HCJ 4293/01

1. New Family
2. Dr. Ruth Zimmerman-Shahar
3. Dr. Ron Shahar
4. A Minor
5. David Ben Nahum

v.

Minister of Labor and Welfare

The Supreme Court sitting as the High Court of Justice
[24 March 2009]

Before President D. Beinisch, Vice President E. Rivlin and Justice A. Procaccia

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

Facts: The institution of intercountry adoption of children in Israel, i.e. the adoption in Israel of children from abroad, is regulated by the Adoption of Children (Amendment no. 2) Law, 5756-1996. By virtue of his authority under this Law, the Minister of Labor and Welfare has issued "Rules and Professional Guidelines for the Operation of a Recognized Non-Profit Organization", rule 4(b)(1) of which states that a person wishing to adopt a child in the framework of an intercountry adoption will not be deemed eligible to do so if the age difference between himself and the child exceeds 48 years on the date of submission of the application to adopt. According to the petitioners, this maximum age difference rule is unlawful and must be struck

down, in that it is incompatible both with fundamental constitutional principles, and with proper administration. Alternatively, the petitioners are asking the Court to order that the rule be amended to the effect that the recognized non-profit organization – the adoption association – is granted discretion to approve eligibility for adoption even when the age difference between the prospective adopter and the child exceeds 48 years, when special circumstances justify so doing; and that it be possible to appeal the decision of an adoption association that refuses to approve an adoption due to the excessive age difference.

The High Court (per President Beinisch, Vice-President Rivlin concurring and Justice Procaccia dissenting), granted the petition in part.

Held: On the constitutional plane, the Court considered the question of whether people seeking to adopt a child had a constitutional right to do so; if so, what were the nature and origins of this right and did the state have a correlative duty to enable realization of such a right. Although the Justices in the majority were of the opinion that no such constitutional right exists, President Beinisch, writing the majority opinion, held that in the circumstances of the case, no ruling was required on this question, and in view of its sensitivity and complexity, it is best left with no firm determination.

On the administrative plane, the Court held that the rule is reasonable and does not discriminate unlawfully against prospective intercountry adopters vis-à-vis other groups such as persons adopting domestically, biological parents and people entering into embryo carrying agreements. Nevertheless, the majority Justices held that the negation of discretion to depart from the rule in special, justified circumstances was not reasonable. This conclusion does not, however, dictate that the private adoption associations be granted discretion in respect of the rule; rather, according to President Beinisch, the correct interpretation of s. 36A of the Adoption of Children Law, 5741-1981, is that the statutory appeals tribunal established by virtue of the Law is authorized to consider requests to depart from the rule in intercountry adoptions, in special circumstances. In this sense, the Court granted the petition in part by recognizing the possibility of departure from the rule. The Court dismissed the concern of the respondent that allowing exceptions to the rule would deflect the focus of attention from the best interests of the child to the interests of the prospective adopters, stating that no major breach of the bounds of the rule was entailed by the existence of a statutory mechanism for considering exceptional cases, and that suitable criteria would be formulated by the appeals tribunal for this purpose.

Legislation cited:

Adoption of Children Law, 5741-1981, and ss. 3, 4, 5, 6, 36a, 25, 28H, 28N

Adoption of Children (Amendment no. 2) Law, 5756-1996

Basic Law: Human Dignity and Liberty 1992; and s. 1A, 2, 4

Embryo Carrying Agreements (Approval of the Agreement and the Status of the Child) Law, 5756-1996

National Health Insurance Law, 5754-1994 (Second appendix)

National Health (IVF) Regulations, 5747-1987

Youth (Care and Supervision) Law, 5720-1960

Israeli Supreme Court cases cited:

[1] HCJ 243/88 *Consellos v. Turgeman* [1991] IsrSC 45(2) 626.

[2] HCJ 7052/03 *Adalah – the Legal Center for Arab Minority Rights in Israel v. Minister of the Interior* (2006) (unreported).

[3] CA 2266/93 *Anon. v. Anon.* [1995] IsrSC 49(1) 221.

[4] CA 3009/02 *Anon. v. Anon.* [2002] 56(4) 872.

[5] HCJ 2245/06 *MK Neta Dobrin v. Prisons Service* (2006) (not yet reported).

[6] LFA 377/05 *Anon. & Anon., Designated Adoptive Parents of the Minor v. Biological Parents* (2005) (not yet reported).

[7] CFH 2401/95 *Nahmani v Nahmani* [1996] IsrSC 50(4) 661.

[8] HCJ 2458/01 *New Family v. Committee for the Approval of Embryo Carrying Agreements, Ministry of Health* [2003] IsrSC 57(1) 419.

[9] HCJ 294/91 *Chevra Kadisha "Kehillat Yerushalayim" v. Kestenbaum* [1992] IsrSC 46(2) 464.

[10] CA 7155/96 *Anon. v. Attorney General* [1997] IsrSC 51(1) 160.

[11] CA 5587/93 *Nahmani v. Nahmani* [1995] IsrSC 49(1) 485.

[12] CLA 3145/99 *Bank Leumi Leyisrael Ltd. v. Hazan* [2003] IsrSC 57(5) 385.

[13] CFH 7015/94 *Attorney General v. Anon.* [1996] IsrSC 50(1) 48).

[14] HCJ 415/89 *Alon v. Child Services* [1989] IsrSC 43(2) 786.

[15] CA 10280/01 *Yarus-Hakkak v. Attorney General* [2005] IsrSC 59(5) 64.

[16] CA 577/83 *Attorney General v. Anon.* [1984] IsrSC 38(1) 461.

[17] LFA 6930/04 *Anon. and Anon. Prospective Adoptive Parents of the Minor v. Biological Father* [2005] IsrSC 59(1) 596.

[18] HCJ 4769/90 *Zidan v. Minister of Labor* [1993] IsrSC 47(2) 147.

[19] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1.

[20] HCJ 953/86 *Poraz v. Mayor of Tel Aviv-Jaffa* [1988] IsrSC 42(2) 309.

[21] HCJ 217/80 *Segal v. Minister of the Interior* [1980] IsrSC 34(4) 429.

[22] HCJ 935/89 *Ganor v. Attorney General* [1990] IsrSC 44(2) 485.

[23] HCJ 558/79 *Jamal v. Jewish Agency* [1980] IsrSC 34(1) 424.

[24] CA 492/73 *Speizer v. Council for the Regulation of Gambling in Sport* [1975] IsrSC 29(1) 22.

[25] HCJ 702/81 *Mintzer v. Central Committee of the Israel Bar Association* [1982] IsrSC 36(2) 1.

[26] CA 438/88 *Barak v. Registration Committee for the Registry of Psychologists* [1990] IsrSC 44(1) 661.

[27] HCJ 637/89 *Constitution for the State of Israel v. Minister of Finance* [1992] IsrSC 46(1) 191.

[28] HCJ 98/69 *Bergman v. Minister of Finance* [1969] IsrSC 23(1) 693.

[29] HCJ 678/88 *Kfar Veradim v. Minister of Finance* [1989] IsrSC 43(2) 501.

[30] HCJ 6051/95 *Recanat v. National Labor Court* [1997] IsrSC 51(3) 289.

[31] HCJFH 4191/97 *Recanat v. National Labor Court* [2000] IsrSC 54(5) 330.

[32] HCJ 59/88 *Zaban v. Minister of Finance* [1988] IsrSC 42(4) 705.

[33] HCJ 6778/97 *Association for Civil Rights v. Minister for Internal Security* [1994] IsrSC 58(2) 358.

[34] HCJ 366/81 *Bureau of Tourist Bus Operators v. Minister of Finance* [1983] IsrSC 37(2) 115.

[35] HCJ 1703/92 *C.A.L. Cargo Air Lines v. Prime Minister* [1998] IsrSC 52(4) 193.

[36] HCJ 20594 *Nof v. State of Israel – Ministry of Defense* [1996] IsrSC 50(5) 449.

[37] FH 10/69 *Boronowsky v. Chief Rabbi of Israel* [1971] IsrSC 25(1) 7.

[38] LFA 5082/05 *Attorney General v. Anon.* (2005) (unreported).

[39] CrA 3439/04 *Bazak (Buzaglo) v. Attorney General* [2004] IsrSC 59(4) 294.

[40] HCJ 3648/97 *Stamka v. Minister of the Interior* [1999] IsrSC 53(2) 728.

[41] CA 1165/01 *Anon. v Attorney General* [2002] IsrSC 57(1) 69.

For the petitioners – S. Oren; I. Rosenblum.
For the respondent – E. Golomb.

JUDGMENT

Justice A. Procaccia

1. The Adoption of Children (Amendment no. 2) Law, 5756-1966 (hereinafter: "the amending Law") regulated, for the first time in Israel, the institution of intercountry adoption. It established that intercountry adoptions will be carried out by means of non-profit organizations whose sole purpose is to operate in the area of these adoptions (hereinafter: "adoption associations"); these adoption associations were granted recognized status for this purpose. Section 28[37] of the amending Law authorizes the Minister of Labor to lay down rules and professional guidelines for the operation of a recognized adoption association. By virtue of this authorization, in 1998 the Minister of Labor and Welfare issued "Rules and Professional Regulations for the Operation of a Recognized Adoption Association". These Rules lay down the following provision in relation to the maximum permissible age difference between adoptive parents and the child who is a candidate for an intercountry adoption:

> 4(b) An adoption association will not certify that an applicant is eligible to adopt a child, if, on the date of submission of the application, one of the following applies to him:
>
> (1) The age difference between the applicant and the child exceeds 48 years; if the applicants are a couple, the age difference between each of the applicants and the child exceeds 48 (*Official Gazette* 5758, at p. 1580) (hereinafter: "the maximum age difference rule").

This provision, amongst the other rules, prescribes how the recognized adoption association must examine the application of

prospective adopters, and in what circumstances the application to adopt cannot be approved due to the age difference between the prospective adopter and the child, which exceeds the maximum permissible difference.

2. The petition is primarily concerned with review of the constitutionality of the rule that sets a maximum age difference between the person seeking to adopt and between the child as a preliminary condition of adoption. According to the petitioners, a conclusive determination concerning the maximum age difference as aforesaid is unlawful, and it must be struck down, both because it is contradictory to fundamental constitutional principles, and because it does not comply with the criteria for proper administration. Alternatively, the petitioners request that the Court order that the maximum age difference rule be changed so as to reduce the damage that it may cause; their suggestion is that a recognized adoption association be granted discretion to approve adoption even when the age difference between the prospective adopter and the child exceeds 48 years, in cases in which special circumstances prevail, and that it be possible to appeal the decision of an adoption association that refuses to approve an adoption due to the age difference exceeding the maximum.

The parties

3. Petitioner no. 1 is an organization that operates for the advancement of the rights of families in Israel, and to promote recognition of the family as a constitutional unit. Petitioners nos. 2 and 3 are a couple who have one minor child, whom they adopted in Guatemala (petitioner no. 4). Petitioner no. 5 is a widower and father of two minor children, who were adopted by him and his late wife in the United States. Petitioners nos. 2 and 3 and petitioner no. 5 all applied to adopt another child from abroad, since their age prevents them from adopting a child locally. Each sought to adopt a new-born child in order to raise him from the time of his birth. Pursuant to the maximum age difference rule, the adoption of a new-born child was not approved, due to their age on the date of submission of the application, which exceeded the maximum allowable age difference. Petitioner no. 2 was born in 1950, petition no. 3 was born in 1949, and petitioner no. 5 was born in 1948. At the same time, intercountry adoption of children was approved for these petitioners, whose ages at the time of the applications complied with the maximum age difference rule.

The respondent is the Minister of Labor and Welfare, who is the competent authority in relation to setting the rules that are the subject of this petition.

The arguments of the petitioners

4. The petitioners claim that the maximum age difference rule is unlawful both from a constitutional and from an administrative point of view. Regarding the **constitutional plane,** it was contended that the right to a family is a constitutional right that embraces the right to parenthood, which may be realized in any manner whatsoever – be it by way of natural parenthood or by way of adoption. As such, the right to adopt is a constitutional right protected by Basic Law: Human Dignity and Liberty 1992. The maximum age difference rule violates the basic right of prospective adopters to a family, by setting a rigid, inappropriate ceiling, and it does not allow for deviation even in special circumstances. According to the argument, this violation of the basic right to a family and to parenthood does not comply with the limitations clause in the Basic Law. The rule is not derived from explicit authorization in the Law, it does not befit the values of the State, it is not intended for a proper purpose, it is not proportional, particularly in view of the fact that it was introduced as a categorical provision allowing no discretion, and without any room whatsoever for special exceptions. According to the petitioners, the said rule is deeply damaging not only to people who seek to adopt, but also to the best interests of the child who is a candidate for intercountry adoption,

since handing him over for adoption to a couple in Israel, even if the parents are older, is preferable on his part to leaving him to grow up in difficult circumstances in his country of origin.

5. On the **administrative plane**, the petitioners argue that the maximum age difference rule suffers from extreme unreasonableness in setting a rigid allowable age difference, without proper factual or scientific basis; moreover, it creates grave discrimination and a violation of equality between, on the one hand, the petitioners and others like them who wish to adopt, and between other population groups – such as natural parents who may bring children into the world with whatever age difference without state interference; similarly, the state does not interfere in the decision of couples to bring a child into the world by means of a surrogate mother by virtue of the Embryo Carrying Agreements (Approval of the Agreement and the Status of the Child) Law, 5756-1996 (hereinafter: "Embryo Carrying Agreements Law") or by other artificial means of reproduction undertaken by the mother that lead to natural birth. Moreover, discrimination exists between the domestic arrangement governing adoption, in respect of which a flexible age difference rule, allowing for deviation, has been set, and intercountry adoption, in respect of which the rule is rigid and has no allowance for special circumstances.

The arguments of the respondent

6. The respondent rejects the basic point of departure of the petitioners' arguments, whereby they have a constitutional right to adopt a child. In his view, the right to adopt is not recognized by either Israeli law or International law as a basic constitutional right. The right to natural parenthood is, indeed, recognized as a basic right, as a component of respect for the autonomy of the individual in society, and the conception of non-intervention of the state in a person's intimate decisions concerning the establishment of a family blends into this. The institution of adoption, on the other hand, focuses on the welfare of the child, and the interest of those seeking to adopt in realizing their parenthood is ancillary and secondary to the principle of the best interests of the child. People who wish to adopt do not have a right to adopt; *a fortiori* they do not have a constitutional right to adopt. Their desire to adopt will be realized only to the extent that it is compatible with the principle of the best interests of the child who stands before them at the center of the laws of adoption. Adoption is a subject of a public nature, which involves the formulation of rules and their application in all that concerns handing children over for adoption in order to promote their welfare. It is not like the right to natural parenthood, the essence of which is the freedom to bear children without the intervention of the state. The respondent further argues that

even if a constitutional right of the petitioners to adopt were recognized, and even on the assumption that this right was breached as a result of the maximum age difference rule – even then this would be a proportional violation that was intended for a proper purpose, i.e., protection of the best interests of children adopted in intercountry adoptions.

7. With respect to the administrative plane, it was argued that the maximum age difference rule conforms to the criteria of propriety according to the rules of administrative law. The rule was adopted in light of purely professional considerations, in accordance with the recommendations of the Advisory Committee to the Minister. The contents of the rule are reasonable, it was intended to promote the best interests of the child, and it does not discriminate between the petitioners and others like them who wish to adopt, and between other groups.

Before embarking on an in-depth analysis of the arguments of the parties, we will describe the background to the institution of intercountry adoption and the rationale underlying the Israeli legislation. What we say has direct ramifications for the question under discussion in this case.

Intercountry adoption – general background

8. The amending Law, passed by the Knesset on 1 May 1996, regulates, for the first time, the question of intercountry adoption in Israeli law. The amendment was conceived against the background of a legislative procedure that originated in a government bill (Adoption (Amendment) (Intercountry Adoption) Bill, 5754-1994 451) and private bills that were consolidated into one bill (Adoption of Children (Intercountry Adoption) Bill, 5756-1995, *Draft Laws*. 5756, 238). The Bills were discussed together in the Knesset Law and Constitution Committee, which drafted the bill that was eventually brought for the approval of the Knesset. The Amendment was enacted against the background of a reality in which the number of Israelis who applied to adopt children from outside of Israel had grown, due to the scarcity of children available for adoption in Israel in relation to the large number of people seeking to adopt, which resulted in many people having to enduring long waiting periods. This scarcity created a widespread phenomenon of adoption by Israeli couples through non-conventional, non-regulated channels, sometimes without the children even being registered in the local registry. Some Israelis were even involved in illegal acts of abduction of and trade in children (for example, HCJ 243/88 *Consellos v. Turgeman* [1]). The sad plight of many Israelis who sought to adopt a child abroad after they failed to adopt in Israel, and the many difficulties that accompanied such adoptions due to

concern for the status of the child in Israel, led to legislative initiatives in the Knesset to resolve this difficult situation (see for example, the comments of MK Limor Livnat, *Knesset Proceedings* 24.5.94, at p. 7494; and MK Avi Yehezkel, *ibid.,* at p. 7487).

