HCJ 2245/06

1. MK Neta Dobrin
2. MK Ronen Tzur
v.
1. Israel Prison Service
2. Yigal Amir
3. Dr Larissa Trimbobler

The Supreme Court sitting as the High Court of Justice
[13 June 2006]
Before Justices A. Procaccia, S. Joubran, E. Hayut

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

Facts: The second respondent (Amir) was convicted of the murder of the late Prime Minister Yitzhak Rabin and was sentenced to life imprisonment. While in prison, he married the third respondent. When the first respondent refused, on security grounds, to allow Amir conjugal visits with his wife, Amir applied to the first respondent to be allowed to provide his wife with a sperm sample for the purposes of artificial insemination. The first respondent granted his request.
The petitioners, two members of the Knesset, consequently filed the petition, arguing that the first respondent did not have any authority in statute to grant the request and its decision was therefore *ultra vires*. In addition, the petitioners argued that it was immoral to allow the murderer of the prime minister to have children; that he had no right to start a family while in prison, that the parental capacity of the third respondent should have been considered; and that the decision was contrary to the natural rules of justice and unreasonable, in that it gave no weight to the feelings of deep abhorrence felt by most citizens at the despicable acts perpetrated by Amir.

Held: The first respondent's decision was made *intra vires*. A prisoner has a constitutional human right to parenthood. This does not cease automatically as a result of the sentence of imprisonment, although it may be restricted for reasons relevant to the imprisonment. The first respondent does not need an authorization in statute to permit a prisoner to realize his rights. The premise on which the petition is based is fundamentally unsound; it effectively turns the law upside down and undermines basic principles of public and constitutional law. When a person has a right, a public authority does not need authority in statute in order to uphold and

respect the right. The opposite is true: authority is required in statute in order to restrict or violate the right.
The first respondent does not have a power to add to a prisoner's punishment that was imposed on him in the sentence handed down by the court. The public's feelings of abhorrence at Amir's crime cannot affect the scope of the human rights given to him in prison, and the nature of the restrictions upon them that are permitted.

Petition denied.

Legislation cited:

Basic Law: Human Dignity and Liberty, ss. 1A, 2, 4, 8.

Knesset Elections Law, 5729-1969, s. 116.

Penal Law, 5737-1977, ss. 1, 48.

Prisons Ordinance [New Version], 5732-1971, ss. 25, 56(30), 58, 76.

Release from Imprisonment on Parole Law, 5761-2001, ss. 9, 10.

Israeli Supreme Court cases cited:

[1] LHCJA 3172/99 *Amir v. Israel Prison Service* (unreported).

[2] LHCJA 5614/04 *Amir v. Israel Prison Service* (unreported).

[3] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* **[2006] (1) IsrLR 443**.

[4] LFA 377/05 *A and B (prospective adoptive parents) v. C and D (biological parents)* (unreported).

[5] HCJ 2458/01 *New Family Organization v. Surrogacy Agreements Approval Committee* [2003] IsrSC 57(1) 419.

[6] CFH 2401/95 *Nahmani v. Nahmani* [1996] IsrSC 50(4) 661; **[1995-6] IsrLR 320**.

[7] CA 232/85 *A v. Attorney-General* [1986] IsrSC 40(1) 1.

[8] LCA 3009/02 *A v. B* [2002] IsrSC 56(4) 872.

[9] CA 2266/93 *A v. B* [1995] IsrSC 49(1) 221.

[10] LCA 3145/99 *Bank Leumi of Israel Ltd v. Hazan* [2003] IsrSC 57(5) 385.

[11] HCJ 355/79 *Katlan v. Prisons Service* [1980] IsrSC 34(3) 294.

[12] LHCJA 3713/04 *A v. State of Israel* (not yet reported).

[13] LHCJA 1552/05 *Hajazi v. State of Israel* (not yet reported).

[14] LHCJA 8866/04 *Hammel v. Israel Prison Service* (not yet reported).

[15] PPA 4463/94 *Golan v. Prisons Service* [1996] IsrSC 50(4) 136; **[1995-6] IsrLR 489**.

[16] PPA 1076/95 *State of Israel v. Kuntar* [1996] IsrSC 50(4) 492.

[17] PPA 5537/02 *State of Israel v. Sarsawi* [2004] IsrSC 58(1) 374.

[18] PPA 4/82 *State of Israel v. Tamir* [1983] IsrSC 37(3) 201.

[19] HCJ 114/86 *Weil v. State of Israel* [1987] IsrSC 41(3) 477.
[20] LHCJA 4338/95 *Hazan v. Israel Prison Service* [1995] IsrSC 49(5) 274.
[21] HCJ 221/80 *Darwish v. Prisons Service* [1981] IsrSC 35(1) 536.
[22] HCJ 540/84 *Yosef v. Governor of the Central Prison in Judaea and Samaria* [1986] IsrSC 40(1) 567.
[23] HCJ 89/01 *Public Committee Against Torture v. Parole Board* [2001] IsrSC 55(2) 838.
[24] LHCJA 6803/04 *Angel v. Tel-Aviv-Jaffa District Court* [2005] IsrSC 59(2) 176.
[25] LHCJA 9837/03 *A v. Parole Board* [2004] IsrSC 58(2) 326.
[26] HCJ 337/84 *Hukma v. Minister of Interior* [1984] IsrSC 38(2) 826.
[27] CrimApp 3734/92 *State of Israel v. Azazmi* [1992] IsrSC 46(5) 72.
[28] HCJ 1/49 *Bajerno v. Minister of Police* [1948] IsrSC 2 80.
[29] HCJ 9/49 *Bloi v. Minister of Interior* [1948] IsrSC 2 136.
[30] HCJ 144/50 *Sheib v. Minister of Defence* [1951] IsrSC 5 399; **IsrSJ 1 1**.
[31] HCJ 122/54 *Axel v. Mayor, Council Members and Residents of the Netanya Area* [1954] IsrSC 8 1524.
[32] HCJ 112/77 *Fogel v. Broadcasting Authority* [1977] IsrSC 31(3) 657.
[33] HCJ 935/89 *Ganor v. Attorney-General* [1990] IsrSC 44(2) 485.
[34] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**.
[35] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [1988] IsrSC 42(2) 309.
[36] HCJ 217/80 *Segal v. Minister of Interior* [1980] IsrSC 34(4) 429.
[37] HCJ 6358/05 *Vaanunu v. Home Front Commander* (not yet reported).
[38] HCJ 4541/94 *Miller v. Minister of Defence* [1995] IsrSC 49(4) 94; **[1995-6] IsrLR 178**.
[39] CA 518/82 *Zaitsov v. Katz* [1986] IsrSC 40(2) 85.
[40] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.
[41] BAA 2531/01 *Hermon v. Tel-Aviv-Jaffa District Committee, Israel Bar Association* [2004] IsrSC 58(4) 55.
[42] HCJ 543/76 *Frankel v. Prisons Service* [1978] IsrSC 32(2) 207.
[43] HCJ 7837/04 *Borgal v. Israel Prison Service* [2005] IsrSC 59(3) 97.
[44] HCJ 96/80 *Almabi v. Israel Prison Service* [1980] IsrSC 34(3) 25.
[45] HCJ 144/74 *Livneh v. Prisons Service* [1974] IsrSC 28(2) 686.

American cases cited:

[46] *Turner v. Safley*, 482 U.S. 78 (1987).
[47] *Overton v. Bazzetta*, 539 U.S. 126 (2003).
[48] *Hudson v. Palmer*, 468 U.S. 517 (1984).

[49] *Pell v. Procunier*, 417 U.S. 817 (1974).
[50] *Washington v. Harper*, 494 U.S. 210 (1990).
[51] *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
[52] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[53] *Carey v. Population Services International*, 431 U.S. 678 (1977).
[54] *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).
[55] *Stanley v. Illinois*, 405 U.S. 645 (1972).
[56] *Anderson v. Vasquez*, 28 F.3d 104 (9th Cir. 1994).
[57] *Hernandez v. Coughlin*, 18 F.3d 133 (2nd Cir. 1994).
[58] *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986).
[59] *Goodwin v. Turner*, 908 F.2d 1395 (8th cir. 1990).
[60] *Percy v. State of New Jersey, Department of Corrections*, 278 N.J. Super. 543 (App. Div. 1995).
[61] *Gerber v. Hickman*, 291 F.3d 617 (9th cir. 2002).

English cases cited:

[62] *R. v. Secretary of State for the Home Department, Ex Parte Simms* [1999] 3 All ER 400.
[63] *R. (Mellor) v. Secretary of State for the Home Department* [2001] 3 W.L.R. 533.

European Commission of Human Rights cases cited:

[64] *X v. UK* (1975) 2 D&R 105.
[65] *X v. Switzerland* (1978) 13 D&R 241.
[66] *Hamer v. UK* (1979) 4 EHRR 139.
[67] *Draper v. UK* (1980) 24 D&R 72.
[68] *ELH and PBH v. UK* (1997) 91A D&R 61.

European Court of Human Rights cases cited:

[69] *Dickson v. United Kingdom*, no. 22362/04 [2006].
[70] *Hirst v. United Kingdom*, no. 74025/01 [2005].
[71] *Aliev v. Ukraine*, no. 41220/98 [2003].
[72] *Evans v. United Kingdom*, no. 6339/05 [2006].

For the petitioners — S. Ben-Ami.
For the first respondent — I. Amir.
For the second and third respondents — A. Shamay, O. Schwartz.

JUDGMENT

Justice A. Procaccia

1. Yigal Amir, a prisoner serving a life sentence, was convicted of the murder of the late Prime Minister Yitzhak Rabin. He submitted an application to the prison authorities in which he requested permission to send a sperm sample out of the prison in order to enable the artificial insemination of his wife, Larissa Trimbobler. On 5 March 2006, the competent authority at the Israel Prison Service decided to grant the request (hereafter — 'the decision).

2. The petitioners, who were both members of the last Knesset, filed a petition against the Israel Prison Service and against the prisoner and his wife in order to cancel the decision. Alternatively, they request that the Israel Prison Service establish a special committee composed of professionals who will consider and examine the conditions required for granting a permit to a security prisoner regarding artificial insemination, which should take into account, *inter alia*, the factor of the best interests of the child that will be born and examine the consent and ability of the wife to take responsibility for raising him, and it should make recommendations in this regard. We were also asked to stay the decision of the Israel Prison Service that is the subject of this petition until the proceedings in the proposed committee are completed. As a third option, the petitioners request that they be allowed to table a draft law in this matter, and that the implementation of the decision should be stayed in the interim.

Background

3. The respondent was convicted of the murder of the late Prime Minister Yitzhak Rabin and of the wounding of his bodyguard in aggravated circumstances. He was sentenced to life imprisonment and to an additional six years imprisonment. He was also convicted in another trial of conspiracy together with his brother, Haggai Amir, and another person, Dror Edni, to murder the prime minister, and of conspiring with them to assault residents of Arab towns and Palestinian police personnel in Judaea and Samaria. For this conviction he was sentenced to an additional eight years imprisonment, to be served consecutively.

4. Because of the nature of the risk presented by Amir, he was classified by the prison authorities as a 'security prisoner.' This classification led to the imposition of various restrictions upon him, of which the main ones are that

he is held separately from other prisoner, surveillance cameras are installed in his cells and there are visitation restrictions. Various objections by Amir to these restrictions were rejected (LHCJA 3172/99 *Amir v. Israel Prison Service* [1], PPA (BS) 2077/01, and see also PPA (TA) 2853/05-A). Notwithstanding, Amir's application to allow him to have meetings with the third respondent, his wife, was approved by the court; this was because, *inter alia*, no evidence was presented with regard to her activity (PPA (BS) 2077/01).

