



**Israel:
The Sheinbein's Decisions, the
Extradition Law Amendments,
and Recent Court Decisions**

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ISRAEL

THE SHEINBEIN'S DECISIONS, THE EXTRADITION LAW
AMENDMENTS, AND RECENT COURT DECISIONS

I. Court Decisions in the Sheinbein Case:

A. Introduction: Sheinbein's Citizenship Status

Samuel Sheinbein was born in the United States. He was an American citizen. Israel's highest court determined that he had spent all his life in the United States, where he grew up and that his native language was English. These facts, in addition to the U.S. citizenship issue, were considered very significant by the minority opinion of Israel Supreme Court, as will be discussed further.

Israeli courts, both the Jerusalem District court as well as the Supreme Court, recognized that Sheinbein was also an Israeli citizen by virtue of being born to an Israeli citizen.

B. Israel-United States Extradition Agreement

The Convention on Extradition Between the Government of the United States of America and the Government of the State of Israel¹ (the "Extradition Treaty") provides for reciprocal extradition of persons charged or convicted of certain offenses. The offense of murder is listed as such an offense. Murder is also listed as an offense which may give rise to extradition under the second schedule in the Israeli Extradition Law.

The Extradition Treaty of 1962² specifically provides:

A requested Party shall not decline to extradite a person sought because such person is a national of the requested Party.

C. Extradition under Israeli Law at the Time Sheinbein's Extradition to the United States was Requested

Israel's Extradition Law, 5714-1954,³ as amended, regulates the extradition of persons from Israel to requesting countries. At the time of Sheinbein's legal proceedings,

¹ 14(2) U.S.T. 1707 (1963).

² *Id.*, art. IV, at 1710.

³ 8 LAWS OF THE STATE OF ISRAEL, L.S.I. 144, (5714-1953/54).

the law provided that a person might be extradited if:

(1) an agreement providing for reciprocity as to the extradition of offenders exists between Israel and the state requesting extradition...

(2) [the individual] is accused or has been convicted in the requesting state of an offence of a non-political character and which, had it been committed in Israel, would be one of the offenses set out in the Schedule to this Law...

In 1978, the Israeli Parliament (*Knesset*) passed an amendment to the Extradition Law. Section 1a was added, it states:

An Israeli national shall not be extradited save for an offence committed before he became an Israeli national.⁴

The amendment seems to contradict the commitment undertaken by Israel in the 1962 Treaty. Under Israeli law, the 1978 amendment takes precedence over the 1962 commitment. This is because as in British law, “conventional international law does not become part of Israeli law through automatic incorporation, but only if it is adopted or combined with Israeli law by enactment of primary or subsidiary legislation from which it derives its force.”⁵ Parliament has the authority to legislate and amend earlier laws. The 1978 amendment thus would supersede the 1962 obligation if the two were deemed inconsistent and irreconcilable.

D. The Jerusalem District Court Decision Declaring Sheinbein as Subject to Extradition

In a 74-page decision, Judge Ravid analyzed the nationality status of the respondent and the implications of this status on whether or not he should be subject to extradition to the U.S.

1. Sheinbein’s Nationality

Evaluation of all relevant evidence concerning the acquisition of Israeli nationality by the grandparents and its transfer to the respondent resulted in a decision in favor of recognition of his Israeli nationality. Evidence submitted in the trial showed that the State of Israel had recognized the nationality status of members of the Sheinbein family. They, in turn, believed in good faith that they were Israeli citizens. This belief contributed to a change in their situation. Both grandparents returned to Israel. The respondent’s father continually maintained contacts with the State by applying for and being granted an Israeli passport, keeping in touch with the

⁴ Offenses Committed Abroad (Amendment of Enactments) Law, 5738-1978, 32 L.S.I. 63, (5738-1977/78).

⁵ INTRODUCTION TO THE LAW OF ISRAEL 386 n. 9 (A. Shapira and K. De Witt-Arar, eds., 1995).

army authorities, making visits, and even trying to settle there.

According to Judge Ravid, a public body owes a duty of decency. Hence, it is estopped from cancelling earlier decisions of the Minister of the Interior to recognize the grandparents and the father as citizens. Moreover, there is a presumption that the decisions of a public body are legal. Therefore, even if there was a cause under Israeli administrative law to cancel the Minister of Interior's decision recognizing the Sheinbeins' nationality,⁶ there is no basis to hold that the respondent is not an Israeli citizen by birth for reasons of delay, reliance, estoppel, lack of decency, and lack of good faith.