9. This distressing situation led, in the end, to the amendment of the Adoption of Children Law, 5741-1981 (hereinafter: "Adoption Law"), by means of the creation of a detailed statutory arrangement for the intercountry adoption of children in Israel. Intercountry adoption is not exclusive to Israel. The need to regulate intercountry adoption intensified in many states in light of the development of criminal activities involving the abduction of and traffic in children in connection with adoption (N. Maimon, *Child Adoption Law* (1994), at pp. 597-599). Against this background, the Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (hereinafter: "Convention on Intercountry Adoption") was signed in The Hague in 1993. The aim of the Convention is to create a system of cooperation between different states in order to ensure the welfare and best interests of children who are handed over for foreign adoption, and to prevent trafficking in children (art. 1 of the Convention). Israel signed the Convention on 2.11.1993 and ratified it on 28.12.1998 (*Kitvei Amana* 1258, vol. 41). The government bill is a result of Israel's adoption of this Convention, which required extensive deployment, including changes in internal legislation and the establishment of bodies to deal with intercountry adoption in Israel.

10. This arrangement of intercountry adoption was intended to provide a response to childless Israelis who encountered difficulties in adopting children in Israel, and to facilitate the process of adoption for them by means of adoption of a child from abroad. It was intended to ensure that the process of intercountry adoption would be carried out in a proper manner and by a legal process. The arrangement was also intended to confer recognition on the status of children who were adopted in intercountry adoptions before this subject was regulated by law. At the same time, it is important to emphasize that although the background to the legislation was the intention to alleviate the plight of those seeking to adopt, and to open up to them new avenues that would answer their yearning for parenthood, the arrangement of intercountry adoption should not be understood as deflecting the focus of adoption from the best interests of the adopted child to the wellbeing of those seeking to adopt. The purpose of the arrangement is to find an appropriate response for children who cannot be raised by their natural families for one reason or another, and who are in need of a home with an adoptive family. The best interests of the child was and remains the central axis around which the laws of adoption, including intercountry adoption, are built (this found expression in the words of MK

Zandberg during the deliberations on the first reading of the amending Law in the Knesset (*Knesset Proceedings* 24.5.94, at p. 7500).

11. This protection of the best interests of children adopted in intercountry adoptions is manifest in s. 28D of the amending Law, which states that a recognized adoption association is obliged to act "**in such manner as to safeguard the best interests of the child and with respect for his basic rights**, including those that are recognized in International law; the recognized adoption association will also have a fiduciary obligation in relation to any person who has applied to it to adopt a child . . ., **as long as this is not detrimental to the fiduciary obligation vis-à-vis the child**" [emphasis added]. This provision was explained by the Chairman of the Law and Constitution Committee during the deliberations on the draft law at the second and third readings:

> 'We hereby establish that the adoption association has an absolute fiduciary obligation to the principle of the welfare of the child, and a fiduciary obligation to the adopter – again, as long as the principle of the welfare of the child is not affected. **The principle of the welfare of the child overrides all other interests,** including the fiduciary duty to the adopter' (*Knesset Proceedings* 11.3.1996, at p. 5151) [emphasis added].

12. On the international level, too, intercountry adoption arrangements are founded on the concept of concern for the best interests of the adopted child. The adoptive parents are not at the focus of attention of this law. The aspiration to safeguard the best interests of the adopted child as a central purpose of the intercountry adoption arrangement is evident in the Convention on Intercountry Adoption, the Preamble to which declares that the states signatory to the Convention [are] "**[C]onvinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.**" Protection of the best interests of the child is included in the objectives of the Convention as follows:

> Article 1: The objects of the present Convention are -
>
> *a)* to establish safeguards to ensure that intercountry adoptions take place **in the best interests of the child and with respect for his or her fundamental rights as recognized in international law** [emphasis added]."

Two additional international documents that emphasize the need for special protection of the child in an intercountry adoption are the

Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally, and the Convention on the Rights of the Child, adopted by the United Nations in 1989, which Israel joined in 1991 (Kitvei Amana 1038, vol. 31, at p. 221). These two international documents also state the need to compare the criteria governing internal and intercountry adoptions. Art. 20 of the Declaration states:

> 'In intercountry adoption, placements should, as a rule, be made through competent authorities or agencies with application of safeguards and standards equivalent to those existing in respect of national adoption. In no case should the placement result in financial gain for those involved in it.'

Art. 21 of the **Convention on the Rights of the Child**, which deals with adoption, states:

> 'States Parties that recognize and/or permit the system of adoption shall ensure that the **best interests of the child shall be the paramount consideration** and they shall:
>
> . . .
>
> (b) Recognize that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
>
> (c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
>
> (d) Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it' [emphasis added].

13. Precisely because the motivation for intercountry adoption is the distress of prospective adopters who do not manage to adopt in Israel, particular importance is attributed to the emphasis placed – in intercountry adoption as in domestic adoption – on the obligation to position the best interests of the child as the paramount consideration in all situations. In the real world, there is liable to be some discrepancy between the criteria for domestic adoption and intercountry adoption, if only due to the significant difference in the number of children available for adoption in each of these spheres. Experience demonstrates that as the number of candidates for adoption decreases,

so the criteria for adoption become more rigid and stricter. The institution of intercountry adoption arouses concern for a conceptual obfuscation between the interests of the adopters and the best interests of the child. This obfuscation creates difficult moral dilemmas, as noted by N. Maimon in her book:

> 'The supporters believe that encouragement should be given to such [intercountry – A.P.] adoption, which saves children and babies from life in institutions, from poverty, homelessness and even death . . . The supporters point out that intercountry adoption attests to the desire to save homeless children and it may well bring down barriers between western states and the states of origin of the children. They also cite studies that demonstrate success in intercountry adoption. The opponents of intercountry adoption, on the other hand, claim that such adoption cuts the children off from their heritage and their culture, and integrates them into a culture that is alien to them. This is liable to create problems of identity in the children when they are older. They further claim that the children taken for adoption are white children who are sought after by childless couples . . . and that there is no demand for children who roam the streets. The opponents point out that intercountry adoption is designed to serve the purposes of childless couples from the West, and it is not the best interests of the child that are foremost in their concerns, and that the one-sided transfer of children from poor to rich countries, from their culture to a culture that is alien to them, will not break down cultural and political barriers. The best interests of the children, so say the opponents, requires that states in the West aid the poor states and the families who struggle to raise their children, and that they supply funds and help in establishing proper welfare systems, so that the children remain in the states with their own culture and tradition. The opponents further argue that intercountry adoption causes crime, trafficking in children, placement of children with couples who have been rejected as adoptive families by the welfare authorities in their own countries' (Maimon, *supra*, at pp. 593-594).

The moral difficulty inherent in the blurring the boundaries between the interests of those seeking to adopt and the best interests of the child was addressed by MK Yitzhak Levy during the debate in the Knesset, as follows:

> '. . . Israeli society applies pressure, and because Israeli society applies pressure, the Knesset proceeds to enact a law for bringing children from abroad. **When children are brought from abroad, the concern is not for the children [but] for the parents** (*Knesset Proceedings* 11.3.96, at p. 5155; emphasis added).

These concerns are not baseless. They obligate the state to be particularly careful in safeguarding the interests of children adopted in intercountry adoptions, and to take special care not to become a tool whose main purpose is to enable realization, come what may, of the aspirations of those seeking to adopt a child.

14. Finally, to conclude these preliminary remarks, it is important to point out the significant innovation in the new statutory arrangement, namely, that intercountry adoption will be carried out through recognized adoption associations, the supervision of which is the responsibility of the Ministry of Labor and Welfare. In this, intercountry adoption differs from domestic adoption, which is in the hands of the Child Services under the supervision of state authorities and the Ministry of Labor and Welfare. Regulation of intercountry adoption by means of the recognized adoption associations has both advantages and disadvantages. On the one hand, action through the adoption associations is particularly efficient with respect to the connection with the foreign states, and it provides an effective response to the needs in this area; on the other hand, placing the determination of the eligibility to adopt in the hands of private organizations, with all the implications thereof, is a complex matter that naturally requires strict, meticulous supervision on the part of the state authorities. The balance between these advantages and disadvantages is achieved by conferring various powers on the adoption associations, including the determination of eligibility of a person seeking to adopt; and parallel to this, establishing various criteria for recognizing these associations, imposing various obligations on them, and supervising their activities by means of a central intercountry adoption authority, in the person of a chief welfare officer, to be appointed by the Minister of Labor and Welfare (s. 28B of the Law). The appropriate balance for the proper and effective operation of the adoption associations is also achieved by means of rules and guidelines for their operation, which the Minister of Labor and Welfare is authorized to prescribe by virtue of s. 28 [37] of the amending Law, pursuant to which the rule at issue in this petition was introduced. Matters were presented as follows in the debate on the amending Law at the second and third readings:

> In the bill presented by the Government of Israel, it was proposed that intercountry adoption be supervised and

> administered by the Government, by the Ministry of Labor and Welfare. On the other hand, several private bills were tabled . . . We decided that intercountry adoption will be carried out by adoption associations, for whom we set very rigid, very strict rules of recognition. We must struggle and fight and take precautions at all times against erring, and being in a position –which is familiar to many, or some foreign states – in which there is in fact traffic in children. The assumption is that these adoption associations [will be] under very rigid supervision – and this will be the task of the Ministry of Labor and Welfare . . . And because they will have a proven record and proven professional capabilities, they will perform this task better than the Government. They have greater freedom to do this work in the Ukraine or Brazil or Rumania, and they will raise the total number of child adoptions. As we have said, extremely strict conditions' (Chairman of the Law and Constitution Committee, *Knesset Proceedings* 11.3.96, at p. 5150; for the different positions on this subject, see: the two bills above and the debate on the first reading, *ibid.,* 24.5.94, at p.7485 ff.).

Decision

15. The petitioners' arguments challenge the maximum age difference rule on two fronts: the **constitutional front and the administrative front.** On the constitutional front, the petitioners seek to convince us that the right to adopt is a constitutional right that inheres in the right to a family and to parenthood. The maximum age difference rule violates this right in a manner that is incompatible with the limitations clause, and it must therefore be set aside.

Parallel to this, the petitioners argue against the validity of the rule on the administrative level, and focus on it being – according to them – unreasonable and discriminatory. The two parallel lines of argument drawn by the petitioners give material expression to the borderline between the constitutional and the administrative examination of the act of secondary legislation of the competent authority, as well as their interface.

Let us begin with the constitutional examination.

The constitutional examination – is the right to adopt a constitutional right?

16. On the level of the constitutional argument, the questions to be considered are these: Does a legal right to adopt a child exist? Does this right enjoy the status of a constitutional right, as a derivative of the right to a family and to parenthood anchored in Basic Right: Human

Dignity and Liberty? If the answer is positive – does the maximum age difference rule comply with the criteria of the limitations clause in the Basic Law? These are the questions that we will endeavor to answer.

The right to family and parenthood

17. Basic Law: Human Dignity and Liberty entrenches a person's right to dignity and liberty, thus embracing the values of the State of Israel as a Jewish and democratic state (s. 1A of the Basic Law). It states that there shall be no violation of the life, body or dignity of any person as such, and that all persons are entitled to protection of their dignity (ss. 2, 4). Within the parameters of the right to human dignity is the right of a person to a family (HCJ 7052/03 *Adalah – the Legal Center for Arab Minority Rights in Israel v. Minister of the Interior* [2]). From the right of a person to dignity stems his right to a family, and it therefore constitutes a constitutional right protected by the Basic Law (CA 2266/93 *Anon. v. Anon* [3], at p. 235; CA 3009/02 *Anon. v. Anon.* [4], at p. 894). The right to a family is one of the central foundations of human existence. "**It reflects the existential essence of a person, and the manifestation of his realization of self"** (*Adalah v. Minister of the Interior* [2], at para. 6 of my judgment). From the right to a family is derived the right to parenthood on the one hand, and the right of the child to grow up in the bosom of his natural parents on the other. Within the framework of the right to family, the natural right of parents to raise their children and the right of the child to grow up in the bosom of his family are recognized. The right to parenthood and the right of a child to grow up with his natural parents are interwoven rights, and together they establish the right of the family to autonomy:

> 'The depth and intensity of the parental bond, which incorporates the natural right of a parent and child to a living bond between themselves, made of familial autonomy a value enjoying a legal status of the highest degree, violation of which is tolerated only in the most extraordinary situations' (*Anon. v. Anon.*[4], at p. 894).

18. The right to a family is derived from the right to privacy and from the realization of the principle of the autonomy of individual will, located at the very kernel of the concept of human dignity. "**The family and parenthood are the realization of the natural inclination to propogation of the generations and realization of the individual in society"** (HCJ 2245/06 *MK Neta Dobrin v. Prisons Service* [□]; LFA 377/05 *Anon. & Anon., Designated Adoptive Parents of the Minor v. Biological Parents* [6]; CFH 2401/95 *Nahmani v Nahmani* [7], at p. 719; HCJ 2458/01 *New Family v. Committee for the Approval of Surrogacy Agreements, Ministry of Health* [8], at p. 447). Amongst the constitutional human rights, the right to parenthood and family ranks

highly, following protection of the right to privacy and physical integrity: "**The right to physical integrity is designed to protect life; the right to a family is what imbues life with significance and purpose"** (*MK Neta Dobrin v. Prisons Service* [5], para. 12). **"These rights are fundamental to human existence, and it is difficult to imagine human rights which equal them in their importance and their impact"** (*Anon. & Anon. v. Biological Parents* [6], at para. 6 of my opinion).

19. The right to establish a family is also recognized under international law. Article 16 of the Declaration of Human Rights establishes the right of a person to marry and raise a family, as does art. 23 of the Covenant on Civil and Political Rights. Article 12 of the Declaration of Human Rights and art. 17(1) of the Covenant on Civil and Political Rights establish the right to privacy and to protection from arbitrary interference in family life. The European Convention on Human Rights establishes, in art. 8, a person's right to respect for his private and family life, and in art. 12, the right to marry and to found a family.

20. The right to family and parenthood is related to the concept of a person's personal autonomy, and to his right to privacy. It is understood as a freedom that may not be violated by interference on the part of the government or other factors. This is a right which does not have a correlative duty of the government to take positive action in order to effect its realization. And indeed, "**a free society imposes minimal limitations on the voluntary choices of the individual"** (HCJ 294/91 *Chevra Kadisha "Kehillat Yerushalayim" v. Kestenbaum* [9], at p. 481; CA 7155/96 *Anon. v. Attorney General* [10], at p. 175). This is particularly true with respect to the aspirations of a person to realize his personality and personal experience by means of establishing a family and bringing children into the world.

In *Nahmani v Nahmani* [7], Justice Dorner discussed the negative character of the right to a family as a right that restricts state interference in a person's freedom of choice to a minimum:

> 'Freedom in the full sense is not only freedom from outside interference of the state or of others. It also includes a person's ability to control his way of life, to fulfil his basic aspirations and to choose between a range of possibilities through the exercise of discretion. In human society, one of the forceful expressions of the aspiration which if not satisfied will cause many people not to regard themselves as free in the full sense of the word is the aspiration to parenthood. This is not a purely natural-biological need. We are dealing with a freedom

> which in human society symbolizes the particularity of a person. "Any person who does not have children is considered as dead" said R Joshua b. Levi (*Nedarim* 49b). Indeed, most people – men and women alike – see propagation as an existential need that gives meaning to their lives' (at p. 719).

In the words of Justice Strasberg-Cohen (*ibid*., at p. 682):

> 'The right to be a parent is, by its nature, its essence and its characteristics, a natural, inherent right, embedded in the person. **This is a right which has no correlative legal obligation**, neither in the relations between the state and its citizens nor in the relations between the spouses themselves' [emphasis added].

(See also the first proceedings in the *Nahmani* case: CA 5587/93 *Nahmani v. Nahmani* [11], at p. 499; P. Shifman, *Family Law in Israel* (5749-1989, vol. 2), at p. 139.)

The conception of the right to parenthood in the international conventions, too, is that of a negative right, the principal thrust of which is protection from arbitrary interference of the state in the private lives of a person, his family and his house (on this point, cf: D. Barak-Erez, "Symmetry and Neutrality: Reflections on the Nahmani Case", (1996) 20 *Iyyunei Mishpat* 197, 199-200 [Heb.]).