5. In January 2004, Amir submitted a request to the Israel Prison Service to be allowed to marry Larissa and to have conjugal visits with her. When the response was slow in coming, Amir filed a prisoner's petition in this matter to the Tel-Aviv District Court. In response to the petition, the Israel Prison Service gave notice that it decided to deny the request for conjugal visits, and that it had not yet formulated a position on the question of marriage. The District Court, in reliance on privileged intelligence information, decided to deny Amir's petition with regard to conjugal visits. Amir applied for leave to appeal this decision in the Supreme Court, which denied the application (LHCJA 5614/04 *Amir v. Israel Prison Service* [2]; hereafter — LHCJA 5614/04 *Amir v. Israel Prison Service* [2] (conjugal visits)). In its decision (*per* Vice-President M. Cheshin), the court examined the conflict of values between the right of a human being to conjugal visits, and the interest of state security that is likely to conflict with it, and it evaluated their weight in order to balance them. The court found that in the circumstances of the case there was a real concern that allowing conjugal visits between the couple would lead to a security risk. It said that the great risk presented by Amir had not decreased since he committed the offences for which he was serving his sentence, and he remained committed to the terrorist ideology that he espoused in the past. The court also found that Amir was the subject of adulation and a role model in certain circles, there was concern that unsupervised meetings with his wife would be abused in order to transmit messages in the spirit of his extreme views, and that he would thereby influence others to carry out extreme acts of the kind that he committed. The concern regarding security interests was greater, in the opinion of the court, because of information that was submitted, according to which Larissa had independent contacts with extreme activists who identified in their ideologies with Amir's beliefs. All of this led to the court's conclusion that the refusal of the competent authority to allow Amir conjugal visits with his wife was reasonable and proper. The question of Amir's right to marry his wife was not decided in that case, since at that stage the decision of the Israel Prison

Service on this matter had not been made. At a later stage Amir and Larissa married by proxy, and on 10 July 2005 the marriage was declared valid by the Rabbinical Court.

6. On 27 July 2005 Amir made a request to the Israel Prison Service to allow him to carry out procedures for the purpose of artificial insemination treatments for his wife, in order to allow them 'to realize their desire to bring children into the world,' and he produced a medical certificate in this regard as required by the authority. On 3 January 2006, before a decision was made with regard to the request, Amir filed a prisoner's petition in which he applied 'to carry out artificial insemination with his wife, Ms. Larissa Trimbobler.' On 5 March 2006, after considering the legal position, the Israel Prison Service decided to approve Amir's request. The following is the language of the decision:

> '1. After the petitioner's request has been examined [it has been decided] to allow the petitioner to send sperm outside the prison for the purpose of the artificial insemination of Ms. Larissa Trimbobler.
>
> 2. The transmission of the sperm sample will be allowed within the framework of a visit by Ms. Larissa or within the framework of a visit by another person who is permitted to visit the petitioner.
>
> 3. Nothing in the aforesaid amounts to consent for the prisoner to be allowed outside the prison for the purpose of any fertility treatments or for other fertility treatments to be administered in the prison, something that was not even requested by him.
>
> 4. It is also clarified that no change whatsoever will be allowed in the rules governing the terms in which the petitioner is held, including the number of visits to which the petitioner is entitled.
>
> 5. If you wish to clarify anything concerning the manner of transmitting the sperm sample, we ask you to refer the matter to us and the matter will be examined by us.'

The petition before us is directed against this decision.

The arguments of the parties

The arguments of the petitioners

7. The petitioners' arguments are composed of several strata: first, they argue that the Prison Service Commissioner does not have the authority to grant a permit to a security prisoner to transmit a sperm sample for the

purpose of insemination within the framework of the powers given to the Commissioner under the Prisons Ordinance, which gives him power to regulate matters of prison administration and discipline. According to the petitioners, a permit for artificial insemination, if at all, should be found in express legislation and not in administrative guidelines, and therefore the decision of the Israel Prison Service concerning Amir should be set aside because it was made *ultra vires.* Alternatively, even if the decision was made *intra vires*, it should be set aside on the merits because it is immoral and violates the basic outlooks of an enlightened society. It is not right to allow the murderer of a prime minister, who has not expressed regret for his despicable act, to give life to a new generation of his progeny and to bequeath the heritage of his despicable beliefs through his child. This decision, so it is alleged, departs from the natural rules of justice, runs contrary to administrative reasonableness and is also contrary to the rules of equality between prisoners, since it was made without carrying out a process of properly examining the right of all security prisoners to have children. The petitioners further argue that a prisoner has no inherent right under the law to create a family while he is in prison. Giving permission for artificial insemination by a prisoner constitutes a privilege that requires the discretion of the competent authority in the specific case, and this should be exercised by balancing the wishes of the prisoner to bring children into the world with maintaining discipline in the prison. In this case, no balance was made between these values, and for this reason also the decision is defective. Amir's special personal circumstances, the seriousness of his actions, his current attitude to his actions and his conduct in the prison were not considered. In giving this kind of permission, the authority should also consider questions of the parental capacity of the mother to raise on her own the child that will be born, as well as the interests of the child, and no weight was given to these matters in the decision of the Israel Prison Service. Finally, the petitioners argue that the unreasonableness of the decision is also reflected in the fact that no weight was given to the serious injury to the feelings of the public that will be caused by granting this permission, in view of the deep abhorrence felt by the citizens of Israel towards Amir for his despicable acts.

The position of the state

8. The state's position is that there is no basis for intervening in the decision of the Israel Prison Service to allow Amir to send a sperm sample out of the prison for the artificial insemination of his wife. According to case law, a distinction should be made between restrictions on human rights

required by the actual imprisonment, such as a restriction on the freedom of movement, and restrictions on other rights that are not inherent to the imprisonment and are not limited by an express provision of statute. A restriction on the ability of the prisoner to provide a sperm sample for artificial insemination is not inherent to the actual imprisonment, and there is no provision of statute that prohibits or restricts it. In the absence of such an express provision of statute, and in the absence of a security reason or any concern of prison discipline that requires such a restriction, there is no basis for denying Amir's request to give a sperm sample to his wife. In the course of the hearing, the state gave notice that the Israel Prison Service intends in the near future to formulate a general procedure concerning the sending of sperm samples by prisoners to their wives.

The position of the second and third respondents

9. The argument of the second and third respondents, Amir and his wife, is that even if we assume that the offences that Amir committed are despicable offences, there is no legal or moral basis for depriving them of the right to have children. The sentence imposed on Amir is limited to depriving him of his freedom for his whole life; it does not extend to the basic right to have a family and to bring children into the world, nor does it permit these to be restricted without a conflicting consideration of great weight. A prisoner retains his human rights as long as there is no public interest of great weight that justifies depriving him of them, and in this case there is no such interest. The consideration of the best interests of the child, which was raised by the petitioners as a reason for denying Amir his right to hand over a sperm sample, is unfounded, since it is clear that the wife has full parental capacity, and this assumption has not been rebutted.

Decision

10. A prisoner serving a life sentence, who has been convicted of the despicable murder of a prime minister, wishes to realize the right to have children by giving a sperm sample to his wife outside the prison. The Israel Prison Service granted his request, while stipulating certain conditions for it that concern the administrative arrangements of the prison. Were there any defects in this administrative decision that justify the intervention of this court to amend it or set it aside?

In view of the petitioners' arguments, it is clear that we are required to examine the validity of the commissioner's decision in two respects: the issue of authority and the issue of administrative discretion. With regard to the issue of authority, the question is whether the commissioner required express

authority under the law to grant permission to a prisoner to transfer a sperm sample to his wife outside the prison. With regard to the issue of discretion, the question is whether the decision is reasonable and proportionate; were all the relevant considerations and no others taken into account? Was the balance between the relevant considerations a proper and proportionate one, in view of the fact that we are concerned with a basic right which can only be violated if the tests of the limitations clause in the Basic Law: Human Dignity and Liberty are satisfied?

I will start with my conclusion and say that the commissioner's decision was made *intra vires* and it contains no departure from the powers given to him by law; the decision on its merits is founded on relevant considerations, it is reasonable and proportionate and it does not contain any defect that justifies judicial intervention.

The following are my reasons.

The commissioner's powers — a normative outline

11. Does the commissioner's decision to allow Amir to hand over a sperm sample fall within the scope of his authority under the law? Is special authorization required in the law in order to give this permission, such that without such authorization the permission falls outside the scope of the authority's power?

There is currently no express statutory arrangement with regard to the right of a prisoner to give a sperm sample to his wife for the purposes of insemination outside the prison. Notwithstanding, the existence of such a legislative arrangement is not a precondition for permitting this, for the following reason: according to general constitutional principles of law, a person in Israel has constitutional human rights. These are reflected, *inter alia*, in the Basic Law: Human Dignity and Liberty (hereafter — 'the Basic Law'), which enshrines some of the human rights and gives them a super-legislative status. These rights include the human right to dignity, from which the right to family and parenthood is derived.

The constitutional outlook that focuses on the protection of human rights is based on the assumption that the constitutional rights of a person are not absolute, and sometimes there is no alternative to allowing a violation of them in order to realize a conflicting essential public interest. In circumstances where tension arises between a human right and a conflicting public purpose, a balance needs to be struck between them for the purpose of finding the balancing point that will reflect the proper relative importance of the conflicting values. The tests in the limitations clause in s. 8 of the Basic

Law are what define the criteria for a permitted violation of the Basic Law, and they are an essential tool for properly balancing the right and the public interest, whose realization necessarily involves a violation of the right. A violation of the right will only satisfy the required constitutional test if the act that violates the right is done pursuant to statute, is consistent with the values of the state, is for a proper purpose and satisfies the test of proportionality.

This normative constitutional basis also lies at the heart of the proper approach to the rights of prisoners who have been sentenced to imprisonment, including those serving a life sentence. It is an established rule that a criminal sanction, including imprisonment, does not automatically deprive someone serving a sentence or a prisoner of his human rights, except to the extent that the restriction of those rights is necessarily implied by the imprisonment and is consistent with the nature of the permitted constitutional violation in accordance with the limitations clause.

The Prison Service Commissioner was given his powers under the Prisons Ordinance [New Version], 5732-1971. Beyond the specific powers given to the competent authority in the Ordinance, the Israel Prison Service is responsible for administering the prisons, guarding the prisoners and doing everything required by these duties (s. 76). The prisons and the warders shall be under the command and management of the commissioner, subject to the directives of the minister (s. 80). The authority of the commissioner extends to the organization of the prison service, administrative arrangements, prison management, discipline and ensuring the proper functioning of the service, and he is authorized to issue general orders in this regard. Within the scope of its authority, the Israel Prison Service is subject to the general principles of the constitutional system and to the fundamental constitutional recognition of human rights and the rights of prisoners that derive therefrom. The restrictions that it is authorized to impose on the prisoners derive from the enabling law, which is the Prisons Ordinance, but where these restrictions violate human rights, they must also satisfy the constitutional test of the limitations clause in the Basic Law. When we are speaking of a constitutional human right, which is given by the Basic Law to a person as a human being, we should not look in the enabling law for a right to uphold it, but the opposite: where the authority wishes to restrict it, we should examine whether it has the power to do so and whether the use made of that power amounts to a permitted constitutional violation in accordance with the limitations clause in the Basic Law.

As we shall describe below, the right of a prisoner to be a parent and to have a family is a constitutional human right, which does not automatically cease to exist as a result of the sentence of imprisonment, even though it is likely to be subject to various restrictions as a result of the conditions of the imprisonment. It follows that the Prison Service Commissioner does not need an authorization in the law to permit a prisoner to realize the various aspects of the right to have a family and to be a parent that he has by virtue of recognized basic rights in Israel. It is a *refusal* to allow a prisoner to realize the right to have children and to be a parent that makes it necessary to satisfy the tests for a permitted constitutional violation. Such a situation will exist where the prisoner's right to be a parent and to have a family is opposed by a conflicting value of sufficient weight that it justifies denying the right to a proper degree, in view of the relative weight of the conflicting values.

In our case, Amir, like any other prisoner, has a human right to establish a family and to be a parent. He was not deprived of the right to establish a family and to bring children into the world by the actual sentence that was imposed on him, even if the loss of liberty resulting from the imprisonment deprives the prisoner of the ability to realize family life in full. The Prison Service Commissioner therefore does not need an express authorization in order to give practical expression to the realization of this right, which is one of the supreme constitutional human rights in Israel. Had the commissioner denied the basic right, this would have required him to show that there were good reasons that supported the violation, and defining the scope of the violation in accordance with the tests of the limitations clause.

In addition to the scrutiny of the decision from the perspective of the authority to make it, we shall also examine the question of its reasonableness in view of the arguments that were raised. This scrutiny will focus on the question whether the authority addressed the relevant considerations and balanced all the relevant considerations in the case properly. The principles of constitutional scrutiny also apply to the consideration of this question, as we shall make clear below.

Let us examine in greater detail the principles of the normative framework that apply to this case.

Constitutional human rights and the right to family and parenthood

12. The Basic Law: Human Dignity and Liberty enshrines the human rights to dignity and liberty and thereby expresses the values of the State of Israel as a Jewish and democratic state (s. 1A). It provides that the dignity of a person as a human being may not be violated and that every person is

entitled to protection of his dignity (ss. 2 and 4); it recognizes the possibility of violating a person's basic constitutional rights, provided that the violation satisfies the tests of the limitations clause (s. 8). The tests in the limitations clause make the constitutional legitimacy of the violation conditional: it should be done pursuant to statute or by virtue of an express authorization therein; it should be consistent with the values of the state; it should be for a proper purpose and it should not be disproportionate.