2. The Extradition Status of Sheinbein

After concluding that the respondent is a citizen within the meaning of Nationality Law, 5752-1952,⁷ Judge Ravid analyzed whether a citizen under the latter law is deemed a citizen for the purpose of protection under the Extradition Law.

Judge Ravid concluded that the amendment of section 1a of the law puts the State in a negative light. By amending the law, the State committed a grave breach of section 4 of the Extradition Treaty with the United States. Despite the amendment, the treaty was never amended. Under international law, Israel violated section 27 of the Vienna Convention on the Law of Treaties, 1969. In addition, the amendment, in its current form, creates many difficulties: it is impossible to force witnesses to come to testify in Israel and the expenses involved in bringing them are large. Furthermore, the Israeli legal system, in which cross examination is a basic right, prevents the submission of testimonies in writing as evidence.

Judge Ravid held that there is a need, if possible, to minimize the friction between the treaty and the law in order to not release criminals from punishment and in order to not impose a financial burden on the State and the public. The judge found that although a treaty not adopted by domestic law is not part of the customary law, it is necessary to presume that domestic law does not contradict international law.

According to Judge Ravid:

The State of Israel is a member of the family of nations. It is proper that Israel not breach its international obligations. Therefore, between two possible interpretations of a piece of legislation, one should choose that which will fulfill the State's international obligations and not the one which will violate them. The domestic legislature may, in the absence of a constitutional restriction, legislate a law negating public international law. In this situation, the law will be valid in customary

⁶ The Government argued that it was granted based on details that were deliberately not disclosed to the Minister.

⁷ 6 L.S.I. 50, (5712-1951/52).

law, even though the State will violate its obligations under international law. But as a general rule, one should not assume the domestic law has any goal contradictory to the rule of law in the international arena.

The apparent contradiction between the provision of the Israeli extradition law and the Extradition Treaty can be limited by recognizing the central purpose of the law, which puts an emphasis on the international obligations of the State.⁸ This consideration, according to judge Ravid, justifies an interpretational presumption that a “citizen” in the Extradition law means a person who has a linkage to Israel. The judge does not define “linkage” in order to allow for flexibility in future cases. In the present case, the judge holds; the respondent had an American passport, which he used when he arrived in Israel. Aside from numerous visits to Israel, he had no other connections to the country.

3. The Extraditability of Sheinbein

Judge Ravid held that although the respondent is an Israeli citizen by birth he is extraditable because a citizen under the Extradition Law is a person who not only has acquired a status of an Israeli citizen but also has a linkage to it. The reasons for this conclusion are:

- the different goals of the two laws: one puts emphasis on international cooperation in fighting crime, the second on the relationship between the citizen and the State
- consideration of the basic principles of the system and, among them, preventing the breach of the extradition treaty between Israel and the United States.
- the close connection between the Extradition Law and extradition treaties which this Law aims at materializing.

A different interpretation would prevent justice from being carried out.

The Court declared Sheinbein as extraditable for all the above reasons.

E. The Supreme Court Split Vote Decision Overturning the Jerusalem District Court Ruling

Sheinbein appealed this decision to the Supreme Court claiming that the Extradition Law does not require a linkage in addition to citizenship to shield a person from extradition.

Alternatively, in view of the appellant’s being a minor, any linkage, if required, must be determined based on the linkage of his father to Israel and not his own. Finally, if the required linkage is that of the appellant himself, he should be allowed to present evidence establishing such a linkage.

In a split vote on February 25, 1999, Israel’s Supreme Court overturned the Jerusalem

⁸ See section 2 of the Extradition Law regarding reciprocity in extradition between Israel and requesting countries.

District Court's ruling that Sheinbein could not be extradited even though he is an Israeli citizen. The following is a summary of the different opinions provided by the five justices who sat in the appeal.

1. Majority Opinion

Justice Or: According to Justice Or, the appellant is an Israeli citizen and therefore is not extraditable. The Law does not require any additional linkage to Israel.

Justice Or analyzed the legislative history of the amendment which creates the exception to extradition of Israeli citizens and found that the drafters of the amendment clearly intended to apply the exception also to Israeli citizens residing abroad. He also concluded that citizenship is a status determined by law and cannot be interpreted differently in different laws. This is a status from which rights and obligations arise.