21. The right to a family and to parenthood as a constitutional right does not achieve full expression in all circumstances. Like other constitutional rights, the right to a family as a freedom that is protected from interference is not absolute. In exceptional circumstances, the law and the authorities are likely to intervene in this right, and to restrict the extent of constitutional protection afforded it, when it is confronted by another important, conflicting value. The legitimacy of violating the right to a family and to parenthood is conditional upon compliance with the criteria of the limitations clause. These criteria reflect the required balance between the import of the basic rights and that of conflicting rights, needs and values, whether of the individual or of society. If a violation of a human right is to meet the constitutional test, its place must be in an appropriate arena of balances, in which the weight of the right is balanced against that of the conflicting right (CLA 3145/99 *Bank Leumi Leyisrael Ltd. v. Hazan* [12]; *MK Neta Dobrin v. Prisons Service* [5], at para. 12).

Thus, for example, in certain circumstances, when realization of family life causes serious harm to the child, the state intervenes in order to protect his wellbeing, and exceptional situations may arise in which natural parenthood will be temporarily or permanently negated by virtue of the Youth (Care and Supervision) Law, 5720-1960

(hereinafter: "Youth (Care and Supervision) Law") (*Anon. v. Anon.* [4]), or by virtue of the Adoption Law. Conditions may arise which will require the state to exercise its authority to remove a child from his parents in order to protect his safety and wellbeing, and also to hand him over to another family for adoption, thus separating him temporarily or permanently from his natural family. Regulation of these powers and their practical application are subject to the conditions of the limitations clause, since what is involved is a violation of a human right to realization of the family bond and parenthood. Other situations of intervention in the right to family may arise where the realization of this right of a resident of Israel who wishes to unite with a spouse from the Area of Judaea and Samaria clashes with considerations of state security (*Adalah v. Minister of the Interior* [2]).

The right to adopt

22. Alongside the right to a family as a "passive" right, the essence of which is protection of a person's personal autonomy from unconstitutional violation, stands the question of the status of the right to parenthood, which the individual seeks to realize by way of adoption of a child born to different biological parents, whether because he is not able to bring a child into the world, or whether because he wishes to forge a parental bond with an adopted child for some other reason. Does the constitutional right to a family extend to the right to adopt a child, where limitation of this right is possible only in accordance with the principles of the limitations clause, or shall we say that the constitutional right to parenthood does not embrace a right to sue the state to intervene in order to make possible its realization by one means or another, including by way of adoption. The question from another angle is whether the constitutional right to a family and to parenthood, which is granted to every person *per se*, engenders a right to obligate the state to act in order to make family or parenthood possible in the event that a person is not able, or does not want, to realize them in a natural way, e.g., by way of adoption, or through surrogacy, or by IVF. Does a lack of action on the part of the state amount to a "violation", the constitutionality of which is subject to the limitations clause? These questions are complex and multi-faceted. They touch on the connection between a constitutional right and the means available to a person for realizing the right. They involve issues with extensive normative, moral, social and other ramifications. The approaches to their solution are subject to the influences of time, place and circumstance.

23. At the same time, for our purposes, it may be said that according to the constitutional conception prevailing in our system, recognition of a **constitutional** right to parenthood and to family rests on the assumption that the right is **protective** in nature, and it does not

give rise to a correlative obligation of the government to act. It is concerned primarily with protection from government interference, as opposed to fulfilment by the government of a duty to take positive action to provide various means aimed at enabling realization of the right. The right to parenthood extends over the autonomy of the individual will. It does not spill over into an area in which intervention of the state is required for its realization. Intervention of the state in areas such as adoption, surrogacy and artificial reproduction, which constitute different means of realizing parenthood, occurs in the framework of its governmental activity, and it is subject to administrative judicial review; but it is not the expression of a duty that exists as a response to a person's **constitutional right** to realization of parenthood by alternative means to natural birth. It is not out of the range of possibility that changing times, social dynamics and human needs will bring with them, over time, changes in the constitutional conception regarding the role of the state in providing the means for realization of a person's right to family and parenthood. On this matter, the considerations pertinent to the different means are not necessarily identical, and the adoption of a child, who is an independent entity and the subject of rights, is unlike means that are designed to enable childbirth, such as surrogacy and IVF. The question of the extent to which the state must help the individual by making available the means for assisted reproduction through artificial reproductive techniques is difficult and complex. The greater the intervention required from factors external to the reproductive processes, the further removed we become from the inner core of the right to parenthood, which is based on the autonomy of the individual and his independent right to make decisions that determine his fate without external interference. The extent of the state's obligation to take positive action to help the individual to realize his natural parenthood by artificial means is a difficult and multi-faceted issue. In this context, various questions arise concerning the obligation to establish a system for the purpose of IVF and surrogacy (see National Health Insurance Law, 5754-1994 (Second appendix); National Health (IVF) Regulations, 5747-1987; and Surrogacy Agreement Law). The relationship between the conception of the right to a family and parenthood as a right of a protective nature, and between the extent of the legitimate expectation of the individual that the state will help him, actively, in realizing his right to parenthood by different means, raises complicated and difficult questions (M. Corinaldi, "The Question of Surrogacy in Israel – Comments on the Embryo Carrying Agreement Law, 5756-1996; Aloni Committee Report", *Hamishpat* 3 (5756), 63, 67, 69).

Professor Shifman relates to the issue as follows:

> 'From the point of view of possible intervention of society, the characteristic components of the substance of the right to be a parent, which are not hewn from the one block, should be noted. The primary component is the right to biological parenthood . . . . Particular attention should be paid to the distinction between the negative and the positive aspects, i.e. between restriction of the freedom of a person to take action to realize his right to parenthood in a way that he considers appropriate, and between negation of the assistance of society. The parameters of the positive assistance of the state are determined, *inter alia*, by means of the changes in the definition of legal parenthood that society is prepared to make in order to fulfil and confirm the desires of the individual (Shifman, *ibid*., at p. 169-170).

These questions greatly exceed the bounds of the discussion in this case insofar as they concern the various means of realizing parenthood other than by way of adoption. This is because the predominant conception in the area of adoption is built on the assumption that the adoption arrangement is designed first and foremost to provide a suitable response to the needs of needy children in cases in which the natural environment into which they were born and in which they were being raised was not capable of providing their basic needs. Handing a child over for adoption, and realization of the parenthood of the adoptive parents are an important by-product to which great moral value is attributed by society, but realization of parenthood by way of adoption is not the major purpose of the institution of adoption.

25. Adoption provides a response to the yearning of people to realize parenthood of children. Its importance from this aspect is obvious. At the same time, the state adoption arrangements are not part of a prospective adopter's constitutional right to a family and to parenthood, and it does not establish a derivative constitutional right of that person to demand that the state enable realization of parenthood by means of adoption. As a citizen, he has a right to expect that the adoption arrangements will be applied by the state in a proper manner that comports with the criteria of public law, but this does not give rise to rights on the constitutional plane.

The focus of the child adoption arrangements under the Adoption Law is the best interests of the child whose natural environment and biological family cannot supply his basic physical and psychological needs. They confer on the state the power and authority to intervene in the natural family unit in order to safeguard the welfare of the minor child where the essential conditions for his growth are unavailable to him. The crux of the institution of adoption in the modern era is the

wellbeing of the child, whose physical and psychological needs require attention (H.E. Still-Caris, "Legislative Reform: Redefining the Parent-Child Relationship in Cases of Adoption", 71 *Iowa L. Rev*. (1985-6), 265).

The Adoption Law, in its basic conception, is directed at the wellbeing of the child. Section 1(b) of the Law, which constitutes the basis and corner-stone for an adoption order, states:

> "An adoption order and every other decision by virtue of this Law will be issued if the Court deems them to be in the best interests of the adoptee."

The arrangement in the Adoption Law is built on the basis of concern for the welfare of the child, recognition being accorded to the status and the constitutional rights of the biological parents to a family relationship and to realization of their parenthood, and subject to the provisions of the Law. The Adoption Law does not presume the existence of a right to adopt; it presumes the possibility of the existence of the **ability** to adopt when certain conditions of eligibility are fulfilled (sec. 3 of the Law): age and religion (secs. 4 and 5), and a successful trial period (sec. 6).

Indeed, a person's decision to realize his parenthood by way of adoption belongs in the area of personal autonomy, which is protected from external state intervention. However, actualization of this decision goes beyond the bounds of personal autonomy, and it is subject to the adoption arrangements determined by the state, the main purpose of which is to promote the interests of the child, with those seeking to adopt fitting into the process of adoption in furtherance of the purpose of the welfare of the child, which will always be the central interest and concern of the institution of adoption (CFH 7015/94 *Attorney General v. Anon.* [13]).

26. The centrality of the principle of the best interests of the child in adoption proceedings is also a leading theme in the **Convention on the Rights of the Child** (which Israel signed and ratified) which states:

> 'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration . . .' (art. 21).

The child enjoys an independent legal status, he is the subject of rights and obligations, and the accepted law is that in every decision that is taken in his regard, consideration must be given, first and foremost, to his best interests:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best

interests of the child shall be a primary consideration' (art. 3(1)).

The Committee for Examining Basic Principles in the Area of the Child and the Law and their Application in Legislation, chaired by Judge Saviona Rotlevy (December 2003), related to this matter in the following terms:

> 'The Convention creates a broad duty on the part of states in all concerning the application of the principle of the best interests of the child. First, in determining that in relation to every action or decision undertaken in relation to children by the various state authorities, the best interests of the child will be the paramount consideration. In this way the Convention introduces the criterion of the best interests of the child into every public enterprise concerning the child, and into each action undertaken by private entities in the area of welfare. The significance of this determination . . . is that the whole body of rights, needs and interests of children enjoys a certain substantive priority over other considerations when a decision involving them is being made. This priority stems from the fact that the decision or action under discussion involves the child himself, and it is therefore natural that the determination in the framework of such decision or action will concentrate on the child himself' (*General Part of the Report of the Committee*, at pp. 128-129).

(On the implementation in Israel of the Convention on the Rights of the Child see also: Israel Report of the Implementation of the Convention on the Rights of the Child, Ministry of Justice and the Ministry of Foreign Affairs, submitted to the United Nations Committee for the Rights of the Child in February, 2001, esp. pp. 154-160, which discuss adoption. On the historical development of the concept of "the best interests of the child" see: J. Ben-Or, "On the Meaning of the Concept 'Best Interests of the Child'", 29 (5734) *Hapraklit,* 608. On the transition from the "best interests of the child" to the theory of "the rights of the child" see: Y.S. Kaplan, "Children's Rights in Israel Case Law – First Stage of Transition from Paternalism to Autonomy", *Hamishpat* 7 (2002), 303; and *Anon. v. Anon* [3]).

27. The best interests of the child in terms of the Adoption Law are incompatible with the existence of a recognized **legal right** of a person seeking to adopt. The assumption regarding such a right distances the best interests of the child from the focus of interest of the institution of adoption, and it cannot be reconciled with the idea that the state has a humanitarian duty to care for needy children as an absolute aim which

is not subject to the rights of others. Consideration of the aspirations of those seeking to adopt at the level of realization of this right would combine external considerations with those of the interests of the child, and detract from the realization of this central principle. This approach finds expression in the case law and the legal literature: they contain no legal recognition of the right of a person to demand that the state hands him a child for adoption, the child being an independent entity, with rights and existence of its own, unless this is essential for the purpose of protecting his welfare and best interests, and for that purpose alone. The duty of the state to safeguard the welfare of children in the hands of adoptive parents who are fit for that rule, in a situation in which the biological nuclear unit to which the child belongs cannot provide an appropriate response (cf. HCJ 415/89 *Alon v. Child Services* [14], at p. 791). The focus of the duty is on the best interests of the child. It does not encompass the aspirations of the prospective adopter to the extent of conferring upon him a legal right.

> 'No person has the right to adopt a child. The argument that every citizen has the right to adopt rests upon a conception that has long disappeared from the enlightened world' (per Vice-President Mazza in CA 10280/01 *Yarus-Hakkak v. Attorney General* [15], at p. 93).

This was discussed by C. Goldschmidt in his article "Adoption, Common Law Marriage and Homosexuality" (*Hamishpat* 7 (2002), 217), who said, *inter alia* (at p. 238):

> 'It is not my intention to argue that a person has a "right" to adopt a child: there is no "right" here opposite which stands a duty of the state. The argument concerning the "right to adopt" of every citizen is an argument that rests on the proprietary conception of children, an argument which has long disappeared from the enlightened world . . . . Moreover, the right is that of the child, the right to grow up in a regular family unit, which will provide him with all that he needs for his development and growth until he is an adult who can take care of himself. The state bears a duty to provide the basic conditions so that the right of the child is not violated, particularly in situations in which the family unit itself does not succeed in providing these . . .'

28. Under **comparative law**, systems that are similar in their approach to the Israeli legal system, have not recognized a basic constitutional right to adopt a child in the broad sense.

In the United States, the existence of a right to adopt as a constitutional right has not been recognized:

> 'It is manifestly clear that not every prospective adoptive parent has an expectation or entitlement sufficient for the recognition of a constitutional liberty interest in the right to adopt a child' (2 *AM. Hur.* 2d Adoption §14 (1994)).

In the American case law presented to us by counsel for the state in the supplementary summation, a series of judicial rulings were cited to the effect adoption is not to be regarded as a constitutional right, and that such recognition would be liable to upset the correct balance between the various considerations and interests involved in the process of adoption.

Owing to their importance, we will quote at length from these cases (all emphases added). In Griffith v. Johnston 899 F. 2d 1427 (1990), the Court said as follows:

> 'Although the Supreme Court has rendered decisions defining various elements of family relationships as "fundamental interests" none of those cases announced a "fundamental interest" in adopting children. What consequences would flow from the recognition of such an interest are unclear. The adoption process is now heavily regulated by states for the protection of all parties involved . . . . If the right to adopt is "fundamental", must the courts review whether states may require that adoptive parents be sane, honest, financially capable or otherwise qualified to be good parents? When does the "fundamental right" to adopt overcome the right of privacy of the birth parents? May the state decide that certain kinds of children, contrary to the wishes of particular prospective parents, may not be adopted? **To assert that such an individualized "fundamental right" exists is sloganistic and oxymoronic, since society must balance the interests of at least three parties – birth parents, child, adoptive parents – when legitimating adoptions**.'

See also the judgment in Lofton v. Secretary of the Department of Children and Family Services, 356 F. 3d 804 (2004), as follows:

> 'Neither party disputes that there is no fundamental right to adopt, nor any fundamental right to be adopted . . . see also Mullins v. Oregon, 57 F. 3d 789 (9th Cir. 1995) ("Whatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest."), Lindley 889 F. 2d at 131 (We are constrained to conclude that there is no fundamental right to adopt"). Both parties likewise agree that adoption is a privilege created by statue and not by

common law . . . **Because there is no right to adopt or to be adopted, it follows that there can be no fundamental right to apply for adoption.**'

In addition, see the decision in **Behrens v. Regier, Secretary of the Florida Department of Children and Families**, 422 F. 3d 1255 (2005): here too, the ruling was that there is no recognized right of adoption, and that at the center of the process of adoption is the rights of the child, as opposed to those of the prospective adopter:

> **'Beherns has failed to point to any provisions of Florida law that grants prospective parents, like him and his wife, the right to adopt an unrelated child. In fact, Florida courts have held that no such right exists.** . . . .
>
> Additionally, Behrens cannot establish that, under Florida law, he has any legal claim of entitlement to have his adoption application approved. . . . Florida adoption laws – like the adoption laws of most states – provide that the decision to place a child in a prospective home is a discretionary one, where "the best interests of the child" always govern. . . . Hence, **adoption is not viewed from the perspective of what rights prospective parents may possess; rather the "intended beneficiary of [an adoption] proceeding is the child to be adopted."'**

The State also referred to the analysis of the American case law on this matter in L.D. Wardle, "Preference for Marital Couple Adoption – Constitutional and Policy Reflections", 5 *Journal of Law and Family Studies* (2003) 345.

In explicit provisions in the Adoption Law of the State of New South Wales, 2000, **Australian law** clearly states that a person does not have a right to adopt a child. Section 8 of the NSW Law prescribes:

> '8(1) In making a decision about the adoption of a child, a decision maker is to have regard (as far as practicable or appropriate) to the following principles:
>
> (a) the best interests of the child, both in childhood and later life, must be the paramount consideration.
>
> **(b) adoption is to be regarded as a service for the child, not for adults wishing to acquire the care of the child.**
>
> **(c) no adult has a right to adopt the child. . . .'**

The Adoption Law, 1994 of the State of Western Australia states, in the Second Appendix to the Law, that there is no right to adopt:

> '1(3) There is no right to adopt a child. The adoptive or prospective adoptive parent with whom the child is placed

with a view to the child's adoption has the right to bond to the child.'

The State in our case also cited case law of the European Court of Human Rights. The European Council for Human Rights determined, on a number of occasions, that no right to adopt arises by virtue of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On this subject, the court in the case of **X and Y v. United Kingdom**, (977) 12 DR 32 said as follows:

> 'Whilst it is implicit in Article 12 that it guarantees a right to procreate children, **it does not as such guarantee a right to adopt** or otherwise integrate into a family a child which is not the natural child of the couple concerned".