Within the scope of the right to human dignity lies the right of a person to have a family and to be a parent (HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [3]). The right to family is one of the most basic elements of human existence. It is derived from the protection of human dignity, from the right to privacy and from the realization of the principle of the autonomy of the will of the individual, which lies at the very essence of the concept of human dignity. The family and parenthood are the realization of the natural desire for continuity and for the self-realization of the individual in society (LFA 377/05 *A and B (prospective adoptive parents) v. C and D (biological parents)* [4]; HCJ 2458/01 *New Family Organization v. Surrogacy Agreements Approval Committee* [5], at p. 447; CFH 2401/95 *Nahmani v. Nahmani* [6], at p. 719 {390}). Within the scope of the human right to dignity, the right to family and parenthood is a constitutional right that is protected by the Basic Law (cf. also CA 232/85 *A v. Attorney-General* [7], at p. 17; LCA 3009/02 *A v. B* [8], at p. 894; CA 2266/93 *A v. B* [9], at p. 235).

On the scale of constitutional human rights, the constitutional protection of the right to parenthood and family comes after the protection of the right to life and to the integrity of the human body. The right to integrity of the human body is intended to protect life; the right to family is what gives life significance and meaning. I discussed this in one case:

> 'These are first principles; the right to parenthood and the right of a child to grow up with his natural parents are rights that are interrelated, and together they create the right to the autonomy of the family. These rights are some of the fundamental principles of human existence, and it is difficult to describe human rights that are equal to them in their importance and strength' (*A and B (prospective adoptive parents) v. C and D (biological parents)* [4], at para. 6 of my opinion).

This right is therefore very high on the scale of constitutional human rights. It is of greater importance than property rights, the freedom of

occupation and even the privacy of the individual. 'It reflects the essence of the human experience and the concrete realization of an individual's identity' (*Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [3], at para. 6 of my opinion).

A violation of the right to parenthood and family will be legitimate only if it satisfies the tests in the limitations clause. These tests reflect a balance of the weight of the basic rights against other needs and values that are essential for the existence of proper social life. Basic rights, including the right to family, are not absolute; they derive from the realities of life that make it necessary to give a relative value to human rights and other substantial interests, whether of other individuals or of the public. A harmony between all of these interests is a condition for a proper constitutional system (LCA 3145/99 *Bank Leumi of Israel Ltd v. Hazan* [10]). In order for a violation of a human right to satisfy the constitutional test, it must fall within the proper margin of balances, which weigh the right against the conflicting value. The more elevated the status of the constitutional right, the greater the weight of the conflicting interest that is required in order to derogate from or counter the right (*Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [3], *ibid*.).

Prisoners' rights

13. The constitutional outlook that gives human rights a supreme normative status also has ramifications on the human rights of a prisoner, and his ability to realize these rights when he is in prison. The constitutional system in Israel is based on the presumption that a person's basic rights should not be denied or restricted unless there is a recognized conflicting interest, whether private or public, that is of sufficient weight to justify this. The same presumption also applies to sentences that are handed down to offenders. Its significance is that the protection of human rights is extended to prisoners even after they have been sentenced, and a violation of their rights is possible only where a conflicting public interest of great significance justifies it. Such a violation is recognized only to the extent necessary in order to achieve the conflicting interest, but no more. In this spirit it has been said that:

> 'The walls of the prison do not separate the person under arrest from human dignity. Life in the prison inherently requires a violation of many liberties that are enjoyed by a free man… but life in the prison does not necessitate a denial of the right of a person under arrest to bodily integrity and to protection against a

> violation of his dignity as a human being' (*per* Justice Barak in HCJ 355/79 *Katlan v. Prisons Service* [11], at p. 298).

Restrictions on prisoners' rights

14. According to the prevailing constitutional system, an offender who is sentenced to imprisonment does not automatically lose all of his human rights. The violation of his rights is limited solely to the degree that it is required in order to achieve the goals of a substantial public interest. These goals include, first and foremost, the purpose of the sentence of imprisonment, which is intended to deprive the prisoner of his personal liberty during the term of imprisonment that was imposed. By being deprived of his personal liberty, a prisoner suffers a violation of a basic right, but the violation is made pursuant to a law that befits the values of the state; it is intended for the proper purpose of isolating the offender from society for a defined period in order to protect the security of the public from the realization of an additional danger that the offender presents, and to rehabilitate him; the assumption is that it is a proportionate sentence relative to the severity of the offence that was committed and the other circumstances that are relevant to the sentence. Restricting the liberty of a prisoner is an inevitable consequence of the sentence that was imposed upon him, and therefore the violation of liberty receives constitutional protection. The restriction upon personal liberty, which is a consequence of the imprisonment, also gives rise to a necessary violation of certain other human rights that cannot be realized because a person is imprisoned. Thus, for example, the prisoner suffers a violation of his right to engage in his occupation, his right to privacy, and to a certain extent also his right of expression, with all the liberties that derive from it. The violation of human rights that accompanies imprisonment as an inherent consequence thereof is limited solely to an essential violation arising necessarily from the loss of personal liberty, but no more than that.

Another purpose that may justify a violation of a human right of a prisoner concerns the need to ensure the proper administration of the prison and to safeguard the welfare of its inmates. The competent authority has the responsibility to impose various restrictions that are required for managing life in prison in an effective manner, and these include maintaining order, security and discipline in the prison, as well as protecting the security of the inmates, the safety of the warders and the safety of the public from the dangers that are presented by the prison inmates (LHCJA 3713/04 *A v. State of Israel* [12]; LHCJA 1552/05 *Hajazi v. State of Israel* [13]; LHCJA

8866/04 *Hammel v. Israel Prison Service* [14]; and PPA 4463/94 *Golan v. Prisons Service* [15]). For the purpose of achieving the objective concerned with the proper administration of the Israel Prison Service, the Commissioner is competent to give comprehensive orders with regard to all the aspects of prisoners' lives, and these may in several respects restrict their personal autonomy in various spheres (PPA 1076/95 *State of Israel v. Kuntar* [16], at p. 299; PPA 5537/02 *State of Israel v. Sarsawi* [17], at p. 379; *Golan v. Prisons Service* [15], at pp. 152 {506} and 172-175 {534-539}).

An additional reason for the restrictions on the rights of a prisoner may derive from other needs that involve an important general public interest, which is not directly related to the prison administration, such as, for example, a need that derives from general reasons of state security that are relevant mainly to security prisoners. Considerations of this kind may make it necessary to impose various restrictions on a prison inmate, which may violate his human rights.

When restrictions that are imposed by the public authority violate the human rights of a prisoner and they do not arise inherently from the loss of his liberty as a result of the imprisonment, they should materially satisfy the tests of the limitations clause in order to comply with the constitutional test. They should be consistent with the values of the state, intended for a proper purpose and satisfy the requirement of proper proportionality.

According to the prevailing legal outlook, a sentence that imposes imprisonment on an offender — and this includes a life sentence — is directly intended to deprive him of his personal liberty for the term of the sentence. The restrictions on the other rights, whether they are inherent to the imprisonment or they are intended to achieve other purposes, are not a part of the purpose of the sentence (PPA 4/82 *State of Israel v. Tamir* [18], at p. 206; HCJ 114/86 *Weil v. State of Israel* [19], at p. 483; *Golan v. Prisons Service* [15], at pp. 152-153 {506}; LHCJA 4338/95 *Hazan v. Israel Prison Service* [20], at pp. 275-276). The constitutional justification for imposing them depends upon the existence of a public purpose of special importance that justifies the violation in accordance with the tests of the limitation clause (*Katlan v. Prisons Service* [11], at p. 298). The greater the importance of the human right on the scale of human rights, the stronger the reasons required in order to justify a violation of it (*Golan v. Prisons Service* [15], at para. 13; HCJ 221/80 *Darwish v. Prisons Service* [21], at p. 546; HCJ 540/84 *Yosef v. Governor of the Central Prison in Judaea and Samaria* [22], at p. 573).

It should be emphasized that the restrictions on human rights that are imposed by the public authority were not intended to add an additional sanction to the sentence that was handed down. Their inherent purpose is not to increase the severity of the sentence that was handed down to the prisoner. Their purpose is not to punish the prisoner for his crimes, for which he has been sentenced to imprisonment, or to make the conditions of his imprisonment more difficult as recompense for his despicable acts. Where this is the purpose of the restrictions, they are likely to fail the constitutional test, since this is not a proper purpose. A restriction that is not required by the realization of the purposes of imprisonment or that is not required by another legitimate public purpose constitutes, *de facto*, the imposition of an additional sentence on the prisoner for the offence of which he was convicted. Such a restriction that adds to the sentence imposed on the prisoner falls outside the scope of the power to limit the rights of prisoners that is granted to the Israel Prison Service. It is a departure from the principles of criminal sentencing, and especially from the principle of legality that is enshrined in s. 1 of the Penal Law, 5737-1977, according to which there are no offences or sanctions unless they are prescribed in statute or pursuant thereto. The penal sanction takes the form of the actual loss of freedom of movement in a prison, which is determined by the court that handed down the sentence; in view of this, the Israel Prison Service is not competent to add a punitive measure to the sentence that was handed down (ss. 9 and 10 of the Release from Imprisonment on Parole Law, 5761-2001; HCJ 89/01 *Public Committee Against Torture v. Parole Board* [23], at p. 869, and also LHCJA 6803/04 *Angel v. Tel-Aviv-Jaffa District Court* [24], at p. 185; LHCJA 9837/03 *A v. Parole Board* [25], at p. 333).

The principles of this approach to the rights of a prisoner in Israel have been expressed in case law over the years. In *Golan v. Prisons Service* [15], at p. 152 {501-502} the court said (*per* Justice Mazza):

> 'It is established law in Israel that basic human rights "survive" even inside the prison and are conferred on a prisoner (as well as a person under arrest) even inside his prison cell. The exceptions to this rule are only the right of the prisoner to freedom of movement, which the prisoner is denied by virtue of his imprisonment, and also restrictions imposed on his ability to realize a part of his other rights — some restrictions necessitated by the loss of his personal freedom and other restrictions based on an express provision of law…

> The basic assumption is that the human rights "package" of a prisoner includes all those rights and liberties conferred on every citizen and resident, except for the freedom of movement of which he is deprived as a result of the imprisonment. Notwithstanding, it is clear that the imprisonment also suspends the prisoner's ability to exercise some of his other liberties. With regard to some of these, where the ability to exercise them depends on the freedom of movement, the suspension of the right is "inherent" to the imprisonment. Other liberties that can be exercised (at least in part) irrespective of freedom of movement and that can be realized even in a prison cell (or from it) continue to be enjoyed by the prisoner even when he is in the prison. If the authorities wish to suspend, or to restrict, his ability to exercise even liberties of this kind, it is required to show that its power to do so is enshrined in a specific provision of law.'

(See also HCJ 337/84 *Hukma v. Minister of Interior* [26], at p. 832; CrimApp 3734/92 *State of Israel v. Azazmi* [27], at p. 81).

The right of a prisoner to family life and parenthood

15. The criminal sanction involved in imprisonment was not intended, in itself, to violate the right of the offender to family life and parenthood directly. Notwithstanding, it is clear that a prisoner is *de facto* deprived of the physical ability to have a regular family life and thereby to realize the right to family as a result of the loss of his personal liberty that is a result of the imprisonment. The violation of the ability to realize a family life in the prison is inherent to the restriction of liberty, and therefore it lies within the margin of the permitted constitutional violation. Isolating the prisoner from society in order to realize the purposes of the sentence also results in a separation from his spouse, children and wider family circle. But even though this restriction is inherent to the imprisonment, the existence of a human right to family and parenthood requires that the scope of the violation is reduced as much as possible, to its essential limits only, such as by way of giving controlled permission for family visits to prisoners, granting furloughs when defined conditions are satisfied, providing facilities that allow conjugal visits between spouses, etc.. This preserves the proportionality of the violation of the human right, which is inherently required by the loss of liberty resulting from imprisonment.