In the absence of an expressed legal provision, an exclusion of certain citizens from the rights and obligations associated with full citizenship damages the status of citizenship itself. It is indeed fair to ask whether there is any logical justification for the protection of citizens who do not reside in Israel and have no real linkage to the State. However, these questions are relevant in determining the preferred law but not the existing law. These considerations cannot justify an interpretation which is clearly contradictory to the language of the law and its objective. The undesired outcome of shielding Israeli citizens who have no linkage to Israel influenced the decision of the government to submit a bill to the *Knesset* designed to amend the Extradition Law and apply immunity from extradition in cases where two commutative conditions are met: citizenship as well as residence in Israel. The submission of the bill is in itself an indication that the current law does not require residence in Israel as a precondition to immunity from extradition.

Based on the above analysis, Justice Or accepted the appeal and held that Sheinbein is not extraditable under section 1a of the Extradition Law.

Justice Matsa and Justice Ilan concurred with Justice Or.

2. Minority Opinion

Chief Justice Barak: Interpretation of terms in legislation should consider the objective the legislation it is intended to serve. A study of the extensive literature on extradition laws in foreign countries indicates three major reasons behind banning the extradition of citizens. The first reason is that it would be unjust to adjudicate a person in a country whose laws, culture, and language he/she does not know. The second reason is that the country of citizenship owes a duty towards its citizens to defend them from a foreign legal system, and make sure that they would be adjudicated by its own legal system. The third reason is that foreign law should not be trusted to do justice with a person who is not a citizen.

An interpretation of the term "Israeli national" in the Extradition Law in light of the above results in the conclusion that the Law prohibits the extradition only of

a citizen who maintains a real linkage with the State of Israel. Only such a linkage can justify a determination that the “natural judges” are Israel’s judges, and that the State of Israel owes a person a duty of adjudication under its laws. The mere citizenship status under the Nationality law is not sufficient. According to Chief Justice Barak, a person who holds a foreign citizenship as well as a linkage to that country cannot argue that it would be unjust to adjudicate him under the laws of that country, whose culture he/she knows and to which he/she is so well connected.

A limited application of the citizenship exception to extradition coincides also with the special purpose of the Extradition Law which is the implementation of international cooperation in fighting crime. In addition, the shielding of a large number of Israeli citizens who own a second citizenship and live abroad does not coincide with the purpose of the Extradition Law and damages Israel’s image. It also creates a reality where defendants against whom there is incriminating evidence in the requesting country walk freely in Israel without trial, and by this endanger the public safety in Israel. Finally, there is a gap between the international obligation undertaken by Israel in the treaty with the United States and the Israeli extradition law. This gap results in a breach of Israel’s international obligation. A proper interpretation of domestic law needs to resort to a restrictive application of the citizenship exception only for special circumstances where there is a real link between the Israeli citizen and the State of Israel.

The linkage which is required from an Israeli citizen in order to be subject to the exception from extradition is an effective one. Israel should be the center of that citizen’s life. He/she should participate in its life and tie his/her fate to the fate of the State. Evidence presented to the Jerusalem District Court did not indicate that Israel was the center of Sheinbein’s life or that his linkage to it was very strong. Chief Justice Barak held that the appellant should be allowed to present additional evidence to that court with regard to the nature of his linkage to Israel within 15 days.

Justice Kedmi: Justice Kedmi concurred with the Chief Justice’s opinion that the term “Israeli national” in section 1a of the Extradition Law applies to an “effective” citizenship compared with a mere “formal” one, and that the meaning of an effective citizenship is the existence of linkage to Israel, such that makes Israel the center of the life of the citizen, who participates in the State’s life and ties his fate to the fate of the State.

Regarding the legislative history of the amendment which created the exception, Justice Kedmi concluded that although the issue of immigrants from Israel was raised in the parliamentary debates, the legislators did not limit the discretion of the court in interpretation of the term “Israeli national.” The legislature did not specify in the law that the meaning of the term is the same as in the Nationality Law. Therefore, the legislative history does not rule out an interpretation requiring linkage to the State in addition to formal citizenship. Furthermore, making immunity from extradition conditioned upon the existence of effective citizenship does not create a different

status of citizens, it simply limits the immunity to those citizens who prove linkage to the State in addition to citizenship.

In response to the majority argument that the submission of a bill requiring a citizen to prove actual residence as a precondition for immunity is an indication that current law does not require citizen such, Justice Kedmi holds that effective citizenship or a linkage is not manifested by mere residence.

F. The Result

Although Sheinbein succeeded in using the loophole in Israeli law created by the 1978 amendment, he was subjected to the jurisdiction of the Israeli court where he was indicted for his part in the slaying and dismemberment of Alfred Tello Jr. in Maryland. On October 24, 2002, the Tel Aviv District Court approved a plea bargain, giving Samuel Sheinbein 24 years in prison. Judge Goren commented that Sheinbein had successfully manipulated the law. He held: "There is no doubt that his [Sheinbein's] entanglement in criminal activity was the sole and immediate factor that motivated him to come to Israel."⁹

II. The Recent Amendments of the Nationality Exception in the Extradition Law

Following the Sheinbein's trial, the Knesset passed two amendments in 1999 and in 2001. The current text of the law reads.¹⁰

1a.

