not Jewish – are entitled to the right of a Jewish *oleh* by virtue of the Law of Return. (Also see and compare: HAIM COHN, THE LAW, pp. 497-498 (Jerusalem: Mossad Bialik, 1991) (Hebrew); Dr. Asher Maoz, *Who is a Relative in the Law of Return?* 38 HAPRAKLIT 637, 641-642 (Hebrew)).

Thus, the Petitioners argue that sec. 4A(a) of the Law of Return informs us that the rights of a Jew under that Law (and the rights of an *oleh* under the Nationality Law) "are also vested in … the spouse of a Jew", and the necessary conclusion is almost self-evident: A Jew is entitled to immigrate to Israel and become an Israeli citizen, the spouse of a Jew is vested with the same rights of a Jew, therefore: the spouse of a Jew is entitled to immigrate to Israel as an *oleh*, and become an Israeli citizen. Moreover, the Law itself does not distinguish between Jews – whether a Jew who has not yet immigrated to Israel and is not an Israeli citizen, or a Jew who is an Israeli citizen. All Jews are treated alike. And just as all Jews are treated alike, such should be the rule in regard to the (non-Jewish) spouses of Jewish Israeli citizens. It should be of no consequence that the (non-Jewish) partner became a spouse prior the Jew's immigration to Israel – in which case it is undisputed that he would be entitled to return – or whether the partner became the spouse of someone who was already a Jewish Israeli citizen. The Petitioners further argue that this conclusion is reinforced by sec. 4 of the Law, which equates the status of a Jew who immigrated to Israel after the enactment of the Law of Return and a Jew who was born in Israel or immigrated to Israel prior to its adoption, as the section states:

> *Residents and persons born in this country*
>
> 4. Every Jew who has immigrated into this country before the coming into force of this Law, and every Jew who was born in this country, whether before or after the coming into force of this Law, shall be deemed to be a person who has come to this country as an *oleh* under this Law.

Thus: every Jew is a Jew, and every spouse of a Jew – as the spouse of a Jew – is entitled, by virtue of section 4A, to the rights of a Jew, even if the Jew is an Israeli citizen at the time of the marriage.

The Respondents reply: Not so. "Spouse", as this term is used in section 4A of the Law of Return, refers only to a person who became the spouse of a Jew when that Jew was not (or was not yet) an Israeli citizen. Whereas if the Jew is an Israeli citizen, section 4A does not apply to him at all, and his spouse will not be entitled to the rights of a Jew under the Law of Return, nor to citizenship by virtue of return (as provided by the Nationality Law).

This raises the question: In regard to that "spouse of a Jew" referred to in section 4A(a) of the Law of Return – is every spouse of a Jew entitled to return and citizenship (as the Petitioners argue), or should we say that the text speaks exclusively of the spouse of a Jew prior to his becoming an Israeli citizen, as the Respondents contend? That is the issue that we will now address.

Linguistic Examination

14. As is our custom, as is the custom of a court, we will begin with a linguistic examination of sec. 4A of the Law of Return. A close reading of sec. 4A reveals that even a linguistic examination is not of one cloth. It would appear that, form a linguistic perspective, we find at least two interpretive levels, and even they do not coexist in harmony.

Reading sec. 4A in accordance with its plain meaning – and at face value – would seem to support the view of the Petitioners. As we see, the legislature instructs us that the rights of a Jew and an *oleh* are granted to the non-Jewish spouse of a Jew, and the Law does not express any limitation or restriction of any kind in regard to his status at the time of his marriage in regard to being, or not being, a citizen of the state. It would, therefore, appear that even if a Jewish Israeli citizen marries a non-Jewish woman – whether in Israel or abroad – and that woman request to enjoy the benefits of the Law of Return and the Nationality Law, both of those laws extend their embrace and grant her their rights. That is the interpretation of the Law in accordance with its plain meaning. We will refer to this interpretation as the "static linguistic construction".

Alongside the static linguistic construction we find the "dynamic linguistic construction", which is an interpretation that does not read the provisions of sec. 4A in isolation, as does the static linguistic construction. The dynamic linguistic construction tells us not to take sec. 4A out of its context – in this case, in the correct sense of taking something out of context – but to read it

in the context of all the provisions of the Law of Return, and that we read the Law of Return – along with sec. 4A – as a single, flowing unit; as a single idea that divided itself into sections and subsections simply due to our limitations, because of the paucity of our communication, because we are unable to express a complex idea other than be dividing it into words, phrases, sentences and paragraphs. Thus, if we read sec. 4A as it flows within the Law of Return, we can say that the underlying provision of the Law of Return is to be found in sec. 1, according to which a Jew is entitled to immigrate to Israel. Section 4A is nothing but a continuation of sec. 1. Section 1 flows into sec. 4A, and sec. 4A converges with the flow of sec. 1, and is to be understood as saying just this: that the right granted to a Jew to immigrate to Israel, is also granted to the members of that Jew's family when he immigrates. Indeed, the phrase "when the Jew immigrates to Israel" is not to be found expressly in sec. 4A. But although it is not expressly stated in the Law, it is subsumed in the text. Section 4A is a quasi-continuation of sec. 1, and the said family members in sec. 4A are the family members of that *oleh* referred to in sec. 1. That the spouse referred to in sec. 4A refers to a (non-Jewish) spouse at the time of the immigration of a (Jewish) spouse is a necessary conclusion. Of course, this interpretation removes a non-Jew who became the spouse of a Jew who is an Israeli citizen at the time of marriage, as the State argues. That Jew is not an *oleh*, and therefore, the non-Jewish spouse has no one upon whom the right can be grounded.

The decisive question in each and every case is whether or not the spouses were spouses before their immigration to Israel. If they were, then the non-Jewish spouse is vested with rights under the Law of Return and the Nationality Law, and if not, then not. We would further add that under the provisions of sec. 4A(b) of the Law of Return, the right of the non-Jewish spouse under sec. 4A – once having vested – remains whether or not the Jewish spouse is alive, and whether or not he immigrated to Israel.

15. To my mind, the dynamic linguistic construction is more persuasive than the static linguistic construction. It would be neither correct nor proper that we say that sec. 4A is a provision that dwells apart, not reckoned among other legal provisions. We have not found an ancient shard in an archeological dig upon which sec. 4A is engraved – a shard in isolation, without origin or destiny, unrelated to anything that came before it or that will come after it – a self-contained entity that we may understand thus, or perhaps otherwise. That is not the case.

Section 4A is planted in the body of the Law of Return with the intention that it be a living part thereof. The Law of Return flows within it, and it flows within the Law of Return. Against this background, it would be neither right nor proper that we uproot it from its place, grasp it between our fingers, and hold it up to the light to examine it in isolation. If we seek the truth, we must examine it *in situ*, in the context of the Law of Return, and we will find ourselves led inevitably to the spouses – one Jewish and one not Jewish – who became a couple before they came to Israel.

16. Of course, we will not suffice with interpreting the Law from within. We will continue our interpretive journey beyond the Law, to discover whence it came, how it came into being, and who conceived it and gave it life. We will learn wisdom and become enlightened, and then we will return to the Law and interpret it to the best of our ability.

About the Law of Return

17. There are few laws around the world like the Law of Return, and it is the justification – albeit not the only justification – for the existence of the Jewish State. "Every Jew has the right to come to this country as an *oleh* by return…", declares sec. 1 of the Law, and it language is like that of an anthem: a Jew – the soul of a Jew still yearns;[3] "as an *oleh*", because one ascends[4] to the Land of Israel, and those who leave permanently are "descenders" [*yordim*]; to "this country" – the name of the country is "Israel", but one does not ascend to Israel, one ascends to "the country". These are not the words of an ordinary law. They are the words of poetry. And let us recall the exalted, stirring words of Prime Minister David Ben-Gurion at the beginning of the debate on the Law of Return (6 *DIVREI HAKNESSET* 2035, 2036-3037):

> The Law of Return is one of the foundational laws of the State of Israel. It comprises a central purpose of our state, the purpose of ingathering the exiles. This law establishes that it is not the state that grants a Jew from abroad the right to settle in the state, but rather it is his inherent right as a Jew, if he desires to join in settling the land … The Law of Return has nothing in common with immigration laws. It is the law of the persistent history of the history of Israel.

[3] Ed: The reference is to the words of *Hatikva*, the Israeli National Anthem.
[4] Ed: The word *oleh* literally means "one who ascends".

> This law establishes the sovereign principle upon which the State of Israel was established. It is the historic right of every Jew, as such, to return and settle in Israel…

Some have argued that the right of return is absolute, and suffers no restrictions. Ultimately, the proposal that was accepted comprised two exceptions to this exalted right, albeit exceptions of limited scope, as set out in sec 2(b) of the Law (the Minister of the Interior can refuse an *oleh* visa to a Jew who is engaged in an activity directed against the Jewish people, and to a Jew who is likely to endanger public health or the security of the State).

The right of return is granted to every Jew – as such – and the primary characteristic of the right is its decisiveness – it is a right that is almost absolute. Every Jew, whomever, can and is entitled to – at his volition alone – realize the right to return, the right that "your children shall return to their country" [Jeremiah 31:17]. Other than those limited exceptions, the right is not contingent, and the authorities have no discretion as to whether the right of return will or will not be granted to a Jew who wishes to immigrate to Israel. The decisiveness of the Law derives from its uniqueness – from its being a concrete expression of the relationship between every Jew and the Land of Israel. A Jew from the "Diaspora" who wishes to settle in Israel is not an immigrant, he is an "*oleh*" to the land, he "returns" to the land, in the sense of "your children shall return to their country" [Jeremiah 31:16]. Indeed, the Law of Return is the direct continuation of the Declaration of the Establishment of the State of Israel and its declaration that "the Jewish State … will open the gates of the homeland wide to every Jew", and "The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles". It is, therefore, no wonder that the Law of Return was described as "one of the foundational laws of the State of Israel. It comprises a central purpose of our state, the purpose of ingathering the exiles" (Prime Minister David Ben-Gurion, 6 *Divrei HaKnesset* (1950) 2037). And as the Court stated: "It should not be forgotten that the Law of Return is one of the State's most fundamental laws. If you like, it is its first Basic Law" (HCJ 265/87 *Gary Lee Beresford v. Minister of the Interior*, IsrSC 43 (4) 793, 845 *per* Barak J.).

18. A derivative of the right of every Jew to immigrate to Israel is his immediate, undisputed right to become a citizen of the State. As stated in sec. 2(a) of the Nationality Law: "Every *oleh*

under the Law of Return, 5710-1950, shall become an Israel national". Prior to the enactment of the Nationality Law in 1952, we did not know whether an *oleh* by virtue of return acquired citizenship "from the moment his foot tread upon the ground of the homeland" (HCJ 26/51 *Salem Menashe v. Chairman and Members of the Rabbinical Court in Jerusalem et al*., IsrSC 5 (2) 714, 721). However, since the enactment of the Nationality Law, we know that there is no statutory waiting period: when a Jew who is subject to the Law of Return immigrates to Israel, he immediately becomes a citizen for all intents and purposes (and see: RUBINSTEIN & MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL, 5th ed., vol. 2 (1996) 881) (Hebrew)). The Minister of the Interior does, indeed, have the authority to delay the granting of a *oleh* certificate for the purpose of examining the necessary facts (see, e.g., HCJ 125/80 *Engel v. Minister of the Interior*, IsrSC 34 (4) 329), or to suspend his decision in regard to an *oleh* who refuses to undergo medical examinations (these are the examinations listed in reg. 6 of the Return Regulations, 5716-1956). However, once the examinations have been completed and the *oleh* is not found to fall within the scope of any of the exceptions enumerated in sec. 2(b) of the Law, he is entitled to an *oleh* certificate, to citizenship, and to all attendant rights.

Incidentally – although not incidental from the perspective of the *olim* – we would note that *olim* are entitled to material benefits, both by law and by virtue of subsidiary legislation and the directives of various governmental agencies (see, e.g., reg. 2 of the Arrangements in the State Economy (Discounts in Property Taxes) Regulations, 5753-1993; sec. 8 of the National Insurance Law, 5754-1994; sec. 351(k)(2) of the National Insurance [Consolidated Version] Law, 5755-1995; sec. 12 of the Development Towns and Areas Law, 5748-1988; and other exemptions, and customs and tax benefits). The Court stated in this regard:

> The State of Israel welcomes every Jew who wishes to immigrate to Israel and settle in it with generously open arms. The blessing that greets every *oleh* is not mere lip service, but involves and is accompanied by real benefits that are granted to the *oleh* upon his immigration to Israel… (HCJ 825/89 *Leon Kelef v. State of Israel*, IsrSC 44 (4) 772, 775).

19. A person who arrives in Israel but who does not fall within the scope of the Law of Return is unlike an *oleh*. His entry into the country, and his residence in it are subject to the

Entry into Israel Law, 5710-1952, and the regulations thereto. Both his entry and residence are in accordance with visas, and the Minister of the Interior and his representatives enjoy broad discretion as to whether to grant or deny a person an entry or residence visa. A decision to deny the request is exempt from explanation under the Administrative Procedure Amendment (Statement of Reasons) Law, 5719-1958. While the exemption from explanation does not, itself, affect the Minister's obligation to exercise discretion (HCJ 758/88 *Kendel v. Minister of the Interior* IsrSC 46 (4) 505, 525-526), needless to say that in the absence of a statement of reasons, the ability of the Court to review the decision is impaired (HCJ 482/71 *Clark v. Minister of the Interior* IsrSC 27 (1) 113, 116-117). If that is the case in regard to entry to Israel and residence, clearly an alien whose residence in Israel is not in accordance with the Entry Law has no right to Israeli citizenship. The same is true in regard to benefits granted to *olim* that are not granted to non-*olim*.