The right to have children is an integral part of the right to family life. It is given to every human being and a prisoner is not deprived of it merely because of the sentence that was imposed on him. The *de facto* realization of the right to have children given to a prisoner depends on the question whether there is a public-systemic consideration of sufficient weight that justifies preventing a prisoner from realizing it, whether in general or in a specific case. Whereas a prisoner cannot realize a full family life since it is inconsistent with the restriction of liberty resulting from imprisonment, the right to bring children into the world as such may be consistent with the framework of imprisonment, if certain conditions are fulfilled. The realization of this right may be consistent with conjugal visits between spouses, which are ordinarily allowed when certain conditions are fulfilled, in accordance with the procedures of the Israel Prison Service. Because of the need to limit the violation of the prisoner's human right merely to the most essential cases, where it is not possible to allow conjugal visits because the prerequisites for this are not satisfied, the prisoner may be left to realize his right to be a parent by way of artificial insemination outside the prison, which does not require a conjugal visit. This possibility is consistent with the purpose of the sentence to keep the prisoner isolated from society, and it does not usually involve a disturbance to the Israel Prison Service administration from the viewpoint of the procedures and resources at its disposal. If, however, there is another reason that justifies the realization of the right to be prevented or restricted, it needs to be a substantial reason that can justify a violation of a human right of the greatest importance, to which even a prisoner is entitled.

The right to have children is a human right that is enshrined in the value of human dignity. This value includes the right of a person to personal autonomy and to self-realization in the form of bringing children into the world. The status of the right to have children imposes on the executive authority a duty to uphold it and to give it significant weight in the course of its deliberations, even when the person seeking to realize it is serving a life sentence in prison. The restriction on the right to have children by means of artificial insemination of the wife outside the prison is not necessarily implied by the restriction of the prisoner's liberty. Notwithstanding, like all human rights, this right too is not absolute, and it may in certain circumstances give way to conflicting interests of great weight. But in view of the strength of the right, reasons of particular importance are required in order to outweigh it and to justify a violation of it, and the principles used to balance them should be consistent with the conditions of the limitations

clause, with the elements of the proper purpose and proportionality that are enshrined therein (*New Family Organization v. Surrogacy Agreements Approval Committee* [5], at pp. 444-445).

It has been held in the past that:

> 'We must remember and recall that the human dignity of a prisoner is like the dignity of every person. Imprisonment violates a prisoner's liberty, but it must not be allowed to violate his human dignity. It is a basic right of a prisoner that his dignity should not be harmed and all the organs of government have a duty of respecting this right and protecting it from violation… Moreover, a violation of a prisoner's human dignity does not merely harm the prisoner but also the image of society. Humane treatment of prisoners is a part of a moral-humanitarian norm that a democratic State is liable to uphold. A State that violates the dignity of its prisoners breaches the duty that it has to all of its citizens and residents to respect basic human rights' (*per* Justice Mazza in *Golan v. Prisons Service* [15], at p. 156 {506}).

As an enlightened society, we should ensure that the dignity of the prisoner is upheld and that his rights are protected as long as it does not conflict with the true purposes of the imprisonment or is inconsistent with a public interest of great importance that justifies a restriction of his rights. This duty applies to every prisoner as such. It applies to a prisoner who is serving a short sentence and it applies to a prisoner who is serving a long sentence for serious felonies. It is also the case with regard to a prisoner serving a life sentence for murder, whether the murder was committed against a background of gang wars in the criminal underworld or it is the murder of a prime minister. The same is true of a security prisoner. The set of principles is the same for every prisoner as such, even though the specific application to individual prisoners may vary from case to case according to the conditions and the circumstances.

The power of the commissioner to give permission to hand over a sperm sample — conclusions

16. The premise on which the petition is based is that express authority is required in statute for the competent authority to allow a prisoner to undergo a procedure of artificial insemination with his wife; without this, granting such permission goes beyond the powers given to it under the law. This premise is fundamentally unsound, and it effectively turns the law upside down and undermines basic principles of public and constitutional law. The

reason for this is that when a person has a right, and certainly when he has a constitutional right, a public authority does not need authority in statute in order to uphold and respect the right. The opposite is true: it requires an authorization in statute *in order to restrict or violate the right*, and where the violation restricts or denies the realization of a human right, it should satisfy the tests of the limitations clause as a condition for its validity and legitimacy. Already in HCJ 1/49 *Bajerno v. Minister of Police* [28], at p. 82, it was held (*per* Justice S.Z. Cheshin) that:

> 'Where an applicant complains that a public official prohibits him from doing a certain act, the applicant does not need to prove that there is a statute that imposes a duty on the public official to allow him to do the act. The opposite is true: the public official has the duty of proving that there is a justification for the prohibition that he is imposing' (see also HCJ 9/49 *Bloi v. Minister of Interior* [29], at p. 140; HCJ 144/50 *Sheib v. Minister of Defence* [30], at p. 411 {14}; HCJ 122/54 *Axel v. Mayor, Council Members and Residents of the Netanya Area* [31], at p. 1532; HCJ 112/77 *Fogel v. Broadcasting Authority* [32], at pp. 663-664).

It follows that in our case there is no need to ask whether the Israel Prison Service is competent to permit a prisoner to realize his right to parenthood by means of artificial insemination; at most, we may need to ask whether there is a power to *restrict* this right, and what is the scope of such a possible restriction in the special circumstances of the case. This question does not arise directly in this case, since the competent authority has recognized and respects the right of the prisoner to parenthood, and it has thereby given expression to a recognition of the human right to family and parenthood that the prisoner has, in so far as possible, even within the framework of imprisonment. It has thereby recognized that the protection of human rights is given to a prisoner in so far as possible, including a prisoner serving a life sentence for a despicable murder, and that the ability to restrict the right does not depend on the nature of the offence but, if at all, on public or systemic purposes that are not a part of the purposes of sentencing. In the circumstances of this case, the commissioner acted within the limits of his authority when he did not find any systemic or other reasons that justify a restriction on the prisoner's right. His decision relies on recognized basic principles of constitutional law and it gives expression to the right of the prisoner when no basis was found for restricting it.

The decision of the public authority according to the test of reasonableness

17. In addition to the petitioners' argument that the commissioner's decision to allow Amir to give a sperm sample to his wife outside the prison was made *ultra vires*, they also argued that this decision does not satisfy the test of reasonableness. According to this argument, the unreasonableness is expressed first and foremost in the fact that the permission given to Amir to realize his right to have children conflicts with public morality and injures the feelings of the public, when it is given to the murderer of a prime minister; it is also argued that granting the permission ignores the interests of the child who will grow up without a father; finally it is argued that in giving the permission the commissioner did not make a comprehensive examination of the significance of the issue for all prisoners, and in the absence of a general procedure in this regard, he acted in a manner that violates the principle of equality between prisoners.

An examination of the reasonableness of a decision of an administrative authority requires, in the first stage, a clarification of whether it considered factors that are relevant and pertinent to the case; second, we consider the question whether, when making its decision, the authority made a proper balance between all the factors that should be taken into account, and whether a proper relative weight was given to each of these. An examination of the reasonableness of an administrative decision is therefore conditional on a proper balance of the relevant considerations (HCJ 935/89 *Ganor v. Attorney-General* [33]; HCJ 5016/96 *Horev v. Minister of Transport* [34], at p. 34 {183}; HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [35]; HCJ 217/80 *Segal v. Minister of Interior* [36]; HCJ 6358/05 *Vaanunu v. Home Front Commander* [37]).

Where a decision of the public authority violates a human right, an examination of the administrative reasonableness of the decision is conditional upon its satisfying the tests of the limitations clause — proper values, a proper purpose and proper proportionality. The criterion for balancing derives from the limitations clause (*Horev v. Minister of Transport* [34], at para. 54 of the opinion of President Barak). The elements of the limitations clause are incorporated in the criteria that have been formulated in public law rulings for examining a violation of basic human rights by an administrative authority (HCJ 4541/94 *Miller v. Minister of Defence* [38], at p. 138 {231}). The court has also held:

> 'This connection between the constitutional limitations clause and all the principles of public law — including human rights that are not covered by the Basic Laws… The general purposes are the values of the State of Israel as a Jewish and democratic state. The specific purposes are the "proper purpose" in the limitations clause. The principle of proportionality that is provided in the Basic Law is an additional expression of the principle of reasonableness, according to which we have also been accustomed in the past to interpret legislation. It follows that the transition from the previous law to the limitations clause is "quick" and "clean," and it involves no difficulty' (*per* President Barak in *Horev v. Minister of Transport* [34], at p. 43 {194-195}).

When an administrative decision violates a constitutional human right, the premise is, first, that the conflicting value whose realization leads to the violation befits the values of the state; second, that this value should be a relevant objective consideration that to a large extent overlaps with the conditions of the 'proper purpose' in the limitations clause; and finally, whether in the overall balance proper relative weight was given to the human right, on the one hand, and the conflicting value, on the other, and whether the administrative decision chose a balancing point that properly balances the conflicting values. This is the requirement of proper proportionality in its constitutional sense.

In our case, on one side of the equation is the right of a human being, who is a prisoner serving a life sentence, to realize his right to be a parent by way of fertilizing his wife with a sperm sample that will be sent out of the prison. His application is filed against a background of the refusal of the public authority to allow him conjugal visits with his wife, because of security considerations. The petitioners argue that there are values that conflict with the right of the prisoner to parenthood, which were not given any weight, and therefore the permission that was granted is invalid. These conflicting values are, first and foremost, an outrage to public morals and public feelings that, it is argued, results from permission to have children being given to a criminal who was convicted of murdering a prime minister. Such permission runs contrary to the feeling of natural repulsion that the public feels towards a vile offender of this kind. It seriously injures the feelings of the public, which is repulsed by the despicable offence and the offender who committed it, and which expects that he will spend the rest of his life in prison in absolute

isolation, without him being allowed to realize his rights to family and parenthood, or any aspect thereof.

I cannot accept this position. The values that are under discussion, on which the petitioners base their objection to the permission that was given, do not satisfy the test of administrative relevancy or the element of the proper purpose in the limitations clause. The public's feelings of repulsion towards Yigal Amir for the despicable crime that he committed are, in themselves, understandable and natural, but they are not relevant to the restriction of the right of a prisoner to become a parent by way of artificial insemination. They do not achieve a 'proper purpose' that is required as an essential conditional for a violation of a human right.

No one denies that the offence of murder that Amir committed and for which he was sentenced to life imprisonment deserves public condemnation and will be recorded in the history of the state as one of the most terrible offences committed in Israel since its founding. But the seriousness of the offence that was committed, with all of its ramifications, found full and final expression in the criminal sanction that was handed down to Amir. The sentencing considerations that are taken into account within the framework of the sentence lie solely within the sphere of authority of the judiciary, and when the sentence is handed down, the sanctions imposed on the offender are exhausted. The Israel Prison Service does not have jurisdiction to punish the prisoner in addition to the sentence that was imposed on him by restricting human rights that even he has as a prisoner. The argument of showing abhorrence for the base acts of the offence that he committed is insufficient. The public's feelings of repulsion for an offender who took human life and murdered the state's leader are also incapable of affecting, in themselves, the scope of the human rights given to him in the prison, and the nature of the permitted restrictions upon them. Basic principles of public morality and the desire for revenge that is felt by a part of the public towards one prisoner or another do not constitute a relevant consideration or a proper purpose for preventing a prisoner from realizing his human right to parenthood, as long as this realization does not amount to a significant administrative disruption in the management of the prison or another relevant violation of a significant public interest that justifies its restriction. The human right is also retained by a prisoner who was convicted of the most terrible offences, and no matter how great the feeling of abhorrence at his acts, it cannot constitute an objective reason for restricting his rights. The strict application of the test for the scope of permitted violations of a human right in accordance with the elements of the limitations clause is what guarantees that the protection of the

right does not become neglected; it ensures, especially in difficult cases like the one before us, that the constitutional principles are observed. Since the considerations of public morality, public sentiment and especially the deep abhorrence that most of the public feels towards Yigal Amir for his act are not relevant to a restriction of his right to parenthood and are therefore not a proper purpose, they also cannot serve as an objective conflicting value that may compete with the prisoner's right to become a parent. Therefore we do not need to consider the question of proportionality, which would have arisen had these considerations constituted a relevant objective reason to restrict Amir's right and which would have given rise to a need to balance them against his right.

We ought to add in this context that it is precisely because Amir was not given the possibility of conjugal visits by his wife for security reasons that the possibility of realizing his parenthood by being allowed to carry out artificial insemination remains his last resort. These circumstances provide even greater justification for the decision of the Israel Prison Service authorities concerning Amir.

