The Right to Family Unity and Immigration Law

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(Relevant articles of the international human rights instruments cited in this presentation can be found in Appendix I.)

The phenomenon of spouses and children separated by international borders is certainly not an Israeli problem alone. Problems of refugees, asylum seekers and immigration have grown in the past decade to new proportions, and over one half of the world's refugees are children. Many European countries are responding with a policy of "fortress Europe" aimed at keeping people out, and asylum laws are being changed. The recent tragedies in East Africa and revolutions in Eastern Europe led to massive migration. This is a problem which affects the entire world, and I would like to address the issue of how international law views the problem of families who are separated.

It seems so natural and obvious that parents and children, husbands and wives, should be allowed to live together, and that no border should come between them. However, the power to determine who will enter a country has traditionally been considered an inherent attribute of the sovereignty of every country and the entry of the foreigner always a privilege, subject to unlimited state discretion. To quote Oppenheim's ***International Law***: "The reception of aliens is a matter of discretion, and every state is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory". When the State of Israel, in its response to 64 petitions on family reunification (***Sarhan et al v. Commander of I.D.F. in Judea and Samaria Region***, H.C.4494/91) wrote (in an unpublished brief) to the High Court of Justice: "The decision who will enter and who will settle in the regions... is a matter for governmental decision and no resident man or woman is permitted to impose his private determination in this matter on the authorities", it spoke with the voice of international authority such as Oppenheim.

In a study of international human rights instruments published in 1983 P. Seighart wrote: "Nowhere in any human rights treaty has any state accepted any express obligation to allow aliens to enter its territory." The same conclusion was reached by Richard Plender who in a massive work on international immigration law concludes that none of the international and regional human rights instruments provide a right to family reunification in general international law.

When we lawyers keep arguing before the court that this is an internationally recognized right, even a customary norm of international law, we exaggerate. We are trying to extend the law, a perfectly legitimate aim, but we certainly cannot rely on these kinds of authorities to support our position.

The Right to Family Life

So what can we rely upon? First, there is an internationally recognized human right of the family to be free from arbitrary and unlawful interference established in Article 17 of the **International Covenant on Civil and Political Rights** of 1966, which Israel has ratified. Article 8 of the **European Convention on Human Rights** similarly prohibits interference with this right, "except such as is in accordance with the law and is necessary in a democratic society", and goes on to state the grounds on which such interference might be legitimate and necessary.

The significance of the **European Convention** is that it has generated a substantial amount of jurisprudence in the European Court of Human Rights in which the scope of the right to family life has been discussed. This jurisprudence is relevant to the interpretation of the parallel provision under the **International Covenant.** I will give a few examples pertaining to international family reunification. The European Commission and the European Court on Human Rights have found violations of the right to family life in cases of expulsion of legally resident aliens whose family ties in the country where they are residing are overwhelming.

One example is the case of ***Beherab v. The Netherlands*** (11 E.H.R.R.322), decided in 1984. This was a case of a Moroccan citizen who had resided in The Netherlands for a few years, married a Dutch citizen and divorced after two years, just before a child was born. The Netherlands at this point ordered him to leave, on the basis that his right of residency was contingent on his marriage to a Dutch citizen. Eventually he was deported to Morocco. The court first examined whether or not there was a family life and concluded that there was; the father had visitation rights with his daughter and was actually visiting his daughter four times a week. The next question addressed by the court was whether there was a violation of family life. If the father was deported, the only way he could see his daughter would be on short term visitor visas, bearing the expense of travel between Morocco and the Netherlands. The court said this was not reasonable; there had been a violation of family life. The next step was to examine whether there was a legitimate purpose for the violation, and here the court concluded that there was; the purpose of excluding foreigners was to protect the local labor market. One of the legitimate reasons for limiting the right to family life under Article 8 of the **European Convention** is the economic well-being of the country. The final step was to analyze whether this was necessary in a democratic society, and the analysis of necessity is actually an analysis of proportionality: is the damage being caused to this daughter and to this father proportionable to the need of the Netherlands to protect its labor market? The court held that it was not proportional or necessary, and therefore held in favor of the father and daughter.

