THE SUPREME COURT IN THE CAPACITY OF THE HIGHT COURT OF JUSTICE

HIGH COURT OF JUSTICE 7385/13
HIGH COURT OF JUSTICE 8425/13

Before:

The Honorable Chief Justice A. Grunis
The Honorable Senior Associate Justice M. Naor
The Honorable Justice E. Arbel (retired)
The Honorable Justice S. Joubran
The Honorable Justice E. Hayut
The Honorable Justice Y. Danziger
The Honorable Justice N. Hendel
The Honorable Justice U. Vogelman
The Honorable Justice I. Amit

Petitioners in High Court of Justice 7385/13

Eitan – Israeli Immigration Policy Center, et al.

Petitioners in High Court of Justice 8425/13

1. Zari Gebreselaissie
2. Tadros Habithamarim
3. The Hotline for Refugees and Migrants
4. The Association for Civil Rights in Israel
5. ASSAF- Aid Organization for Refugees & Asylum Seekers in Israel
6. Kav LaOved – Worker's Hotline
7. Physicians for Human Rights in Israel
8. ARDC – African Refugee Development Center

Requesting to join in High Court of Justice 8425/13 as "Amici Curiae":

1. Kohelet Policy Forum
2. Concord Center

v.

Respondents in High Court of Justice 7385/13

1. The Israeli Government
2. The Prime Minister
3. The Minister of Defense
4. The Minister of Interior
5. The Minister of Public Security
6. The Minister of Finance
7. The Minister of Justice

8. The Minister of Economics
9. The Administrator of the Population and Immigration Authority
10. The Attorney General to the Government
11. The Head of Border Control in the Ministry of Interior

Respondents in High Court of Justice 8425/13

1. The Knesset
2. The Minister of Interior
3. The Minister of Defense
4. The Minister of Public Security
5. The Attorney General to the Government

Opposition to the Order Nisi

Date of the Sessions:	22 Tevet 5774	(May 25, 2013)
	4 Nissan 5774	(April 1, 2014)

In the Name of the Petitioners in High Court Justice 7385/13:	Adv. Doron Taubman

In the Name of the Petitioners in High Court Justice 8425/13:	Adv. Oded Peller, Adv; Yehonatan Berman; Adv. Anat Ben-Dor; Adv. Elad Kahana; Adv. Assaf Wiezen; Adv. Osnat Cohen-Lifshitz

In the Name of the Respondent in High Court Justice 7385/13:	Adv. Dr. Gur Blei

In the Name of the Respondents in High Court Justice 8425/13:	Adv. Yochi Gennisin; Adv. Ran Rosenberg; Adv. Yitzchak Barret; Adv. Noam Moulla

In the Name of Respondent 1 requesting to join as “amicus curiae” in High Court Justice 8425/13:	Adv. Ariel Erlich; Adv. Dr. Avishay Bakshi

In the Name of Respondent 2 requesting to join as “amicus curiae” in High Court Justice 8425/13:	Adv. Avinoam Cohen

JUDGMENT

Justice U. Vogelman

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I. *Introduction*

Over the last few years, tens of thousands of "infiltrators" from Eritrea and northern Sudan have entered into the State of Israel. The executive branch and the legislative branch were requested to cope with the consequences of this phenomenon in several manners – by means of establishing a "physical barrier" in the form of a fence on the southern border of the country and by means of what may be referred to as "normative barriers" through amending the legislation. The Petitions before us place criticism on two constitutional arrangements which were determined in primary

legislation regarding this matter. By virtue of the first arrangement it is possible to detain "infiltrators" in detention, who have had a deportation order issued against them for a period of one year and by virtue of the second arrangement it is possible to order the transfer of the "infiltrators" to an "open" Residency Center for an unlimited period of time. Are these arrangements constitutional? These are the questions pending our decision.

1. The two Petitions before us were set for a hearing before the extended panel and their review has been consolidated (according to the decision from December 25, 2013). The first petition (High Court of Justice 8425/13) criticizes the constitutionality of the Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Order), 5774 – 2013, legislation ledger 74 (hereinafter: *Amendment No.4 or* the *Amendment to the Law*) due to the infringement of the "infiltrators" rights. The second petition (High Court of Justice 7385/13) primarily criticizes the manner in which Amendment No. 4 is applied, whereby the basis of the claim is that the State is not acting sufficiently to secure the rights and safety of the South Tel Aviv residents as a result of the "infiltrators" phenomenon.

2. In the last few years, tens of thousands of people entered into Israel by means other than border patrol stations. In 2012, prior to the legislation of Amendment No. 3 of the Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 3 and Temporary Order), 5772 – 2012, legislation ledger 119 (hereinafter: *Amendment No. 3*) the "infiltrators" were placed in detention by virtue of the Law of Entry into Israel, 5712 – 1952 (hereinafter*: Law of Entry into Israel*), but were released after a relatively short period of time in light of the restrictions on the duration of detention according to the arrangements which are set in the Law of Entry into Israel. The legislation of Amendment No. 3 was designated to apply a unique, strict statutory arrangement upon the "infiltrators", more so than the arrangement applicable to the "infiltrators" by the virtue of the Law of Entry into Israel, in particular in light of the difficulty of clarifying the identity of those individuals that entered into the territory of the country without any identification documents and in an unrecorded fashion; in light of their entry to Israel which in the outset was unlawful (explanatory notes for the Proposal of the Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Order), 5774 – 2013, the Government's proposed law 122, p. 122 (hereinafter: *Explanatory Notes for Amendment No.4*)). Article 30A which was supplemented to the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714 – 1954 (hereinafter: the *Law or the Law for the Prevention of Infiltration*) which is within the confines of Amendment No. 3 permits detaining "infiltrators" in detention, when a deportation order has been issued against them, for a period of up to three years, subject to the grounds for release that were determined in the Law. This Court declared that the Article is unconstitutional and instructed that it be repealed (High Court of Justice 7146/12 *Adam v. The Knesset* (September 16, 2013) (hereinafter: the *Adam* Case)). As a result, the Knesset enacted Amendment No. 4 of the Law. There are two arrangements at the epicenter of Amendment No. 4: first, the matter of the re-enactment of Article 30A of the Law which was repealed by the *Adam* Case, by means of reducing the detention

period to a maximum of one year and additional modifications; and secondly, a normative arrangement under which it is possible to establish – as it was indeed actually established – a "Residency Center" for "infiltrators" (hereinafter: *Residency Center* or *Center* or the *Facility*), allowing for the possibility to transfer an "infiltrator" for whom it is difficult to deport (Article 32D(a) of the Law). In the "Holot" Facility, which was declared a Residency Center by virtue of Chapter 4 of the Law, correct as of April 30, 2014, there are more than 2,000 "infiltrators" being detained.

3. In the *Adam* Case we were requested to review the constitutionality of Amendment No. 3. Now, we are being requested to determine the constitutionality of Amendment No. 4. I will already state: that in my view, Article 30A and Chapter 4 of Amendment No. 4 do not pass constitutional scrutiny. With regard to the new version of Article 30A of the Law, as its precursor was repealed, it disproportionately violates the right of freedom and the right of dignity. Moreover, the establishment of a Residency Center unlawfully violates basic constitutional rights. Therefore, Article 30A and Chapter 4 of the Law for the Prevention of Infiltration should be repealed.

4. The following will be the order of events: first, we will review the principles of the judgment in the *Adam* Case. Thereafter, we will present the legislative modification of Amendment No. 4 which is at the epicenter of these Petitions. Later, we will review the claims of the parties in this proceeding. Finally, we will review two tiers of the Law – Article 30A and Chapter 4 of the Law – in light of the constitutional scrutiny tests.

5. Before proceeding, I would like to make a preliminary comment. The Law that we are examining in this case is the Law for the Prevention of Infiltration. An "infiltrator" (as such term is defined in the Law) is an individual who is not a resident, who entered into Israel by means other than border patrol stations that have been set-up by the Minister of Interior. In the *Adam* Case, I presented my stance that use of the adjective "infiltrate", for those same individuals to whom the statutory arrangement subject of our hearing is directed, is problematic. The term "infiltrator" was originally designated to describe those individuals who entered Israel for the purposes of executing terrorist attacks and crimes (para. 10 of my opinion). As I previously indicated there, the legislator's rhetoric selection does not comply with our tests, however, let us not begin to obscure the essence. We must remember that the claim is not that the "new" "infiltrators" requested to enter our territory to execute acts of hostilities, and that many of them are requesting to be categorized as "asylum seekers". Given this comment, in my opinion I will use – as I did in the *Adam* Case – the term that is designated in the Law.

II. *The Adam Case*

6. Currently, within the territory of the State of Israel there are close to 50,000 "infiltrators" who entered the territory by various ways. As will be detailed, the question of the traits of those same "infiltrators" is subject to polar controversy between the State and the Petitioners. According to the State's position, most of the population of the "infiltrators"

– are from northern Sudan and Eritrea – they are migrants who arrived in the State of Israel for financial motives, for the purposes of working, earning a living, improving their standard of life and supporting their families that remained behind in the country of their origin. The Petitioners, on the other hand, are of the opinion that the "infiltrators" are comprised of a population who are mainly requesting asylum and who escaped countries where their lives and their well-being were in genuine danger. Either way, for reasons which will be explained, most of the aforesaid population of "infiltrators" is deemed non-deportable from the territory of the country.

7. Massive and un-invited immigration of tens of thousands of "infiltrators" into the territory of Israel placed complex challenges before the country and its residents. In Amendment No.3, the legislator was asked to cope with the "infiltrators" phenomenon by means of enacting Article 30A of the Law for the Prevention of Infiltration. The primary provision of this Article – which was enacted as a temporary order – was that it would be possible to detain an "infiltrator" in detention for a period of up to three years. The decision in the *Adam* Case was given on September 16, 2013, by my colleague Justice *E. Arbel* (retired) (hereinafter, all references to the *Adam* Case, where there is no indication to any other author shall refer to her opinion). In the extended panel of nine justices, this Court determined that the arrangement set forth in Article 30A of the Law for the Prevention of Infiltration is not constitutional, in light of its infringement of the right to liberty which is anchored in the Basic Law: Human Dignity and Liberty (hereinafter also: the *Basic Law*). In the majority opinion, we instructed on the repeal of the arrangements that were set forth in the various provisions of Article 30A of the Law (my colleague, Justice *N. Hendel*, was of the opinion that there was only place to instruct on the repeal of Article 30A of the Law, and not the entire Temporary Order contrary to the ruling of the majority of the Justices). It was further determined that alongside the repeal of Article 30A of the Law, the detainment and deportation orders that were issued against the "infiltrators" – who, by its virtue, were held in detention in the "Saharonim" Facility – shall be deemed as issued in accordance with the provisions of the Law of Entry into Israel. Furthermore, it was determined to commence the process of individual examinations and release anyone being detained in detention immediately. The examination process concerning all "infiltrators" who were in detention was constrained to a period of 90 days commencing from the date upon which the ruling was given in order to grant the State the necessary period to organize, in spite of the unremitting infringement of the constitutional rights of the detainees throughout the entire period. In order to complete the picture, it should be noted that the Petitioners believe that the rate of the release following the *Adam* Case ruling is unsatisfactory. The two motions that were submitted according to the Contempt of Court Ordinance were rejected (decisions from November 7, 2013 and December 9, 2013), however, in its consolidated opinion, the Court noted that it is not comfortable with the current rate of the examinations and the decision-making process for the execution of the ruling.

III. *Amendment No. 4 – the Legislative Process, the Principles of the Amendment and its Application*

8. Following approximately two months from the date the *Adam* Case ruling was given, the Knesset passed Amendment No. 4 of the Law for the Prevention of Infiltration. According to the Explanatory Notes to the proposal of the Law, Amendment No. 4 was designated to provide an appropriate response to the illegal immigration phenomenon, since the normative framework set forth in the Law of Entry into Israel– which remained in tact following the repeal of Article 30A of the Law in the *Adam* Case ruling – does not provide the ability to handle this phenomenon in an effective manner. The principles of the Amendment are two-fold: one, Article 30A of the Law was declared unconstitutional in the *Adam* Case, was re-enacted in a manner whereby the maximum period of detainment permitted by its authority was reduced from three years to one year, and the Article would be applicable only to "infiltrators" that unlawfully entered into the State of Israel following the effective date of the new amendment. Within the framework of the second modification, Chapter 4 of the Law was supplemented, which permits declaring a certain facility as a "Residency Center" whereby the "infiltrators", who arrived in the territory of the State of Israel prior to the legislation of Amendment No. 4, and who cannot be deported from Israel at this time, would stay.

9. Amendment No. 4 was enacted in a rapid timeframe. On November 7, 2013, following the repeal of Amendment No. 3, the Government issued a memorandum of the Proposal of the Amendment of the Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. …) (Temporary Order), 5774 – 2013. On November 17, 2013, the Government approved the memorandum, and three days later on November 20, 2013, it placed before the Knesset, the Bill for the Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Order), 5774 – 2013, the Government's proposed law 122 (and hereinafter: the *Proposed Law*). An additional five days passed, and on November 25, 2013, the Proposed Law was approved during the first call in the plenum of the Knesset. The Interior Committee of the Knesset had four meetings with regard to the Proposed Law, where they presented the Government's position and the opinion of the Knesset's Attorney General, and the positions of various organizations were heard. On December 9, 2013, deliberations concerning the Proposed Law were held in the plenum of the Knesset, and upon its culmination the Proposed Law was approved during the second and third calls. Thus, Amendment No. 4 became a law.

10. From the date of the enactment of Amendment No. 4, it did not take long until the Residency Center, whose establishment was arranged in Chapter 4 of the Law, was occupied. Already on November 24, 2013, the Knesset passed a resolution in the matter of an "integrated and coordinated program for handling the unlawful phenomenon of infiltration." The Government instructed, inter alia, that the establishment of a Residency Center be completed by December 12, 2013; the various cabinet offices will prepare themselves accordingly and determine the manner in which the Facility or its surroundings will be operated; the Ministry of Finance would allocate the budgets. It was

further decided by the Government to cut-back on several cabinet offices in order to fund the operation of the Facility (Decision 960 of the thirty-third Knesset "an integrated and coordinated program for handling the unlawful phenomenon of infiltration" (November 23, 2013) (hereinafter: *Decision No. 960 of the Government*)). On December 11, 2013, in accordance with Article 32b of the Law, the Order for the Prevention of Infiltration (Offenses and Judgment) (Declaration of Residency Center for "infiltrators") (Temporary Order), 5774 – 2013, compilation of regulations 306 (hereinafter: the *Order* or the *Declaratory Order*) was published in the Official Gazette. In this Order, the Minister of Interior declared the "Holot" Facility a Residency Facility for "infiltrators" according to Chapter 4 of the Law. The day after the publication of the Declaratory Order of the "Holot" Facility (on December 12, 2013), the Population and Immigration Authority began transferring the "infiltrators" detained in detention and who were not yet released, as required by the ruling in the Adam Case, from the custodial facilities to the Residency Center, specifically the "Holot" Residency Center, in accordance with the provisions of Amendment No. 4.

IV. *The Petitions before Us*

A. *A Summary of the Petitioners' Claims in High Court of Justice 7385/13*

11. Petitioner 1 is a non-profit organization, where one of its goals is to educate and raise awareness concerning the subject of immigration to Israel and the immigration policy in the world (hereinafter: the *Foundation*). The Foundation operates to "aid the residents of south Tel Aviv with their struggle of the consequences of immigration and illegal immigration to Israel." Additional petitioners in this Petition are the residents of south Tel Aviv and property owners in the area, who believe that the "release of the "infiltrators" and the continuation of a non-enforcement policy of the prohibition of their employment, will certainly lead to material harm to their personal safety, their well-being and their freedom." In this Petition, which was submitted on October 30, 2013 (i.e.: following the *Adam* Case ruling and prior to the legislation of Amendment No. 4) it was argued that even though the *Adam* Case ruling recognized the distress that would be sustained by the Petitioners as a result of the release of the "infiltrators" in an unorganized fashion and indicated the possible courses of action to prevent any harm to the Petitioners, the State did not act to minimize the harm arising from the anticipated release of the "infiltrators". The Petitioners in this Petition also expressed their concern of the future release of approximately 2,000 "infiltrators" following the *Adam* Case ruling, and from their anticipated arrival, according to their claim, to south Tel Aviv; and insisted on the difficult existing reality in the area and consequently the infringement of the Basic Rights that will be conferred upon them. As a result, the Petitioners claimed that the Authority must implement alternate measures prior to the release of the "infiltrators", and requested to instruct the Respondents to prevent the anticipated harm that they will sustain; to operate the "Saharonim" Facility as an open center; and to notify of the commencement of enforcement actions against employers of those individuals staying in the open center. Furthermore, it was requested that the Respondents act to

transfer the "infiltrators" staying in south Tel Aviv to open custodial facilities "in order to terminate the ongoing harm to the residents of south Tel Aviv."

B. *Summary of the Petitioners in High Court Justice 8425/13*

12. The two Petitioners in this High Court of Justice matter are Eritrean citizen asylum seekers and the others are a series of human rights organizations (hereinafter they will all be referred to as: the *Petitioners*). Petitioner 1 infiltrated to Israel on August 1, 2012 and a deportation order was issued against him by virtue of Article 30A of the Law for the Prevention of Infiltration. According to the claims of counsel for the Petitioners, Petitioner 1 escaped from Eritrea after he was forced to serve in the mandatory national service for a period of 16 years. During his stay in detention, Petitioner 1 submitted an asylum request, which was denied on July 28, 2013. Petitioner 1 filed a request for reconsideration of this decision, and as was provided in the Statement of Response, this motion will be decided in the near future. On December 10, 2013, a residency order was given on his behalf, and since then he is in the "Holot" Residency Center. Petitioner 2 infiltrated to Israel on June 26, 2012. In the Petition, it was claimed that he escaped from Eritrea after he refused to enlist in the mandatory military service there, because he is an orthodox priest whose belief prohibits him from the aforesaid service. On September 5, 2012, a deportation order was issued against Petitioner 2 and by its authority he was detained in detention – at first in "Givon" Detention Review and later in the "Saharonim" Facility. On November 13, 2012, during the hearing before the Tribunal for Infiltrators (hereinafter: the *Tribunal*), Petitioner 2 claimed – according to the Respondents, for the first time – that he is requesting political asylum (according to his claim, he appealed to the unit that handles asylum requests in the Ministry of Interior back in the month of July 2012). On September 19, 2013, the Petitioner's motion for asylum was denied. On December 12, 2012, a residency order was given to Petitioner 2, and he was transferred from the "Saharonim" Facility to the "Holot" Residency Center. As indicated in the State's Statement of Response, on December 17, 2013, Petitioner 2 left the Residency Center and he refrained from appearing in the afternoon hours. As a result, he was warned not to repeat a violation of the residency order. On December 19, 2013, the Petitioner once again left the Residency Center and did not appear in the afternoon hours. When he was returned to the Residency Center, a hearing was held and it was decided to transfer him to detention for a period of 30 days. On January 16, 2014, Petitioner 2 returned to the Residency Center, and the following day, without any authorization, he left the Residency Center and only returned after approximately 48 hours. As a result, and following a hearing that was held, it was decided to transfer him to detention for a period of 90 days. Later, the period was reduced by the decision of the Head of Border Control, and Petitioner 2 was returned to the Residency Center, where he currently is located.

13. The Petitioners' position is that Article 30A of the Law (according to its version following Amendment No. 4) and the provisions of Chapter 4 of the Law (which deals with the establishment of a "Residency Center") are not constitutional and therefore must be repealed. With regard to the purposes of Amendment No. 4, the Petitioners claim that

the underlying purposes of the Amendment are identical to the underlying purposes of Amendment No.3: preventing the settling down of the "infiltrators" in Israel and deterring them from coming to Israel. According to the Petitioners, the deterrent purpose is not proper and raises difficulties that we insisted upon in the *Adam* Case (paras. 85-86 of Justice E. *Arbel's* opinion; para. 4 of Justice *S. Joubran's* opinion; para. 19 of my opinion); and that the purpose to "prevent settling down in Israel" is not proper, considering that it imposes separation and isolation from the Israeli society with regard to those that cannot be deported. According to the claims of the Petitioners, alongside these two purposes, there is also an additional, undeclared purpose of the Law: "breaking the spirit of the detainees", so that they will ask to leave Israel "voluntarily". It was claimed that the "encouragement" of people to leave "voluntarily" to the countries where their lives are endangered, when being implemented by means of the deprivation of liberty and personal autonomy is improper –and therefore it is not a proper purpose.

14. The Petitioners added that the two arrangements set forth in the Law – Article 30A and Chapter 4 – are not consistent with the proportionality requirements of the limitations clause of Article 8 of the Basic Law: Human Dignity and Liberty. In the matter of Article 30A of the Law the Petitioners reiterate their primary claims in the *Adam* Case, whereby this Article deviates from the principle that in the absence of an effective deportation process, an individual should not be detained in detention. It was further claimed that since Article 30A of the Law was repealed in the *Adam* Case and until the submission date of this Petition (over a period of three months), only 4 Sudanese men entered Israel. In this state, placement in detention for a period of one year is not proportionate.

15. As aforementioned, the Petitioners' claims also pertain to the provisions of Chapter 4 of the Law. The Petitioners do not distinguish between the various provisions of this chapter. In their view, these provisions jointly comprise the normative arrangement of "converting the Center into a prison." According to their opinion, in practice the Center deprives the freedom of those detained there; the Law grants a series of irregular powers concerning searches, judgments and punishments; referral to the Center is done in an arbitrary and discriminatory manner, without any proactive judicial review; and no time limit for the possible stay in the Center was determined in the Law, such that "a person can find themselves in the Facility for an unlimited amount of time." The remedy requested by the Petitioners is an immediate declaration of the repeal of all the provisions of Amendment No. 4, and instead to apply the provisions of the Law of Entry into Israel, as was done in the *Adam* Case. Alternatively, it has been requested that we repeal the provisions of Article 30A of the Law and Chapter 4 of the Law.

C. *The State's Position*

16. We will commence with the State's Attorney's answer (hereinafter: the *State*) in High Court of Justice 7385/13, which was submitted on behalf of the Foundation and the residents of south Tel Aviv. The State's position is that the requested remedies in this Petition (which were submitted, as aforementioned, prior to the enactment of Amendment

No. 4) received a complete response within the framework of this Amendment and Decision No. 960 of the Government. The State notes that the Minister of Interior and the Population and Immigration Authority determined express conditions for the prohibition of residence and employment in Tel Aviv and Eilat within the framework of the release of the "infiltrators" from detention in the course of the implementation of the *Adam* Case ruling. Thus, an immediate response was provided to the Petitioners to adopt measures to prevent the anticipated harm to them as a result of the release of the "infiltrators" in accordance with the implementation of this ruling. It was further claimed that Amendment No. 4 of the Law granted the requested remedy with regard to establishing an Open Residency Center; with regard to the requested remedy for handling new "infiltrators" a response was provided by way of enacting the new Article 30A of the Law. With regard to the Petitioners' request to a remedy concerning enforcement measures against employers of "infiltrators" located in the Residency Center, the State's position is that the Petition is premature in light of the declared intentions of the Population and Immigration Authority to act accordingly. With regard to the Petitioners' request to instruct that the transfer of the "infiltrators" who are currently in south Tel Aviv to the Open Residency Center, the State refers to the fact that until March 3, 2014, 3,172 "infiltrators" were ordered to arrive to the Center. It was further argued that the State allocated NIS 440 million in favor of the application of the Amendment to the Law; and that the Government is acting to outline and implement solutions for the "safe departure" of the "infiltrators" from Israel; and that the Government allocated designated funds in the amount of NIS 73 million to the Ministry of Public Security in order to advance the plan and enhance the personal security of the residents of all cities where there is a large concentrated population of "infiltrators"; and there is preparation for increased activities by the Israeli Police in the neighborhoods of south Tel Aviv. Consequently, the State believes that the Petition should be rejected.

17. With reference to the Petition High Court of Justice 8425/13, the State's position is that Amendment No. 4 is constitutional and is substantially different from Amendment No. 3 which was repealed in the *Adam* Case ruling– and therefore this Petition should also be rejected. According to the State, Amendment No. 4 is an important tier in the normative arrangement and implementation which was designated to supply a proportionate, reasonable and balanced response to the "infiltrators" phenomenon. The State claimed that the overwhelming majority of the "infiltrators" are not refugees or asylum seekers, but rather individuals who arrived from underdeveloped countries with a low standard of living with the intent to earn a significant amount of money (in comparison to the countries of their origin). With reference to the nationals from Eritrea and northern Sudan, the State believes that given the difficulty to deport them back to the countries from which they arrived (which we will still review further below), Amendment No. 4 is required to handle the "infiltrators" phenomenon on the one hand and reduce the complex consequences, and on the other hand to provide the basic standard of living to the "infiltrators" who are already within the borders of the State. With regard to the infringed-upon rights, the State agrees that Article 30A of the Law relating to detention infringes on the right of liberty; however according to its claims, Chapter 4 of the Law

(which relates to the Residency Center), while it imposes restrictions on the liberty of those staying in the Center, does not deny them this right.

18. The State believes that the infringement on liberty hidden in the provisions of Article 30A of the Law complies with the conditions of the limitations clause. It was argued that the purpose of the Article – preventing the recurrence of the unlawful illegal immigration, by way of modifying the system of incentives for potential "infiltrators"; exhausting the channels of departure for those who have already entered the country, while imparting a certain period of time for discovering the identity of the "infiltrator" – are worthy purposes. It was further claimed that the provisions of Article 30A are proportionate. With reference to the first proportionality test (the rational relationship test) it was argued that since the enactment of Amendment No.4 and through the hearing date of the Petition, only 18 "infiltrators" entered into Israel (in comparison to 16,851 in 2011 and 14,747 in 2010), thus the Article realizes its designated purpose in light of the decrease in the number of "infiltrators" who entered into Israel. With reference to the second proportionality test (the least offensive measure test) the State claims that there is no other measure that is less offensive that has the power to achieve the purpose of the Law to the same extent – not including an Open Residency Center where one can leave without returning. It was further argued that the fence that was placed on the southern border of Israel is not a sufficient measure to prevent the "infiltrators" phenomenon, since if the motivation to arrive to Israel will increase, the professional smuggling networks – whose existence in known by the Intelligence from different sources of information – will not have any difficulties to smuggle the "infiltrators" beyond the fence. With regard to the third proportionality test (proportionality in the strict sense), it was argued that the provisions of the Amendment prescribe a softer, more subdued arrangement than the provisions of Amendment No. 3 which were repealed in the *Adam* Case ruling, since the current version of the Article is applicable only to "infiltrators" who unlawfully entered Israel following the effective date of the Amendment to the Law; the maximum detention period in detention was minimized to one year; and additional modifications were implemented as will be detailed below. The State further claimed that an additional substantial difference is the existence of arrangements between Israel and third world countries, which allows for the deportation of the "infiltrators" from Israel "in secure departure channels", which are now being utilized. According to the State, the "softening" of the inherent violation on the law translates into a proportionate infringement in light of the inherent benefit.

19. According to the State, Chapter 4 also complies with the requirements of the limitations clause. It was argued that with respect to the purpose of the Law, Chapter 4 was designated to halt the settling down of the population of the "infiltrators" in urban cities in Israel, prevent their integration into the local work force, and provide an appropriate response for the needs of this population. With regard to the first proportionality test, the State claims that the presence of th "infiltrators" in the Residency Center satisfies the aforementioned purpose. It was emphasized that albeit that the "Holot" Facility cannot accommodate the entire population of the "infiltrators" in the urban cities in Israel, it was

established in a limited "pilot" format in the attempt to examine its efficiency, and in any event, Amendment No. 4 of the Law does not restrict the number of Residency Centers that will be established by its virtue. Furthermore, it was argued that the Residency Center was not solely designated to prevent the settling down of the population of "infiltrators" in the city. With regard to the second proportionality test, it was argued that in order to realize the purpose of the Law in its entirety, it is inevitable to have certain restrictions on the accessibility of the Center and to impose restrictions on employment outside the Center. With reference to the authority for "punishment" it was argued that it is an administrative enforcement measure which was designated to cope with the difficult reality of recurring disciplinary violations of the duty to report in the Center, which characterized its operations from the onset, whereby without them all efforts to have an alternative of an open Center would be thwarted. It was further argued that judicial review or quasi-judicial review for these decisions significantly reduce the intensity of the infringement of the right of liberty for those that are staying in the Residency Center. The State added that the "infiltrators" are referred to the Center based upon known and non-discriminatory criteria; and that it is not permissible to restrict the time of the "infiltrators" stay in the Center, since this would mean that the purpose for preventing settling down in urban centers would not be realized in an identical measure. With respect to the third proportionality test, it was argued that the inherent public benefit in preventing the settling down of the "infiltrators" in the urban cities is reasonably proportionate to the restriction of the right to liberty, when considering the services that are provided in the Center and that the Center is opened most of the day.

D. *The Knesset's Reaction*

20. The Knesset did not see the need to supplement with respect to what was mentioned in the constitutionality claim that was presented in the State's Statement of Response. In the matter of the legislative process of the Amendment, it was noted that following deliberations that were conducted by the Interior Committee of the Knesset the proposal for the original law underwent modifications which were designated to create a more proportionate arrangement, which minimizes the infringement of the rights of the "infiltrators". With regard to Article 30A of the Law, it was emphasized that in contrast to the previous version of the Article, the Head of Border Control's authority to release an "infiltrator" on guarantee after one year transpired from the commencement of his time being held in detention was formulated as being compulsory and not optional; the possibility to release an "infiltrator" on "extraordinary humanitarian grounds" was no longer solely limited to "exceptional cases"; and it was determined in the security opinion, that the state of domicile or the country of residence of the "infiltrators" who are executing operations which may endanger the security of the State of Israel, may be used as an evaluation of the imminent danger posed to the "infiltrator" – however it will not constitute independent grounds for the prevention of release from detention . In addition, the various dates which were set forth in the previous version of Article 30A of the Law concerning bringing the "infiltrator" before the Head of Border Control and the Tribunal were reduced; and the period for the periodic examination was also reduced.

With respect to Chapter 4 of the Law which pertains to the establishment of the Residency Center, the Knesset emphasized that a Article was added to the Chapter which empowers the Director of the Open Facility to conduct medical examinations for the "infiltrator" as close as possible to the beginning of his stay; various restrictions were imposed upon the authority to instruct on the transfer of the "infiltrator" from the Center to detention (within the framework of "disciplinary powers"); and a provision was added whereby families, women and children would not be placed in the Residency Center until special regulations would be regulated in their matter.

E. *Parties Requesting to Join as Amici Curiae*

21. Two organizations requested to join High Court of Justice 8425/13 as amici curiae. The first organization – the Kohelet Forum (hereinafter: the *Forum*) – is a public non-profit organization which was established by public official and members of academia in the fields of constitutional law, political science and economics. The essence of the Forum's claims are as follows: in the sphere concerning the purpose, it was argued that when examining the question of whether the purpose of a law is proper, the purpose of the law must be defined in the highest abstract level and therefore in our case, examining the question if inhibiting the infiltration phenomenon and enforcement of an immigration policy are proper purposes, should be sufficient. It was further argued that deterring "potential "infiltrators" in and of itself is a proper purpose, since "infiltrators" who are placed in detention or who are in the Residency Center, are a party to the matter – since they were the ones who unlawfully entered the country, thus they were not solely used as a measure. With respect to the Residency Center, it was argued that their presence in the Center primarily infringes on the right to liberty of movement – and not on the right of personal liberty. Finally, the Kohelet Forum requests to emphasize that the Court has the authority to examine legislative acts in light of the Basic Rights – and not in light of the principles of international law or ambiguous fundamental principles.

22. An additional entity that requested to join the proceeding as an amicus curiae is the Concord Research Center for Integration of International Law in Israel (hereinafter: the *Concord Center*) which is an institute for academic studies. The Concord Center requested to emphasize that according to the principles of international law, the deprivation of liberty with the aim of protecting the sovereignty of the state with regard to immigration is permitted provided it is not for purposes of punishment; in a proportionate and reasonable fashion and after conducting a detailed examination of the necessity of the restrictions. It was argued that Article 30A of the Law does not meet these principles, since even after the reduction of the maximum period of being held in detention, the permissible holding period is still set as the "default" and it is not directly associated with the permitted purpose – deportation of those individuals who entered unlawfully. It was also argued that the provisions of Chapter 4 do not meet the aforementioned principles, due to the vast similarity between the Residency Center and detention; with the absence of any period of restriction of time for staying in the Center;

and in light of the declared purpose of this part of the Law – the separation of the "infiltrators" from the Israeli society and general public.

I reviewed the motions to join and I did not find the need to decide them. The materials which were submitted by the Applicants to join and their detailed arguments were brought before us for our review, and even in the deliberation conducted before us we heard their counsel. On the basis of the overall data and the claims which were presented before us – the instance of such decision is premature.

V. *Deliberation and Ruling*

A. *High Court Justice 8425/13*

1. *The Constitutional Analysis*

23. The question before us is the matter of the constitutionality of Amendment No. 4 of the Law for the Prevention of Infiltration – on both its parts. The starting point for the constitutional scrutiny is that before us we have a law of the Knesset, which expresses the will of the elected officials. As such, this Honorable Court is required to act with restraint and prudence during the examination of its constitutionality. No one denies that particular prudence is required when dealing with a law that was enacted a short period of time after its previous version was repealed by this Court (the *Adam* Case Ruling). Nonetheless, such prudence does not mean that this Court is exempt from performing its duties which are imposed upon it in our constitutional regime. It is imperative that we verify that Amendment No. 4 does not unlawfully infringe on any human rights that are anchored in the Basic Laws. The prudent characteristics of the examination are derived from the balance between the doctrine of the tyranny of the masses and the doctrine of the separation of powers and the Court's duty to protect human rights and the principle values set at the foundation of our government (see, for example, para. 67 of the *Adam* Case, High Court of Justice 2605/05, *The Human Rights Division v. The Minister of Finance*, *PADI Journal* 63(2)545, 592-594 (2009) (hereinafter: the *Privatization of Prisons Case*); High Court Justice 6427/02 *The Movement for the Quality of Government in Israel v. the Israeli Knesset*, *PADI JOURNAL Journal* 61(1) 619, 694-696 (2006) (hereinafter: the *Tal Law* Case); High Court Justice 1661/05 *The Local Council of the Gaza Strip Beach v. The Israeli Knesse*t, *PADI Journal* 49(2) 481, 552-553 (2005) (hereinafter: *the Gaza Strip Beach Case*)).

24. As is known, the examination of the constitutionality of a law is conducted in three phases (see, inter alia, para. 68 of the *Adam* Case; High Court Justice 10662/04 *Hassan v. The National Insurance Institute*, para. 24 (February 28, 2012) (hereinafter: the *Hassan* Case); the *Privatization of Prisons* Case, p. 594-595; *Gaza Strip Beach* Case, p. 544-545; Tal Law Case, p.669-670; Civil Appeal 6821/93 *The United Mizrahi Bank v. Migdal Kfar Shitufi*, PADI Journal 49(4) 221, 428 (1995)). *In the first phase*, it is necessary to examine if the law infringes on human rights that are anchored in the Basic Laws. If the

answer to this question is negative – the constitutional examination culminates at this phase. On the other hand if the answer is affirmative – the legal analysis will transition to the second phase. *In the second phase*, there is a need to examine if the infringement on the human rights is consistent with the test of the limitations clause that is set forth in Article 8 of the Basic Law: Human Dignity and Liberty.

Violation of Rights *8. There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.*

25. Examination of the provisions of the law in light of the limitations clause are conducted based upon our constitutional perception whereby human rights anchored in the Basic Laws are relative, such that they may be limited for proper purposes which include the collective public needs or the rights of other individuals. The limitations clause "[…] in any event, therefore has a double rule – it determines that the human rights which are set forth in the Basic Rights shall not be infringed upon unless certain conditions have been fulfilled, however, concurrently, it defines what are the conditions whereby the infringement of the human rights shall be permitted (the *Privatization of Prisons* Case, p. 620). The limitations clause determined four cumulative conditions for any law which infringes human rights which a law must meet in order for the infringement to be deemed lawful. First, the violation of the right must be by virtue of explicit authority in the law. Second, the law needs to befit the values of the State of Israel. Within this framework, there is a need to examine the law opposite the values of the State of Israel as a Jewish and democratic state (Article 1A of *the Basic Law: Human Dignity and Liberty*). Third, the law needs to be enacted for a proper purpose. A purpose will be deemed proper of it was designated "to protect human rights, including by means of determining a reasonable and fair balance between the rights of individuals with opposing interests in a manner which will lead to a reasonable compromise when granting the optimal rights to each and every individual" and "if it serves the important public interests of the state and society with the purpose of maintaining a foundation for a joint life within the social framework which is requesting to protect and advance human rights" (High Court of Justice 4769/05 *Menachem v. The Minister of Transportation*, *PADI Journal* 57 (1) 235, 264(2002)). Insofar and to the extent that the infringement on the right is acute and more comprehensive and insofar and to the extent that the infringed right is of a greater importance, thus there will be a necessity that the purposes are more important and significant in order for it to be deemed a proper purpose (see the *Hassan* Case, para. 55; High Court of Justice 6304/09 *Lah"av - The Office for the Independent Businesses v. The Attorney General of the Government*, para. 107 (September 2, 2010); *Privatization of Prisons* Case p. 621; High Court of Justice 10203/03 "*The National Commander" Ltd. v. The Attorney General of the Government*, PADI Journal 62 (4), 715, 822 (2008); the *Tal Law* Case, pp. 698-670; High Court of Justice 8276/05 *Adalah – The Legal Center for Minority Rights of Israeli Arabs v. The Minister of Defense*, *PADI Journal* 62(1)1, 25 (2006) (hereinafter: *Adalah* Case); High Court of Justice 6893/05 *Levy v. The*

Government of Israel, PADI Journal 59(2) 876, 890 (2005)). According to the words of Chief Justice *A. Barak*: "When a central right is infringed – for example, life, liberty, human dignity, property, privacy – the purpose must realize a material social purpose or a pressing social need" (*Adalah* Case, *ibid*; the dispute of the doctrine regarding the question referring to the offensive measures and the infringed constitutional right within the framework of the scrutiny for the purpose, also see my opinion in the *Adam* Case, para. 18). Finally, the infringement on the constitutional rights needs to be to an extent no greater than is required. The last condition expresses the proportionality test, which focuses on the measures taken in order to realize the purpose. The proportionality test is comprised of three cumulative secondary tests, which we will now discuss.

The first secondary test is the "reasonable relationship" test or the "compatibility test", whereby there needs to be a substantive correlation between the proper purpose of the law and the arrangements determined in the law for the sake of its realization. In other words, the selected measure must rationally lead to the realization of the purpose. For this matter, there is a need for a "real correlation" between the appropriate measure and the proper purpose. A remote or theoretical possibility alone is not sufficient, since the infringing measure must lead to obtaining the purpose by "a serious degree of probability" (*Hassan* Case, para. 59; *Tal Law* Case, p. 706; High Court of Justice 1715/97 *The Office of Managing Investors in Israel v. The Minister of Financ*e, PADI Journal 51 (4) 367, 420 (1997) (hereinafter: the *Investment Managers Case*); also see *Dalia Dorner "Proportionality"* Branson Books, 281, 289 (2000)).

The *second* secondary proportionality test in the "necessity" test or the "least offensive measure test", accordingly when the remaining conditions are equal, there is a need to select the measure that has been nominated in the law as the least offensive of human rights. The legislator must obtain the "same degree of all the measures" within the obtained framework of the proper purpose, without infringing the human right beyond what is necessary. When doing so, the legislator has legislative latitude. The Court instructs to explore flexibility in this matter. It must consider only the measures which realize the legislative purpose in the same measure or in a similar measure which was selected by the legislator (see the *Privatization of Prisons* Case, pp. 601-602; High Court of Justice 7052/03 *Adalah – The Legal Center for Minority Rights of Israeli Arabs v. The Minister of Defense*, PADI Journal 61(2) 202, 343-344 (2006) (hereinafter: the *First Law of Citizenship Case*)). It must recognize the "difficulties of the legislator's selection, the influence of its selection on the different sectors of the society and the institutional advantage of the legislator when assessing these figures" (*Bank Mizrahi Case*, p. 444; High Court of Justice 1789/13 *Lotan v. The Minister of Agriculture and Rural Development*, para. 10 (June 20, 2013) (hereinafter: *Lotan* Case); also see *Aaron Barak "Proportionality in the Law – the Infringement of a Constitutional Right and its Limitations* 391-415 (2010) (hereinafter: *Proportionality in the Law*)).

The *third* secondary test is the proportionality test in the "strict sense" or the "cost-benefit" test, whereby accordingly there is a necessity to have an appropriate relationship

between the public benefit that will arise from the realization of the purpose of the law and the infringement of the accompanying human rights. This scrutiny of values, which is the central test of all three secondary tests, is in its essence a test of balance. Insofar and to the extent that the infringement of the constitutional rights is more acute and deeper, thus the derived benefits from the law must also be greater. On the other hand, insofar that the basis of the law complies with an imperative social purpose or the pressing social need, then the more severe infringement of the social rights will be justified. At the foundation of the third proportionality test is our constitutional view whereby the purpose does not justify all means. The relationship between the public benefit and the infringement of human rights must be proportionate in order for a legislative act to be deemed constitutional (see the *Adam* Case, paragraphs 26-27 of my opinion; *Privatization of Prisons Case*, pp. 602-603; the *Adalah* Case, pp.25-26; *Tal Law* Case, pp.707-708). It should be noted that the examination of the last two conditions of the limitations clause shall be done, inter alia, while considering the type of infringement on the rights and its intensity. As was previously ruled, "the essence of the infringed right, the reasons at the foundation of the rights and its relative social importance, the intensity of the infringement and the relationship in which the infringement is executed – all of the above are projected onto their interpretation and the manner of their implementation for the requirements of a proper purpose and proportionality […]" (*National Commander Case*, p. 823).