(A) A person who committed an extraditable offense under this law and at the time of committing the offense¹¹ is an Israeli citizen and a resident shall not be extradited unless the following two conditions are met:

(1) The extradition request is designed to bring the requested person to trial in the requesting state;

(2) The state requesting the extradition agreed in advance to return the person back to the State of Israel for incarceration, if he was convicted and sentenced for imprisonment.

(B) The provision of subsection (A) will not prevent an Israeli citizen from forfeiting his return to the State of Israel for incarceration.

⁹ Z. Harel, *Court Approves Plea Bargain, Giving Sheinbein 24 Years*, HA'ARETZ NEWSPAPER, online edition, Oct. 25, 1999.

¹⁰ Available on Takdin (Juridisc- Legal Database by CDI Systems). Translation from the Hebrew by author, R.L.

¹¹ The determining time is submission of the extradition request for requests submitted prior to May 24, 2001.

(C) The provisions of section 10 of the Penal Law, 5737-1977,¹² will apply, subject to necessary changes, to incarceration in Israel under this section.

III. Two Recent Decisions Interpreting the Amendments

A. Criminal Appeal 3025/00 *Sharon Harosh v. State of Israel*, 54(5) Piske Din 111 (5759-1999) Decision of the Supreme Court sitting as a Court of Criminal Appeals, rendered on September 15, 2000

1. Facts and Issues for Consideration

The appellant is an Israeli citizen who has resided in New York since 1991, where he married an American woman in 1993 and had two children. His 1994 request for permanent residence in the U.S. was approved in 1996. In 1998, however, the appellant left the United States and arrived in Israel with his family. The date of his departure from the U.S. coincides with the opening of an investigation of the appellant and others by U.S. authorities on suspicion of defrauding the elderly and exerting from them about half a million dollars, and the freezing of his bank account. Upon their arrival in Israel, the appellant and his children obtained a status of "returning residents," while his wife obtained an *Oleh* (immigrant visa under the Law of Return) status. The couple purchased a house in Israel where they resided at the time of the court hearings. The appellant bought a car and made necessary arrangements with the army authorities and the Social Security office.

The U.S. authorities filed Federal and state indictments against the appellant on September 23, 1998 and on February 1, 1999 and requested his extradition in October 1999. The appeal centers on the interpretation of the 1999 amendment of the Extradition Law.

There was no dispute that the appellant was an Israeli citizen and that the offenses he was accused of were committed at the time he was an Israeli citizen. There is similarly no dispute that the United States did not agree in advance to transfer the appellant back to Israel for his incarceration. The extradition of the appellant was therefore possible only if the new law applies to his case, and if at the time the extradition request was filed he was not an "Israeli resident."

2. Holding

The 1999 amendment of the law applies to the circumstances of this case.

The extradition requests were filed with the District Court after the new law had already entered into force. Therefore, the application of the new law to the

¹² Laws of the State of Israel, Special Volume, Penal Law, 5737-1977. Section 10 provides instructions regarding penalties imposed outside of Israel.

circumstances of this case is a legal retroactive application of the law. This conclusion is based on both the intent of the legislature and the law, as well as the accepted rule that the presumption against acquired rights does not apply to procedural laws.

Chief Justice Barak held that the legislature's intent in this case was to extend application of the new law to Israeli citizens that committed offenses prior to its application. Furthermore, according to the new law extradition will be permitted if the person was an Israeli citizen and a resident at the time of filing for extradition, and not at the time of committing the offense.

In addition, an application of the new law to Israeli citizens that committed extradition offenses prior to its enactment does not create a criminal liability that had not existed before. Rather than establishing liability, the extradition law assumes the existence of double criminal liability, both in the requesting state as well as in the requested state. The effect of the new law is merely in guaranteeing implementation of criminal liability and assistance to the international community in its war against crime. The court rejected the claim that the prior law created expectations for Israeli citizens who committed extraditable offenses outside of Israel and believed they could avoid punishment by escaping to Israel. Such expectations, the Court held, do not deserve protection and cannot be balanced against the need to guarantee the efficiency of extradition. Moreover, the expectations were obviously groundless since the offenders faced the danger of not only getting arrested prior to their arrival in Israel, but also the danger of facing criminal trial in Israel in case they succeeded in arriving there.