Even the petitioners' additional argument that Amir should not be given permission because of the damage that can be anticipated to the best interests of the child that will be born to the couple cannot serve as a valid ground for violating the right to parenthood in the circumstances of this case.

The question when the consideration of the best interests of the child may justify preventing his birth is a profound question in the field of ethics and philosophy. The question when the law may intervene in this, and when a public authority has power to intervene in the human right to have a child for reasons of the best interests of the child and for other reasons, is a very difficult and complex one. The right to have a child and the right to be born are concepts that lie to a large extent in the field of morality and ethics that are outside the law. Whether and in what circumstances the Israel Prison Service has a power to restrict the right to have a child against a background of considerations of the best interests of the child is a difficult and loaded question. Thus, for example, a question may arise as to whether the Israel Prison Service may prevent a prisoner's conjugal visits or the realization of his right to parenthood because of a serious and contagious disease from which he suffers that is likely to infect his wife and child (CA 518/82 *Zaitsov v. Katz* [39], at pp. 127-128; *Nahmani v. Nahmani* [6], at pp. 729-30). Is it entitled to restrict the right of women inmates in the prison to have children when they have been sentenced to long terms of imprisonment for the reason

that it is not desirable from the viewpoint of the best interests of the child to raise him inside the prison or, alternatively, to condemn him to be placed in a foster home or in an adoption, or to separate him from his mother when he reaches a certain age? Are these considerations that the Israel Prison Service may address and do they fall within the scope of its authority? These questions do not require an answer in this case, since with regard to the best interests of the child it has only been argued that he is expected to be born to a single-parent mother because the father has been sentenced to life imprisonment. This argument has no merit in the specific context. No reasons have been brought before us to show, on the merits, any real grounds why the best interests of a child that will be born from artificial insemination to the Amir couple will be harmed. No basis has been established for the argument that Amir's wife lacks the capacity to raise a child. Moreover, the raising of a child by a single-parent mother while the father is sentenced to life imprisonment does not in itself indicate that the child's best interests are harmed, nor does it allow the public authorities to restrict the right of his parents to have children. In the modern world, the single-parent family has become a common and accepted phenomenon, and it does not in itself indicate harm to the interests of the child on such a scale and to such an extent that it justifies the intervention of the public authority in a way that violates the right of individuals to self-realization by bringing children into the world. The mere fact that one of the parents is in prison does not constitute, *prima facie*, a ground for violating the right of the couple to parenthood and the right of a child to be born, for reasons of his best interests. The remarks of Prof. Shifman in his book *Family Law in Israel*, vol. 2, at p. 156, are pertinent:

> '… In artificial insemination we are concerned with planning the coming into the world of a child who has not yet been born, in order to realize the expectations of persons to be parents. Is it possible to determine categorically that it would be better for that child not to be born than for him to be born? Will the situation of that child necessarily be so wretched merely because he is born into a single-parent family that for this reason we have a duty *ab initio* to prevent him from coming into the world?'

In this case, no factual basis was established to show harm to the best interests of the child that may be created as a result of giving the permission to the Amir couple. Therefore the question of balancing the relevant

conflicting values to the right to parenthood does not arise, and this argument should be rejected.

18. This leaves the argument that the prison authorities did not conduct a comprehensive examination of the question of prisoners sending sperm samples to their wives, nor did they formulate a general procedure for all prisoners in this regard, nor did they make the proper balances in this regard with regard to the case of Amir, who in their opinion has received better treatment in comparison to other prisoners.

In this matter also the petitioners' arguments are general and they do not establish a concrete factual basis for the existence of conflicting values to the prisoner's right, which would justify a restriction or denial thereof. Indeed, the prison authorities have stated that they will take action to prepare general procedures concerning the transfer of sperm samples of prisoners to their wives for the purpose of artificial insemination outside the prison. But their willingness to do this, which is important in itself, has no bearing on the specific decision in Amir's case, which is reasonable. From the state's response we see that, first and foremost, it took into account as a relevant factor the right of the prisoner to artificial insemination, and it gave this right the proper weight. There is no real public or administrative need that can be a consideration that conflicts with the prisoner's right in this case, to the extent that it might justify a violation of the right. The security considerations that were the basis for the refusal of the Israel Prison Service to allow Amir conjugal visits with his wife are not relevant to the transfer of a sperm sample out of the prison, and no other legitimate administrative argument was raised that might justify a violation or restriction of the aforesaid right of the prisoner.

Since there is no important value that conflicts with the prisoner's right to parenthood, no proportionate balance is required here between relevant conflicting considerations, nor is there a proper reason to violate the prisoner's human right (see *Horev v. Minister of Transport* [34], at p. 37 {187}; *Ganor v. Attorney-General* [33], at pp. 513-514; HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [40], at paras. 40 and 41).

In addition, no concrete information was brought before us to support the petitioners' claim with regard to a violation of equality between prisoners as a result of granting the permission to Amir. Moreover, the concept of equality in this context is loaded and complex, and it may justify possible distinctions between types of prisoners from the perspective of the possibility to realize the right to have children while in prison. Thus, for example, it is possible

that there will be a distinction between the ability of male prisoners to realize parenthood by sending sperm samples to their wives for the purpose of insemination and raising children outside the prison, which does not involve any responsibility on the part of the public authority for the birth and raising of the child and does not require any special institutional and budgetary arrangements, and the ability of the authority to allow pregnancies and childbirths of female prisoners in the prison on a large scale, which gives rise to difficult questions concerning the manner of raising and caring for the child after his birth, as well as questions involving resources and budgets that are required for this purpose. This issue involves difficult moral and practical questions that relate both to the prisoners and to the children who are born to a difficult fate. Logic therefore dictates that in this area of realizing the right to parenthood there may be a legitimate distinction between types of prisoner according to various criteria, which should satisfy the constitutional test.

In view of the aforesaid, there is no merit to the petitioners' argument that the decision of the commissioner to permit the transfer of Amir's sperm sample to his wife outside the prison was tainted by a defect of unreasonableness. The Israel Prison Service acted in making its decision in accordance with its responsibility by virtue of general legal principles, which recognize the right of the prisoner to realize his right to parenthood, and it saw fit to allow its implementation by way of giving a sperm sample to his wife outside the prison, in the absence of significant conflicting considerations that justify a restriction of the right.

Comparative law

International conventions and the position of the United Nations

19. The position of Israeli constitutional law on this issue and its ramifications upon the rights of prisoners serving a prison sentence is in essence consistent with the outlook of the international conventions and the position of the United Nations. This is the case with regard to the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966, which was ratified by Israel in 1991, and also with regard to the position of the Human Rights Commission of the United Nations and the basic principles that were determined by its institutions with regard to the treatment of prisoners. According to these sources, the right of a person to have children is considered to be a natural right, and it may only be restricted by statute, in accordance with the purposes of the United Nations Universal Declaration of Human Rights, and on reasonable grounds according to the circumstances of the case. With regard to the rights of

prisoners, the principle enshrined in these conventions is that these should only be limited by those restrictions that are required by the actual imprisonment.

The right to found a family

Article 16 of the Universal Declaration of Human Rights establishes the right to marry and found a family.

This is also provided in art. 23 of the International Covenant on Civil and Political Rights:

> '1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.'

In interpreting this article, the United Nations Human Rights Commission has held that the significance of the right to found a family in its fundamental sense is the right to procreate and to live together (General Comment no. 19 (1990)):

> 'The right to found a family implies, in principle, the possibility to procreate and live together.'

The right to protection against arbitrary intervention in family life

Article 12 of the Universal Declaration of Human Rights enshrines the right to privacy and protection against arbitrary intervention in family life.

Article 17(1) of the International Covenant on Civil and Political Rights also enshrines the right to privacy and protection against arbitrary intervention in family life:

> 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

The United Nations Human Rights Commission has commented that this right should only be restricted *by law and in accordance with the objectives of the Covenant and should be reasonable in the particular circumstances*. It also said that the term 'family' should be given a broad interpretation (General Comment no. 16 (1988)).

Prisoners' rights

Article 5 of the Universal Declaration of Human Rights provides that:

> 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

In addition, article 7 of the International Covenant on Civil and Political Rights provides (*inter alia*) that no one should be subjected to degrading punishment, and article 10(1) of the Covenant provides that:

> 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

With regard to this article, the United Nations Human RiOPghts Commission has determined that a person who has been deprived of his liberty should not suffer a violation of additional rights except to the extent that the restrictions are required by the actual imprisonment:

> '3. … Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, *but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment*' (emphasis added).

Similarly the Basic Principles for the Treatment of Prisoners, 1990, that were adopted by the United Nations provide that:

> '5. Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.'

Human rights and prisoners' rights under the European Convention on Human Rights

20. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, regulates the protection of human rights in the European Community. Article 8 of the convention provides the right to respect for private and family life, and article 12 provides the right to marry and to found a family:

> 'Article 8 – Right to respect for private and family life

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> …
>
> Article 12 – Right to marry
>
> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.'

The European Prison Rules of the Council of Europe, 1987, (Recommendation no. R (87) 3 of the Committee of Ministers of the Council of Europe) constitute recommendations for standard minimum rules of imprisonment for the countries of Europe, in which the inherent basic outlook is that the deprivation of liberty is itself a punishment, and it should not be aggravated by imposing conditions of imprisonment that are unnecessary:

> '64. Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this.'

(With regard to the centrality of this principle, see the explanatory notes to the rules, para. 64, *ibid*.). These principles are consistent with the constitutional outlook underlying the legal system in Israel.

In *X v. UK* [64] an English prisoner applied to be allowed to have a conjugal visit with his wife. The European Commission of Human Rights (hereafter also: 'the commission'), to which individuals had to apply at that time in order to file a case in the European Court of Human Rights, held that under art. 8(2) of the convention, it was possible to prevent prisoners from having conjugal visits for reasons of public security. In *X v. Switzerland* [65], a married couple from Switzerland, who were held separately in the same place of arrest for a period of approximately two months, applied to be allowed to have conjugal visits. The commission held that considerations of public security in a prison might justify preventing married persons under

arrest from having conjugal visits. It also held that the persons under arrest were married and had already established a family, and it therefore followed that they were entitled to respect for family life under art. 8, and that a violation of the right to family which is justified under art. 8(2) cannot be considered at the same time a breach of art. 12, which addresses the right to marry.

In two additional cases that considered the right to marry, the commission held that the prisons should allow prisoners to realize their right to marry, since marriage does not create any risk to the security of the prison (*Hamer v. UK* [66]; *Draper v. UK* [67]). The commission in these cases rejected the argument that the existence of personal liberty was a precondition for realizing this right, and in the absence of personal liberty the right should not be recognized (*Hamer v. UK* [66]), and also the argument that imprisonment includes a public interest that justifies preventing the marriage of someone serving a life sentence (*Draper v. UK* [67]). A particularly important decision for our case was *ELH and PBH v. UK* [68]. In that case a prisoner requested a conjugal visit with his wife, for the purpose of the wife becoming pregnant. It was also requested that the visit would take place shortly after a surgical operation that the wife would undergo, which was expected to increase her chances of fertility for a short period of time only. The commission reiterated the rule that, notwithstanding the fact that preventing conjugal visits violates the right to respect of family life in art. 8 of the convention, preventing them is justified for the purpose of preventing breaches of discipline and the commission of offences under art. 8(2), and that a justified violation under this provision will not be regarded as a violation of the right to marry under art. 12. Notwithstanding, the commission added that it regarded in a favourable light reforms that were being made in several European countries to prepare prisons to facilitate conjugal visits:

> ‘The commission considers that it is particularly important for prisoners to keep and develop family ties to be able better to cope with life in prison and prepare for their return to the community. It therefore notes with sympathy the reform movements in several European countries to improve prison conditions by facilitating “conjugal visits”’ (p. 64).

More importantly, the commission went on to say that in the circumstances of the specific case, preventing the visit did not constitute a violation of arts. 8 and 12 of the convention since the local law did not prevent the prisoner having the possibility of artificial insemination:

> 'The Commission considers that the same conclusions should be reached under articles 8 and 12 of the convention in the present case, despite the exceptional circumstances invoked by the applicants. Thus, although the first applicant requires major surgery to be able to conceive and this surgery can only be performed when the couple are in a position to attempt conception, *domestic law, as the applicants themselves accept, does not exclude artificial insemination in the case of prisoners*… The Commission, therefore, considers that no appearance of a violation of Articles 8 and 12 of the convention is disclosed…' (emphasis added).