26. An infringement on protected human rights is then a lawful infringement only when the infringement meets the four conditions of the limitations clause, including the conditions of proportionality of the three secondary tests. The conclusion is that a law could potentially infringe on the human right, however, it could still be deemed constitutional, provided that the infringement fulfills all the conditions of the limitations clause. In these circumstances, the constitutional scrutiny will culminate. On the other hand, if it will be determined that the infringement is unlawful, the scrutiny will traverse to the final phase. In the third phase, there is a need to examine the results of the unconstitutionality in the sphere of the remedy. Here we must examine if there is any place to repeal the unconstitutional provision or reduce the scope of its applicability, so that the scope of the infringement in the law will be reduced to what is most crucial (see *Gaza Strip Beach Case*).

27. Below we will discuss the constitutional scrutiny of Amendment No. 4 according to these phases. The scrutiny will be divided into two: first, we will review the constitutional scrutiny of Article 30A of the Law which by its virtue an "infiltrator" can be held in detention for a maximum period of one year. First, the question whether the Article infringes the protected human rights in the Basic Laws will be examined; afterwards, we will examine if the infringement on the inherent human rights in Article 30A of the Law is an unlawful infringement; and finally the results of the unconstitutionality will be examined, insofar and to the extent that they exist, in the sphere of the remedy. After the completion of the constitutional scrutiny of Article 30A of the Law, we will continue the scrutiny of the provisions of Chapter 4 of the Law which were supplemented to the Law

by means of Amendment No. 4, and by its virtue whether it is possible to instruct that the "infiltrators" be transferred to the Residency Center. Within this framework we will first examine whether the purpose of Chapter 4 complies with the requirements of a proper purpose. Thereafter, we will specifically discuss the constitutional scrutiny for part of the infringing arrangements of the Law. With respect to any arrangement that we will find as infringing constitutional rights, we will supplement and examine if the infringement is lawful. Later, we will examine if the manner in which Chapter 4 of the Law infringes – as a whole – the constitutional rights complies with the proportionality requirements. In the last phase, we will examine an appropriate remedy by virtue of which it is possible to cure the constitutional flaws that were found in each of the infringing arrangements and Chapter 4 in its entirety.

However, before we proceed, it is important to place the matter in the appropriate context, and thus we shall briefly review the "infiltrators" phenomenon and its scope thus far.

2. *The "Infiltrator's" Phenomenon, Requests for Asylum and their Relationship*

(A) *Background – the "Infiltrator's" Phenomenon*

28. The inter–country immigration of the masses is a global phenomenon which has been on the rise over in the recent decades. Many countries are required to cope with "infiltrators" who unlawfully enter their borders without any visa. Israel is also included amongst these countries. As of 2007, Israel has been handling the "infiltrators" phenomenon of the nationals from African countries on a wide scale – most of whom are nationals from Eritrea and the Republic of Sudan (hereinafter: "*Sudan*") – who are unlawfully entering the territory, mainly by crossing the uncontrolled Israeli – Egyptian border (until 2012, the border was mainly open and to date is blocked by a fence that was built across its entire length). According to the data from the Population and Immigration Authority, until June 30, 2014, 64,464 "infiltrators" entered Israel. Save for those that left the country, as of this date 48,212 "infiltrators" are in Israel (see the Population and Immigration Authority – the Division for Planning Policy, Figures for Foreigners in Israel) (July 2014) (available here) (hereinafter: *Population Authority Data*); for the factual and normative background of the "infiltrators" phenomenon in Israel see our position in detail in the *Adam* Case. See the *Adam* Case, paragraphs 2-24; and paragraphs 109 of my opinion).

29. A majority of the "infiltrators" that arrived to Israel are young men, in their twenties through forties. In the State Comptroller's report which was recently published it appears that a majority of them live in Tel-Aviv – Jaffa (in particular in the neighborhoods of south Tel Aviv), and the remainder live mainly in Eilat, Ashdod, Ashkelon, Beer Sheva, Petach Tikva, Rishon Lezion and Ramla (the State Comptroller "foreigners that cannot be deported from Israel, annual report 64c, 59, 69 (2014) (hereinafter: the *State Comptroller's Report*)). The State argues before us, that the prolonged stay of the

"infiltrators" in the country's territory and their settling down in urban cities constitute a real threat on the sovereignty of the State of Israel and the national, social and economic resilience. The State specifically emphasized the tendency of the population of the "infiltrators" to settle down in unsubstantiated neighborhoods, which seriously undermines the social fabric and personal security of its residents, due to the alleged claim of the increase of the crime rate within this population. The State further emphasized that the economic impact of the phenomenon and its budget and economic aspects, in light of the need to provide this population basic health and education services because of the massive and uncontrolled increase of the number of foreign workers. Even without considering the data cited in relation to this context (at least with respect to some of them a question mark was raised; see the *Adam* Case, paragraphs 12-18), it is apparent to everyone that the infiltration of "infiltrators" raises considerable difficulties of which the Governmental Authorities and its residents are forced to cope.

30. Who are the "infiltrators"? Why did they make their way to Israel? In the Petition before us, once again the neglected fundamental dispute emerges between the State and the Petitioners regarding the question of the identity of the "infiltrators" and the question of their primary motive for arriving in Israel – finding employment and improving the standard of life, as is the claim of the State; or according to the claims of the Petitioners, finding asylum from the imminent danger for their lives and their well-being in the countries of their origin. The State reiterated and claimed that the underlying reason of the "infiltrators" decision to come to Israel is primarily financial; and the interviews which were conducted with the "infiltrators" after their entry into Israel support this conclusion. Consequently, the Government promoted the legislation of the provisions of a different law relating to the prohibition of removing property from Israel by the "infiltrator"– legislation which is not being examined in these Petitions (Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Temporary Order), 5773 – 2013, legislation ledger 78; Prohibition of Money Laundering Law (Temporary Order), 5773 – 2013, legislation ledger 81). Within the framework of this legislation, a Article was supplemented to the Law for the Prevention of Infiltration whereby an "infiltrator" cannot remove property from Israel except upon his departure (Article 7a(b)(1) of this Law); a restriction on the value of the property that an "infiltrator" can remove upon his departure from Israel was also imposed; the authority to seize property was also determined (Article 7a(c) of the Law). Additional regulations were promulgated which arrange the manner in which an "infiltrator" may request authorization to remove property from Israel (Regulations for the Prevention of Infiltration (Offenses and Jurisdiction) (Removing Property from Israel) (Temporary Order), 5774 – 2013, compilation of regulations 10).

On the other hand, the Petitioners claimed that the majority of the "infiltrators" are asylum seekers who escaped the imminent danger they faced in the countries of their origin. According to their claims, the United Nation High Commissioner for Refugees recognizes that the nationals of Eritrea and Sudan are exposed to danger, and countries throughout the world are granting many of them the status of refugees. In this context, the

Petitioners refer to the *Adam* Case, where the Court noted that since "[…] the majority of the "infiltrators" arrive from countries with the most difficult living conditions, which at many times pose imminent danger to the lives of its residents, and the situation of human rights there is horrendous. Some of them underwent extremely difficult experiences, such as abduction, torture, rape, etc., prior to arriving in Israel" (ibid., para. 112 of my colleague's, Justice *E. Arbel*'s opinion). The Petitioners further insisted that the difficulties that the "infiltrators" face do not end when they leave the countries of their origin. In fact, according to the State Comptroller's Report which was recently published it suggests that the "infiltrators" reported to the aid organizations of the violence they faced on their way to Israel and during their stay here; the local authorities in the areas where large groups of "infiltrators" reside indicated that these groups often present symptoms that are characterized with post-traumatic stress. The State Comptroller further added and insisted in detail the difficult living conditions which have become part of the daily routine of the "infiltrators" who arrived in Israel, and indicated the series of shortcomings in the manner which the authorities have handled the treatment of this population to date (see the State Comptroller's Report, pp.60-67).

31. As I noted in the *Adam* Case (para. 8 of my opinion), the accurate picture regarding the identity of the "infiltrators" is certainly more complex than that of which each party is trying to present. It may be assumed that the economic motive side prompted many of the "infiltrators" to specifically arrive to Israel; however it cannot casually reject the claims concerning the escape from the imminent danger in their countries of origin. In order to place the "infiltrators" phenomenon in its context, it is pertinent to briefly review what is occurring in those countries (for a comprehensive review see the *Adam* Case).

    Approximately 73% of the "infiltrators" in Israel are nationals from Eritrea – a country located in Northeast Africa on the shore of the Red Sea. This country, which is one of the youngest and poorest countries in the world, was established in 1993 after receiving its independence from Ethiopia following an ongoing war of independence. With the establishment of the country democratic elections were held in Eritrea – the units which still exist in the country to date – where the President was elected, who is still serving as the same head of state, the Prime Minister and the Commander in Chief of the Army. Only representatives of one party serve in Eritrea's National Assembly, and any political organization which is not within the framework of this party or any other organization that criticizes this party is forbidden. According to recent reports, the Eritrean Government is systematically and extensively violating human rights – citizens are arrested arbitrarily and are being held in detention under inhumane conditions; prison sentences are imposed without any trials; there is an obligation to serve in the military forces for an unspecified and unlimited amount of time, during which the soldiers are subject to harsh punishments; severe restrictions are imposed on freedom of religion and freedom of expression, etc. (see Special Rapporteur on the Situation of Human Rights in Eritrea, Rep. on the Situation of Human Rights in Eritrea, Human Rights Council, U.N. Doc. A/HRC/23/53 (May 28, 2013) (by Sheila B. Keetharuth (available here); also see Foreign & Commonwealth Office, Human Rights and Democracy: The 2013 Foreign &

Commonwealth Office Report, 2014, Cm. 8842, at 201–06 (U.K.), (available here); U.S. Dept. of State, Bureau of Democracy, Human Rights & Labor, Eritrea 2013 Human Rights Report (Feb. 2014) (available here)).

Approximately 19% of the infiltrators' are nationals from Sudan – a country located in Northeast Africa on the shore of the Red Sea, northwest of Eritrea. Sudan, is currently the third largest country in size on the African continent, it is a country versed in military coups and internal struggles, where most of its citizens are living in substantial poverty. In 2003, a revolt erupted in the Darfur region, in the west of the country, which became an ethnic struggle, accompanied by mass massacres – genocide. In 2011, southern Sudan declared its independence from Sudan (today it is known as the "*Republic of Sudan*", as aforementioned) after a long and bloody civil war between the north and the south. Despite the significant improvement in the country since 2011, there are still reports of human rights violations in different parts of the country (see Indep. Expert on the Situation of Human Rights in the Sudan, Rep. on the Situation of Human Rights in the Sudan, Human Rights Council, U.N. Doc. A/HRC/24/31 (Sept. 18, 2013) (by Mashood A. Baderin) (available here).

32. Correct to date, Israel does not deport Eritrean nationals or Sudanese nationals to the countries of their origin. Eritrean Citizens are not deported from Israel within a framework of temporary policy of deportation. This is in accordance with the principle of *non-refoulement* whereby one cannot be deported to the place where there is imminent danger to his life or liberty. The "*Non-refoulement*" principle is a customary principle in international law and is anchored in Article 33 of the Refugee Convention (the International Convention relating to the Status of the Refugees, Convention Treaty 65, 5 (opened for signatures in 1951) (hereinafter: *the Refugee Convention or the Convention*) and in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention Treaty 31, 249 (opened for signature in 1984) and which is also binding in internal Israeli law (High Court of Justice 4702/94 *Al-Tai v. The Minister of Interior*, PADI Journal 49(3), 843, 848 (1995) (hereinafter: the *Al-Tai Case*); the *Adam* Case, para. 8 of my opinion). On the other hand, with regard to Sudanese nationals, as a declared policy – which is not being examined in the Petitions before us and I am not taking a stance on the subject matter – Israel does not provide any protection. Since 2012, South Sudanese nationals are deported; a country with which Israel has diplomatic relations, back to their country of origin, subject to individual examination of asylum requests. Notwithstanding, the country does not deport "infiltrators" who are Sudanese nationals (the "*Republic of Sudan*") to their country of origin due to practical difficulties arising from the absence of diplomatic relations with this country. It should be noted that although work visas are not issued to the "infiltrators" that are currently within the borders of Israel, correct to date, the prohibition of employing individuals to whom a temporary *non-refoulement* policy applies or those who have filed asylum requests and their case has not yet been completed, has not been enforced (see the Government's declaration in High Court of Justice 6312/10 Kav *La'oved – The Worker's Hotline v. the Government* (January 16, 2011) (hereinafter:

Third Kav La'Oved); the *Adam* Case, para.17). It should be noted that the Government notified of its intent to implement measures for the enforcement of the prohibition of working commencing as of December 12, 2013 as it relates to the "infiltrators" in the Residency Center (see the notice from the Ministry of Interior and the Population and Immigration Authority concerning "Establishing a Residency Center for Infiltrators and the Commencement of the Enforcement against Employers of Infiltrators (available here).

33. The *non-refoulement* policy applicable to Eritreans, and the fact that in practice Sudanese nationals cannot be deported to the countries of their origin, to date, results in the prolonged stay of many "infiltrators" within the borders of the country. However, most of the "infiltrators" believe that not being deported to the countries of their origin is not sufficient. On the basis of the imminent danger in some of the countries of their origin and considering the unremitting violation of human rights in these countries, they are claiming that they are entitled to the status of refugees. In light of the consequence this has on the requisite constitutional scrutiny on the Petitions before us, we will briefly review the normative and factual foundation which is necessary for this issue.

A "refugee" is an individual who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" (Article 1(2) of the Refugee Convention). In order to gain recognition as a refugee, a person is required to submit a request to the hosting country – the country where he arrived to from his country of origin – a request for asylum (in some countries asylum requests are submitted to the United Nations High Commissioner for Refugees and in other countries directly to the governmental authority commissioned for the domain). The Refugee Convention requires granting those recognized as refuges with rights in different areas, and it is prohibited to deport him to countries where his life or liberty are in danger due to the aforementioned reasons. According to the United Nations High Commissioner for Refugees report, correct as of the end of 2012, more than 9.8 million people were recognized as refugees worldwide. The majority of them were concentrated from countries in Africa and southern Asia, and a few from Europe and the United States (see U.N. High Comm'r for Refugees, UNHCR Statistical Yearbook 2012, at 26 (2013) (available here) (hereinafter: *the Statistical Yearbook Report of the United Nations High Commissioner for Refugees*)). The State of Israel, which was one of the 26 countries with representatives who took part in drafting the Refugee Convention, signed the Convention in 1951 and was one of the first countries that ratified it in 1954 (inter alia due to the population that the Convention was designated to assist was the refugees of World War II, including Jewish refugees of the Holocaust) (see Tally Kritzman, Adriana Kemp, "Between State and Civil Society: The Formation of a REFUGEE regime in Israel", Empowerment in Law, 55, 64 (Guy Modelack and Mimi Eisenstadt (eds.) (2008)). Thereafter, Israel also joined the 1967 Protocol relating to the Status of the Refugees, Convention Treaty 21, 23 (opened for signatures in 1967), which expanded the definition

of the term refugee and was also applicable to individuals outside of their countries due to events that occurred after January 1, 1951. Even though the Protocol was not received in Israel, it is still has significance in our internal legal system. This is primarily due to the presumption of interpretation that was set forth in our case law, whereby there is compatibility between the laws of the state and the norms of international law which bind the State of Israel. According to the "presumption of compatibility", the laws of the State shall be interpreted – insofar and to the extent that it is possible – in a manner which is consistent with international law (see for example, Criminal Further Hearing 7048/97 *Doe v. The Minister of Defense*, *PADI Journal* 54 (1), 721, 742-743, 767 (2000); "The Status of International Law in Domestic Law", International Law 69, 72-74 (ed. Robbie Sabel, 2nd ed, 2009)).

34. To date, as aforementioned, no measures have been implemented to absorb the Convention as part of the internal Israeli law. Nevertheless, Israel's consistent stance has been that it views itself as committed to the application of the provisions of the Refugee Convention. In spite of this, recently the "infiltrators" have been facing difficulties submitting asylum requests in order to gain the status of a refugee. Even though in 2009 the asylum requests were gradually transferred to the RSD department (Refugee Status Determination) in the Ministry of Interior, from the entity who previously handled these requests (United Nations High Commissioner for Refugees – UNHCR), the State Comptroller's Report indicates that actually, until the end of 2013, the Israeli Ministry of Interior did not commence with the clarifications of the asylum requests that were submitted by the Eritrean and Sudanese citizens who were not being held in the Residency Center, save for extraordinary cases (State Comptroller's Report, p. 69; for further details see Appeal on Administrative Petition 8675/11 *Tedessa v. Division for the Treatment of Asylum Seekers*, paras. 9-11 (May 14, 2012)). This fact has immense significance for our purposes. In many countries, the mere fact of submission to receive the status of a refugee leads to the application of a unique legal system which is different from the system applicable to illegal immigrants who do not have the right to claim special protection and who cannot be deported for technical reasons. This is due to the recognition of exceptional circumstances of those who did not leave their countries due to choice or preference, but rather out of necessity and constraint (see for example, the distinctions used in European law: E.U. Agency for Fundamental Rights, Handbook on European Law Relating to Asylum, Borders, and Immigration 41–57, 135–57 (2013); (available here) Mathilde Heegaard Bausager et al., Eur. Comm'n, Study on the Situation of Third-Country Nationals Pending Return/Removal in the EU Member States and the Schengen Associated Countries, Annex-1 Country Reports (2013) (HOME/2010/RFXX/PR/1001)(available here) (hereinafter: *Countries Annex 2013*). In Israel, the aforementioned distinction is not accepted (see Netta Moshe, Policy Towards Asylum Seekers in the European Union and Countries Within 5, 14 (Center for Research and Information of the Knesset, 2013)(available here)). Thus, for example, the provisions of Chapter 4 of the Law for the Prevention of Infiltration, whereby of its virtue it is possible to instruct that the "infiltrators" be held in the Residency Center, does not distinguish between the asylum seekers and other foreigners who cannot be deported:

these are individuals required to report to the Residency Center; the fact that an asylum request was submitted does not change the terms of detainment; the pace of treatment for asylum requests is not grounds for release. The provisions of Article 30A of the Law for the Prevention of Infiltration, which permits holding an "infiltrator" in detention , although they differentiate between asylum seekers and other "infiltrators" with respect to the reference to the grounds for release from detention (the Head of Border Control is permitted to release an asylum seeker from detention if more than three months transpired from the date he submitted the request and the treatment of his request has not commenced (Article 30A(b)(5) of the Law); and if a decision was not reached following six months from the submission of his request (Article 30A (b)(6) of the Law)) – however, despite that the submission of the asylum request may accelerate the pace of release, it does not prevent the mere detainment in detention. To complete the picture, it should be noted that according to the State's response to the request for additional details, correct as of March 25, 2014, approximately 50% of the asylum requests submitted by "infiltrators" in Israel were submitted by "infiltrators" being held in detention, and approximately 3% were submitted by "infiltrators" detained in the Residency Center (which as aforementioned, was inhabited three months earlier on December 13, 2013).

35. This is not the only manner in which the State of Israel differs from other countries in the world. A comparative view indicates that the world-wide recognized percentage of asylum requests submitted by Eritrean and Sudanese nationals – the countries of origin for majority of the "infiltrators" in Israel – are significantly greater than the percentage in Israel. In 2012 (the last year with updated figures) the world-wide percentage for the recognition of Eritreans as refugees was 81.9% and for Sudanese – 68.2% (see the Statistical Yearbook Report of the United Nations High Commissioner for Refugees, pp. 102, 104). According to the figures provided by the State, which are current as of March 3, 2014, it appears that in Israel less than 1% of submitted asylum requests from Eritrean nationals were accepted and no requests were accepted from Sudanese nationals (and in numbers: 1,468 asylum requests were submitted by "infiltrators" from Eritrea; which to date only 980 applicants have been interviewed, and 444 requests were determined – 442 were rejected and 2 were approved. Furthermore, 1,373 asylum requests were submitted by "infiltrators" from Sudan, of which only 505 applicants were interviewed and 9 requests were determined – they were all rejected).

36. The State and the Petitioners are in dispute regarding the interpretation required to provide these figures, and each party requests to reach a different conclusion. The State emphasized the low number of asylum requests that were submitted with respect to the volume of the population of "infiltrators" in Israel, a number which attests to, in its opinion, the motives that caused the "infiltrator" to arrive in Israel in the first place. In contrast, the Petitioners claim that the low number can be explained due to the extended period during which the Eritrean and Sudanese nationals were not provided with the possibility of submitting asylum requests; the State simply did not notify them that currently there is a possibility to do so; the long period of the handling of such requests (considering that majority of them have not yet been decided); and the zero rate of their

approval. The question concerning the context of the manner in which to present the low approval rate of the asylum requests from the Eritrean and Sudanese nationals is also at the root of the parties' dispute. The State and the Petitioners in High Court of Justice 7385/13 believe that the situation in the State of Israel is significantly different than the situation of other countries throughout the world, inter alia, being that it is the only developed country along the lengthy land border with the African continent; its location in comparison to its neighbors, which as a result the "infiltrator" does not to proceed to any other countries; its geo-political state which makes it difficult to cooperate with neighboring countries for handling the phenomenon with the aim of minimizing its scope, as done by other countries throughout the world (for inter-state cooperation in other places in the world see James C. Hathaway, Refugees and Asylum, in Foundations of International Migration Law 177, 183 (Brian Opeskin, Richard Perruchoud & Jillyanne Redpath-Cross eds., 2012); Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or Stateless Person (Recast), art. 17(2), 2013 O.J. (L 108) 31, 41–42 (Dublin III) (available here); With respect to the claim that there is need to have this type of cooperation, albeit limited and solely under the fulfillment of certain circumstances, see Michelle Foster, Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State, in Human Rights & Refugee Law 422 (James C. Hathaway ed., 2013). It is argued that all of these led to the fact that Israel has been forced to absorb thousands of "infiltrators" from Eritrea and Sudan, such that in 2011 it became the country that received the highest number of Eritreans throughout the entire world. In contrast, the remaining countries of the world, and in particular the countries of the European Union, are dealing with a few dozen to a few hundred of Eritrean and Sudanese nationals seeking asylum in their borders – volumes which permit them to recognize their asylum requests at significantly higher rates. On the other hand, the Petitioners claim that this is not sufficient to explain the low rate of recognition, considering that the rate for all asylum seekers (and not only those who originate from Sudan and Eritrea) in these countries are similar – and even greater – than in Israel. It was argued that in 2013 alone, the countries in the European Union submitted asylum requests at a rate that was close to 1% of the total population of the Union (a total of 398,235 asylum requests). However, while the number of people entering Israel without a visa during the last 9 years is approximately 1% of the total population (with regard to the claim that the burden of handling the refugees imposed on Israel today is relatively smaller in comparison to other countries in the region, also taking into consideration its economic state, the size of its population and territory, see Tally Kritzman- Amir "Introduction" Refugees ad Asylum Seekers in the State of Israel: Social and Legal Perspectives 7, 16 (Tally Kritzman-Amir editor, expected to be published in 2014) (hereinafter the article will be referred to as *Kritzman-Amir* and the book will be referred to as *Refugees and Asylum Seekers in Israel*)). The Petitioners added that the comparison to what is occurring in other countries in the western world indicates that even countries that recognize the Eritrean and Sudanese citizens as refugees in low percentages, the percentage of recognition as being entitled to

"supplementary protection" (including granting official status and certain protections which are not required by the Refugee Convention) are greater (for example, it was noted that in 2012 they were recognized in Holland –to whom the Petitioners are referring to as an example of a western country where the percentage of recognition was lower – only 2.6% were refugees from Eritrea, however, 57.9% of them were entitled to supplementary protection).

(B) *The Dimensions of the Phenomenon – A Recent View*

37. Before we begin the task of the constitutional scrutiny of the principles of Amendment No. 4, and for the sake of formulating the factual foundation which will be at the basis of the constitutional analysis, we will refer to the recent information that was provided to us with respect to the volume of the "infiltrators" phenomenon and the acceptable methods of coping with it today. As I noted in the *Adam* Case, presenting a clear picture, insofar and to the extent that it is possible, is essential to refining the questions pending our decision (para. 1 of my opinion), since the constitutional scrutiny on all its phases is not conducted in a vacuum. It must not only rely upon the fundamental values that the State is requesting to implement in its field, but also rely on the needs and the actual reality with which it is required to contend (see and compare: High Court of Justice 4542/02 *Kav La'Oved – The Worker's Hotline v. the Government of Israel*, PADI Journal 61(1) 346, 377 (2006) (hereinafter: *First Kav La'Oved* Case); High Court of Justice 466/07 *Galaon v. The Attorney General of the Government*, para. 15 (January 11, 2012)). Indeed, the exceptional nature of emergency situations may shift the constitutional balance in a manner that will justify the temporary and limited infringement on rights, when the infringement is inevitable (see, for example, High Court of Justice 4634/04 *Physicians for Human Rights in Israel v. The Minister of Public Security*, PADI Journal 62(1) 762, 782 (2007); High Court of Justice 10466/08 *Elchayani v. The Commander of the IDF Forces in the West Bank*, para. 19 (January 19, 2009); *First Law of Citizenship* Case, pp. 340, 550-551). For example, during the period when Israeli citizens were subject to incessant acts of terror which endangered their lives, the importance for the protecting the security of the State and its residents was recognized even at the expense of significant infringement on fundamental rights (see Criminal Appeal 6659/06 *Doe v. the State of Israel*, *PADI Journal* 62(4) 329, 373-374 (2008)). Similarly, international law recognizes that it is possible to implement provisional measures "in time of war or other grave and exceptional circumstances" (see Article 9 of the Refugee Convention; also see Article 4 of the Convention relating to Civil and Political Rights, Convention Treaty 1040, 269 (opened for signing in 1966)). In our matter, if it turns out that thousands crowd the borders of a country they desire to "infiltrate", we will insist on one type of constitutional balance; and in the event that it appears that the "infiltrators" phenomenon has almost virtually ceased, another type of balance will be required. The existence of a real possibility to deport the "infiltrators" within a short time frame will create one type of balance and the reality that they cannot be deported at all – will create another type of constitutional balance. Different factual figures may, therefore, lead to a different legal result.

38. In this context, we will first review the entry rate of the "infiltrators" into Israel. As aforementioned, today there are close to 50 "infiltrators" in Israel. Examination of the figures indicates the rising trend of the number of "infiltrators" that entered into Israel between the years 2009-2011 (in 2009 5,235 "infiltrators" entered into Israel; in 2010 – 14,702; and in 2011 – 17,312) – a trend that was halted in 2012, when there was a decline in the number of "infiltrators" that entered into Israel (10,444 "infiltrators" entered into Israel during this year) (see Population Authority Data). The State insists that the significant decline of the "infiltrators" that entered into Israel was recorded between the months of June 2012 (when 928 "infiltrators" entered the borders of the country) and July of this year (when only 282 "infiltrators" entered). According to the State, this gap can be explained by the fact that in June 2012 Amendment No. 3 of the Law was beginning to be applied. The Petitioners, on the other hand, attribute this decline to the number of "infiltrators" entering Israel to the completion of vast Articles of the fence on the Israeli-Egyptian border (in June 2012, 75% of the Israeli-Egyptian border was constructed and an additional 7% was completed in July of that same year). Whatever the reasons may be for the decline in number of the "infiltrators" in 2012, there is no dispute that in the following year, in 2013, there was a steep decline in the number of "infiltrators" that entered Israel: according to the State's response, in 2013 only 45 "infiltrators" entered Israel. In the three months following the ruling of the *Adam* Case only 4 "infiltrators" entered, 19 "infiltrators" entered after the effective date of Amendment No. 4 of the Law and until June 2014, after going over the fence that was built on the Israeli-Egyptian border. The current Population Authority Data indicates that during the month of January 2014, 12 "infiltrators" entered into Israel; in March only one "infiltrator: entered the borders of the country; in the month of April – four "infiltrators"; and during the course of the months May-June 2014 not even one "infiltrator" entered the borders of the State.

39. Simultaneous to the decline in the number of people entering into Israel, at the end of 2013, there was a rise in the number of people departing from Israel. During the first half of 2014, 4,795 "infiltrators" left Israel, of which 3,676 Sudanese, 696 Eritreans, and 423 from additional countries in Africa. The State updated that 112 "infiltrators" from Eritrea and Sudan left Israel within the framework of two arrangements that were signed with "third world countries" whose purpose was to permit "a secure departure" of the "infiltrators" in Israel to countries that were not the "infiltrators'" countries of origin. These arrangements, according to the State's response, are the product of contacts which were conducted opposite different countries that was based upon Decision 3696 of the 32nd Government "establishing a detention facility for the "infiltrators" and inhibiting the unlawful infiltration into Israel" (December 11, 2011), which permitted deporting the "infiltrators" to countries which were not the countries of their origin. Due to the elevated diplomatic and political sensitivity, the parties undertook to avoid exposing the identity of the third countries with which the arrangements were signed, thus the State refrained from elaborating these countries. Nevertheless, according the State's claim, these are countries whose state of affairs will permit a safe departure to them (and thus the State believes – I will not express any opinion on this matter – that an "infiltrator" who refuses

to depart to these countries is deemed an individual unwilling to cooperate with his deportation). The State also emphasized that the Attorney General to the Government was updated regarding these aforementioned arrangements and authorized each of them from a legal perspective. During the hearing that was conducted before us, the counsel for the State noted that according to these arrangements which were signed with third world countries, consent of the "infiltrator" is required for his departure to these countries, since they are not willing to have people enter their country shackled and bound (and therefore, counsel for the State noted that the arrangements refer to "departure" of the "infiltrators" from Israel and not "compulsory expulsion"). It was further noted that in light of the third world countries requests not to create a burden of the entry of the "infiltrators" along with the intention to ensure that the exit channels are indeed "secure" – it was agreed that the process of removing the "infiltrators" in this manner will be gradual and moderate.

(C) *Interim Summary*

40. At this present time we will summarize the situation thus far. It seems that today we are facing a real change with respect to the magnitude of the "infiltrators" phenomenon. As described above, commencing in the middle of 2012, and in a heightened degree in 2013 and this year, the number of "infiltrators" entering the country decreased significantly (from 17, 298 "infiltrators" that entered in 2011 to 45 "infiltrators" that entered in 2013 to 17 "infiltrators" that entered in the beginning of 2014 and through June of this year). In other words: the wave of the large "infiltration" that was part of the mundane routine of the State since 2012, to a large extent ceased. Simultaneously, the number of people leaving Israel drastically increased (during the first half of 2014 close to 5,000 "infiltrators" left Israel). Despite the fierce controversy between the parties with respect to the reason for the change in the aforementioned trend, we cannot ignore the fact that the number of "infiltrators" within our borders is slowly diminishing.

Nevertheless, the State of Israel must still cope with the tens of thousands of "infiltrators" within its territory, without any real possibility of deporting those that are not interested in leaving the country. Arrangements that were signed with third world countries (whose actual implementation has commenced), through which it is possible to deport the "infiltrators" from the State of Israel beyond what was defined as "secure" exit channels – does not significantly modify the situation. As mentioned above, these are arrangements whose implementation is dependent upon receiving consent from the "infiltrator"; departure by the "infiltrator" in this manner is anticipated to be executed in a moderate and gradual manner, for the third-world counties demand to prevent a massive influx of the "infiltrators" into their territory and the Government's desire to ensure exit channels which are "secure" (and for proof of this matter – until March 25, 2014 only 112 Eritrean and Sudanese "infiltrators" exited in this manner). For these reasons, I believe that even though considering that this is relatively new channel of operation which has not yet been examined sufficiently, the aforementioned arrangements do not offer – at this time – an imminent and concrete channel in relation to majority of the population of the "infiltrators" in a manner which can affect constitutional scrutiny.

We have now established the factual basis necessary for our ruling and we will now progress to the constitutional scrutiny.

3. *Article 30A of the Law*

41. Article 30A of the Law, which is at the epicenter of the deliberations in the *Adam* Case, permits detaining an "infiltrator" in detention for a maximum period of three years. The Article which is now before us determined that the maximum holding period is one year, and below is the wording:

Bringing before the Head of Border Control and his authorities:

> 30A. (a) An infiltrator located in detention will be brought before the Head of Border Control no later than five working days from the day the detainment commenced.
> (b) The Head of Border Control is authorized to release an infiltrator with a monetary guarantee, with a bank guarantee or another suitable guarantee or under other suitable conditions (in this law – guarantee), if he is convinced that one of the following applies:
>
> > (1) Due to the infiltrator's age or to his physical condition, his detention may harm his health and there is no other way to prevent this stated harm;
> > (2) There are other special humanitarian grounds from those stated in paragraph (i) justifying the release of the infiltrator with a guarantee, including if as a result of the detention, a minor will be left unaccompanied;
> > (3) The infiltrator is a minor who is unaccompanied by a family member or a guardian;
> > (4) The release with guarantee of the infiltrator may assist in the infiltrator's deportation proceedings;
> > (5) The infiltrator submitted a request for a visa and permit for residency in Israel and the processing of his requests has not begun despite the fact that three months have passed;
> > (6) Six months have passed since the date on which the infiltrator submitted a request as stated in Article (5) and a decision has not yet been rendered on his request;
>
> (c) The Head of Border Control shall release an infiltrator with guarantee if one year has passed since the beginning of the infiltrator's detention.
> (d) Notwithstanding the instructions in Article (b)(2) or (4), (5) or (6) or Article (c), an infiltrator will not be released with guarantee if the Head of Border Control is convinced of one of the following:

(1) His deportation from Israel is prevented or delayed due to a lack of full cooperation on his part, including with regard to clarifying his identity or arranging for the proceedings for his deportation from Israel;

(2) His release would endanger national security, public order or public health; for this matter, the Head of Border Control is allowed to rely on an opinion from authorized security officials according to which in the infiltrator's country of origin or region of residence activities are taking place which are liable to endanger the security of the State of Israel or its citizens;

All the above unless the Head of Border Control is convinced that due to the age or health of the infiltrator, holding him in detention is liable to cause harm to his health and there is no other way to prevent the stated harm.

(e) His release with guarantee from detention will be contingent on conditions determined by the Head of Border Control, to ensure that the infiltrator will report in order to be deported from Israel at a determined time or for any other legal proceedings; the Head of Border Control is allowed at any time to review the guarantee conditions if new facts have been discovered or if the circumstances have changed after the decision to release with a guarantee was rendered.

(f) With regard to an infiltrator released from detention with a guarantee according to this Article, the decision granting his release with a guarantee will be regarded as the legal attestation of his stay in Israel for the period of his release with a guarantee; the validity of this decision regarding release with guarantee is contingent on the fulfillment of the conditions for release described above.

(g) If a guarantor requested to cancel the guarantee which he gave, the Head of Border Control may grant the request or deny it, as long as his decision will ensure the reporting of the infiltrator by supplying a different guarantor; if it is not possible to ensure the reporting of the infiltrator by means of a different guarantor, the infiltrator will be returned to detention.

(h) If an infiltrator is deported from Israel at the time determined, he and his guarantors will be exempt from their guarantee and the monetary guarantee will be returned, according to the matter.

(i) If the Head of Border Control realizes that an infiltrator who has been released with a guarantee violated or is about to violate one of the conditions of his release on guarantee, he may instruct, by issuing an order, that the infiltrator is returned to detention and he may also instruct that the guarantee is confiscated or realized.

(j) No instruction will be given to confiscate or realize the guarantee as mentioned in Article (i) until the infiltrator or guarantor has been given an opportunity to state their claims, according to the issue at hand, to the extent that it is reasonably possible to locate them.

42. In order to properly understand how the Article operates, we will first review the basic provisions of the Law for the Prevention of Infiltration. Article 1 of the Law states that an "infiltrator" is one who entered Israel not by way of a border crossing. Anyone who has done so – it shall be permissible to issue a deportation order against him and hold him in

detention (Article 30A of the Law). A deportation order shall not be executed without the authorization of the Minister of Defense, or anyone authorized on his behalf, to execute the order in consideration of the "infiltrator's" personal circumstances and the target country to where he is being deported (Article 30(A1) of the Law). If the "infiltrator" has been granted a visa and permit of residency in Israel in accordance with the Law of Entry into Israel, the deportation order shall be annulled (Article 30(A2)of the of the Law). An "infiltrator" requesting to strike the validity of a decision by a competent authority concerning the deportation order or detainment in detention by virtue of Articles 30-30A of the Law shall be permitted to submit an appeal to the Appeals Tribunal in the region in which he is located (see High Court of Justice 4747/14 *Orbermariam v. the State of Israel*, para. 2 (July 31, 2014) (It should be noted that until June 1, 2014, the way to strike a decision of a competent authority was by submitting an administrative appeal to the Court for Administrative Affairs – and not to the Appeals Tribunal (see Entry into Israel Law (Amendment No. 22), 5771 – 2011, legislation ledger 1068; Entry into Israel Order (Amendment No. 22) (Gradual and Initial Implementation), 5774-2014, regulations compilation 1152; Entry into Israel Regulations (Rules of Procedures and Administration of Appeals Tribunal), 5774 -2014, regulations compilation 1152; Entry into Israel Order (Modification of the Amendment of the Law) (Temporary Order), 5774 – 2014, regulations compilation 1162). It is permissible to file an administrative appeal with the Courts for Administrative Matters concerning the decision of the Appeals Tribunal. Likewise, an "infiltrator" may file an administrative appeal concerning the Tribunal's decision in the matter of the detention of the "infiltrators" – who conducts a periodic review on his detainment in detention (Article 30D of the Law) – with the Court for Administrative Affairs (Article 30f(a) of the Law).

43. Article 30A of the Law – which is the Article that we are reviewing – is in Chapter 3 of the Law which deals with the authorities for deportation and detainment in detention. The provisions of Article 30A of the Law arrange the powers of the Head of Border Control concerning detainment and release from detention. The Article authorized the Commissioner to detain an infiltrator for a period of one year (Article 30A(c) of the Law) – and for a greater period of time if the infiltrator is not cooperating with his deportation (Article 30A(d)(1) of the Law, or if there is imminent danger pending his release (Article 30A(d)(2) of the Law) – unless there are special humanitarian grounds justifying his prior release (Article 30A(b) of the Law).

44. This Article, in its current version, differs from Article 30A in its version in Amendment No. 3 of the Law, in several manners. First, the applicability of the Article is prospective – in other words: the provisions of the Article are only applicable to those who unlawfully entered into Israel following the effective date of Amendment No. 4, and not on the entire population of the "infiltrators". Second, the maximum holding period of an "infiltrator" in detention was reduced from a period of three years (subject to the extraordinary grounds of release enumerated in Article 30A(b) of the Law; and the authority to hold an "infiltrator" for a longer period of time for the reasons enumerated in Article 20A(d) of the Law). Third, the power to release an "infiltrator" in accordance

with the grounds for release set forth in the Law (save for the existence of exceptions listed therein) has been drafted as "compulsory" and not optional (see the *Adam* Case, para. 96). Fourth, it was determined that failure to comply with the dates for the handling of requests and applications for visas and permits of residency (for example a request for political asylum) shall constitute independent grounds for the release of the "infiltrator" from detention provided that three months has passed since the date of the submission of the request and treatment of the request has not yet commenced; and if no decision was provided within six months (Articles 30A(b)(5)-(6) of the Law). Alongside, the periods of time to bring the "infiltrator" detained in detention for judicial review before the Tribunal was minimized: it was determined that an infiltrator held in detention shall be brought before the Tribunal no later than five days from the commencement date of his detention (in contrast to 14 days in the previous version of the Law) (Article 30A(a) of the Law). With regard to the picture of the current state concerning the number of "infiltrators" actually being detained in detention by virtue of this Article – according to the figures provided by the representative of the State in this hearing before us, since the beginning of 2014, 18 "infiltrators" entered into Israel and to which the provisions of Article 30A are applicable. Thirteen "infiltrators" were detained in detention and are still being detained in detention, two women were transferred to a women's center and three left the State of Israel.

45. Prior to commencing the actual constitutional scrutiny, I would like to note that in the Petition before us the constitutionality of the entire Article 30A of the Law is being attacked (on the basis of the abusive authority set forth therein permitting the detainment of an infiltrator in detention for a maximum period of one year), the constitutionality of some of its specific arrangements, which according to the Petitioners, are specifically offensive (in particular Articles 30A(b)(1), 30A(a), 30e(1)(a) and 30A(d)(2) of the Law). In the matter before us, in light of the results that I reached whereby Article 30A in its entirety is unconstitutional and requires that we declare that all of its provisions be repealed; and whereas I did not find any need to grant different reliefs with respect to certain specific arrangements of this Article, I did not see the necessity to address the Petitioners claims concerning the constitutionality of the specific arrangements in Article 30A of the Law.