Barak distinguished between substantive law (in which the presumption against harm to acquired rights enjoys significant weight) and procedural law (in which such a presumption does not apply). Extradition laws are considered procedural laws, and therefore not subject to the above presumption. In addition, extradition under the new law depends on the Israeli nationality and residence at the time of filing the extradition request and not at the time of committing the offense.

The appellant was not "an Israeli resident" at the time of filing of the extradition request.

The Court held that the term "Israeli resident" must be interpreted according to the purpose of the law. The 1999 amendment law is based on the idea that an "Israeli resident" has a real nexus to the State of Israel, the center of his life and destiny.

A real nexus is reflected in the sum of his/her contacts (subjective and objective) with the State of Israel. Residence for the purpose of the extradition law is acquired by a continuing status. Mere presence of an Israeli citizen outside of Israel does not negate his/her residence. For example, an Israeli student who studies abroad continues to be an Israeli resident for the purpose of the extradition law. Israeli residence will cease if that student completed his studies and he continues to reside and work in the foreign country, where he marries a wife, his children are born and he acquires a status of a resident. If this citizen returns to Israel, he may start a new process

of linking to the State of Israel, by slowly renewing old links and creating new ones. This process of reestablishing residence requires the accumulations of subjective as well as objective links which detach the resident from the foreign state in which he resided and relocate the center of his life again to Israel.

The above analysis raises the question whether an Israeli citizen who left Israel and lost his status as an “Israeli resident” may reacquire his status as an “Israeli resident” if he escapes to Israel from fear of being brought to justice in the foreign country. The Court held that the mere reason of escaping foreign justice does not in itself negate the development of new links with the State of Israel, and reestablishing it as the center of his life. The reason for the escape, however, strongly shifts the balance towards the temporary nature of the stay in Israel. To be convinced otherwise, it needs to be concluded that the stay in Israel is not temporary until the danger is removed, and reflects a real choice to transform Israel into the person’s center of life.

In the circumstances of this case the appellant’s stay in Israel and his separation from the United States were so short that it could not be inferred that the center of his life was transferred from the United States to Israel. Justice Barak reaffirmed the holding of the District Court that the burden of proof that a person is not an Israeli resident is on the Attorney General, who in this case proved it. The appellant did not bring any information within his personal knowledge on his linkage to the United States and Israel to change the conclusion that he was not an Israeli resident. The appeal was therefore rejected.

B. Criminal Appeal 7840/01 Michael Akva v. the Attorney General¹³—Decision of the Supreme Court Sitting as a Court of Criminal Appeals, rendered on July 17, 2002

1. Facts and Issues for Consideration

The appellant, an Israeli citizen residing since 1989 in the United States, where he married a U.S. citizen, and where his children were born, was indicted in 2000 in New York for inside trading and conspiracy to commit fraud in stock. After being arrested following the indictment in the U.S. in March 2000, the appellant was released based on a \$150,000 bond and a deposit of his passport. In September 2000, however, the appellant violated the conditions of his bail, and while using an additional German passport in his possession, under a different last name, left the United States and arrived in Israel. The U.S. requested his extradition nine months after his arrival in Israel, based on its extradition treaty with Israel. The appeal centers on the appellant’s claims that the offenses for which his extradition was sought were not extraditable offenses within the Extradition Law and the U.S. - Israel Extradition Agreement and that being an Israeli resident, he could not be extradited without getting the United States’ consent to

¹³ Available on Takdin (Juridisc- Legal Database).

his return to Israel for the penalty phase.

2. Holding

Justice Dorner held that there was sufficient evidence for indicting the appellant as required by section 9(a) of the Extradition Law. In addition, the appellant could be indicted in Israel in an offense of inside trading based on partnership with the principal offender who in this case became state witness for the United States' prosecution.

Being recognized as an offense in both countries, as well as covered under the U.S. - Israel Extradition Agreement, the offense for which extradition is requested it is an extraditable offense. The Court further rejected the appellant's claim that he was an Israeli resident under section 1a of the Extradition Law. Residency under the latter provision is determined by a combined test which includes a subjective element of the intent of the requested person to settle down in Israel, and an objective one based on factual links created by the requested person and Israel. The objective circumstances of this case indicate that the appellant chose the United States as his place of residence, arrived in Israel while using a German passport, with his American wife and children in order to escape U.S. justice. During his short stay in Israel he did not commit any significant actions indicating acquisition of residence. The appeal was therefore rejected.

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