We have addressed the rights of an *oleh* at length not only in order to explain and interpret the superior status of an *oleh* under Israeli law, but also – and primarily – to present the difference between the rights of an *oleh* and those of a non-*oleh* who arrives in Israel. We will reserve our discussion of this profound, fundamental difference for further consideration below.

The Provisions of Section 4A of the Law of Return – Where do they originate and what do they address?

20. The provisions of sec. 4A and 4B originated in 1970, in Amendment No. 2 to the Law of Return. Section 4B defines who is a Jew for the purpose of the Law of Return, while sec. 4A establishes the right of return – or if one prefers: the quasi-return rights of the family members of a Jew. The issue that concerns us began with the *Shalit* case (HCJ 58/68 *Shalit v. Minister of the Interior*, IsrSC 23 (2) 477). That case involved a Jewish man and a non-Jewish woman, or more precisely, their children, who were not deemed Jewish under the criteria of Jewish religious law. Shalit and his children asked that the children be registered as "Jewish" in the Population Registry, and the Registrar refused the request. The Shalit family's petition was granted, and the Supreme Court – by a five-to-four majority – ordered the Population Registry to register the children in accordance with their request, even though they were not "Jewish" in accordance

with Jewish religious law. The majority's opinion was premised upon the nature of registration under the Population Registry Law, and upon the scope and limits of the authority of the Registrar to deny the registration of data when he lacked reasonable grounds to doubt their veracity. That affair did not decide the question of "who is a Jew", but rather the scope of the Registrar's duty to enter registration data presented in good faith, among them, data as to ethnicity.

In fear that the Law of Return might be implemented in accordance with the Population Registry Law, such that the term "Jewish" in the Law of Return would be interpreted in accordance with the *Shalit* rule – bearing in mind that there were several dicta in the majority opinion that the Law of Return should be interpreted in the same manner as the Population Registry Law – the legislature enacted Amendment No. 2 to the Law of Return, comprising secs. 4A and 4B (the Population Registry Law was also amended by the addition of sec. 3A thereto). Section 1 of the Law of Return states that "Every Jew has the right to come to this country as an *oleh*", and sec. 4B was added, stating that for purposes of the Law of Return, a Jew is "a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion". At the same time as the addition of sec. 4B, sec. 4A was enacted with the purpose of granting the rights of an *oleh* to the close family members of a Jew, as stated there. As stated in the Law:

> *Rights of members of family*
>
> 4A. (a) The rights of a Jew under this Law and the rights of an *oleh* under the Nationality Law, 5712-1952, as well as the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.
>
> (b) It shall be immaterial whether or not a Jew by whose right a right under subsection (a) is claimed is still alive and whether or not he has immigrated to Israel.

> (c) The restrictions and conditions prescribed in respect of a Jew or an *oleh* by or under this Law or by the enactments referred to in subsection (a) shall also apply to a person who claims a right under subsection (a).

21. One cannot avoid being aware of the two contrary tendencies of this amendment to the Law of Return. On one hand, there is a clear desire to provide an objective definition of "Jewish" – while eliminating the subjective element – while on the other hand, granting the right of Jews to people who are obviously not Jewish. Both for purposes of the Law of Return and the Population Registry Law, a "Jew" is – consistent with *halakha* – only a person born to a Jewish mother or who converted and does not profess another religion. Simultaneously, and seemingly contradictorily, for the purpose of return, the close family members of a Jew acquire the rights of "Jews", even though they are not Jewish (and see the words of Knesset Member Moshe Sneh in the Knesset debate, 57 (5730) *DIVREI HAKNESSET* 1133-1134).

These two, apparently – and perhaps only apparently – contradictory tendencies, each intended for its own purpose, were ultimately meant to complement one another. The definition of a "Jew" was intended to preserve the unity of the Jewish people in accordance with accepted tradition, while expanding the right of return to family members was intended to preserve family unity where one family member was Jewish. Intermarriage is a common phenomenon among Diaspora Jews, and the fear was that denying rights to a non-Jewish family member might dissuade Jews from immigrating to Israel, as Jews would not be willing to immigrate to Israel without their families. Indeed, sec. 4A was manifestly intended for intermarried families, with a view to prevent their division, and with a purpose of encouraging their immigration. The legislature sought to achieve this latter purpose by granting rights of return to the non-Jewish family member of a Jew, without recognizing that person as being Jewish. Knesset Member Haim Zadok addressed this in the course of the Knesset debate, stating (56 (5730) *DIVREI HAKNESSET* 766):

> When the husband was Jewish, he immigrated under the Law of Return, while his wife and children, in accordance with the Entry into Israel Law. He was granted citizenship automatically, while his wife and children had to wait some period until their naturalization. This could not but be interpreted by people, to the East

> and to the West, as meaning that such families were not wanted in Israel. This created a serious problem for potential *olim* from the West, and it may create a serious problem for the large-scale immigration that we expect from the Soviet Union.
>
> The important change that is now established is that, from now on, when one of the two heads of the household is Jewish, both heads of household, and their children and grandchildren, whether they immigrate together or separately, are entitled to come to Israel by virtue of the Law of Return, and obtain automatic citizenship. This is of primary importance for us as a land of immigrants.

As Deputy President Elon stated in the *Beresford* case (*ibid*., 834):

> The entire purpose of enacting sec. 4A of the Law of Return … is to resolve the problem of the immigration of families in which Jews and non-Jews are intermarried, in regard to the spouses and children who do not meet the definition of a Jew in the Law of Return. Granting the right under sec. 4A is intended to facilitate the immigration of such mixed families in their entirety, in the hope that all the members of the family will join the Jewish People.

And further see CA 3157, 3339, 3363, 4066/98 *Kniazhinski et al. v. State of Israel* (not yet published; particularly sec. 2 and 3 of the opinion of Justice Beinisch). And see the words of Prime Minister Golda Meir in 56 (5730) *DIVREI HAKNESSET* 773. It is like the act of Ruth the Moabite, who lovingly clung to her mother-in-law Naomi:

> But Ruth replied: "Do not urge me to leave you, to turn back and not follow you. For wherever you go, I will go; wherever you lodge, I will lodge; your people shall be my people, and your God my God" (Ruth 1:16).

So it was then, and so it is now, except that the non-Jewish relatives of the Jew – unlike Ruth the Moabite – will be granted the right of return even without converting.

In regard to the granting Jewish rights to non-Jews, we should address sec. 4A(b) of the Law of Return, stating:

Rights of members of family

4A. (a) …

(b) It shall be immaterial whether or not a Jew by whose right a right under subsection (a) is claimed is still alive and whether or not he has immigrated to Israel.

The non-Jewish family members of a Jew are, in some ways, seen as having attached themselves to the Jewish people, and thus the law grants them independent rights of their own – they are entitled to the rights of an *oleh* even if they immigrate on their own, without the Jew (the source of the rights), and whether or not that Jew has immigrated, even after that Jew is no longer living.

22. Against this background, we can now return to the problem that concerns us, which is the matter of a Jewish Israeli citizen who married a woman who is neither Jewish nor an Israeli citizen. Will the Law of Return avail such non-Jews and grant them the rights of an *oleh* under the Law of Return? Will sec. 4A of the Law of Return spread its wings over that woman and grant her those benefits reserved for new *olim*? Will that woman – solely by her own volition – be granted Israeli citizenship and the other benefits that the Law of Return and the laws of the State grant to new *olim*?

A synoptic view of the subject will provide an unequivocally negative response. The reason is that such an interpretation of the Law will not lead us to the purpose arising from the Law of Return – neither its primary purpose, nor those secondary purposes attendant to it.

23. As regards the primary purpose of the Law of Return, we addressed the uniqueness of the Law of Return, and saw that at its core stands the desire of "your children shall return to their country". "Go from your country and your kindred and your father's house to the land that I will show you" (Genesis 12:1). So the Lord commanded Abram, and since then, the homeland of the Hebrew – the Jew – is the Land of Israel. The historical homeland of a Jew, every Jew wherever he may be, is the Land of Israel. And if he wishes to observe God's command to Abram, we will accept him with an open heart, as we accept a lost son. All this – in whole and in part – does not apply to that non-Jewish spouse. Indeed, we will respect the foreigner among us, but we will

never say that he has returned to the land of his forefathers, and that the Law of Return thus applies to him automatically.

As for the amendment of the Law of Return, that Amendment introducing secs. 4A and 4B of the Law, we have addressed it's the historical event that led up to it, and its twofold purpose that restricts and limits while expanding and extending. The main purpose of the expansion was to encourage the immigration of spouses in a mixed marriage, together with their close family members, while preventing the division of families and a distinction in the status of family members seeking to immigrate to Israel. All of these exalted objectives have nothing in common with granting the right of return to a non-Jew merely by reason of marriage to a Jewish citizen of Israel. The interpretation advanced by the Petitioners does not in any way serve the purpose of the Law of Return or of the Amendment to the Law of Return, and we would automatically reject it as inadmissible. Indeed, in the case of people who were family before their immigration to Israel, not only will we not divide them but we will encourage them to immigrate as one. That is the purpose of sec. 4A of the Law, which we will fully realize. That is not the case in situations of the type before us, in which an Israeli Jew marries a person who is neither Jewish nor Israeli. That Jew – whether he was born in Israel or whether he immigrated to Israel at some time in the past – has exhausted his right to return, and thus no non-Jew can sign on to that extinguished right.

24. Moreover, it would not be proper to interpret secs. 4A and 4B of the Law of Return detached from the original Law of Return. The original provisions of the Law of Return, and secs. 4A and 4B, cannot be interpreted and understood in isolation. They are complementary and become one: one body whose organs are in harmony with one another. In amending the Law of Return, the legislature was like one who plants additional flowers and fruit trees in a long-existing garden that already thrives and bears fruit. The provisions of sec. 4A of the Law of Return became an inseparable part of the "greater purpose" of the Law of Return: gathering in the exiles of the Jewish People to the Jewish State – returning the children to their home. The Law of Return, as its name says, is directed at Jews wherever they may be. It invites Jews to return home – to return to the Land of Israel. Every Jew, as such, always has a sort of "stock option" that can be redeemed at will. "The Law of Return establishes a principle that all of the People of Israel, throughout the entire world, have a part and place in Israel, and that when a

person of Israel wishes to return to his homeland – to Israel – it is not as an immigrant, but as one who returns to his homeland" (Knesset Member Zerach Warhaftig in the Knesset session of Feb. 2, 1954, 15 *DIVREI HAKNESSET* 823). And even if here and there we may find some subsidiary purpose or other, this is the primary matter, and the provisions of sec. 4A will be interpreted in accordance with that primary purpose (and see the *Beresford* case, *ibid*., 844).

I will not deny that we may face "hard" cases. What, for example, is to be done in the case of a man and woman – he Jewish, and she not – who were about to be married in in their place of residence, and then immigrate to Israel? Had they married where they resided, then the non-Jewish spouse would enjoy the right of return, and everything would be fine. But for whatever reason, the two did not marry in their place of residence, but rather did so (in a foreign marriage, of course) after immigrating to Israel. That is an example, and there will be others like it. We will contend with such cases when the time comes. We will contend and succeed.

25. A final word. As we have seen, the Law of Return is a special, unique law that is primarily intended for Jews. Its roots are longer than long, and are woven into the natural right of every Jew to immigrate to Israel and join his people in his land. Thus far, we are all in agreement, and we will not expand upon the bitter debates as to the justifications that might be raised for its very existence (see, e.g., HAIM H. COHN, THE LAW, *ibid.*, 486*ff*; Asa Kasher, *Justice and Affirmative Action: Naturalization and the Law of Return,* 15 ISRAEL YEARBOOK ON HUMAN RIGHTS 101 (1985); Chaim Gans, *The Law of Return and Affirmative Action*, 19 *IYUNEI MISHPAT* 683-697 (1995) (Hebrew); Chaim Gans, *Nationalism and Immigration,* M. Mautner, A. Sagi and R. Shamir (eds.), MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE, (Tel Aviv, Ramot Press, 1998), 341- 360 (Hebrew) [also published in English: Chaim Gans, *Nationalism and Immigration*, 1 ETHICAL THEORY AND MORAL PRACTICE (1998), 159-180]). All this applies to a Jew who returns to his land – him and his family – but there can be no justification for preferential treatment of a Jew residing securely in his land as opposed to a non-Jew, such that the former would be entitled to acquire the right of return for his non-Jewish spouse while the latter would not. While we fully agree with the entitlement granted every Jew, whomever he may be, to immigrate to Israel together with his family, we would be hard-pressed to agree to showing preference to a Jew who is an Israeli citizen by granting a right of return to a non-Jew who has become his spouse, while not granting the same right to a non-Jewish citizen of the State. Were

we to recognize the right of a Jewish Israeli citizen to bestow the right of return upon his non-Jewish spouse, while denying that same right to a non-Jewish Israeli citizen, we would be committing a serious act of discrimination, with no conceivably proper purpose. In this regard, Minister of the Interior Haim Shapira stated in the Knesset debate on the Nationality Law (6 *DIVREI HAKNESSET* 2039 (5710)):

> The Law of Return defines the right of Jews to immigrate to Israel, and the Nationality Law defines their right to become Israeli citizens. But acquiring citizenship does not grant preferential rights or higher status to Jews. There will be no difference whatsoever, and no discrimination whatsoever, between those who acquired citizenship as *olim* and those who acquired it under one of the other provisions of the Nationality Law. One law shall apply to all citizens, without distinction of origin…
>
> This will be the composition of the citizens of the State of Israel. The large majority of citizens will be member of the Jewish nation, but also those prior residents who joined the new State at its outset, and all those who will join it in the future, will be citizens with equal rights and obligations.