    Thus, we will approach the constitutional scrutiny of Article 30A of the Law, according to the constitutional analysis phases that are accepted in our judicial system.

(A) *The Infringement on Constitutional Rights*

46. There is no dispute that detaining a person in detention is an infringement on his right to liberty. Even according to the State, Article 30A of the Law in its current version, by its virtue infringes the constitutional rights of the "infiltrators" in detention, to the right of liberty. My colleague, Justice *E. Arbel* (retired), reviewed in detail the importance of the right to liberty in the *Adam* Case (ibid, paragraphs 71-76), and I will only review it briefly. The right to liberty is the pillar of a democratic regime. It was recognized in

Israel as a fundamental right of the first degree, as an underlying value of the State of Israel as a Jewish and democratic state (see, for example, Miscellaneous Motions, *Dannenashvili v. The State of Israel*, PADI Journal 41(2) 281, 288 (1987); High Court of Justice 6055/95 *Zemach v. The Minister of Defense*, PADI Journal 53(5) 241, 261-262 (1999) (hereinafter: *Zemach* Case); Criminal Appeals 111A/99 *Shwartz v. The State of Israel*, PADI Journal 54(2) 241, 272 (2000); High Court of Justice 3239/02 *Marav v. The Commander of Chief of the IDF Forces in the West Bank*, *PADI Journal* 57(2) 349, 364 (2003); the *Privatization of Prisons Case*, pp. 573-574). The right to personal liberty is anchored in Article 5 of the Basic Law: Human Dignity and Liberty: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise." It is granted to each person as an individual who is currently in Israel – independent of his status as a citizen and from the question of how he entered into the borders of the State or if he is here legally (see High Court of Justice 11437/05 *Kav La'Oved- the Worker's Hotline v. The Minister of Interior*, para. 36 (April 13, 2011) (hereinafter: *Second Kav La'Oved* Case)). At the foundation of the right to liberty is the right to physical liberty – the right not to be held behind prison bars (see for example, Appeal for Prisoner Appeals 4463/94 *Golan v. Israeli Prison Services*, *PADI Journal* 50(4) 136, 153 (1996) (hereinafter: *Golan* Case)). However, the right to liberty is not summarized in this matter. The infringement on the right to liberty has broad consequences. In practical terms, the right to liberty is unconditional for the exercise of other fundamental rights. As noted by Justice *I. Zamir* "the infringement on personal liberty, is like tossing a pebble in water, it creates a broader circle for the infringement on other fundamental rights: not only in personal movement, but in freedom of speech, the right to privacy, proprietary rights and additional rights […] only a free person can fully and appropriately exercise his fundamental rights. And his personal liberty, more so than any other right, is what enables him to be a free person. Thus, the deprivation of one's personal liberty in particular is an extreme violation" (*Zemach* Case, p. 261). As aforementioned, in the matter before us, it has been agreed that the authority to detain an individual by virtue of Article 30A of the Law infringes the "infiltrators'" right to liberty. It is a violation of profound intensity – whether it is deprived for a period of up to three years or when it is deprived for up to a maximum period of one year.

47. Alongside the infringement on the right to liberty, Article 30A of the Law also infringes the right to dignity. We are not dealing with only an accompanying right to the right to liberty – which is associated with and subject to the everyday rules of behavior and discipline regiment of the lifestyle of a detainee in detention (compare to the *Privatization of Prisons* Case, pp. 579-580) – but rather an independent infringement which stands alone. Article 30A of the Law prevents an "infiltrator" from realizing his desires and wills, to create his own life story and be the master of his destiny. An infiltrator detained in detention is in a closed and sealed facility and is forbidden to leave. He is not free to choose when he will leave his room; what his daily routine will be; how and when he will enjoy the company of his family and friends; which possessions he will possess; with whom will he share his room; what kind of work and tasks will he do; what will satiate his appetite; and so on and so forth. As such, Article 30A of the Law infringes

the "infiltrators'" right to autonomy – a right which is part of any person's right to liberty and which is afforded to him by the mere nature of being human (I will discuss in detail the right to dignity with the framework of the discussion concerning Chapter 4 of the Law).

48. Since we found that Article 30A of the Law infringes constitutional rights, we must now traverse to the second phase of the constitutional analysis whereby we will examine if the infringement was lawful, i.e., were the four conditions of the limitations clause met. The parties did not discuss in depth the first two conditions of the limitations clause (a violation by virtue of explicit authority in the law; the law is befitting of the values of the State of Israel). Thus, we will assume that the first and second conditions of the limitations clause were fulfilled, and we will continue and examine the last two conditions – has the infringing law been enacted for a proper purpose and is the infringement to an extent no greater than is required.

(B) "*For a Proper Purpose*"

49. In the State's response it insists that the two central purposes which Article 30A of the Law was designated to realize differ from one another with respect to the targeted audience that they are referring to: the first purpose is aimed at the population of the "infiltrators" who actually entered into the State of Israel after the effective date of Amendment No. 4. The purpose of Article 30A of the Law with reference to this group is to allow the State to exhaust all methods for their identification, while allocating the required time necessary to formulate and exhaust all departure channels from Israel. This purpose is being argued for the first time in the Petitions before us, and it was missing in the deliberations in the *Adam* Case. The second purpose is aimed at the population of the potential "infiltrators" who are considering making their way to Israel or are already in the midst of the journey here. With respect to this population, the Article was designated to prevent the recurrence of the "infiltrators" phenomenon and the attempt to settle down in Israel. Alongside these aforementioned purposes which were presented by the State, the Petitioners argue that there is an additional "obscured" purpose to Amendment No. 4 – "breaking the spirit" of the "infiltrators" with aim to encourage them to "voluntarily" leave the country. Considering that this claim is further detailed in regard to the detainment of the "infiltrators" in the Residency Center, I will review this issue later, in the Article where I deal with Chapter 4 of the Law. Thus at this stage, we are required to examine the two declared purposes of the Law according to the State's claims.

(i) *Identification and Exhaustion of the Departure Channels for Deportation*

50. First we will review the first purpose of Article 30A of the Law, which refers to, as aforesaid, the clarification of the identity of the "infiltrators" and the exhaustion of departure channels from the country. In this aspect the detention is designated, as it appears in the Explanatory Notes of the Law, to provide the authorities "a reasonable and

proper period of time relating to the circumstances to clarify the identity and state of citizenship or residence of the "infiltrators", while considering the unique characteristics of the population that "infiltrated" into Israel in mass volumes during the last years, without any official identification from the foreign country and in an unrecorded manners. This timeframe is essential in order to conduct a clarification process, for the unique circumstances for that population, a process which is comprehensive and complex. In the absence of a possibility to conduct such a clarification process, it is difficult to examine the possibility of deporting and actually deporting the "infiltrators" who arrived in Israel" (the Explanatory Notes to Amendment No. 4, 124).

51. This purpose – alone and isolated from the factual figures which I will review later – is proper. The question as to who will be permitted to enter the borders of the country is a question which by its nature is clearly sovereign related. The State has a broad prerogative to determine who will enter its gates, for how long and under what conditions, in a manner which permits is proper operations and affords protection to the rights to its citizens and residents (see High Court of Justice 482/71 *Clark v. The Minister of Interior, PADI Journal* 27(1), 113, 117 (1972); High Court of Justice 431/89, *Kendall v. The Minister of Interior, PADI Journal* 46(4) 505, 520 (1992); High Court of Justice 1031/93 *Pessaro(Goldstein) v. The Minister of Interior, PADI Journal* 49(4) 661, 705 (1995); the *Second Kav La'Oved* Case, para. 24). Alongside the State's right to determine who will enter its territory, it also has the right to deport from its borders any individual who entered in an unorganized fashion, subject to the internal Israeli law and international law to which Israel is bound. For this purpose – and solely for this purpose - the State is permitted to detain an individual in detention. The case law with respect to Article 13 of the Entry into Israel Law, which is also appropriate for the matter before us, set that holding an individual in detention who has a deportation order issued against him is legitimate when it is designated to ensure the execution of the process of his deportation from the country. It is permissible provided that the purpose is deportation, but is prohibited when there is no effective deportation process in the matter of the detainee, or when it does not appear to be feasible to deport him from the country (High Court of Justice 1468/90 *Ben Israel v. The Minister of Interior, PADI Journal* 44(4) 149, 152 (1990) (hereinafter: *Ben Israel* Case); also see the *Al-Tai* Case, p. 851; Civil Appeals 9656/08 *The State of Israel v. Saiidi*, para. 26 (December 15, 2011)). The conclusion is that there is no flaw in the sphere of the purpose of a law whose purpose is designated to allow detainment in detention for the sake of executing effective deportations processes.

(ii) *Preventing the Recurrence of the Infiltrator Phenomenon*

52. Contrary to the first purpose which we just reviewed, the second purpose of Article 30A of the Law - preventing the recurrence of the "infiltrators" phenomenon – is not free of difficulties. According to the Explanatory Notes of the Law, the arrangement in Article 30A of the Law was designated to minimize "[…] the economic incentive for the infiltration into Israel, such that a potential "infiltrator" whom is currently in their country of origin will know that in the event that he selects to arrive to Israel by means other than

a border station, he shall be detained in detention, according to the proposed arrangement, for a period of one year, and he will be prohibited from settling in urban cities in Israel and from being employed, and it will be difficult for him to yield a return on the high cost involved for his arrival to Israel" (the Explanatory Notes for Amendment No. 4, p. 126). According to the claims of the State, Article 30A of the Law was designated to serve as a "normative barrier" which will modify the system of incentives for the potential "infiltrators" considering arriving to Israel, and therefore prevent the recurrence of the "infiltrators" phenomenon. The State believes that the fact that the purpose is prospective and currently aimed solely at the "potential" "infiltrators" ensures that this is a proper purpose. As for myself, I am not convinced. I think that simply put the purpose is to deter. My colleague, Justice *E. Arbel* (retired), reviewed the difficulty of the deterrent purpose in our context at length in the *Adam* Case (*ibid*., paragraphs 85-93), and in this context, I will say the following laconically: the process of detainment in detention is not a punitive proceeding. It is not designated to penalize individuals who unlawfully entered into Israel. It is an administrative proceeding, with a specific and practical nature – the clarification of the identity of an individual who entered into Israel in an unorganized manner and the execution of his deportation process from the country. There is no doubt: the results of the process may deter others who are considering making their way to Israel. There is no flaw in the detainment of an "infiltrator", when it is aimed at promoting the process of his deportation, with an accompanying deterrent affect (*Al-Tai* Case, p. 851). Nevertheless, it should not be assumed that it is possible to detain an "infiltrator" in detention for the sake of deterring others, even after his identity has been discovered, and after it has been determined that there are no effective measures to deport him from the country (*Adam* Case, para. 86). Nonetheless, I am willing to avoid setting rules in this matter regarding the purpose, due to the reason, that in my opinion Article 30A does not fulfill the proportionality tests, which I will now review.

(C) *Proportionality*

(i) *The Reasonable Relationship Test*

53. In accordance with the *first* proportionality test, we must examine if a rational relationship exists between the offensive measure which was selected by the Law and the purpose it was designated to realize. The question in the matter before us is does the placement of an "infiltrator" in detention for a period of one year (subject to the grounds for release set forth in Articles 30A(b)(1)-(6) of the Law are grounds which permit the extension of the detention , as indicated in Articles 30A(d)(1)-(2) of the Law) realizes the two declared purposes at the basis of the legislation: exhaustion of departure channels from Israel and preventing the recurrence of the "infiltrators" phenomenon.

54. First, with respect to the purpose for the *clarification of the identity of the "infiltrator" and exhausting and formulating departure channels from the country*. There is no dispute that detaining an "infiltrator" in detention makes it easier to clarify his identity in a controlled and organized process – a matter which has great importance on the basis of

the unique characteristics of the population of the "infiltrators", who entered into Israel by means other than the border stations and who do not possess official documentation. It is also apparent that the detention assists in executing the deportation process from Israel since it ensures that no person will "disappear" and it spares any difficulties for the possibilities of locating persons in the future (compare to Article 13g(a)(2) of the Entry into Israel Law).

55. Nevertheless, examining the aforesaid purposes opposite the private arrangement set forth in Article 30A of the Law and the criteria set forth therein raise doubt with respect to the question whether the legal outline which was created can realize the purpose of the legislation (compare: High Court of Justice 1030/99 *Oron v. The Chairman of the Knesset*, PADI Journal 56(3) 640, 666 (2002)). An arrangement concerning the release of an "infiltrator" when an effective deportation process concerning his matter does not occur is absent from the provisions of Article 30A of the Law. Likewise, there is no set mechanism for the periodic review of the detainment of the "infiltrator" whose purpose is to ensure that concerning his matter there is an anticipated deportation process in the horizon which will be exercised within a reasonable time (also see the *Adam* Case, para. 34 of my opinion). The Law also does not distinguish between "infiltrators" whose identity is known and those who have not yet been identified; and those "infiltrators" who have a tangible departure channel in their horizon and to those that for whom there is no clear option to deport them. All of these make it difficult on the ability to determine if there is a rational relationship between the purpose and any other selected lawful measures (compare: *Foundation for Commitment Case*, pp.506-507).

56. In addition to the aforesaid, it should be added that picture of the factual state – which is the background for the constitutional scrutiny, although it does not rely upon it – that it also does not assist the State's claims with regard to the aforesaid existence of the rational relationship. As is known, at this current time, the nationals of Eritrea and Sudan (who constitute a major portion of the population of the infiltrators) are not deported back to their countries. To date, arrangements have been signed with third world countries – which according to the State are "secure departure channels" – and requires that the exit of the "infiltrators" in this manner be shall be done in a gradual and moderate fashion and receipt of the infiltrator's consent for his exit from the country. The State is continuing to manage contacts for the purposes of the formulation of similar arrangements with additional countries, which have not yet come to fruition. In this state of affairs, it is not clear if there is an actual effective channel of deportation in the matter of majority of the "infiltrators" detained in detention by virtue of Article 30A of the Law. There is no need to mention the entrenched law in our case law whereby a person is not to be detained in detention in the circumstances where the possibility of his deportation from the country is not in the horizon of the foreseeable future (*Ben Israel* Case, p. 152). The question of the existence of an "effective" deportation procedure and the restrictions of the time within the framework of which this aforesaid process should be executed, are acceptable criteria in international law (see 2001, Baban v. Australia, 78th Sess., July 14–Aug. 8, 2003, U.N. Doc. CCPR/C/78/D/1014/2001 ¶7.2 (Sep. 18, 2003);;Human Rights Comm.

Communic'n 1050/2002, D & E, & Their Two Children v. Australia, 87th Sess., July 10–28, 2006, U.N. Doc. CCPR/C/87/D/1050/2002 ¶7.2 (Aug. 9, 2006) (hereinafter: D & E Case)). Thus, European Law prohibits detaining illegal immigrants if there is no effective deportation process that is anticipated to be executed within a reasonable timeframe (see Directive 2008/115/EC, of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, art. 15(1), 2008 O.J. (L 348) 98, 105. (available here); also see the rulings of the European Tribunal for Human Rights: Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 1863 ¶113 and the European Tribunal of Justice: Case C-357/09 PPU, Kadzoev, 2009 E.C.R. I-11189, ¶ 63). Similarly, various western countries determined in their internal legal system that the detainment of illegal immigrants in detention cannot extend beyond a reasonable amount of time; and the absence of the authorities of the state's objective ability to issue and execute a deportation order does not serve as grounds for prolonged detention (Alice Edwards, U.N. High Commissioner for Refugees, Div. of Int'l Prot., Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants 56–60, U.N. Doc. PPLA/2011/01.Rev.1 (2011) (available here) (hereinafter: U.N. High Commissioner Document for Refugees 2011)). Therefore, it is clear that insofar and to the extent that there is no effective deportation process which is anticipated to occur within a reasonable timeframe in the matter of the "infiltrators" being held in detention – it is not possible to continue to hold them only for the sake of the "formulation" of departure channels which at this present time are not applicable.

57. The existence of a rational relationship between the selected measures and the second purpose of the Law, which is the prevention of the recurrence of the infiltration phenomenon, is apparently more significant. Indeed, the question what are the factors which have the powers to curtail the "infiltrators" phenomenon is a complex question (see the *Adam* Case, paragraphs 98-101). The decline in the number of those unlawfully entering into Israel, which I reviewed above, can be explained inter alia to the geo-political development in Egypt (which affected the immigration channels in Israel); by the legislation of the provisions of the Law which prohibited the "infiltrators" from removing property from Israel; by opening the possibility of immigrating to other countries in the world; and the rumors circulating amongst the potential population of "infiltrators" about the instability in Egypt and the existence of "torture camps" in the Sinai Peninsula (*Kritzman-Amir*, p. 33). It is also apparent that a portion of the decline can be attributed to the completion of the fence that was set-up on the Israeli-Egyptian border. This fence constitutes a "physical barrier" which was established along the southern border of Israel simultaneous with the legislation of Amendment No. 3 and Amendment No. 4 of the Law which was designated to serve as a "normative barrier" for the entry of the "infiltrators" (also see the *Adam* Case, para. 223 of my opinion). Had the State waited several months with the legislation of Article 30A of the Law until the completion of the construction of the fence on the southern border, it would have been possible to assess more accurately the contribution of each of these aforesaid "barriers"

for immobilizing the phenomenon (in this context, see the figures from 2012 concerning the decline in the number of the "infiltrators" who entered into Israel simultaneous to the progress of the construction of the fence – *Adam* Case , para. 99). Nevertheless, there is no doubt that the "physical barrier" does not have the power to completely prevent the "infiltrators" phenomenon. As indicated by the State, in the period following the legislation of Amendment No. 4 and until June 2014, 19 "infiltrators" entered Israel in spite of the existence of the fence, whilst they passed over it, hence the fence alone does not absolutely immobilize the entry of the "infiltrators".

58. Alongside all of the above, I am willing to presume that a "normative barrier" also has an impact on the "reasonable infiltrator's" set of considerations who wishes to make his way to the State of Israel. The knowledge that he is expected to stay in detention may strongly affect the "infiltrator's" set of considerations when making his way to Israel on the grounds of economic migration (as aforesaid, I concur with the fact that a portion of the "infiltrators" wish to arrive specifically in Israel for these reasons; for more see the *Adam* Case, para. 22 of my opinion); and the concern from being detained in detention – in other words the least offensive measure which was selected by the legislator in Article 30A of the Law – which may even provide for those who fled from imminent danger from their origin country to the destination of his journey. If he is expected to be in detention, it is possible that he will select not to arrive in Israel, but other countries which apply more comfortable normative arrangements. In other words, even though a few causal factors can account for – albeit partially – the declining trend in the number of "infiltrators" who entered Israel in the last few years, and despite the existence of the "casual ambiguity" in the exact contribution of all of each of these aforesaid measures, it is possible to assume that the detention arrangement set forth in Article 30A of the Law is an additional "deterring" element which aids in obtaining the deterrent purpose (I have already reviewed the inherent difficulties).

59. The question of the rational relationship in our case thus reveals the aspects on both parts. Nevertheless, I am willing to assume that Article 30A of the Law passes the first proportionality test – although it is apparent that the doubts raised that will have an impact on the continuation of the constitutional scrutiny (see *Hassan* Case, para. 61; *Adam* Case, para. 101).

ii) *The Least Offensive Measure Test*

60. The second proportionality test requires the legislator to select the measures that will least infringe on the human rights amongst all measures that can realize the proper purpose of the infringing law. In our case, when reviewing this test we are instructed to do so with special prudence, when the legislator selected the harshest of measures – detention – which means total deprivation of the right to liberty. When the most offensive measure is selected "it must be [within the framework] the last measure" (High Court of Justice 316/03 *Bachari v. the Council for Movie Reviews, PADI Journal* 58(1) 249, 268 (2003)), and the Court must ensure more intensely that although an alternate

measure whose harm is less for the realization of the purpose of the legislation does not exist (compare to paragraphs 13(b) and 21(b)(1) of the Criminal Law Procedure (Powers of Enforcement – Arrest) Law 5756-1996 (hereinafter: *Arrests Law*) Appeal for Administrative Arrest 8788/03 *Federman v. The Minister of Defense, PADI Journal* 58(1) 176, 188 (2004) (hereinafter: *Federman Case*).

61. The Petitioners requested to point out an assortment of alternate measures that they have to realize the purpose of the law in the least offensive measure against the rights of the "infiltrators". In my opinion, the examination of these measures – which I will review shortly – suggests that they cannot obtain in the same degree or in a similar degree the two declared purposes of the law, such that Article 30A of the Law fulfills the second proportionality test, and I will explain.

62. With respect to the purpose concerning the *clarification of the identification of the "infiltrator" and the formulation of the exhaustion of all departure channels from the country*: It appears that it is difficult to differ the fact that placing an infiltrator in detention when an effective process of deportation is being conducted in his case, aids in easing the concern that he will escape and thus thwart the clarification process of his identity and his deportation from Israel. However, are there other alternate measures which will lead to a similar result, whose infringement on rights will be less? The first alternate measure that must be reviewed seriously are the open or semi-open Residency Centers, which aid in the supervision of the population of the "infiltrators" (see the *Adam* Case, para. 104; para. 4 of the opinion of my colleague, Senior Associate Justice *M. Naor*; para. 40 of my opinion). To date, Israel operates a Residency Center in the "Holot" Facility, which was recently established by virtue of Chapter 4 of Amendment No. 4 (which I will revert to and review later). There is no doubt that the infringement on the right to liberty in this Facility, which permits any type of movement to and from is less severe. Nevertheless, it is certain that a Facility of such nature, where one can leave without returning (as 105 "infiltrators" actually did since March 11, 2014, according to the figures provided by the State), is not a measure which realizes the purpose of the Law in a similar effective manner.

63. I will further note that in several countries in the world, additional measures which contribute to the realization of the deterrent purposes are acceptable. For the purposes of illustration, as of 2004, in the United States, alternatives for "monitored release" were developed, including the Intensive Supervision Appearance Program (ISAP) and the Electronic Monitoring Device Program (EMD). Within the framework of these programs, the detainees are released, in general, without the requirement of a significant physical appearance, however, they are subject to electronic monitoring devices; monitored visits in their home; and telephone reporting requirements by means of a voice identification system. Additional technology that is implemented is the Radio Frequency (RF) Monitoring, which include electronic cuffs (see Memorandum from Wesley J. Lee, Acting Dir., U.S. Immigration & Customs Enforcement, to Field Office Dirs., Eligibility Criteria for Enrollment into the Intensive Supervision Appearance Program (ISAP) and

the Electronic Monitoring Device (EMD) Program (May 11, 2005) (available here); Alison Siskin, Cong. Research Serv., RL 32369, Immigration-Related Detention: Current Legislative Issues 15–16 (2012) (U.S.) (available here); however, see the claim whereby the broad application of these measures may worsen the condition of those who at outset are not in detention : Anil Kalhan, Rethinking Immigration Detention, 110 Columbia L. Rev. Side Bar 42, 55-56 (2010); For additional examples of alternate measures for detention in this context which are acceptable in other countries throughout the world see the *Adam* Case, para. 107).

There is no doubt that the integration of different measures for detention – open or semi-open Residency Centers, depositing a guarantee, the requirement to appear and register and electronic means of reporting and monitoring – can significantly minimize the concern of the "infiltrator's" "disappearance" in a manner which will cause the execution of his deportation process to be difficult (when an effective departure channel will be located for him). Thus, these measures can promote the realization of the purpose for deportation. However, in my opinion, the effectiveness of these measures are not equivalent to the one offered by closed detention. This is sufficient to pass the second proportionality test with respect to this purpose

64. With reference to the second purpose of the Law – *preventing the recurrence of the "infiltrators" phenomenon* – I accept that there are no other alternate measures which are less offensive which can realize the purpose in the same degree or in a similar degree. It is indeed possible to indicate measures that have the power to deter potential "infiltrators" for making their way to Israel, in the same degree or otherwise, whose harm will be less. A central measure in the matter before us that was reviewed extensively in the Adam Case was the construction of the fence on the Israeli-Egyptian border. My colleague, Justice *E. Arbel* (retired) believed there that Amendment No. 3 did not pass the second proportionality test, for the reason that she did see to negate the possibility of an alternate measure which obtains the immobilizing purpose in a similar manner, with a less offensive infringement on the rights (*Adam* Case, para. 103). My opinion is different. As I noted *there*, "for every fence – it is possible to find a ladder, and even a physical barrier that is not hermetic" (para. 25 of my opinion). Even now I am willing to accept the State's claim that the existence of a "normative barrier" alongside the fence aids in obtaining the effectiveness of the deterrent purpose to the highest degree, in comparison only to the fence. I will further note that within the framework of the deliberations of the Petitions before us the State referred to Intelligence reports, whereby the organized smuggling groups operating in North Africa have the power to sabotage the fence and pass the "infiltrators" through the fence if the motivation to enter Israel will increase; and to start smuggling "infiltrators" through Jordan – a country whose borders are primarily with Israel. In any event, it is sufficient that only 19 "infiltrators" crossed the Israeli – Egyptian border from the legislation of Amendment No. 4 and until June 2014 to teach us that the fence is not impassable.

65. An additional alternate measure that must be examined is the new legislation which prohibits the "infiltrators" from removing property from Israel. Indeed, it appears that Amendment No. 4 has the power to somewhat promote the deterrence of the potential "infiltrators" requesting to enter into Israel for primarily economic motives. Notwithstanding, it is apparent that this is not a measure that can obtain the effectiveness of the deterrent purpose in the same degree as being detained in detention. Similarly, I think that open or semi-open residency centers, which I reviewed earlier, were not designated to have a "deterrent effect" which is similar to that which is intrinsic in detention, in light of the possibility of leaving without returning. The result is that a measure that is least offensive of the rights for the realization of this purpose cannot be indicated.

66. In the absence of an alternate measure that has the power to realize the purpose of the Law in *the same degree* or in a *similar degree* to being detained in detention, the conclusion is that Article 30A of the Law does not pass the second proportionality test. Notwithstanding, the fact that there are many alternate measures which promote the purposes of the Law to some degree or otherwise, and the influences will be revealed later during the constitutional scrutiny (*Adam* Case, para.7 of my opinion; High Court of Justice 2056/04 *Council of Bet Sorik Village v. The Government of Israel*, PADI Journal 58 (5), 807, 851-852 (2005); High Court of Justice 10202/06 *The Municipality of Dahariyah v. the IDF Commander In the West Bank*, para. 21 (November 12, 2012); *Barak – Proportionality*, pp, 434-437).

(*iii) The Proportionality Test in the Strict Sense*

67. According to the third proportionality test, the proportionality test in the "strict sense", we must examine if there is an appropriate relationship between the purpose that the public will accrue from the legislation whose constitutionality is on the agenda, and between the infringement on the constitutional right that will be sustained as a result of the operation of the offensive measure set forth in the Law. In the ruling in the *Adam* Case we concluded that Article 30A of the Law – according to its version in Amendment No. 3 – is not constitutional, after we found that a proportionate measure between the impact of the infringement on the rights and its inherent purpose does not exist. Now, the question before us is if the new "softened" version of Article 30A of the Law passes the proportionality test in the strict sense. We are forced to answer this question in the negative. Although certain modifications in the current version of Article 30A of the Law reduced the impact of the infringement on these rights – it is not sufficient to shift the balance point from its place and alter our decision in the *Adam* Case.

68. With respect to the balance between the benefit and the harm – we are first required to review the benefit. In our case, we will clarify the benefit as seen before the legislator: the significant high toll of the "infiltrators" phenomenon on the residents and citizens of the State. Indeed, this phenomenon has economic, social, security and national ramifications – it reduces the available supply of job vacancies in the labor force; it

affects the sense of personal security to the residents living near the "infiltrators"; modifies the social fabric in the areas where the "infiltrators" live; and requires from the State to allocate significant resources in order to handle it. Nevertheless, within the framework of the third proportionality test, it is not sufficient to examine the benefit of the law according to the view of the legislator. The Court has a complex task of considering the expected benefit of the law in *practice*. We must assess what is the degree in which the purposes of the Law are realized following the operation of the least offensive measure prescribed in the Law. On the part of the value attributed to the desired benefit, one must also consider the extent to which the offensive measure (and not other measures which are least offensive) specifically will promote the same benefit. This task is not simple whatsoever. Yet, even when the assessment remains controversial, a decision is necessary. The decision must be made the Court. This is the role and authority of the Court (*Zemach* Case, pp. 273-274).

69. We are required then to assess to what extent is it anticipated that the offensive authority set forth in Article 30A of the Law – detaining an "infiltrator" in detention for a maximum period of one year – will "supplement to the benefit" of the attempt to reduce the dimensions of the "infiltrators" phenomenon (also see the *Adam* Case, para. 29 of my opinion). Within this framework, there is significance to the conclusions arising from the first and second proportionality tests. As recalled, the examination of Article 30A of the Law in the first proportionality test raised concerns regarding the existence of the rational relationship between the first purpose of the Law, dealing with the exhaustion of the departure channels from the country, and between the offensive measure selected by the legislator. These doubts also affect the assessment of the inherent benefit of holding the "infiltrators" in detention, as required by the third proportionality test.

Even with the existence of alternative measures, which I reviewed within the framework of the least offensive measure test, there is an effect on the assessment of the anticipated benefit from the Law. Within the framework of the second proportionality test we reviewed additional measures that could promote the purpose concerning deterring potential "infiltrators" – including the fence along the Israeli-Egyptian border whose construction was already completed and the new legislation prohibiting the "infiltrators" from removing property from Israel. We also mentioned the possibility of instructing the stay of the "infiltrators" in a Residency Center as an alternative which has the power to advance (if not achieve it in a similar degree of effectiveness) of both the deterrent purpose and the purpose concerning the exhaustion of departure channels from the country. Then what is the recognized marginal benefit of Article 30A of the Law on the basis of the background of the combination of these measures? It is difficult to answer this question with clarity, and to a great degree the response is speculative (compare to *First Kav La'Oved Case*, p. 396; High Court of Justice 3648/97 *Stemka v. the Minister of Interior*, PADI Journal 53(2) 728, 782 (1999)). Although I don't seek to dispute that Article 30A of the Law provides an "added benefit" to all of these (which is defined as being a "normative barrier" by the State), the fact is this is solely an "added benefit" – an

additional aiding measure, which stands alongside the other measures – it bears weight in the scope of the constitutional balance.

Finally, compliance with the inherent benefit of Article 30A of the Law is affected from the sharp one-dimensional modification in the "infiltrator" phenomenon (which I reviewed in paras. 38-39 above). As previously mentioned, during the course of the last two years there was a real decline in the number of "infiltrators" who entered the country. Thus, in 2013, 45 "infiltrators" entered into Israel; and until June 2014 only an additional 19 "infiltrators" entered into Israel. This is in contrast to the 17,298 "infiltrators" who entered into Israel in 2011. In light of these figures, it appears that there is a pressing social need for a strict normative arrangement for this phenomenon which appears in another form.

In the absence of a clear link between Article 30A of the Law and the existence of effective deportation proceedings; given the existence of the measures that have the power to promote the purposes of the Law while reducing the infringement on the rights of the "infiltrators"; and in light of the considerable change in the rate of the "infiltrators" entering the country – the conclusion is that albeit that Article 30A of the Law transposes a benefit to the public, the benefit is solely limited.

70. Opposite the benefit there is a need to examine the impact of the infringement of the Law on constitutional rights. There is no doubt that Article 30A of the Law, in its current version, is preferable to its precursor. Amendment No. 4 reduced the maximum holding period in detention from three years to one year and the authority to release an "infiltrator" following the aforesaid timeframe was formulated as a compulsory power (the authority in Amendment No. 3 was defined as an "optional" power, See the *Adam* Case, para. 96); the Article is applicable only to "infiltrators" who unlawfully entered Israel following the effective date of the new amendment; the timeframes of bringing an "infiltrator" before the Head of Border Control and the Detention Review Tribunal for Infiltrators were reduced; the timeframes for the handling of asylum requests were reduced, and non-compliance with them constitutes grounds for release from detention; it was determined that the opinion of a certified security official concerning the danger from the "infiltrator's" country of origin or the region of his residence shall not constitute independent grounds that will enable him to be detained in detention; express provisions were anchored whereby the detention facility will provide appropriate conditions that will not harm the health or dignity of those who are staying there; and it was determined as a rule – and not an exception – that it is possible to release an "infiltrator" from detention based upon unique humanitarian grounds. All of the above have the ability to reduce the impact of the infringement on rights which is a direct result of the detainment in detention. However, is this sufficient to pass the third proportionality test? My answer to this is nay. I will elaborate my reasoning.

71. The main change implemented by the legislator in Article 30A of the Law is the provision that the permitted period of detainment in detention of an "infiltrator" is a

period of up to one year (in contrast to, as aforesaid, the three year period set forth in Amendment No. 3). It shall be said unequivocally: within the scope of the protection in its sovereignty – the State has the right – and there are those who will claim even the obligation – to impose restrictions on unidentified foreigners unlawfully entering its borders, including also detaining them in detention. Notwithstanding, even though the State is permitted to do so, it is not permitted to do so at any cost. As aforesaid, detainment in detention is permitted only when protecting the sovereignty of the State, with the purpose of deporting from Israel those individuals who are unlawfully staying in its borders. It cannot be executed as a punitive act, which is not within the framework of a criminal proceeding. In accordance with the requirements of the limitations clause, it must be executed when it is crucial: when no other alternate measure exists; and for a proportional period of time. In our case, the "default" set forth in Article 30A of the Law, where it is possible to detain in detention the illegal immigrants when there is no possibility to deport them for a maximum period of time for one year, does not comply with these requirements. In my opinion, when we are dealing with the population of the "infiltrators" to whom this Article is directed – infiltrators" who are primarily non-deportable from Israel, for reasons which are not dependent upon them – even this timeframe for the deprivation of the right to liberty is not consistent with the constitutional criteria.

72. Notwithstanding, diverting our attention to what is occurring overseas teaches us that the maximum period of one year for the detainment of detention of the illegal immigrants who cannot be deported on grounds that are not connected thereto is not acceptable in most countries. Before delving deeper into the comparative examination, I will request to emphasize the obvious: a comparative examination is a limited examination. It must be conducted cautiously, while relating to the specific context, and the normative, cultural and social restrictions that may affect the nature of the comparison. A particular statutory provision should not be isolated and it nature should not be measured independently from the overall arrangement that was created within this framework and which grew from its shadows, since "comparative law is not the concerned with the matter of comparison of the pure provisions of the law (the *Investment Managers* Case, p. 403; Dafna Barak – Erez "Comparative Law in Practice –Institutional, Cultural and Applicable Aspects", *Haifa Law Review* 4, 81, 83-91 (2008); also see Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Jacco Bomhoff, *Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law*, 31 HASTINGS INT'L& COMP. L. REV. 555 (2008). And yet, even after we warned ourselves of the aforementioned, and in consideration of the examinations executed in other countries which is not designated to replace the internal constitutional scrutiny that is based upon the constitutionality criteria set forth in Israeli law, it should be recalled that democratic countries differ on the common basic values. It is possible to learn from one another. By means of comparative law it is possible to broaden the constitutional horizons and receive interpretive inspiration (*Proportionality in the Law*, pp. 91-94). In an issue similar to this matter, which occupies many

countries throughout the world to find diverse solutions, it is not correct that we overlook the comparative analysis.

73. In most western countries in the world the detention of illegal immigrants awaiting their deportation for a period that is greater than several months has been prohibited (for a general overview see OXFORD PRO BONO PUBLICO, REMEDIES AND PROCEDURES ON THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST OR DETENTION TO BRING PROCEEDINGS BEFORE A COURT, 27-28 (2014) (available here) (hereinafter: the *Research for the Infringement of Liberty*). Thus, for example, in France it was determined that it is possible to detain illegal immigrants in detention for a period that shall be not exceed *45 days* (Code de l'entrée et du séjour des étrangers et du droit d'asile [CESEDA] §§ L551-1, L552-7; Nicolas Fischer, The Detention of Foreigners in France: Between Discretionary Control and the Rule of Law, 10 EUR. J. CRIMINOLOGY 692, 693-96 (2013). In Canada, the law does not restrict the maximum period for detaining illegal immigrants in detention, but they are actually detained for a period of *25 days* on average. Those not deemed to be suspected as dangerous are released in much shorter timeframes (Canadian Immigration and Refugee Protection Act, S.C. 2001, c. 54-61; Immigration and Refugee Protection Regulations, SOR/2002-227; STANDING COMM. ON CITIZENSHIP & IMMIGRATION, 41ST PARL., STANDING ON GUARD FOR THEE: ENSURING THAT CANADA'S IMMIGRATION SYSTEM IS SECURE 23 (2013)(available here). Also, in Britain the law does not set a limitation on the duration of the stay (Immigration Act, 1971, c.77, Sch. 2, § 16(2), Sch. 3, § 2 (U.K.); *the Research for the Infringement of Liberty*, p. 467), but it is however subject to judicial scrutiny limiting the power for the duration of the detainment (Dallal Stevens, *Asylum Seekers, Detention and the Law: Morality or Abeyance?*, in THE ASHGATE RESEARCH COMPANION TO MIGRATION LAW, THEORY AND POLICY 395, 408-12 (Satvinder S. Juss ed., 2013). A period of three months is deemed a significant period, and a period that is greater than *six months* is deemed justified only when there is a special need, such as the protection for public security (Bail Guidance for Judges Presiding over Immigration and Asylum Hearings 5 (First-Tier Tribunal Immigration & Asylum Chamber, Presidential Guidance Note No. 1 of 2012) (U.K.) (available here). In any event, in Britain it was prohibited to detain an individual in detention when it is not possible to deport him within a reasonable timeframe (R (Lumba) v. Sec'y of State for the Home Dept., [2011] UKSC 12, 103, [2012] 1 A.C. 245 (appeal taken from Eng.), and in practice approximately 94% of the illegal immigrants are not detained in detention for a period that is greater than *four months* (Home Office, Immigration Statistics, January to March 2014 § 12.3 (May 22, 2014) (U.K.) (available here).

74. In Germany, it is possible to detain illegal immigrants in detention only as a last resort, for a period that will not exceed *six months*, provided that there is a forecast to the implementation of the deportation order within the next three

months (Aufenthaltsgesetz [AufenthG] [Residence Act], Feb. 25, 2008, BUNDESGESETZBLATT I [BGBL. I] at 162, as amended, §§ 61–62) *the Research for the Infringement of Liberty*, p. 241. Nevertheless, hindering the deportation on the part of the illegal immigrant may cause an extension for a period of an additional 12 months. *ibid*, Article 62(4) of the Law). In Austria, it is possible to detain illegal immigrants for the sake of executing the deportation order for a period of time that shall not exceed *four months*, and in unique circumstances – *six months* (FREMDENPOLIZEIGESETZ 2005 [FPG] [ALIENS' POLICE ACT] BUNDESGESETZBLATT I No. 100/2005, as amended, §§ 76–81; *the Research for the Infringement of Liberty*, p. 27). In Spain, it is possible to detain an individual where a deportation order was issued against him for a period limited to *two months* (Ley sobre derechos y libertades de los extranjeros en España y su integración social [Law Regarding Rights and Freedoms of Foreigners in Spain and Social Integration], art. 62(2) (B.O.E. 2000, 544) (as amended); E.U. AGENCY FOR FUNDAMENTAL RIGHTS, FUNDAMENTAL RIGHTS OF MIGRANTS IN AN IRREGULAR SITUATION IN THE EUROPEAN UNION 34–38 (2011) (hereinafter: *FRA Report*) (available here)). In South Africa, it is not possible to detain illegal immigrants in detention for a period that is greater than *four months* (Immigration Act 13 of 2002 § 34(1)(d); Arse v. Minister of Home Affairs and Others 2012 (4) SA 544 (SCA) ¶ 9). In New Zealand, ordinarily it is possible to instruct on the detainment of an illegal immigrant in a closed facility for a limited period of 28 days. This period may be extend for additional 28 day periods at a time, depending on conditions justifying the continuation of the detention, but as a rule, the *detention shall be no more than six months* in the aggregate, unless the detainee is not cooperating with his deportation (Immigration Act 2009, §§ 316, 323). An amendment was recently passed, concerning the entry of large groups of "infiltrators" into the country, which permits, upon the approval of a judge, detaining an illegal immigrant for a period that is greater than *six months* without periodic extensions by a judge (Immigration Amendment Act (Mass Arrivals) 2013; *the Research for the Infringement of Liberty*, pp, 24, 27). Even in the United States it was determined that in the absence of refutable reasons, illegal immigrants detained in detention for a period greater than *six months* shall be released if there is no likelihood that it will be possible to execute the deportation order in their matter in the near future (Zadvydas v. Davis, 533 U.S. 678, 701 (2001); nevertheless, see the comments of my colleague, Justice *N. Hendel*, in the *Adam* Case, para. 7 of his opinion).