From these remarks it can be deduced, *prima facie*, that the position of the European Commission of Human Rights was that the absolute prevention of a prisoner's possibility of having children is unconstitutional. But an interesting development in this matter occurred in a judgment that was given only recently by the European Court of Human Rights: *Dickson v. United Kingdom* [69]. A prisoner who was sentenced to life imprisonment for murder applied, together with his wife (a former prisoner, whom he married in prison), for access to facilities for artificial insemination. The couple argued that when the husband would be released from the prison, the wife would be 51 years old, and if their application would not be granted, their chances of having children would be non-existent. The Secretary of State for Home Affairs refused the application, while clarifying his policy with regard to artificial insemination. According to this policy, requests by prisoners for artificial insemination will be considered on an individual basis, and they will be granted only in 'exceptional circumstances.' The policy will give special weight to several factors, including: whether artificial insemination is the only possible means of having children; the date of the prisoner's release (if the release is very close, it is possible that waiting to be released will not cause much hardship to the prisoner, and if the date is particularly distant, it can be assumed that the prisoner will not be able to function as a parent); whether both parents are interested in the procedure and are able to undergo it from a medical viewpoint; whether the relationship between the couple was stable before the imprisonment, so that it can be assumed that it will continue to be good after the imprisonment; the financial resources of the parent who will raise the child; and whether, in view of the prisoner's criminal past and other relevant facts, there is a public interest in depriving him of the possibility of artificial insemination. The Home Secretary decided that, even though in that case a refusal of the request meant that the couple would lose

most of their chances of having a child, on the other hand the considerations of the seriousness of the offence that was committed and the harm to the interests of the child who would be raised for many years without a father prevailed. The majority justices in the European Court of Human Rights adopted the position of the United Kingdom. First they confirmed that according to the case law of the European Court, the prisoners retain all of their rights under the convention (including the right to respect for privacy and the family) apart from the right to liberty (*Hirst v. United Kingdom* [70], at para. 69). Notwithstanding, the restriction of liberty naturally results in a restriction upon the ability to realize additional rights, and therefore the key question is whether the nature of the restriction and its degree are consistent with the convention. According to the majority justices, within this framework a distinction should be made between an intervention in the right of the prisoner to respect for family and privacy and a violation that takes the form of non-performance of a positive obligation that is imposed on the state with regard to that right. According to them, even though restrictions on family visits and conjugal visits have been recognized in its previous decisions as intervention in the rights of the prisoner (*Aliev v. Ukraine* [71], at pp. 187-189), the restriction on the possibility of the prisoner carrying out artificial insemination merely constitutes the non-performance of a positive duty that applies to the state. But when determining the scope of the positive duties, the member states of the convention have a broad margin of appreciation. Further on, the majority justices approved the principle that the convention does not permit an automatic denial of prisoners' rights merely because of adverse public opinion, but notwithstanding this, according to their approach considerations of public confidence in the penal system are legitimate considerations within the framework of determining policy in the prison. They were also of the opinion that a legitimate consideration in this matter is the question of the best interests of the child. According to these principles, the majority justices held that the criteria determined in the policy of the United Kingdom were neither arbitrary nor unreasonable. With regard to the specific case, the majority justices held that according to the broad margin of appreciation, it was possible to give the considerations of public confidence and the best interests of the child greater weight than the harm to the prisoner in losing the possibility of bringing children into the world. Three justices dissented from this approach. The president of the court, Justice Casadevall, and Justice Garlicki emphasized that the right to have children is a constitutional right, which is enshrined in the convention (*Evans v. United Kingdom* [72], at para. 57). It follows that the access of a prisoner

to artificial insemination facilities is a part of the right to respect for family life in art. 8 of the convention, and where the couple are married, it is also enshrined in art. 12. The minority justices said that the premise adopted by the majority justices, according to which the prisoner retains his constitutional rights apart from the right to liberty is correct. But the logical conclusion that follows from this is that a violation of the right to have children is lawful only if it is necessitated by the restriction on liberty. The minority justices also emphasized that the premise adopted by the United Kingdom in its policy was erroneous, since, according to it, access to artificial insemination would be granted only in special circumstances. This is the opposite of the basic philosophy of human rights and the European Convention, according to which the right is the rule, whereas the restriction of the right is the exception. They held that in the specific case, in which refusing access to artificial insemination facilities means the loss of the possibility of having children in its entirety, the refusal of access was disproportionate. The third minority justice dissented from the majority position that took no account of the mother's right to have children.

It would appear that the minority opinion in that case is more consistent with the approach to the principles of the convention according to the opinion expressed by the majority, and it is consistent with the principles of the constitutional system in Israel.

English law

21. According to the case law of the House of Lords, imprisonment is intended to restrict the rights and liberties of the prisoner. Therefore, it restricts the personal autonomy of the prisoner and his freedom of movement. At the same time, the prisoner retains all of his civil rights, apart from those that have been taken from him, either expressly or as a necessary consequence of the imprisonment:

> 'A sentence of imprisonment is intended to restrict the rights and freedoms of a prisoner. Thus, the prisoner's liberty, personal autonomy, as well as his freedom of movement and association are limited. *On the other hand, it is well established that "a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication"*: see *Raymond v. Honey*…; *R. v. Secretary of State for the Home Department, Ex parte Leech*…' (*R. v. Secretary of State for the Home Department, Ex Parte Simms* [62]; emphasis added).

The Human Rights Act 1998, which came into force in 2000, applied the main parts of the European Convention on Human Rights (including the rights under discussion in this case) to English law. Without purporting to exhaust the question of how the new statute affected English law, we can say that the various public authorities, including the prisons, are required to act in accordance with the convention (s. 6 of the law). Similarly the courts have a duty to take into account the case law of the European Court of Human Rights (s. 2 of the law; see also P.B Proctor, 'Procreating from prison: Evaluating British Prisoners' Right to Artificially Inseminate Their Wives Under the United Kingdom's New Human Rights Act and the 2001 Mellor Case,' 31 *Ga. J. Int'l & Copm. L.* (2003) 459, at pp. 467-470). It should be noted that even before the new law came into force, prisoners were entitled to apply to the European Commission of Human Rights with regard to *prima facie* breaches of the convention (after exhausting proceedings in England), and the public authorities in England acted in accordance with its decisions. A detailed consideration of the right to have children by means of artificial insemination was made by the English Court of Appeal in *R. (Mellor) v. Secretary of State for the Home Department* [63]. The Court of Appeal decided that the right of a prisoner to artificial insemination had not yet been recognized in case law under the European Convention, and that a prisoner should not be allowed artificial insemination in every case where he has not been allowed conjugal visits. The implication of the case law, in its view, was that only in exceptional cases, in which the violation of the right granted in the convention was disproportionate, would it be justified to impose a duty to allow artificial insemination. According to the approach of the Court of Appeal, the judgment of the House of Lords in *R. v. Secretary of State for the Home Department, Ex Parte Simms* [63] means that it is possible to justify a restriction of a prisoner's rights even when this is not required for reasons of the proper functioning of the prison, but it is a result of the loss of liberty that is inherent in the penal objective:

> 'They recognised that a degree of restriction of the right of expression was a justifiable element in imprisonment, not merely in order to accommodate the orderly running of a prison, but a part of the penal objective of deprivation of liberty.'

Consequently, according to the approach of the Court of Appeal, there may be a justification for restricting the right to artificial insemination for reasons of public interest:

> 'A policy which accorded to prisoners in general the right to beget children by artificial insemination would, I believe, raise difficult ethical questions and give rise to legitimate public concern.'

According to the court in England, an additional legitimate consideration for restricting the right is the consideration of the best interests of the child, who will grow up while one of his parents is in prison:

> 'By imprisoning the husband, the state creates the situation where, if the wife is to have a child, that child will, until the husband's release, be brought up in a single parent family. I consider it legitimate, and indeed desirable, that the state should consider the implications of children being brought up in those circumstances when deciding whether or not to have a general policy of facilitating the artificial insemination of the wives of prisoners or of wives who are themselves prisoners.'

The Court of Appeal did not consider in depth the question when a restriction of the right of a prisoner to carry out artificial insemination will be considered disproportionate. Notwithstanding, it said, as a premise, that it must be shown that preventing the possibility of carrying out artificial insemination does not lead only to a delay in realizing the prisoner's right to establish a family, but to his being completely deprived of it:

> 'I would simply observe that it seems to me rational that the normal starting point should be a need to demonstrate that, if facilities for artificial insemination are not provided, the founding of a family may not merely be delayed, but prevented altogether.'

American law

22. The premise in American law is that prisoners retain their constitutional rights inside the prison:

> 'Prison walls do not form a barrier separating prison inmates from the protection of the constitution' (*Turner v. Safley* [46], at p. 84).

Therefore, the prisoner retains constitutional rights such as the right to equal protection before the law, the right to due process in the Fourteenth Amendment of the United States Constitution, and the right to privacy. At the same time, other constitutional rights that are not consistent with the actual imprisonment are not retained by the prisoner:

> 'An inmate does not retain [constitutional] rights inconsistent with proper incarceration' (*Overton v. Bazzetta* [47], at p. 132; *Turner v. Safley* [46], at p. 96).

According to the stricter opinion in the United States Supreme Court, the rights of which prisoners can be deprived are only those that are *fundamentally* inconsistent with imprisonment ('we have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself…', *Hudson v. Palmer* [48], at p. 523). But an opinion has been expressed that the rights that are consistent with the actual imprisonment may also be restricted, if this is done for the purpose of realizing legitimate penal objectives:

> 'It is settled that a prison inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system," *Pell v. Procunier* [49], at p. 822' (*Turner v. Safley* [46], at p. 95).

In the leading decision in *Turner v. Safley* [46], it was held that the appropriate standard for scrutinizing a violation of the constitutional rights of prisoners is the lowest level of scrutiny, the rational connection. The reason for this lies in the complexity of the task of administering the prison, and the court not having the proper tools to consider the matter (*ibid*. [46], at pp. 85, 89). In addition, details were given of four tests for examining the constitutionality of the violation, in accordance with the aforesaid standard. The judgment in *Overton v. Bazzetta* [47], at p. 132, adopted the tests laid down in *Turner v. Safley* [46] and summarized them as follows:

> 'Whether the regulation [affecting a constitutional right that survives incarceration] has a "valid, rational connection" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation' (*ibid*. [47], at p. 132).

The aforesaid standard of scrutiny also applies when the constitutional right that is violated is a fundamental and basic one and when in other circumstances a stricter test would be applied (*Washington v. Harper* [50], at p. 223). Notwithstanding, restrictions that are imposed in reliance upon a classification that gives rise to a suspicion of a racist consideration are examined with the constitutional strict scrutiny test (*Johnson v. California*,

543 U.S. 499 (2005)).

The right to have children is recognized in American law as a constitutional right, which lies at the very heart of the right to personal freedom (see: *Skinner v. Oklahoma* [51], at p. 541; *Eisenstadt v. Baird* [52], at p. 453; *Carey v. Population Services International* [53], at p. 685; *Cleveland Board of Education v. LaFleur* [54], at p. 639; *Stanley v. Illinois* [55], at p. 651).

In view of these principles, the United States Supreme Court has held that the right to marry is retained even during imprisonment (*Turner v. Safley* [46]). Notwithstanding, the Federal courts have consistently refused to recognize a right to conjugal visits and intimacy with a spouse as a constitutional right (*Anderson v. Vasquez* [56]; *Hernandez v. Coughlin* [57]; *Toussaint v. McCarthy* [58]). The question whether allowing a prisoner to provide a sperm sample for the purpose of artificial insemination and realizing his constitutional right to have children is consistent or inconsistent with the actual imprisonment and what are the potential conditions for restricting it has not yet been brought before the United States Supreme Court, but other courts in the United States have approved administrative decisions that restrict the realization of the right. These decisions raise the question of whether they are consistent with constitutional principles and the substantive rules of conventional international law on this issue. In *Goodwin v. Turner* [59] the Federal Court of Appeals of the Eighth Circuit approved a policy that denied prisoners the possibility of artificial insemination. It was held that even if the right survived imprisonment, there was a rational connection between this policy and the duty of the prison to treat all prisoners equally. The argument was that the prisons would also be required to allow female prisoners to realize the right to have children, and as a result also to care for their needs during pregnancy and for their infants, and that this would lead to imposing substantial costs on the prisons and make it necessary to divert resources from important programs and the security needs of the prison. Therefore, for this reason it was possible not to approve artificial insemination for spouses of male prisoners.