Neither a Jew who immigrates to Israel – once having immigrated – nor a Jew born in Israel is entitled to a right of return that they can pass on to non-Jews who are not entitled to it. In regard to the right of return, sec. 4A of the Law of Return is exhausted within the confines of the family that immigrates, and not beyond.

26. But the Petitioners do not desist. As a last resort, they make recourse to sec. 4 of the Law of Return, and seek to pin their rights upon it. Section 4 states:

> *Residents and persons born in this country*
>
> 4. Every Jew who has immigrated into this country before the coming into force of this Law, and every Jew who was born in this country, whether before or after the coming into force of this Law, shall be deemed to be a person who has come to this country as an *oleh* under this Law.

The Petitioners argue as follows: This provision teaches us that all Jews in Israel are like "new *olim*", and we thus learn that there should be no distinction between those entitled to immigrate who have not realized their right, and people entitled to immigrate who have realized their right or who were born in Israel. The conclusion, therefore, is that the right of a Jewish citizen of Israel – whether he acquired citizenship at birth or acquired citizenship by immigration – is identical to the right of a Jew living abroad, the former and the latter are all entitled to grant a right of return to their spouses.

We are unable to accept that argument, and for the very reasons that we addressed at length, above. Section 4 of the Law of Return seeks to make the law equal for all Jews as Jews, and sees all Jews as having realized their natural right to return to the Land of Israel. See: Amnon Rubinstein, *Israel Nationality*, 2 TEL AVIV UNIVERSITY LAW REVIEW 159, 161 (1976); and see HAIM COHN, SELECTED WRITINGS, Aharon Barak and Ruth Gavison eds. (1991) 331-332 (Hebrew). However, after a person has immigrated and acquired citizenship, or has been born and acquired citizenship, their rights are the same as the rights of every citizen, and they have no excess rights (we would note, *obiter dictum*, that the legislature was mistaken in its language. No Jew immigrates to Israel "under this law". Jews did not immigrate, and do not immigrate to Israel "under this law" or any other law. Jews immigrated and immigrate to Israel of their souls' desire to immigrate, of their yearning to immigrate, of their deep longing to immigrate, or because they fled their haters. The Law of Return appended a legal right to immigration to Israel, a right that is attendant to the natural, historical right of every Jew).

27. In conclusion, the right of return is granted only to the family members of Jews prior to their immigration to Israel. Each of the Jewish spouses before us is an Israeli citizen – whether by birth or by realizing the right of return – and thus do not have the power to grant a right of return to their partners.

The policy in regard to the request of the alien spouse for permanent residency and citizenship

28. First, let us recall the typical case that we are addressing: "A", an Israeli citizen marries a woman – who is not Jewish and not an Israeli citizen – in a foreign marriage ceremony. Similarly, "B", an Israeli citizen marries a man – who is not Jewish and not an Israeli citizen – in a foreign marriage ceremony. From here on, for simplicity's sake, we will speak only in terms of

the first example, but needless to say, the law is the same in regard to the second. We would further add that in addressing the Law of Return, we spoke of a couple in which one of the partners was a Jewish Israeli citizen, whereas now we will speak in terms of a couple in which one of the partners is an Israeli citizen, regardless of whether or not he is Jewish.

When the Ministry of the Interior is informed that a couple married in accordance with the model we presented above, and the non-Jewish partner requests permanent residence in Israel and Israeli citizenship, the question presented is this: How should the Ministry of the Interior treat such requests, and what criteria should govern its policy?

We are informed that the Ministry of the Interior's policy distinguishes two types of a cases, and in each it acts differently. One type of case concerns marriages celebrated when the foreign, non-Jewish partner was lawfully in Israel, whereas the other type concerns cases where the marriage was celebrated when the non-Jewish partner was not in Israel lawfully. This type of case also comprises a subcategory that we will address in para. 29, below. We will address each of the two types of cases, beginning with the second.

At the time of the marriage, the non-Jewish partner was in Israel unlawfully

29. There was a change in the Ministry of the Interior's policy in regard to this issue. In the past, when the couple presented a marriage certificate to the Ministry of the Interior clerk, and the alien non-Jewish partner requested permanent residence in Israel and to acquire citizenship, that partner was required to pay a fine for the period of unlawful residence in Israel, and once the fine was paid, he would be granted a tourist visa and work permit (a B/1 visa, as defined in reg. 5(a) of the Entry into Israel Regulations, 5734-1974). This visa was granted for a period of six months, during which time the Ministry would examine the veracity of the marriage.

The Ministry of the Interior changed its policy in September 1996. From then on, the non-Jewish alien partner – who had resided in Israeli unlawfully at the time of the marriage – was required to leave Israel immediately for a period of two months, and his request for permanent residence and citizenship was made conditional upon his leaving the State. During those months, in accordance with the new policy, the Ministry of the Interior was meant to

examine the veracity of the marriage, and if it was persuaded of that the marriage was legitimate, the alien non-Jewish partner was permitted to return to Israel, and the pursuant consideration was the same as that for the marriage of an Israeli citizen who had married a person who was not Jewish and not an Israeli citizen, but who lawfully resided in Israel. We will further address such cases below.

The main points of this policy were published in a notice by the spokesperson of the Ministry of the Interior on Sept. 25, 1996, as follows:

> **Aliens unlawfully residing in Israel and who are married to Israelis will be required to leave Israel, and will be permitted to enter Israel only after obtaining a decision in regard to their status from the Ministry of the Interior.**
>
> To date, the Ministry of the Interior permitted the residence in Israel of those who had married Israeli citizens, and did not require that they depart.
>
> Recently, after a significant increase in the number of persons married in Paraguay marriages (marriages conducted by mail) pursuant to the Ministry of the Interior's efforts to deport unlawful foreign residents, the Ministry decided not to further permit the exploitation of this method of arranging the status of unlawful residents for preventing their deportation.
>
> Once persuaded as to the legitimacy of the relationship between the partners, the Ministry of the Interior will permit the reentry of the alien to Israel (emphasis original – M.C.).

The Ministry of the Interior employs a similar procedure in regard to a request by a non-Jewish alien who enters Israel on a tourist visa, which is granted for a very short period, and during those few days – and while lawfully in Israel – marries an Israeli citizen. This non-Jewish alien is also required to leave the country before his request will be addressed on its merits, and leaving the country is a precondition for considering the request.

Needless to say – as is self-evident – as far as the Ministry of the Interior is concerned, the couple's marriage certificate is of no significance or value. The policy presupposes that the couple have a marriage certificate that testifies to some marriage ceremony. Moreover, the Ministry of the Interior does not deny that that ceremony may have succeeded in marrying the couple, and that the couple are married to each other in every way in terms of substantive law. The Ministry's policy simply ignores all of that. It does not consider the marriage ceremony or the possible legal significance that may derive therefrom. For the purpose of the policy, it is sufficient that the non-Jewish partner was residing in Israel without a permit at the time of the wedding, and this factor – as such – sets off the policy, and the non-Jewish alien partner is required to leave the country for a number of months, until the legitimacy of the marriage ceremony and the status of the partners as truly married are examined.

30. The Petitioners, needless to say, are bursting with arguments against the policy of the Ministry of the Interior, and they present their arguments in painful detail. Of course, the arguments are repeated by the Petitioners' attorneys – each in his own style, loudly or in anguished whisper, in arguments that waft fundamental rights or in standard arguments regarding interpretation. However, before we consider those arguments on the merits of the policy, we must first address several arguments presented on threshold and quasi-threshold issues. Once we have finished considering those arguments, we will proceed to address the policy on the merits.

Did the Minister of the Interior possess authority to deport the non-Jewish alien married to an Israeli citizen?

31. Advocate Dr. Schvarcberg – representing some of the Petitioners before us – argued that the Minister of the Interior entirely lacked authority *ab initio* to deport the alien non-Jewish spouse married to an Israeli citizen. From the moment of marriage, he argues, and as long as nothing changed in the couple's status, no Israeli law permits the deportation of the alien partner from Israel. If we accept this argument, we can, of course, conclude this part of our opinion and move on to other issues that require decision.

This is how the argument proceeds, step by step. The Minister of the Interior's authority to deport a person from Israel resides in sec. 13 of the Entry into Israel Law, 5710-1952, according to which the Minister it authorized to issue a deportation order in regard to "a person other than an Israel national or an *oleh* under the Law of the Return, 5710-1950 … if such person is in Israel without a permit of residence". Advocate Schvarcberg argues that the Minister's authority to deport the non-Jewish partner from Israel is subject to two conditions, and one of them is that the partner "is not an Israeli citizen". I argue – as he further states – that the non-Jewish partner is an Israeli citizen, in practice – even though he is not a regular citizen in all the jots and tittles of the term "citizen" – and in any case, he is very nigh a citizen, and having acquired that status of almost-a-citizen, the Minister lacks authority to deport him from Israel.

In what way is an alien spouse a citizen or almost-citizen? Section 1 of the Nationality Law lists the various ways for acquiring Israeli citizenship one after the other, as though assembled for inspection, and marrying an Israeli does not muster. Indeed, sec. 5 of the Nationality Law Bill, 5710-1950 (*Bills* 190) was meant to grant citizenship by marriage to an Israeli (and see: the Explanatory Notes to the Bill, *ibid*., 198; and the statement of then Minister of the Interior Haim Moshe Shapira in presenting the Bill to the Knesset: 6 *DIVREI HAKNESSET* 2039 (5710)). However, that proposal was rejected, and the under the Nationality Law, marriage to an Israeli citizen does not, itself, grant citizenship to a spouse who is not an Israeli citizen. Dr. Schvarcberg does not deny that, but he argues that the alien spouse acquires a right to obtain citizenship by naturalization, and that right that is vested in him makes him an almost-citizen whom the Minister of the Interior is barred from deporting. How can this be?

Section 5 of the Nationality Law treats of citizenship. Subsection (a) thereof lists six conditions that, if met by some adult who is not an Israeli citizen, authorize the Minister of the Interior to grant citizenship. As sec. 5(b) states:

> 5. (a) …
>
> …

(b) Where a person has applied for naturalisation, and he meets the requirements of subsection (a), the Minister of the Interior, if he thinks fit to do so, shall grant him Israel nationality by the issue of a certificate of naturalisation.

Section 7 of the Nationality Law adds as follows:

Naturalisation of husband and wife

7. The spouse of a person who is an Israel national or has applied for Israel nationality and meets or is exempt from the requirements of section 5 (a) may obtain Israeli nationality by naturalisation even if she or he is a minor or does not meet the requirements of section 5 (a).

On the basis of all this, Dr. Schvarcberg argues that the right of the alien spouse to Israeli citizenship is acquired and crystalizes upon marriage, and that the authority of the Minister of the Interior – the authority under sec. 7 of the Nationality Law – is merely of a declaratory nature, *viz*: it is a declaration as to a right that the alien acquired upon marriage to an Israeli citizen. Therefore, inasmuch as the alien is entitled to Israeli citizenship from the moment of marriage, he cannot be deported on the basis of the authority granted under sec. 13 of the Entry into Israel Law.

32. This argument is nothing but an argument. First of all, the Entry into Israel Law authorizes the Minister of the Interior to deport anyone who is not an Israeli citizen or an *oleh* under the Law of Return. That is undeniable. Therefore, the Minister's authority to deport stands. Section 13 does not recognize a status of "almost-a-citizen", and "almost-a-citizen" does not, therefore, grant immunity from deportation.

This status of "almost-a-citizen" is a creation of the argument, but has no basis in the law in regard to the Minister of the Interior's authority to deport aliens from Israel. Indeed, under the provisions of secs. 5(b) and 7 of the Nationality Law, the Minister of the Interior can – at his discretion – show leniency in regard to the spouse of an Israeli who requests naturalization, and grant him citizenship even if he does not meet all of the conditions required of persons seeking naturalization as set forth in sec. 5(a) of the Nationality Law. However, the Minister of the Interior's discretion remains, and marriage – in and of itself – is insufficient to waive the need

for submitting an application for naturalization, or to deny the very discretion of the Minister of the Interior. Leniency in regard to the conditions for naturalization – yes; denial of the Minster's discretion whether or not to grant citizenship – absolutely not.

33. Dr. Schvarcberg further argues that sec. 7 of the Nationality Law limits the Minister of the Interior's authority to examining the legitimacy of the alien's marriage to an Israeli citizen, and if he is satisfied that the marriage is bona fide, he must grant Israeli citizenship to the alien. There is nothing to this argument. The Minister of the Interior holds discretionary authority whether or not to grant an application for naturalization – that is his authority as established under sec. 5(b) of the Nationality Law – and that authority also extends to an application submitted by an alien spouse married to an Israeli citizen. Or, as stated by Justice Barak in HCJ 754/83 *Rankin v. Minister of the Interior*, IsrSC 38 (4) 113, 116:

> The power of the provision under sec. 7 of the Nationality Law makes it possible for a spouse to obtain Israeli citizenship by naturalization even if he does not meet all the special criteria established under sec. 5(a) of the Nationality Law. The provision does not have the power to do away with the need for the exercise of discretion by the Minister of the Interior in accordance with sec. 5(b) of the Nationality Law…Thus, a spouse can acquire Israeli citizenship by virtue of naturalization even if he does not meet the special criteria established under sec. 5(a) of the Nationality Law, but he can acquire Israeli citizenship only if he requests it, and if the Minister of the Interior "thinks fit", as stated in sec. 5(b) of the law …
>
> The Minister of the Interior thus has discretion ("thinks fit to do so") whether or not to grant Israeli citizenship to the spouse of an Israeli citizen.