75. On the other hand, there are several countries that apply a stricter policy relating to detainment in detention. In Italy, the decision of the immigration authorities to transfer an illegal immigrant into detention requires the approval of a judge within 48 hours from the date of the arrest. Insofar and to the extent that the judge approved the detention, as a rule, it shall not continue for more than 30 days, however, it is possible to provide extensions of 30 or 60 days with the

approval of a judge for a period which shall not ordinarily exceed *six months*. In cases where deportation is not possible due to the lack of cooperation of the detainee or due to the delay in the submission of the required documents, it is possible to extend the detention for periods of 60 days at a time, until an additional 12 months of detention , in other words: *18 months* in total (Testo Unico dell'Immigrazione, § 14; *the Research for the Infringement of Liberty*, pp. 299-301). In Greece, it was determined that the detention of an illegal immigrant shall be permitted only as a last resort when it not possible to obtain the deportation purposes in less offensive measures – which is limited to a period that shall not exceed *six months* – nevertheless, the period may be extended for an additional 12 months (a total of *18 months*), as is usually done in practice (ΚΩΔΙΚΟΠΟΙΗΣΗ ΝΟΜΟΘΕΣΙΑΣ: Για την είσοδο, διαμονή και κοινωνική ένταξη υπηκόων τρίτων χωρών στην Ελληνική Επικράτεια (On The Entry, Residence and Social Integration of Third Country Nationals on Greek Territory) 3386/2005, §§ 76(2), 76(3); Ιδρυση Υπηρεσίας Ασύλου και Υπηρεσίας Πρώτης Υποδοχής, προσαρμογή της ελληνικής νομοθεσίας προς τις διατάξεις της Οδηγίας 2008/115/ΕΚ (Establishment of Asylum Authority and First Reception Service) 3907/2011, §§ 22(3), 30(1), 30(5), 30(6); Presidential Decree 116/2012; *the Research for the Infringement of Liberty*, pp. 250-255; U.N. High Comm'r for Refugees Greece, Current Issues of Refugee Protection in Greece, 4 (July 2013).

76. Added to this is Australia which does not set forth in its legislation a time limitation for detainment in detention (see Migration Act 1958 (Cth) § 196; Al-Kateb v Godwin [2004] HCA 37, (2004) 219 CLR 562, ¶ 33–34; *the Research for the Infringement of Liberty*, p. 130; for another trend see the recent ruling of the Australian Supreme Court *S4-2014 v Minister for Immigration & Border Protection* [2014] HCA 34) and Malta, where it is possible to detain an illegal immigrant in detention for a period of *18 months*, or for a period of *12 months* with the submission of an asylum request (U.N. High Comm'r for Refugees, Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Malta. 1 (Mar. 2013) (hereinafter: the *Maltese Report*) (available here)). The customary policies in these last two countries have been sharply criticized (for Australia, see the ruling of the UN Committee for Human Rights whereby these are unacceptable policies: see the *D & E Case*, paragraph 7.2; for criticism concerning the policy in Malta, see Daniela DeBono, *'Not Our Problem': Why the Detention of Irregular Migrants is Not Considered a Human Right Issue in Malta*, in ARE HUMAN RIGHTS FOR MIGRANTS? CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES 146 (Marie-Benedicte Dembour & Tobias Kelly eds., 2011).

77. It is also worthy to note in this context the rule determined by the European Deportation Directive, that a portion of the mentioned countries designed their

internal legislation given its outline, whereby if there is no less offensive measure, it is possible to detain an illegal immigrant in detention (primarily when there is danger that he will flee or thwart his own deportation from the country) for a period of up to *six months*. This period may be extended for a period of an additional 12 months (*18 months* in total) if the detainee is not cooperating with his deportation; or when there is a delay in the submission of the necessary documents for the actual implementation of his deportation order (Directive 2008/115/EC of the European Parliament of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, § 15 (available here)). It should be noted that the European High Court of Justice ruled that it is possible to extend the detention following the six month period only if there is an effective deportation proceeding (Case C-357/09, Kadzoev, 2009 O.J. (C 24) 17, 63–67 (Eur. Ct. Justice (Grand Chamber).

78. The comparative examination contributes to the enrichment of knowledge, but it is an examination that is "beyond necessity". Our constitutional law leads us to the same conclusion: placement of "infiltrators" into detention when there is no deportation in the horizon for their matter for a period for a whole year – when it is not as a punishment for their actions, and without the ability to do anything to advance their release – obviously establishes a severe infringement on their rights (*a fortiori* is true with reference to those requesting asylum; see the *Adam* Case, para. 37 of my opinion).

79. Detainment in detention takes a heavy toll on the detainee. There is almost no right which is not compromised as a result. It deprives the right to liberty and infringes on the right to dignity; it derogates from the right to privacy, negates the ability to have a family and limits the individual's autonomy in the most fundamental sense. The deprivation of the right physical liberty, then in turn leads to the infringement on additional constitutional rights, and affects all aspects of the individual's life. Detaining a person in detention for a whole year diverts his life from its course. It "freezes" – in the very least, for a significant period of time– his ability to manage his life and exercise his autonomy. It is not for naught that majority of the western world countries placed limitations on the maximum period for detainment in detention which is estimated at a few weeks or several months.

    The result is that the profound nuclear harm substantially caused by Article 30A of the Law on constitutional rights persists in the current version of the Law. In my opinion, this infringement fails to meet – even closely – a direct relation to its derived benefit. As such, it is disproportionate and unconstitutional.

(D) *The Remedy*

80. It appears that Article 30A of the Law is not constitutional due to the difficult and disproportionate infringement on the right to liberty and dignity. However, our task is not completed. In the last phase of the constitutional scrutiny we are required to examine the remedy that possesses the power to cure the unconstitutionality.

81. My opinion is that there is no alternative but to declare the repeal Article 30A of the Law in its entirety. Having reached the conclusion that the central provisions of Article 30A of the Law are tainted with unconstitutionality, it is not possible to separate between the different arrangements in an attempt to differentiate between those parts that are constitutional and those which are not constitutional (also see the *Adam* Case, para. 119). Indeed, after this Court reached the conclusion that a certain legislative act is unconstitutional "it is not its role to determine the details of an arrangement that will take the place of the unconstitutional legislative bill, this is the responsibility of the Knesset" (*the Privatization of Prisons* Case, pp.614-615). Therefore, we can only instruct on the repeal of the entire Article, and leave it to the Knesset, if so desired, to arrange a new arrangement in its place.

82. Similar to the outline that we took in the *Adam* Case, I will suggest that in the place of Article 30A of the Law we immediately revert to the constitutional arrangement that was in effect until Amendment No. 3 of the Law for the Prevention of Infiltration – the Law of Entry into Israel. Accordingly, the deportation orders issued by virtue of Article 30A of the Law for the Prevention of Infiltration shall be deemed issued by virtue of Articles 13(b) and 13(a)(c) of the Entry into Israel Law. The authorities will be required, therefore, to examine the individual mattes of those being detained in detention to date by virtue of Article 30A of the Law according to the time schedules and grounds for release (including the exceptions thereto) which are set forth in the Law of Entry into Israel (compare to the *Adam* Case, paras. 117-118). Obviously, the remaining arrangements in the Law shall be applied side by side, including Article 13f(b) of the Law whereby one will not be released on guarantee if his release will endanger the security of the State, the public welfare or the public health, and an individual whose deportation is prevented as a result of the lack of full cooperation on his part.

83. In the *Adam* Case we found it necessary to determine that the grounds for release in Article 13f(a)(4) of the Law of Entry into Israel– whereby the Head of Border Control is permitted to instruct upon the release of an illegal immigrant on guarantee if he is detained in detention for more than 60 consecutive days – shall not be applicable to a period of 90 days from the date of the ruling. We determined that in order to allow the State to prepare for the examination of the individual cases of those being detained in detention, which at that time the numbers were great (approximately 1,750 infiltrators; see the *Adam* Case, para.

35), and it required extraordinary preparation. Nevertheless, this time it appears that the required continuous organization period of this type is not required in light of the limited number of "infiltrators" being maintained in detention by virtue of Article 30A of the Law. Thus, and in consideration of the approaching Jewish holidays and for the sake of a sufficient organization period, I will suggest to my colleagues that we determine that the grounds set forth in Article 13f(a)(4) of the Law of Entry into Israel not be applied before October 2, 2014.

4. *Chapter 4 of the Law*

84. Chapter 3 of the Law which is primarily Article 30A of the Law deals with holding an "infiltrator" in forward – looking detention, and in the matter of those that entered into the gates of the county during the period following the effective date of the amendment. The provisions of Chapter 4 of the Law deal with establishing a relevant Residency Center primarily for the "infiltrators" who are currently in our borders, and it arranges its purpose, characteristics and methods of operation for the Residency Center. We will now review this issue.

85. An "infiltrator" finds his way to the Residency Center when difficulties arise in executing his deportation. In this state, the Head of Border Control is permitted to give the "infiltrator" a "residency order" which by its virtue he is required to report to the Residency Center. This is irrelevant to whether the "infiltrator" being detained in detention at such time or not (Articles 32d(a) and 32d(b) of the Law. An "infiltrator" who has been issued a residency order cannot receive a visa and permit for residency in Israel according to the Law of Entry into Israel (Article 32(d) of the Law). Article 32(22) of the Law determines that families, women and children will not stay in the Residency Center until the Minister of Public Security will determine, with the approval of the Interior and Environmental Protection Committee of the Knesset have approved, special provisions in this matter. In the State's updated response there are still no provisions that were prescribed in this matter.

86. The everyday management of the Residency Center is outlined in the provisions of Chapter 4 of the Law. According to the Law, from 10:00 PM and until 6:00 AM, an "infiltrator" is not permitted to be outside the Residency Center (Article 32h of the Law). In addition, he must report to the Residency Center for the thrice a day reporting requirement, once in the morning hours; once in the afternoon hours; and finally in the evening, according to the hours that are set forth in the Regulations (see the Regulations for the Prevention of Infiltration (Offenses and Jurisdiction) (Reporting/Attendance and Exit of the Resident in the Residency Center) (Temporary Order), 5744–2013, regulations compilation 308 (hereinafter: *Reporting Regulations*). The exceptions to the reporting requirement in the Residency Center is set forth in Article 32(h)(3) of the Law. According to this Article, and according to the request of the "infiltrator", the

Head of Border Control is permitted to provide an exemption from the reporting requirement for a period that shall not exceed 48 hours. Likewise, in cases where the resident or a family member of the first degree requires medical hospitalization, the Head of Border Control is authorized to provide an exemption from reporting for a longer period of time. These decisions are subject to judicial review of the Appeals Tribunal.

87. The Residency Center is operated by the Israeli Prison Service of the Southern District, where some of them previously worked in the detention facility (they were appointed by the Minister of Public Security by virtue of his authority in Article 32C of the Law). The Israeli Prison Services' employees (and other officials) are granted powers to conduct searches; to demand identification and seize belongings (Articles 32 M-N). They are authorized to execute delays in cases where there is a concern for unlawful use of weapons or carrying a prohibited object (Article 32 O-R of the Law), and even use force against an "infiltrator" who does not comply with his obligations of the provisions of Chapter 4 of the Law (Article 32S(a) of the Law). Additional disciplinary measures are granted to the Head of Border Control. The Commissioner is authorized to instruct the transfer the "infiltrator" from detention to the Residency Center, after conducting a hearing, in the events where there were violations or recurring violations of the conditions of stay in the Center, for example, tardiness for the reporting times; causing bodily harm; causing actual damage to property; and the violation of the prohibition to work outside the Residency Center (Article 32T(a) of the Law). Article 32T(b) of the Law limits the period where it is possible to detain an "infiltrator" in detention by the virtue of these powers. An upper limit for the period of detainment in detention was set for one year, while creating a distinction between the types of violations and a hierarchy concerning the recurring violations by the same resident.

88. An "infiltrator" who received a residency order is not permitted to work in Israel (Article 32F of the Law), and on the Population and Immigration Authority's website and other forms of media outlets the State published its intent to enforce the prohibition of labor and employment of "infiltrators" who received residency orders, subject to its obligations in the *Third Kav La'Oved* Case. Simultaneously, in Amendment No. 4 conditions were arranged whereby it is possible to voluntarily employ an "infiltrator" residing in the Residency Center in maintenance and ongoing services in the area of the Center, for "reasonable compensation" (Article 32G). A resident can be employed, for example, in janitorial jobs (which are not in the area of his residence and surroundings); in kitchen tasks; maintenance; construction and gardening; loading and unloading of equipment; laundry services; the barbershop, etc. With respect to majority of the jobs the average wage is NIS 12 per hour (see Article 32G(2) of the Law; Regulations for the Prevention of Infiltration (Offenses and Jurisdiction) (Employment of Residents in Maintenance Jobs and Ongoing

Services) (Temporary Order), 5774 – 2014, regulations compilation 697 (hereinafter: *Regulations for Employment of Residents*)). It was determined that the Regulations would be in effect for a period of one year. Furthermore, the residents in the Center are entitled to receive an "allowance" or another benefit which may be realized in the Center for each day of his stay in the Center. It was determined that the allowance shall not exceed NIS 16 per day, however, with regard to a resident employed in the Center – a portion of the amount will be decreased, in accordance with the index set forth in the Regulations (Article 32K of the Law; Regulations for the Prevention of Infiltration (Offenses and Jurisdiction) (Granting an Allowance and Other Benefits and the Conditions for the Denial) (Temporary Order), 5774 – 2014, regulations compilation 696). It was further determined the manner in which the allowance will be transferred to the resident, and the possibility for providing an advance (in certain cases) to an "infiltrator" transferred from the detention facility to the Residency Center was also determined. It was determined that these Regulations would also be in effect for a period of one year.

Thus far we reviewed the normative framework which arranges the establishment and operations of the open Residency Center. For the sake of the constitutional analysis, these provisions – and only these –will be under our review. However, the parties before us added to and extended their points also in the manner in which the "Holot" Residency Center is operated (which, at the current time, is the only Facility inhabited by virtue of Chapter 4 of the Law). Although the claims concerning the manner of the operations of the "Holot" Center are primarily administrative, I believe that the database of factual figures that accumulated since the commencement of the Facility (in the month of December 2013) can assist in the fundamental examination of these constitutional and other claims. Thus, I will also review, in brief, the manner of operations of the "Holot" Facility.

(A) *The "Holot" Residency Center*

89. The "Holot" Residency Center began operating on December 12, 2013. Since then and to date the Population and Immigration Authority customarily issues "residency orders" to "infiltrators" in the cities when they come to renew their temporary visa and residence permits which are issued by virtue of Article 2(a)(5) of the Entry into Israel Law. Correct as of March 30, 2014, 5,678 residency orders were issued against the "infiltrators", when the deadline for the last appearance was on April 30, 2014. The Head of Border Control decided to revoke 838 cases of the residency orders for specific reasons, such that 4,840 "infiltrators" were required to appear in the Center until April 30, 2014. An additional 483 residency orders were issued against "infiltrators" from Eritrea and Sudan who were in detention in the "Saharonim" Facility with the opening of the Center. The total attendance in the Residency Center is approximately

46% of the "infiltrators" who were summoned; thus according to the estimates to date there are approximately 2,000 "infiltrators" in the Facility. It should be noted that since the opening of the Center and until March 9, 2014, 105 "infiltrators" received residency orders and were absorbed in the Center from which they left never to return.

90. The criteria standing at the foundation of the issuance of the residency orders against the "infiltrators" coming forth to renew their licenses primarily include the date of their infiltration (residency orders were issued against Sudanese nationals who arrived to Israel prior to December 31, 2010, and to Eritrean nationals who arrived to Israel prior to December 31, 2008); the family status of the "infiltrator"; and his criminal past. The State emphasized that these criteria are subject to change from time to time, and noted that correct to date 7,820 "infiltrators" meet the set criteria for residency in the Facility. I will already note at this point that according to the Petitioner's claims, the issuance of residency orders to a portion of the population of "infiltrators", considering that the currently Residency Center is the only one operated by virtue of the Law – the "Holot" Center cannot accommodate all the "infiltrators" currently in Israel, and constitutes an invalid "selective enforcement". The Petitioners insist that those staying in Israel are non-deportable constitute a homogenous group, and therefore are entitled to "equal treatment and particular rights arising from their unique status." In their view, it is not possible to distinguish between members of the group for the purpose of denying their freedom and an infringement on their overall rights in the absence of the relevant criteria for the matter. The State, on its part, claimed that the "infiltrators" are referred to the Center on the basis of known and non-discriminatory criteria.

91. What is at the basis of the criteria presented by the State? This question was not sufficiently proven within the scope of the deliberations for the Petitions before us. The State did not specify if there is a good reason to distinguish between the nationals from Eritrea and the nationals from Sudan, or what is the recognized significance for the date of the "infiltration" concerning the issuance of the residency orders. Indeed, enforcement against one and not against others, without any good reason for distinguishing between them, can be deemed selective enforcement (Criminal Appeals 6328/12 *The State of Israel v. Peretz*, para. 23 (September 10, 2013); according to its claim whereby the determination of criteria by an administrative authority does not always promote equal decision making, see Dafna Barak – Erez, *Administrative Law*, volume 2 695-696 (2010)). Notwithstanding, the place for such a claim –I will not determine the rules – is not in the proceeding before us. The claim of selective enforcement concerns the exercise of administrative discretion as aforesaid and is not for us to decide and rule in these proceedings. Consequently, within the scope of the proceeding before us, I will not express a stance concerning this dispute as well as the matter relating to the question of whether the identity of

an individual who can be placed in the Residency Center does not constitute an "initial arrangement" whose place is in primary legislation, in light of the infringement on the inherent rights of Chapter 4 of the Law (see and compare: High Court of Justice *Rubinstein v. The Minister of Defense*, *PADI Journal* 52(5) 481, 513-515 (1998)).The Petitioners are thus permitted to refer their claims in this sphere to the authorized instance of law, and all their claims are reserved.

92. According to the State, when an "infiltrator" who meets the criteria comes forth to renew his aforesaid temporary permits, an interview is conducted for the purpose of examining whether he meets the criteria for the issuance of a residency order, including questions concerning his personal circumstances. It should be noted that the Petitioners dispute this description. According to their claims, a preliminary interview is not conducted for majority of the "infiltrators", and when an interview is conducted there are no material questions concerning their well-being or their rights. In any event, at the end of the process, the Head of Border Control decides whether to issue a residency order or not. Insofar and to the extent that it will be decided to grant a residency order, as a rule the temporary permit of residency by virtue of the Law of Entry into Israel will be extended for an additional 30 day period for the sake of a period for organization, alongside the given residency orders for the date which is coordinated with the date for the end of the temporary permit of residency. The decision concerning the grant of the residency orders is subject to direct attack by means of submitting an appeal to the Appeals Tribunal (as aforesaid in para. 42 above), and the decision of the Appeals Tribunal is subject to an administrative appeal in the Court for Administrative Affairs. In fact, the various aspects concerning the means in which the residency orders are issued by the Head of Border Control were already placed before judicial scrutiny for various claims, including the claim that there is an obligation to conduct a hearing prior to the issuance of a residency order (see: Administrative Appeal (Administrative Center-Lod) 4436-04-14 *Haggos v. The Minister of Interior* (June 1, 2014); Administrative Appeal (Administrative Haifa) 42975-04-14 *Adam v. The Minister of Interior* (June 1, 2014). It should be noted that within the framework of the proceeding conducted in this Court (Appeal on Administrative Appeal 2863/14 *Ali v. The Ministry of Interior – the Population and Immigration Authority*), on May 26, 2014, the State notified of its intent to conduct a "pilot" for the new procedure requiring the aforesaid hearing (see the partial ruling in this proceeding from August 10, 2014, para. 6). Either way, when a residency order is issued, the "infiltrators" are required to report to the "Holot" Facility on the set date. The Population and Immigration Authority provide transportation from the urban centers (per hour and only from Tel-Aviv) to the Residency Center. Alongside this system, the residents are permitted to arrive independently to the Center. Upon his arrival to the Residency Center, a clarification process concerning the identity of the "infiltrator" is conducted.

Upon the culmination of the interview, he is transferred for absorption, his fingerprints are taken, and the gear that he carried is deposited in the supply room. Lastly, he is offered the possibility to be examined by a physician and he is given clothes, towels, blankets, a shaving kit and more.

93. In its response, the State asserted that there are facilities and services which are available to the "infiltrators" in the Residency Center. Thus, it was noted that a laundromat, a barbershop, a general store operated by a private concessionaire, whose products are sold according to regulated prices, are all operated in the Center. The State added that in each sub-center in the Residency (which accommodates up to 140 residents), there is a club that is open 24 hours a day, and sports fields were set up in the Center. In addition, the State noted that currently there are classes being offered in the Center, including painting and drawing classes (in which approximately 20 residents participate each time) sports classes (in which approximately 30 residents can partake); and in the future adult study classes in English and mathematics will be opened in the Center. With respect to social services, it was noted that in every "segment" (which accommodates up to 1,120 residents) in the Center three social workers are employed whom the residents can contact, and on the premises there are two therapy groups where in each one there are approximately 15 residents. Healthcare services are provided by Magen David Adom under the supervision of the Ministry of Health. There is a clinic in the Center which is opened until 5:00 PM which has a doctor and two paramedics. After hours of operation, there is a paramedic on call on the premises. Residents that require further medical care or laboratory testing, imaging, expert consultation, etc., are referred to the "Soroka" Hospital or other designated hospitals.

94. The Petitioners, in contrast, request to emphasize that the living conditions in the "Holot" Facility are harsh. According to their view, in each room in the Residency Center, 10 "infiltrators" are held and it includes five bunk beds, ten small storage compartments which cannot be locked, and a small cubicle for the shower and toilet; there are no heating or cooling measures in the room and it is forbidden to hang items on the walls; the wings are locked during the night; the "club" only has televisions and a few chairs, and the "library" which serves the Facility includes two shelves with a few books; the "infiltrators" residing in the Center are not permitted to prepare their food on their own or bring food into the Facility that was purchased outside and which is not packaged, and they are not permitted to accommodate in the Facility. According to the Petitioners, essentially there is no difference between the services provided in the "Holot" facility to the services provided in the "Saharonim" Facility which served for detainment in detention.

95. Entry and exit from the Center is possible, as aforesaid, commencing from 6:00 AM and until 10:00 PM, and a thrice a day reporting requirement is set forth in

the Reporting Regulations. The State noted that thus far 610 requests were submitted for an exemption from reporting for a period of up to 48 hours (in accordance with Article 32h(c) of the Law), of which 25 requests were denied. It should be noted that the Petitioners claim that many of the residents in advance waive submitting the aforesaid requests since meetings are conducted for the purposes of submitting the requests which are exploited to exert pressure to "voluntarily" leave the country, and many are required to wait for many hours outside the offices until the receipt of an answer to their requests. For the sake of mobility to and from the Center, public transportation bus lines are operated close to the hours of reporting. According to the State, the data for entry and exit from the Residency Center indicates daily use of this option. Thus, it is noted that already in the month of February of this year, 13,625 entries and exits were recorded; and there is a steady increase in the volume of the traffic. With respect to the employment of the residents in the Center (Article 32g of the Law and the Regulations for Employment of Residents) the State's update, correct as of the beginning of March 2013, is that 179 residents are registered in the database as being employed in the Center.

96. With respect of the possibility of transferring the residents to detention, the State indicated that until March 30, 2014, 53 residents were transferred to detention after their tardiness to appear for reporting registration (Article 32T(a)(1) of the Law) – of which 43 residents were tardy after they participated in an organized protest on December 19, 2013. It should also be noted that 265 of the residents were transferred to detention because they left the Residency Center without returning for a duration of more than 48 hours (by virtue of Article 32T(a)(7) of the Law) – of which 153 residents did so within the framework of the organized protest on December 17, 2013. It was reported that the Head of Border Control decided to reduce the detention period concerning these residents to a few days until a few weeks. Sixteen "infiltrators" were transferred to detention after they were summoned to the Residency Center and did not appear (by virtue of Article 32 T(a)(6) of the law); and 191 "infiltrators" were transferred to detention after they did not appear for the renewal of their temporary residency permit (by virtue of Article 32T(c) of the Law). Lastly, it was reported that residents were not transferred to detention by virtue of Articles 32T(a)(2)-(5) of the Law in matters relating to violations of behavioral rules, causing real damage to property or causing bodily harm and work in violation of the employment prohibition.

    This is the normative arrangement which permits the operation of the Residency Center, and this is how the Center operates in practice. Is the arrangement set forth in Chapter 4 of the Law constitutional?

(B) *Millin Academy*

97. No one will dispute that for the best interests of the State, which seeks to find solutions for the unorganized immigration phenomenon, there is a wide range of broad constitutional latitude. In my opinion, within this range it is also possible to establish *open* Residency Centers, which will provide a response to the difficulties of this phenomenon. In fact, this possibility was discussed already in the *Adam* Case. In our ruling there, some of my colleagues and I, insisted on alternate measures for the detention facility. My colleague, Justice *E. Arbel* (retired) noted that "it is possible to consider obligating the "infiltrators" to *stay overnight* in the Residency Center which was prepared for them and that will supply their needs, and prevent other difficulties from them" (para. 104 of her opinion; emphasis added – U. V.); my colleague Senior Associate Justice *M. Naor* insisted that "the State could consider converting the existing structure into an *open camp*, where the stay is voluntary" (para. 4 of her opinion; emphasis added – U. V.); and even in my opinion in para. 40 I referred to the original version of the document (which since then has been published in English) from the U.N. High Commissioner for Refugees entitled *Guidelines for Detention: Directives for the Applicable Criteria and Standards of Detention for Asylum-Seekers and Alternatives to Detention* (2012) (available here). In this document, amongst the alternatives discussed, the possibility for residency in open or semi-open centers was presented. It was emphasized that there is a need to protect the liberty of the residents of these centers and the freedom of movement within the centers and outside of them, and secure that they do not become an alternate form of arrest ("[…] it is pertinent to be pedantic about the general freedom of movement in and out of the Residency Centers in order to ensure that the Center does not become another type of detention facility", *ibid*, p. 42).

98. In the case at hand, the establishment of a Residency Center is no longer within the framework of a theoretical proposal. Chapter 4 of the Law created an inclusive constitutional framework, whereby by its virtue the "Holot" Facility in the Negev accommodates approximately 2,000 "infiltrators" operates today. However, the framework before us is not similar to the same "open" or "semi-open" facilities of the type that was discussed in the *Adam* Case. As will be detailed below, the relevant Residency Center for our examination, which was designed within the provisions of Chapter 4 of the Law, bears characteristics that are closer to of a "closed" facility then an "open" civilian center – contrary to the required relationship to the population of the "infiltrators" (as I will further elaborate below). Thus, while as a rule the establishment of the Residency Center needs to be consistent with the constitutional criteria that is accepted in our legal system, the concrete legislative outline created by the legislator in Chapter 4 of the Law for the Prevention of Infiltration infringes in a disproportionate measure on the right to liberty and the right to dignity, and as such – it should be repealed.

(C) *Infringement of Rights and the Structure of the Examination*

99. There is no real raging dispute between the parties whether Chapter 4 of the Law infringes constitutional rights. The State does not deny that Chapter 4 of the Law

infringes the right to liberty, and allegedly – the foregoing is sufficient to bring us to the next phase of the constitutional analysis, which requires the examination of the provisions of Chapter 4 of the Law within the scope of the limitations clause. However, in my opinion, it is not sufficient to view Chapter 4 in its entirety, and requires a specific examination of a portion of the arrangements set forth therein. This examination is required whenever specific arrangements require various constitutional remedies. This is the state in our matter. The infringement of the several provisions set forth in Chapter 4 of the Law is so severe, such that there is not one remedy that has the power to cure the unconstitutionality attached to the various arrangements.

100. Notwithstanding, the constitutional scrutiny is not limited to the question whether each provision is specific – when alone – satisfies the constitutional criteria. We should continue and ask "whether the overall mixture of the constitutional arrangement is proportionate. Any individual arrangement could be proportionate. However, the *overall accumulation* may not be proportionate" (the *Investment Managers* Case, p. 402; my emphasis – U.V.). An accumulation of this kind can impact several provisions of Chapter 4 of the Law for had they been stand-alone they would have passed judicial review since they do not individually infringe on the protected constitutional rights. Yet, the relationship between the different provisions also reflects upon the provisions which pass the judicial review. A constitutional provision (by itself) may "taint" another offensive provision to the extent that the entire constitutional arrangement that is disproportionate – and therefore the arrangement is non-constitutional. Thus, the result is that the constitutionality of Chapter 4 of the Law cannot be examined as though the non-constitutional provisions alone were "removed". We are dealing with a broad Article with multiple parts. It is constructed as an equation. One arrangement (for example the strict requirement to appear for reporting in the Center) may be balanced in a different arrangement (for example a set time of stay in the Center for a short period of time). The Court must not select for the legislator the relationship between the different arrangements. Any constitutional relationship, which meets the compulsory restriction of the Basic Law: Human Dignity and Liberty, is an option. Any relationship that is not constitutional – is invalid.

101. Thus, the order of the examination shall be as follows: first, we will review the purpose of Chapter 4 of the Law. Thereafter, we will examine the same arrangements which give rise to constitutional difficulties per se. With respect to each arrangement that we will deem as infringing on human rights, we will add and examine its compliance with the proportionality requirement. Later, we will examine the constitutional arrangement as a whole, and we will see whether the arrangement set forth in Chapter 4 of the Law – the entire arrangement – is proportionate. During this phase there is place to review the relationship between the various arrangements set forth in Chapter 4 of the Law and the constitutionality of the Chapter as a whole. Finally, we will examine the appropriate remedy for each of the arrangements that will be deemed unconstitutional, and the required remedy for the entire Chapter 4 of the Law.

(D) *"For a Proper Purpose"*

102. The declared purpose of Chapter 4 of the Law is to immobilize the settling down of the population of the "infiltrators" in urban cities and prevent their integration into the work force in Israel, as well as provide an appropriate response to their needs. As aforementioned, the Petitioners believe that an additional main purpose is the attempt to "break the spirit" of the "infiltrators" with the intent that they "voluntarily" leave Israel. We will begin our discussion with the declared purposes of Chapter 4 of the Law.

(i) *Preventing Settling Down and Integration to Work Force*

103. We will commence with the purpose of preventing the settling down of the "infiltrators" in the concentration of the population and their integration into the work force. This purpose was previously discussed in our ruling in the *Adam* Case, where the State noted that one of the purposes of the Amendment as discussed *there* – Amendment No. 3 permitted detainment in detention for a period of three years – is for the prevention of the settling down of the "infiltrators" in the large cities in Israel. My colleague, Justice *E. Arbel* (retired) found *there* that it is a proper purpose, considering the State's right to determine how to cope with the illegal immigrants (who were not recognized as refugees); and the desire to prevent "the infiltrators' free possibility to settle down in any place in the State of Israel, to integrate into the work force, and to compel the local society to cope with their entry into their regions, with all that entails" (para. 84 of her opinion). In my opinion in the *Adam* Case, I abstained from determining any rules in this matter – on the basis of the difficulty that arises from the purpose of separating one population from another population – for the reason that Amendment No. 3 already did not pass the proportionality test (para. 19 of my opinion). Whereas, my view is that the principles of Amendment No. 4 do not pass these tests, there is also no urgency to determine this question in the proceeding before us and I will assume for the purposes of the discussion that it is a proper purpose.

(ii) *A Response to the Needs of the Infiltrators*

104. Alongside the purpose for preventing the settling down, there is the purpose of granting a response to the needs of the "infiltrators". This purpose in itself is proper. Many of the "infiltrators" who came to our shores underwent tribulations. Many reports indicate that in the countries of their origin many of them suffered from the gross violation of their human rights, and were persecuted by those who sought their lives. Several were severely tortured and were victims of human trafficking. Even upon their arrival the "infiltrators" faced many difficulties. Many of the needs of the population are not received with an appropriate response. Majority of them have difficulties working and earning an honorable decent living, including inter alia, in light of the ambiguity of the non-enforcement policy practiced by the State which I reviewed earlier (para. 32 above) (*State Comptroller's Report*, p. 99); they are subject to a "normative mist" in relation to the cluster of rights that the State recognized in their regard, yet there are still no clear rules

and procedures relating to their rights (Appeal on Administrative Appeal 8908/11 *Aspo v. The Minister of Interior*, the opinion of my colleague, Justice *E. Hayut* (July 17, 2012)); their entitlement to social rights is minimized and social services are not granted to them unless there is an imminent danger to their safety; the medical treatment given to them when it is not an emergency is partial and missing; the response to women who are victims of violence is not sufficient as well as the treatment of victims of trafficking and torture (*State Comptroller's Report*, pp. 112-118). Thus, my conclusion is that a law whose purpose is to establish an open Residency Center with the purpose to provide a response to the needs of the "infiltrators"– is a law with a proper purpose.

105. Does the manner in which the "Holot" Facility is being currently operated properly realize the aforesaid purpose? The Petitioners elaborated the concrete management with respect to the "Holot" Center: the food served there, the supply of services provided there, the healthcare and education services provided given there, etc. According to the Petitioners, the Residency Center is far from answering the needs of the "infiltrators" in a manner which will realize the purpose of the legislation. However, the Law for the Prevention of Infiltration does not refer to these directly. All that was prescribed in Chapter 4 of the Law is the matter of the conditions of the "infiltrators'" stay was that "the Residency Center will provide its residents appropriate living conditions, including healthcare and social welfare services" (Article 32H of the Law). It does not set forth the obligation to provide education, religious, sports, and cultural, recreational or legal counsel services. For the sake of the comparison, other arrangements relating to the deprivation of liberty include many diverse provisions concerning the well-being of the detainees and prisoners – far beyond those provisions set forth in Chapter 4 of the Law for the Prevention of Infiltration. Thus, it is stated in the Prisons Ordinance [New Version] 5732 – 1971 (hereinafter: *the Prisons Ordinance* or the *Ordinance*) that " a prisoner will be held in appropriate conditions which shall not harm their health or dignity (Article 11b(b) of the Ordinance); and the Arrests Law dictates that "the arrest and detainments of a person shall be in a manner which endure the maximum protection for human dignity and all his rights (Article 1(b) of this Law). The Ordinance further prescribes that – and similar to the Arrests Law (Article 9(b) of the Arrests Law) – specific conditions which the prisoner will be entitled to, including appropriate sanitary conditions, conditions that will permit him to maintain his personal cleanliness, required medical treatment for preserving his health, and appropriate supervision conditions according to the request of the Prison Services doctor; a bed, mattress and blankets for his personal use, and the guarding of his personal items as prescribed in the Regulations; drinking water and food in the quantity and composition that is necessary to preserve his health; clothes, items for his personal cleanliness and linens; lighting and ventilation conditions in his cell; daily walks in the open air (Article 11b of the Ordinance). The Ordinance adds and stipulates that a prisoner shall be entitled to integrate recreational activities or education (Article 11c of the Ordinance).

106. The absence of specific emphasis in the primary legislation relating to the manner in which the Residency Center is operated is left to the Executive Branch, who operated the

Center in practice, with a wide range of discretion in the manner of its operation. I am not determining the significance of this well-known fact. The importance in our case is the exercise of administrative discretion – in other words: the manner in which the administrative authority applied and applies the Law and operates the "Holot" Center – deviates from the constitutional question that stands before us for our ruling in this Petition (and it is clear that the Petitioners' claims in this matter are reserved for them in the appropriate administrative proceedings). Notwithstanding, I saw the need to stress that our case law has already emphasized that every person – including a prisoner and detainee, and certainly an "infiltrator" – "is entitled to the minimal and basic human needs. These needs are not necessarily only the right to food, drink, and sleep in order to sustain the body in the *physical* sense, but also minimal civilized arrangements in a *manner* which will satisfy these needs, in order to maintain his human dignity in the *psychological* sense" (Miscellaneous Criminal Motions 3734/92 *The State of Israel v. Azazami*, PADI Journal 46(5), 72, 84-85 (1992)'; also see High Court of Justice 144/74 *Levana v. The Commissioner of the Prison Services*, *PADI Journal* 28(2) 686, 690 (1974) (hereinafter: *Levana* Case)). According to the words of Justice *H. Cohen*, it is a person's right to have "a civilized life", since "a civilized person has additional psychological needs than the need to live: he could, for example, sustain and live by simply eating by putting the food into his mouth. However, a civilized person needs a plate, spoon and fork to eat" (High Court of Justice 221/80 *Dariush v. Prison Services*, *PADI Journal* 35(1) 536, 538-539 (1981)). Therefore, even in the absence of clear directives in the primary legislation, it is coherent that the right to dignity means that it is not sufficient to satisfy the most immediate needs of the prisoner, detainee or "infiltrator", and the authority is not fulfilling its obligation to satisfy these when their liberty is deprived and the living conditions only permit their continued survival.

(iii) *An Additional Claimed Purpose: Encouragement of "Voluntary Returns"*

107. The Petitioners claimed, as aforesaid, that the dominant purpose of Amendment No. 4 of the Law –and primarily Chapter 4 of the Law – is to "break the spirit" of the "infiltrators", so that they consent to "voluntarily" leave Israel to countries where they face imminent danger for their lives and liberty. This purpose, as is claimed, is invalid. I would like to review this claim briefly.

108. Our rule is, and we asserted this in the beginning of our remarks that anyone who unlawfully entered into Israel and is currently residing here is not entitled to stay. The State is provided with the prerogative to decide if it intends to deport him, and in ordinary circumstances – there is nothing preventing it to do so. Nevertheless, anyone who entered into Israel is entitled that his life not be in danger – not in Israel or any target country to where he will be deported. Thus, our case law states that a person cannot be deported from Israel to a place where there is imminent danger to his life or liberty (*Al-Tai* Case, p. 848), or to a third world country when there is a concern that he will be deported to his country of origin, whereas aforesaid his life is in imminent danger (*Adam* Case, para. 8). As I noted earlier, this principle, whereby an individual is not deported to a country

where there is imminent danger of this type, is recognized in international law as the customary principle of *Non-refoulement*.

109. Alongside the rule prohibiting the deportation of a person to the country where his life or freedom is in imminent danger, Israeli Law and International Law do not prevent the person from choosing, *voluntarily*, to leave the country wherein his life is in imminent danger. The reason for this is that every person, at any given moment, is entitled to choose to leave the country in which he resides. This principle is anchored in Article 6(a) of the Basic Law: Human Dignity and Liberty whereby "any person is free to leave Israel." Furthermore, given the rules of international law, it is doubtful that a country shall be deemed liable for the infringement of human rights of an illegal immigrant who chose to voluntarily return to his county, despite the imminent danger on his life and liberty (see NILS COLEMAN, EUROPEAN READMISSION POLICY: THIRD COUNTRY INTERESTS AND REFUGEE RIGHTS 248 (2009). The premise in this matter is that people are autonomous to design their lives and destiny according to their wishes and desires. Therefore, even though it is not possible to compel an individual to leave to a country where there is an imminent danger to his liberty – there is nothing preventing him from selecting to voluntarily return.

110. The question is when will the decision to leave Israel to the country where there is an imminent danger to his life and personal freedom be deemed a decision that was made "voluntarily". Extreme cases provide a simple answer to this question. In the absence of extraordinary circumstances in the hosting state which places pressure on a person to leave – the decision to return to his country shall be deemed a "voluntary" return; and unlike, an official decision to deport a person to a county where there is imminent danger to his life or liberty shall be deemed forced deportation which is prohibited. Between these two extreme points there is a wide spectrum of events where the question of whether the individual's decision to leave to the country where there is imminent danger to his life or liberty is the result of voluntary choice or the product of prohibited coercion – becomes complex and complicated (For more details see Christian Mommers "Between Voluntary Repatriation and Constructive Expulsion? Exploring the Limits of Israel's actions to Induce the Repatriation of Sudanese Asylum Seekers (hereinafter: *Mommers "Voluntary Repatriation"*)). In my view, the touchstone decision to this question is related to the existence – or the absence – of pressing measures for a period to return to a country where he faces imminent danger. Thus, leaving the country may be deemed forced deportation (and not "voluntary" return) not only in situations where the State officially instructs upon the deportation of an individual, but also when the State adopts severe and particular offensive measures designated to exert pressure that will lead to the "voluntary" return from the country. I will elaborate.

111. Free will is only possible when a sovereign individual reaches a conscious and informed decision from the number of options, which do not present themselves

in an impossible reality. This notion is the underlying principle in our legal system. It is a recurring theme in our case law (Civil Appeals 1212/91 *Libi Fund v. Binstock*, PADI Journal 48(2) 705, 721 (1994); also see Civil Appeals 2781/93 *Daaka v. "Carmel" Hospital in Haifa*, *PADI Journal* 53(4) 526, 570 (1999) (hereinafter: *Daaka* Case)). It is applicable in many and several areas of law (see, for example, in Labor Law: High Court of Justice 8111/96 *The New Employees Union v. Israel Aerospace Industries Ltd.*, *PADI Journal* 58(6) 481,542 (2004) ("it seems that the alternate to resignation, which cuts off the employee's source of income, cannot be deemed an option which provides him an actual choice. Indeed, the economic reality is not one that denies a viable option to select this option"); in Contract Law: Civil Appeals 1569/93 *Maya v. Panford (Israel) Ltd.*, *PADI Journal* 48(5) 705, 721 (1994) ("and what is the impact of the coercion that we acknowledge it as a legal rule? The acceptable test for determining the intensity of the pressure is finding an answer to the question if there was a simple practical and reasonable alternative not to succumb to the pressure"); in Criminal Law: Disciplinary Appeal – State Services 4790/04 *The State of Israel v. Ben Haim, PADI Journal* 60(1)257, 268 (2005) ("the way shall be reflected in the foundation of the "exploitation of authority" which shall be – the meaning will always be the same: obtaining the consent of the subordinate to perform acts not against his free will but rather abuse in relation to the authority"), and Motion for Request of Criminal Appeals 10141/09 *Ben Haim v. The State of Israel*, para. 27 (March 6, 2012) ("As a rule the circumstances when a person encounters a police officer requesting to conduct a search of his body, instruments or home […] the same person may believe that the refusal to agree to perform the search may cause him to be detained or arrested and at the very least arousing suspicion against him. The consent given in these circumstances, which means a waiver of the constitutional right to privacy […] is not informed consent; since it does not really reflect the true autonomous choice of the citizen to waive his rights"); in Evidentiary Law: Criminal Appeals 377/67 *Dahan v. The State of Israel*, *PADI Journal* 23(1) 197, 212 (1969) ("the confession in question is invalid evidence, for the reason that it was exhausted from him by measures of exercising psychological pressure until it negates the possibility that it was done by free will"); in Administrative Law: High Court of Justice 3799/02 *Adalah – The Legal Center for Minority Rights of Israeli Arabs v. General Central Commander of the IDF*, PADI Journal 60(3) 67, 81 (2006) ("in light of the inequality between the seizing power and the local resident it should not be anticipated that the local resident will resist the request to provide a warning to those requesting be arrested. A procedure should not be based upon consent since in most instances it will not be real").