See on this matter also the ruling in **Dallilla Di Lazzaro v. Italy Eur. Commn**. HR, App. No. 31924/96, admissibility decision of 10 July 1997, 90 DR. 13:

> **'The right to adopt is not, as such, included among the rights guaranteed by the convention** and . . . Article 8 does not oblige States to grant to a person the status of adoptive parent or adopted child.'

See also **X. v. Belgium and the Netherlands**, (1975) 7 DR 75; **X v. Netherlands**, (1981) 24 DR 176.

In **Frette v. France**, 36515/97 [2002] ECHR 156, the European Court for Human Rights ruled that the decision of the French authorities to reject the application of an unmarried man with homosexual tendencies to adopt a child does not in contradict art. 8 of the European Convention on Human Rights. The court said as follows:

> 'The court notes that the Convention does not guarantee the right to adopt as such. Moreover, the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family. . . .'

And further on it stated:

> '**Adoption means "providing a child with a family, not a family with a child"** and that the state must see to it that the persons chosen to adopt are those who can offer the child the most suitable home in every respect. The court points out in that connection that is has already been found that where a family tie is established between a parent and a child, "Particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. . .".'

See also the ruling of the European Court in **Pini v. Romania** [2004] ECHR 780/01.

Similar rulings were handed down in England, where it was held that a person does not have a right to adopt a child, and that in circumstances in which the adoption had not been completed or where there were no *de facto* family ties, there is no protected meta-right: **Thomson & Ors, R o the application of) v. The Minister of State for Children** [2005] EWHC 1378 (Admin) (04 July 2005).

It is important to note – and the State addressed this in its pleadings – that regarding the existence of a right to adopt, there may well be a distinction between a normal situation in which the adoption of a child is sought in a regular adoption process in which the prospective adopter has no prior connection with a particular child, and a situation in which adoption is sought when in reality a *de facto* family exists for all intents and purposes, i.e., when full and complete family ties have already been established in practice between the prospective parents and a particular child. Foreign case law has considered such a possible distinction, negating the existence of such a right in the first case and tending to recognize the right in the second (see the decision of the constitutional court in South Africa in **Du Toit and Another v. Minister for Welfare and Population Development and Others,** (2002) 13 BHRC 187.

It should be emphasized that we are not dealing here with the special situation of an application for adoption aimed at conferring recognized legal status upon an actual familial parent-child relationship that hs developed: such a situation which may well support a claim to an existing constitutional right to formalize the existing family relationship in the framework of adoption, within the parameters of the wider constitutional right to a family. Rather, our concern is with the question of the existence of a constitutional right to adopt a child in general, in the absence of any prior connection between the person seeking to adopt and a particular child.

29. Even though a right of prospective adopters is not recognized, they may have a legal interest that must be considered before the adoption order is issued. This is not a legal right, but a legitimate expectation that must be taken into acount when exercising administrative and judicial discretion. In the course of the adoption process, and prior to issuing an adoption order, the dominant consideration is the best interests of the adoptee. Alongside this consideration, the court considers the rights of the natural parents. It also considers the interests of the prospective adoptive parents, when they are raising the child in their home:

> '. . . It is also appropriate to consider the interests of those seeking to adopt the minor child. They do not have a right to custody of the child, but they do have an interest that

must be considered. Even though this interest does not have the weight of the right of the natural parents, it too is a factor that must be taken into account' (per President A. Barak in CA 577/83 *Attorney General v. Anon.* [16] at p. 471).

Neither do those to seek to adopt have direct standing in the preliminary stages of adoption proceedings. This standing is accorded to the biological parents and the Attorney General as representing the public interest. The prospective adopters do not stand in the forefront of the proceedings, but only behind the scenes (LFA 6930/04 *Anon. and Anon. Prospective Adoptive Parents of the Minor v. Biological Father* [17]; and see Maimon, *supra*, at pp. 30-34.)

30. In its basic concepts, the institution of adoption rests on the humanitarian duty of the state to pursue the best interests of children whose biological families cannot respond to the basic requirements of raising them, and to integrate these children into life in adoptive families in which they will be able to grow and develop in conditions of physical and psychological wellbeing. This primary aim of the adoption arrangements also provides a response, as a by-product, to the desparation of childless couples to adopt a child, or to the desire of parents of biological children who wish to adopt another child. These prospective parents have a legitimate expectation that a suitable arrangement will exist, the criteria and means of implementation of which are conducted in a proper manner. They do have the right that their application for adoption be treated fairly, in good faith, out of relevant considerations and without discrimination. This right does not amount to a right to adopt; *a fortiori* it does not amount to a constitutional right to adopt, derived from the right to a family and to parenthood. Prof Shifman explained this in his abovementioned work, at pp. 145-150:

'This institution [of adoption – A.P.] is clearly almost the absolute opposite of the previous model, which was characterized by the autonomy of the individual in natural reproduction. In the adoption of children, we have a selective distribution, controlled totally by the state, that operates through the welfare authorities . . . what is the justification for the selective distribution of children for adoption, which is controlled totally by the welfare authorities? . . . A number of answers and explanations can be offered for the phenomenon of intervention in adoption. The preliminary explanation is: the scarcity . . . as a result of a scarcity in supply, and of the constant rise in the number of those applying to adopt, the adoption authorities

> are forced to tighten the criteria of "entitlement" to receive a child, and the waiting periods until the child is handed over stretch out . . . But we must point out that considerations of scarcity, per se, are not the only consideration supporting the need for state intervention. The other, and possibly determinant consideration, is the welfare of the child. In truth, the preliminary orientation of the institution of adoption is the solution of the problem of homeless children, and only indirectly, and as a secondary goal, is the anguish of childless people who wish to adopt a child likely to be relieved. It must be stressed: **A person does not have the right to adopt a child. His right is not to suffer adverse discrimination relative to other applicants, and that he be treated fairly, and without superfluous bureaucracy; but the point of departure is the best interests of the child. . .**
>
> In any case, we may sum up and say that in the adoption at hand, there are several cumulative factors that create the model of intervention: first, the scarcity of children; second, the desire to safeguard the best interests of the child who has already been born; third, the effective ability to intervene in light of the need for the involvement of other people, other than the couple themselves; fourth, the intervention does not affect the intimate decisions of the couple themselves, nor their freedom over their bodies; and finally, in adoption, society is providing positive assistance to the will of the couple to become parents. These factors do not operate in the natural reproduction of a child, at the stage at which his parents decide whether to bring a child into the world' (and see also at pp 52-53; emphasis added).

31. Even though prospective adopters have no recognized legal right to adopt, the state must take into consideration and respect their expectation to do so as a natural and legitimate one, and as an important factor in finding a fitting solution to the main purpose of adoption – to promote the best interests of the child in need. And indeed, among the criteria for adoption set by the state institutions (the Child Services in relation to domestic adoption, and the Minister of Labor and Welfare in intercountry adoption) may be found a type of merger between considerations of the "best interests of the child" that are not detached from general social considerations, and the desire to establish a fair administrative arrangement in relation to those who seek to adopt (Shifman, *supra*, at p. 148).

32. In summary, we cannot accept the argument of the petitioners whereby those who seek to adopt have a constitutional right to do so, and that the state must provide a response to this right for otherwise, it would be violating a constitutional right that is subject to the principles of the limitations clause. During the course of the adoption process and prior to the adoption order, those seeking to adopt have a natural expectation and a recognized interest. A legal right, and *a fortiori* a constitutional right to adopt, are not recognized. This does not detract from the fact that upon completion of the adoption process with the issuing of an adoption order, a relationship of full duties and rights that characterizes parent-child relationships is created between the adopted and the adoptee, replacing the biological blood ties of the child with his original family, and a new family unit, bearing constitutional rights, is created.

The argument of the petitioners on the constitutional level must, therefore, be dismissed. Their arguments on the administrative level ought now to be examined, insofar as they relate to the administrative acceptability of the maximum age difference rule according to the criteria of public law.

The administrative level

33. On the administrative level, it was argued that the maximum age difference rule does not meet the criteria of public law, and that it harms the petitioners in two respects: the first – in the unreasonableness of the age difference that was set in the rules and in the creation of a rigid rule, that fixes an age difference between the adopter and the adoptee in relation to the process of intercountry adoption with no allowance made for special circumstances; the second – in that the petitioners' group suffers discrimination vis-à-vis groups who seek to adopt in a domestic process, in relation to whom no similar rigid rule exists. In analyzing the administrative arguments, we will concentrate on the area of judicial review of administrative rules that by their nature constitute secondary legislation that was submitted to the Knesset for approval, as is the case with the rules in question (Y. Zamir, *Administrative Authority* vol. 1 (5756-1996), at pp. 75-85; HCJ 4769/90 *Zidan v. Minister of Labor* [18], at p. 172).

The background to the formulation of the maximum age difference rule

34. The Rules and Professional Guidelines for the Activity of a Recognized Non-Profit Organization, 5758-1998, which are the relevant rules here and which include the maximum age difference rule, were issued by the Minister of Labor and Welfare on the basis of the recommendation of the Advisory Committee by virtue of sec 28F of the Adoption Law. The members of the Committee include an expert in the

field of social work, the chief welfare officer for the purpose of the Child Adoption Law and the Central Authority for Intercountry Adoption under the Law, the national inspector for intercountry adoption in the Ministry of Labor and Welfare, head of the advisory department in the Ministry of Justice, and a rabbi. This Committee was established for the purpose of advising the Minister "on matters of intercountry adoption, including recognition of an adoption association, withdrawal or suspension of recognition of an adoption association, the establishment of professional guidelines and rules for the mode of operation of a recognized adoption association and its supervision (sec. 28F(a) of the Law). This is a professional body whose considerations are professional. The said rule concerning the maximum age difference, too, was laid down on the basis of professional considerations relating to the welfare of the child that were weighed by the Advisory Committee and submitted as recommendations to the Minister. Accordingly, the petitioners' argument whereby the rules were fixed without the requisite factual and professional basis must be dismissed. In the framework of his considerations, the Minister initially decided that the maximum age difference would be 45 years. On 23 December 1997, a proposal was submitted to the Law and Constitution Committee of the Knesset with additional regulations on the matter of intercountry adoption. Following deliberations in the Committee, which related, *inter alia*, to the question of the age difference, the proposal was amended and the age difference was extended to 48 years. It was also decided that the determining date for calculating the difference would be the date of submission of the request to adopt. After these changes were made, the Committee approved the rules (Protocol no 136, Session of the Law and Constitution Committee of 23 December 1997, R/2 – Response of the respondent to the original petition). The rules, therefore, were approved by the Law and Constitution Committee, as required by s. 36(a) of the Adoption Law.

Reasonableness

35. An examination of the reasonableness of an administrative act, including secondary legislation, requires a suitable balancing of relevant considerations:

> 'The reasonableness of a decision is determined by balancing the values competing for supremacy, according to their weight, and deciding between them at the point of friction. Our concern, therefore, is with the doctrine of balancing in our public law. This is invoked where there is governmental authority, the exercise of which grants discretion that must take into account conflicting values and interests (per President Barak in HCJ 5016/96 *Horev*

v. Minister of Transport [19], at p. 37; see also HCJ 953/86 *Poraz v. Mayor of Tel Aviv-Jaffa* [20]; HCJ 217/80 *Segal v. Minister of the Interior* [21]; HCJ 935/89 *Ganor v. Attorney General* [22], at pp. 513-514).

The balancing is effected by attributing relative weight to the various interests. "The act of 'weighing' is a normative act. It is designed to allocate to the various factors their place in the legal system, and their social value within the entirety of social values (per President Barak in HCJ 5016/96 *Horev v. Minister of Transport* [19], at p. 41).

36. Unreasonableness of secondary legislation constitutes independent grounds for an administrative challenge (HCJ 4769/90 *Zidan v. Minister of Labor* [18]), at p. 172). Judicial policy in reviewing the reasonableness of secondary legislation is guided from a point of departure that seeks to protect the statutory norms laid down by an administrative body, as well as the expectation created by that legislation amongst the public. Accordingly, the court, as a rule, will not intervene in the discretion of the administrative body in relation to the secondary legislation that it formulated, unless the unreasonableness of that legislation goes to the heart of the matter "and it is almost certain that, according to the correct degree of reasonableness, the authority would not have been able to reach a decision of that sort" (Justice Elon in HCJ 558/79 *Jamal v. Jewish Agency* [23], at p. 429).

> 'In such a case, the court is bound to act with restraint and forbearance, so that it should not be found to replace the discretion of the administrative authority with its own discretion. It has therefore been held that only unreasonableness of a high degree – "extremely radical" . . . or "exaggerated" . . . is likely to justify judicial intervention in the validity of secondary legislation. Moreover, the court must exercise special caution before intervening in secondary legislation that has obtained the approval of one of the Knesset committees' (HCJ 4769/90 *Zidan v. Minister of Labor* [18]), at p. 172; and see CA 492/73 *Speizer v. Council for the Regulation of Gambling in Sport* [24], at p. 26).

The reasonableness of secondary legislation is assessed, *inter alia*, in light of its general purpose, even if in the specific case it may cause injustice (HCJ 702/81 *Mintzer v. Central Committee of the Israel Bar Association* [25], at p. 13; CA 438/88 *Barak v. Registration Committee for the Registry of Psychologists* [26], at pp. 671-672). The criteria for judicial review of an act of secondary legislation from the aspect of

reasonableness focuses on the parameters of reasonableness within which various options are possible, each of which may meet the criteria of proper administration. It is sufficient that the legislative act fall within these parameters in order for it to meet the criteria of administrative reasonableness.

From the general to the specific

37. The **first** basic assumption in determining the reasonableness of the maximum age difference rule is that setting specific criteria for the eligibility of prospective adopters is dictated by necessity, in order to establish a system of clear, organized norms in a field that is so sensitive and fateful in a person's life. The Court related to this when it said:

> 'The area of the processes for preparing the lists of adopters or selecting the prospective adoptees, including screening and examining them, ought not to be conducted other than on a clear normative basis; it should be subject to the defined responsibility of a governmental body, whose decisions and modes of operation are subject to review in light of clear criteria. In other words, the authority to deal with these pre-judicial areas should be fixed by law, in order to define, *inter alia*, who will determine the principles of operation and what are the means for challenging or appealing the various decisions at the said stage, at which there is not yet the possibility of recourse to legal processes according to the above law. It is very possible that it would indeed be reasonable if provisions such as these were to find their place in the Adoption of Children Law, and this may be effected by authorizing the Minister of Justice, in consultation with the Minister of Welfare, to make regulations, *inter alia*, in all concerning the means for determining prospective adoptees, the means for determining eligibility, appeals and objections and other such provisions. At present the matter is not regulated by law, and this must be corrected' (HCJ 415/89 *Alon v. Child Services* [14], at pp. 790-791).

38. A **second** basic assumption is that criteria are set solely in pursuit of the child's best interests. In the framework of this principle, it is only natural to regulate, as well, the suitable and reasonable age difference between the adopters and the adoptee. Such determinations are accepted in many states world-wide. Already at the time of the debate on the Adoption Bill in 1959, it was proposed to set a maximum age for adoptive parents, since "the child's best interests require not a grandfather's house, but father's house" (*Knesset Proceedings* 25, at

pp. 934-935). This proposal was not adopted in the Law, but the maximum age limit was set by the Child Services, which is the organ responsible for determining eligibility of prospective adopters (Maimon, *supra*, at pp. 111-112). As opposed to this, the Law prescribed a minimum age difference between adopter and adoptee, which stands at 18 years. There is an exception: the court has the authority to deviate from this rule where it is in the best interests of the adoptee to do so (ss. 4, 25 of the Adoption Law).

39. The **third** basic assumption is that the factor of the suitable age difference, including the maximum age difference between the adoptive parent and the adoptee, is a matter for professionals, and belongs in the fields of social, psychological and educational science. The purpose of setting an age difference is focused entirely on the best interests of the adoptee: this is the guiding principle underlying adoption, and the entire system of adoption is built upon it. The question of whether the best interests of the child are indeed affected, *inter alia*, by the difference in age between himself and his adoptive parents, and what ought to be the maximum and minimum age differences for this purpose, is a professional question, and as such it is clearly a matter for the discretion of the authorized body, which for this purpose has recourse to the opinions of professional bodies from the various relevant fields.