Another case is that of ***Moustaquim v. Belgium*** (13 E.H.R.R. 802), decided in 1991, in which a boy moved from Morocco to Belgium at the age of one and a half years with his parents. Three of his brothers and sisters were born in Belgium and one of his older brothers naturalized as a Belgian citizen; he could not even speak Arabic. However, as a result of a series of criminal convictions when he was aged fifteen and sixteen, the state decided to expel him. The court conducted the same analysis and decided as follows. First, there was clearly a family life; by this time he was twenty years old, his brothers, sisters and parents lived in Belgium and, despite the fact that he was a street gang leader, he also lived at home. Second,

there was obviously a violation of family life. Third, there was a legitimate purpose in expelling him: the protection of public order. Finally, however, the court decided that this purpose was not proportional to the damage caused, and Belgium was ordered to allow the man back.

All these cases involve people who were already in the country. Concerning the person who marries outside of the country, or an immigrant who acquires resident status while his wife and children are still in the country of origin, the European court has been very clear in a negative sense. To summarize I will quote a recent article from ***The European System for the Protection of Human Rights***, 1993, by G. Cohen-Jonathan, which states that the Convention "clearly does not guarantee any right of entry or residence for aliens in a contracting State." Denial of family reunification to non-resident alien spouses has been uniformly upheld by the European Court.

There are, however, a whole string of cases in which the European Court says that, theoretically, family unity can be violated by not letting an alien in. In the well known cases of ***Abdulaziz Cabales and Balkande v. the United Kingdom*** from 1985 (7 E.H.R.R. 471), the court held that while measures taken in the field of immigration (that is, measures preventing people from entering) may affect the right to respect for family life under Article 8 of the Convention, the obligation to admit relatives of immigrants will vary according to the particular circumstances of the persons involved. This duty, however, "cannot be considered as extending to a general obligation on the part of the contracting state to respect the choice by married couples of the country of their matrimonial residence and to accept non-national spouses for settlement in that country". In other words, family unity could take place elsewhere.

Another case from the United Kingdom of 1993 is ***N.***, a minor girl of three years old, ***v. The United Kingdom*** (16 E.H.R.R. Commission Supplement 28). Her mother had arrived in the United Kingdom at the age of thirteen with her entire family and was a naturalized British citizen. She applied for entry for her husband, whom she had married in her country of origin, Bangladesh. The United Kingdom Immigration Appeal Tribunal held that this was a marriage for the primary purpose of immigration, and therefore the Bangladeshi husband could not enter. The fact that they already had an infant daughter born in Britain did not influence the Tribunal. The European Commission agreed that confronting the mother with the choice between expatriation back to Bangladesh, and raising a fatherless child, did not entail a violation of the human right to family life protected under the **European Convention**.

To sum up, in terms of its relevance for Israel, the protection from arbitrary and unlawful interference with family life under the **International Covenant on Civil and Political Rights** can be a key to enabling people who are already in the area to remain, but is very unlikely to be helpful in gaining entry for those not already in the area.

The Convention on the Rights of the Child

The most popular convention of recent years is the **Convention on the Rights of the Child**. If all the countries that have signed this Convention will also ratify, it will have more

contracting states than any other convention except for the **Geneva Conventions** of 1949, even though it has only been on the books since 1989. In my view, the reason it is such an "international hit" is that nobody has examined its revolutionary implications.

The provisions on family reunification are contained in Articles 9 and 10. Article 10, on the face of it, seems very weak. Its origins can be found in the **Helsinki Accords** of 1975, which said that: "The participating states will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their family", and "will deal with applications in this field as expeditiously as possible". The first weakness is the problem of defining "a positive and humanitarian spirit"; this merely expresses a kind of moral commitment. The same is true of "as expeditiously as possible"; what if a country claims that it is unable to deal with an application for two or three years? The second weakness of the **Helsinki Accords** is that they are not an international treaty binding state parties, but are considered a declaration of political intent by those states who were party to the conference, and only apply to those states, which were the European countries, the United States and, I believe, Japan.

The question is, does Article 10 of the **Convention on the Rights of the Child** simply repeat this general moral obligation to look at things nicely? This is not, in my opinion, the proper interpretation of Article 10. Article 10 opens by saying that states are to deal with family reunification where a minor child is involved "in accordance with the obligations of state parties under Article 9, paragraph 1". Article 9.1 provides for family unity in unambiguous obligatory terms. States "shall ensure that a child shall not be separated from his or her parents", and only where "necessary for the best interests of the child" can states justify departure from the obligation to ensure family unity. This is a far cry from Article 8.2. of the **European Convention**, which mentions a wide range of interests which can justify violating the right to family life, including the economic well being of the country. Article 10.1., then, projects the right to family unity from Article 9, which concerns municipal law, into the international arena; it spells out how the state is to fulfill its obligations under Article 9.1. in the realm of international movement and immigration.