> 'According to the Bureau's artificial insemination policy statement, if the Bureau were forced to allow male prisoners to procreate, whatever the means, it would have to confer a corresponding benefit on its female prisoners. The significant expansion of medical services to the female population and the additional financial burden of added infant care would have a

> significant impact on the allocation of prison resources generally and would further undercut the Bureau's limited resources for necessary and important prison programs and security' (*ibid*. [59], at p. 1400; the Supreme Court of the State of New Jersey made a similar ruling in *Percy v. State of New Jersey, Department of Corrections* [60], at pp. 548-549).

The minority justice in that case thought otherwise. According to him, the right to have children, like the right to marry, survives the imprisonment. In addition, in his opinion it is not legitimate to make use of the principle of equality in order to deny the constitutional right of another (*ibid*. [59], at pp. 1403-1407). Further detailed consideration of this issue can be found in *Gerber v. Hickman* [61], in an opinion of the Federal Court of Appeals of the Ninth Circuit. In that case a majority (of six judges) held that the right to have children is inconsistent with the nature of imprisonment, since imprisonment naturally separates the prisoner from his family and his children. It was also stated there that restricting the right to have children is consistent with the legitimate objectives of the penal system, including deterrence and retribution:

> '… "these restrictions or retractions also serve… as reminders that, under our system of justice, deterrence and retribution are factors in addition to correction"…' (*ibid.* [61], at p. 621).

Following from these remarks it was held that the right to have children is inconsistent with imprisonment, even when it is possible to realize it by means of providing sperm for artificial insemination:

> 'Our conclusion that the right to procreate is inconsistent with incarceration is not dependent on the science of artificial insemination, or on how easy or difficult it is to accomplish. Rather, it is a conclusion that stems from consideration of the nature and goals of the correctional system, including isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation' (*ibid*. [61], at p. 622).

By contrast, the five minority justices were of the opinion that realizing the right to have children by means of a process that does not require an intimate meeting does not pose a security risk, and therefore it is consistent with the substance of imprisonment and should be respected:

> '… the right to intimate association and the right to privacy — are clearly inconsistent with basic attributes of incarceration because of security concerns. Procreation through artificial

> insemination, however, implicates none of the restrictions on privacy and association that are necessary attributes of incarceration' (*ibid*. [61], at pp. 624-625).

They also emphasized that the majority judges had not shown why the right to have children was inconsistent with the penal objectives, and in so far as their intention was to deny the right to have children as a method of punishment, a determination of this kind should be made by the legislature:

> 'The majority identifies correctional goals such as isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation that are supposedly inconsistent with the right to procreate, yet does not explain how the right is inconsistent with any of these goals. If, in fact, the purpose behind prohibiting procreation is to punish offenders, this is a determination that should be made by the legislature, not the Warden' (*ibid*. [61], at p. 626).

It would appear that the minority position in this proceeding corresponds in essence to the outlook that has become accepted in the Israeli legal system, whereby human rights are retained by the prisoner in so far as they are not inconsistent with the substance of the imprisonment, and restricting and limiting them is permitted only in so far as this is essential for achieving a very weighty public purpose, such as security and disciplinary arrangements in the prison, or another important public interest. In the absence of such an interest, the remaining rights should be respected, and the prisoner should be allowed to realize them *de facto*.

Conclusion

23. Yigal Amir was and remains one of the most abhorred criminals in the Israeli national consciousness in recent generations, if not the most abhorred. He was convicted of the murder of a prime minister, and first introduced into the public consciousness the possibility that a terrible event of this kind, in which an ordinary Israeli citizen would murder his leader, could also take place in Israel. Amir has been sentenced by the legal system in so far as the law requires, and his punishment has been exhausted. But his sentence has not reduced the feelings of abhorrence towards him, for the nefarious deed of taking the life of a man who was the symbol of the democratic system of government in the independent State of Israel.

Notwithstanding, from the moment that Amir's sentence was handed down and he became a prisoner serving a sentence of life imprisonment, his punishment was exhausted. From this stage, like all prisoners, Amir is subject

to severe restrictions on his liberty, and additional restrictions on his human rights, that derive inherently and essentially from the loss of his liberty. In addition he is subject to further restrictions that concern the discipline and order that are required by life in the prison. It is also permitted, where necessary, to impose restrictions on him that are derived from the needs of state security or from other essentials needs that are a public interest. But apart from these restrictions he retains, like every prisoner, basic human rights that were not taken from him when he entered the prison (cf. BAA 2531/01 *Hermon v. Tel-Aviv-Jaffa District Committee, Israel Bar Association* [41], at para. 19). The executive authority is required to respect these rights and to do all that it can in order to allow them to be realized, unless they are confronted by conflicting considerations of public interest whose weight justifies a limitation of the human right. These considerations do not include the consideration of desiring to worsen the conditions of imprisonment of someone who is serving a life sentence because of the severity of his crime, or the consideration of restricting his human rights as revenge for his deeds. These considerations are irrelevant to the issue and they are inadmissible.

The outlook that it is possible to violate the prisoner's right to parenthood because of the gravity of the offence that he committed, for reasons of deterrence and to show abhorrence towards the offender, is foreign to the basic principles of criminal law and to penal theory. This approach is also clearly inconsistent with the prevailing constitutional approach in the Israeli legal system. It is inconsistent with the ethical principles of the State of Israel as a Jewish and democratic state; it does not reflect a proper purpose nor is it proportionate. This court has already said, in another context:

> 'A restriction upon contact with persons outside the prison should not be imposed on security prisoners if it is not required by security considerations or other objective considerations, but merely derives from considerations of retaliation or revenge, or if it harms the prisoner to a degree greater than that required by objective considerations' (*per* Justice Zamir in *State of Israel v. Kuntar* [16], at p. 501, and LHCJA 5614/04 *Amir v. Israel Prison Service* [2] (conjugal visits), at p. 5).

With regard to the realization of human rights that are retained by a prison inmate, Amir's status is the same as any other prisoner. In the absence of substantial conflicting considerations of public interest, the human rights that he retains as a prisoner serving a life sentence should be respected and not violated, and the right to parenthood is among the most exalted of these. This

is what the competent authority decided in this case, and it was right to do so.

Respect for human rights and the protection of human rights lie at the heart of the constitutional system in Israel. The protection of the human rights of prison inmates is derived from and required by this outlook. Without *de facto* implementation of this protection, to the extent that it is possible, even for someone who has lawfully been deprived of his liberty, the value of human dignity may be diminished. This is equally true of all prisoners, whether less serious or more serious offenders. It is also true with regard to prisoners serving a life sentence because they have taken human life; society's recognition of the human rights retained by the prisoner preserves his dignity as an individual. But no less importantly it preserves the dignity of society as a civilized society that does not merely protect the rights of its ordinary citizens, but also those of persons who have committed crimes against it, even if the crime is the worst of all — the murder of a human being — and even where the victim of the murder symbolized in his life and his death the image of Israeli society as a democracy that is built on constitutional values that give precedence to human rights.

> 'Moreover, a violation of a prisoner's human dignity does not merely harm the prisoner but also the image of society. Humane treatment of prisoners is a part of a moral-humanitarian norm that a democratic state is liable to uphold. A state that violates the dignity of its prisoners breaches the duty that it has to all of its citizens and residents to respect basic human rights' (*per* Justice Mazza in Golan v. Prisons Service [15], at p. 156 {506}).

We should remember that a civilized country is not merely judged by how it treats its faithful citizens, but also by how it treats the criminals living in it, including the most despicable criminals who wish to undermine its ethical foundations. In a proper constitutional system, the umbrella of human rights extends over every human being, including the criminal sitting in prison, subject to conditions and restrictions that satisfy constitutional criteria. The public authority acted in this case in accordance with the proper constitutional criteria, and its decision was made according to the law.

On the basis of all of the aforesaid, the petition should be denied. The interim order that was made is set aside.

In the circumstances of the case, I propose that no order is made for costs.

Justice E. Hayut

1. I agree with the opinion of my colleague Justice Procaccia and I would like to add several remarks.

This petition concerns a decision of the Prison Service Commission of 5 March 2006 to allow Yigal Amir, who is serving a life sentence, to send sperm outside the prison for the purpose of the artificial insemination of his wife, Mrs Larissa Trimbobler. Like my colleague, I too am of the opinion that the argument of the petitioners that the Prison Service Commissioner is not competent to allow the sperm to be transferred as aforesaid should be rejected. The question in this context is not what is the source of the authority to allow this but by virtue of what authority was the Prison Service Commissioner entitled to refuse the request of this prisoner in this regard. It would appear that in so far as the commissioner's decision does not restrict the human rights of the prisoner but realizes them, his decision enjoys the presumption of being made with authority and no fault can be found with it in this regard. A completely different question is whether the authority has a duty to exercise its power in this matter and what are the limitations and restrictions that it may determine in this regard. These questions do not arise in the case before us, and therefore we can leave them until they do.

2. With regard to the question of the reasonableness of the decision, the petitioners as public petitioners sought in their petition to give expression to the feeling of abhorrence that the Israeli public feels to the murderer of the late Prime Minister Yitzhak Rabin. According to them, the punishment incorporated in the criminal sanction should also receive expression after the sentence has been imposed, when the murderer is serving his sentence of imprisonment. Therefore, so it is alleged, he should not be allowed to realize his right to parenthood. The petitioners further argue that the decision of the Israel Prison Service to allow the Trimbobler-Amir couple artificial insemination is an improper decision from a moral viewpoint, and according to them 'a person who commits such a serious crime ought to know that not only will he lose his personal liberty, but also other basic rights may be impaired… someone who takes the life of his fellow-man may discover that that he cannot give life to his progeny.' The petitioners emphasize, however, that it is not in every case that a prisoner is not entitled to have children, but in their opinion 'the murder Amir does not have this right.'

3. In his book *A Judge in a Democracy* (2004), President Barak discussed how a judge ought not to estrange himself from the society in which he lives and functions. In his words:

> 'The administration of justice is a form of life that involves a degree of seclusion; it involves distancing oneself from social and political struggles; it involves restrictions on the freedom of expression and response; it involves a considerable degree of solitude and introspection. But this is not a form of life that involves an estrangement from society. A wall should not be built between the judge and the society in which he functions. The judge is a part of his people' (*ibid.*, at p. 52).

Indeed, as an integral part of Israeli society we ought to be aware and sensitive to the strong feelings that the public has to the terrible act of murder committed by Amir, and these feelings have been well expressed by the petitioners in their petition. But as judges in a democracy, we are enjoined to decide the petition according to the law, by applying the basic principles of our legal system even if our decision is not consistent with these feelings. In his aforementioned book, President Barak outlines the important distinction between the need to maintain the confidence of the public in its judges and being carried away unprofessionally by public opinion and public feelings. He says:

> 'The need to ensure public confidence does not imply a need to ensure popularity. Public confidence does not mean following the prevailing trends among the public. Public confidence does not mean making decisions on the basis of public opinion surveys. Public confidence is not pleasing the public. Public confidence does not mean making decisions that are inconsistent with the law or with the conscience in order to reach a result that the public wants. On the contrary, public confidence means making decisions according to the law and in accordance with the judge's conscience, irrespective of the public's attitude to the actual decision' (*ibid.*, at p. 51).

In our case, it is possible to understand the collective feeling of revenge that the petitioners are expressing in view of the national trauma caused by Amir by means of the political murder that he committed. But this feeling cannot dictate an outcome that is inconsistent with the basic principles of our legal system. According to these principles, which my colleague discussed at length in her opinion, the punishment to which Amir was sentenced, according to which he was removed from society and imprisoned behind bars for life, does not inherently deprive him of the right to parenthood. Therefore, we can find no unreasonableness in the decision of the Israel Prison Service

to allow the transfer of the sperm (subject to the restrictions stipulated in the decision), in order to give Amir a chance to realize his right to parenthood by means of artificial insemination.

Justice S. Joubran

1. I agree with the opinion of my colleague Justice A. Procaccia and the reasons that appear in her profound and comprehensive opinion. Notwithstanding, in view of the complexity of the question before us, I think it right to add several remarks of my own, if only in order to present the difficulties raised in this case from a different and additional viewpoint.

2. From time to time the court is asked to consider petitions concerning the conditions of imprisonment and the various restrictions that are imposed on prisoners who are serving sentences in the prisons. On a theoretical level, these petitions involve complex questions concerning the purpose of the sanction of imprisonment. In this context, it is possible to identify two main approaches that conflict with one another. According to one approach (hereafter — the first approach), the purpose of imprisonment is limited to depriving the prisoner of his personal liberty, by restricting his freedom of movement when imprisoning him behind bars for the period of imprisonment to which he has been sentenced. According to this approach, restricting any other rights of the prisoner is not a part of the sentencing purpose. In this regard it makes no difference whether we are dealing with rights whose violation is a consequence of the restriction of the liberty because of the fact that the ability to realize them depends upon the freedom of movement, or we are dealing with rights that are being violated in order to achieve other public purposes, including ensuring the proper management of the prison service, security considerations and other legitimate public interests (see para. 14 of the opinion of my colleague Justice A. Procaccia).