112. In other areas of law, the power of the principle of free choice – and in saying so our intention is that the choice is free of any unreasonable pressures – is also correct in relation to a person's decision to leave Israel to a country where there is imminent danger to his life or liberty, even more so in light of the sensitive material that we are dealing

with. Nevertheless, in many countries there is a prevalent notion that not every independent decision made by an individual to leave the country shall be deemed "voluntary" return. According to the U.N. Committee for International Law, a country can deport an illegal immigrant by means of "Constructive Expulsion" – by means of coercive acts or threats that can be attributed to the State, which are not official resolutions or orders (U.N. Secretariat, Expulsion of Aliens, Memorandum by the Secreteriat, Int'l Law Comm'n, U.N. Doc. A/CN.4/565, p. 68 (July 10, 2006) (available here). It should be noted that to date the prohibition of constructive expulsion has been narrowly interpreted and has been criticized. See Mommers "Voluntary Repatriation", pp. 402-413). One of the important aspects of tracing the existence of "free" will is the legal status of the individuals entitled to protection in the hosting country. If we do not recognize the rights of the "infiltrators", and if they are subject to pressures and restrictions and are detained in closed camps, then according to the U.N. High Commissioner for Refugees, their decision to return to their countries cannot be deemed a decision that "voluntary" made (U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK: VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION § 2.3 (1996). (available here). This notion has already been recognized in our case law. Thus, for example, in the Petition before us an illegal immigrant who "selected" to leave his country and leave his wife and children behind, this Court has determined that it is "difficult to attribute 'informed choice' – *free and voluntary* – to the same people, that following a long (illegal) stay in Israel, where during its course they even established a family in Israel, they preferred to leave, without detention procedures and harsh expulsion means taken against them, while leaving family members behind. The normative reality that is resonating in Israel […] allegedly negates the conclusion of "*voluntary return from Israel*" (Appeal on Administrative Appeal *Naava v. The Minister of Interior*, para.16 (July 11, 2013 – emphases in the original). Thus it follows that the certain normative reality may be considered, in extraordinary circumstances, as a "pressure steamroller" which prevents the existence of "voluntary return" from Israel.

The summary of this point: the question whether the choice of a person to leave the country voluntarily has been made by free will or if it is the product of prohibited coercion associated with the underlying conditions in the hosting country. Unreasonable pressures and measures which oppress the person to leave the country may make his return a coerced and prohibited deportation.

113. In the matter before us, the Petitioners claim that the purpose of Chapter 4 of Amendment No. 4 – whereby its virtue it is possible to detain "infiltrators" in the Residency Center – is to deny the aforesaid free will, by means of empowering the plight of the infiltrators. The Petitioners support their claims, inter alia, by statements made by the Minister of Interior and Senior Officials in the Population and Immigration Authority in various deliberations in the

Knesset. In contrast, the State argues that this claim has no anchoring provisions in the Law, in the Explanatory Notes or in the everyday reality in the Residency Center. The decision between these two polar stances is not simple, and the question whether in fact one of the purposes of the Law whose constitutionality we are examining here is "to break the spirit" of the "infiltrators" so that they select to leave the country is not clear of reservations (due to, inter alia, given the statements of the representatives of the cited authorities in this Petition). It appears that no one will dispute that the Residency Center which was established by virtue of Chapter 4 of the Law makes it difficult for the lives of the "infiltrators", and that a difficulty of this nature may absolutely incentivize one to select to leave the country. Notwithstanding, certain difficulties are the lot of every person who opts to immigrate to another country in an unorganized fashion. It is not possible – and in certain instances not desirable – to conceal them entirely. Legitimate incentives (for example, financial incentives) for leaving the country whether by exercising significant and unjust pressure which denies, in practice, the ability of the illegal immigrants to opt not to leave the country – thus crosses a fine line. Does Chapter 4 of the Law– on the basis of denying the inherent right to liberty, which is not time restricted, and on the basis of additional matters which we will review later – cross this line? Although I did not see that it is possible to deny outright the Petitioners' claims in this sphere, I did not find the need to determine the issue since either way in my opinion Chapter 4 of the Law must be repealed since it does not comply with the proportionality requirement. I will clarify that I am not determining any rules concerning the question of the "infiltrators'" "secure" departure to third world countries, since this question in itself is not being examined in this proceeding.

Here ends the discussion concerning the purpose of Chapter 4 of the Law. We will now proceed to the examination of several arrangements in the Law that give rise to unique constitutional difficulties, and later we will review the complete pensive picture of Chapter 4 of the Law.

(E) *The Arrangements of Chapter 4 of the Law – A Concrete Examination*

(i) Mandatory Reporting in the Center – Is it really "open"?

114. The *first* arrangement that we will review deals with the mandatory reporting in the Residency Center. This requirement creates a byproduct of requirements which appear in the Law (and the Reporting Regulations that were promulgated thereunder) to report for daily counting ("Attendance Register") in the Center. Article 32H of the Law prescribes the terms of residence and exit from the Residency Center, as follows:

Reporting and Leaving the Center

32H. (a) A resident shall report to the Center three times a day, according to the times stipulated in the Regulations in accordance with sub-Article (d), for the purpose of the attendance registration.

(b) The Residency Center shall be closed between the hours of 10:00 PM through 6:00 AM; A resident shall not stay outside the Residency Center during the aforesaid hours.

(c) Notwithstanding the aforementioned in sub-Articles (a) and (b), the Head of Border Control, in accordance with a resident's requests and extraordinary circumstances, shall be permitted to exempt the resident from the mandatory reporting or from the prohibition of staying outside the confines of the Center, as aforesaid in the same sub-Articles; An exemption according to this sub-Article shall be granted for a period of time that shall not exceed 48 hours, and if it has been provided for medical hospitalization of the resident or for a family member of the first degree – the Head of Border Control shall be permitted to grant such exemption for a longer period of time; The Detention Review Tribunal for Infiltrators shall be permitted to examine the decision of the Head of Border Control in accordance with this sub-Article, provided that such a request has been submitted by the resident within 14 days of receipt of the Head of Border Control's decision.

(d) The Minister of Interior, with the consent of the Minister of Public Security, shall prescribe provisions concerning the reporting of the residents in the Residency Center, including matters relating to their exit from the Center and their return, and for matter concerning the Attendance Register and the manner of its registration; times and dates of reporting as aforesaid shall be determined in a manner which shall not permit the resident from working in Israel.

115. Thus, it follows that according to the Law, the gates of the Residency Center are closed at night – from 10:00 PM and until 6:00 AM the next day. During these hours an "infiltrator" is prohibited from staying outside the Center. In addition, during the hours of the day – whereby the Center is "open" the residents are permitted to exit and enter freely –reporting is mandatory thrice a day for the sake of registration. The Law adds and stipulates that the reporting hours shall be prescribed in the Regulations "in a manner which will prevent the resident of the Center from working in Israel" (the end of Article 32H(d) of the Law). In light of this provision, it appears that there is no dispute that the natural interpretation of the Article is that there is mandatory thrice a day reporting– in the morning hours, in the afternoon hours and the evening hours – in a manner which makes it difficult for the resident to find employment and work in a persistent and steady manner outside the Center. In fact, the Regulations promulgated by virtue of the Law set forth that there are three times for reporting, in the morning (between the hours 6:00-7:30 AM); in the afternoon (between the hours 1:00-2:00 PM) and in the evening (between the hours 8:30-10:00 PM) – times which make it difficult for the residents to find a job, and simultaneously substantially limits their freedom. The Regulations state as follows:

Resident's 1. A resident is permitted to leave the Residency Center any time

Leave from the Center

when the Center is open.

Identification upon Entry and Exit

2. A resident in the Residency Center exiting the Center or entering shall be identify himself before a Center employee.

Reporting Times

3. The following are three times that the resident shall report daily to the Center according to Article 32H(a) of the Law (hereinafter – Reporting)
   (1) Between the hours 6:00-7:30 AM;
   (2) Between the hours 1:00-2:00 PM;
   (3) Between the hours 8:30-10:00 PM.

Place of Reporting

4. The Reporting shall take place in such place allotted by the Director of the Residency Center for such purpose.

Identification

5. A resident shall identify himself in the Center during Reporting, in a manner that is satisfactory to the Center employee or the Head of Border Control, as the case may be, provided that they were sufficiently convinced of the identity of the resident.

Publication

6. The notice of the identification requirement when exiting and entering the Center, the mandatory reporting, times of mandatory reporting shall be published in a conspicuous place in the Residency Center and shall be translated into the primary languages of the residents of the Center, including English.

116. According Petitioners' claims, conducting a thrice a day headcount pragmatically limits the detainee's ability to leave the Residency Center, and thus severely infringes the right to liberty. On the other hand, the State believes that the Residency Center does not deny the right to liberty – but merely limits it, and there is a material difference between the inherent infringement in the residence there and the inherent infringement of placing a person in detention. In this context, the parties requested to refer to the factual data relating to the manner of operation of the "Holot" Facility (despite that the framework of the Petition before us which is being examined – as aforesaid – is the constitutionality of the Law and not the application of the provisions in this Facility). The Petitioners claimed that the "Holot" Facility is located in the south remote from any settlement, and this location exacerbates the impact of the infringement on the right to liberty arising from the mandatory reporting (since the necessity to register in the Facility during the afternoon hours significantly minimized the possibility to exit to inhabited areas). On the other hand the State claims that it has no obligation to establish the Residency Center specifically in proximity to the urban centers; that there is a public transportation system connecting between the "Holot" Facility and the city of Be'er Sheva, that the inspection times for attendance is done in a mild manner; that according to the entry and exit statistics since

the month of February 2014, more than 200 residents on average left the Center daily during its opening hours; and that recently an automated identification system was purchased which shall permit the quick attendance of the movement of the residents, that will prevent the need to report before an employee of the Center. According to the State, all these indicate, that the Facility is primarily "open", such that the mandatory reporting does not limit the right to liberty in the impact claimed by the Petitioners.

1) *The Infringement of Constitutional Rights*

117. I am of the opinion – and I will explain my reasons below – that the mandatory reporting infringes on both the right to liberty and the right to dignity – rights afforded to the "infiltrators" as they are afforded to any human being.

An infringement on the right to liberty (whose principles were reviewed above, para. 46) is inherent to any facility where presence therein is not voluntary. Open Residency Centers where entry therein is not voluntary, the result of the resident's free will; and which require the attendance of the residence, even if it is for some part of the day – by nature, infringe on the right to liberty. In our matter, the State does not dispute that the Residency Center limits the right to liberty; however it distinguishes, as aforesaid, between the *deprivation* of the right to liberty and its *limitation*. With regard to the analysis of the infringement of the right, I have not found the novelty of such distinction. As noted by *A. Barak*, "the limitation of constitutional rights means its infringement. The Basic Law: Human Dignity and Liberty uses the term "violation" ('there shall be no violation of rights under this Basic Law…'). In contrast, the Canadian Charter and majority of the modern constitutions use the term "limit". In my opinion, there is no distinction between the two" (*Proportionality in the Law*, p. 135). According to *Barak's* explanation:

> "The limitation or the violation occurs in a state where the governmental authority which prohibits or prevent the right holder from its realization to the full extent. In this matter there is no significance to the question whether the violation is severe or mild; whether it is in the heart of the right or in its shadows; whether it is intentional or not; whether it is done by means of an act or by means of an omission (where there is room for a positive duty to protect the right); any infringement, whatever the scope may be, is unconstitutional unless it is proportionate (*ibid*, pp. 135-136).

118. Even if we assume that the infringement on liberty is in the lowest rank in comparison to detainment in detention – the restriction on the inherent liberty in the "open" Residency Center is certainly an infringement on the constitutional right to liberty. In any "open" or "semi-open" facility – wherever its location may be – where there is mandatory reporting requirement during the afternoon hours makes it extremely difficult, in the pragmatic sense, to leave the Facility, for the necessary time required to perform persistent activity. This difficulty is not limited to the limitation on the freedom of movement, but rather an

actual infringement on the right to liberty. Indeed, the difference between the deprivation of the right to movement and the deprivation of the right to liberty is a matter of degree (Alice Edwards, *'Less Coercive Means': The Legal Case for Alternatives to Detention of Refugees, Asylum-Seekers and Other Migrants,* in THE ASHGATE RESEARCH COMPANION TO MIGRATION LAW, THEORY AND POLICY 443, 447-448 (Satvinder S. Juss ed., 2013). As determined by the European Court for Human Rights, the deprivation of the right to movement in a high degree may overlap with the infringement on the right to liberty (see Guzzardi v. Italy, 39 Eur. Ct. H.R. (ser. A) at 32–34 (pp 91–95) (1981), it was determined that an arrangement which included, inter alia, mandatory reporting twice a day and limitations on the right to movement between 10:00 PM to 7:00 AM constitutes an infringement on the right to liberty, in contrast to Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, C.E.T.S. No. 5; Alice Edwards, *The Optional Protocol to the Convention Against Torture and the Detention of Refugees*, 57 INT'L & COMP. L. Q. 789, 811-13 (2008). This is the state of affairs in our matter. The limitation here – is so acute, that there is no room other than to state that the Law and Regulations promulgated by virtue of the Law infringe on the right to Liberty, even if is not referring to the complete deprivation of the right but its limitation.

119. Alongside the infringement on the right to liberty, I believe that mandatory reporting during the afternoon hours also infringes the right to dignity. This right has already received extensive review in our jurisprudence, and we will review the principles below in light of the significance of the matters on the agenda.

2) *The Constitutional Right to Human Dignity*

120. Human dignity relies on the recognition of the physical and spiritual wholeness of a person, his humanity and value as a person and this is irrespective of the extent of the benefit that arises from it for others (*Tal Law* Case, pp. 684-685). Different opinions were heard concerning the question of the scope of the interpretation of the right to dignity. There is no dispute that the right to dignity is applicable in relation to preventing a person's degradation and preventing a violation of his dignity and his value as a person (*the Privatization of Prisons* Case, pp. 589-590). The scope of application of the right to human dignity, the minimum right for dignified human existence is presently comprehensible. This stance that the right to human dignity is also the right to have living conditions that permit the actual existence of liberty as a human being, received the recognition of a presumption in our case law (see High Court of Justice 366/03 *Foundation for Commitment to Peace and Social Justice v. The Minister of Finance*, PADI Journal 60(3)464, 480 (2005) (hereinafter: *Foundation Commitment* Case); the *Hassan* Case, para. 34 and the reference there; High Court of Justice 4511/12 *Gamlieli v. the National Insurance Fund*, para.4 (January 6, 2013)). According to the "interim model" adopted in the case law of this Court (*Tal Law* Case, pp. 683-684), within the

scope of human dignity there is also a need to include an infringement that is closely associated to human dignity that expresses the autonomy of the individual's need, free will and action, etc. (High Court of Justice 8300/02 *Nassar v. The State of Israel*, para. 46 (May 22, 2012); *Tal Law* Case, p. 687).

121. The right to autonomy is a portion of human dignity, and it is entitled to constitutional protection in the Basic Laws. At its base there is recognition that a person is a free creature, developing according to his own will in the society in which he lives. The significance is that each individual is given the right to control his actions and desires according to his choices, and act accordingly. He has the right to shape his life and destiny, and develop his personality as he sees fit; it is his right to acquire knowledge, culture, values and skills; to decide where he will live; with whom he will live and in what he will believe (*Tal Law* Case, *ibid*.; High Court of Justice 7245/10 *Adalah – The Legal Center for Minority Rights of Israeli Arabs v. The Ministry of Social Welfare and Social Services*, para. 44 (June 4, 2013); *Zaaka* Case, p. 570; High Court of Justice 7426/88 *Tabaka, Law and Justice for Ethiopian Immigrants v. The Minister of Education*, PADI Journal 64(1) 820, 844-845 (2010) (hereinafter: *Tabaka* Case); also see the *Gaza Strip Beach* Case, p. 561; Aaron Barak "Human Dignity as a Constitutional Right" *Hapraklit* 41 271, 277 (1994) (hereinafter: *Barak – The Right to Dignity*). For an extensive review see Aaron Barak *"Human Dignity – the Constitutional Right and its Subsidiaries"* volume A 245 and onwards (2014) (hereinafter: *Barak – the Constitutional Right and its Subsidiaries*).

122. These are the outlines for the right to dignity. Who possesses this right? The answer is simple. *Every person* is entitled to the right to human dignity. This is required by the Basic Laws. The title of Article 2 of the Basic Law is "Preservation of Life, Body and Dignity" states that "There shall be no violation of the life, body or dignity of *any person as such*"; Article 4 of the Basic Law, whose title is "Protection of Life, Body and Dignity", instructs that: "*All persons* are entitled to protection of their life, body and dignity" (emphases added – U.V.). This is also required by the underlying plinth of democracy as a whole and our legal system in particular, since "there is no better accepted value than the underlying value of human dignity: a free and civilized society is distinguished from the ferocious or oppressed society by the degree of dignity measured for a person as such that he is a person" (High Court of Justice 355/79 *Katlan v. the Prison Services*, PADI Journal 34(3) 294; opinion of the acting Chief Justice *H. Cohen* (1980) (hereinafter: *Katlan* Case). Indeed, "the right to dignity is a person's right in such that he is a person. Young and old, man or woman, healthy or mentally incapacitated, a prisoner, a detainee and the righteous, an Israeli citizen or resident or a foreigner – each one is entitled to the right of human dignity." Therefore, "human dignity is not just my dignity but the dignity of another and the unique" (*Barak - Human Dignity*, pp. 257, 379-381).

123. "Infiltrators" are also human beings. We are concerned with - if to borrow from another place – "people who are flesh and blood, people in pain, people who are alive and

breathing" (Civil Appeals 1165/01 *Anonymous v. The Attorney General of the Government*, PADI Journal 57(1) 69, 80 (2003); also see the *Foundation for Commitment*, p. 501). And if this requires clarity, we will say it explicitly: "infiltrators" shall not lose an iota of their right to dignity because they arrived in the country after many hardships. They do not cast off their dignity when they are placed into detention or the Residency Center, and they are entitled to the right of dignity in its fullest extent even if they arrived in the country in an organized form of immigration. Their dignity cannot be violated and they are entitled to protection. Moreover – precisely in their case we are obligated to scrutinize and be carefully meticulous. As indicated by *H. Cohen*, surely the protection for dignity reaches not only those whose dignity as a human being is obvious and not questionable, but specifically to those whose dignity as a human being appears to be questionable and blurred. In his words:

> "Even if the outward appearance or the general prevailing opinions indicate the opposite, the potential dignity is still equal for all human beings. The fact that for certain people, dignity is clearly evident, and in other cases it is not apparent, is not relevant – not for its nature nor for the scope of the protection that the law grants for the dignity of every human being. Insofar and to the extent that the man's ability to protect the right to dignity on his own diminishes, the greater the obligation imposed upon the governmental authorities and institutions to ensure that his dignity is protected in an efficient manner" (Haim Cohen "On the Significance of the Human Right to Dignity" *Human and Civil Rights in Israel*, Volume 3, 267, 268-269 (1992); also see the *Privatization of Prisons* Case, pp. 588-589).

124. Just think by way of example: a firmly entrenched law in our case law is that the deprivation of personal liberty and freedom movement of a prisoner, which entails his actual imprisonment, does not justify an additional infringement of the other human rights of the prisoner beyond a measure that requires the prisoner himself or for the sake of the exercise of a vital public interest that is recognized in the law (the *Privatization of Prisons* Case, p. 571; also see the *Golan* Case, pp. 152-153). As was determined years ago "the prison wall do not separate the prisoner from human dignity. Life in prison intrinsically involves an infringement of many rights which a free man enjoys […], but life in prison does not deny the prisoner's right to his well-being and the protection from a violation of his dignity as a human being. Freedom is deprived from the prisoner; his humanity is not taken from him" (*Katlan* Case, p. 298). Indeed, "many evils are associated with prison life, are added to the deprivation of freedom. However we shall not add to the necessary evils restrictions and infringements which cannot be prevented and which are neither necessary nor justified" (*Levana* Case, p. 690). All of these are even more so correct in the era of the Basic Laws, which have made the right to human dignity a supra-constitutional right (*Privatization of Prisons* Case, pp. 589-590; compare with: Civil Appeals 8622/07 *Rotman v. Department of Public Works the National Roads Company in Israel Ltd.*, paras. 97-98 (2012)). If this is the case in relation to prisoners who were placed behind bars and bolts because of criminal offenses and following legal

proceedings conducted in their manner, *a fortiori* in the matter of the "infiltrators" who were placed in detention or the Residency Center, who are not prisoners and who are not "criminals" in the conventional sense that we have in criminal law; many of whom define themselves as "asylum seekers".

125. How does this manifest in our case? Mandatory reporting that is prescribed in the Law and the Reporting Regulations restrict in an effective manner the ability to be outside the gates of the Residency Center. This prevents an "infiltrator" from the possibility of developing his personality. Thus, his right to human dignity has been infringed. When he is required to report three times a day in a Residency Center that is remote from any major settlements, how will the infiltrator meet a potential mate? What kind of hobbies is he able to adopt? When will he have the opportunity to meet with friends who have not yet been received in the Residency Center? Could he acquire an education and information in the place of his choice? Thus, we will clarify, that the existing structure of Chapter 4 of the Law does not permit the "infiltrator" from exercising his right to autonomy in a manner that is consistent with the obligations of the State's authorities – including the legislative branch – to preserve his dignity.

126. In our case, all of these are empowered on the basis of the unique characteristics of the "Holot" Facility which have been detailed by the parties. The infringement on liberty and dignity could be more or less acute – as is derived for the reporting requirements in the Facility and geographical location. "Holot", as indicated by its name – is surrounded by mounds of sand. It is remote from any settlement. The cities in its proximity (Be'er Sheva and Yerucham) are at least 60 kilometers away. This fact significantly increases the likelihood that the "infiltrator" will select – insofar and to the extent that it can be called a "choice" – to remain in the Center throughout the entire day. Let us not allow the title "Open Facility" to lead us astray: the thrice a day mandatory reporting requirement, alongside the great distance of the Center from the settlements in the region, nearly denies the ability to routinely exit from the Detainment Center. Thus, is the Center really "open"?

127. The conclusion that the compulsory reporting not only infringes the right to liberty but also the right to dignity is warranted even independent of the Petitioners administrative claims, in other words: even if the Center was located in the heart of the city and not in its current location. A person needs an appropriate window of time in order to fulfill a more meaningful real life. Thus, short and fixed hours are not sufficient. The afternoon reporting requirement, which is added to the customary morning and evening reporting requirements – means that the "infiltrator's" exit from the Residency Center is virtually futile. And what will the "infiltrator" do during the few hours that he has outside the Residency Center? The manner in which the legislator outlined the mandatory reporting requirement in the "open" Residency Center in practice turns the Center into a Center that by its nature is a closed facility. Thus, in my view, part of the minimum life in dignity that a person is entitled to, and which allows him to "select his choices and exercise his

freedoms" (*Barak – the Constitutional Rights and its Subsidiary*, volume B, pp. 598-601) has been infringed.

On the basis of what has been said thus far, my conclusion is that the requirement that the "infiltrator" report three times a day to the Center means a severe infringement to the liberty and dignity of the "infiltrators". It is not consistent with the right to liberty; it is not sufficient to provide the "infiltrators" with a dignified human existence. Is the infringement on these rights proportionate?

3) *Proportionality*

A) The Rational Relationship Test

128. The first proportionality test is the rational relationship test, which requires that the selected measure will realize the purpose at the foundation of the legislation. I will already note at this stage – and this comment shall accompany us throughout the entire examination of the proportionality of the entire Chapter 4 – that the parties did not focus their claims on the purpose of "providing a response to the needs of the 'infiltrators'." The proportionality question of the various arrangements of Chapter 4 of the Law and this chapter as a whole shall thus be examined solely in relation to the purpose "preventing the settling down in the urban cities".

As a matter of principal, between the obligation to stay in the Residence Center and the requirement to report for three daily headcounts and the purpose of the Law, there is a rational relationship, since the selected measure is designated to aid in preventing the settling down of the "infiltrators" in the urban cities and preventing their integration in the workforce (see the end of Article 32H(d), whereby "times and dates of reporting as aforesaid shall be determined in a manner which shall not permit the resident from working in Israel"). Reporting for the headcount allows the possibility to frequently and efficiently examine the state of the "infiltrator" and to keep him in "visible range" – *a fortiori* at a time when the "infiltrator" is required to report for the headcount during the afternoon hours, in a manner that makes it difficult to leave the Center during the day. Thus, in a theoretical manner, there is doubt that if this occurs in the practical sense. On the basis of the minority detained in the Residency Center in comparison to their general number within the population, I am not convinced that their placement in the Residency Center and the requirement to report three times a day was designated for an *effective influence* for preventing the settling down of the "infiltrators" as a group in the urban cities, and if it aids in actually preventing their integration in the workforce (including, inter alia, in light of the State's commitment not to enforce the prohibition of work for whom is not detained in the Residency Center as indicated in Article 32 above. For similar concerns expressed by my colleague, Justice *E. Arbel* (retied) see the *Adam* Case, *ibid*, para. 97). Notwithstanding, considering the fact that the State claimed that the "Holot" Facility serves as a "pilot"; that by virtue of the Law it is possible to establish additional residency centers; and there are additional measures to obtain the purpose of

the Law, for the purposes of these deliberations, I am willing to presume that the reporting requirement complies with the rational relationship test.

B) The Least Offensive Measure Test

129. The reporting requirement in the Facility also complies with the second test – whereby the infringing Law prevents the infringement on the constitutional right beyond the necessary scope for the purposes of realizing the appropriate purpose. It is not sufficient that the "infiltrators" will be permitted to spend the nights in the Center and the days in the open Residency Center – in the same degree of effectiveness – the purpose for preventing the settling down in urban cities. Indeed, the "infiltrator's" center of life, who is required to report to the Facility in the evening, which is located far away from any settlement, is shifted to the Residency Center. He cannot really "settle down" permanently in the urban cities. In any event, south Tel-Aviv, that was (and still is) the population focal point for many "infiltrators" is far removed from this Center. Even if the Center was located closer the population concentrations, clearly the "infiltrator's" address – is the Residency Center. Notwithstanding, there is no denying: if the "infiltrator" could be absent from the Center for several hours during the day, the likelihood that he will request to join the work force increases, even if it requires travelling to this destination or any other.

130. Despite that this fact is sufficient for us to proceed to the second proportionality test, I will note that it is worthy of considering additional measures that may prevent integration into the work force. As was already suggested in the *Adam* Case, "it is possible to strictly enforce the labor laws so that there will not be a preference to cheaper labor by the "infiltrators"" (*ibid*, para. 104); it is also possible to consider raising payable to the "infiltrators" that are employed in the Residency Center (which to date is only NIS 12-13 per hour and which may cause the decrease of the "allowance" that they are entitled to receive), in a manner that will incentivize them to refer to this type of employment, under the risk involved in the violation of the prohibition from working outside the walls of the Center. The minimum number of those currently employed in the Center (according to the State, correct as of the beginning of March 2014, it is only 179 residents) indicates that is it possible that there is room to develop this channel. It is also possible to consider the requirement of depositing different guarantees, which will be seized if the "infiltrator" violates the employment prohibition. These measures may assist, but I do not dispute that they cannot obtain the purpose in a similar manner of effectiveness that is actually achieved by the thrice a day reporting requirement for a daily headcount. As is known, the second proportionality test does not examine the actual existence of a less offensive measure of the protected constitutional right. It requires the examination of the least offensive measure that will realize the purpose of the law in the same degree or a similar degree to the measure selected by the legislator (*Privatization of Prisons* Case, pp. 601-602). These alternate measures do not meet the aforesaid criteria, and therefore the conclusion is that the existing arrangement is consistent with the second proportionality test. Nevertheless, the existence of additional measures could aid in

reducing the infringement, could be a known effect regarding the third proportionality test.

C) The Proportionality Test in the Strict Sense

131. We determined that the reporting requirement passed the first and second proportionality tests. However, in my view, the statutory arrangement conducting a thrice a day daily reporting requirement, which is concretized in the current Regulations whereby there is a reporting requirement in the afternoon, fails the third proportionality test – proportionality in the strict sense. The derived benefit from the legislation is clear: the reporting requirement in the afternoon makes it difficult for the movement of the "infiltrators", prevents them from "settling down" in the urban cities or to maintain a job (they are not permitted to work). Notwithstanding, the benefit arising from the public interest from the triple reporting requirement is not comparable to the damage sustained by the "infiltrators". This damage – the infringement on the "infiltrators'" rights – is derived from the degree of the openness of the Residency Center. The legal obligation that the "infiltrator" stay in the Residency Center during the nights – then he could –at least during the day –move around freely, consume culture, meet his friends and family, exercise his hobbies, acquire an education or other similar activities involved in the realization of his autonomy – is not the same as the obligation of the "infiltrator" to report to the Residency Center in the afternoon. If he leaves the Center in the morning hours – by the time he reached his destination he will already need to return. Thus, it is not possible to develop a life of content and worth. The noun – "prison", "detention" or "Residency Center" is not what prevails. The essence is what is important. The meaning of the requirement to report for a headcount that takes place in the afternoon hours is that for many "infiltrators" – the Center is not open whatsoever – and the open gates of the Residency Center in practice are actually closed.

132. The acute infringement of the reporting requirement becomes apparent when we look at other western countries where in practice a periodic reporting requirement whose purpose is to supervise the illegal immigrants located at the borders of their country. Before delving in the aforesaid examination, it should be clarified that the absence of a normative distinction in Israel – which is acceptable in other countries – between asylum seekers and others, makes it difficult to conduct a comparative examination between legislative arrangements which dominate the immigration of foreigners in different countries (without taking a stance in relation to the affiliation of the "infiltrators" in Israel, in whole or in part, to the categories of asylum seekers or other categories that we reviewed). Nevertheless, as we have clarified above – in light of the joint fundamental values of democratic countries, it is possible to learn and be inspired in what is happening in other legal systems cautiously and with proper reservations.

133. In the cases of asylum seekers, in practice most European countries maintain collective open residency centers for persons whose applications for asylum have not yet been decided do not impose their stay in them, and at times it is really a benefit that is granted on the basis of financial need. The "open" facilities in the sense that the residents can

leave and return freely, even in the certain places where the facilities close their gates in the evening hours (however this is also for a shorter time period than what is practices in Israel). The examination of the open residency facilities on other places, therefore, is that in many countries from the perspective of the asylum seeker it is a voluntary arrangement, which allows adequate residential and living conditions to those who cannot afford it. In places where it is deemed a social benefit, the centers usually serve as residency for the asylum seekers for a limited period, insofar that their needs for international protection are being reviewed. Following this initial period, it is appears that this person is "non-deportable", he is entitled, in principle, to choose his place of residence (within the borders of the country or designated areas therein) and move freely throughout the country or the aforesaid designated areas (see the U.N. High Commissioner for Refugees *Comments on the Proposed Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Order), 5774 – 2014* (2013); for the review of the status granted by other countries to foreigners that are non-deportable, see the *FRA Report*, pp. 34-38). From a comparative examination that was recently conducted by the European Migration Network (EMN) it appears that this is the situation in Britain, France, Holland, Spain, Belgium, Hungary, Italy, Poland and Sweden (EUR. MIGRATION NETWORK, THE ORGANISATION OF RECEPTION FACILITIES FOR ASYLUM SEEKERS IN DIFFERENT MEMBER STATES, 13-16 (2013) (available here) (hereinafter: *Open Facilities Report*").

134. Even when there is a reporting requirement, it is not a strict requirement as it is in the existing Israeli law. In Austria, asylum seekers await a decision in their case, and those persons whose request has been denied but cannot be deported, reside in an open facility based upon an economic need. In each state district (Bundesländer) different arrangements are applicable, which restrict, in general, the freedom of movement of those residing in the facilities. In several state counties the maximum duration of the absence from certain facilities is no more than 24 hours (thus in practice there is a reporting requirement *once a day*), however, the movements of the residents is limited to the borders of the state county in which the facility is located; in other facilities there is a need to report *once in three days*. Failing to report as required usually leads to a sanction of reducing the welfare benefits or their negation (see Sieglinde Rosenberger & Alexandra König, *Welcoming the Unwelcome: The Politics of Minimum Reception Standards for Asylum Seekers in Austria*, 25 J. REFUGEE STUD. 537, 546–51 (2011); SASKIA KOPPENBERG, INT'L ORG. FOR MIGRATION& EUR. MIGRATION NETWORK, THE ORGANIZATION OF THE RECEPTION SYSTEM IN AUSTRIA 21-28, 61-62 (2014) (available here); OPHELIA FIELD, U.N. HIGH COMM'R FOR REFUGEES, DIV. OF INT'L PROTECTION SERVS., ALTERNATIVES TO DETENTION OF ASYLUM SEEKERS AND REFUGEES 162, U.N. Doc. POLAS/2006/03 (April 2006) (available here). In Germany, there are similar arrangements. In various state counties residency centers were established in order to accommodate the foreigners where in their case the deportation order or asylum request are being reviewed. Each state county is permitted to formulate its own specific rules with regard to the facilities as it deems appropriate, but in general there is no reporting

requirement, and the entry exit and entry to and from the facility is free. Nevertheless, the movement of the residents is limited to the boundaries of the state county in which the facility is located (Asylverfahrensgesetz [AsyIVfG] [Asylum Procedure Act], Sept. 2, 2008, BUNDESGESETZBLATT I [BGBL. I] at 1798, as amended, §§ 47, 56–57; AufenthG, §§ 61–62; ANDREAS MÜLLER, FEDERAL OFFICE FOR MIGRATION & REFUGEES & EUR. MIGRATION NETWORK, THE ORGANISATION OF RECEPTION FACILITIES FOR ASYLUM SEEKERS IN GERMANY 12 (2013) (available here) (hereinafter: *the German Report*)). In Belgium, asylum seekers are placed in shared housing facilities or state-funded housing in the community, according to their personal needs, and are entitled to receive an allowance. If an asylum seeker does not request the allowance or is absent from the facility for a period that is greater than *10 days*, he is deemed to have violated the conditions and may lose his place in the facility (EUR. COMM'N & EUR. MIGRATION NETWORK, THE ORGANISATION OF RECEPTION FACILITIES IN BELGIUM 4 (2013) (available here) (hereinafter: *the Belgian Report*); Liesbeth Schockaert, Alternatives to detention: Open Family Units in Belgium, 44 FORCED MIGR. REV. 52, 52, 54 (2013). In Canada, there is a "presumption against detention", and the rule is that an asylum seeker is released from detention when it is possible to obtain the purpose of deportation by other means, or when the placement into detention is required to clarify the asylum request. Accordingly, approximately 90% of the asylum seekers – are those whose requests are being clarified and those whose requests have been denied and are awaiting deportation – are released into the community based on a variety of diverse conditions. These conditions include, inter alia, the reporting requirement. For the purposes of illustration, in one of the release programs under restricting conditions – Toronto Bail System – initially there is a duty *to report bi-weekly*, however the frequency decreases insofar as the time passes and trust is built between the parties. In advanced stages, amongst other things, the duty to report via telephone based on an automated voice recognition system is enabled (*U.N. High Commissioner's Document for Refugees 2011*, pp. 56-60). In Norway, asylum seekers whose request was denied and other foreigners awaiting deportation are permitted to remain and reside in the open center where other asylum seekers are living whose request have not yet been decided. In order for the authorities to issue and implement a deportation order effectively, they are required to report to the center *once in three days* (Eur. Comm'n, Study on the Situation of Third-Country Nationals Pending Return/Removal in the EU Member States and the Schengen Associated Countries 75, E.U. Doc. HOME/2010/RFXX/PR/1001 (Mar. 11, 2013) (available here). In Australia, as mentioned above, an illegal immigrant shall be detained in detention indefinitely until his deportation or until he receives status in the country (however see the recent ruling of the Supreme Court there, which is mentioned in para. 76 above. It was already noted that in any event that this practice received criticism (see *ibid)*. Notwithstanding, in Australia there is also a possibility for "Community Detention", which at times is operated after several years of residence in the "ordinary" detention . In the framework of this arrangement the illegal immigrant is required to reside in a place determined by the minister; to report *once a day* before the authority according to the times that will be determined; and he is not permitted to work or study

(J. STANDING COMM. ON MIGRATION, IMMIGRATION DETENTION IN AUSTRALIA: COMMUNITY-BASED ALTERNATIVES TO DETENTION 22-24 (2009) (available here). In Denmark, subject to the exceptions, those persons who cannot have a deportation order issued and implemented against them –based upon technical, constitutional or humanitarian grounds – are referred to open residency centers. The residents in these facilities are required to report to the police according to the times that shall be determined, generally *once a day* (Udlændingeloven [Aliens Act], jf. lovbekendtgørelse nr. 863 af 25. juni 2013, as amended §§ 42a(9), 42a(10), 34(3); *Countries Annex 2013*, pp. 106-109). In Holland, individuals who received deportation orders are transferred to the open centers. The residents are permitted to freely leave the centers, but not from the municipality in which they are located. Likewise, there are required to report *once a day* (Vreemdelingenwet [Aliens Act], Stb. 2000, Nr. 495, p. 1 §§ 56–57 (hereinafter: *Vreemdelingenwet*); *Countries Annex 2013*, pp, 272-276). In Lithuania, they apply the arrangement closest to the one that exists here with regard to the reporting requirement, asylum seekers are detained in closed facilities between 10:00 PM and 6:00 AM *and in addition* they are required to report *once a day*. This policy was criticized in the European Parliament Report (EUR. PARL. & STEPS CONSULTING SOCIAL, THE CONDITIONS IN CENTRES FOR THIRD COUNTRY NATIONAL (DETENTION CAMPS, OPEN CENTRES AS WELL AS TRANSIT CENTRES AND TRANSIT ZONES) WITH A PARTICULAR FOCUS ON PROVISIONS AND FACILITIES FOR PERSONS WITH SPECIAL NEEDS IN THE 25 EU MEMBER STATES 113, 196 (2007) (available here) (hereinafter: *the Residency Center Report*)). In Malta, foreigners were released from detention and transferred to open residency centers on the basis of economic need, whereby the reporting requirement applicable to them ranges between *once a day to three times a week* (Immigration Act, c. 217, §25A(13) (as amended); Suso Musa v. Malta, App. No. 42337/12, ¶ 33 (Eur. Ct. H.R. July 23, 2013); C.O.E. Comm'r for Human Rights, Report Following His Visit to Malta from 23 to 25 March 2011, ¶ 57, E.U. Doc. CommDH(2011)17 (June 9, 2011) (available here).

The summary of this point: The distinction between the infringement on the freedom of movement and the infringement on the right to liberty is not rigid. Imposing significant restrictions upon a person's movement may give rise, in substantive terms, to the infringement on liberty. In theory, this infringement may cause the infringement on the right to dignity, which included the right to a person's autonomy which allows him to shape his life according to his desires.

135. And here, in Israel, the "infiltrator" is required – by virtue of Article 32H(a) of the Law – to report for *a thrice a day* headcount. This requirement deviates from the accepted practice in the world. This deviation has genuine implications on the scope of the infringement on the rights of the infiltrators. The difference between an "open" facility and a "closed" facility – is a considerable difference. An open facility allows a person to preserve his identity. His has his independence. In many aspects, he is the master of his own destiny. A closed facility is similar to detention or prison. Residency of days, weeks

and months (in fact – the residency may continue for several years, as will be further explained below) in a closed facility, means that every aspect of a person's life – his spare time, the food that he eats, the people with whom he associates and comes into contact – all these are dictated by the State. This is a severe infringement on liberty and dignity. Indeed, the reporting requirement in the afternoon bears a benefit to the public interest (even though it is worth considering, as we did in the deliberation we conducted concerning the existence of the least offensive measure, if there are additional measures that can make it difficult to integrate into the workforce) – however this benefit does not justify the severe infringement on the constitutional rights.

(ii) *The Management of the Residency Center by the Israeli Prison Services and the Authority of the Prison Guards*

136. The *second* arrangement before our judicial scrutiny deals with the identity of the operating entity that operates the Residency Center. According to the Law, the managing body of the Center is the Israeli Prison Services. This arises from Article 32C of the Law, which prescribes:

Appointment of the Manager of the Center and the Center Employees

32C. The Minister of Public Security declared that the Residency Center shall appoint a senior warden for the purposes of managing and operating the Center, whom shall be the Center Manager; the Commissioner shall appoint warders who shall be employees of the Center, provided that they have undergone the appropriate training as has been instructed.