What does the obligation to deal with an application in a "positive, humane and expeditious" manner (Article 10.1.) mean? It seems to me that it means to act positively. The term "positive" does not appear in any other international human rights treaty. If we are talking about a mere recommendation to consider affirmative action, other language could have been chosen. For example, the contracting states shall "consider favorably the possibility of according", or shall "deal in a positive spirit" as the **Helsinki Accords** state. To deal in a positive and a humane manner with a family reunification application and to deal with it in accordance with the obligation to ensure non-separation of children from parents, would seem to me to allow only one possible answer – affirmative approval.

The implications of this term "positive" did not escape the notice of the delegations involved in the drafting process. The British objected: the term invited misinterpretation; "objective" should replace "positive." The French agreed: the French text too "seemed to contain an element of prejudgment". The Finns assured the other delegates that the word "positive" has an

established usage in the European context and to clarify, suggested that the word "favourable" could replace "positive". The Americans, who had originally sponsored the article and had urged that family unity and reunification are basic human rights, claimed that "positive", unlike "favourable", does not prejudge the issue. At this point, the British, for once preferring American understanding of their language, agreed, and the French never indicated if they were convinced by the Finnish understanding of European treaty language. The word "positive" remained. (However, when the British came to ratify this treaty, they reverted to their original understanding and entered a reservation, seeing that a requirement to give positive action on family reunification requests would affect their immigration law. The Germans entered a similar reservation.) In its context, positive consideration of an individual's request for family reunification can hardly mean anything other than as the British and French had indicated: it is a presumption in favor of approval. Rejecting an application is on its face a violation of the obligation to ensure that a child shall not be separated from his parents. Discretion remains but it is limited; there is a burden on the public authority to demonstrate that separation is necessary in the best interests of the child or that the child's best interests can in fact be ensured by reunification with his or her parents in a different country.

This problem still remains. Why should England agree to reunification in England when the family could reunify in Bangladesh? There are a number of answers to this. One is that this attitude presupposes that there is another place in the world where the family can enjoy reunification and this is not always the case, certainly not for refugees. Secondly, the state considering the application has to be absolutely sure that in fact the entire family is able to live in this other state. It is similar to the requirement that the Israeli Ministry of Interior, before accepting a request to renege on Israel citizenship, must first determine that the person is actually going to acquire citizenship in another state and will not be rendered stateless.

Finally, a state cannot as a matter of policy determine that family reunification of sundered families will take place somewhere else in the world simply by deporting family members. There is no true recognition of a right if that right can only be realized abroad. In any event, states do not normally have the power to ensure the realization of that right outside their jurisdiction. A policy to reject most requests to immigrate for purposes of family reunification where there is a minor child certainly violates the **Convention on the Rights of the Child**. Articles 9 and 10 require an opposite presumption, a presumption in favor of reunification.

The other requirement in Article 10 of this Convention is that requests be dealt with expeditiously. This provision of the **Convention on the Rights of the Child** is included for obvious reasons; especially if you are talking about a young child, a year or two is like a lifetime, and delays can be very damaging.

It should also be observed that unlike most other provisions in the **Convention on the Rights of the Child**, this provision affects the rights of adult parents as well as those of children. The reference in Article 10.1. to applications by a child or his or her parents makes it clear that the duty to ensure non-separation of a child from parents entails a reciprocal right both of the child and of the mother and father.

The right, however, remains the right of the child. If the parents are no longer married, for example, the child has a right to family unity with each of his or her parents. The European Commission case mentioned above of a Bangladeshi father and a United Kingdom mother (the case of *N*) should have been decided differently under the **Convention on the Rights of the Child**. So I would suggest that this Convention significantly extends international treaty law on the issue of family reunification where a child is concerned.

Refugees

The issue of refugees is one that concerns us very much in the Middle East and does have some relevance to Jerusalem, such as refugees from Kuwait married to Jerusalem residents. The **Fourth Geneva Convention** has the weakest possible provisions regarding family reunification of those dispersed by conflict. Basically, it merely says that children should not be left on their own; they must be cared for, and the parties to the conflict shall facilitate the reception of such children in a neutral country (**Fourth Geneva Convention**, Article 24). Article 26 adds that parties shall facilitate inquiries with the object of renewing contact if possible. This does not mean family reunification, and in my view the Israeli High Court was right to reject petitions based on the **Fourth Geneva Convention**.