40. As transpires from the response of the respondent, and from the deliberations in the Knesset Constitution Committee, the Advisory Committee held many discussions on the subject of the appropriate age difference for the purpose of intercountry adoption, and the rule that was formulated relies on a professional conception, as evident from the "Summary of the Position on the Matter of Deviation from the Maximum Age Difference" of 20 August 2002, which was drawn up by the Chairman of the Advisory Committee, Prof. Joseph Tamir, and submitted to the Court (hereinafter: "Advisory Committee Position Summary"). In this document, *inter alia* the rationale behind determination of the maximum age difference rule was explained:

> 'The Committee commenced with a discussion of the subject of parenthood and the skills it required. It noted that parenthood is not a one-off event, but a process that requires changing skills according to the age and development of the child . . . . The parent of an adolescent must have the capacity for flexibility, concession, responsiveness to the emotional needs – which are sometimes confusing – of the youth . . . . Such (adoptive) parenthood must incorporate the skills required from biological parenthood, and in addition, special awareness

of the complexity of the subject of adoption. Adoptive parenthood is, therefore, a more challenging parenthood, requiring a wider range of skills and greater parental capacity to deal with complex situations, and constant learning of the subject of adoption. Therefore, the Advisory Committee gave its support to the existing age constraint, since the professional knowledge indicates that the capacity for flexibility and learning declines with an increase in age. The Committee envisaged an adolescent of 15 with one parent aged almost 65 and the second parent much older than that. Thus the generation gap between the adopter and the youth is not a gap of one generation but of at least two generations, with all the implications thereof. Experience in the Child Services teaches that the generation gap increases the sense of otherness of the adopted child, who feels that he is not growing up in a normative family, and that his parents are different from other parents.'

Similar thinking emerged during the discussions in the Constitution Committee, in the words of Nechama Tal, the social worker in the Ministry of Welfare:

> 'To be a parent is a difficult job. To be an adoptive parent, is ten times more difficult. Today we are in the situation in which people who were adopted both as babies and as children come back . . . First of all, the age of the parents is extremely significant– most of the children who were given to older couples complain a lot about this. In what sense? In the sense that an adopted child, because he has "built-in" problems of identity from the fact of being adopted, at the age of adolescence has much greater difficulty in undergoing the experience of his adoption, of adolescence and of his identity, than a regular child . . . I am talking about my experience, I have been in the Service for twenty years . . . therefore, for parents to go through such a stormy age of adolescence, when they themselves are 65 years old, is a difficult thing . . .' (Protocol of the session in the Law and Constitution Committee, 23.12.97, pp. 25-26).

41. The foundation of the rule, therefore, is the conception that an suitable age gap between the adoptee and the adopter is an important element in achieving a good and proper parental connection in adoption relationships. Too great an age difference between the adopter and adoptee is liable to make it difficult to create a close, understanding and

sensitive relationship between parents and child, and to be detrimental to his welfare. The requirement that the age gap not exceed a certain difference is extremely important for the creation of good communications within the family and to the building of a healthy set of relationships within the family unit in order to achieve the aims of the adoption.

It should be added that setting a maximum age different is stems from the outlook that adoption relationships look to the future, and continue over the years, throughout all the stages of the life and development of the adoptee. Attainment of the purpose of the child's wellbeing does not focus on one point of time close to the time of adoption, but it spreads over a span of many years, beginning with the first years of the child's life, and extending to the years of his growing up until he is an adult. Too large an age difference is liable to make it difficult for adoptive parents to cope with the special needs of educating an adopted child. They are liable to entail other difficulties when the child is growing up, involving difficulties of communication and in providing a response to the needs of the maturing child. One should also not underrate the importance of ensuring the prospects of a reasonable lifespan and the good health of the adoptive parent – which decrease with age – in order to ensure, insofar as possible, that the adoptee has a warm family unity and a complete, protected framework for the duration of his childhood and his youth. Primarily, the maximum age difference rule strives to conform to the average accepted age difference in natural parenthood, leaving wider margins in the intercountry adoption process. The approach whereby the model found in nature is the marker that in general reflects the ideal natural situation is a desirable approach, not only from the point of view of physical suitability, but also from the point of view of psychological suitability. Setting the maximum difference at 48 years constitutes a significant extension of the age difference familiar in nature, and it is difficult to say that an additional extension is required in order to meet the criterion of reasonableness.

42. Regarding the age difference that was set in relation to intercountry adoption, it is important to note that in this area in particular, the secondary legislator acted leniently with respect to adoptive parents, when he set a maximum gap at 48 years. In domestic adoption, the age difference is set at 43 years, pursuant to the amended "Procedure Approving Prospective Parents for Adoption" of the Child Services, which is the body responsible for handing over children for the purpose of adoption. From this aspect, the Committee assigned weight also to the expectations of those seeking to adopt, and permitted a larger age gap in relation to intercountry adoption than in domestic adoption.

> 'It should be noted that the Committee gave serious consideration to the subject of the desire of the prospective adopters, and views its task, *inter alia*, as helping people to realize this desire, taking into account the quality of family life. The said rule does not negate the right of the candidates to fulfill themselves as parents, but it limits the age difference in such a way that a candidate who is fifty, for example, will be able to adopt a child of two and thus realize his desire for parenthood. The right to parenthood is not only for a baby. Representatives of the Child Services pointed out to the Committee that in their experience, the adoption of a child (not a baby) can be handled well and lead to satisfaction of the yearning for parenthood on the one hand and great benefit for homeless children on the other' (Advisory Committee Position Summary, *ibid.*)

43. Several additional aspects relating to the maximum age difference rule should be mentioned:

(a) The meaning of the rule is that exceeding the maximum age difference does not totally negate the possibility of adoption. The rule works in such a way as to enable adoption, as long as there is compliance with the maximum age difference. Thus, an adoptive parent who is over the age of 48 can adopt a child whose age comports with the maximum difference or less. In these circumstances, the possibility of adopting is preserved, and the adopter is required to compromise in relation to the factor of the age of the child at the time of adoption. An examination of the existing statistics on adoption that arise from the respondent's response reveals that the adoption of new-born babies is only a very small part of the total adoptions by Israeli parents. Only 14% of child adoptions relate to babies up to 6 months old; 40% of the adoptions are of babies up to the age of one year, and 25% relate to babies till the age of 18 months.

(b) Even though the formulation of the rule on this matter is not sufficiently clear, it would appear that the requirement for a maximum age difference of 48 years between the adopter and the adoptee relates to only **one** of the couple. The requirement does not apply to both partners. One partner may well be older and exceed the maximum age difference, and this will not prevent the adoption by the couple (respondent's interpretation of the rule in s. 14(b) of the State's response to the amended petition).

(c) The maximum age difference relates to the day of submission of the application for adoption, and not to the actual date of adoption. Hence, a prospective adoptee will not suffer, from the aspect of the

maximum age difference rule, from the adoption proceedings being drawn out.

(d) It was argued that the maximum age difference rule is tainted with unreasonableness, since it is presented as an inflexible rule that does not allow the competent authority discretion to depart from it in appropriate circumstances. In the course of the hearings on the petition, the State was asked to consider whether the maximum age difference rule could be relaxed by allowing discretion. After further deliberation, the State announced that the introduction of such flexibility was not warranted. Its reasons were as follows: first, there is a concern that allowing exceptions to the maximum age difference rule would lead to a natural positioning of the focus on those seeking to adopt, in departure from the principal purpose of the norm, which is concerned with the best interests of the child. Secondly, deviation from the maximum age differences places a question mark over the effect of the age gap in the years to come, the impact of which is difficult to foresee at the time of the adoption proceedings. Thirdly, the maximum age difference in intercountry adoption is greater than the norm in domestic adoption, and this already reflects a significant relaxation of the appropriate and reasonable gap. Any further relaxation, by way of creating exceptions, upsets the appropriate balance. And fourthly, the existence of clear rules relating to the eligibility of adopters in the framework of the professional activities of the adoption associations is important. The process of intercountry adoption is executed by private bodies with the oversight of the state. The existence of clear, uniform criteria will facilitate the operation of the adoption associations, and it will ensure equal, non-discriminatory treatment and that the wellbeing of the child is seen as the principal aim.

The cumulative weight of the above reasons leads to the conclusion that the maximum age difference rule falls within the bounds of reasonableness. This rule focuses on the best interests of the child as required, and it is compatible with the purpose of the institution of adoption. The limitation on the age difference between the adopter and the adoptee is directed at the welfare of the adopted child at various points in time along the axis of the years of his life in the course of his childhood, his adolescence and his youth. It is designed to help in creating relationships textured with warmth, sensitivity and understanding within the new family unit that is built around the adoption. At the same time, the rule is more lenient in relation to adopters in intercountry adoptions than domestic adoptions in that it allows for a greater age gap. The limiting rule does not negate adoption by older parents, as long as the age of the adoptee at the time of the adoption is not outside of the maximum permitted gap. This is a commendable, balanced, relevant and professional arrangement that

answers the purpose of the institution of adoption. There is no cause to intervene since the arrangement is not defective due to unreasonableness.

The claim of discrimination

44. The petitioners claim that the maximum age difference rule is tainted by discrimination that distinguishes them vis-à-vis other population groups, as follows: first, in relation to parents who bring children into the world through natural birth, with respect to whom there is no state intervention even when the birth takes place at a late age, and when the age difference between the parents and the new-born is more than 48 years. Secondly, it was argued, that in relation to couples who wish to have a child by way of a surrogate, pursuant to the Embryo Carrying Agreements Law, there is no provision limiting the age difference, and therefore, in this sense too, there is a discriminatory situation in relation to the age provisions in intercountry adoption. This argument extends also to state assistance for those who resort to fertility treatments in order to give birth. Thirdly, it is argued, that there is discrimination between those seeking to adopt by way of intercountry adoption and those who seek to adopt by way of domestic adoption: in relation to the latter, the internal procedural directive grants discretion to deviate from the rule.

45. One of the main functions of judicial review of the policies of the competent authority is to examine whether that authority acts in an equal manner and without discrimination towards different sectors of the population. The principle of equality is one of the basic principles of the constitutional regime, and it is a foundational value in public law and in judicial review of administrative acts (HCJ 637/89 *Constitution for the State of Israel v. Minister of Finance* [27], at p. 201; HCJ 98/69 *Bergman v. Minister of Finance* [28], at p. 698). Unlawful discrimination that is contrary to the value of equality involves different treatment of equals and unequal and unfair treatment of those deserving of equal treatment. Inequality is engendered by creating distinctions between individuals or between matters for irrelevant reasons. At the same time, the existence of a material difference may justify a distinction, provided that the basis for the distinction has a relevant foundation (HCJ 678/88 *Kfar Veradim v. Minister of Finance* [29], at pp. 507-508; HCJ 6051/95 *Recanat v. National Labor Court* [30], at p. 312; HCJFH 4191/97 *Recanat v. National Labor Court* [31]; Y. Zamir and M. Sobel, "Equality Before the Law", 5 *Law and Government* (2000), 165; HCJ 59/88 *Zaban v. Minister of Finance* [32], at p. 706-707). Sometimes, it is precisely the aspiration to apply the value of material equality that justifies differential, differentiating treatment of different sectors, according preference to the weak and needy and

detracting from the strong and able (HCJ 6778/97 *Association for Civil Rights v. Minister for Internal Security* [33], at pp. 365-366; HCJ 366/81 *Bureau of Tourist Bus Operators v. Minister of Finance* [34], at p. 117). Sometimes, affirmative action is required in order to correct deep gaps and unfairness that has increased over the years (see also HCJ 1703/92 *C.A.L. Cargo Air Lines v. Prime Minister* [35]; HCJ 20594 *Nof v. State of Israel – Ministry of Defense* [36]). Equality does not require identity. It requires equal treatment of people whose basic particulars are similar and are relevant for the same purpose, and as expressed by Justice Agranat:

> 'The concept of "equality" in this context means, therefore, relevant equality, and this requires, for the purpose under discussion, "equality of treatment" of those who are characterized by the said situation. As opposed to this, it would be a permissible distinction, if the difference in treatment of different people was the outcome of their being, in consideration of the aim of the treatment, in a situation of relevant inequality, just as it would be discrimination if it was the outcome of their being in a situation of inequality which was not relevant to the aim of the treatment' (FH 10/69 *Boronowsky v. Chief Rabbi of Israel* [37], at p. 35).

In our case, a clear relevant difference exists between the group seeking to adopt – to which the petitioners belong – and the other groups to which they referred in their pleadings.

46. As for the group that includes biological parents who bring children into the world the natural way: as we mentioned at the beginning of our words, the right to a family and to realization of parenthood in a natural manner is a basic constitutional right that derives from human dignity. This right is by its nature a "liberty" that does not involve the correlative obligation of another, and the state is not entitled to intervene in the autonomy of the individual that it represents, other than in unusual and exceptional circumstances. As a result, the state is not entitled to intervene in an act of natural childbirth on the part of parents, even where the age difference between them and the child exceeds the maximum age difference under discussion here. At the same time, situations of such an age gap are rare and very exceptional, and they do not reflect the natural reality in relation to the majority of the population. Things are different in relation to adoption. The state controls the institution of adoption, which is its exclusive responsibility. The focus of the system is on the best interests of the child as a principal aim, and determination of the maximum age is an important element in promoting these interests. Prospective adopters

can expect, at most, consideration on the part of the state. Against the background of this structure, the role and the obligation of the competent authority is to set criteria of eligibility for those seeking to adopt, which will provide the greatest possible benefit to the child, whose interests are the focus of the system.

There is, therefore, no equality between that sector of the population that includes the natural parents, whose decision whether and when to have a child is a matter of their personal autonomy and is beyond the sphere of intervention of the state, and between the group of prospective adopters, who require the assistance of the state in order to realize their goals. The state, as the factor responsible for the wellbeing of the child is permitted, and even has a public obligation, to set the conditions of eligibility for adoptive parenthood. The maximum age difference is a required condition. Setting the maximum age difference at 48 years is actually being very kind to those pursuing intercountry adoptions, in that it is based on a difference that substantially exceeds the accepted and common difference in natural parenthood, which normally fluctuates between 20-35 years. It must also be recalled that in domestic adoptions, the accepted age difference according to the rules is also lower than the rule under discussion here. In light of the above, the argument in this context must be dismissed.

47. As for the group that has recourse to embryo carrying agreements, an amending announcement of the respondent clarified that in the past, the age of the prospective mother for the purpose of a surrogacy agreement was at most 48 years old. On this matter there was a change, and the competent authority decided that for the purpose of approving their candidacy for surrogacy, the Committee for the Approval of Embryo Carrying Agreements would take into account the age of the prospective parents, the starting point being **the accepted age of natural parenthood.** Age does not constitute a prerequisite, but a consideration when determining suitability, and for this purpose, the natural age of parenthood constitutes a starting point.

On this issue, too, we are not dealing with groups whose particulars are equal, but rather, with groups that are distinguished by substantive differences, which explains the difference in the arrangements concerning the required age differences.

First and foremost, cancellation of the age difference requirement in embryo carrying agreements does not, in these circumstances, make things easier for the applicants; on the contrary, it should be seen as making things more difficult for them vis-à-vis those seeking intercountry adoptions. Whereas beforehand, there was a precondition setting the age difference at 48 years, now it is a matter for the competent committee, and the relevant age is the accepted age of

natural parenthood, which is the starting point for the appropriate difference. This condition means that in an embryo carrying agreement, the maximum age is significantly lower than that of intercountry adoption, at least as a starting point. In these circumstances, it could well be argued that there has been an increase in stringency in relation to those wishing to enter an embryo carrying agreement, vis-à-vis prospective intercountry adopters.

Secondly, there is a material difference between the process of surrogacy and that of adoption. Surrogacy is closer to natural parenthood, and its goal is to help couples to bring a child into the world, the child being related genetically to one of them. The closer the process of birth is to natural parenthood, the less justification there is for state intervention in the autonomy of private will, as stated by the Court:

> '. . . The process of adoption is similar to the process of surrogacy: both of them were intended to realize and satisfy the need of parenthood, and in both processes, the authorities are involved in one way or another. However, the process of surrogacy – unlike adoption, is very close to natural parenthood, which expresses the autonomy of the individual . . . the difference between the process of adoption and that of surrogacy negates the analogy from the former to the latter . . .' (*New Family v. Committee for the Approval of Embryo Carrying Agreements, Ministry of Health* [8], at p. 448, per Justice Cheshin).

This difference is also evident in relation to the funding of fertility treatments, an area that is even closer to natural childbirth, and therefore, the arguments of the petitioners regarding discrimination vis-à-vis those who are helped by fertility treatments must be dismissed. In this context, the words of Prof. Shifman concerning the difference between the process of adoption and new reproductive techniques are apt:

> '. . . It would appear that most of the considerations for intervention in handing children over for adoption do not apply to the new techniques of reproduction. This is not a matter of a scarcity of children, nor of the desire to ensure the optimal welbeing of the child who has already been born. This is a matter of planning to bring a child into the world, which is close to natural childbirth' (Shifman, *supra*, at p.151).

Thirdly, another difference between the process of surrogacy and that of child adoption lies in the authorities who are responsible for approving the sought-after process. Whereas the approval of an embryo

carrying agreement is issued by a professional public committee that was established by virtue of the Law, approval of intercountry adoptions was placed in the hands of private adoption associations; public policy in this area aspires to establish norms of eligibility that are as clear and detailed as possible, which will dictate the mode of operation of the adoption associations while creating clarity, certainty and stability.