Moreover, sec. 7 of the Nationality Law speaks of leniency in favor of an alien spouse, by which he may be granted citizenship even if he does not meet the criteria of sec. 5(a). The case law has established that it is within the scope of the Minister of the Interior's discretion to establish a policy under which the right of the alien spouse will be contingent upon fulfilling the conditions of secs. 5(a)(1) and 5(a)(4). In other words, the Minister of the Interior is not required to waive the conditions for presence in Israel and the conditions for residence (or intention to

reside) in Israel. (See: HCJ 576/97 *Uriel Scharf et al. v. Minister of the Interior* (not yet published); and see: the *Rankin* case, *ibid*., 116-117; HCJ 328/60 *Jamal Najib Mousa v. Minister of the Interior*, IsrSC 17 69, 74).

We therefore reject these arguments by Advocate Schvarcberg. An alien who marries an Israeli citizen does not acquire – by virtue of marriage alone – a right to naturalization, and the Minister of the Interior retains his authority to grant or deny an application for naturalization submitted to him by that alien spouse. It is, of course, another question whether the Minister of the Interior *properly* exercises his authority when he orders the deportation of the alien spouse, but that question – which is not a question of authority – is a separate one, which we will address further on.

Was the deportation policy approved by the High Court of Justice?

34. Another threshold argument – raised by the State – is that the policy of deporting alien spouses unlawfully living in Israel was approved by the High Court of Justice, and that we should not overturn that established ruling. In this regard, the State relies upon two decisions rendered in HCJ 774/97 *Natalia Molodova et al. v. Ministry of the Interior* (not yet published), and HCJ 6844/97 *Reggie Kedar v. Minister of the Interior* (not yet published), claiming that these two judgments have established the policy of the Ministry of the Interior in the case law.

We do not agree with the State Attorney's Office.

As for the *Natalia Molodova* case, the petitioner in that case entered Israel on a fifteen-day tourist visa, and when – at the conclusion of the period – she was ordered to leave the country, she claimed before the Ministry of the Interior that in the course of the days of her visit, she had married an Israeli citizen in a Paraguay marriage. The Ministry of the Interior demanded that the petitioner leave the country immediately, adding that an examination of the legitimacy of the marriage would be undertaken while she was abroad. In making that decision, the Ministry of the Interior relied upon its policy by which a person who received a short-term tourist visa would be required to leave the country at the end of the visit granted in the visa, and his application in regard to his status would be addressed while he was abroad. The petitioner asked that her visa

be extended until her status was set in order, but the Court approved the decision of the Ministry of the Interior. The Court found that the petitioner's intention – from the outset, upon arriving in Israel – was to marry and remain in Israel, and that she had not revealed that intention to the Ministry of the Interior, and that for that reason, refusing her request was justified. In the words of the Court: "If the petitioner sought to come to Israel in order to marry and reside, it was her duty to inform the appropriate authority in the Ministry of the Interior of that intention". Having failed to do so, the position of the Ministry of the Interior could not be found "unreasonable in the extreme".

That case, therefore, concerned a tourist who misled the authorities of the Ministry of the Interior, and the Court adopted the well-known, accepted rule that the Court will do its best to ensure that a wrongdoer not benefit by his misdeed. (And see and compare: HCJ 164/97 *Conterm v. Ministry of Finance*, para. 33*ff*. of my opinion [http://versa.cardozo.yu.edu/opinions/conterm-ltd-v-finance-ministry]). The Court expressed no opinion, one way or the other, as to the Ministry of the Interior's deportation policy.

The second case that the State seeks to rely upon – that of HCJ 6844/97 *Reggie Kedar v. Minister of the Interior* – cannot serve to support its argument. In that case, a deportation order was issued against the petitioner, a non-Jewish alien who was living in Israel unlawfully, and his request was that the deportation order be rescinded simply because he wished to marry an Israeli woman (of Philippine birth, who had married a man outside of Israel and had acquired Israeli citizenship) after she divorced her husband. The Court dismissed the petition, and refused the petitioner's request that his application be reviewed and his status arranged before he departed the country. Needless to say, that case is not at all like the one before us, if only because the petitioner was not married to an Israeli citizen. The policy in regard to married couples did not, therefore, arise for examination on the merits. Moreover, reading the judgment reveals that the claim regarding a pending marriage appeared suspicious to the Ministry of Interior on its face. All would agree – including the Petitioners – that the Ministry of the Interior is justified in its policy not to allow fictitious marriages – which create fictitious spouses – to create a real right to permanent residence in Israel and to citizenship when, of course, the authority has sufficient administrative evidence showing that the marriage is a fiction. (And see and compare: HCJ 2394/95 *Svetlana Motzenchik v. Ministry of the Interior*, IsrSC 49 (3) 274, 278-280; HCJ 559/92

Bernardo Daniel Mendel at al. v. Ministry of the Interior – Population Administration (unpublished); the *Rankin* case, *ibid.*, 117; and further see: the *Kniazhinski* case, *ibid*.).

The deportation policy – Publication

35. The Petitioners raise an argument that has the character of a quasi-threshold argument, which is that the deportation policy was never properly published to the public at large as required. And that is indeed so. We noted above the publication of a notice regarding the policy in the newspaper (see para. 29), but needless to say, a one-time publication by the spokesperson of the Ministry of the Interior is not sufficient to fulfill the publication requirement. We thus find that an individual facing deportation has no way of knowing his rights or how to plan. He cannot seek the advice of legal counsel, as without published directives, how will that counselor know what to advise? As we will see, there are exceptions to the deportation policy. But how can an individual or his lawyer know about those exceptions and their scope if he doesn't even know the scope of either the policy itself or its exceptions? In this manner, the exceptions will be nothing but a dead letter, for the only one who can make recourse to them would be some beneficent clerk who might reveal their existence. We thus find that the deportation policy is carried out in the light of day, but its principles and details – including its exceptions – were never reasonably published as appropriate to good governance.

36. This situation is not only unsatisfactory, it borders on actual illegality. While, indeed, this policy that the Ministry of the Interior established for itself is not – itself – a regulation having legislative effect, which must be published in the Official Gazette under sec. 17 of the Interpretation Ordinance, we have, nevertheless held – time and again – in regard to internal directives that may affect individual rights – like the policy before us – that "a necessary precondition to their establishment and implementation…is bringing them…to the knowledge of those interested, whether by publication to the public or by other means" (HCJ 5537/91 *Efrati v. Ostfeld*, IsrSC 46 (3) 501, 513; and also see: HCJ 4539/94 *Dr. Nabil Naksa v. Dr. Ephraim Sneh, Minister of Health* (not yet published, paras. 13*ff.* of the opinion of Justice Strasberg-Cohen); HCJ 1689/94 *Harari v. Minister of the Interior*, IsrSC 51 (1) 15). As we have held, this publication requirement "is required by the nature of the material, and as a derivative of the rule-

of-law principle" (the *Efrati* case, *ibid*., 515). And when we are concerned with so serious a violation of an individual's right – the right of the spouse of an Israeli to continue to live in the country with the person she has chosen as her partner in marriage – there is no doubt in my mind that the Ministry of the Interior is under an obligation to publish its policy and make it available to any who may wish to read and study it.

37. We have considered, and are aware that we are speaking of couples in which one member is an Israeli citizen, while the other is a non-Jewish alien residing in Israel unlawfully. They married while the foreigner was living in Israel without a permit, and the alien is being asked to leave the country until the authorities of the Ministry of the Interior examine the sincerity of the marriage. One might argue: What right has the alien to raise an argument against the non-publication of the policy, when the preliminary assumption is that he is living in the country unlawfully? Will we entertain a claim by an unlawful resident that the Ministry of the Interior's policy was not published to the public at large? For my part, I do not believe that this response to the alien is appropriate or pertinent. We are concerned with the rule of law, and if the case law has established a requirement of publication, the argument as to non-publication will be heard from anyone injured by the policy. But even if we had said otherwise – and we did not – there is the Israeli partner, and his right – that the Ministry of the Interior not deport his spouse – certainly stands, and no one can argue that the claim of non-publication cannot, at the very least, be raised by him.

Deportation and a request to leave the country

38. One of the Respondents' arguments is that they are not deporting the alien spouse from Israel. All that they are doing is requesting that the alien spouse leave the country before his application for residence and naturalization will be considered on the merits.

That argument/response is meaningless. Cultured people speak politely, and it is appropriate that we all speak with our friends – and even with those who are not our friends – in polite language. At the same time, we must not use polite language deceptively, and we all know that the silk glove is hiding a fist. When a representative of a governmental agency asks a person

residing in the country without a permit "to be so kind" as to leave the country, he is not merely offering that alien good advice. Moreover, every governmental agency has the authority granted to it by the law, and within the scope of that authority, it may act in accordance with its discretion. An agency of the Ministry of the Interior that asks an alien to leave the country is understood to be doing so in accordance with its authority. The question is, therefore, whether or not it is authorized to ask the alien – the spouse of an Israeli – to leave the country. This is the question we are addressing in this opinion, and therefore, the *manner* of addressing the alien is of no relevance. We have long experience with suggestions that are not suggestions, and we know how to distinguish between a suggestion and a directive, and between advice and an order (see: HCJ 144/50 *Dr. Israel Sheib v. Minister of Defence*, IsrSC 5 399, IsrSJ 1 1 [http://elyon1.court.gov.il/files_eng/50/440/001/Z01/50001440.z01.pdf]).

39. Having concluded our examination of the threshold and quasi-threshold arguments of the Petitioners and the Respondents, we will now turn to an examination of the policy on the merits. We will first briefly discuss the Respondents' authority to deport aliens, and against the background of that authority, we will address the Petitioners' issues on their merits.

On the status of aliens in Israel and the authority to deport them

40. An Israeli citizen has the right to be in Israel as he wishes, and the State does not have the right to deport him. The citizens of Israel constitute Israel. Is it conceivable that Israel would deport Israel? That is not the case in regard to one who is not an Israeli citizen. A person who is neither an Israeli citizen nor an *oleh* enters Israel by virtue of an entry permit granted under the Entry into Israel Law, 5712-1952. The Minister of the Interior may grant visas and permits of various sorts, and may extend them from time to time, as stated in the Entry into Israel Law (secs. 2 and 3). Entering and residing in Israel without a permit, and violating the terms of a visa or residence permit, constitute a criminal offense, and the offender is liable to punishment (sec. 12). In addition, and this is the main thing for the matter before us, the Minister of the Interior may issue a deportation order against a person who is not an Israeli national or an *oleh* under the Law of Return if that person is in Israel without a residence permit (sec. 13(a) of the Entry into Israel Law). The Minister of the Interior is exempt from stating his reasons for issuing a

deportation order, in accordance with the express provision of sec. 9(b) of the Administrative Procedure Amendment (Statement of Reasons) Law, 5719-1958.

41. The case law has established that the Minister of the Interior's authority to order the deportation of an alien is very broad (HCJ 740/87 *Bentley v. Minister of the Interior*, IsrSC 42 (1) 443), and some have gone so far as to describe it as "absolute discretion" (the *Bentley* case, *ibid*., 444). Nevertheless, the Supreme Court has held that despite its breadth, the authority is not immune to review by the High Court of Justice, and that review covers all the known reasons for review under administrative law. (See: HCJ 282/88 *Awad v. Prime Minister and Minister of the Interior*, IsrSC 42 (2) 424, 434; HCJ 100, 136, 137/85 *Gideon Ben Yisrael et al. v. State of Israel*, IsrSC 39 (2) 45, 47). Of course, the exemption from stating reasons – in those cases in which the Minister of the Interior does not state his reasons for a deportation decision – makes review more difficult, but it does not detract from the authority to review or from its scope (the *Kendel* case, above, 524-528, and see and compare: the *Clark* case, above, 117). To their credit, the Ministers of the Interior have only rarely made recourse to that privilege of exemption from stating reasons, and I cannot recall a single case over the last few years in which the Minister of the Interior decided to deport a person from the country, and refused to reason his decision.

At present, no one would describe the Minister of the Interior's authority to deport aliens from the country as one of "absolute" discretion. However, we would all agree that the Minister's authority is considerably broad. In other words: the Minister's discretion whether or not to deport an alien is of considerably wide scope. Against this background, we will now examine the policy for the deportation of non-Jewish aliens married to Israeli citizens.

The deportation policy – Reasons and reasonableness

42. Our preliminary assumption is that when an Israeli citizen marries a non-Jewish person lawfully residing in Israel, but who is not an Israeli citizen, the Ministry of the Interior does not intervene in that alien person's right of residence. If that alien applies for permanent residence in Israel, as well as for citizenship, the Ministry of the Interior addresses the application in accordance with a particular policy that it has established (and that we will address below). The

matter is different if than alien resides in Israel without a permit. An Israeli citizen marries a woman who is not Jewish and not an Israeli citizen, while she is residing in Israel without a permit. If the couple request that that alien be allowed to reside in Israel permanently and acquire citizenship, that woman will be asked to leave the country until such time as the Ministry of the Interior will evaluate the nature of that marriage in order to determine whether it is bona fide of fictitious. The Appellants have cried out against this demand to leave the country for the purpose of the examination, and it is that cry that we will now address.

