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Position Paper

Proposed Nationality and Entry into Israel Law (Temporary Order) (Amendment), 5765 – 2005

1. The bill preserves unconstitutional legislation

In August 2003, the Knesset enacted Hoq ha-Ezrahut weha-Kenisa le-Yisra'el (Hora'at Sha'a) [the Nationality and Entry into Israel Law (Temporary Order)], 5763 – 2003. The law, which prevents the family unification of Israeli residents and citizens with their spouses who reside in the Occupied Territories, has harmed thousands of couples, some of whom married many years ago, who have been forced to separate or leave Israel. The law also severely harmed residents' and citizens' children who were born in the Occupied Territories; as a result, there are families in which some of the children have a legal status in Israel, while their siblings do not. Because it is impossible to arrange a status for these children, they are subject at any time to be stopped, detained, and deported.

Much has been said about the security needs that ostensibly justify this discriminatory and racist legislation, but the drafters of the law have yet to provide precise figures on the involvement in attacks on Israelis of Palestinians who obtained a status in Israel through family unification. Basing such a sweeping policy on isolated cases punishes an entire public, and infringes their fundamental rights although they have committed no wrong.

The constitutionality of the temporary order is presently being challenged in the High Court of Justice. The High Court has already stated that the law raises constitutional questions on the nature of the rights, their constitutional basis, the proportionality of the harm, the exceptions, the transitional provisions, and other matters. The High Court also contended that the law is not an "ordinary" law, and that it requires special consideration.

Study of the present bill indicates that, not only does it not respond to the constitutional problems mentioned by the Court, it exacerbates the harm to the population affected by the legislation.

In essence, the present bill preserves the fundamental provisions of the temporary order. Thus, this bill is also unconstitutional and will not hold out.

2. The bill exacerbates the provisions of the existing temporary order

The proposed bill is portrayed as a softer version of the old version, one that expands the exceptions and aids persons who are harmed by the existing law.

To a large extent, however, this claim is a sham. Alongside a certain easing of provisions, the bill provides a number of provisions that will significantly limit the narrow exceptions offered by the statute in its current form. The so-called "reform" is nothing more than a set of improvements to tighten the strangulation created by the original temporary order.

3. The increased harms that will result from the proposed changes are as follows:

A. Definition of "resident of the region"

Article 1 of the proposed bill expands the definition to include, in addition to residents of the Palestinian Authority living there, all persons who are recorded in the population registry of the Palestinian Authority. As a result, children who were born in Israel, live in Israel together with their parents, and are registered, for one reason or another, in the Palestinian Authority's population registry come within the amended definition.

B. Denial of powers of the Interior Minister

(1) **Type of permit** Article 2(2) of the proposed bill replaces Article 3(1) of the existing law. Along with a certain expansion of the reasons that may be taken into account in granting a permit to stay in Israel, the amendment revokes the power of the Interior Minister to grant these permits. The power is transferred exclusively to the military commander. This means that spouses of Israeli residents and their children, to whom the article applies, will remain without any status in Israel. The most they can hope for is permits issued by the Civil Administration, which do not grant their holder a possibility to work in Israel and to provide for his

family. They also do not grant any social benefits, most importantly health insurance. Revocation of the Interior Minister's power in this matter will result in a situation in which spouses invited in the family unification procedure and minor children over 12 years of age live in Israel for years, pursuant to temporary permits to stay in the country, while being denied rights completely, in violation of the state's obligation derived from Hoq Yesod: Kevod ha-Adam we-Heruto [Basic Law: Human Dignity and Liberty].

(2) **Elimination of discretion** As mentioned above, Article 2(2) of the proposed bill hands over to the military commander the sole power to arrange stay in Israel. Revoking the Interior Minister's discretion makes it impossible to respond to exceptional and humanitarian cases. The effect of this change will be grave and far-reaching.

C. Arranging the status of minor children over 12 years of age

(1) **Approval of family unification of the foreign parent as a condition for granting a temporary permit to stay** The proposed Article 2(2)(e), which amends Article 3(1) of the existing temporary order, gives the regional commander the power to issue a permit to stay in Israel to minor children over the age of 12 to prevent their separation from a parent who was given a permit to stay in Israel pursuant to subparagraph (c) or (d), that is, prevention of separation from a parent who is a permanent resident of Israel will be insufficient reason to grant a permit to these children. Only if the parent from the *Territories* meets the criteria of age and lack of a reason to prevent such stay, and only when the initial approval of the request for family unification is given (the process takes years to complete), and after the permit is received, are children permitted to live lawfully with their resident parent.

(2) **Discrimination based on age** The arrangement severely and wrongfully discriminates, on the basis of age, between children who are under 12 years of age and children over 12. Whereas the former are entitled to a status in Israel, including permanent residency, the latter are only entitled to DCO [District Coordination Office] permits. Whereas the fact that one of the parents has a status in Israel is a sufficient reason to grant a status

to the former, the latter need to have both parents staying lawfully in the country.

(3) **D. Arranging the status of children under 12**

(1) Article 2(4) of the amendment, proposed as an addition to Article 3 of the law, empowers the regional commander to grant permits to stay to children under 12, including newborn infants. After the temporary order was enacted, the implementation of this policy began, but the procedures were changed following court petitions, and children were included in the shortened graduated arrangement, which lasts two years, at the end of which the applicant receives permanent residency status.

(2) Until now, such infants have been entitled to a status based on whether the custodial parent living with his or her children in Israel meet the center-of-life test. In the normal course of affairs, infants and children in nursery and elementary school do not have to undergo security checks. Article 3A of the proposed bill establishes a collective security test. Defining a distant relative as a "security threat" is sufficient to deny the Interior Minister power to prevent the infant being torn from his mother.

E. Definition of "security threat"

Article 3 of the proposed bill sets forth a criterion that can only be characterized as collective punishment. According to the article, family members, including children, bear responsibility for the acts of close and distant relatives, with the punishment for a crime they did not commit being refusal to arrange their status in Israel.

Even if defense officials are convinced that a certain person is not a security threat, belief that the person's brother-in-law constitutes such a threat is sufficient to deny discretion to grant the permit.

The proposed Article 3A, which is rigid and collective in substance, applies to all permits and authorizations, except for permits related to medical matters. The Interior Minister and the military commander are not given discretion to grant a permit to a person whose testimony is required in court, to a vital employee, to an infant whose mother is a resident of Israel, or for any other purpose, if a distant relative of the applicant constitutes a threat to state security.

The bill, as formulated, also requires the total cessation of family visits to residents of the Occupied Territories who are being held in Israeli prisons, which are presently conducted by means of guarded transportation organized by the Red Cross in coordination with security officials. This absurd result indicates how little the bill reflects any real security need.

In this article, "member of family" means spouse, parent, child, brother, sister, and their spouses, while in Article 3(2) of the law, in the article that deals with collaborators with Israel and their families, "member of family" means spouse, parent, and child. Two different definitions for the same term, found in the same law, indicate the clear intention of the drafters and their lack of good faith.

In addition to the arbitrariness and lack of proper purpose of the provision, outright rejection of a person because of information relating to another person, over which he or she has no control, flagrantly violates the principle that persons are responsible for their own acts, based on the principle of the person's autonomy and human dignity. The provision is surpassingly unconstitutional, and it is forbidden that it smudges the Book of Laws.

4. **In light of the above, the amendments to the temporary order significantly, and disproportionately, exacerbate the harm to Israeli residents and citizens and their children.**