In light of the above, the argument, insofar as it concerns the relationship between intercountry adoption and embryo carrying agreements and state aid in funding fertility treatments, must be dismissed.

48. Finally, it was argued that there is discrimination between those applying for intercountry adoption and those seeking domestic adoption. This argument, too, must be dismissed, even if only for the reason that the maximum age difference under the present procedure in domestic adoption is 43 years for the older one of the couple seeking to adopt (Rule 3.7 of the Procedure for Approval of Prospective Adoptive Parents, as amended on 1 June 2000). It was not made clear in the response of the State whether there is discretion to deviate from the rule, but even so, the internal rule is still more stringent, and does not create a basis for a claim of discrimination. In these circumstances, the argument of discrimination raised by the petitioners is unfounded, and must be dismissed.

Comparative law

49. Both the petitioners and the respondent presented to us numerous examples from states worldwide, and each clung to its examples to strengthen its arguments. One side brought examples of states in which there is no set maximum age difference for the purpose of adoption; the other side brought examples of states which have set a more stringent age difference than that set in Israel.

Indeed, a survey of the situation in various states reveals that there is no universal legal policy on the question of the age difference between adoptive parents and their child. On the one hand, there are those states that set a level for the maximum age difference. In these states, the decision is usually more stringent than that in Israel. Thus, for example, in Denmark, Italy and Ethiopia, the maximum age difference is 40 years. In Germany, the law does not set a maximum age difference, but in the rules set by the administrative authority, a maximum difference of 40 years was prescribed. In Iceland the rule is that the adopter will be between 25-45 years old, and in South Korea, the age of an adopter may not exceed 45 years. In other states, there is a maximum age for adoption, which is usually below 48 years. Thus, in Hungary, Holland and Hong Kong, the maximum age for adoption is 45. On the other

hand, there are states in which there is no set maximum age difference or maximum age for the purpose of adoption. This is the situation in the United States and in England, in which age is indeed a factor that is considered in determining eligibility for adoption, but no defined, compulsory age has been set for this purpose. The petitioners did not provide any information concerning the actual practice in these states, and how the discretion given to the adoption authorities is implemented in practice. Without such information, it is difficult to know whether the absence of a rigid rule regarding the age of adoption or the maximum age difference is to the benefit or the detriment of those seeking to adopt in those states. Thus, for example, in England it was stated:

> 'Although there is no prescribed maximum age, it should be appreciated that in practice, adoption agencies are unlikely to consider applicants over 40 (and often over 35) at any rate as potential adopters for healthy babies' (N. Lowe & G. Douglas Bromley's Family Law (9th ed., 1998), p. 628).

Similarly, special arrangements exist in some states, such as Australia, in which the age requirement as a condition of adoption was cancelled, but it was decided that the applicants for adoption must comply with the age requirements of the state that is handing over the child for adoption.

Looking at the law overseas does not, therefore, strengthen the arguments of the petitioners. Setting an age difference is accepted practice in many states. In some of them, there is a more stringent age difference, and in relation to states in which there is no binding rule, we do not have information on how the discretion of the adopting authorities is exercised in the application of the age requirements in practice.

A final word

50. The rule regarding the maximum age difference between the adopter and the adoptee in intercountry adoptions does not violate constitutional principles. It complies with the criteria of proper conduct according to public law. It reflects an appropriate criterion, amongst the other conditions of eligibility of people seeking to adopt, which is designed to secure the best interests of the child by ensuring that the age difference between him and his adoptive parents will not exceed the reasonable norm. A balanced age difference between parents and children makes it easier to create harmony in relations between parents and children within the family unit, and it is important for the healthy growth and development of the adopted child. This consideration of the best interests and the wellbeing of the child is the cornerstone on which

the institution of both internal and intercountry is built. The maximum age difference rule is fair, reasonable and non-discriminatory, and conforms to the basic purpose of the institution of adoption.

51. In view of all the above, the petition in all its parts should be dismissed. In the circumstances, I would recommend that no order for costs be issued.

President D. Beinisch

Before me is the reasoned opinion of my colleague Justice A. Procaccia. The petition before us centers on rule 4(b)(1) of the Rules and Professional Guidelines for the Activities of a Recognized Non-Profit Organization, enacted by the Minister of Labor and Welfare in 1998. This rule, called the "maximum age difference rule", states that a person wishing to adopt a child in the framework of intercountry adoption, will not be eligible to adopt if the age difference between himself and the child on the date of submission of the application for adoption exceeds 48 years. As was explained in the opinion of my colleague, the petitioners challenge the said rule on both the constitutional and the administrative levels. On the constitutional level, the petitioners argue that the maximum age difference rule violates realization of the constitutional right to family life and to parenthood, and that the said violation is unlawful in that it does not meet the criteria of the limitations clause. On the administrative level, the petitioners contend that the said rule is unreasonable and discriminatory. The main request of the petitions is that we order that the rule be changed in such a way as to allow departures from it in special cases justifying such departure, even when the age difference between the prospective adopter and the child exceeds 48 years. It will be noted that in the hearing held in this Court on 25 February 2007, the State agreed that the petition be heard as if an order *nisi* had been issued.

My colleague, Justice Procaccia, discussed the arguments of the petitioners one by one, and dismissed them for the reasons elucidated in her opinion. I agree with many of the normative rulings on which Justice Procaccia's opinion is based. Nevertheless, I wish to add my say on a number of aspects in which I differ from the path taken by my colleague. On the constitutional level, Justice Procaccia ruled that people seeking to adopt a child do not have a recognized legal right, and in her view, such a right ought not to be recognized on the meta-legal constitutional plane. As I will explain below, in my view, the matter is sensitive and complex, and I would therefore prefer to refrain from a firm ruling in the matter, for such a ruling is not necessary in the circumstances of the case before us. As for the administrative plane –

my colleague's conclusion was that the maximum age difference rule is fair, reasonable and non-discriminatory. My colleague's words imply that this conclusion stands even if the existing legislation does not permit discretion to deviate from the said rule in exceptional, justified circumstances. For reasons that I shall discuss below, I am of the opinion that s. 36A of the Adoption of Children Law, 5741-1981 (hereinafter: "Adoption Law") must be interpreted in such a way that the statutory appeals committee that it established is authorized to consider applications for a departure from the maximum age difference rule in intercountry adoptions, in special, exceptional circumstances that justify such a departure. Taking this into account, I am of the view that the petition should be granted in part, in the sense that the possibility of considering a deviation from the maximum age difference rule is not a matter for the private adoption associations as requested by the petitioners, but it can be entertained by the statutory appeals committee under the Adoption Law. I will clarify.

The constitutional plane

1. As stated, the main argument of the petitioners on the constitutional plane is that the right to become a parent by means of adopting a child enjoys a constitutional, meta-legal status in our legal system, and the maximum age difference rule violates this right, contrary to the conditions of the limitations clause.

In relating to these arguments, Justice Procaccia ruled that that prospective adopters have a natural and legitimate **expectation** that their said desire be taken into account in the framework of the exercise of administrative and judicial discretion, and even a right to expect that adoption arrangements will be implemented by the state lawfully in accordance with the criteria of public law. At the same time, according to my colleague's approach, none of these give rise to a recognized legal right ("a right by law") to adopt a child, and in any case, there is no cause to recognize a constitutional right as aforesaid. Justice Procaccia based her view on two main reasons: **first,** according to my colleague, recognition of a legal right to adopt children will lead to a conceptual confusion between the best interests of the child and the interests of those seeking to adopt, in a way that is liable to distance the main goal of the institution of adoption, which is the commitment to the meta-principal of the wellbeing of the child, from the center of interest. **Secondly**, according to my colleague, the constitutional right to family life and to parenthood – which stems from the constitutional right of a person to human dignity and privacy – is a right in the category of a "liberty", the aim of which is to provide protection from unjustified external intervention of the state in the intimate decisions of the individual. Under this approach, the right to family life and to

parenthood is of a negative character, and it cannot impose upon the state a duty to take positive action in order to promote the aspirations of the individual to establish a family and to become a parent. Justice Procaccia's view is that a person does not have a constitutional right to realize his yearning for a child by alternative means to natural childbirth, and the state is under no active duty to make such alternative means available to him. In this context, my colleague commented that "it is not beyond the realm of possibility that changing times, social dynamics and human needs will bring with them, eventually, changes in the constitutional conception of the place of the state in providing the means for realization of a person's right to a family and to parenthood. On this matter, the considerations need not be identical in relation to the different means, and adoption of a child, who is an independent entity and the subject of rights, is unlike other means that are designed to make it possible to bring a child into the world, such as surrogacy and IVF" (para. 23 above).

2. Regarding my colleague's position, I will comment that in my view, definition of the internal scope of the constitutional right to family life and to parenthood is a sensitive, complex and multi-faceted question. The case law of this Court has recognized, in the past, a right to family life and to parenthood as a constitutional right that derives from human dignity, and also from realization of the right to personal autonomy and self-fulfillment (see *Adalah v. Minister of the Interior* [2], per President Barak at para. 32 ff., per Vice President Cheshin at paras. 46-47, my opinion at para. 6, per Justice S. Joubran at para. 8 ff, per Justice Procaccia at paras. 1, 6, per Justice Naor at para. 4, and per Justice Rivlin at para. 8; see also *Neta Dobrin v. Prisons Service* [5], per Justice Procaccia at para. 12).

At the heart of the constitutional right to family life and to parenthood is the natural and preliminary right of every person to bring children into the world, and by so doing to realize his existential instinct to establish the next generation bearing the genes of the parents. The kernel of the right to family life and parenthood also contains the right of the biological parent to custody of his children and to raise them, as well as the right of the child to grow up within the bosom of his biological parents by virtue of the blood ties between them. This is the "hard nut" of the constitutional right to family life and parenthood, about which there would seem to be no argument (see e.g. *Nahmani v Nahmani* [7], at pp. 680-681, per Justice T. Strasbourg-Cohen; *Anon. & Anon. v. Biological Parents* [6], at pp. 184-188, per Justice A. Procaccia; and LFA 5082/05 *Attorney General v. Anon.* [38], at para. 5).

The question that is more difficult to answer concerns the definition of the internal scope of the constitutional right to family life and to parenthood in contexts other than natural childbirth and biological parenthood. This subject has not yet been dealt with in depth in our case law. Thus, for example, in *New Family v. Committee for the Approval of Surrogacy Agreements, Ministry of Health* [8], this Court refrained from ruling on the question of whether the internal scope of the constitutional right to family life and parenthood includes the aspiration to bring a child into the world by means of an embryo carrying agreement, which is based on a division between the genetic code (originating in one or both of the parents party to the agreement) and the physiological aspect (which is realized by means of the surrogate mother who undergoes the pregnancy and the birth). As for realization of the yearning for a child by means of the institution of adoption – to date, the case law has tended to recognize the rights of prospective adopters only in circumstances in which actual family ties existed between the prospective adopter and the prospective adoptee, in a way that affected the examination of the best interests of the adoptee (see what I wrote in *Anon. v. Attorney General* [10], at pp. 175-176, on the matter of the adoption of an adult by a person who married his biological brother and raised him since he was a baby; see and compare: *Yarus-Hakkak v. Attorney General* [15], per President A. Barak, concerning a female couple who live together, and each applied to adopt the biological children of her partner; see also the recent decision of the House of Lords, which granted the petition of an Irish man who sought to adopt the biological child of his female partner with whom he lived out of wedlock: *Re P and others (adoption: unmarried couple)* [2008] 4 HRC 650). As opposed to these cases, in the case before us the argument of the petitioners is that constitutional status should be granted to their aspiration to become parents by means of the institution of adoption, at the preliminary stage of the process of adoption, in the absence of any reality of *de facto* family life with the concrete child.

3. As stated, Justice Procaccia discussed the reasons against constitutional recognition of the right to become a parent through the institution of adoption. However, as against these weighty considerations discussed by my colleague, one can muster counter-considerations that support according a constitutional status to the said right. *Prima facie*, it is plausible to argue that the yearning for a child is a deep, fundamental human need, and that this existential need is equally intense in the case of natural childbirth and where the couple are not able to bring children into the world by natural means and they wish to realize their yearning for a child by means of the adoption. According to this approach, a relatively broad definition of the internal

scope of the constitutional right to family life and to parenthood ought to be recognized, while adapting the scope and intensity of the constitutional **protection** that will be afforded to the said right in different contexts, where it conflicts with opposing rights and interests. *Inter alia*, the degree of protection of realization of the right to family life and parenthood will be affected by the positioning of the case in the hub of the constitutional right or at its margins (see and compare: *Adalah v. Minister of the Interior* [2], per (then) Justice Rivlin, at para. 8).

In accordance with the said approach, the right to become a parent through the institution of adoption is situated on a more exterior circle vis-à-vis natural childbirth (which, as we have said, is included in the "hard kernel" of the right to family life and to parenthood), and even vis-à-vis artificial reproductive techniques and embryo carrying agreements, which involve external involvement of the state but which are based on planning the birth of a child who will bear the genetic code of one or both of his parents (see and compare: *New Family v. Committee for the Approval of Embryo Carrying Agreements, Ministry of Health* [8], per (then) Justice Cheshin, at p. 448). According to the approach of the petitioners, positioning of the right that they claim on a circle further from the core of the constitutional right is liable to affect the intensity of the protection afforded to those who seek to become parents by means of adoption of a born child who does not bear the genetic code of either of them. At the same time, according to the argument, this alone is not enough to negate the actual constitutional recognition of the right to become a parent by means of the institution of adoption, considering that realization of the yearning for a child is a basic and inseparable part of human dignity, of the realization of a person's self-hood and his internal "I".

It will be stressed that the petitioners to not presume to argue that the right of those seeking to adopt is an absolute right or that it should be granted maximal constitutional protection. Like all rights, the right claimed by the petitioners, too, is a "relative" right, and at times it must yield to competing rights and interests. In their pleadings, the petitioners did not dispute that the best interests of the child constitutes an overarching principle in our legal system and in international conventions that deal with child adoption, and that it is the principle of the best interests of the child that is the basis of the laws of adoption, as elucidated in the opinion of my colleague. It is clear, therefore, that even according to the petitioners, the constitutional right to become a parent through the institution of adoption cannot be discussed independent of questions of parental capability and the best interests of minors who have already been born. Moreover, there was no disagreement between the parties to this petition on the need to protect

the rights of biological parents, and on their preferred status vis-à-vis people seeking to adopt – certainly at the early stages of adoption proceedings. No one disputes, therefore, that in the triangle of interests of the wellbeing of the child – rights of the biological parents – rights of those seeking to adopt, the status of the last group is relatively weak, and the constitutional protection they will be given will be less in scope and intensity, in view of the elevated status that must be assigned to the best interests of the child and to the blood ties between the child and his biological parents. At the same time, so goes the argument, one cannot ignore the fact that the institution of adoption – both domestic and intercountry – also satisfies the needs of childless people, who wish to realize their desire for a child even if the child will not be a biological descendent (see and compare: Shifman, *Family Law in Israel*, *supra*, at p. 148). According to that argument, the need to place the best interests of the child at the center of adoption law and the need to protect the rights of the biological parents do not mean that there is no room for recognizing the existence of a constitutional-legal right of those who seek to become parents through the institution of adoption, even though, as stated, this would be a relatively "weak" right from the point of view of the intensity of the protection it receives.

I would point out that an additional possible justification for an approach that supports constitutional recognition of the right to become a parent by way of adoption may be based on the close dependency of those seeking to adopt on state institutions. The state representative confirmed in her response before us that adoption in its very essence is "public". Intervention and external arrangement on the part of the state are required for the purpose of handing children over for adoption. An individual seeking to adopt is unable to create the legal status of parenthood on his own – certainly when it is not a case of natural birth –and he requires the external validation of the state and its institutions in order to create the status of adoptive parent vis-à-vis the whole world. In view of this, it may be argued that there ought to be constitutional recognition of the right claimed by the petitioners, in order to balance the great power of the state in the said context. According to this approach, the constitutional right to human dignity – from which the right to family life and parenthood is derived – is not based only on negative content, and in suitable (although limited) cases, the said right is liable to impose positive duties on state authorities in order to protect individual rights and to provide a real possibility of realizing them (for a supportive view, see: Sigal Davidow-Motola, "Feminist Decision? Another Aspect of the Nahmani Case", 20(1) *Iyunei Mishpat* 221, 227-228 (1996)). In this context, it will be noted that the State referred in its pleadings to statements in *Nahmani v Nahmani* [7] from which it transpires that the right to parenthood is a

negative liberty which is not capable of imposing positive duties on the legal level (see *ibid*., at p. 682, 780-781, 790). On this matter, it is doubtful whether these statements apply in our case with the same intensity as in the *Nahmani* case, since that case dealt with the relationship between two individuals (former spouses), and not with the relations between the individual and the state. In the words of Justice E. Goldberg (*ibid.*, at p. 726): "The question of whether the state bears an obligation to assist the individual in realizing his desire to be a parent does not arise in any way in this case."