137. Thus, it follows that the Law imposes the responsibility for the management and operation of the Center upon the Israeli Prison Services. The Center is managed by a senior warden that was appointed by the Commissioner of the Prison Services; and its employees are warders of the services, and are subject to the disciplinary rules applicable to warders. In this context, the State requested to emphasize that within the scope of the actual application of the Law in the "Holot" Facility – the warders whom are Center employees underwent unique training of several days prior to the commencement of working in the "Holot" Facility, and they do not walk around in uniforms in the Center but rather in "special clothing". Notwithstanding, according to the Petitioners' claims, the fact that the Center is operated by the warders – in addition to the other characteristics of the Residency Center – the meaning is that those detained in the Center are expected to experience the residency there as being in prison for all intents and purposes.

138. In my view, placing the management of the Residency Center in the hands of the Israeli Prison Services – who were also granted extensive authorities required to operate the Center – intensifies the infringement on the rights of the infiltrators. I will explain my conclusion.

139. The Israeli Prison Services is the body responsible by law for incarceration in prisons for those individuals convicted by the law. The legislator placed the task of managing

prisons, ensuring the safety of the prisoners and all that is entailed in such service (Article 76 of the Prison Ordinance; *Privatization of Prisons* Case, pp. 579-580). Thus, the Israeli Prison Services are part of the governmental authorities. It is an arm of the executive branch. In our case law it has been named "the national incarceration organization"; "the authority in charge of the prisoners"; and "the authority in charge of the prisons" (High Court of Justice 6069/10 *Machamali v. The Israeli Prison Services*, para. 20 (May 8, 2014); *Golan* Case, pp. 153-154). Notwithstanding, there is a difference between an ordinary administrative authority and officers in the Israeli Prison Services, primarily in light of the nature and scope of the authority granted to them. The authority to manage a prison confers upon the Commissioner and the officers in the services full control over the lives of the prisoners. Indeed, "There is no person subject to or dependent upon the administrative authority for better or worse like the prisoner, and there is no authority that dictates the way of life for a person like the Israeli Prison Services. An ordinary administrative authority has a specific authority, for certain matters and under certain conditions. The Commissioner of the Israeli Prison Services and his staff have comprehensive relentless authority for the preservation of order and safety […] hence the authority of the Israeli Prison Services is not similar, by its nature and scope, to the ordinary administrative authority" (Ron Shapira, "An Administrative Procedure that Determines the Boundaries and Scope of Criminal Punishment" *Hamishpat* 12 – Adi Azar Book 485, 491-492 (2007)).

140. The prison, whose operation is entrusted to the Israeli Prison Services, is a "punitive institution". The actual enforcement of the punishment is part of the criminal process; and serving the sentence behind bars and bolts is a part of the punitive process (*Privatization of Prisons* Case, p. 662; Netanel Dagan and Uri Timor "A Voyage into the Open Space: the Discretion of the Israeli Prison Services for Operating the Punitive Authorities (following Small Claims (Netanya) 1348/09 *Magabada v. The Deputy of the Sharon Prison*¸ *Defense Journal (Hasanegor)* 178 4, 7 (2012)). Thus, the Prison Services are authorized to manage the punitive institutions, as it does in practice. The outcome from the aforesaid is that the daily routine of the services is entailed with handling the population of the prisoners who are serving their sentence after being convicted by the criminal law. This is a population of criminals. Unique characteristics. Coping with this population requires constant evaluations to prevent crimes and acts of violence, including, inter alia, by establishing a non-civilian relationship of discipline and intimidation (Rina Shapira & David Navon, *Cooperation between Inmates and Staff in Israeli Prisons: Towards a Non-Functionalist Theory of Total Institutions*, 15 INT'L. REV. MODERN SOCIOLOGY 131 (1985) ;Erving Goffman, *The Characteristics of Total Institutions*, in ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 321 (1961); On Violence in Prisons in Israel see Joshua Weiss and Gabi Yehuda "Violence Amongst Criminal Prisoners in Prison" *Zohar Journal for Prisons* 10 73 (2006)).

141. On the other hand, the presence of the "infiltrators" in the Residency Center is unmistakably "civilian" by nature. The residency provisions issued for them, by virtue of

which they are required to come to the Residency Center, is not a convicting verdict. Their residency is not a crime for their mere infiltration (see the *Adam* Case, para. 90). The State itself recognizes that "we are dealing with an open Residency Center, which was designated for civilian purposes, and not an incarceration facility which was designated for punitive purposes" (para. 238 of the State's Response). And behold, the Israeli Prison Services, who does not ordinarily deal with managing a "civilian" population, is the body ordained by the Law to operate the open Residency Center, and to date it is the operating body of the "Holot" Facility. This matter presents difficulties. The service specializes in the management of "closed" facilities whose residents are a criminal population or suspected in criminal activities. It is accustomed to facilities designed to counteract precariousness and prevent escape; It deals with operation incarceration facilities, that are obligated to cope with the criminal population. All these are not characteristics of an open Residency Center, permitting exit and entry on a daily basis.

142. Notwithstanding, it seems worthy to distinguish between the management of a *detention* facility and an *open facility*: detention facilities deny the liberty of those detained there in an absolute manner, and are essentially similar to jails or prisons. Selecting the Israeli Prison Services as the managing body for detention services is more understandable (even this is despite that the "criminal" nature of the custodial facilities have been criticized, and in several places there has been a call to make them more "civilian". See for example, the United States Asylum Abuse: Is it Overwhelming Our Borders? Hearing Before the H. Comm. on the Judiciary, 113th Cong. 79 (2013) (U.S.) (available here); DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 20–21 (2009) (available here); and in Holland (Arjen Leekers & Denis Broeders, *A case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention*, 50 BRIT. J. CRIMINOL. 830, 833-38 (2010) 830, 833-38). By contrast, the open Residency Center must have "civilian" characteristics, given the differences between the population of the "infiltrators" and the population of prisoners and detainees. The outcome is that a facility that hosts the "infiltrators" must preserve the sense of the liberty of those residing there. Thus, it is no wonder that placing the management of the Residency Center in the hands of the Israeli Prison Services is not acceptable in other western countries, which developed different arrangements concerning the identity of the managing body of the open or semi-open facility. The commonality is that the facilities are operated by "civilian" entities in their nature: the immigration authority; local municipalities; non-profit organizations and private entities (however with respect to the criticism on the privatization in a similar context see: Michael Flynn, *Who Must Be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy*, 33(3) REFUGEE SURV. Q. 40, 64-65 (2012).

143. Thus, in France, the responsibility for managing the facilities is dedicated in part to the immigration authority officials and in part to non-profit organizations and private service providers (FRENCH CONTACT POINT OF THE EUR. MIGRATION NETWORK, THE

ORGANISATION OF RECEPTION FACILITIES FOR ASYLUM SEEKERS IN FRANCE 13–15 (2013) (available here)). In Belgium, non-profit organizations manage the facility, including the Red Cross and a designated authority to care for the asylum seekers (Fedasil) whose role is also to supervise the facilities (*the Belgian Report*, pp. 8-9). In Sweden, the responsibility is distributed between the immigration authority and the local municipalities (*Open Facilities Report*, pp. 15-16). In Britain, the management of the facilities, in general, is by private companies that are engaged by the state by means of designated agreements. Notwithstanding, the state is not licentious from its responsibilities and continues to maintain extensive supervising authorities on what is done in the facility (MAGNUS GITTINS & LAURA BROOMFIELD, HOME OFFICE, THE ORGANISATION OF RECEPTION FACILITIES FOR ASYLUM SEEKERS IN DIFFERENT MEMBER STATES: NATIONAL CONTRIBUTION FROM THE UNITED KINGDOM 8-9 (2013) (available here). In Malta, the facilities are operated by a governmental authority responsible for the care of the asylum seekers, and at times it is in conjunction with church-related organizations (DeBono, p. 149). A similar combination for the distribution of responsibility between immigration authority, non-profit organizations and private entities exists in Germany, France, Poland, Norway and Denmark (*Residency Centers Report*, p. 194). In Israel, the possibility that the open Residency Center be managed by the Ministry of Interior was also considered (see the Proposal for the Law Combating the Infiltration Phenomenon on the Southern Border (Temporary Order), 5772 – 2011; *Adam* Case, para. 104). However, ultimately, the legislator selected the Israeli Prison Services for the operation and management of the open Residency Center.

144. The managing and operating body of the open Residency Center has daily contact with the residents in the Facility. The control over the "infiltrator" residing in the Center is great, and encompasses all aspects of life. This control is expressed, inter alia, by the many powers granted to the warders in Chapter 4 of the Law (and other entities enumerated there) for the purposes of supervising the Center, including: the authority to conduct a search without a court order on the body of a person staying at the Center (Article 32L of the Law); the authority to conduct searches on the grounds of the Center (Article 32M of the Law); the authority to prevent entry or remove a person who refused to identify themselves or to permit a search (Article 32O of the Law); the authority to seize contraband items on the grounds of the Facility (Article 32D of the Law); the authority to detain (Article 32P of the Law); and the authority to maintain the order and discipline in the Center. The Director of the Center and his deputy are also authorized to use disciplinary measures, such as, a reprimand, warning and limitations on exiting the Center (Article 32S). Some of the Articles also grant the managing entity the authority to exercise force if necessary. The result is that the "infiltrator" does not come into contact with the warder on sporadic "points of contact" during the course of his day; he is subject to him during all the hours that he is in the Center. The identity of the managing body of the Center is designated then to have an effect on the daily routine of the "infiltrators"

and their emotions. It is a crucial component concerning the question how the Facility is perceived amongst the residents there: an open facility with civilian characteristics or an incarceration or detainment center with criminal characteristics. We said that the population of the "infiltrators" is "civilian" by its nature. Then, why, is their life being managed by the warders, with all the symbolic weight that accompanies it? The State insisted that the warders do no wear prison service uniforms when working at the Residency Center and that they also underwent a short training course for this purpose. Nevertheless, even it is sufficient to minimize, the infringement sustained by the "infiltrators" as a result, it is clear that removing the uniform does not remove the Israeli Prison Services from many years of handling incarcerated criminals. This is the DNA of the service and a few days of training cannot later that.

145. Please note: this is not to discredit the Israeli Prison Services, who does its job faithfully. I do not wish to dispute its abilities or competence to manage the kind of facility that we are dealing with. Operating this kind of facility is a difficult task, and there is no doubt that the Israeli Prison Services are skilled enough to do it successfully. The presumption is that the service professionals exercise their authorities proportionately and reasonably and that they are faithful to the provisions of law and values of the service they are performing and they are making an effort to treat the population of the residents with the necessitated sensitivity. The focus in this context is not the skills or character of the service professionals, which is undisputed. Our law is concerned with the *manner* in which the liberty is deprived – and not only its mere deprivation – which has an impact on the scope of the infringement. As noted by Chief Justice *D. Beinisch* in the *Privatization of Prisons* Case:

"The right to liberty is not only infringed by its mere complete denial. The scale of the infringement of the right is broad and complex. The manner in which the infringement of the constitutional right occurs, the nature of the infringement and the intensity that it naturally has on the effect of the examination of the constitutional right in the lenses of the restriction clause" (*Privatization of Prisons* Case, p. 585).

To summarize this point is: the constrained stay of a person in any institution carries, in varying degrees, a daily routine that is marked with policing. The traits of the managing entity of the institution – whose personnel is involved in all aspects of life there – is of great significance in this regard; and with respect to the identity of the authorized personnel – to whose authority the residents are dejected, there is a real impact on the daily routine of the residents of the institution and the manner in which they perceive the Facility they are residing.

146. In our case, I have no intent of determining rules concerning the question if the management of the Residency Center by the warders causes an additional independent infringement on the constitutional right to liberty, beyond the infringement arising from the liberty itself. I also do not request to view the placement of the management of the Residency Center in the hands of the Israeli Prison Services as an independent

infringement on the dignity of the "infiltrators", which is in the confines of the "interim model" that was adopted in our case law (as was determined, for example, in the *Privatization of Prisons* Case in relation to incarceration by a private corporation; *Privatization of Prisons* Case pp. 584-586). My conclusion which shall be explained further below whereby Chapter 4 of the Law is void does not rely therefore on placing the management authorities of the Facility in the hands of the Israeli Prison Services. It is possible that an additional normative outline that will arrange the operations of the Facility as aforesaid would pass the constitutional scrutiny even if the managing entity would be the Israeli Prison Services. However, this does not derogate from the fact that the selection of the Israeli Prison Services as the managing entity is sufficient *to enhance* the infringement on the dignity and liberty of the "infiltrators", sustained by their detainment in the Residency Center. Therefore, even though the provisions of Article 32C of the Law do not create an independent infringement on constitutional rights (in a manner that requires us to examine if it meets the conditions of the limitations clause), since it intensifies and exacerbates the infringement on the right to liberty and the right to dignity it affects the proportionality of the entire arrangement.

(iii) *Restriction of the Duration in the Residency Center and Grounds for Release*

147. The *third* matter that requires our examination, which is not in first in order but may be the first in terms of importance, is with regard to the duration of residence in the Residency Center. Chapter 4 of the Law does not have any provision whatsoever that limits the duration of residency in the Center. According to the Petitioners' claims, this means that the "infiltrators" right of liberty who are referred to the Center is denied for an unlimited period of time. On the other hand, the State claims, reducing the duration of stay in the Center is not possible, since otherwise this would mean not realizing the purpose of the Law in the identical degree – preventing the settling down of the "infiltrators" in the urban cities and preventing their integration into the work force in Israel.

1) *The Infringement of Constitutional Rights*

148. Chapter 4 of the Law, which arranges the establishment of the Residency Center, lacks any provision concerning the duration of stay in the Center. Contrary to the detention arrangement set forth in Article 30A of the Law, Chapter 4 does not even include grounds for release, including no designated grounds for release concerning the passage of time. What, then, is the maximum limit for residence in the Center? Since Chapter 4 does not restrict the duration of residency in the Center, and since the provisions of the residency provided to the "infiltrator" do not indicate the anticipated date of release, it can be argued that in the current version, the Law does not offer any horizon for release for anyone required to report to the Residency Center, such that it is expected that he will stay in the Residency Center indefinitely.

149. I do not believe that this is the case. Chapter 4 which was supplemented to the Law for the Prevention of Infiltration within the framework of Amendment No. 4 is within the confines of a temporary order. It was determined that this temporary order is in force and effect for *three years* (Article 14 of Amendment No. 4). In the Explanatory Notes of the Proposed Law it was explained that the arrangement was determined as a temporary order which is designated "to examine during the course of this period how the arrangement realizes the purpose of preventing the settling down of the "infiltrators" in Israel and how the State will cope with the extended implications of the "infiltrators" phenomenon […]" (Explanatory Notes of Amendment No. 4., p. 123). The statutory structure means that the orders of stay that were issued to the "infiltrators" shall be in force until the expiration of the statutory arrangement following three years (if it is not extended), or until a decision of the executive branch to release him from the Center before that (and see Article 32D(a) of the Law which determines that the Head of Border Control is permitted to instruct an "infiltrator" residing in the Residency Center "[…] until his deportation from Israel, until his departure or any other time that shall be determined").

150. Thus, it follows that the current state of affairs permits holding an "infiltrator" in the Residency Center for a period of at least three years. During this long period the "infiltrator" will be required to be in a place where his liberty is deprived. The course of his life will be obstructed. He cannot continue to work in the job he worked; he can no longer spend time with his friends who were not called to the Residency Center; he can no longer select how to spend his hours; he can no longer manage his day as he desires. All of this, is not a punishment for his mere "infiltration", or for the purpose of advancing his deportation – but for the sake of "preventing his settling down in the urban cities and his integration into the work force."

151. Moreover, the "infiltrator" to whom a residency order was issued, to date cannot assume with certainty that he will be released from the Residency Center after three years. Since the temporary order that we are dealing with, clearly after three years the Knesset will decide whether to extend the validity of the temporary order or not. Given the known "history" of the temporary order that dominates the material similar to what we are considering, one cannot say whether there is a possibility if the validity of the temporary order will be extended or not – and as a result, the "infiltrators" called to the Residency Center shall be compelled to stay there for a period greater than three years – is a theoretical possibility, a possibility which was also not denied by the State as aforesaid (see and compare: *First Law of Citizenship* Case, p. 464). In other words: the fact that the statutory arrangement in our matter is anchored in the temporary order which is temporarily defines the duration of stay in detention (for three years), however, alongside this – it does not provide the "infiltrator" that has been called to date to the Residency Center, concrete knowledge with regard to the question when his liberty will return. The result is that he is subject to uncertainty – with harsh implications –concerning his future and destiny.

In my view, in this state of affairs, the infringement on the "infiltrators'" right to liberty is exacerbated, and therefore their right to dignity is infringed. I will explain my reasoning.

152. We will begin the deliberations with the right to liberty, which we reviewed earlier (see para. 46 above). Even though the State declares that one of the purposes of the Residency Center is to provide a response to the needs of the "infiltrators" (I am not determining rules at this stage in connection with the question if the Residency Center undeniably provides the aforesaid response), we will clarify that when the "infiltrator" is called to the Residency Center he cannot be released according to his will. Therefore, in the model of the Center where reporting is compulsory, it then infringes on the right to liberty. In the *Adam* Case, I noted that detaining a person in detention for *any* period *whatsoever*, let alone for a period of three years, is an acute infringement of his right to personal liberty (para.15 of my opinion). This is also correct in reference to the Residency Center. Imposing an obligation on a person to reside in a certain place *not of his own free will* – even for one day – infringes his liberty. Ordering a person to disconnect from his surroundings – even for one day – during the course of which he cannot select where or with whom we will spend his evenings; in the context of which the control of his life is expropriated from him, and he is not free to do with his time as he deems fit – infringes his liberty.

153. If this is regard to one day – this is *a fortiori* true in relation to a longer period of time. The fundamental principles are that the passage of time intensifies and exacerbates the infringement on liberty and insofar and to the extent that the infringement of the right of liberty is longer – the intensity of the infringement also increases. Thus, for example, in consistent case law concerning Article 62 of the Arrests Law, this Court reiterated that the passage of time is a substantial consideration concerning the question if to continue to remand the accused in detention until the culmination of the proceedings, whose trial did not culminate after several months; and it shifts the balance point from the right of the public interest to the exhaustion of the proceedings with the accused – to the accused' right of freedom (see, amongst many examples: Miscellaneous Criminal Motions 2970/03 *State of Israel v. Nassradalin*, paragraphs 3-6 (April 2, 2003); Miscellaneous Criminal Motions 9466/06 *State of Israel v. Dahan* (November 20, 2006)). Thus, it follows that insofar and to the extent that the deprivation of the right to liberty is extended – the greater the impact of the infringement. Thus, there is no need to say that the arrangement that limits liberty for a period of at least *three years* – encompasses an acute infringement on the right to liberty, an infringement that will only deepen if the period will be extended by the temporary order.

154. Staying in the Residency Center for three years not only infringes the liberty of the "infiltrators" but also their right to dignity. The time dimension has a real impact on the infringement on the dignity of a person whose liberty has been deprived. The deprivation of liberty for a short period of time allows the person to return back to the course of their life in a short time frame. Insofar and to the extent that the deprivation of liberty is extended, thus a person is required to waive more of his wishes and desires. His personal

identity and unique voice are drowned in the regimented and wearing daily routine. Anyone who enters the Residency Center and is released after *three years* does not come out as he was. Three years – a period during the course in which he could have gotten married and started a family, advance in his career and acquire an education. A period in his life that will never return.

155. Moreover: as we have already clarified, given that the temporary order may be possibly extended, an "infiltrator" sent to the Residency Center is in a state of structured uncertainty with respect to his release. The uncertainty is not part of the infringement on dignity which is part of the structure of any residence facility that deprives liberty: it is a unique and independent infringement on the right to liberty, arising from the manner is which the uncertainty enhances the suffering already associated with the deprivation of liberty. Notwithstanding, psychological studies indicate that the uncertainty is a significant stress factor in a person's life, and at times it is often linked to anxiety and depression (for a detailed overview of the literature in this matter see: Emily L. Gentes & Ayelet Meron Rusico, *A Meta-Analysis of the Relation of Intolerance of Uncertainty to Symptoms of Generalized Anxiety Disorder, Major Depressive Disorder, and Obsessive-Compulsive Disorder*, 31 CLINICAL PSYCHOL. REV. 923 (2011); Veronica Greco & Derek Roger, *Uncertainty, Stress, and Health*, 34 PERSONALITY & INDIVIDUAL DIFFERENCES 1057 (2003). When we are dealing with the deprivation of liberty, the dimensions of the uncertainty have particular grave implications.

156. This is also correct *a fortiori* with regard to foreigners seeking asylum, which is a population particularly vulnerable to post traumatic stress disorders associated with the deprivation of liberty (Mathew Porter & Nick Haslam, *Predisplacement and Postdisplacement Factors Associadted with Mental Health of Refugees and Internally Displaced Persons*, 294 J. AM. MED. ASSOC. 602 (2005). A study that was conducted by the European Parliament, whereby the lives of foreigners in residency centers were examined (including open facilities and those that the entry was voluntary) indicated that unlimited residency in the residency center, without a clear status and uncertainty concerning its culmination, increases the rate of attempted suicide and mental disorders amongst the residents (*Residency Centers Report*, pp. 70-72, 184-186, 198-200). Thus it appears that there is a reason that the European Reception Directive determines that the terms of detainment shall include protection for the mental welfare of the detainees (Directive 2013/33/EU, of the European Parliament and of the Council of 26 June 2013 on Laying Down Standards for the Reception of Applicants for International Protection (recast), art. 17(2), 2013 O.J. (L 180) 96, 104-05) (available here)). The U.N. High Commissioner for Refugees reviewed the severe implications of the uncertainty concerning the continuing deprivation of liberty (available here):

> "Lack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention, in particular for stateless persons and migrants who cannot be removed for legal or practical reasons" (U.N. High Comm'r for

Refugees & U.N. Office of the High Comm'r for Human Rights, Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons, Geneva, Switzerland, 11–12 May 2011: Summary Conclusions 4 (July 2011).

157. Thus, it follows that, a normative arrangement that deprives the liberty for a person for a period of three years (at least), even without previously limiting in a certain manner the duration of this period – is a severely infringing arrangement whose impact is great on the right to liberty and the right to dignity. Consequently, we must consider the question whether these infringements are consistent with the requirements of the limitations clause. We previously reviewed the purpose of the Law, and we assumed that it is proper. Now what remains is to examine if the Law is proportionate.

2) Proportionality

A) The Rational Relationship Test

158. I am willing to assume that Chapter 4 of the Law, which does not include any provision restricting the duration of the residency or the grounds for release, passes the first proportionality test. Indeed, there is a rational relationship between limiting the liberty for an ongoing period and the purpose of the Law. Residency in the Residency Center can detach the "infiltrator" from his surroundings where he already "settled down" and make it difficult to maintain his job. Insofar and to the extent that his residency there shall be extended – thus his "settling down" in the urban cities will be more so prevented, and the likelihood that he will work without a visa – decreases. Any restriction on the limitation of the residency period means that after the passage of a certain amount of time he can return and join the circle of work (after all the State committed that it would not enforce the prohibition to work for those not detained in the Residency Center). In this sense, the absence of an outline for the duration of the duration of the residency ensures the realization of the purpose of the legislation, and maintains the rational connection between the purposes of the Law.

B) The Lease Offensive Measure Test

159. The examination of the Law in the scope of the second proportionality test leads to a similar result, since I do not believe that there is a less offensive measure that will be able to obtain the purpose of the Law in a similar degree of effectiveness. Indeed, the limitations of the duration of the residency for a shorter period will lead to such that after the "infiltrator" will complete the required residency period – he can return and "settle down" in the urban cities and take part in the workforce. Although, as I stated above,

certain measures may incentivize the "infiltrators" from refraining from participating in the workforce (see para. 130 above), they do not permit obtaining the purpose of the Law in the effectiveness ascribed to the Residency Center. Thus, the absence of an outline for the duration of residency and the lack of grounds for release pass the second proportionality test.

C) The Proportionality Test in the Strict Sense

160. On the other hand, in my view, Chapter 4 of the Law does not pass the third proportionality test, because there is not a proper balance between the benefit arising from obtaining the purpose and the damage sustained as a result of the infringement on constitutional rights. Indeed, reducing the residency period to a period that is less than three years or adding grounds of release to the Law means that an "infiltrator" who is released will return to the urban cities and request to integrate into the work force. There is room for the opinion that the Israeli society actually benefits from the fact that its residents are not required, on a daily basis, to bear the burden of the absorption of tens of thousands of infiltrators, and that when they are placed in the Residency Center, the adverse effects associated with a mass and unorganized migration – which cannot be and which is incorrect to ignore – are reduced to a large extent.

161. Notwithstanding, the impact of the infringement sustained by the "infiltrators" following their detainment in the Residency Center for a period of three years – a period which may even be extended, as aforesaid – is not directly proportional to the public benefit derived from it. A democratic society cannot deny for this kind of period the liberty of people who do not pose a risk and whom do not bear any punishment for any wrongdoing that committed, even if the deprivation of liberty has a benefit. In any event, residency in the Residency Center as required by the "infiltrator" by virtue of Chapter 4 of the Law infringes on the nuclear core of the right to liberty and the core of the right to dignity. The infringement on the right to liberty is exacerbated due to the extension of the deprivation of liberty; and the uncertainty concerning the concerning the date of his release, which is the outcome of the possibility of extending the temporary order, adds another dimension to the infringement of dignity.

162. Limiting the timeframe of the residency – how? In my opinion, a proportional normative arrangement to preserve the proper relationship between the degree of the restriction of rights in the Facility and the maximum duration of residency, such that insofar and to the extent that the limitation of the fundamental rights is more severe – then it will reduce the compulsory residency in the Facility. In this matter it is appropriate to consider the damages sustained by a long term stay in detention or in residency centers. Studies that deal with foreigners detained in detention or residency centers found that even a "short" term stay of one month in detention may increase the rate of psychiatric problems amongst the asylum seekers, and that insofar and to the extent that the detainment is extended – thus there is a greater emergence of different problems, including depression; anxiety; post-trauma (Janet Cleveland, *Psychiatric Symptoms Associated with*

Brief Detention of Adult Asylum Seekers in Canada, 58 CAN. J. PSYCHIATRY 409 (2013); Zachary Steel et al., *Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees*, 188 BRIT. J. PSYCHIATRY 58 (2006); Janet Cleveland & Cécile Rousseau, *Mental Health Impact of Detention and Temporary Status for Refugee Claimants Under Bill C-31*, 184 CMAJ 1663 (2012); Charls Watters, *Emerging Paradigms in The Mental Health Care of Refugees*, 52 SOC. SCI.& MED. 1709 (2001); Mary Bosworth, *Human Rights and Immigration Detention in the United Kingdom*, in ARE HUMAN RIGHTS FOR MIGRANTS? CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES 165, 179-180 (Marie-Benedicte Dembour & Tobias Kelly eds., 2011).

163. For the purposes of illustration, in western countries it is accepted to limit the duration of the residency for short periods which are measurable by months. Thus, for example, in Holland, for anyone whom a deportation order was issued against him or if it cannot be implemented, he is obligated to reside in an open facility which restricts his freedom of movement to the borders of the municipality in which the facility is located for a maximum period of *three months* (Vreemdelingenwet, §§ 56–57; *Countries Annex 2013*, pp. 272-275). In Austria, the authority is commanded to consider lenient alternatives to detention in regard to the illegal immigrants that are not asylum seekers and an order of deportation was issued against them. Amongst the alternatives enumerated in the Law residency in a specific place that shall be instructed by the authority or reporting requirements (reporting). Restrictions of this kind shall be applicable, as a rule, for a limited period. When we are dealing with asylum seekers whose requests are only beginning to be examined, residency in the open facility is required for a measured timeframe which is usually *several weeks* (FPG, § 77 ;KATERINA KRATZMANN& ADEL-NAIM REYHANI, INT'L ORG. FOR MIGRATION & EUR. MIGRATION NETWORK, PRACTICAL MEASURES FOR REDUCING IRREGULAR MIGRATION IN AUSTRIA 34-35 (2012) (available here) Rosenberger& Konig, pp. 546. -551). In Germany, an asylum seeker is required to reside in the residency center for a period that shall not exceed *three months*, and shall be released thereafter. During this period he must be available to the authorities of the country. After his release, there may be certain geographical restrictions that are applicable to the asylum seeker which require him to stay within the state county in which the facility is located (AsyIVfG, §§ 47-49; *the German Report*, p. 12). Similarly, in Belgium, which operates open residency centers for asylum seekers where its residents can exit and enter as they please (subject to the reporting requirement), there is a *four month* residency requirement, and thereafter, when the handling of his matter has not yet been completed, the asylum seeker is permitted to request to be transferred to private housing or a smaller facility (*the Belgian Report*, pp. 15-17; FED. AGENCY FOR THE RECEPTION OF ASYLUM SEEKERS, ANNUAL REPORT: RECEPTION OF ASYLUM SEEKERS AND VOLUNTARY RETURN 2012, at 11, 18 (2013) (available here)).

164. Unlike the aforesaid arrangements, the arrangement that we are required to review in this instance requires compulsory residence for a period of at least three years in the Residency Center. This period is not by any means commensurate with inherent infringements. In my view, this period of time is *distinctively* disproportionate. It is long – much longer – than comparative arrangements that we reviewed. At this point, it can already be said that the Residency Center outlined by the legislator in Chapter 4 of the Law acutely infringes the fundamental rights: this is a Center that is managed by the Prison Services; there is thrice a day mandatory reporting requirement; and there are no grounds of release from it. The deprivation of liberty under these conditions and for the period of time that we have reviewed – is a severe infringement, and it does not justify the benefit that it carries. In light of what we have enumerated, I believe that there is no alternative other than determining that Chapter 4 of the Law is disproportionate. Notwithstanding, we must continue to examine the specific arrangements of this Chapter, in light of the question of the remedy concerning the various concrete arrangements of Chapter 4 of the Law – a question that will be examined below.

(iv) *Transferring an Infiltrator into Detention*

165. The *final* arrangement that we will review is that which authorizes the Head of Border Control to instruct on the transfer of a resident or "infiltrator" to detention with respect to different disciplinary violations. According to the Petitioners' claims, the Article authorizing the Head of Border Control to deprive the liberty of the "infiltrators" for prolonged and disproportionate periods of time, and grants him various powers which are similar in nature to criminal punishment which should not be granted to a public official. On the other hand, the State claims that the Article defines in an express and specific manner the discretion of the Head of Border Control, and determines a hierarchy of proportionate and balanced punishment with many limitations concerning the exercise of the power.

The power to transfer an "infiltrator" into detention is anchored in Article 32T of the Law, which states:

Transfer into Detention	32T. (a) If the Head of Border Control found that a resident committed any one of the following below, he shall be permitted to instruct an order of transfer into detention , for a period that shall be determined in the order subject to the provisions of sub-Article(b):
	(1) He was tardy to show at reporting times

according to Article 32H(d) of the Law or he did not report for registration during the aforesaid times, in a recurring manner, without receipt of any authorization of such as set forth in Article 32H(c) of the Law;

(2) He repeatedly and methodically violated the disciplinary rules set forth in Article 32J(a)(2) of the Law in a manner that can significantly harm the order in the Center;

(3) Caused actual damage to property;

(4) Caused bodily injury;

(5) Worked, in violation of the provisions of Article 32f;

(6) Did not report to the Center at such times set forth in the residency provisions, and if he was transferred into detention according to this Article – did not report to the Center at the culmination of his detainment in detention ;

(7) Left the Residency Center and did not return within 48 hours of the time that he should have returned in accordance with the provisions of this Chapter and the provisions promulgated thereunder, without receipt of prior authorization in accordance with Article 32H(c) of the Law.

(b) The period of detainment in detention that the Head of Border Control may instruct upon in the order according to sub-Article (a) shall not exceed the following listed below, *mutatis mutandis*:

(1) The order has been issued based upon the grounds as aforesaid in sub-Articles (a)(1) through (3) – 30 days;

(2) The order has been given for grounds as aforesaid in sub-Articles (a)(4) –

(a) With respect to a first-time order issued to resident based upon the same grounds – 30 days;

(b) With respect to a second-time order issued to resident based upon the same grounds – 60 days;

(c) For any additional order issued to the resident based upon the same grounds – 90 days;

(3) An order that has been issued based upon the grounds set forth sub-Article (a)(5) –

(a) With respect to a first-time order issued to resident based upon the same grounds – 60 days;

(b) With respect to a second-time order issued to resident based upon the same grounds – 120 days;

(c) For any additional order issued to the resident based upon the same grounds – 1 year;

(4) An order that has been issued based upon the grounds set forth sub-Article (a)(6) through (7) –

(a) If the resident is absent from the Center for a period that does not exceed 30 days from the date he should have reported to the Center or returned, as the case may be (in this paragraph – the Reporting Date) –

(1) With respect to a first-time order issued to resident based upon the grounds for the absence in the aforesaid period – 90 days;

(2) With respect to a second-time order issued to resident based upon the grounds for the absence in the aforesaid period – 180 days;

(3) For any additional order issued to the resident based upon the grounds for the absence in the aforesaid period – 1 year;

(b) If the resident is absent from the Residency Center for a period that exceeds 30 days from the Reporting Date and does not exceed 90 days from the aforesaid period –

(1) With respect to a first-time order issued to resident based upon the grounds for the absence in the aforesaid period – 180 days;

(2) With respect to a second-time order issued to resident based upon the grounds for the absence in the aforesaid period – 240 days;

(3) For any additional order issued to the resident based upon the grounds for the absence in the aforesaid period – 1 year;

(c) If the resident is absent from the Center for a period that exceeds 90 day from the Reporting Date – 1 year.

(c)In the event that the Head of Border Control determined that the infiltrator received a temporary permit for a visit residency according to Article 2(a)(5) of the Law of Entry into Israel and did not report for its renewal within 30 days from the date of the expiration of the permit (for this sub-Article – Expiration Date), he shall be permitted to instruct an order of transfer of detention for a period that shall be set forth in the order, provided that it shall not exceed the period listed below, *mutatis mutandis*:

(1) If the infiltrator did not report for the renewal of the permit within a period that exceeds 30 days form the Expiration Date and does not exceed 60 days from the aforesaid period – 90 days;

(2) If the infiltrator did not report for the renewal of the permit within a period that exceeds 60 days form the Expiration Date and does not exceed 120 days from the aforesaid period – 180 days;

(3) If the infiltrator did not report for the renewal of the permit for a period that exceeds 120 days from the Expiration Date – 1 year.

(d) The Head of Border Control shall not provide an order to the resident according to sub-Articles (a) and (b) or an order to the infiltrator according to sub-Article (c), unless he has provided him the opportunity to state his claims before him; if it is not possible to locate the resident or the infiltrator, the Head of Border Control shall be permitted to provide the order in his absence, provided that he shall have the opportunity to state his claims no later than 24 hours after his transfer into detention ,

(e) A resident or intruder who was transferred into detention according to this Article shall be brought before the Head of Border Control no later than five days from the commencement of his detention; the Head of Border Control is permitted to instruct upon the release of the resident from detention and his transfer to the Residency Center if he is convinced that the provisions of Article 30a(b) have been satisfied subject to the enumerated exceptions in Article 30a(d), *mutatis mutandis*.

(f) An order shall not be issued in accordance with this Article against a resident upon the culmination of one year from the execution of the act of which would have permitted the issuance of the aforesaid order.

(g) The Head of Border Control shall not instruct upon transfer into detention for a period that exceeds the longest period specified in this Article regarding a violation of the provisions of paragraphs (1) through (7) of sub-Article (a) in connection with one act that constitutes a violation of one or more of the aforesaid provisions.

(h) The provisions of Article 30b through 30f

shall be applicable to any individual transferred into detention in accordance with this Article, *mutatis mutandis* and with this modification: in Article 30e(1)(a), instead of "no later than ten days" it shall read "no later than seven days".

(i) Upon the culmination of the detention period in this Article the resident shall return to the Residency Center.

166. Article 32T therefore confers upon the Head of Border Control the power to instruct upon the placement of a resident or "infiltrator" into detention for different periods of time – until 30 days with respect to a *trivial* violation; and up to *an entire year* for recurring violations – provided that it was determined that the circumstances which are cause for the grounds of placement into detention have been fulfilled (sub-Articles (a) and (c) of this Article). The Article further stipulates that hearing shall be conducted before the Head of Border Control prior to the exercise of his power, unless it is not possible to locate the resident or the "infiltrator", and then in such instance the hearing shall be conducted no later than 24 hours from the time he was place into detention (sub-Article (d) of this Article); that the "infiltrator" shall be brought before the Head of Border Control no later than five days from the time he was placed into detention, and the Head of Border Control is permitted to release him if one of the grounds set forth in Article 30A(b) and subject to the enumerated exceptions set forth in Article 30A(d), *mutatis mutandis*, have been fulfilled (sub-Article (e) of this Article); and that the provisions of Articles 30B through 30E of the Law shall be applicable to anyone transferred into detention , provided that he shall be first brought before the Tribunal no later than 7 days after his placement into detention (sub-Article (h) of this Article).

Article 30D(a) of the Law stipulates the framework of the authorities of the Detention Review Tribunal for Infiltrators, as follows:

The Authorities of the Tribunal

30D. (a) The Detention Review Tribunal for Infiltrators shall be permitted –

(1) To authorize the detainment of an infiltrator in detention, and if it authorized the aforesaid it shall determine that the matter of the infiltrator shall be brought before it for additional examination upon the fulfillment of conditions that shall be determined or within a period of time that shall not exceed 30 days;

(2) To instruct upon the release on guarantee of the infiltrator upon the culmination of the specified period, if it was convinced that the conditions for his release on guarantee have been fulfilled in accordance with Article 30A(b) or (c) or subject to the exceptions set forth in Article 30A(d);

(3) To instruct upon the amendment of the guarantee conditions that were determined according to Article 30A(e), and upon the forfeiture of guarantee following the violation of the conditions of release on guarantee.

The Tribunal is thus authorized to release an infiltrator on guarantee if it is convinced that the grounds for his release have been fulfilled as set forth in Article 30a(b), as follows:

Being Brought Before the Head of Border Control

30A. […] (b) (1) Due to the infiltrator's age or to his physical condition, his detainment in detention may harm; his health and there is no other way to prevent this stated harm;

(2) There are other special humanitarian grounds from those stated in paragraph (1) justifying the release of the infiltrator with a guarantee, including if as a result of the detention, a minor will be left unaccompanied without supervision;

(3) The infiltrator is a minor who is unaccompanied by a family member or a guardian;

(4) The release with guarantee of the infiltrator may assist in the infiltrator's deportation proceedings;

(5) The infiltrator submitted a request for a permit and license for residency in Israel and the processing of his requests has not begun despite the fact that three months have passed;

(6) Six months have passed since the date on which the infiltrator submitted a request as stated in Article (5) and a decision has not yet been rendered on his request;

167. Thus, it follows that, insofar and to the extent that any of the exceptional grounds enumerated in Article 30A(b) of the Law exists, the Detention Review Tribunal for Illegal Immigrants is not authorized to intervene in the decision of the Head of Border Control and release an "infiltrator" or resident. The mere decision to instruct the transfer of an "infiltrator" into detention is not subject then to a proactive judicial review by a judicial or quasi-judicial entity whatsoever, save for the grounds of release enumerated in Article 30A(b) of the Law (hereinafter: *Proactive Judicial Review)*. An "infiltrator" or resident interested in attacking the Head of Border Control's decision instructing his placement in detention by virtue of Article 32T(a) or (c) of the Law must submit an administrative appeal to the Court for Administrative Affairs (Article 5(1) and in particular Article 12(8) of the First Addendum to the Courts for Administrative Matters, 5760 – 2000).

1) *The Infringement of the Constitutional Rights*

168. Article 32T of the Law infringes two independent rights. First and foremost, it infringes on the "infiltrators'" constitutional right to liberty. Concerning the role and importance of the right to liberty and its infringement that is caused by the detention, I have reviewed it above (para. 46) and there is no need to reiterate it. Nevertheless, the discussion being conducted now is being done from a different angle. We insisted that the "infiltrators'" right to liberty is significantly infringed as a result of actually placing him in the Residency Center. Thus, the question that arises: does the transfer into detention create an independent infringement on the constitutional right to liberty? My answer to this question is affirmative. The transfer from the Residence Center into the detention facility is accompanied with the reduction of various aspects of the constitutional right which are not summarized by the intensification of the infringement of the mere physical right. The infringement on the personal liberty, as a byproduct, infringes additional fundamental rights (*Zemach* Case, p. 261). Transfer to detention prevents the possibility given to the "infiltrator" in the Residency Center from exiting its boundaries during the permitted times; it restricts the possibility of to create social contacts; it disrupts the daily routine that the infiltrator adopted during the course of his residency in the Center (see more regarding the infringement associated with the detention arrangement stipulated in Article 30A of the of the Law in paras. 46-47 above). The transfer to detention thus exacerbates the infringement established by residency in the Residency Center in a manner where an independent infringement on the right to liberty emerges. Furthermore, Article 32T(c) of the Law authorizes the Head of Border Control to transfer an "infiltrator" who does not reside in the Residency Center into detention (due to non-renewal of the temporary permit for a visit residency in accordance with Article 2(a)(5)of the Law of Entry into Israel within 30 days from the date of its expiration whish also establishes grounds for the transfer into detention). In summation: transfer into detention– whether directly or whether from the Residency Center – infringes on the constitutional right to liberty. Thus, this is the starting point of our deliberations.