43. The question that presents itself is why the Ministry of the Interior decided to change the policy it had maintained for many years (see above, para. 29) and begin to implement the deportation policy that we have just described. It would appear that the Ministry of the Interior decided to change its policy due to a precipitous rise in the number of fictitious marriages among aliens in Israel, and the new policy was originally intended to combat this deplorable practice of fictitious marriages.

As we are all aware, Israel has become a lodestone for people of various nationalities and countries who come to live and work in Israel. Those aliens who come here see that it is good, and wish to remain as long as possible, and even establish permanent residence. Thus, when their residence permit expires, they stay even without a permit. We are informed that we are concerned with tens of thousands of people. The Ministry of the Interior, having decided to put an end to this improper and undesirable phenomenon, began to check the residence permits of aliens in Israel, and when it found that they were residing in Israel without a valid permit, it sent them back to their countries of origin. The phenomenon of fictitious marriages began as a counter-measure.

Mr. A or Miss B who found the good land but lacks a residence permit, discovered a way to lengthen their stay by marrying an Israeli citizen in a wedding ceremony that is merely a fiction. The couple have no intention of forming a family unit and living together as a couple. The entire purpose of the purported marriage is to obtain recognized status in Israel for the alien spouse, and thereby prevent deportation. As the Ministry of the Interior's enforcement policy became more severe, the number of fictitious marriages increased, and the battle waged on. (On

the subject of fictitious marriages and the family unit, see the *Kniazhinski* case, above, particularly the opinion of Justice Beinisch).

We would add that such fictitious marriages can have various motives, and similarly, various forms of "consideration". Sometimes, the consideration is simply money, where the Israeli citizen receives payment for his participation in that ugly ceremony of fictitious marriage. Sometimes there is a symbiotic relationship in which both partners gain some consideration. Thus, for example, a foreign worker seeking to ensure his continued stay in Israel marries (so to speak) a young Israeli woman who wishes to evade the burden of military service by means of the fictitious marriage.

44. The Ministry of the Interior is intent on a fight to the finish against these fictitious marriages, and the method it found appropriate was that of demanding that the alien leave the country while the legitimacy of the marriage was examined. The Ministry believes that this method will reduce the incentive to conduct fictitious marriages, and all – or almost all – will be well. Or, in the words of the Ministry of the Interior, as sated in its affidavit:

> The purpose of the said policy is to deprive unlawful residents of an "insurance policy", while sending a clear message that anyone who seeks to retroactively legitimize his residence in Israel (or obtain some other benefit, such as an exemption from military service) by means of a fictitious marriage, will not easily achieve it. Rather, obtaining any legal status in the State of Israel will subject him, as well as his Israeli spouse, to an examination and waiting period, during which time the Ministry of the Interior will be able to examine all that needs to be examined, in advance and retroactively, by various ways and means.
>
> As stated, the purpose of the said policy is to frustrate, to the extent possible, attempts to unlawfully establish permanent residence in Israel, while granting the Ministry of the Interior the opportunity to form an opinion as to the legitimacy of the marriage before, rather than after, granting legal status in the State of Israel.
>
> The said policy decision by which the application of the couple would be examined while the applicant for "family reunification" is out of the country will

> not only serve to offset the immediate benefit and significantly frustrate attempts at unlawful residence, but will also allow the Ministry of the Interior to examine the relationship without the outward appearance of "living under one roof in Israel" itself carrying real weight in examining the relationship, and without "the sinner benefitting from his sin".

The Ministry further informs us that the new policy has proven itself in the following two ways: first, since adopting the new policy, the number of applications for changing status in Israel by reason of marriage has decreased, and second, there has been an increase in the discovery of fictitious marriages. We would, however, note that these statements by the Ministry of the Interior are not supported by statistical data, and are merely based upon "impressions" and "educated guesses" of those involved in the matter.

45. The Ministry of the Interior adds that against this gloomy background that was clear to all, the new policy under which the alien is asked to leave the country before and as a precondition to examining his application is sensible and reasonable. The former policy encouraged widespread fraud, and that fraudulent activity was advanced by "marriage contractors" who arranged for Israelis and aliens to meet for the sole purpose of arranging fictitious marriages to mislead the authorities. The Ministry of the Interior further argues:

> If we would not have adopted this policy, we would soon find ourselves facing a situation in which all the unlawful aliens in Israel would be married to Israelis, and any possibility of addressing the problem of unlawful residency would be foiled.

The Ministry of the Interior further argues that the harm inflicted upon the individual is not at all severe. The alien is only asked to leave for a few months, and a brief separation of a few months is only a slight inconvenience to a bona fide couple, as opposed to the great benefit of the new policy in frustrating the fictitious marriages.

46. In the course of the proceedings before the Court, the Ministry of the Interior further informed us that the Ministry's policy is not overly strict, and that there are exceptions to the general policy that address the personal circumstances of the couples. Thus, where there is a

strong humanitarian concern, it may override the general policy. We were informed of these exceptions in the course of the arguments presented by the Ministry of the Interior's attorney, but we were not shown any clear, written directive in this regard. However, after the conclusion of the hearings and arguments, the Ministry of the Interior submitted a document entitled "Criteria for granting an Exceptional Exemption from the Demand that an Illegal Alien who married in the course of his Unlawful Residence leave the Country". The document presented by the Ministry of the Interior states as follows (emphasis original):

> ***Criteria for granting an Exceptional Exemption from the Demand that an Illegal Alien who married in the course of his Unlawful Residence leave the Country***
>
> ***The Rule:***
>
> An unlawful resident who marries an Israeli is required to leave Israel ***before the examination of his application*** and the application of the Israeli partner for family reunification in Israel in accordance with the law.
>
> ***Exceptions:***
>
> The Head of the Population Administration, his deputy, and department heads in the Population Administration are authorized to grant an exemption from the said rule to the alien partner in exceptional cases in such special humanitarian circumstances as the following:
>
> a. Special health circumstances that require that both partners remain in Israel.
>
> An appropriate medical opinion must be submitted to that effect.
>
> b. The couple have a ***joint*** child, and the couple brought unequivocal evidence that they maintained a common household for a period of 12 months.

c. The alien partner cannot return to his country of nationality due to a danger to his life, and he is unable to leave for a third-party country and remain there until a decision is made.

We would add that we do not know the origin of these criteria, and the Respondents' attorney made us no wiser. Thus, for example, the document's heading does not state the date of the issuance of the criteria, and we also do not know who issued them and what there normative value might be.

Moreover, it seems strange to us that these criteria – which go to the heart of the matter – were not brought to our attention until after the conclusion of the proceedings. And having brought them to our attention, the Respondents did not indicate the date of their issuance or the place of their publication, and did not even claim that the criteria had been published to the public at large. That being the case, of what value are criteria – and let us bear in mind that we are concerned here with exceptions – that the individual does not know exist? Needless to say, criteria that lie in a clerk's drawer, and never see the light of day, invite arbitrariness and have all the weight of a plucked feather.

47. In conclusion: An alien residing in Israel without a permit, who has married an Israeli citizen, will be asked to leave the country for a number of months until the authorities have time to investigate whether the marriage is bona fide or fictitious. Only after a few months, and if the Ministry of the Interior official is satisfied that the marriage does not appear to be fictitious, will that alien be permitted to return to the country. Only then will his application for permanent residence or naturalization be considered. In accordance with this policy, a marriage certificate between an Israeli and an alien carries no weight – in and of itself – in the eyes of the Ministry of the Interior. The alien spouse is asked to leave the country notwithstanding the existence of a marriage certificate, and despite there being no factual foundation that the marriage is fictitious. Under the current policy, except for those limited exceptions of which we have recently been informed, the individual matter of the couple presenting itself before the authorities will not be addressed on the merits. The Ministry of the Interior does not conduct any examination

whatsoever, and does not hear the arguments of the couple. The alien partner must leave the country, regardless of the nature of the marriage.

48. The Petitioners clamor with strident arguments challenging the Ministry of the Interior's new policy. For example, they argue that the new policy is based upon the gut feeling of administrator's without any statistical data to back it up. Indeed, when the Respondents were asked to present the data upon which they based the policy, they were hard-pressed to collect it. We were only presented with data after examinations and investigations, and even then, the data was partial, and primarily sample data. Thus, we heard that some 2,500 applications are submitted annually by the type of couple with which we are concerned, and 500 of those applications are submitted by couples in which the alien partner resided in Israel without a permit. How many of these were proven to be fictitious marriages? How many of these fell within the scope of the humanitarian exceptions? We were not told. And if we were not told, we do not know.

In the absence of any real data on the extent of fictitious marriage, the question automatically arises as to the justification for the firm policy currently in place. If, for example, there are only a (relatively) small number of fictitious marriages among all the marriages in this category, is it really justifiable to shake up hundreds of innocent couples due to those few sinners? Is it proper to harm the many for the few? Perhaps the shadows of hills look to the Respondents as men?[5]

It is established law that before a governmental authority makes a decision that affects individual rights – whether an individual decision or one of general policy – it must collect data on the matter, winnow the grain from the chaff, dissect the data, weigh it, consider the significance of the proposed decision and its expected consequences, and only then act (see:HCJ 297/82 *Berger et al. v. Minister of the Interior*, IsrSC 37 (3) 29, 48-49; HCJ 987/94 *Euronet Kavei Zahav (1992) Ltd. v. Minister of Communications*, IsrSC 48 (5) 412, 423-426). In establishing their policy – and in the way they established it – the Respondents transgressed this fundamental rule of administrative conduct.

[5]Ed: See Judges 9:36.

49. The Petitioners further argue that the Respondents are also violating the fundamental principle requiring that a potentially harmed person be granted a hearing, whereas the Respondents refuse to hear the arguments of a person residing in Israel without a permit, and "ask" that he leave the country prior to addressing his application. To this we would respond that infringing the right to be heard is a severe violation of the rights of the person harmed, and the Respondents are guilty of this, as well. (And see: the *Motzenchik* case, above, 281; and see and compare: *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Landon v. Plasencia*, 459 U.S. 21, 2-33 (1982)).

We would also recall that we are also concerned with the right of an Israeli individual. His interest in the application would appear to be equal to that of his alien spouse. If the couple is separated, and the alien is sent abroad – or even if the alien's application for permanent residence will not be addressed until he leaves the country – not only is the interest of the alien harmed, but that of the Israeli citizen, as well. And certainly no argument can be made in favor of violating the right of the Israeli partner to be heard.

On reasonableness and proportionality

50. The attorneys for the parties – the attorneys for the Petitioners on one side, and the attorney for the Respondents on the other – devoted most of their arguments to the subject of the reasonableness of the Ministry of the Interior's policy, and in particular, the question whether the policy is "proportionate". Needless to say, the Petitioners argue that the condition that the alien leave the country before the couple's application for residence and naturalization will be considered on the merits is a "disproportionate" means that must be voided. This argument of disproportionality was accompanied by additional arguments – like those we addressed above – concerning the failure to collect relevant data, failure to hear the spouse, and other such arguments that have bearing upon the inappropriateness of the means to the purpose.

51. There is no need to elaborate on the proportionality test. As we know, the test comprises three branches: a rational connection between the means and the purpose; the least harmful means; and the benefit-injury test, better known as the proportionality *stricto sensu* test (see:

HCJ 3477/95 Ben-Atiya rt al. v. Minister of Education and Sport, IsrSC 49 (5) 1; HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance*, IsrSC 51 (4) 367; CA 6821/93, LCA 3363, 1908/94 *United Mizrachi Bank et al. v. Migdal Cooperative Village et al*., IsrSC 49 (4) 221, 346-347, 436-437, 470 [http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village]; HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Eli Yishai, Minister of Labor and Social Affairs*, IsrSC 52 (2) 433; HCJ 6972, 6971/98 *Partitzky v. State of Israel* (not yet published) and the references there). The question is whether the policy of the Ministry of the Interior passes this three-part test that every administrative act must meet.

But before we enter the chamber, let us first take a moment to enjoy the fresh air.

There is disagreement among the experts as to the status of proportionality, and more specifically, about its origin (see, e.g., the *Ben-Atiya* case, above, 14-15 *per* Barak D.P., and the references there). Some are of the opinion that it is a derivative of the reasonableness test, and nothing more than a refinement of that test whose boundaries were not established, and which breaks out in every direction. As opposed to those, there are some who say that the proportionality test stands on its own two feet, and is sustained by a light that emanates from within. I believe that the truth lies somewhere in between those two schools of thought. Historically, the proportionality cause predates that of reasonableness – as that cause is presently recognized – and was born before the reasonableness cause took its first breath (see, e.g., HCJ 14/65 *Khouri and Basil v. Minister of the Interior*, IsrSC 19 (2) 322, 334; HCJ 115/67 *Rosh Haayin Local Council v. Minister of Education and Culture*, IsrSC 21 (1) 524, 526). In time, when it appeared as a comprehensive cause of action, reasonableness – like the tort of negligence in its time and place – came to dominate all, and its predecessors fell under its shadow. Like negligence in tort law, reasonableness in administrative law came to be a "framework" cause whose characteristics changed from matter to matter and from time to time, in accordance with the time and the place. In the next stage, the reasonableness cause gave birth to rules, causes and sub-causes of various types, accompanied by new headings that achieved independent status. One of those new category headings was proportionality. And as reasonableness is to legality, so proportionality is to reasonableness. Having liberated itself from its parent, proportionality could develop itself freely and independently, such that we might say: in the beginning (although not at the beginning of all beginnings) proportionality dwelt in the house of reasonableness, but one

day it left that house, and through its own efforts, built a house of its own. Thus, proportionality now presents us with a sharper, more decisive means than the general cause of reasonableness. It provides us with a more developed tool for examining the rationality of administrative acts.