4. Thus, the fundamental issue concerning the question of constitutional recognition to become a parent by means of the institution of adoption is complex and sensitive. It is inextricably linked to the definition of the internal scope of the constitutional right to family life and to parenthood. It gives rise to questions concerning the essence of the institution of adoption and the relationship between the best interest of the child, the rights of biological parents and the desires of those seeking to adopt a child. It raises broad questions concerning the extent of active duties that ought to be imposed on the state by virtue of constitutional rights. The said matter is also likely to have ramifications for the legal-constitutional definition of concepts such as "legal parenthood" and "family unit" in the Israeli legal system (see P. Shifman, "On the New Family: Opening Lines for Discussion" 28(3) *Iyunei Mishpat* 643, 670 (2005)). It should be noted that in view of all the above-mentioned problems, other states have refrained to date from granting constitutional status to the right to adopt a child. Even the European Court of Human Rights ruled that a right to adoption cannot be derived from the right to privacy and to family life as stated in art. 8 of the European Convention on Human Rights (see *Frette v. France* (2002) 38 EHRR 438; but see recently the minority opinion of Justice Mukaroni of the European Court of Human Rights, who calls for a change in the interpretation of the said art. 8 of the Convention, such that this article will protect the possibility of submitting an application to adopt a child in the framework of the domestic law of each state: *E.B. v. France* (Grand Chamber judgment of 22 January 2008, Application no, 43546/02).

5. As we said, in the circumstances of the case before us, the constitutional issue does not require a decision, as the matter of the petition according to the remedy that is sought can be resolved on the administrative plane. In view of the sensitivity of the constitutional issue and its complexity, and in the absence of a need to decide on this issue in the circumstances of the case before us, I prefer to leave it for future consideration.

In conclusion, I would comment that even if we recognize a constitutional right to realization of the aspiration for parenthood by means of the institution of adoption, as requested by the petitioners, in the circumstances of the said case, the violation of this right does not go to the heart of a clear, recognized constitutional right, and the severity of the violation is not great in view of the fact that the maximum age difference rule does not prevent the petitioners from adopting a child, but only prevents them from adopting a new-born child. (Thus, for example, if a couple who are fifty years old look for succour from the institution of adoption, the maximum age difference rule enables them to adopt a two-year-old child.) In all events, in view of the conclusion that will be elucidated below, whereby the existing legislation contains a mechanism for considering exceptional cases in which it is possible to deviate from the said rule, I am of the opinion that even had a violation of a basic right been proven – and I am not ruling on this – it would conform to the limitations clause, including the requirement of proportionality.

Furthermore – and this is the most important thing in my eyes – the difficult question that arises under the approach of the petitioners concerns the contents of the constitutional right that they claim, and the nature of the corresponding duty. In their pleadings in this Court, the petitioners agreed that no-one has a vested right to adopt a child, and that the state does not bear a duty to "provide" a child for those who wish to have recourse to the institution of adoption; this is in view of the necessity of protecting the best interests of children who are prospective adoptees as well as the rights of the biological parents. It will be noted that in their amended petition, the petitioners stated that they do not insist on voiding the secondary legislation on which this petition turns, and that the remedy they are seeking is the moderation of the maximum age difference rule by recognizing the possibility of deviating from the rule in exceptional cases that justify so doing.

Thus, a careful reading of the arguments of the petitioners and the remedy they seek reveals that their main contention on the constitutional plane is that the state has a duty to create a **proper legal mechanism** for examining the applications of those interested in realizing their right to parenthood by means of the institution of adoption; this, subject to the overriding principle of the best interests of the child, the rights of the biological parents, examination of the parental capabilities of the prospective adopters, and the other interests that are relevant to the matter. Apparently, the state fulfilled the duty as claimed by the petitioners, in view of the fact that the Adoption Law and the secondary legislation enacted by virtue thereof establish regular mechanisms for examining applications for child adoptions, both in domestic adoption and in intercountry adoptions. At the same time, as

we have said, the argument of the petitioners in this context is that the maximum age difference rule unlawfully infringes their rights, in that it does not allow for a mechanism for **departing** from the rule in exceptional cases, on the basis of a substantive examination of the suitability of the applicants to adopt a new-born baby when the age difference exceeds 48 years. On this matter, I am of the opinion that the existing legislation contains a mechanism for considering exceptional cases as requested by the petitioners, and the question confronting the respondents is whether this mechanism can also be implemented in relation to the matter of the maximum age difference. To clarify my position as stated, I will address the arguments that were raised on the level of administrative law.

The administrative level

6. On the administrative level, the petitioners raised three main arguments against the maximum age difference rule: **first**, it was argued that the said rule is not reasonable in that it has not been proved that the wellbeing of the child suffers when the age difference between the prospective adopters and adoptee exceeds 48 years. **Secondly**, it was argued that the maximum age difference rule creates unlawful discrimination against those who seek to adopt a child in an intercountry adoption vis-à-vis other groups who seek to realize their right to parenthood, and particularly in relation to those applying for a domestic adoption. **Thirdly**, it was argued that the said rule is neither fair nor proportional in view of its rigid nature that does not allow for an individual examination of the circumstances in exceptional cases which justify so doing.

My colleague Justice Procaccia discussed the reasons for dismissing the arguments of the petitioners relating to the lack of reasonableness of the said rule, and I agree with all she said in this regard. As related in the opinion of my colleague, the Minister initially prescribed a 45 year maximum age difference in intercountry adoption However, after deliberation in the Knesset Law and Constitution Committee, the proposal was changed: the age difference was fixed at 48 years, and the relevant date for determining the maximum age difference would be the date of submission of the application to adopt, and not the actual date of adoption. It was further decided that it will be sufficient if one of the prospective adopting couple fulfils the maximum age difference requirement of 48 years between himself and the adoptee, even if the other partner exceeds the maximum age difference requirement. On this matter, I am of the opinion that the question of the extent to which the best interests of the child are affected by the age difference between himself and his adoptive parents, and what ought to be the maximum age difference between them, is a professional question, clearly subject

to the discretion of the competent authority, assisted by the expert opinions of professionals. In the particular circumstances, the decision to set the maximum age difference at 48 years was made in accordance with professional evaluations of what the child's best interests require, not only when he is a child but also as he grows and matures over the years, and in light of the accepted social conceptions that are influenced, *inter alia*, by the maximum age difference in natural birth, which is significantly lower than that anchored in the rule. A glance at comparative law reveals also that fixing the maximum age difference at 48 years does not deviate significantly from what is accepted in other states, as discussed by my colleague discussed in para. 48 of her opinion. Taking all the above into account, it cannot be said that the rule is unreasonable to an extent that requires striking down secondary legislation that has been approved by the Constitution Committee of the Knesset.

It will be noted that fixing the maximum age difference at 48 years may well involve a certain degree of arbitrariness which typifies every norm that fixes a set measure, certainly in relation to a limitation based on age. Our case law has already stated that ". . . this is what happens with times, with measurements, with weights, with distances and other such measurable concepts, that they are somewhat arbitrary at their boundaries. This is well known" (per (then) Justice Cheshin in CrA 3439/04 *Bazak (Buzaglo) v. Attorney General* [39], at p. 307). A certain alleviation of the problem of arbitrariness may be attained by granting discretion to depart from the maximum age difference rule in special circumstances that justify so doing, and I will discuss this below.

As for the argument of unlawful discrimination – on this too I am in agreement with Justice Procaccia that there is a relevant difference between those seeking to adopt a child in an intercountry adoption and the other groups to which the petitioners referred in their pleadings. The reasons for this position were elucidated by my colleague (para. 45 ff.) and I see no reason to repeat what was said there.

7. From the whole array of arguments raised by the petitioners on the administrative plane, the argument that most disturbed me relates to the question of whether a possibility exists of deviating from the maximum age difference rule in intercountry adoption in special, exceptional circumstances that justify so doing. From the material submitted to us it transpires, apparently, that in domestic adoption, it is possible in exceptional circumstances to deviate from the procedure that requires a maximum age difference of 43 years between prospective adopters and the child to be adopted. In intercountry adoption, however, the position of the State is that there is no justification for allowing a deviation from the maximum age difference

rule, which stands at 48 years. It will be mentioned that this alone is not sufficient to create unlawful discrimination between prospective adopters in domestic and in intercountry adoptions. This is because the age difference in the case of domestic adoption is lower than that in intercountry adoptions (43 and not 48 years), and therefore, *prima facie*, in relation to domestic adoption there is greater justification for allowing discretion to deviate from the rule.

The aspect that disturbed me in the said context does not stem, therefore, from the prohibition on unlawful discrimination, but from the competent authority being bound by fitting administrative norms that are based on fairness, reasonableness and proportionality. As mentioned above, even according to the approach whereby prospective adopters have no legal right recognized by law, there is no dispute that they have a legitimate expectation and interest that consideration will be accorded to their desire to adopt a child, and that limitation of the possibility of realizing this desire will be effected in a fair, reasonable and proportional manner in keeping with the accepted criteria of administrative law. The question that arises is whether the State's position negating the existence of discretion to deviate from the maximum age difference rule in intercountry adoption fulfills the said criteria. I fear that this question must be answered in the negative. It has already been ruled in our case law that "policy that has no exceptions is like a ball-bearing machine without lubricant. Just as the machine will not work and will burn out quickly, so too will the policy" (HCJ 3648/97 *Stamka v. Minister of the Interior* [40], at p. 794, per (then) Justice Cheshin). In another case, the Court said that ". . . it is the obligation of every administrative authority to apply his discretion from case to case, and to recognize exceptions to the rules and the set guidelines when circumstances justify so doing" (*Adalah v. Minister of the Interior* [2], per President Barak, at para. 72).

The requirement of fairness and proportionality in the actions of the administrative authority – including secondary legislation – supports limiting rigid arrangements to circumstances in which the establishment of an all-encompassing arrangement is unavoidable. As a general rule, the exercise of administrative discretion will permit flexibility in cases in which there is justification for deviating from the rule without thereby harming the principle of equality. In the words of Justice Cheshin: "Law is designed for that which is accepted, middling, average, and the need for flexibility is obvious, even if only so as to avoid trampling on the minority and the exception . . . hence, the flexibility that is required, to adapt the rules – which in their essence were created for the middling and the average – to whosoever is not middling or average" (CA 1165/01 *Anon. v Attorney General* [41], at p. 79).

In the case at hand, the State presented a number of reasons for its approach whereby no departure from the maximum age difference rule should be allowed in intercountry adoption. I examined these reasons, and I was not convinced that they justify the existence of a rigid rule that allows no deviation, even in cases that are special and exceptional. The argument of the State whereby the existence of such discretion will divert the focus of attention to the prospective adopters instead of the best interests of the child is not convincing in my view, for it is clear that the existence of exceptional circumstances will be examined subject to the overriding principle of the best interests of the children waiting to be adopted. Neither is the argument that it is difficult to anticipate the ramifications of the age difference between the adopter and adoptee convincing, for the process of adoption is constructed entirely on future-directed anticipation, which is naturally characterized by uncertainty. The State further argued that since the process of intercountry adoption is executed by private adoption associations which operate under state supervision, the existence of clear rules of eligibility of adopters is of great importance; this is so in view of the concern for undesirable consequences of competition between the private adoption associations, which harm the interests of the children awaiting adoption, as well s concern for the lack of equal treatment of those who seek to adopt them. *Prima facie*, this last argument is significant. Nevertheless, it appears that the concern expressed by the State should be answered not by setting a rigid rule regarding the maximum age difference, but rather, by a suitable choice of the entity that will exercise discretion to deviate from the rule. I will discuss this below.

8. The obvious conclusion from what has been said so far is that the absence of discretion to conduct an individualized examination of exceptional cases in which departure from the maximum age difference rule is justified – even if only in exceptional circumstances of limited scope – would have engendered genuine questions about the reasonableness and proportionality of the rule. In actual practice, I am of the opinion that the said difficulty does not arise, in that the mechanism fixed in s. 36A of the Adoption Law has the capacity to include a process of review which allows for a departure from the maximum age difference rule in suitable cases. Section 36A of the Adoption Law prescribes as follows:

> Appeals Tribunal
>
> (a) A person who considers himself harmed by a decision of the Welfare Officer regarding the determination of his eligibility to become an adopter **or by a decision of a recognized adoption association**

concerning his eligibility to adopt a child in an intercountry adoption, may appeal the decision to an Appeals Tribunal comprising five members, who will be appointed by the Minister of Labour and Welfare in consultation with the Minister of Justice [emphasis added – D.B.].

(b) The members of the appeals tribunal will be a judge of the family court, who will preside, two social workers, a clinical psychologist and an expert psychiatrist, provided that at least two of the members will not be state employees.

(c) A decision of the appeals tribunal is not subject to further appeal.

Section 36A of the Adoption Law prescribes that the appeals tribunal it establishes will be competent to hear, *inter alia*, appeals on the decision of a recognized adoption association concerning eligibility to adopt a child in an intercountry adoption. Correct interpretation of s. 36A, in light of the abovementioned principles, leads to the conclusion that a person who seeks to adopt a child in an intercountry adoption and is deemed to be ineligible to do so – possibly, *inter alia*, because he does not fulfil the maximum age difference requirement – is entitled to appeal this decision to the appeals tribunal in a way that makes it possible to conduct an individualized examination of the circumstances of the case. In this context, I would like to stress two points: **first**, in the existing legal situation, the authority to depart from the rule is not granted to the private adoption associations, and the reasons for this were articulated by the State in its pleadings. At the same time, in keeping with the said interpretation of s. 36A of the Adoption Law, discretion to deviate from the maximum age difference rule in intercountry adoption will be exercised by the statutory appeals tribunal, which constitutes a public body with mixed administrative and quasi-judicial characteristics. This would seem to provide a response for the main fears raised by the State in its pleadings concerning the exercise of the said discretion by private bodies that compete amongst themselves. **Secondly**, the existence of a statutory mechanism for examining exceptional cases does not constitute an extensive breach of the bounds of the maximum age difference rule. It may be assumed that the appeals tribunal will formulate criteria for departing from the rule under discussion, and will limit these departures to special and unusual cases that justify the deviation. Moreover, since a maximum age difference of 43 years has been fixed for domestic adoption, whereas the difference was fixed at 48 years for intercountry adoption, it may be assumed that the number of exceptional cases in which justification will

be found for departing from the maximum age difference in intercountry adoptions will be smaller than the number of exceptions – small in any case – in which justification is found for departing from the rule in domestic adoptions.

9. Thus, the Adoption Law establishes a mechanism which, according to the interpretation that seems to me to be reasonable and appropriate, allows for departure from the maximum age difference rule in special cases that justify so doing. In this sense, the existing legislation provides a response to the main relief sought by the petitioners, i.e., to allow exceptions to the said rule and to the norm that was set in its framework. In light of this, and subject to the possibility of the appeals tribunal having discretion, according to my approach, the petition should be granted partially only, in the sense that the possibility of considering a departure from the maximum age difference rule in exceptional, unusual cases is not in the hands of the private adoption associations, as requested by the petitioners, but rather, in the hands of the statutory appeals tribunal the operates according to the Adoption Law.

Vice President E. Rivlin

1. The legal question that lies at the heart of the case before us is not simple, and my two colleagues, President D. Beinisch and Justice A. Procaccia, each arrived at a different conclusion. After reading both the opinions, I have reached the conclusion that my position is closer to that of President Beinisch in relation to most of the issues, and I would even go further than she did had her ruling not provided an appropriate response to the question at issue. Rule 4(b)(1) of the Professional Rules and Guidelines for the Operation of a Recognized Non-Profit Organization under the Adoption of Children Law, 5741-1981 (hereinafter: the maximum age difference rule), enacted by the Minister for Welfare in 1998, raises questions on the constitutional and administrative planes. I concur in the position of my colleague, the President, that for the purpose of ruling on the petition, it is not necessary to decide on the constitutional questions that arise, and similar to her opinion, my position too is based on the administrative arguments raised by the petitioners. Nevertheless, I would like to briefly discuss the constitutional question at issue, addressed by my colleagues in their opinions.