3. According to the other approach (hereafter — the second approach), a restriction of additional basic rights of a prisoner, apart from the right to personal liberty, will be possible if this is consistent with the additional legitimate purposes underlying the objective of the sentence, including the removal of the prisoner from society, the suppression of crime, (specific or general) deterrence, a denunciation of the offender and punishment (with regard to these reasons, see the memorandum of the draft Penal (Amendment — Incorporation of Discretion in Sentencing) Law, 5765-2005, which is based on the opinion of the committee chaired by Justice Emeritus E. Goldberg; an expression of the second approach can be found in the majority

opinion in the judgment in *Gerber v. Hickman* [61], which is mentioned on page 33 of my colleague's opinion). In other words, according to this approach, the purpose of the sentence of imprisonment that is imposed on the prisoner is not limited to sending him to prison in itself, and the restriction of the prisoner's freedom of movement, together with the other violations of his rights that accompany it, do not express the full sentence that is imposed on him.

4. It is not superfluous to point out that the distinction between the aforesaid two approaches is not merely a matter of semantics but a difference that goes to the heart of the purpose of sentencing. Thus it may be asked most forcefully why sentencing should only take the form of a denial of the prisoner's liberty and freedom of movement and not a restriction of other rights. It should be emphasized that the distinction between the different approaches has major ramifications on the scope of the protection given to the rights of the prisoner. Thus it is not difficult to see that whereas the first approach results in a restriction of the violation of the prisoner's basic rights, the second approach actually extends the possibilities of violating them. To a large extent it can be said that the approach that the sanction of imprisonment should realize the various purposes underlying the sanction, including punishment and deterrence, leads to an approach that holds that the mere restriction of the freedom of movement does not exhaust, in every case, the sentence that is imposed on the prisoner. According to this approach, imprisonment should fully reflect the society's abhorrence at the acts that the prisoner committed and the severity with which society regards them. In this way, not only is the prisoner placed behind bars for his acts, but his imprisonment should reflect, in all its aspects, his isolation and removal from society.

5. The difference between the aforesaid two approaches may easily be clarified by giving several examples: serving a prison sentence within the confines of a prison inherently results in a violation of the prisoner's right to engage in an occupation, since he is subject to various restrictions that deprive him of the possibility of leaving the prison confines. But consider, for example, a case in which a prisoner, who committed crimes that gave rise to public outrage, wishes to publish, from the prison, a novel that he has written, which is based on the story of his personal life. Assuming that the writing of the book during the prisoner's free time does not interfere with the proper functioning of the prison and does not affect the maintenance of order and discipline in the prison, according to the first approach the prisoner should not be prevented from publishing the book, by which means he realizes his

right to the freedom of expression and the freedom of occupation. In parenthesis I will point out that the need to examine the writings of the prisoner and to ensure that they do not include details that may affect order and discipline in the prison may impose a significant burden on the prison service so that it will be justified in refusing publication of the book (see and cf. *Golan v. Prisons Service* [15], at pp. 165-166 {524-527}). In any case, it should be noted that according to the second approach it is possible that the publication of the book may be prevented for very different reasons. It may be argued that the purposes underlying the sentence of imprisonment, including punishment, expressing revulsion at the acts of the prisoner and isolating him from society, justify not allowing that prisoner, while he is in prison and before he has finished serving his sentence, to derive an economic benefit from the commission of his despicable acts or achieving public recognition as a result of the publication of the book.

Another interesting example concerns the question of the rights of a prisoner to participate in elections to the Knesset. Whereas according to the first approach there is no basis for restricting the right of a prisoner to vote, as long as this does not harm the proper management of the prison, according to the second approach it is possible to regard the refusal of the right to vote as a measure that reflects the purpose of isolating the prisoner from society, which derives from the idea that there is no reason to allow a prisoner who has been removed from society for a certain period to influence the shaping of its system of government and other aspects of society. This is the place to point out that, in Israel, the arrangement that allows prisoners to realize their right to vote is enshrined in legislation (see s. 116 of the Knesset Elections Law, 5729-1969; HCJ 337/84 *Hukma v. Minister of Interior* [26]; *Golan v. Prisons Service* [15], at pp. 158-159 {514-516}).

The same applies to the restrictions imposed on the prisoner's ability to have contact with members of his family and with additional persons outside the prison, whether by means of visits to the prison or by sending letters or making telephone calls. It may be argued that the aforesaid restrictions were not only imposed because of the need to prevent a disruption to the running of the prison but they were also intended to realize the purpose of removing and isolating the prisoner from society.

6. Several different variables may increase the disparity between the aforesaid two approaches. One of these variables concerns the seriousness of the offence that the prisoner committed. Thus, for example, according to the second approach, the more serious the offence, the greater the degree of

revulsion that the public feels towards the acts of the prisoner, and this should be reflected to a more significant degree in his sentence. This can be done, *inter alia*, by preventing him from benefitting from additional rights that he would have had, were he a free man.

7. It can be said that the petitioners' arguments are based to a large extent on the second approach. According to what is alleged in the petition, when considering a request of someone who committed such a despicable and serious offence as the second respondent to be allowed to have children, the competent authority should take into account considerations that go beyond the effects of the application on the mere ability to keep him behind bars, and it should also balance the violation of his rights against the principles of punishment and deterrence that underlie his sentence. Thus they request that the administrative authority should also take into account the profound feelings of abhorrence that the citizens of the state feel towards his despicable acts, when it decides whether there are grounds for allowing the artificial insemination of his spouse. It follows from this, the petitioners seek to argue, that someone who committed such a serious act against the Israeli public should not be allowed to realize his right to have a family.

8. But as my colleagues say in their opinions, the path that the petitioners seek to follow is not the path of the Israeli legal system. It is the first approach presented above that has established over the years a firm basis in our case law. The remarks of this court in *Golan v. Prisons Service* [15], which are cited in the opinion of my colleague Justice A. Procaccia, are pertinent in this regard:

> 'The basic assumption is that the human rights "package" of a prisoner includes all those rights and liberties conferred on every citizen and resident, except for the freedom of movement of which he is deprived as a result of the imprisonment. Notwithstanding, it is clear that the imprisonment also suspends the prisoner's ability to exercise some of his other liberties. With regard to some of these, where the ability to exercise them depends on the freedom of movement, the suspension of the right is "inherent" to the imprisonment. Other liberties that can be exercised (at least in part) irrespective of freedom of movement and that can be realized even in a prison cell (or from it) continue to be enjoyed by the prisoner even when he is in the prison' (*ibid*., at p. 152 {502}; see also the references cited there).

Or as my colleague expressed so well in her own words:

> 'It should be emphasized that the restrictions on human rights that are imposed by the public authority were not intended to add an additional sanction to the sentence that was handed down. Their purpose is not to increase of the severity of the sentence that was handed down to the prisoner as a goal in itself. Their purpose is not to punish the prisoner for his crimes, for which he has been sentenced to imprisonment, or to make the conditions of his imprisonment more difficult as recompense for his despicable acts' (para. 14 of the opinion of Justice A. Procaccia).

9. Admittedly it is possible to find instances in Israeli case law in which it appears that a prisoner's rights were in practice denied as a part of his punishment. In this regard, the following examples can be mentioned: the refusal of a prison governor to allow a prisoner to have use of a 'sex doll' in order to release his tensions and as a substitute for having marital relations (LHCJA 4338/95 *Hazan v. Israel Prison Service* [20]); a refusal to allow a book that was held to contain inflammatory and inciting content into a prison (HCJ 543/76 *Frankel v. Prisons Service* [42]); a decision not to allow prisoners on a hunger strike salt and milk powder and to remove these products from their cells, where it was held that the right to allow a prisoner to participate in a hunger strike is not one of the rights granted to him when he is in prison (HCJ 7837/04 *Borgal v. Israel Prison Service* [43]); a prohibition against security prisoners having radio receivers (HCJ 96/80 *Almabi v. Israel Prison Service* [44]). Naturally it is possible to point to many more examples, but for the sake of brevity I will not mention them. But it is important to note that all of these cases concerned a restriction of the prisoner's rights that derived from the principle that his punishment was exhausted by his being placed behind bars, and any additional restriction was intended to serve the needs of the imprisonment only. Thus, in all the examples that were mentioned above, the restriction of the additional rights was made in order to ensure the proper running of the prison and the disciplinary and security arrangements in the prison. Notwithstanding, in order that these case law rulings with regard to the importance of preserving the human rights of the prisoner do not become empty words, the court should ensure that the Israel Prisons Service does not make improper use of its power to ensure the proper functioning of the prison as a means of restricting additional rights of prisoners, even where this is not necessary. The

remarks of Justice H. Cohn in HCJ 144/74 *Livneh v. Prisons Service* [45] are pertinent in this regard:

> 'Many evils that are a necessary part of prison life are added to the loss of liberty. But we should not add to the necessary evils that cannot be prevented any restrictions and violations for which there is no need or justification. The powers granted to prison governors to maintain order and discipline need to be very broad; but the broader the power, the greater the temptation to use it unnecessarily and without any real justification.'

10. It is proper at this stage to make two additional points. First, it is possible to mention incidents that can perhaps be regarded as expressing the second approach. These are cases where certain aspects of the sentence of imprisonment reflect to some extent purposes that go beyond those concerning the restriction of liberty. Thus, for example, s. 9 of the Release from Imprisonment on Parole Law, 5761-2001, provides that among the considerations that should be taken into account when considering the question of the early release of a prisoner from imprisonment, there are considerations concerning the severity and type of the offence, the circumstances in which it was committed, its scope and consequences, and also considerations relating to the prisoner's criminal record. Moreover, s. 10 of the same law states that:

> 'In cases of special seriousness and circumstances in which the board is of the opinion that the parole of the prisoner will seriously harm the public, the legal system, law enforcement and the deterrence of others, when the severity of the offence, its circumstances and the sentence handed down to the prisoner are unreasonably disproportionate to the term of imprisonment that the prisoner will actually serve if he is released on parole, the board may also take these factors into account in its decision.'

Another example of this can be found in the duty imposed on every prisoner to work in the course of the sentence of imprisonment imposed on him (s. 48 of the Penal Law, 5737-1977, together with s. 25 of the Prisons Ordinance [New Version] (hereafter — the ordinance)). According to what is stated in s. 56(30), if a prisoner refuses to work, this will lead to the sanctions listed in s. 58 of the ordinance. Thus, even though the rationale underlying this provision is a rationale that is intended to rehabilitate the prisoner, it does involve a conflict with his freedom of choice.

Notwithstanding, it is important to point out that in all of these examples and others, the violation of the prisoner's rights in addition to his actually being held in prison is enshrined in a specific provision of statute (see for example *Golan v. Prisons Service* [15], at p. 152 {502}). The position is different when the Prison Service Commissioner wishes to violate additional rights that are not inherent to the loss of liberty without such a power being given to him expressly in statute.

11. Second, there is an additional category of cases in which the gravity of the offence or the fact that a prisoner has not expressed regret for his actions would appear to have an effect on the scope of the violation of rights that is not necessarily inherent to the loss of liberty. Even though the circumstances relating to the severity of the offence do not constitute in themselves a justification for violating the rights of the prisoner, they are capable of indicating the risk presented by him, and consequently they are capable of justifying imposing additional restrictions that violate the basic rights given to him. Notwithstanding, it is important to note that this is not a continuation of the sentencing or an additional sentence resulting from these circumstances, but a violation that is incidental to the actual sentence of imprisonment (see and cf. LHCJA 5614/04 *Amir v. Israel Prison Service* [2]).

12. In conclusion, as I pointed out in my opening remarks, I agree with my colleagues that in the circumstances of the present case there was no reason to prevent the second respondent realizing his right to have children by means of artificial insemination. Notwithstanding, I saw fit to add these remarks, in order to try to focus upon the difficulty in the issue before us and to clarify why even when we are dealing with someone who committed one of the most abhorrent crimes in the history of our state, we are obliged to continue to adhere to the principles that lie at the heart of our legal outlook.

Petition denied.
17 Sivan 5766.
13 June 2006.