We have stated the above only "to magnify the Law and make it glorious",[6] inasmuch as we would all agree that it is by means of the proportionality test that we examine the discretion of a duly-authorized governmental agency.

52. The proportionality test focuses upon the means for achieving an objective. The preliminary assumption is that the objective itself is proper, and the question is simply whether the means chosen for its achievement are proper, as well. We should bear in mind that in implementing the proportionality test, the measure of our strictness with the governmental agency will be commensurate with the importance of the infringed right, or the severity of its infringement.

In the matter before us, the preliminary assumption is that the fight to the finish that the Ministry of the Interior is waging against fictitious marriages is a "proper purpose", and that the Ministry's intention is to eradicate this weed is a proper intention. All agree that the Ministry of the Interior's intention befits the values of the State of Israel, and that it is intended for a proper purpose. The State of Israel is trying to contend – and may contend – with unlawful immigration across its borders, and it is certainly appropriate to recognize its right to combat people and organizations that exploit the limitations of the enforcement mechanisms in order to reside unlawfully in Israel. The battle against fictitious marriages is, therefore, a proper battle. However, the question that must be asked is whether, notwithstanding all the above, the means adopted by the authorities – i.e., the demand that the alien leave the country until the question of whether the marriage is bona fide or fictitious is examined – is a means " to an extent no greater than is required".

53. In our opinion, the means adopted by the Ministry of the Interior does not stand in a proper ratio to the purpose that the Ministry seeks to achieve – a purpose that is, itself, proper. The means is inappropriately forceful relative to the purpose, and insofar as the benefit-harm ratio, its harm exceeds its benefit.

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[6] Ed: see Isaiah 42:21.

54. As for the appropriateness of the means to the purpose, the Ministry of the Interior is of the opinion that a policy requiring the alien spouse to leave the country before the application in regard to his status is reviewed constitutes a disincentive to fictitious marriages, inasmuch as the alien partner will know that (fictitious) marriage will not, itself, guarantee his continued presence in Israel. Is that truly the case?

Indeed, although the policy has been in place for a number of years, not only has it not adequately been shown to actually bring about a reduction in the number of fictitious marriages, but it can be argued that the rational connection between the means and the objective is not sufficiently strong. An alien who seeks to extend his presence in Israel by means of fictitious marriage will not be deterred by a waiting period of several months abroad. As opposed to this, a couple – both the alien and the Israeli – who have entered into a bona fide marriage will certainly and severely be harmed if they are compelled to separate, or if – out of their love for one another – they are forced to leave the country together for a number of months.

Moreover, the Ministry of the Interior did not provide us with any relevant statistics either in regard to the number of fictitious marriages or in regard to the ratio between them and the total number of marriages between Israeli citizens and non-Jewish aliens. Let us assume that we are concerned with a one-to-ten ration of fictitious marriages. Would that represent a rational connection between the means and the end? Is there a rational connection when nine suffer on account of one?

55. And further, according to the Ministry of the Interior, it examines the legitimacy of the marriage while one of the spouses is in the country and the other is abroad, or while both are abroad. To my mind, it would seem that examining the marital relationship while one of the spouses is abroad and the other in Israel is more difficult than examining that relationship when both are in Israel. I will not deny that there are certain advantages to an examination conducted when the couple is separated, but I find it hard not to be under the impression that the possibility for conducting an examination, as well as the dependability of that examination, would be far greater when the two are in the country, rather than under the alternative of one being here and the other abroad, and would certainly be greater than when both are abroad. Indeed, one of the clear indicators of a bona fide marriage – although not the only one – is the maintaining of a

common residence and a joint household over time. How can the Ministry of the Interior ascertain that if one of the partners isn't even in the country? Indeed, one gets the clear impression that the laxity of the Ministry of the Interior's scrutiny was a – and perhaps the primary – reason for adopting the new policy, and rather than improve the efficiency of its inspections, the Ministry of the Interior chose the easy route of demanding that the alien spouse leave the country.

That was the case in the matter of *Ben-Atiya* (above). In that case, we were concerned with a program implemented by the Ministry of Education and Sport under which students were exempted from matriculation examinations in certain fields of study. In place of the exams, the Ministry recognized the grades that the students attained in internal exams administered by their high schools. The question was whether the Ministry could deny certain schools the right to participate in that program solely because large-scale occurrences of copying on matriculation exams had been discovered in those schools in previous years. The Court granted Ben-Atiya's petition, and Justice Kedmi wrote (*ibid*., p.8):

> The occurrence of a relatively large number of infringements of the honesty of the exams reflects a laxity in supervision, and the manner for contending with that phenomenon is by improving the efficiency of supervision, and by the appropriate punishment of those involved, rather than by harming "the next class" and the educational institution and its faculty.

What the Court stated there in regard to increasing supervision can be said in this case, as well.

56. The second branch of the proportionality test treats of the question of whether the harm caused to the individual is greater than necessary. There is no doubt in our minds that the Ministry of the Interior's policy absolutely fails this test. First, we will agree with our colleague Justice Dorner that this second branch of the proportionality test concerns the "margin of proportionality", or as she stated in the *Tenufa Manpower and Maintenance Services* case (above):

> And it is sufficient that the violation of the right fall within the "margin of proportionality" for the norm to meet the proportionality requirement. This is certainly true in regard to the legislature…and it is even true in regard to norms adopted by the executive branch… the "margin of proportionality" is also decided with consideration for the nature of the violated right or interest, and their relative importance.

The Ministry of the Interior's policy fails this test, as well.

57. It does not require great powers of imagination to know and understand the severity of the harm to a legitimately married couple compelled to leave the country or separate for a number of months. The Respondents state in this regard:

> On the contrary, if the couple's relationship is sufficiently strong, then it will not suffer at all from a not particularly long separation, or due to the couple's travelling to the alien partner's country of origin, if it is real.

This response that love will conquer a few months of separation is cynical and inappropriate. Moreover, the violation of their dignity and family unity is not something to make light of. And how will separating lovers make matters easier in this matter. Have we forgotten Desdemona's pain when the Duke ordered Othello to leave to fight in Cypress (William Shakespeare, Othello)?

> DESDEMONA:
>
> That I did love the Moor to live with him,
> My downright violence and storm of fortunes
> May trumpet to the world: my heart's subdued
> Even to the very quality of my lord:
> I saw Othello's visage in his mind,
> And to his honour and his valiant parts
> Did I my soul and fortunes consecrate.
> So that, dear lords, if I be left behind,
> A moth of peace, and he go to the war,

> The rites for which I love him are bereft me,
> And I a heavy interim shall support
> By his dear absence…

Should our hearts make light of the pain of separation? Justice Elon addressed the pain of separation in CA 488/77 *Anonymous and Anonymous v. Attorney General*, IsrSC 32 (3) 421, teaching us (p. 432):

> The Sages said that it is as difficult to match people together as parting the Red Sea (TB Sotah 2a, and Rashi *ad loc*.). And if that is true for matching and joining people, *a fortiori*, separating and "parting" them from one another is as difficult as parting the Red Sea.

And let us not ignore the financial burden involved in such a compelled separation of a couple.

58. In their summation briefs, the Petitioners presented us with some of the obstacles confronting a couple when one of them is required to leave the country: the economic problems involved in leaving the country and staying abroad; the limited employment opportunities; and health issues. Indeed, it is hard to avoid the impression that a decree requiring a spouse to leave the country is too heavy to bear. The Respondents did not adequately weigh the right of an individual to marry, and the severe harm to family life attendant to the policy they adopted. In the the *Tenufa Manpower and Maintenance Services* case (above), our colleague Justice Dorner addressed the issue of violating basic rights:

> As for the test regarding the choice of the means that violate the right to the least extent necessary, which, as noted, is not an absolute test, the choice of the means will be influenced by the right violated. When an important, basic right is involved, we must be more strict in choosing means that only minimally violate the right, even if those means are significantly costly.

The matter before, it should be recalled, concerns a basic right of the individual – every individual – to marry and found a family. We should need no reminding that this right is recognized in universally accepted international conventions (see: Art. 16 of the Universal

Declaration of Human Rights, 1948; Art. 12 of the European Convention on Human Rights; Art. 23(2) of the International Covenant on Civil and Political Rights, 1966. For more on this right, see: Amnon Rubinstein, *The Right to Marry*, 3 IYUNEI MISHPAT 433 (1973) (Hebrew); Irene Fahrenhorst, *Family Law as Shaped by Human Rights*, 12 TEL AVIV UNIVERSITY STUDIES.IN LAW 33 (1994)).

Indeed, the force of the right and its strong emanations require, almost on their own, that the means that the Ministry of the Interior chooses be softer and more moderate than the hard, drastic means that it decided to adopt. It is difficult not to infer that the Respondents entirely ignored – or gave only minimal weight to – these basic rights of the individual to marriage and founding a family. If that is the case in regard to the alien, it is all the more so in regard to the Israeli citizen who is a partner to the marriage.

59. It would have been appropriate for the Respondents to choose other means for achieving their – itself proper – purpose, which would be less harmful to the individual. Thus, for example, increased monitoring of unlawful residence in the country, greater supervision over the legitimacy of marriages, and so forth. The employment of such means would, we assume, require the expenditure of greater resources, but that alone cannot justify the harsh means that the Ministry of the Interior chose to adopt towards individuals.

60. The third branch of proportionality addresses the benefit deriving from the policy, as opposed to the harm that it inflicts. In our opinion, the benefit of the policy does not stand in a proper ratio to the harm it causes. The benefit that the policy achieves is, primarily, merely speculative, and we did not receive any of the data we would have expected to see. It is hard to free oneself from the impression that whether the policy will lead to the eradication of fictitious marriages or to harm to bona fide marriages is merely a matter of chance. The harm – harm to bona fide marriages – is real and proven, whereas the benefit – harm to fictitious marriages – is speculative and unproven. Moreover, in the absence of statistics, it is hard to ignore the real possibility that the many – those in bona fide marriages – will suffer for the few – those in fictitious marriages.

In our opinion, examining the harm and benefit leads to the unequivocal conclusion that the Ministry of the Interior's policy does not meet the test of a proper, proportionated relationship, as required.

61. The necessary conclusion from the above is that the Ministry of the Interior's policy in regard to aliens who married Israelis while they (the aliens) were living in Israel without a permit is a policy that does not meet the proportionality test, and is improper and void. The Ministry of the Interior's demand – as a fundamental policy – that the alien spouse leave the country for a number of months until the legitimacy of the marriage is reviewed, is a policy that is inconsistent with first principles of a democratic regime that is concerned for civil rights.

62. Does that mean that the Ministry will be acting unlawfully whenever it demands that an alien living in Israel unlawfully, and married to an Israeli, leave the country immediately until his application is reviewed in depth? In our opinion, the answer is no. It may be assumed that there will be cases in which the fictitious character of the marriage will be apparent to all in all its ugliness, even without any in-depth investigation. That would be so, for example, when it becomes apparent in the course of an interview with the couple that the woman barely knows her spouse, or the opposite, and that, of course, neither of the two is acquainted with their spouse's family, birthplace, and so forth. That would also be the case where it is manifest that the marriage certificate is a forgery (see, for example, the *Motzenchik* case, mentioned above in para. 34). In such cases, and after granting the couple an opportunity to be heard, there would appear to be nothing that would prevent asking the alien spouse to depart the country immediately until the completion of a further review of the marriage (if there would be any need for such a review). However, subject to such exceptions, the Ministry of the Interior is prohibited from demanding that the alien leave the country prior to a review of the legitimacy of the marriage. This, of course, is subject to overriding concerns of a criminal record or a danger to public safety. Needless to say that the couple is entitled to present their case to the Ministry of the Interior official, and that no decision shall be made before they are granted a fair opportunity to present their case in full. If, following the examination, the Ministry of the Interior concludes that the couple's marriage is fictitious, it may then deport the alien from the country, subject to his right to challenge the deportation in court.

63. Moreover, our preliminary assumption is of a couple presenting itself as married to the Ministry of the Interior. The man (for example) is Israeli, and the woman is an alien. The wedding ceremony took place while the alien woman was living in Israel without a permit, and the two now request that the woman be granted permanent residency and citizenship. We have not agreed to the establishing of a precondition requiring the woman to leave the country before her application will be addressed. At the same time, we cannot ignore the fact that the woman took the law into her own hands, continued to remain in the country contrary to law and order, and that she now seeks to legitimize her continued stay in reliance upon the marriage. We can also not ignore the fictitious marriage phenomenon that the Ministry of the Interior confronts when that woman (in this example) and her spouse seek to fraudulently extend the woman's stay in the country. In considering all the above, and having rejected deportation, it would appear to us that in such cases, the couple should be subject to a heavier-than-normal burden to prove the legitimacy of the marriage. Indeed, the nature and severity of the matter should influence the burden of proof, as in other matters of law, and require a higher level of proof of the couple than is usual. If that is the general rule, it is all the more so the case when the marriage was celebrated after deportation proceedings against the alien spouse commenced.