The parameters of the constitutional right to parenthood

2. My colleague Justice Procaccia ruled that the right to adopt a child is not a recognized legal right, and *a fortiori*, it is not a meta-legal constitutional right. She points out that the right to parenthood is in essence a "negative" right and it does not have the capacity to impose

on the state a positive obligation to assist individuals in its realization. According to Justice Procaccia, the right to adopt, which is derived from the right to parenthood, involves active assistance on the part of the state in realizing the aspiration to parenthood, and consequently, it should not be recognized as a constitutional right. Another reason for not recognizing a constitutional right to adopt is attributed by Justice Procaccia to the fact that recognition of such a right might detract from the main purpose for which the institution of adoption was created – concern for the best interests of the adopted child. The President, on the other hand, preferred not to rule definitively on the constitutional question confronting us. Nevertheless, she pointed out that the right to parenthood by way of adoption is found "on a more exterior circle vis-à-vis natural childbirth (which . . . is included in the 'hard kernel' of the right to family life and parenthood), and even vis-à-vis artificial reproductive techniques and embryo carrying agreements, which involve external involvement of the state but which are based on planning the birth of a child who will bear the genetic code of one or both of his parents." The President is of the opinion that because of the remove of the right to adoption from the hard core of the right to parenthood, the degree of protection it enjoys is less.

3. I would like to add a few words relating to the positions expressed by my colleagues on the constitutional question. I am not convinced that there is such a significant gap between realization of the right to natural parenthood and realization of the right by way of adoption, to the extent that it can be said definitively that one is situated within the kernel of the right to parenthood and the other on its margins. Indeed, ideal parenthood is by natural childbirth, and the assumption is justified that bearing a child who carries the genetic code of his parents creates a bond and responds to a stronger need than parenthood that is realized by way of adoption (para. 3 of the opinion of my colleague, the President; *New Family v. Committee for the Approval of Surrogacy Agreements, Ministry of Health* [8], at p. 448). It may also be assumed that many of those who apply to adopt do so as the default option after their desire to bring children into the world naturally has not been realized. Nevertheless, the underlying need is similar in essence in both cases – the desire for a child, for continuity. As noted by my colleague President Beinisch, "[]*prima facie*, it is plausible to argue that the yearning for a child is a deep, fundamental human need, and that this existential need is equally intense in the case of natural childbirth and where the couple are not able to bring children into the world by natural means." The sound words appearing in the opinion of my colleague, Justice Procaccia, concerning the status and the great importance of the right to family life, are applicable, in my view, to

both natural parenthood and to parenthood that is realized by way of adoption.

Moreover, it often happens that the yearning for a child is strongest in those who are not able to realize it in a simple manner. The cry of the childless for help has been heard since ancient times. In *New Family v. Committee for the Approval of Surrogacy Agreements* [8], Vice-President Cheshin described one of these cases:

> 'Who does not remember the desperate cry of the barren Rachel in calling to her husband Jacob: "Give me children or else I die" (Gen. 30:1). (Neither will we forget Jacob's harsh, irritated reply: "And Jacob's anger was kindled against Rachel; and he said: Am I in God's stead, who hath withheld from thee the fruit of the womb?") This cry is the cry of the living being's will to survive, a will which, with the birth of a child, will fulfill the "voice of blood" between parents and their children (as per Deputy President Sh.Z. Cheshin, in CA 50/55 *Hershkovitz v. Greenberger* [1955] IsrSC 9(2) 791, at p. 799, para. 30).

Rachel's pain, and that of Hannah, who wandered around the Tabernacle when "she was in bitterness of soul, and prayed unto the Lord, and wept sore," resound down the generations and express the great void created by the absence of a child. This, in many cases, is the situation of those who seek to adopt. Thus, for example, Rachel at the end of the day adopts a solution that is to a certain degree related to adoption, and she realizes her desire for continuity through the children of her handmaiden Bilhah. After the birth of the son of Bilhah and Jacob, Rachel declares: "God hath judged me, and hath also heard my voice, and hath given me a son," and her cry is no longer heard.

4. The legal status of the relationship that is created between the adoptee and the adopters after the adoption supports the position that the difference between biological parenthood and parenthood by way of adoption should not be seen as creating a difference of substantial normative significance. My colleague Justice Procaccia addressed this relationship, and noted that non-recognition of a constitutional right to adopt does not "detract from the fact that upon completion of the adoption process with the issuing of an adoption order, a relationship of full rights and obligations typical of the relations between parents and children is created between the adopter and the adoptee, replacing the biological blood ties of the child with the family of origin, and a new family unit is established that constitutes a subject of constitutional rights." It is hard to believe that pursuant to the difference between biological parenthood and parenthood by way of adoption, a certain level of constitutional protection would be granted to the relations

between a child and his parents in the case of a biological family, and inferior protection granted in the case of an adopted child (after the adoption). In light of all this, it appears that the difficulty in defending the right to parenthood in the case of adoption does not stem from a substantive difference between biological parenthood and parenthood by way of adoption, but from two other difficulties – the difference between a right which is of a "negative" nature and a right of a "positive" nature, and primarily, the great importance of the wellbeing of the adopted child.

5. My colleague Justice Procaccia is of the opinion that the right to parenthood that is recognized in Israeli law is in essence a "negative" right, one that was designed to protect the individual from state intervention, and it contains nothing which would impose a positive duty on the authorities to enable the individual to adopt. Personally, even if I were to accept the distinction made by my colleague between "negative" rights and "positive" rights in Israeli law, I am not convinced that this distinction necessarily reflects the situation in our case. Justice Procaccia assumes that adoption necessarily involves a positive act on the part of the state that helps the adopters to come to complete the process. However, it is possible to look at the matter from a somewhat different angle. In an unconstrained world, adoption would be likely take place by means of agreements between prospective adopters and third parties. These agreements would make the adoptions actually happen with no intervention of the authorities. And indeed, prior to enactment of the Adoption of Children (Amendment no. 2) Law, 5756-1996, as described in the opinion of my colleague Justice Procaccia, there was a "wide-spread phenomenon of adoption of children with no oversight, sometimes without the children even being registered in the local register." Accordingly, limiting the possibilities of adoption by means of statutory regulation can be seen as a violation of the right to parenthood in the "negative" sense. It will be stressed immediately that statutory restriction of the possibilities regarding adoption is legitimate as well as essential, in view of the need to protect the child's interests; this however, does not change the fact of the violation of the right, but only affects the degree of protection that it is accorded.

Particularly apt here are the words of Vice President M. Cheshin in *New Family v. Committee for the Approval of Surrogacy Agreements* [8], written as a response to a similar argument that was raised in relation to the constitutionality of limitations that were imposed on people seeking to realize their right to parenthood by way of surrogacy:

> 'The State further argues thus: the right to parenthood is indeed a right, but a right to surrogacy cannot be derived

> from the right to parenthood. The reason is that the right to natural parenthood means only a prohibition on the state to intervene in the life of the individual and in his autonomous will, whereas the right to surrogacy implies . . . a duty imposed on society to help the individual to realize the need throbbing in him for parenthood. We will not accept this argument either. Indeed, the right to parenthood is a right in the category of a liberty – it is a right that has no correlative duty imposed on another – whereas surrogacy necessitates the intervention of third parties. As stated in the Aloni Report . . . "It is accepted, in the United States, that extension of the right [to bear a child – M.C.] to reproductive technologies does not obligate society to cover costs and expenses, just as it does not obligate the doctor or the technician to perform the procedure. The accepted explanation is that the right [to bear a child – M.C.] has a negative character – it has the power to prevent interference in procreation – and not a positive nature – to impose a duty on another body in order to assist in procreation." However, I do not understand how this distinction bears on our case. We are not dealing with the imposition of any sort of duties on the state (or on any third party), but with a request of the petitioner that she not be prohibited from embarking on the process of surrogacy. A prohibition imposed on her by the state to resort to the process of surrogacy, so claims the petitioner, is what violates her right to parenthood, and the response of the State, which relies on the distinction between a liberty-type right and between a right that has a correlative duty is in any case not an answer' (*ibid.,* at pp. 448-449).

The Adoption Law, like the Embryo Carrying Agreement (Approval of Agreements and the Status of the Child) Law, 5756-1996, create a comprehensive system for realizing the right of parenthood in a certain manner, and even though most of the arrangements in these Laws fulfill the criteria of the limitations clause, it cannot be said that they involve no violation of the right to parenthood.

6. The major problem attaching to the right to parenthood, in the context of adoption, concerns the great importance of the best interests of the child. On this matter, I agree with my colleague the President that the question of the best interests of the child ought not to be examined at the stage of actual recognition of the constitutional right, but rather, when we turn to the task of balancing and we examine the degree of protection afforded to this right. No one disputes that the best interests of the child is the crux of the legal adoption arrangement. A

consequence of this is, as stated, that most of the statutory arrangements will fulfill the constitutional balancing criteria. But it must again be stressed that the upholding of values, interests and competing rights, however strong they may be, should not affect the upholding *per se* of a distinct constitutional right, but only the degree of protection it is afforded. As I pointed out in another matter:

> 'The actual definition of the right to establish a family should not be restricted. Even if it is not possible, due to permitted constraints, to enable the full realization of the right, this does not detract from recognition of the right. My colleague the Vice President notes that the constraints that are imposed on the constitutional right here do not touch upon the "kernel" of the right; rather, they are at its periphery. He therefore would define the disputed right in a more focused manner. My view is different. Even if this is a matter of a "peripheral" aspect of the right – as he assumes – this does not affect the definition of the right. The starting point must assume a generous definition. The restriction – which is likely to take into account the position of the matter on the periphery of the right or at is heart – must be taken into account in the framework of application of the limitations clause. The balance between the rights of the individual and the public interests, or between [these interests] themselves, must be effected in the framework of the limitations clause (*Adalah v. Minister of the Interior* [2], at para. 8 of my opinion).

As stated, the petition before us is not the appropriate forum in which to decide on the constitutional questions that were raised, and the ruling on the substance of the petition below will focus on the arguments on the administrative plane.

The administrative plane

7. I, like my colleague the President, believe that the main problem with the maximum age difference rule lies in it being a rigid rule that does not allow for discretion to depart from it in appropriate cases. My colleague the President is of the opinion that negation of the possibility of deviating from the maximum age difference rule is incompatible with the accepted criteria of administrative law, and she dismisses the arguments of the State on this point one by one. I concur fully with the President's position on this matter, and adopt her words completely.

As the President stressed, the lack of flexibility in the arrangements established by the Authority make one wonder about the reasonableness and the proportionality of these arrangements. This is generally the case, and all the more so when the arrangement causes

real harm to a person's basic legal right. In our case, the arrangement established by the State is substantively detrimental to the aspiration for parenthood of those seeking to adopt, and in these circumstances, the competent authority must point to reasons bearing substantial weight in order that the arrangement pass the tests of reasonableness and proportionality.

8. Another matter is the relationship between the individual examination and the comprehensive arrangement. As a rule of thumb, it may be assumed that in cases such as that under discussion here, an individual examination will in most cases lead to a more precise, correct result than a comprehensive arrangement. Comprehensive arrangements, by their nature, are not adapted to all the possible circumstances, but are based on a general assessment, on a presumption concerning the appropriate rule. This is all the more true when we are dealing with the assessment of people, each of whom bears traits and characteristics peculiar to him. In the case of adoption, we find ourselves in a framework of an extremely complex task, the aim of which is to bring together separate people and make them into a family. There is, therefore, more than reasonable basis to assume that a meticulous individual examination, that weighs up all the relevant data, including, of course, the age of the applicant, will lead to a more correct answer in each individual case – more correct not only in relation to the applicants, but also, and primarily, in relation to the best interests of the child, for whom the most suitable arrangement will be found.

Indeed, sometimes the establishment of a sweeping arrangement, of which arbitrariness is an inseparable component, is unavoidable. But when is this so? When there is a clear advantage to such a sweeping arrangement – an advantage that outweighs the price it exacts. Thus, for example, it seems that there is a clear advantage to setting a minimum age for obtaining a driving license, which exceeds the advantage of individual examination. At other times, there are weighty reasons for recognizing the legitimacy of a sweeping arrangement. This is the case, for example, when the argument that it is impossible to conduct efficient individual examinations is justified (*Adalah v. Minister of the Interior* [2], per President Barak, at para. 89; per Vice President Cheshin, at para. 109). However, the case before us is one in which a meticulous, comprehensive and individual examination of each adopter **actually takes place**, reflecting and confirming the position that there is a clear advantage to individual examinations on the question of the suitability of the prospective adopter. Thus, in any case, there is an examination, *inter alia*, of the "eligibility and suitability of the person seeking to be an adoptive parent . . . the family background of the applicant and his present position . . . his social environment . . . [and] other matters to be determined by the Minister of Labor and Welfare,

including a psychological assessment of the applicant and his family" (s. 28H of the Adoption Law). Similarly, in every case of an application to adopt, determination of the eligibility of the applicant is made in light of an individual report drawn up by a social worker (s. 28N of the Adoption Law). This examination places the emphasis on the concrete adopter and his suitability to adopt; it comprises many criteria that are all weighed, and in light of the result, the decision is made as to whether the applicant is indeed suitable to be an adoptive parent. In these circumstances, there must be special justification for deviating from the individual examination that already exists, justification which, as elucidated in the opinion of President Beinisch, apparently is not present in our case.

My colleague Justice Procaccia holds that the question of the age difference between the adopter and the adoptee is a question for professionals, subject "the clear discretion of the competent authority". Indeed, the question of the effect of the age difference on the adoptee is a relevant question, which falls, as one of the considerations, within the discretion of the Authority. We are not denying the importance of the age difference, but we disagree with setting an age difference as a sweeping arrangement from which there can be no deviation in appropriate cases. A study of the expert positions presented by the respondents reveals that they recognize the importance of the age difference to the wellbeing of the child, but they do not address the position of the age difference within the whole set of relevant considerations relating to the child's best interests. Calculation of all the data sometimes raises complex questions. For example, is it better for the prospective adoptee that he be handed over to a family in which one of the couple is 47 years old and the other is 70 years old, or to a family in which the couple are both aged 49? Would it be justified to hand over a child for adoption to adopters who are immeasurably superior to other candidates in all other criteria (such as socio-economic position, and personality structure) but they are just over the maximum age limit? No satisfactory answer to these difficult questions has been provided by the respondents. Nor has a satisfactory answer been given to the possibility of exceptions in domestic adoption as opposed to their absence in intercountry adoption, or to the fact that the ideal age difference is not the same for domestic and intercountry adoption, and even in intercountry adoption itself, the age difference was changed from 45 to 48. These matters seem to hint that there is no unequivocal justification for setting a comprehensive, sweeping arrangement on the question of the age difference from the point of view of both the best interests of the child and the interests of the applicants. The number of different arrangements in comparative law regarding the desirable age difference, as cited at length in the pleadings of both the petitioners and

the respondents, is another indication that there is no one accepted age difference that crosses boundaries and experts. The only professional reference on the part of the respondents to the question of the possibility of exceptions to the rule is found in the summary of the position of the relevant committee that was drawn up by Professor Joseph Tamir, part of which was quoted in the opinion of my colleague Justice Procaccia. The opinion of my colleague the President contains a clear and incisive response to these arguments, and I can only concur with her on the matter.

10. My colleague the President attributed weight to the argument of the respondents whereby in view of the fact that the process of intercountry adoption is implemented primarily by private adoption associations, and due to the concern that the competition between the adoption associations may be detrimental to the child's interests, the existence of rigid rules for checking the eligibility of prospective adopters is justified. In my view, this argument cannot change significantly the answer to the question of the reasonableness and the proportionality of the maximum age difference rule. As stated, when an adoption association examines an application for adoption, it must check many parameters, some of which were mentioned above. This examination is conducted for each case individually, and weighing up of all the parameters is done with recourse to the report of the social worker. The process as a whole is subject by law to close oversight by the authorities. The concern expressed by the respondents is relevant to the process of adoption in general, but a sweeping, unequivocal rule that does not take into account other parameters for checking the eligibility of the adopter, exists – according to the material before us – only with respect to the question of the age difference. I have not found a good reason for the fact that according to the respondents, the private adoption associations can be relied on to weigh up the information regarding the applicants in an appropriate fashion, but they cannot be relied on to depart from the maximum age difference rule in suitable cases only. Similarly, I am not convinced that the regular oversight, which is designed to ensure that the individual examination be conducted in proper fashion, cannot ensure a similar result on the question of the significance of age for the eligibility of the adopter.

In view of all the above, I struggled hard with the question of whether there is no choice but to declare the nullity of Rule 4(b)(1) of the Rules and Professional Guidelines for the Operation of Recognized Non-profit Organizations by virtue of the Adoption Law. However, as stated, broad validation of the position of my colleague the President may obviate the need to totally nullify the rule. Indeed, empowerment of the appeals tribunal assumes necessarily that the rule itself is not absolute, for otherwise the tribunal would not be authorized to depart

from it. One way or the other, whether the rule in its strict interpretation cannot stand or whether it stands because of the interpretation proposed by my colleague the President – the result is the same: it is possible, in appropriate circumstances, to approve adoption at the stage of the final examination even if the age difference exceeds that set in the rule, as proposed by my colleague the President.

Decided by majority opinion, as stated in the judgment of President Beinisch, Vice President E. Rivlin concurring, Justice A. Procaccia dissenting.

No order was issued for costs.

28 Adar 5769
24 March 2009