2) The Constitutional Right to Due Process

169. In addition to the infringement on the right of liberty, Article 32T severely undermines the infiltrators' constitutional right of dignity, due to the infringement on the "subsidiary rights" of the constitutional right of due process. A fundamental rule of our legal system dictates that "in any event whereby a governmental authority seeks to infringe on the rights of an individual, such infringement must be conducted according to the right to due process in which the justification for the aforementioned infringement shall be resolved" (*Barak – Human Dignity*, p. 863). Albeit that most of the activity of the right to due process is within the scope of criminal law, its application is universal. It is applicable in any event whereby a governmental authority coercively uses its power in a manner which may infringe on the protected rights of the individual – whether for the benefit of another individual (civil proceedings), or the general public interest (an administrative act, criminal proceeding or disciplinary proceeding). The underlying basis of the right to due process is guided by "general considerations of fairness, justice and the prevention of the miscarriage of justice" (Criminal Appeals 5121/90 *Issacharov v. the Chief Military Advocate General*, *PADI Journal* 61 (1), 461 559 (2006) (hereinafter: the *Issascharov Case*); High Court of Justice 11339/05 *The State of Israel vs. The District Court of Beer Sheva*, PADI Journal 61(1) 93, 154 (2006) (hereinafter: the *District Court of Beer Sheva Case*); please also see Richard B. Sapphire, *Specifying Due Process Values: Toward a more Responsive Approach to Procedural Protection*, 127 U. PA. L. Rev. 111 (1978)). The right to due process is composed of procedural due process which is designated to protect the interest of the individual whose rights have been infringed by the state on the one hand and the public's interest for justice and exposing the truth on the other hand. "It is like a puzzle. It is not restricted to a certain procedural arrangement or a specific right, but rather establishes itself on a cluster of resources, procedural arrangements and substantive rights which jointly coexist alongside one another" (the *District Court of Beer Sheva* Case, p. 155).

170. Like most human rights, even the right to due process is not an absolute right and is nevertheless relative. The scope of its application must be satisfied. "Certain aspects of due process are also applicable on the entire proceeding – whether it is criminal, civil or administrative. Other aspects are unique for this proceeding or any other proceeding" (*Barak –Human Dignity*, p. 872). Thus, we must limit the scope of the constitutional right to due process. Since the Basic Law: Human Dignity and Liberty does not include an independent provision which deals with right to due process, we must examine if this right can be derived from any of the other rights that are anchored in the Basic Law. In this context and in connection with the case before us, the constitutional right of dignity and the constitutional right of liberty are considered.

171. Article 5 of Basic Law: Human Dignity and Liberty states: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise". The text of the Article raises questions of interpretation which have not yet been elucidated in our jurisprudence. The primary question being the interpretation of the

phrase "or otherwise" – does it apply solely to the restriction of a physical liberty or does is also encompass the individual's right of autonomy (*Barak – Human Dignity*, pp. 338-345). In the case before us there is no need to determine the question concerning interpretation since there is no doubt that the right of liberty directly applies to any deprivation of physical liberty, including being detained in detention. Therefore, it was held that the constitutional right to due process in a criminal proceeding is directly derived from the constitutional right of liberty (see, for example, High Court of Justice 3412/91 *Sophian vs. The Commander of IDF Forces in the Region of the Gaza Strip PADI Journal* 47(2), 843, 847 (1997); Further Criminal Hearing 4390/91 *The State of Israel vs. Haj Yechia*, PADI Journal 47(3) 661, 694 (1993); Criminal Appeals 5956/08 *Al Uka vs. The State of Israel*, para. 10 (November 23, 2011), *Barak – Human Dignity*, p. 868). Moreover, when we are dealing with a proceeding that may deny an individual's right to physical liberty, the constitutional right to due process is also derived from the constitutional right of dignity (Criminal Appeals 1741/99, *Yousef vs. The State of Israel, PADI Journal* 53(4) 750, 767 (1999); Retrial 3032/99, *Barnes v. The State of Israel, PADI Journal* 56(3), 354, 375 (2002); also see Criminal Appeals 9956/05 *Shay vs. The State of Israel, para*. I of Judge *A. Rubinstein's* ruling (November 4, 1999); Likewise please see the references listed in *Barak's – The Constitutional Right and Its Subsidiary Rights*, Volume B, page 869, notes 50-51).

172. Indeed, not every infringement on the right of due process amounts to an infringement on human dignity. In our legal system, as aforementioned, "the intermediate model" requires a strong substantive relationship between the "subsidiary right" (the right of due process) and the "mother right" (the right of human dignity). Thus, the right to due process is a framework right that is derived from the right of dignity. The guiding principle of the act of "derivation" is that all subsidiary rights reflect an aspect of human dignity with regard to due process. There must be a strong connection to human dignity (*Barak – Human Dignity*, p. 870). Which of these aspects of the right to due process are closely linked to human dignity? *A Barak* – in his comprehensive treatise – distinguishes between the joint aspects of any legal right to due process be that as it may and the aspect that are applicable solely in a criminal proceeding. With respect to aspect of the first kind, *Barak* writes:

> "Two aspects of the right to due process are applicable in all types of proceedings: the first aspect is related to the court; the other aspect is related to the right of representation. We will begin with the court: the starting point is that judges deciding a dispute be independent (personally and institutionally) and sovereign. The court must operate objectively and impartially. Every person is entitled to the right of equality before the court. The proceeding must allow for the fair and proper inquiry of the claim. It must provide a fair opportunity to use the procedural rights. It must maintain the principles of natural justice. Each party must have its day in court. The proceeding needs to be public. The ruling must be explained, given in a reasonable time and published. Every person has the right to appear in court – whether physically or by proxy. Hence, the right to

due process must permit each person to be represented by an attorney" (*Barak – Human Dignity*, pp. 872-873).

173. Thus, it follows that a material and significant aspect of the legal right to due process – whether it be a criminal, disciplinary, administrative or civil proceeding – is the right of every person when a legal proceeding is being conducted in his matter which shall be resolved by an independent entity that is personally and institutionally independent. This principle is drawn directly from fundamental principles concerning the separation of governmental powers and our adversarial legal system. This method is based upon the assumption that both parties of a judicial proceeding are procedural adversaries whereby each party represents a different interest, and the deciding entity is passive. He is not proactive in collecting evidence and clarifying the truth, but relies on the evidentiary basis that each side selected to bring before and decided accordingly. Thus, the adversarial legal system is distinguished from the inquisitor system (see Shlomo Levin *The Theory of Civil Procedure – Introduction and Fundamental Principles* 149-161 (second edition, 2008) (hereinafter: *Levin*); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 67-103 (1988); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996). In order for the judicial proceeding to be fair from the perspective of the litigant whose rights may be infringed, it is incumbent upon the judge to be neutral and objective throughout the entire proceeding (Article 2 of the Basic Law: The Judiciary). He is forbidden to know the person and pervert justice (Article 6 of the Basic Law: The Judiciary; Yigal Mersel "About the Judges' Oath of Office" *IDC Law Review "Or Compilation"*, 647, 652 (Aaron Barak, Ron Sokol and Oded Shacham, editors, 2013)). It is prohibited that there be any personal interest in the result of the proceedings, and if there is he must recuse himself (Article 77A(a) of the Court Law [Consolidated Version], 5744 – 1984; Yigal Mersel, *Laws for the Recusal of a Judge* 18-21 (2005)). By virtue of these principles – which are applicable also to a quasi-judicial tribunal – there is an accepted and clear separation between the executive branch, the belief of effective enforcement of the law and it is granted a broad range of discretion concerning the question how to manage the proceeding and which matters shall be decided by the court; and between the judicial branch whose role is to resolve the disputes brought before it and it has no discretion concerning which disputes are brought before it (High Court of Justice 164/97 *Kontras Ltd. v. the Ministry of Finance, Department of Customs and VAT, PADI Journal* 52(1) 289, 388-389 (1998)). The separation of the authorities is an inherent inseparable part of the constitutional right of due process. Any deviation thereof infringes this right and it is subject to the proportionality tests.

174. Alongside the right to be adjudicated by an entity that is personally and institutionally independent, is the constitutional right of due process with additional "procedural guarantees" which are "subsidiary rights" to the

constitutional right of due process ("grand-daughter rights" of the constitutional right to human dignity). These guarantees are applicable, in different scopes, in a civil (see *Levin*, pp. 79-91; compare to: High Court of Justice 3914/92 *Lev v. The Superior Rabbinical Tribunal*, PADI Journal 48(2) 491, 500 (1994)), administrative (see Dafna Barak-Erez "The Right of Pleading – Between Procedural Justice and Efficiency" *IDC Law Review "Or Compilation"* 817 (Aaron Barak, Ron Sokol and Oded Shacham, editors, 2013)), disciplinary and criminal proceeding (*Barak – Human Dignity*, pp. 873-875). Their purpose is two-fold: *first*, to increase the likelihood that the proceeding will culminate with the proper result, after giving the person whose right may be infringed the opportunity to bring his version before the court and convince it that it is not just to infringe on his right; *and secondly*, to increase the chances that the proceeding will be conducted in a just fashion according to the perspective of the injured party, in a manner which will make it easier to accept the outcome and accept the rule of the law with understanding and acceptance, after having his day in court (see E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127 (2011). At the basis of procedural guarantees is the presumption that normative acknowledgment of human rights is not sufficient, but it requires a practical mechanism which will protect them. Indeed, "the history of liberty is primarily the liberty of procedural protective measures" (these words are attributed to the U.S. Supreme Court Justice Felix Frankfurter as they appear in Motion for Request of Criminal Appeal 2060/97 *Vilenchik v. The Tel Aviv Region Psychiatrist, PADI Journal* 42(1) 697. 715 (1998); for the significance of the procedural guarantees in the United States in the context similar to our case see: Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detentio*n, 65 HASTINGS L. J. 363, 372-73 (2014); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 5 EMORY L. J. 1003, 1014-21 (2002).

175. The scope of constitutional right of due process – from both the scope of its application on the procedural guarantees and from the perspective of the outcome of their violation within the framework of a concrete proceeding (as a derivative from the relative outcome doctrine; see Motion for Criminal Appeal 3080/10 *Samorgornisky v. The Chief Military Advocate*, paragraphs 12-13 (December 25, 2012)) – is influenced, inter alia, from the normative status of the right that may be infringed and from the degree of the potential infringement (compare to Motion for Request of Administrative Appeal 1512/14 *Doe v. The Minister of Interior*, para. 6 (March 19, 2014) (hereinafter: *Doe* Case); Yissaschar Rosen – Avi and Talia Fischer "Beyond Civil and Criminal: A New Order for Procedures" *Hebrew University Law Review* 38 489 (2009)). This principle is a recurring theme across the board of the provisions arranging the

procedures in the courts and quasi-judicial tribunals and in administrative law. It is directly drawn from the proportionality principle anchored in the limitations clause and binding upon all governmental authorities (Article 11 of the Basic Law: Human Dignity and Liberty). Insofar and to the extent that the right infringed is on the high normative hierarchy and insofar and to the extent that the degree of the potential infringement is greater, thus the scope of the application of the right of due process increases, and it will include more procedural guarantees (see and compare: High Court of Justice 266/05 *Pillint v. the Chief Military Advocate*, *PADI Journal* 59(1) 707, 715 (2005); Retrial 7929/96 *Cosli v. The State of Israel*, *PADI Journal* 53(1) 529, 564; Motion for Request of Criminal Appeal 1790/06 *Gousaynov v. The State of Israel*, para. c of the ruling of Justice *A. Rubinstein* (August 7, 2007)). Imposing an obligation to refer to the court as a condition of the infringement on the right, or alternately applying Proactive Judicial Review as a condition for such – both are procedural guarantees whose purpose is to ensure, in a varying degree, due process. The question is whether any of them are included in the field of the *constitutional* right of due process which shall be derived, as aforesaid, from the normative status of the right that may be infringed and from the degree of the possible infringement.

176. Notwithstanding the aforementioned, it is clear that due process requires balancing between the aspiration to arrive at the proper result and give the potential injured party his day in court, as aforesaid, and the equally important interests of efficiency and finality (see Motion for Request of Administrative Appeal 6094/13 *Madahana v. The Ministry of Absorption*, para. 8 (December 10, 2013)). This includes imparting the appropriate weight to the efficient exploitation of the resources of the judiciary branch and the executive branch. These resources are limited by their nature, and their exploitation in one way shall never be on the account of the exploitation of other purposes. Naturally, insofar and to the extent that the procedural proceedings will include more procedural guarantees, then the likelihood that the correct result will be achieved at its culmination increases; and as is for the case before us the procedure of the proceeding will complement it. In direct proportion to such, the costs dedicated to its management on account of other purposes, which are also important, will increase. The scope of the procedural guarantees requires that this reflect the proper balance between the costs invested in the proceeding (including the procedural guarantees) and the importance of the right at stake and the implication of the potential infringement to it (for the balance between the competing interests standing at the base of the legal procedure from an economic perspective see Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, J. ECON. LITERATURE 1067, 1087-88 (1989).

177. Please note: the type of proceeding being conducted – criminal, disciplinary, administrative or civil – is a relevant and important consideration concerning the question which procedural guarantees are within the framework of the constitutional right of due process, however it is not the sole consideration. Surely, insofar and to the extent that the proceeding is more offensive by its nature, it requires that more significant procedural guarantees be involved. In general, a criminal proceeding has more offensive characteristics relative to a civil proceeding, and therefore it includes more procedural guarantees. Nevertheless, this assumption is not always correct. The right that may be infringed in a criminal proceeding and the scope of its infringement varies in different criminal proceedings. A criminal proceeding revolves on a misdemeanor indictment where the maximum punishment carries a monetary fine is not the same as a criminal proceeding for a felony when the maximum punishment carries many years of imprisonment which may infringe on the constitutional right of liberty. The same is applicable in other types of proceedings. A civil proceeding with a minute claim for a minute amount of money is not the same as a civil proceeding whereby as a result a person may lose his home in a manner which may infringe on his constitutional right of property (compare: Motion for Request Civil Proceeding 646/14 *Ashtrom Contracting Company v. New Koppel Ltd.*, para. 7 (May 8, 2014)); A disciplinary hearing that may result in a reprimand is not the same as a disciplinary hearing whereby as a result a person may lose his professional license permanently in a manner which will severely impact his constitutional right of freedom of occupation; An administrative proceeding whose result is the infringement on the design and planning of the property is not the same as an administrative proceeding that is based upon the constitutionality of the residency order in the Residency Center.

178. To summarize this point: insofar and to the extent that the potential infringement on the individual's right at stake is greater, and insofar and to the extent that the normative status of the right is greater, thus the obligation to balance the infringement by means of ensuring the procedural guarantees, as aforesaid, increases, in order to increase the chances that the result will be proper and the proceeding will be just from the perspective of the injured party. These two purposes do not stand alone and they must be balanced opposite the need for efficient management of the proceeding on all its aspects.

179. Does Article 32T of the Law infringe on the constitutional right of due process? In my opinion this must be answered in the affirmative. As I noted above, the scope of the constitutional right of due process – including the nature and scope of the procedural guarantees that are included, is affected, inter alia, by the normative hierarchy of the right at stake and from the scope of the potential infringement of the right. Insofar and to the extent that the sanction is more severe and it infringes on the fundamental rights more acutely, thus the balance

point shifts towards the individual rights and requires more significant procedural guarantees in order to ensure that the right of due process is maintained. The scope of the procedural guarantees will be applicable in the relevant circumstances and it must be balanced opposite the public interest in the efficient exploitation of resources. Article 32Tof the Law authorizes the Head of Border Control to infringe on the constitutional right to liberty – one of the constitutional and significant rights of any person being because he is human – for a prolonged period of time that could reach an *entire year*. The normative ranking of the right to liberty, which we reviewed above (para. 46), and the scope of its potential infringement, jointly require adherence to the existence of these appropriate procedural guarantees as a condition of the existence of the constitutional right of due process (see and compare the *Anonymous* Case, para. 7). These guarantees do not exist in our case. *First and foremost*, the offensive authority set forth in Article 32T of the Law is conferred upon an administrative entity, enumerated with the executive branch, without it being accompanied by Proactive Judicial (or quasi-judicial) Review. This authority severely infringes on the right of due process. The authority to restrict liberty and supervise it is at the core of the role of the judiciary branch, and therefore – as a rule, and in the absence of significant considerations to refute – Proactive Judicial Review is an indispensable condition for the deprivation of liberty. Thus is the case of detention prior to filing an indictment (Articles 12-18 of the Arrests Law) and afterwards (Articles 21-22 of the Arrests Law); thus is the case in administrative arrests in Israel (Articles 4-5of the Authorities Emergency (Arrests) Law, 5739-1979, the West Bank (Article 287 of the Order for Security Provisions (West Bank) (No. 1651), 5770-2009). The judicial review is then an inherent part of the process of the deprivation of liberty, and grants it the legal validity, until it can be stated that it is a decision integrated in an administrative entity that instructs the deprivation of the liberty and a judicial entity approving it (*Federman* Case, pp. 187-188; Isaac H. Klinghopper "Preventative Arrest for Security Reasons" *Hebrew University Law Review* 11, 286, 287 (1981)). In our matter, all that can be done to prevent transfer into detention is to submit an appeal to the Court for Administrative Affairs. In other words, the "infiltrator" needs to initiate the legal proceedings (and finance it), and he is not eligible for Proactive Judicial Review is his matter (save for the exceptional grounds enumerated in Article 30A(b) of the Law, as detailed in para. 167 above). This matter raises difficulties. Access to the courts requires knowledge, measures and for the most part legal representation. It is clear that this is not necessarily the lot of the residents in the Residency Center – people who, in any event, are less fortunate and whom do not have a great deal of money; where a majority of them do not speak the language or are familiar with the details of the normative arrangement applicable to them; they are unfamiliar with the legal tools available to them. Thus, this population encounters a certain structured difficulty for Proactive Judicial Review, its management and success therein (see and compare: High Court of Justice 10533/04 *Vais v. The Minister of*

Interior, para. 10 (June 28, 2011); Yuval Albashan "Accessibility for the Disadvantaged Populations in Israel in the Law" *Ramat Gan College of Law & Business Law Review* C 492 (2003)). Moreover: without Proactive Judicial Review, the "infiltrator" is not heard by an objective entity that enjoys institutional independence. This outcome contradicts the principle of separation of powers. It may create a feeling of a "sold game" amongst the "infiltrators" which is demeaning and infringes on his dignity (compare to: *Issacharov* Case, p. 560; Miscellaneous Criminal Motions 8823/06 *Doe v. The State of Israel*, para. 16 of the opinion of Senior Associate Justice *E. Rivilin*, para.1 of my colleague Justice (her former title) *M. Naor* (February 11, 2010). *Secondly,* Article 32T of the Law does not stipulate additional procedural guarantees. Thus, for example, there is no mention of the right of inspection in the evidentiary materials; and there is no included right for representation by counsel. The absence of procedural guarantees which secure the integrity of a procedure depriving liberty intensifies the scope of the infringement on the constitutional right of due process.

Following these statements I would like to parenthetically note that the current structure of Chapter 4 of the Law, questions whether there is a need for Proactive Judicial Review also in relation to the residency order whereby its virtue the "infiltrator" is required to report to the Residency Center, and this is within the confines of the constitutional right of due process. The question whether Proactive Judicial Review is an essential part of this right will be decided, as aforesaid, according to the status of the infringed right and the intensity of the infringement. Given the conclusion that I deduced, and since in any case Chapter 4 of the Law ought to be repealed, as will be explained below, I don't see the need to determine this question at this point. I will note that it is apparent that if another legislative arrangement will be enacted, if it is enacted, in place of Chapter 4 of the Law in its current version – which shall offer different balances relating to the open Residency Facility – may not require conducting the aforesaid review.

3) Proportionality

A) The Rational Relationship Test

180. Does Article 32T of the Law pass the proportionality tests? We will begin with the rational relationship test, in the context of which the Court will examine if the offensive measure assists in realizing the purpose of the law. The offensive measure in the case before us is detention (it is a sanction that the Head of Border Control is authorized to impose), where by its nature, in any event, deepens and exacerbates the infringement on the inherent liberty in the Residency Center, to the point that it creates an independent infringement on this right. Does this infringement contribute in obtaining the purpose of the law? My answer to this question is affirmative. The sanctions determined in Article 32T of the Law incentivize the "infiltrators" to fulfill the orders of stay in the Center; to report for the headcount; to behave properly; and to avoid harming the security and property of the residents and employees there. Indeed, in the absence of effective

administrative enforcement measures there is a concern that the Residency Center will become "voluntary", in a manner that will thwart the purposes for which it was established. An additional question at hand is whether the infringement on the right of due process, which is expressed in the absence of procedural guarantees (mainly in the absence of the Proactive Judicial Review) as a condition for the deprivation of liberty, aids in realizing the purpose of the legislation. I will also respond here in the positive. Conferring the aforesaid authority to an administrative body facilitates the operation of the Facility and reduces costs, for both the executive branch and the judiciary branch. Conducting a hearing for an "infiltrator" prior to his placement in detention with respect to the violation is a quick and efficient proceeding; the subjugation of the hearing proceeding realizes his right to be heard, in a manner that decreases the probability of an error in the decision; and finally, the cost of such a hearing is not high, and it permits the efficient exploitation of the resources of the administrative authority. All of these are sufficient to determine that the arrangement ser forth in Article 32T of the Law establishes a rational relationship for the purpose it intends to achieve.

B) The Least Offensive Measure Test

181. Similarly, Article 32T of the Law passes the second proportionality test – the least offensive measure test. The arrangement set forth in Article 32T includes a quick, cheap and efficient mechanism for imposing a sanction with respect to the breach of the applicable rules in the Facility, however, doing so infringes the constitutional right of due process. Is it possible to obtain the same purpose in an identical measure of effectiveness, while using a less offensive measure? My answer is nay. In order to cure the infringement on the right of due process there is a need to add procedural guarantees to the Law which are missing, primarily Proactive Judicial Review. There is no dispute that these guarantees bear a price. Thus, supplementing Proactive Judicial Review entails considerable costs, including the judicial time of the Tribunal that will conduct the judicial review; adding the right of representation by counsel will delay the exercise of the sanction, and to some degree it may harm its effectiveness (although it is not certain that this will occur); and finally, the management of an adversary proceeding before a judicial tribunal may require additional resources on the part of the State. Whereas the resources are limited, supplementing additional resources on the part of the judicial and executive branches will indeed be on account of other, equally important goals. Therefore, it cannot be said that it is possible to achieve the purpose of the Law in the same degree of effectiveness and at the same costs (compare to: *Lotan* Case, para.19), and the arrangement passes the second secondary test.

C) The Proportionality Test in the Strict Sense

182. We saw that Article 32T of the Law passed the first two proportionality tests. Notwithstanding, Article 32T of the Law does not pass the third proportionality test. Regarding the benefit of the arrangement: the arrangement in its current version establishes efficient deterrence with minimal costs. There is no doubt that Proactive

Judicial Review and its accompanying procedural guarantees entail considerable costs (which we have previously reviewed extensively), and it is possible that it will somewhat harm the effectiveness of the existing deterring mechanism (even though it is not obligatory). However, this benefit is not directly proportional to the inherent damage in Article 32T of the Law. The constitutional right of due process is an important right, and the scope of its infringements in our case is acute. We will reiterate that Article 32T of the Law confers upon an administrative entity the authority to deprive the "infiltrators'" liberty for a period of up to one year, without Proactive Judicial Review, without procedural guarantees which are suitable for the status of the infringed right and the intensity of its infringement. The Head of Border Control is authorized to revoke the "infiltrator" of his liberty, after finding that he violated one of the provisions of the Law. The Head of Border Control, who is enumerated as part of the executive branch and is responsible for the realization of its declared and known policies concerning infiltration, is thus the deciding entity at the outset, prior to the hearing, when the grounds arise to transfer the "infiltrator" to detention ; it is also the entity that decided if it will accept the claims presented by the "infiltrator" during the hearing; and finally, it is the entity that determined what sanction shall be imposed upon the "infiltrator" – sending him to detention for a period that could be up to one year. The entire proceeding – from start to finish – is not subject to the review of any neutral and objective, institutionally independent entity. In this state, the scope of the infringement on the "infiltrator's" right of due process is self-evident. It is natural that the "infiltrator" will feel that it is a "sold game"; since he is not being heard willingly and conscientiously; since the decision to impose a sanction upon him has already been pre-determined; and that the possibility to change his ill fate is low. In this state, the possibility granted to the "infiltrator" to attack the administrative decision of his placement in detention is by means if filing an administrative appeal with the burden of proof being imposed upon him, and it is a reversal of roles. The infringement is then difficult and its weight is considerable.

183. Given the status of the right and the intensity of its infringement – lack of Proactive Judicial Review bears a heavy toll which does not establish by any means or manner, an appropriate relationship between the arising benefit and the public interest. Indeed, the necessity to "deter" "infiltrators" from executing these violations – as we said is a necessity, since it is not possible to manage the Facility without the presence of this type of coercive power – it requires measures, and these measures have costs. Applying Proactive Judicial Review would result in the resources that are currently being exploited for other benefits to be channeled for the sake of this latter necessity. It is a pronounced public benefit that we be pedantic not to deprive liberty prior to exerting minimal protective mechanisms whose purpose is to reduce the risk of error, which leads to a more severe infringement; and which will give the injured party the feeling that his matter was conducted with due process. Based upon the aforementioned the conclusion is that the benefit arising from the arrangement set forth in Article 32T is not adequately proportionate to the degree of the infringement on the right.

184. My ruling is that the arrangement set forth in Article 32T is not constitutional due to its disproportionate infringement on the right of due process making it superfluous to examine if the Article passes the limitations clause in light of its infringement on the constitutional right to liberty. As aforesaid, under these circumstances, the infringement on the right of due process by its nature entails the infringement on the constitutional right to liberty. Nevertheless, as noted above, the arrangement that infringes the right to liberty is an independent infringement which is worthy of a separate examination, mainly in light of the detention periods that are determined in Article 32T of the Law as a derivative of the nature of the infringement (which range between 30 days and to a whole year). In this context, the State claims that the nature of the authority is deterrent /disciplinary, and that the duration of the period is proportionate. Notwithstanding, in my view, placement into detention for long periods of time (until one year) crosses the line between a "disciplinary" sanction which is primarily deterrent and a "punitive" sanction which is inherent in its essence. Since there is no dispute that the authority to penalize should not be granted to the Head of Border Control, a sanction of this type cannot withstand – irrelevant of the dependency upon the question if judicial review follows or not. In light of my aforesaid conclusion concerning the disproportionate infringement of the legislative arrangement to the right of due process and the repeal of the entire arrangement (as will be explained below), I do not wish to prescribe rules concerning this question at this current stage; however, I will note that the outlines of the new legislative arrangement, insofar and to the extent that it will be decided upon, should be examined – meticulously –including the period for detainment in detention . A long period of detention may also be disproportionate (in itself) – even if the decision of the Head of Border Control will be accompanied by Proactive Judicial Review. It is clear that this does not derogate from the State's right to conduct criminal proceedings in the appropriate cases, which by its nature, also permit imposing strict penalties.

We completed the examination of the individual examination of the various legal arrangements. Now, we will examine Chapter 4 of the Law in its entirety at a glance. Does this Chapter withstand the proportionality tests?

F) *Chapter 4 in its Entirety and the Proportionality Requirement*

185. The legislator created Chapter 4 of the Law within a constitutional framework designated to arrange the establishment and operation of the Residency Center for "infiltrators" in Israel. This Residency Center – does not resemble any corresponding centers throughout the world. The restrictions imposed by its virtue upon the liberty of the "infiltrators" are far more severe than those recognized in other western countries. The infringement on the "infiltrators'" dignity – is more acute than that which is sustained in similar facilities. Some of the arrangements of Chapter 4 which I have reviewed – which are not exhaustive of all the aspects of the Law which raise constitutional difficulties – established independent infringements on the protected fundamental rights. Other arrangements intensified and exacerbated the aforesaid infringements, even if alone they would not be sufficient to infringe on these rights. Even if we assume that the measure

selected by the legislator is sufficient to realize the purpose of the legislation; and even if we assume that there is no other measure which is less offensive to these rights – thus Chapter 4 of the Law passes the first and second proportionality tests – my opinion is that the public interest does not justify the severe infringement of the constitutional human rights which are afforded to each person as such.

186. I do not deny the social benefit that arises from placing the "infiltrators" in the Residency Center. The Residency Center facilitates the plight of some of the residents of the large cities, who virtually carried the burden of the absorption of tens of thousands of "infiltrators" by themselves. However, not all of the benefits have the identical weight. The existence of an adequate relationship between the benefit and the damage is also associated with the relative social significance of the various underlying principles of the anticipated social benefit from the legislative bill. Insofar and to the extent that the infringement on the right is more severe, thus there is a need for a greater intense public benefit in order to justify the infringement. A severe infringement on an important right, which was not designated to protect the public interest whose weight is not on the same hierarchy, may be considered an infringement to an extent that is greater than is required (*Privatization of Prisons* Case, pp. 602-603; *Zemach* Case, p. 273). Legislation which promotes preventing the infringement on human life is separate, and legislation that assists in preventing negative phenomena accompanied with unorganized immigration – as severe as they may be – is separate. The first may justify a more extensive infringement on human rights than the latter.

187. In our matter, I believe that the inherent benefit of Chapter 4 of the Law does not justify the infringement on human rights that is sustained by the "infiltrators" from this chapter. The projected image from the statutory arrangement in Chapter 4 of the Law – is a bleak image. The image that emanates is that the "infiltrator" does not control his daily routine; that his daily routine is dictated by the warders, who were granted search and disciplinary powers; an "infiltrator" is exposed to being transferred into detention, according to the decision of an administrative entity without any Proactive Judicial Review in the required scope; his hours go by passively, since he does not really have the possibility of leaving the Center during the daytime hours; and his residency in the Center has a start – but no visible end. All of these aggregate into an unbearable infringement on his fundamental rights, especially the right to liberty and the right to dignity.

These aspects, which we reviewed in depth above, are even more correct in relation to this particular vulnerable population, of which Chapter 4 of the Law does not spare its wrath from them. First is the population of the children, where the current structure of Chapter 4 of the Law permits holding them in the Residency Center (after the legislation of the appropriate regulations, where according to the State have not yet been enacted; see Article 32V of the Law). This fact raises significant difficulty. Children are a particularly vulnerable population with respect to dismal consequences of the deprivation of liberty. They experience the infringement on the right to liberty as the harshest of infringements (see and compare: Sara Mars et al., *Seeking Refuge, Losing Hope:*

Parents and Children in Immigration Detention, 10 AUSTL. PSYCHIATRY 91 (2002); Aamer Sultan & Kevin O'sullivan, *Psychological Disturbance in Asylum Seekers Held in Long Term Detention: A Participant-Observer Account*, 175 MED. J. AUSTL. 593 (2001)). These difficulties are not exhausted in the infringement on the rights to the children's liberty and they also relate to the children's right to dignity. The dignity of every person is worthy of protection; the dignity of a child –special protection. As has already been ruled "the infringement on the dignity of a child is part of the infringement on human dignity, however, it has its own significant dimension, due to the unique vulnerability of the child, his age, who has not yet gained the powers of the body and spirit to cope with the struggles of life and unacceptable social phenomena. Insofar and to the extent that human dignity is precious and sanctified, the dignity of a child is even more sanctified, since he needs the protection of the society more than an adult (*Tabaka* Case, pp. 848-849).

An additional population that is worthy of special consideration includes those individuals whose personal circumstances make their residency in the Residency Center exceptionally difficult. Chapter 4 of the Law does not require the Head of Border Control to consider the release of the "infiltrators" in exceptional circumstances suitable according to the Law, and does not determine under what circumstances a residency order will not be issued against the "infiltrator" at the outset (contrary to the detention arrangement set forth in Article 30A of the Law, which determines the various grounds of release of age, health condition and humanitarian grounds). It does not propose any mechanism whereby its virtue it permits the most vulnerable – the sick, those who were victims of human trafficking, who were tortured, raped and suffered other atrocities – not to be held in the Residency Center. Several "infiltrators" who were not referred to the Residency Center due to their personal status, or are released as a result thereafter, would not derogate from the realization of the underlying purpose of the legislation, and at the very most – would derogate from it an insignificant degree. Thus, an individual examination would not prevent the realization of the purpose of the Law (also see the *Adalah* Case, p. 43), and the absence of exceptions "significantly emphasizes the lack of proportionality (in the strict sense) of the comprehensive prohibition" (*First Law of Citizenship Case*, p. 349).

The conclusion is that the legislation at the center of our discussion is not adequately proportionate to the benefit that arises from it. It crosses that barrier of values which democracy should not bypass, even if the purpose we wish to realize is proper (see the *Adalah* Case, p. 36). At a time where Chapter 4 of the Law is absent of a provision that restricts the duration of the residency and the grounds for release from the Center, provisions which this Court cannot supplement by interpretative means to the ranks of the Law; and since it is not only that some of the arrangements of Chapter 4 of the Law which are

disproportionate, but rather the cumulative non-constitutional aspects of this Chapter which taint the entire arrangement and make it disproportionate – in light of all the inherent infringements therein, my opinion is that Chapter 4 of the Law in its entirety infringes human rights in a disproportionate manner. What is the appropriate constitutional remedy?

G) *The Remedy*

188. Chapter 4 of the Law – is completely unconstitutional. In light of the principle of the separation of power, we are not authorized to reformulate the legislation. Thus, it is inevitable to instruct on its repeal. I will note that that I have not overlooked the fact that the constitutional review of a "fixed" law is not the same as a "temporary" law and that "the less that the constitutionality of a temporary law is repealed, the better" (*Gaza Strip Beach* Case, p. 553; the *First Law of Citizenship Case*, p. 450). Nevertheless, the temporary nature of this law or otherwise, does not necessarily, cure the inherent constitutional flaws, and a "temporary" law is not immune from constitutional scrutiny. In fact, this was the effect of Chief Justice *A. Barak's* opinion in the *First Law of Citizenship* Case whereby the temporary nature of the temporary order reviewed there (Law of Citizenship and Entry into Israel (Temporary Order) 5763-2003 (hereinafter: the *Citizenship Law*)) did not "really" modify the lack of proportionality in the Citizenship Law (*ibid*, p. 346) and is worthy of being repealed.

189. As is well known, the declaration of the Court for the repeal of a law or provision therein does not necessarily become effective immediately. It can be applicable in the future (prospective), if the circumstances are justified, in order to allow adequate preparation for its repeal (*Zemach* Case, p. 246; Yigal Mersel : Suspending the Decree of Repeal" *Haifa University Law Review* I 30 (2006)). We must add that in our ruling in the *Adam* Case we did not rule out the alternative of open or semi-open Residency Centers, while imposing proportionate restrictions on the freedom of movement. In these circumstances, we should leave the legislator sufficient time to do so. As such, I will suggest to my colleagues that w delay the repeal for a period of 90 days, so that the declaration of repeal of the *entire Chapter 4* will enter into effect within a period of three months from the date of this ruling. My assumption is that this is a sufficient considerable period in order to formulate an appropriate legislative arrangement, which will meet the derivative restrictions of the Basic Law: Human Dignity and Liberty.

190. However, I believe that regarding the two particularly offensive arrangements set forth in Chapter 4 of the Law, it is not possible to suspend the declaration of repeal for a period of 90 days. The first is the arrangement set forth in Article 32H(a) of the Law concerning the thrice a day reporting requirement, which is complemented by the Reporting Regulations. This arrangement means that in

practice the Residency Center does not function as an open Center but rather a closed Facility. Considering the severe and disproportionate infringement on the right to liberty and the right to dignity, I suggest that our declaration for the repeal of Article 32H(a) of the Law and the repeal of regulation 3 of the Reporting Regulations be delayed until September 24, 2014 until 1:00 PM. In order not to thwart the reporting requirement during the night hours, and until the effective date for the declaration of the repeal relating to Chapter 4 of the Law in its entity within 90 days, I suggest that Article 32H(a) of the Law be read as such that the resident shall be required to report in the Center twice a day, according to the reporting times set forth in regulations 3(1)-3(2) of the Reporting Regulations.

191. An additional arrangement that cannot be remain intact for a 90 day period is that which permits transferring an "infiltrator" into detention , as set forth in Article 32T of the Law. This arrangement establishes an administrative entity an extraordinary scope of power to revoke – without any Proactive Judicial Review – the liberty of the "infiltrator" for a prolonged period, severely and disproportionately infringes the constitutional rights of liberty and due process. Waiting for a period of 90 days prior to declaring its repeal – under these circumstances – is disproportionate. Consequently, considering the upcoming Jewish holidays and for the sake of the necessary sufficient organization period, I will suggest to my colleagues that as of October 2, 2014 through the end of the 90 day period from the date of the ruling, Article 32T of the Law in relation to each of the grounds enumerated in Article 32T(a) be read that the Head of Border Control shall instruct by order the transfer of the "infiltrator" into detention for a period that shall not exceed 30 days. Those detained in detention from the date of our ruling by virtue of the aforesaid decision of the Commissioner shall be released at the end 30 days of their detainment in detention or at the end of the period designated by the Commissioner – whichever is earlier.

H) *Following the Aforesaid*

192. After writing the aforesaid, I received the opinions of my colleagues including the opinion of my colleague Chief Justice *A. Grunis*, which I will refer to in light of the differences of opinion between us. My colleague believes that Article 30A of the Law and Chapter 4 of the Law (save for regard to the thrice a day requirement to report to the Residency Center) pass the constitutional scrutiny. In my opinion, I explained in detail why my conclusion is different, and I do not wish to reiterate those matters but merely clarify what emerged and that which needs clarification.

193. I will begin with the disputes that arose between my colleagues and myself in all that is related to Article 30A of the Law. As noted by my colleague, the core

difference made by the legislator in what is stipulated in this Article is the reduction of the maximum permitted period of detainment in detention from three years to one year. His position is that given this change and other changes that he enumerated, Article 30A in its current version passes the constitutional scrutiny. My colleague attributes particular consideration to the fact that in his opinion we are dealing with "a constitutional question which is "quantitative" in nature", considering that what stands before constitutional scrutiny – according to his definition – is not the mere detainment in detention but the duration of the detainment period (para. 16 of his opinion). In this matter my colleague believes that the legislator has extensive legislative "latitude", and to this effect he asked me the same question: what will we say about a legislative bill that permits detainment of detention for a period of six months; and what will we say about legislation that permits detainment in detention for a period of eight months. Is it constitutional (para. 20 of his opinion). I hereby respond: both are likely to be found unconstitutional – it is all dependent upon the question of the existence of an effective deportation proceeding in the matter of the detained. In my opinion, there should be no instruction for detainment in detention if there is no forecast in his deportation, *a fortiori* for a period longer than one year. Therefore the question is not solely quantitative – what is the maximum constitutional duration for detainment in detention – but rather (and perhaps primarily) qualitative: is detainment in detention permitted if an effective deportation proceeding is not being conducted in his matter. My response to this question – as this Court has responded before me in extensive case law–absolutely not. Indeed, I am aware that the Respondents claim that one of the purposes of Article 30A of the Law is the identification and exhaustion of the departure channels for deportation. In my opinion I noted that there is no flaw in the sphere of the purpose of the Law whose purpose is to permit effective deportation proceedings (para. 51 of my opinion). However, inspection of the Law for the Prevention of Infiltration reveals a gap between the declared purpose of the Law and its wording. In our case, it is doubtful that the legal outline that was created – which does not include reference to the question of existence of an effective deportation proceeding – indeed realizes the purpose of the aforesaid legislation (para. 55 of my opinion). It is particularly true when the matters of majority of the "infiltrators" anyway an effective deportation proceeding cannot be conducted at this time given the temporary policy of non-deportation applicable to them (para. 56 of my opinion). This difficulty stands alongside the quantitative difficulty that arises in this context, which concerns the duration of maximum detainment in detention (and in this matter I would like to comment with due caution that according to my opinion, when referring to the deprivation of liberty construed in its most fundamental sense, there is a difference between the deprivation for a period of six months and its deprivation for a period of one year – it is a considerable difference (and in relation to a period of time of several hours see the *Zemach* Case)). Since this is the status, and I am aware to the due caution that this Court must exercise when declaring the repeal of the provisions of a law, I did not see how we cannot do so in this case.