An analogy – although not a perfect one – can be brought from the rule requiring that a complainant in a tort suit who claims a larger loss of income than his reported tax income must bring "persuasive evidence" as to the truth of his claim (see, e.g., CA 8639/96 Aryeh Insurance Company Ltd. v. Kardonis (not yet published; para. 5 of the opinion of Justice Orr; and see: CA 5794/94 Ararat v. Ben Shevach (unpublished) in which Justice Orr held that we must be "strict" with such a complainant).

The law is similar in the United States in cases comparable (although not identical) to our own, where the law speaks of the non-deportation of an alien where the alien proves:

> [B]y *clear and convincing evidence* to the satisfaction of the Attorney General that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given... (8 U.S.C. § 1255(e)(3)) (emphasis added).

Thus we find that in order to prevent deportation, the alien will be required to meet a higher standard of proof in order to convince the authorities of the legitimacy of the marriage.

Proceedings for granting the right of permanent residence – the "graduated test"; Naturalization of an alien married to an Israeli

64. As we saw above, the Ministry of the Interior's policy distinguishes between a marriage between an Israeli and an alien residing in Israel unlawfully, and the marriage of an Israeli to an alien residing in Israel lawfully. Up to now, we have addressed cases in which the alien resides in Israel unlawfully, and we shall now turn to the other type of case, in which the alien resides in the country lawfully. We would preface this by stating that this situation also includes cases in which the residency is unlawful, and it has been determined that the marriage is bona fide.

We are now concerned with the case of a married couple in which one spouse is Israeli and the other is a non-Jewish alien applying for the right of permanent residency and naturalization. Under the currently accepted procedure, these two requests are handled separately, and we will, therefore, address them separately, respectively.

65. The Ministry of the Interior's policy for granting permanent residency to the alien spouse – which has been in place since 1996 – is divided in to three separate stages, and the entire process may take nearly six years to complete. The first stage – an undetermined period, up to six months; a second period of two years; and a three-year third period, totaling some six years.

66. In the first stage – which extends for an undetermined period of up to six months – the Ministry of the Interior begins to examine whether the marriage was entered into in good faith, and the question of any security or criminal impediment to granting the requested rights. Unlike the situation of an alien who marries an Israeli while residing in Israeli without a permit, the alien residing in Israel with a permit is not requested to leave the country until the completion of the examination. The examination is conducted while both spouses are in the country.

In conducting its examination on the merits, the Ministry of the Interior assigns little importance to the marriage certificate presented by the couple as proof of their marriage, and

needless to say, it does not suffice with that document. The Ministry of the Interior invites the couple for an interview, and conducts further meetings in order to ascertain whether the marriage is bona fide, as well as in regard to the continued marital relationship. Once the Ministry is satisfied that the marriage is bona fide – at least prima facie – and in the absence of any security or criminal impediment to the spouse's continued presence in the country (these issues were not raised before the Court, and we will not address them), the "graduated test" period begins. The total length of the "graduated test" period is five years and three months, and it begins, as noted, on the day that the Ministry of the Interior is satisfied that the two people who presented themselves as a couple are partners to a bona fide marriage.

67. In the second stage (the first stage of the graduated test), the alien spouse is granted a visa and a B/1 visitor's permit (temporary worker) under the provisions of reg. 5(a) of the Entry into Israel Regulations, 5734-1974. The visa and permit are valid for three months (as stated in sec. 2(a)(2) of the Entry into Israel Law, 5712-1952), and can be renewed. After 27 months in this status, we proceed to the third stage (the second stage in the graduated test).

If the marriage continues as before, and in the absence of any security or criminal impediment, the alien spouse acquires the right to a visa and A/5 temporary residence permit (general temporary resident) under reg. 6(e) of the Entry into Israel Regulations. The alien spouse will remain in this status for a period of three years, until the completion of the aggregate test period of five years and three months. At the end of that period, the Ministry of the Interior examines whether the marriage is still in force. Having so found, and in the absence of any impediment, the alien spouse is granted the status of permanent resident, i.e., a visa and permit for permanent residence under sec. 2(a)(4) of the Entry into Israel Law.

Thus far, the procedure for granting the right of permanent residency. We will now address the procedures for naturalization.

68. The alien spouse is entitled to commence naturalization proceedings only upon completing the test period for granting the right to permanent residence. That is the policy and practice of the Ministry of the Interior.

69. The Petitioners primarily complain of the length of the proceedings for obtaining permanent residence; of the fact that the Ministry subjects them – unjustifiably in their opinion – to the graduated-test period applying to "family reunification" proceedings; of the fact that naturalization proceedings begin only upon the completion of the graduated-test period; and of the fact that the Ministry does not apply a more lenient naturalization policy, as provided under the Nationality Law. We will now address these arguments.

Granting the right to permanent residence – prefatory remarks

70. The attorneys for the parties employed the term "family reunification" in regard to granting rights to alien spouses, but that term is inappropriate, and we should make that clear from the start. A distinction should be drawn between the concept of "family reunification" as it applies to the administered territories – in which regard the use of this concept is correct – and borrowing that concept and applying it to the territory of the State. The substance of the two may appear similar, as in both instances we are concerned with the desire of family members to live together. However, if there is (partial) substantive identity between "family reunification" in the administered territories and "family reunification" in Israel, there is no legal identity. The law is different, the authorized government agency is different, and the nature of the right is different. We do not intend to go into the details of the arrangements for "family reunification" in the administered territories. Our intention is merely to state that no analogy should be drawn to the matter before us, just as no analogy should be drawn between the matter before us and those arrangements. Each arrangement addresses its own issues.

71. A further comment. The Ministry of the Interior applies the identical "graduated test" to aliens seeking status after marrying Israeli residents, and to aliens who married Israeli citizens. As a matter of law, one could argue that the spouse of a citizen is different from the spouse of a resident, inasmuch as the spouse of a citizen (as we shall see below) falls directly under the purview of the Nationality Law, whereas the matter of a resident is governed by the policy that the Ministry of the Interior chooses to adopt from time to time. However, as noted, the Ministry of the Interior decided to adopt a uniform policy for citizens and residents, and applies the "graduated test" to the spouses of both.

72. We hall now address the subject of granting the right to permanent residence and the right to citizenship, respectively.

The procedure for granting the right of permanent residence to the alien spouse

73. The State of Israel recognizes a citizen's right to choose a partner freely, and to establish a family together. Israel is committed to protecting the family unit on the basis of international conventions (see: art. 10 of the International Covenant on Economic, Social and Cultural Rights, 1966, and art. 23.1 of the International Covenant on Civil and Political Rights, 1966). Although those conventions do not dictate any particular policy in regard to family reunification, Israel has recognized – and recognizes – its duty to provide protection for the family unit also by means of granting permits for family reunification. In doing so, Israel joined the most enlightened nations, those recognizing – subject to restrictions regarding state security, and public good and welfare – the right of family members to live together in the territory they may choose. (See and compare: Ryszard Cholewinski, *The Protection of the Right of Economic Migrants to Family Reunion in Europe*, 43 INT. & COMP. LAW QUARTERLY 568 (1994); the judgment of the European Court of Human Rights in *Berrehab v. The Netherlands* (1988) 11 E.H.R.R 322).

74. The same is true for the matter before us. The Respondents recognize the right of the partners – an Israeli citizen and a non-Israeli citizen – who married in good faith to live together in Israel, and the right of the alien to an arrangement that will ultimately grant him permanent status in the State: permanent residency and citizenship. What, then, gives rise to the complaint? It arises due to the length of time of that "graduated test", and the rigidity of the arrangement.

75. When we are concerned with endogamous Jewish marriage, no problem arises inasmuch as every Jew is entitled to return and to citizenship. Our matter concerns non-Jews who marry Israeli citizens. All would agree that the alien partner is not entitled to an immediate right of permanent residency and citizenship, and that such an entitlement would not be proper. As is universally accepted, the State has the right to monitor and supervise the procedures for granting rights to an alien spouse, and the State will naturally adopt a policy of stages. We may also assume that it is generally agreed that proceeding from one stage to another will be contingent

upon the continued marital relationship (in the course of each stage, as well) and the absence of any security or criminally related impediment to the continuation of the process. It would have been proper that these arrangements adopted by the State be established by statute, or at least, in regulations, rather than in "internal directives" (and we have not seen even those). We would, nevertheless, recall that those directives were subjected to judicial review (see: HCJ 2950/96 *Hana Mousa and 37 others v. Minister of the Interior* (not yet published); HCJ 3087/97 *Raina Aisha et al. v. Minister of the Interior* (not yet published)). The question is simply whether the policy of a test in stages in regard to an alien spouse, as adopted by the Ministry of the Interior, meets the proportionality test and its derivatives.

The reasonableness of the arrangement for granting permanent residency

76. As noted, the same graduated arrangement that the Ministry of the Interior employs in regard to the spouse of an Israeli resident is also applied to the alien spouse of an Israeli citizen. This is why the alien spouse is subjected to a waiting period of five years and three months prior to the granting of permanent residency. The Petitioners argue that their matter is different, and that there is no justification for applying this years-long test that applies to the spouse of a resident to the spouse of a citizen, as well. We will state that, as a matter of principle, this argument has been raised in the past, and this Court rejected it. Thus, for example, in HCJ 3497/97 *Afaf Said Musa Kamleh v. Minister of the Interior* (not yet published), the Court stated:

> As far as the procedure and the reason grounding it, there is no room for distinguishing between a resident and a citizen.

As for the period of time required before the spouse of a citizen can obtain permanent residency, the Petitioners argue that the time period does not meet the proportionality test in that it is unjustifiably long. The Respondents reply that they are acting lawfully, with due authority, and reasonably. We would all agree that, to the extent that considerations of national security or public safety are concerned, the Respondents are acting properly and reasonably even if the procedure is significantly long. However, in the absence of such or similar considerations, we unfortunately heard only hesitant, partial arguments as to the time required until the alien spouse can obtain permanent residency. Against this background, it would not be appropriate for the Court to further explore this subject on its own. Moreover, in the main, the subject of permanent

residency is subsumed in the alien spouse's application for naturalization. It would, therefore, be appropriate that we first address the question of citizenship. If that is not enough, we have also discovered that this question in regard to permanent residency is the primary issue in another petition pending before the High Court of Justice (HCJ 338/99 *Sabri Issa et al*.), and it would be preferable that we leave our decision of this question for that petition.

Thus far on the issue of permanent residency. We shall now proceed to the subject of naturalization.

Naturalization of the alien spouse – lawfulness and reasonableness

77. The issue of the naturalization of the alien spouse differs from that of permanent residency, if only because here we are not navigating policy and directives, but stand on the terra firma of statute. Elsewhere (see paras. 31-33, above) we briefly addressed the relevant provisions of the Nationality Law, and we shall now expand somewhat.

78. Nationality is conferred by seven means (sec. 1 of the Nationality Law), and we are concerned with that of naturalization (secs. 5-8 of the Nationality Law). Section 5 of the Nationality Law establishes as follows:

> *Naturalisation*
>
> 5(a) A person of full age, not being an Israel national, may obtain Israel nationality by naturalization if –
>
> (1) He is in Israel; and
> (2) He has been in Israel for three years out of five years preceding the day of submission of his application; and
> (3) He is entitled to reside in Israel permanently; and
> (4) He has settled, or intends to settle, in Israel; and
> (5) He has some knowledge of the Hebrew language; and
> (6) He has renounced his prior nationality or has proved that he will cease to be a foreign national upon becoming an Israel national.

(b) …

That is the general path for naturalization, but not the path in the case of a spouse, whose right to citizenship takes precedence over the right of others. Thus, sec. 7 of the Nationality Law informs us:

> *Naturalisation of husband and wife*
>
> 7. The spouse of a person who is an Israel national or has applied for Israel nationality and meets or is exempt from the requirements of section 5 (a) may obtain Israeli nationality by naturalisation even if she or he is a minor or does not meet the requirements of section 5 (a).

The spouse of an Israeli citizen – alone – is entitled to this more lenient procedure for naturalization, the reasons for which were addressed by Justice Barak in the *Rankin* case (above, p. 117):

> There is a readiness for significantly greater flexibility in regard to the requirements when the spouse of a citizen requests citizenship. The reason for this is to be found in the desire to preserve the family unit, and the need to prevent a division in the citizenship of its members.

And further see the *Kniazhinski* case, above.

79. The spouse of an Israeli citizen may, therefore, be granted some leniency in the naturalization process, but in order to obtain it, he must pass through the corridor of the Minister of the Interior's (or a person upon whom the Minister of the Interior confers authority) discretion. We have already noted (para. 33, above) that this leniency granted to the spouse of a citizen does not detract from the discretion of the Minister of the Interior, and we are concerned only with the boundaries of that discretion and the criteria that the Minister may employ in exercising it. All would agree, for example, that in the case of an applicant with a criminal record that may place the public at risk, or an applicant who may present a threat to national security, the Minister of the Interior can refuse the application for naturalization. If that is true of return –

which allows for the prevention of the immigration of a Jew for these reasons (see sec. 2(b)(2) and (3) of the Law of Return) – should not the same hold for normal naturalization?

