



## Executive Failures and Judicial Policy in Israel's Immigration System

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*This paper presents the executive branch of government's severe practical failures regarding immigration that have not thus far been researched, as well as a review of judicial phenomena that create negative incentives and lead to the rise in illegal settlement in Israel. These failures amount to an actual threat to the long-term implementation of the Return policy governing the population in the State of Israel as the nation state of the Jewish people, requiring direct intervention by democratically elected policy makers.*

The **first** chapter reviews Israel's immigration policy as written into the Law of Return, its legal foundation, and the exceptions to the rule.

The **second** chapter presents the data on foreigners in Israel, updated to the second quarter of 2020, alongside an analysis of trends, estimates and specialized measures for drawing conclusions.

The **third** chapter examines the various failures in light of the Law of Return, tracing their origins and offering recommendations for resolution.

### Summary:

Israel has a clear immigration policy: the 1950 Law of Return. This policy states that Israel, as the national state of the Jewish people, is open to all Jews and closed to all others. Since the establishment of the state, large waves of immigration (*Aliyah*) have been incorporated into the citizenry on the basis of the Law of Return; without it, Israel as a nation state in its current form would not exist. Alongside this general policy, the 1952 Entry into Israel Law authorizes the Minister of Interior to grant citizenship to foreign citizens on a special case basis at his or her discretion. The Israeli government is also authorized to make group exemptions and grant citizenship to whomsoever meets the criteria it so sets. Both are localized events that have no further implications for the general "Return" policy.

Despite the great clarity of the law and the immigration policy, the rate of illegal residence in Israel in addition to the estimated number of Palestinian illegals and the general birth rates of foreigners stands at 2%, twice as high as in Europe. Recent years have shown some improvement - with a decrease in the number of illegals between 2014-2020 - but there was also a 300% increase in the number of legal proceedings involving immigration. These proceedings grant temporary relief that allows the foreign claimants to remain in Israel for the duration of their case, and the rate of success among these suits is high, considering that legally, all applicants are residing unlawfully in the country.

This paper presents three components that have had an impact on the erosion of the “Return” policy and contribute to the increase of illegal immigration to Israel:

- (A) **Failures in executive function.** The Return policy requires management, maintenance, and application. Wherever the executive fails at its task, the ability to eradicate illegal migration is impaired.
- (B) **Government legal advisors and the Department of Justice** usurp the authority to shape policy from the public and its representatives in violation of the law and the principles of democracy.
- (C) **The Court**, by intervening in the unlimited discretion of the Minister, generates a set of norms parallel and contradictory to the law. Thus the Court pries the immigration gates open ever wider to ineligible applicants by judicial generalizations from specific ministerial decisions. The failing here is twofold: The Court erroneously generalizes from singular cases and thus encroaches on the Return policy; and it transfers discretion on immigration to jurists who are removed from the democratic decision-making.

Judicial policy effectively shapes entire sections of the immigration legislation, and in fact, creates its own set of laws out of whole cloth. Nevertheless, the responsibility, accountability, and authority over the issue of immigration lies with the executive branch of government, derived from the democratic decision mechanism, and there is much value in studying its function in this regard. This paper does not discuss direct HCJ judicial review of legislation and policy, which must and has been addressed separately, but rather examines issues of judicial policy and government execution.

These major issues are:

- (1) The judicial policy of granting temporary relief.
- (2) The failure to collect court costs awarded to the State in the Appeals Tribunal, highlighting the need to create an effective collection mechanism.
- (3) The failure of distribution in the Supreme Court immigration appeals cases so that virtually all cases reach only two specific Justices.
- (4) The failure to deduct foreign workers’ deposit money, which should be an easy step for the government to take, as it is already held by the state.
- (5) The Court’s hollowing out of the legal procedure and its expansion of humanitarian grounds for consideration, forcing the Minister to consider them as well in all cases of exceptions to the Return policy that are at his discretion.
- (6) The manner in which the Court disregards the law’s provisions. The presentation of the special judicial circumstances in immigration that allows the Court to formulate a set of parallel – and contradictory - laws; and the obligation of the Minister to consider them in cases of exceptions to the Return policy.
- (7) The weakness of the State’s litigatory policy, underscoring the need to design the Ministry of Interior’s legal representation in Court in a way that represents the Minister’s policy and the Return policy as the official immigration policy in Israel.
- (8) The development of the “good of the child” saga, and the central role of the Ministry of Justice in immigration issues, in an attempt to shift judicial doctrines away from their original context in order to erode the judicial validity of the legal Return policy, which should be under the purview of the Ministry of Interior and the Population and Immigration Authority alone.
- (9) The sporadic government decisions that repeatedly exempt different groups from the Return policy, highlighting the need to retain exemption authority in the hands of the

Minister of Interior on a case-by-case basis, so that the Return policy remains the customary, binding general policy.

(10) The failure to set government goals for immigration regarding illegal presence of all kinds.

**Recommendations:**

- Legally restrict temporary judicial remedies solely to cases that have some grounds for justification, such as the inability to conduct their case from their home country.
- Demand payment of court costs to the state in all cases of frivolous suits and create a mechanism to collect all damages awarded to the state.
- Halt the process by which 96% of the cases are presided over by two specific Justices.
- Deduct foreign workers' deposits in cases of illegal residence.
- The Minister of Interior should (i) appoint a project manager to consolidate and direct all government representation on immigration issues; (ii) establish an internal procedure compelling the Minister's approval for: any new grounds for recognition of refugee status; any government concession to grant status in the course of legal proceedings; lateral administrative commitments; any choice to forego an appeal on judicial pronouncements that have long term repercussions, etc.; (iii) demand independent representation in the Supreme Court whenever necessary. State representatives must argue that the protected constitutional right is the collective Return policy. They must demand the Court return every administrative case to the Minister of Interior for a final decision – even after judicial review. The only authority for granting or revoking status lies in the hands of the Minister of Interior.
- Halt the long line of government decisions eroding the immigration policy.
- Set immigration goals – the government has yet to set. A recommended five prong program is – (1) reducing the number of tourists whose visa expired from 58,000 to 5000; (2) reducing the number of infiltrators by a yearly 6,000; (3) reducing the number of illegal foreign workers by 2,250 each year; (4) increasing deportations from the country to a minimum of 10,000 a year; and (5) conducting a campaign to encourage voluntary departure.

[Full paper in Hebrew](#)