The **First Protocol to the Geneva Conventions** goes considerably further in Article 74 (the problem is that Israel, like many other countries including the United States, is not a party to the First Protocol): "Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task". It is arguable that a country which simply does not let families reunify is not facilitating their unification. Still, this provision falls short of an actual duty on states to permit aliens to enter, or refugees to return to an occupied territory.

Turning back to the **Convention on the Rights of the Child** in the hope of finding another revolution, a first glance is very disappointing. The original Danish proposal for a provision on the rights of child refugees was strong: that states recognize the right of the refugee child to be reunited with his/her parents, relatives and guardians. There is no doubt that the first thing that has to be done for a child refugee is to reunite him/her with his/her parents. This was one of the conclusions of the United Nations High Commissioner on Refugees in his report of 1988. This right was completely watered down in the **Convention on the Rights of the Child**. Article 22 says merely that the state parties shall assist such a child to trace his parents, or other family members, in order to obtain information necessary for reunification; the only duty this strong convention contains about refugee children is to provide an information service.

I would argue for a different interpretation, on the basis of Article 2, which sets out the scope of application of all the rights under the Convention. It says that state parties shall respect and ensure the rights set forth in the Convention regardless of race, color, etc., and regardless also of national origin or other status. It applies to every child within the jurisdiction of a state. If a child refugee is to be found in a certain country, all the rights under this Convention apply to him/her, including the right not to be separated from his/her parents under Article 9 and the

right to family reunification under Article 10. Therefore the information service under Article 22 of the Convention should be seen as merely supplementing the basic right of the child refugee to live together with both of his/her parents.

The Relevance for Israel

What are the practical implications of the above for Israel and for litigation in Israel? Israel is a party to and has ratified both the **International Covenant on Civil and Political Rights** and the **Convention on the Rights of the Child**. There is a basic rule concerning interpretation of laws which is stated in the strongest possible terms in Aharon Barak's recent book, ***Interpretation In Law, Volume II, Statutory Interpretation*** – and it should not be forgotten that Barak is to be the next president of the Supreme Court of Israel. According to Justice Barak, local law must be interpreted wherever possible in accordance with international obligations of the State; not only international obligations under customary law, but all international obligations including treaty obligations. Furthermore, he says that only express, clear and unequivocal language in a local law would override the international obligation where such a local law contradicts the international obligation.

In the Israeli and Jerusalem context, we are talking about the **Law of Entry Into Israel** which contains nothing that contradicts the international conventions discussed above. This law merely gives the Interior Minister complete discretion to permit people to enter Israel. In my opinion, he is obligated to exercise his discretion in accordance with these international obligations and I would hope that the Israeli courts would follow this interpretation.

The same problem exists in all countries which, like Israel, have inherited a common law tradition because in such countries, international treaties do not automatically become a part of local rights and of local law, but require a specific act of Parliament in order to become so. In a recent case in New Zealand in 1993, ***Tavita v. Minister of Immigration and Attorney General*** (C.A. 266/93, unpublished interim judgment of 30th November 1993), a father challenged his deportation order from New Zealand where his child was a New Zealand resident and citizen, claiming a right under Article 9 of the **Convention on the Rights of the Child**. The New Zealand court in a preliminary decision stated that a failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. "Legitimate criticism could extend to the New Zealand courts if they were to accept the argument that because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the Executive is necessarily free to ignore them." The court did not take this view, and sent the case back for reconsideration by the Immigration Board in New Zealand.

I think it might be possible to achieve similar decisions in Israel on the basis of international obligations.

"Non-Aliens"

A final note: the fact that the Palestinian residents of East Jerusalem are not aliens or foreigners only makes the arguments made above a fortiori all the stronger. If what has been

described in this presentation is the way aliens are dealt with under international law, then those who are not aliens have to be dealt with even more favorably.

This view is supported in ***The Legal Position of Aliens in National and International Law***, published by the Max-Plank-Institute in 1987, which argues that the status of family members of citizens is not only a question of the law relating to aliens, but also touches fundamental interests of a country's own citizens concerning their right to live with their family. Plender, cited above, agrees that a national's claim to reunification with his immediate family members is based on his own right of residence, for if they are denied admission, the national is confronted with the choice between expatriation and destruction of the family unity. Most national laws do recognize the right of a citizen to bring his family and children into the country but this is not always the case, such as the example from the United Kingdom. In the context of the Occupied Territories and of Jerusalem, the term "non-aliens" would perhaps be more appropriate; they are not citizens but neither are they aliens. The non-alien resident spouse or child has the strongest possible claim to unification with the foreign family member.