Moreover, it is decided law that the Minister's discretion in regard to the granting of citizenship is so broad that, despite the provisions of sec. 7 of the Law – authorizing the Minister to waive the conditions established under sec. 5(a) of the Law in addressing the naturalization application of the spouse of an Israeli – he is permitted not to waive the fulfillment of some of those conditions and insist that they be met. Thus, the Minister of the Interior is authorized to waive the conditions established under sec. 5(a)) of the Law, or not to waive them, and insist upon fulfilling some of them (and cf. HCJ 31/53 *Nabia Taufiq Badran Mustafa v. General of the Northern Command, IDF et al*., IsrSC 7 587, 588). Thus, for example, the Minister of the Interior decided – as a matter of general policy – not to waive the requirements under sec. 5(a)(1) and 5(a)(4) of the Law in regard to the spouse of an Israeli citizen requesting naturalization. In other words, the applicant for naturalization must meet the requirement of presence "in Israel" and the requirement that he "has settled, or intends to settle, in Israel". When that matter was raised before us, we approved that policy, stating that the Minister of the Interior properly exercised his discretion in seeking to prevent the exploitation of the naturalization process by those who did not intend to use it for the purpose of the family's residing in Israel. As we stated in the *Uriel Scharf* case (above):

> This policy of the Minister of the Interior is intended to prevent enlarging the circle of Israeli citizens who do not reside in Israel, do not intend to reside in Israel, and do not take any part in the obligations imposed upon its residents.

80. The scope of the Minister of the Interior's discretion is derived, *inter alia*, from the nature of the right to citizenship, and we may state, in general, that the nature of that right is such as to indicate broad discretion. Citizenship is a basic right (HCJ 2757/96 *Alroi v. Minister of the Interior*, IsrSC 50 (2) 18, 22-23). It is a right that establishes a continuing relationship between the citizen and the state that may grant rights and ground various obligations (see: RUBINSTEIN & MEDINA, vol. 2, 896-903; M.D. GOULDMAN, ISRAEL NATIONALITY LAW (Hebrew University, 1970) 101-118. And see more recently: CrimA 6182/98 *Sheinbein v. Attorney General*, IsrSC 53 (1) 624). A citizen carries his citizenship on his back, and it accompanies him wherever he may

go. The right is not limited to the country's borders, but "applies to the territory of the state and beyond" (the *Rankin* case, 117). From the above we see that, by nature, the granting of citizenship is subject to broad to discretion, and that the Minister has the authority to weigh many different considerations before deciding whether or not to grant an application for naturalization.

Nevertheless, as with every matter of discretion, boundaries and limits have been imposed upon the Minister of the Interior's discretion under the Nationality Law. One of those limits is established in sec. 7 of the Nationality Law, in which the legislature expressed its desire that leniency may be shown in regard to the spouses of Israeli citizens who apply for Israeli citizenship. The legislature stated its desire, and the Minister of the Interior cannot ignore the directives of the law.

The legislature's directive regarding leniency in the naturalization of the spouse of an Israeli citizen

81. Section 7 of the Nationality Law does not deprive the Minister of the Interior of his broad discretion, even when he is considering the naturalization application of the spouse of an Israeli citizen. At the same time, it instructs us that leniency is appropriate in considering such an application. I would not go so far as to say that the "burden of persuasion" rest on the Minister's shoulders to show why and wherefore he chooses not to exempt the spouse of an Israeli citizen from the provisions of sec. 5(a) of the Nationality Law. However, I would have no difficulty in stating that the Minister is under a burden to explain why he will not grant an exemption from those requirements to the spouse of an Israeli citizen, in part or in full.

Once again, we are not traversing untrodden ground. Section 7 of the Nationality Law expresses the international obligation that Israel assumed in regard to granting leniency in the naturalization of a married woman, or in the language of art. 3 of the Convention on the Nationality of a Married Woman (8 *Kitvei Amana* 605):

> Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged

naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.

The Convention is intended, by its language, to protect the rights of women, but in view of the principle of equality in our legal system, we can say that the right also extends, in principle, to men, as well. The purpose of sec. 7 of the Nationality Law is to protect the rights of the spouse, from which we learn that the Minister of the Interior is required to include this purpose in the policy that he establishes for the implementation of sec. 7. Thus, for example, a rigid policy that would declare that a spouse would not be granted citizenship unless he met *all* of the conditions established under sec. 5(a) would be hard to accept as being within the Minister's authority and lawful. Indeed, we might possibly approve such particular discretion only in the most exceptional case, as it severely detracts from the provisions of sec. 7 of the Law.

82. As for the matter before us, as we saw, the Minister of the Interior is unwilling to consider an application for naturalization before the conclusion of the probationary period for permanent residency, or in terms of months and years: after five years and three months from the submission of the application for permanent residency. Is it proper to impose that condition upon a spouse seeking naturalization?

83. In sec. 5(a) of the Nationality Law, the legislature established six preconditions – threshold conditions –for the right to naturalization (subject to the Minister of the Interior's discretion not to grant citizenship even upon meeting those conditions). Two of those conditions – those listed in sec. 5(a)(1) and 5(a)(4) – compose part of the Minister's permanent policy, i.e., presence in Israel and settling, or intending to settle, in Israel (see para 79, above). Now, in demanding – as a precondition – that the spouse requesting naturalization first obtain permanent residency, the Minister adds a requirement similar to the condition established under sec. 5(a)(3), i.e., that the applicant be "entitled to reside in Israel permanently". In practice, if not in law, the spouse is required to meet a condition similar to the condition established under sec. 5(a)(2) of the law, under which a precondition for granting citizenship is that the applicant "has been in Israel for three years out of five years preceding the day of submission of his application".

Of the six conditions of sec. 5(a), there remain only two from which the spouse is (apparently) exempt: "has some knowledge of the Hebrew language" (sec. 5(a)(5)), and "renounced his prior nationality or has proved that he will cease to be a foreign national upon becoming an Israel national" (sec. 5(a)(6)). I am of the opinion that in so burdening the spouse, the Minister of the Interior went too far in the scope of his broad discretion. If that is so in general, it is all the more so when that policy was presented to the Court – even then, only orally – without our hearing that it is subject to some or other exceptions.

84. Thus we find that, in accordance with sec. 7 of the Law, in considering an application for naturalization by a spouse, the Minister is authorized to waive the condition of permanent residence, and for good reason. Acquiring the right to permanent residency generally involves a long waiting period, and one might argue that the Law impliedly asks that we exempt a spouse from a long waiting period prior to naturalization. However, in practice, the policy established by the Minister of the Interior ignores this directive of the legislature by imposing nearly a six-year waiting period upon a spouse before considering his application for naturalization. Even if we were willing to accept this policy in regard to the right to permanent residency, we are hard pressed to distinguish how the Minister intended to be lenient toward a spouse, as the Law directs (in principle). The legislature asked that we not be strict with the spouse of an Israeli citizen, and rather than establishing rigid conditions and fixed time periods – the conditions established under sec. 5(a) of the Law – the Minister of the Interior was asked to weigh a more lenient approach, in accordance with each person's circumstances and a predetermined policy. Yet the Minister of the Interior hardened his heart against the spouse as if he were a regular applicant for naturalization.

Moreover, we were not informed of the establishing of any exceptions to the policy, and a policy without exceptions is like bearings without lubricating oil. Just as the latter will not work and will quickly burn out, so it is in regard to the policy as well. Imagine a couple living in Israel for four years, with three children. The husband is a civil servant, and the wife is a senior industrial and management engineer in an industrial factory. Are we seriously going to say that they must wait more than a year before the Minister of the Interior will begin to consider whether to grant this non-Jewish woman citizenship?

We are not saying – and would not say – that the spouse of an Israeli citizen is entitled to automatic citizenship. By nature, some period of time is required until the authorities decide to grant citizenship to the alien spouse, and even in establishing a policy, the time periods may differ from one matter to another. However, it is hard to accept that the Minister of the Interior has established a rigid requirement of a waiting period of more than five years before he is willing to *begin* considering an application for naturalization submitted by the non-Jewish spouse of an Israeli citizen. The legislature showed us the way, and we may not stray from it.

85. In conclusion, it would appear to us that when an alien spouse, married to an Israeli citizen, submits an application for naturalization, the Minister of the Interior may not rigidly condition the examination of that application upon the conclusion of the graduated test and the obtaining of permanent residency as a necessary prerequisite. We should also bear in mind, and not forget, that we are not only concerned with the right of that non-Jewish, alien spouse. We are also concerned with the right of the Israeli spouse, and his desire that his spouse, who lives with him and their children in Israel, enjoy equal rights to those around her. The Minister of the Interior holds discretion as to how and when to decide, but establishing a rigid framework of nearly six years until he is willing to begin examining a foreign spouse's application for naturalization pushes the Minister of the Interior's discretion beyond the established boundaries of his authority. Indeed, the Minister of the Interior is authorized to establish a minimum time period ("TIG" in colloquial usage), and it is but natural that the authority will establish internal directives for the average case. But the directives that the Minister established for himself do not meet the tests of reasonableness and proportionality.

Regarding registration of the marriage in the Population Registry

86. Some of the Petitioners further request that we direct the Minister to register their marriages in the Population Registry. Inasmuch as, in any case, we are going to remand the matter of the Petitioners to the discretion of the Minister of the Interior, a separate discussion of the issue of registration is not appropriate at this time. The Minister will carry out his examination and decide, and the doors of this Court will remain open to anyone who believes that he has been wronged.

Conclusion

87. At the outset of our journey, we presented four questions that required decision (see para. 3, above). Now, at the end of the voyage, we will present the main points of our conclusions:

A. The right of return: We have found that the right of return is granted only to the family members of Jews prior to their immigration to Israel. In other words, Jews who are citizens of Israel – whether by birth, or after realizing their right to return – cannot grant the right of return to their non-Jewish spouses. We should, however, bear in mind that *aliya* [immigration] to Israel is not necessarily a clear-cut process. In some cases, the process may be prolonged, and there may be instances in which we will have to apply the Law flexibly in regard to couples whose matter is being considered (see the end of para 24, above).

B. (1) The Ministry of the Interior's policy in regard to aliens who marry Israelis while they (the aliens) reside in Israel without a permit does not meet the proportionality test, and it is therefore unlawful and void. The Ministry of the Interior's requirement – as a matter of policy – that the alien spouse leave the country for a number of months while the legitimacy of the marriage is investigated is not consistent with the fundamental principles of a democratic regime that is concerned for civil rights.

(2) Nevertheless, in a case in which the alien spouse resided in Israel without a permit, the Ministry of the Interior may be strict with the couple, and demand a higher-than-usual degree of proof of the legitimacy of the marriage. This higher level of proof will apply all the more so in cases in which deportation proceedings have commenced, and the alien spouse seeks to legitimize his stay in Israel on the basis of that marriage.

(3) In those cases in which the fictitious character of the marriage is manifest without need for in-depth examination and investigation, the Ministry of the Interior may demand that the alien spouse leave the country prior to conducting a comprehensive examination of the legitimacy of the marriage.

(4) In any case, the State is under an obligation to hear the spouses and permit them to persuade the authority of the legitimacy of their marriage. No decision as to the legitimacy of the marriage can be made before the couple has been afforded an opportunity to fully present its case.

(5) The above addresses only the legitimacy of the marriage. Needless to say, the Ministry of the Interior is authorized to weigh considerations other than the legitimacy of the marriage, such as considerations concerning a criminal record, danger to public safety, and other such overriding considerations.

(6) If, following a comprehensive examination, the Ministry of the Interior concludes that the marriage was merely a fiction, it may deport the alien from the country, subject to his right to challenge that deportation before a court.

(7) It would be appropriate for the Ministry of the Interior to compose its policy in detailed, written form, and that the internal directives that it establishes be published.

C. The arrangements for the alien spouse's stay in Israel should be set out in regulations, or at the very least, the Ministry of the Interior must establish them as internal directives that will be published to the public at large.

D. (1) Naturalization of the alien spouse: The Minister of the Interior is authorized to establish a policy – which must be published – under which the alien spouse will be granted citizenship at the conclusion of a reasonable period that will be decided, and upon fulfilling the necessary preconditions. Needless to say, the Minister of the Interior must consider each application for naturalization on its merits, in accordance with its special circumstances, and in accordance with the established policy. In the absence of special reasons, the Minister of the Interior may not condition the commencement of the examination of the application for naturalization upon the passage of the time period required for the granting of permanent residency to the alien spouse.

(2) In the framework of his general policy, the Minister of the Interior may establish a minimum time period for responding to the application of the alien spouse for naturalization, and needless to say, that time period must meet the proportionality test.

E. We were not required to decide upon the question of the time period required for the granting of permanent residency, nor upon the question of the registration of the marriage.

88. We have decided the fundamental legal issues without expressing our opinion as to each individual petitioner. We now further order that the matters of the Petitioners before the Court be remanded to the examination and consideration of the duly authorized agency, which shall decide upon the matter of each one of them in accordance with the decisions made in this judgment. Needless to say, the doors of this Court stand wide open – and shall always be so – for any who may be in distress.

89. The matter of Jorge Arnulf (HCJ 8016/96) raises the particular problem of a non-Jewish alien who married a Jewish Israeli citizen, where the Rabbinical Court has declared that marriage void. This petition raises additional problems that do not arise in the others, and the Ministry of the Interior must, therefore, consider this petitioner's request in light of all the circumstances of his case in their entirety.

Here we shall conclude.

90. We order that the orders nisi be made absolute in all that relates to the policy of the Minister of the Interior's policy in regard to the treatment of the application of an alien residing in Israel without a permit who married an Israeli, and in all that regards the Minister of the Interior's policy on the subject of granting citizenship to a non-Jewish alien married to an Israeli – all as explained and detailed in our opinion hereinabove. The Respondents shall pay the legal fees of the Petitioners in each of the petitions in the amount of NIS 10,000.

Justice D. Dorner:

I concur.

Justice D. Beinisch:

I concur.

Decided in accordance with the opinion of Justice M. Cheshin.

This 18th day of Iyar 5759 (May 4, 1999).