194. My colleague, the Chief Justice and I also disagree with respect to the constitutionality of Chapter 4 of the Law. My colleague believes that this Chapter – save for the provision concerning the reporting requirement in the Residency Center during the afternoon hours – is constitutional. As indicated in my opinion, my conclusion is different. First and foremost – *and these are the main points* – Chapter 4 of the Law is not constitutional since it does not determine a time limit in the matter of the residency in the Residency Center or offer any grounds of release from it. Concerning this point I will first note, parenthetically the words of my colleague (para. 32 of my opinion), that I do not believe there is a need to attribute considerable weight to such that the Head of Border Control was authorized by the Law to instruct upon the residency of the "infiltrator" in the Residency Center "until such other time that shall be determined", since in the beginning of the Article the Head of Border Control was authorized not to determine any time at all and instruct upon his residency in the Residency Center "until his deportation from Israel, or until his departure" (Article 32D(a) of the Law). The outcome is that even if an administrative decision can be received concerning the issuance of a residency order that is time restrained, which may reduce the infringement on the rights of the "infiltrators" (and no decisions of this kind were presented to us for our review), in any event it is not sufficient to derogate from the legal authority itself – which is what is under constitutional scrutiny – permits the issuance of orders of stay which have no known end date. My colleague claims that an "infiltrator" can submit a request for the limitation of the period, and the decision of the Commissioner in this regard will be subject to judicial review. However, the legislator did not outline this matter (which may be correct if we view it as an initial arrangement; see and compare to para. 91 of my opinion) any criteria for the Commissioner's discretion, and in any event it requires employing an active legal proceeding on the part of the "infiltrator", for all the inherent obvious difficulties therein (see para. 179 of my opinion). In any case, the limitation of such kind is not required according to the provisions of the Law.

195. The result then is that Chapter 4 of the Law is not constitutional also because of what it lacks. This deficiency in the Law – the absence of a time limit for the residency in the Center and the absence of the grounds of release from it – cannot be completed by this Court. Justifiably, my colleague points out that in his review of Article 30A of the Law that had we determined a maximum detention period we would find ourselves stepping into the shoes of the legislator, and this is not our role as judges (para.15 of his opinion). This is also correct in relation to Chapter 4 of the Law. A normative arrangement that is designated for the purposes of which the Amendment is meant to realize, which permits the deprivation of a person's liberty for a period of three years (given the expiration date of the temporary order) – a period which is disproportionate in itself – is not constitutional for the reasons that were clarified in detail in my opinion. It is not the role of the court to "reduce" the residency period determined by the primary legislator or add to Chapter 4 grounds for release as it deems appropriate. In this state of affairs – there is no alternative but to repeal the entire arrangement, in a manner which will permit the legislator, if he so chooses, to place another arrangement in its place which includes a proportionate maximum period of detainment in the Residency Center and grounds for

release. Due to this issue which in itself is worthy in my opinion we need to declare the repeal of Chapter 4 of the Law (as I noted in Article 164 of my opinion). Additional arrangements that I reviewed in my opinion support this conclusion, however it is independent even if anyone will believe that it is constitutional in itself. Thus, I do not claim that Chapter 4 of the Law must be repealed because of the "cumulative effect" of the number of infringements on constitutional rights which in itself are *independent* in the judicial review tests (such that the "whole is greater than the sum of all its parts"; see Zamar Blondheim and Nadiv Mordechai "Towards the Cumulative Effect Doctrine: Aggregation of Constitutional Judicial Review" *Hebrew University Law Review*, 44 569, 571 (2014)). First, since it is sufficient in the absence of the restriction of the duration of the residency and the absence of grounds for release leads to the conclusion to declare the repeal of this entire Chapter; and secondly, since Chapter 4 is comprised of a mosaic of *unconstitutional* arrangements in themselves.

196. However, the matters are not exhausted in this sense. In my opinion, when we are dealing with an inclusive legislative arrangement, it is not correct for us to conduct a specific constitutional scrutiny of the provisions of the Law without observing them also from an overview perspective in a manner which reveals the relationship between them. I will demonstrate: My colleague, the Chief Justice, believes that the thrice a day reporting requirement in the Residency Center disproportionately infringes the "infiltrators'" right to liberty. Is it possible to exclude the possibility that his conclusion would have changed had an arrangement limiting the duration of residency in the Residency Center been brought forth for our review? Would this conclusion be different had the Law which established the Residency Center require the grant of improved social welfare benefits and relief to its residents and managed by a "civilian" governmental entity in its essence? How can we focus our view only on one legal provision without reading it closely to other provisions which outline the reality of life for those subject to the encompassing statutory arrangement that was released by the legislator? A "cumulative" reading of the provisions of the Law, whereby unconstitutional provisions have ramifications on the constitutional provisions alongside them, is then necessary when we deal with legal arrangements of such kind, given our constitutional scrutiny in this Petition.

197. An additional issue that we were requested to relate to is what is described by the Chief Justice as "the central difficulty" that I found in these arrangements that were reviewed above (which is not the case): the arrangement permitting the transfer of an "infiltrator" from the Residency Center to detention that is determined in Article 32T of the Law. First, I will clarify as it has arisen from my statements thus far, my conclusion regarding the unconstitutionality of Chapter 4 of the Law remains intact even without any connection to the last arrangement. On the merits, my colleague and I do not agree with respect to the interpretation of the aforesaid arrangement. In my opinion I noted that in my view it is not possible to view the review conducted by the Detention Review Tribunal for Infiltrators as "Proactive Judicial Review" concerning the decision to transfer the "infiltrator" into detention. In contrast, my colleague, the Chief Justice, believes that the authority conferred upon the Appeals Tribunal in Article 30D(a)(1) of

the Law – "*to approve* the detainment of the "infiltrator" into detention […]" – also has the inherent duty of the power *not to approve* the aforesaid detainment, including instructing his release *based upon administrative grounds whatsoever*. It appears to me that it is difficult to reconcile this interpretation with the wording of the Law with the review of the Commissioner's decisions conducted by the Tribunal. Please note. My colleague and I do not disagree that the ordinary authority of the Commissioner to instruct upon release from detention – as well as the review by the Detention Review Tribunal for Infiltrators (by virtue of both the Law of Entry into Israel and this Law) to instruct upon the release within the scope of judicial review – is limited to the grounds enumerated in the Law, which cannot be denied (see Article 13O (a)(2) of the Law of Entry into Israel which restricts the grounds for release which the Tribunal is authorized to release by their virtue to those that are enumerated in Article 13F of the same law; and Article 30D(a)(2) of the Law which limits the grounds for release that the Tribunal is authorized to release by their virtue to those that are enumerated in Article 30A(b) or (c) of the Law; Motion for Request of Administrative Appeal 1662/11 *Birhaa v. The Ministry of Interior*, paragraphs 29-31 (September 1, 2011); the Explanatory Notes for the Proposal of the Law of Entry into Israel (Amendment No. 8) 5760- 2000, law proposals 117). These grounds are primarily humanitarian grounds, and they do not apply to the actual decision of placement into detention – the legality or the plausibility. Notwithstanding, it appears that my colleague believes that whereas the term "to approve" according to its definition in Article 30D(a)(1) should be interpreted as "ordinary" (in other words, such that it does not permit the Tribunal "not to approve" the detention unless the some of the grounds for release enumerated in Article 30B(a) of the Law exist) when we are dealing with the decision for the placement in detention by virtue of Article 30 of the Law, in the case of the transfer into detention from the Residency Center, should be interpreted as *the exact term* ("to approve") in an entirely different manner – as enabling the Appeals Tribunal not to approve detention of there was an administrative flaw which establishes the grounds for such. The reason for the difference stems from, according to the view of my colleague, the fact that Article 32T(h) of the Law (transfer to detention from the Residency Center) enforces Article 30D of the Law (which refers to, as aforesaid, the grounds for release enumerated in Article 30A(b)), "*mutatis mutandis*". By applying the arrangement mutatis mutandis we can learn, according to my colleague's approach, of the legislator's intent to confer the authority to the Appeals Tribunal to conduct judicial review on the Head of Border Control's decision according to Article 32T of the Law according to any administrative grounds whatsoever.

I find it difficult to partake in this conclusion, since it is difficult to reconcile it with the wording of Article 32T(e) of the Law, which limits the authorities of the Head of Border Control to instruct upon release from detention that was imposed *by virtue of Article 32T of the Law* only "*if he is convinced that the stipulated in Article 30A(b) exists*, and subject to the reservations enumerated in Article 30A(d), mutatis mutandis." Indeed, at the end Article 32T(e) of the Law includes the wording "mutatis mutandis". However, whereas the beginning of the Article *explicitly* limits the grounds for release from detention that was imposed by Article 32T of the Law to those enumerated in Article

30A(b) of the Law, I doubt whether it is possible to read the ending – "mutatis mutandis" – as authorizing the Head of Border Control (or the Tribunal) to deviate from the list of grounds prescribed in the beginning of the same actual Article. This conclusion is supported by the Explanatory Notes to sub-Article 32T(e) of the Law, where it was written that "according to the proposed, the Head of Border Control shall be permitted to, *upon the existence of the stipulated in Article 30A(b) or (c)(1) or (2)* of the Law to instruct upon the release of the resident or "infiltrator", as the case may be, from the place of detention, and his transfer to the Residency Center" (Explanatory Notes of Amendment No. 4, p. 138; emphases added - U.V.).

Thus, it follows that, according to the wording of Article 32T(e) of the Law and the Explanatory Notes it appears that the authority to release that was conferred upon the Commissioner is limited in the closed list of grounds enumerated in Article 30A(b) of the Law, which cannot be denied; and when the Commissioner is not authorized to release from detention based upon any administrative grounds whatsoever, it is doubtful if it is possible to interpret the Law in a manner which authorizes the Appeals Tribunal to do so. Hence my conclusion that the words "mutatis mutandis" does not have the accumulated power to *fundamentally change* the scope explicitly determined in sub-Articles 32T(e) and (h) of the Law – which, are as aforesaid, part of the specific arrangement determined in Article 32T of the Law itself – and to substantially extend it. It should be added that the Respondents – who responded to this Petition in depth and in detail – did not claim with regard to the interpretation of the Law, and therefore I have no doubt that there is room to adopt it from our own initiative.

I will conclude with this. The position of the Chief Justice is to declare that the majority of the arrangements at the focus of our review as constitutional. As my colleague explained, this conclusion is reached, inter alia, "in light of the concern of the contempt and dilution of important constitutional rights" (para. 2 of his opinion). This concern is real – the concern for the status of the important constitutional rights that are at stake – is what lead me to my conclusion, whereby the arrangements are not constitutional and should be repealed.

I) *Final Comments*

198. As we are approaching the conclusion, I received additional comments from my colleague the Chief Justice, which require brief attention. First, Article 30A of the Law. As has already been clarified, placement in detention for the sake of deportation requires the existence of an effective deportation process. Article 30A of the Law does not link between the actual detainment in detention and the existence or absence of the aforesaid deportation process. On this basis my colleague believes, as indicated in his final words, that instead of repealing Article 30A of the Law, it can be interpreted in a manner which will establish the missing link in the Law. In my opinion, this cannot be done and there is no other alternative but to declare the repeal of the provisions of the Law. I will explain.

199. This is the rule that has been formulated in our case law, there is no denying that: detainment in detention requires the existence of an effective deportation process. In order not to deprive any person's liberty for the sake of his deportation, a general statement of the State's intent to do so in not sufficient. There is a need for consistent action whose purpose is to formulate the appropriate speed the channel of deportation. A Article of a law that authorizes a person to instruct upon the detainment in detention *for a long period* of someone until their deportation (contrary to the limiting timeframes in the Law of Entry into Israel) to manifest the connection between the deportation process and detainment in detention; must impose upon the State the burden to periodically examine the matter of the detainee, an examination whose purpose is to ensure that a person does not remain in detention when the State is complacent and is doing nothing concerning his deportation; and it must include appropriate grounds for release in the event when there his deportation is not feasible.

200. An arrangement of this kind, which establishes the aforesaid connection and determines the grounds for review, does not appear within the framework of Article 30A of the Law. Then, what shall we do in this state of affairs? According to my colleague's approach – an approach which was not claimed by the State and which we did not examine in the *Adam* Case – even if maintains that there is a necessity for the existence of an effective deportation process as a condition for detention, Article 30A of the Law can be interpreted as such that it is possible to detain an "infiltrator" in custody for a period of one year provided that a deportation process exists in his matter. On the other hand, my opinion is that we must declare the provisions of the Law invalid. Presumably, the two routes – which is mine, whereby it is correct for us to declare the invalidity of the provisions of the Law (invalidity which at the end permits the legislator to bring a new arrangement that meets the criteria of the constitutionality under the existing Article to day), and which is my colleague's, whereby it is possible to so by means of judicial review – lead to the identical result. However, my colleague's route is by means of judicial review which requires this Court to determine for the legislator an arrangement for the release of an "infiltrator" when no effective deportation process exists in his case, including the grounds for release which are not included in the current version of the Law. Whereas, according to my route the task should be left to the legislator, so that he will determine the entire and exhaustive arrangement in this matter.

201. Please note: the arrangement before us requires us to respond to two questions: one, is there a need for an effective deportation process for the purpose of detainment in detention; and the second, does the time period for detainment in detention that is prescribed in Article 30A of the Law meet the constitutionality criteria. With respect to these two questions, the qualitative question and the quantitative question, according to my colleague's definition, were reviewed by me in my opinion. With regard to the first question, my colleague suggests even if we maintain that there is a requirement to have an effective deportation process, we can establish such obligation by means of interpretation, within the confines of the existing law. Even if I was ready to go the distance towards my colleague in connection with the stated in the first question and

assume for the sake of the discussion that it is possible by means of an interpretative-ruling to read into the lines of the Law a condition whereby in the absence of an effective deportation process the detainee in detention must be released immediately and even add grounds for release that are not specified in the law (and as aforementioned – I do not believe that doing so is correct), even then my conclusion would not be different. This is due to the different answer provided by my colleague and myself to the second question. In my view, and as I explained in depth in my opinion, the period of detainment in detention currently determined in Article 30A of the Law – one year – is distinctively a disproportionate time.

202. My colleague himself recognizes that there is no room for this Court to determine what is the maximum period of time permitted for detainment in detention for the legislator. It is for this reason that my colleague refrained – according to his own words – from determining such in the *Adam* Case (see his words in para. 15 of his opinion; para. 5 of my opinion in the *Adam* Case). This approach is of course acceptable to me, and what causes me to use the required restraint that leads to the result that I reached in this case. In other words: since the legislator determined that the mandatory time period for detainment in detention is one year (subject to the limited grounds in this Article); and since this period does not pass the constitutional scrutiny because, as aforementioned, it is a period time that is disproportionate – there is no alternative other than the repeal of the provisions of Article 30A of the Law. In order to overcome it by interpretive means, we must determine the duration of a different time, a shorter time, for the maximum detainment in detention. We did not do this in the *Adam* Case, and I do not believe that it is correct to do so now as well. I share my colleague's perception whereby there is a need to make an interpretive effort to avoid repealing a law of the Knesset. However, in the case before us, I did not see how, when we stand before a provision of the legislator which determines detainment in detention for a period of one year (a period of time which in my opinion is not proportionate) we can avoid its repeal.

203. Parenthetically, I will note that my colleague has another criticism, whereby this ruling that we are rendering in the matter of the provisions of Article 30A of the Law does not rely upon factual figures concerning the identity of the "new" "infiltrators" who arrived after Amendment No. 4 was enacted. I thoroughly reviewed this claim raised by my colleague, and did not see how it modifies anything. The State did not argue before us, in writing or orally, that the characterization of the "infiltrators" that entered following the legislation of Amendment No. 4 of the Law is different than the "infiltrators" who arrived in Israel prior to the Amendment. Since the figures in this matter are in the hands of the State, and since it did not see the need to raise this aforesaid claim, I did not see the need to assume otherwise. In any event, even if the reality teaches us that individuals from other countries where deportation is not an option "infiltrated" into the territory of the State – it will not be sufficient to cure the underlying, fundamental flaw that occurred in Article 30A of the Law.

204. Now with respect to Chapter 4 of the Law in our case, I will point out the essence in two brief comments, since everything has already been said. The first is: my colleague believes that given the authority of the Head of Border Control to limit the residency period in the Center, as such there is no flaw that grounds for release therefrom are missing from the provisions of this Chapter. My opinion is different. We are dealing with the provisions of a law whereby its virtue thousands of people are detained in a remote Center in the desert, while infringing their liberty and dignity. They are required to reside there for a disproportionate period of three years (and this is based upon the assumption that the validity of the Law will not be extended). As I have already indicated, I think that all the primary arrangements when dealing with such a nuclear infringement of the right to liberty and the right to dignity require the legislator – and no other – to prescribe a proportionate time cap for detainment in the Center, as well as an arrangement stipulating the grounds for release therefrom. According to my colleague's position, the ruling whereby it is the legislator's duty to do so may minimize the Commissioner's discretion to limit the residency period in the Center. Given our ruling today, I do not share this concern. It is clear that there is no impediment that the legislator will leave room for the broad discretion of the Commissioner in this matter, for example by means of determining appropriate grounds, and perhaps it is even proper that he do so. Given the severe infringements of Chapter 4 of the Law, any other option save for the determination of a proportionate limitation for detention as aforementioned as well as grounds for release in the primary legislation – seems to be difficult. My second comment, which concerns the dispute – which is not related to the core of the matter – regarding the "disciplinary" authority given to the Commissioner to transfer an "infiltrator" from the Residency Center to detention: as I indicated in my opinion, there are limited, defined and confined grounds for release, on account of which the Appeals Tribunal may conduct judicial review and release an "infiltrator" who was transferred from the Residency Center to detention (as aforementioned in para.167 of my opinion). However, as I clarified, judicial review solely on the aforesaid grounds – is not sufficient. In this context, I have no alternative but to reiterate what I said in para.197 above.

205. I will conclude my words with the *Adam* Case, to which my colleague refers to, whereby there is no principle flaw in the mere establishment of the Residency Center (see para.40 of my opinion there). I have already said this before and I reiterate it today. However, when one enjoys the benefits conferred by the consideration of granting the deed, he must remember that alongside the deed there is a debenture which will require compensation when the circumstances require such: in my opinion in the *Adam* Case, I referred to the acceptable criteria mentioned in the guidelines of the U.N. High Commissioner in the matter of open or semi-open residency centers. The legislator did not accept upon himself the accepted international arrangements, and thus obviously acted within the scope of the prerogative conferred upon it. However, this bears no significance because the legislator is permitted to set arrangements that are not consistent with the provisions of the Basic Law: Human Dignity and Liberty, which in my opinion it did in this case.

206. In conclusion everything has been heard. My colleague and I do not see eye to eye on the constitutionality of the arrangement that was presented to us for our examination. I carefully reviewed the words of my colleague, and I was not sufficiently convinced that it is possible to avoid the declaring the repeal of Article 30A of the Law of Prevention of Infiltration and from the declaration of the repeal of Chapter 4 of the Law. This is my comprehension of what is implied by our constitutional law, and I will reiterate and propose to my colleagues that we declare such.

VI. *High Court of Justice 8425/13 – Summary*

207. We put Article 30A and Chapter 4 of the Prevention of Infiltration Law to judicial review. We first examined the detention arrangement prescribed in Article 30A of the Law, whereby its virtue it is possible to detain in detention an "infiltrator" in the territory of the State following the legislation of Amendment No. 4 for a period of one year (subject to the grounds permitting the abridgment or the extension of the period). We opened with the assertion that detainment in detention is an inherent infringement on the right to liberty (an infringement which was not disputed between the parties) and we added that the detainment in detention also infringes on the right to dignity. We continued and reviewed the declared purposes of Article 30A of the Law. We determined that the purpose of the "exhaustion of departure channels from Israel" in itself is proper; however, we pointed out the difficulties that arise in relation to the second purpose of the Law – "prevention of the recurrence of the "infiltrators" phenomenon" – which is a deterrent purpose by its nature. Thereafter, we examined if the infringement by Article 30A of the Law is proportionate. First, we found that there is a rational relationship between detainment in detention and the prevention of the recurrence of the "infiltrators" phenomenon, however we expressed concern if the detention accordingly promotes the departure from the country for one who cannot be deported. Second, we determined that although other alternative measures exist which can promote the purposes of the Law; it is not possible to identify less offensive measures that will realize the Law in a similar degree of effectiveness of detainment in detention. Third, we considered the relative benefit in the law opposite to the continuous deprivation of the right to liberty, and we found that it is not in a proportionate and proper degree. Finally, since Article 30A of the Law did not pass the constitutional scrutiny, we declared its repeal and applied in its place the arrangement prescribed in the Law of Entry into Israel, while indicating that the grounds set forth in Article 13F(a)(4) of the Law of Entry into Israel shall not apply for a period of ten days from the date of this ruling.

208. Thereafter, we examined the constitutionality of Chapter 4 of the Law, which permits the establishment of the Residency Center. This Chapter (which was

enacted as a temporary order valid for three years) authorizes the Head of Border Control to issue a residency order against an "infiltrator" requiring him to reside in the Residency Center for an unlimited period. In the absence of an actual dispute between the State and the Petitioner concerning the Chapter's infringement on the right to liberty, we were requested to examine the prescribed outline in the limitations clause of Article 8 of the Basic Law: Human Dignity and Liberty. First, we reviewed the different purposes of the Residency Center – those that are declared and those that are claimed – and we reviewed the difficulties that are raised by several of these purposes. We noted that the purpose relating to "providing a response to the needs of the 'infiltrators'" is worthy; and we reviewed the possibility that Chapter 4 of the Law has another purpose, concealed, of encouraging "voluntary" return – with all the difficulties entailed therein. Afterwards, we examined some of the arrangements of Chapter 4 on their merits. We reviewed the arrangement prescribed in Article 32H(a) of the Law whereby its virtue an "infiltrator" must report for three daily headcounts. We determined that this arrangement infringes the right to liberty and the right to dignity in a manner which is not proportionate. We also examined the difficulties that arise in Article 32C of the Law which authorize the Israeli Prison Services to operate the Residency Center. We noted that despite that these difficulties do not give cause to an independent infringement of the constitutional rights, however in any event they are sufficient to intensify the existing infringement on the Residency Center. Later, we discussed the absence of provisions that limit the residency in the Residency Center or which determine grounds for release therefrom. We saw that the lack of provisions of this kind intensifies the infringement on the right to liberty, and independently infringes the right to dignity. We believed that this infringement is not proportionate, and is sufficient – in itself – to presume the grounds for the repeal of Chapter 4 of the Law in its entirety. We reviewed the arrangement set forth in Article 32T of the Law, concerning the administrative authority to transfer an "infiltrator" to detention. This arrangement was determined to be one that infringes on both the right to liberty and the right of due process since the decision of the administrative authority is not accompanied with Proactive Judicial Review. Our opinion was that this arrangement is not proportionate. Finally, we found that Chapter 4 in its entirety is not proportionate in light of the cumulative unconstitutional arrangements which comprise it. Therefore, as a result, we determined that Chapter 4 of the Law – in its entirety – does not pass constitutional scrutiny. In the sphere of the remedy, we deemed that it is correct to suspend the declaration of the repeal, concerning Chapter 4 in its entirety, to 90 days after the date of this ruling. The declaration of repeal of the arrangement for reporting (Article 32H(a) of the Law) we delayed only for 48 hours, and thereafter reporting in the Center will be required two times a day, morning and evening, as aforementioned in para. 190 above. We also delayed the declaration for repeal of the arrangement of the transfer to detention (Article 32T of the Law) for 48 hours, and upon its

culmination the Head of Border Control will be authorized to instruct upon the transfer of an "infiltrator" to detention only for 30 days; and we instructed upon the release of those detained in detention whereby upon the date of this ruling they have been detained for more than 30 days by virtue of the aforesaid decision of the Commissioner.

VII. *High Court of Justice 7385/13*

209. The result that we reached – whereby the rule is that Amendment No. 4 in its entirety be repealed – renders the discussion of High Court of Justice 7385/13 superfluous. In the deliberations that were conducted before us the Petitioners in this Petition relied on the State's claims concerning the constitutionality of Amendment No. 4 of the Law. It should be assumed that the repeal of the Amendment will lead the Legislator to set forth a new normative arrangement, based upon the stated in this ruling, which will handle the range of matters that require attention. Included therein there may be a response to the claims of the south Tel-Aviv Petitioners. Therefore, there is no reason that we review their claims concerning the alleged harm to them at this time, before the legislator has had its say in this matter.

210. I request to emphasize that the result which we reached in regard to the Petition in High Court of Justice 7385/13 does not attest to the fact that the voices of the residents of south Tel-Aviv were not heard in this proceedings Their distress was before us, and their pain concerning their surrounding living environment which completely changed beyond recognition is clear an apparent to us all. We live amongst our people. We saw how the settling down of the "infiltrators" in the neighborhoods of south Tel Aviv, changed the character of the region, added to the congestion and intensified the daily activities of the local residents. We read the State Comptroller's Report concerning the significant rise in zoning and planning laws in the region; about many businesses and vendors operating without a license; of the many "pirate" connections of gas facilities and connections which are hazardous to the electric system; and the increasing risk for potential fires (*State Comptroller Report*, pp.73-85). There is no dispute that the state of affairs in south Tel-Aviv requires attention. The obligation to find adequate solutions is before the state authorities. The distress of the residents of south Tel-Aviv is not a decree of fate; it is in the hands of the legislative branch and the executive branch.

While we understand the hearts of the Petitioners, our conclusion is that the petition in High Court of Justice 7385/13 must be dismissed, while the claims of the Petitioners are reserved in their entirety insofar and to the extent that the new arrangement that will be prescribed will not provide a solution for the alleged harms, and this is without us expressing any position on the merits of the issue.

VIII. *Prior to Closing the Deliberations*

211. We found that Article 30A of the Law is not proportionate. We found that Chapter 4 of the Law is not proportionate. We declared their repeal. Indeed, "the declaration for the repeal of a law or any part thereof is a serious matter. A judge should not do so with ease" (*Investment Managers* Case, p. 386). As was explained *there*, we also did not request to fill the shoes of the legislator or borrow any measures that they would have selected had we been part of the legislative branch. We conducted judicial review. We did not examine the wisdom of the law; we examined its constitutionality. Our conclusion was that the provisions of Article 30A of and Chapter 4 of the Law are not constitutional.

212. We did not overlook the fact that the outcome of this ruling is that we are returning and invalidating a primary law of the Knesset. We are aware of the weight of the doctrine of the separation of powers. We are not requesting "to plow the fields of the legislative branch without permission" and "we will walk very cautiously until we instruct upon the repeal of a provision of a law by the Knesset (*Foundation for Commitment* Case, p. 518). However the arrangements set forth in the new amendment of the Prevention of Infiltration Law significantly, profoundly and fundamentally infringe on human rights. They do not comply with the conditions of the limitations clause, and they do not pass constitutional scrutiny. Therefore, there is no other alternative other than to declare its repeal. We did not do this willingly; we were compelled to do so by virtue of our duty.

213. Since we are at the point of conclusion, I will request to say this as well: currently there are many unwelcomed guests amongst us. Some of the "infiltrators" are in Israel for many years now. They created social ties and established families, adopted hobbies and acquired the language. At this stage, their deportation from Israel is not on the horizon. Indeed, their residency is an economic and social burden on all of the residents of the State. We are not blind to the difficulties that the residents of south Tel-Aviv and other cities are facing. Nevertheless, current data indicated that the "infiltrators" phenomenon is not as it was. Although Israel's border is not immune from uncontrolled crossings, and even though "new" "infiltrators" are crossing and entering the gates of the country – there is a significant decline in the number of "infiltrators" entering Israel. Only 45 "infiltrators" made their way to Israel in 2013. Since the enactment of Amendment No. 4 and until June 2014 only 19 "infiltrators" entered Israel. This change of circumstances requires reconsideration. It offers the opportunity to formulate a comprehensive solution in a broad perspective.

    Indeed, there is no dispute that the arrival of tens of thousands of "infiltrators" into the territory of Israel is a complicated issue; a complicated issue – but also a human issue. The State has many tools which permit it to handle the "infiltrators" phenomenon, and the legislator is the sovereign to select the appropriate legal solution. Many different legal solutions can be considered – but they must be constitutional. A constitutional solution

must reflect the balance between the greater good and the individual good. It must minimize the harm to the residents of the urban cities on the one hand and the "infiltrators" on the other hand. The legislator must select the measure whose infringement on human rights is proportionate. The heart understands the difficulties but the mind cannot tolerate the selected solution. Article 30A and Chapter 4 of the Law for the Prevention of Infiltration are not constitutional. They cannot remain intact.

IX. *Summary*

214. Thus, I will suggest to my colleagues to dismiss the High Court of Justice 7385/13 Petition and accept the High Court of Justice 8425/13 Petition. If my opinion will be accepted, Article 30A of the Law for the Prevention of Infiltration will be repealed. The arrangement prescribed in the Law of Entry into Israel shall replace it. The grounds for release prescribed in Article 13F(a)(4) of the Law of Entry into Israel shall not be applicable for a period of ten days from the date of our ruling, i.e., until October 2, 2014. Chapter 4 of the Law for the Prevention of Infiltration will also be repealed. The declaration of its repeal shall be delayed for a period of 90 days. The repeal of Article 32H(a) will enter into effect on September 24, 2014 at 1:00 PM, subject to the aforesaid in para. 190 above. The repeal of Article 32T of the Law shall be as aforesaid in para. 191 above.

In consideration of the result that we reached, I will suggest to my colleagues not to issue an order for expenses in High Court of Justice 7385/13, and that the Respondents shall bear the costs of the Petitioners in High Court of Justice 8425/13 in the total amount of NIS 25,000.

Justice

Justice Y. Danizger

1. I concur with the detailed and profound opinion of my colleague Justice Vogelman.

As my colleague, I too believe that the Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Order), 5774 – 2013, does not pass the test of constitutional scrutiny and that Article 30A in its new version infringes in a disproportionate manner the right to liberty and the right to dignity that are anchored in the Basic Law: Human Dignity and Liberty. In addition, in my opinion, the establishment of a Residency Center (Chapter 4 of the Law) also, unlawfully infringes fundamental constitutional rights.

Like my colleague, I too am aware that we are conferred with the obligation to act cautiously, reserved and restrained when exercising judicial review and examining the constitutionality of a law of the Knesset, which expresses the will of the elected officials, in particular at a time when this examination is conducted regarding a law that was

enacted within a relatively short time period following this Court's repeal of the previous version of the Law with the scope of the ruling High Court of Justice 7146/12 Adam v. The Knesset (September 16, 2013).

It should be noted that we do no take the unique complexity of the "infiltrators" phenomenon in Israel or its difficult implications, primarily the residents of south Tel-Aviv for granted. Notwithstanding, the legislator is required to adopt a legal solution that complies with the constitutionality demands and that the infringement sustained by the "infiltrators" on the one hand and the residents of Tel-Aviv and other cities on the other hand, shall be limited insofar and to the extent possible and proportional.

2. Therefore, I concur with the position of my colleague, Justice *Vogelman* whereby there is a need to dismiss the Petition in High Court of Justice 7385/14, accept the Petition of High Court of Justice 8425/13 and adopt the operative arrangements proposed by him in para. 197 of his ruling.

3. After I joined the position of my colleague Justice *Vogelman*, I received the erudite opinion of my colleague, Chief Justice, *A. Grunis*. My colleague, the Chief Justice, determined that within the framework of constitutional scrutiny, greater consideration should be given to "the legislator's latitude", in particular when it is the "second round" of constitutional scrutiny, in other words, when the Court examines an amendment that the legislator enacted to the law, after it was repealed by this Court in the "first round". In principle, I agree with the approach of my colleague, the Chief Justice, however, I disagree with my colleague, the Chief Justice, concerning its application in this case. Ultimately, my opinion remained the same, and as aforementioned, I concur with the position of my colleague, Justice *Vogelman*.

Justice

Justice I. Amit

1. Within the framework of the dialogue that exists between the judicial branch and the legislative branch, and following the repeal of Amendment No. 3 of the Law for the Prevention of Infiltration (hereinafter: *the Law*), the Knesset enacted Amendment No. 4 of the Law. The Amendment is two-fold – Article 30A of the Law and Chapter 4 of the Law. My colleague, Justice Vogelman, in his enlightening and voluminous ruling, reached the conclusion that the Amendment ought to repealed on both its facets. I will begin with stating that I concur with my colleague's conclusion with regard to Chapter 4 of the Law, however, I disagree with his conclusion concerning Article 30A of the Law.

In what shall follow I will briefly explain my position and I will explain its essence below. Amendment No. 4 of the Law modifies "the rules of the game" that were practiced until recently concerning the "infiltrators"; however there is a significant difference between Article 30A of the Law and Chapter 4 of the Law. Article 30A can be deemed the safeguard of the gates of the country; it observes the exterior, the future and

unspecified community of potential "infiltrators". Chapter 4 of the Law refers to the interior of the country and imposes harsh limitations on a specific group of individuals who are already in this country for several years. In fact, if not in theory, Chapter 4 of the Law retroactively modifies the "rules of the game".

Chapter 4 of the Law

2. My colleague Justice Vogelman dismantled Chapter 4 of the Law to all its components and factors, and appositely demonstrated that each one severally, jointly and cumulatively, creates an intense infringement on liberty and human dignity.

   It is possible to understand the State's concern that if we grant the "infiltrators" rights in the areas of employment – welfare – health – housing, it will constitute an incentive for additional "infiltrators". This is because the "infiltrators'" salaries in Israel will be transferred overseas in order to finance the arrival of others in their footsteps, and Israel will once again become an attractive destination for the "infiltrators". I also believe the State's statements that we are also concerned with networks of sophisticated smugglers whom transfer the "infiltrators" to "attractive" target countries in terms of the "infiltrators".

   However, this concern can be dulled by a series of measures, some of which have already been taken by the State, commencing from the prohibition of transferring money overseas, as mentioned by my colleague in para. 30 in his decision, the placement of a physical barrier by means of a fence and finally the normative barrier prescribed in Article 30A of the Law, whose activities are forward and future looking. Precisely because we are concerned with the sophisticated and organized smuggling networks, according to the level of economic attractiveness of the destination countries, and with respect to the contentions of the State which are pending this ruling – the various forms of telecommunications will transport the voice and transmit the message that the State distinguishes between a "fait accompli" with respect to the same individuals who arrived to our country before the amendment of the Law and those planning to arrive henceforth, following Amendment No. 4 of the Law.

3. As Senior Associate Justice Naor indicated in the *Adam* Case, this could have been the State's finest hour to locate humanitarian solutions for the "infiltrators" already living amongst us. It is possible that approximately the half a billion shekels that the State invested in locating, deporting, isolating and placement in quasi-detention conditions of several thousand amongst tens of thousands of "infiltrators", could have borne other benefits, had they been invested in the welfare of the residents of south Tel-Aviv and finding other solutions for those who already arrived in Israel. Agriculture is desperate for labor, hotels in Eilat are seeking employees in Jordan – would we have derogated from our part had we permitted employment in several branches and different locations throughout the country? The fact that the "infiltrators" chose to concentrate in south

Tel-Aviv, in particular the Shapira neighborhood, is not a coincidence but the result from the lack of policy which lasted for years.

However as judges we do not examine the wisdom of the law but its constitutionality, and the legislator is permitted to select a different way to handle the issue concerning "infiltrators" who are already in this country. As judges, we rely on the somewhat dry analysis of the provisions of the law in order to examine its constitutionality and this is what my colleague, Justice Vogelman did in his ruling. However, we shall not allow these matters to blur the real picture that has emerged before us. The practical relevance of Chapter 4 of the Law is the near imprisonment of individuals presumably for a period of "only" three years; however its culmination is uncertain. We are talking about guests, even if they are unwelcomed, that arrived in the country after many hardships, whether they are guests for an hour or for several years. Indeed, the entry of these individuals into our country was in an unlawful manner, however upon the quasi-reliance of the state of fenceless borders and the absence of any policy that existed at that time. We must remember that our case deals with people residing in Israel for several years, some of whom already built for themselves a socio-economic network, even if it is lax and poor. Even though we are not comfortable with the situation that has been created, we must lift the veil from the same "block" of "infiltrators" and look directly at each and every one of them. That is the essence and nature of humanity – the recognition that what we see from afar as a blurred audience is still a community that is comprised of people, and every person has a name, and every person has his own face, language and own way to exercise his human dignity. To the human countenance of each of the "infiltrators" we can add a touch of compassion towards the thousands who even underwent abuse in the Sinai Peninsula who arrived here physically and spiritually bruised. Amongst these individuals, there are those who never even planned to arrive to Israel, however, were abducted by smugglers and were held for ransom by the smugglers in the Sinai Peninsula, while being subject to horrendous atrocities.

4. My colleague, Justice Vogelman depicted the state of affairs in different European countries, which are also coping with immigration and refugee problems. We must follow in the footsteps of those countries, however as a country requesting to be included amongst liberal-democratic developed countries, we must also identify our place amongst the other countries, looking right and left and examine if we are secluded far down the line or in such a place or another within that line. The conclusion that arises from Justice Vogelman's illuminating extensive overview is that the Residency Centers created by the legislature in Israel, completely misses the characteristics and purposes of the residency centers in the different countries in Europe. Please note: the State is not required to accept a model of residency centers that were designed to solve housing and welfare problems of the "infiltrators", as was done in several countries in Europe. As for myself, although I do not believe that the management of the Residency Center by the Israeli Prison Services is what "characterizes" the Center as a detention facility, since the State is permitted to authorize anybody or entity on its behalf to handle various tasks that are time-bound, in accordance with the needs and skills required for such task, for example,

sending a military medical staff and soldiers from the Home Front Command to assist a foreign country after an earthquake or sending the police force for international state supervision in Haiti (High Court of Justice 5128/94 *Federman v. The Police Commissioner, Moshe Shahal*, PADI Journal 48(5) 656 (1995)). The arrangement authorizes the Head of Border Control to instruct upon the transfer into detention, it is undeniably tough and disproportionate; however it could have been cured without the comprehensive repeal of the provisions of Chapter 4. Yet, the provision for thrice a day reporting and the absence of the horizon for the residency period, are provisions which bring the "Holot" Residency Center closer to a facility bearing characteristics of a detention facility. For this there must be regret, and therefore there is room to repeal Chapter 4 of the Law in it current version.

5. As one who spent his childhood and youth in the Shapira neighborhood, the fate of the neighborhood and the adjacent Hatikva neighborhoods, whose streets I walked for many years, is very dear to my heart. The heart aches that the neighborhood, which was about to join the wave of development in Tel-Aviv, now bears meager infrastructures bearing most of the "infiltrators" issue. As mentioned above, it is not a fatal decree, and it is possible to adopt measures that will result in the dispersion of the population of "infiltrators" throughout the country. In any case, it is possible to wonder if the transfer of several thousand "infiltrators" to the Residency Center undeniably solves the overall problems associated with the mere existence of tens of thousands of "infiltrators" in Tel-Aviv. This Court is not exempt from examining the practical-utilitarian aspect of the matters, since a severe infringement on rights, which is not beneficial to any other important social interest, must be repealed since it is disproportionate.

6. Thus it follows that I concur with my colleague Justice Vogelman concerning the conclusion of Chapter 4 of the Law, however, we part ways with all that is stated regarding Article 30A of the Law, and I will discuss it below.

Article 30A of the Law

7. Article 30A of the Law cannot be compared to its precursor, which was created by Amendment No. 3 of the Law, whereby, it was possible to detain in detention "infiltrators" who were in Israel for several years for a period of three years, without charging them or being able to deport them to a different country. Article 30A reduced the period to one year.

   Here is the essence. In *the realm of time* Article 30A is forward-future looking, contrary to the previous state, where detainment in detention was applicable also to the population of "infiltrators" already in the country. *In the geographic sphere* Article 30A of the Law is directed beyond the borders of the State, as a normative barrier which supplements the physical barriers of the fence. *In the target-population sphere* – the population whom the Article refers to is an undefined group of potential "infiltrators", contrary to the previous version also applicable to the population of "infiltrators" in Israel.

8. In the *Adam* Case, I insisted that we are dealing with an equation of two unknowns:

> "Is there is a causal relationship between the *normative barrier* determined in the law and the dramatic decrease in the number of "infiltrators", or can this be attributed to the *physical barrier* in the form of the fence? Are we dealing with *immigration* or *refugees* – migrant laborers who are wishing to improve their economic status or refugees escaping for their lives or those that are on the continuum of the two polarities?" (emphasis in original - IA).

Time did not solve the two missing unknowns of the equation; however, it appears that the answers to these two questions are not binary. There is no doubt that the physical barriers in the form of a fence has considerable weight in intercepting the "infiltrators" phenomenon, and therefore we need to add additional factors such as the changes that occurred in the Sinai Peninsula and in Egypt. However, in all probability, the normative barriers and the knowledge of the change of the "rules of the game" also contributed their part. The "infiltrators" are not war refugees like the refuges currently flooding the neighboring countries to Syria. Eritrea and Sudan – the two main countries from where "infiltrators" arrive – are not neighboring countries to Israel, and Israel is not the only alternative for them. Therefore, there is weight to the economic attractiveness of Israel as a preferred target country for the "infiltrators" from these countries.

9. Therefore, there are implications when we examine the constitutionality of Article 30A of the Law. During our deliberations I asked the Petitioners' representatives, what tools can the State employ, in their opinion, in order to protect its borders. This question was left unanswered, and more specifically, the response was that the State is not permitted to adopt a measure such as Article 30A of the Law. I find it difficult to accept this answer, and it is also because of this point that I part ways from my colleague, Justice Vogelman.

My colleague also agrees that under different circumstances, and if it becomes clear that thousands will assemble near our borders, we will be faced with a different type of constitutional balance (para. 37 of his ruling). Similarly, the following was said by my colleague Justice Arbel in her ruling in the *Adam* Case:

> "Indeed, it is possible that as a last resort, if "infiltrators" continue to flock in the masses to the State of Israel, despite the physical and sophisticated barriers, the implications on the local society will only exacerbate despite the sincere fostered attempts of the State and its agencies to prevent it in many different ways, and the State of Israel will find itself under threat and fear of serious harm to its fundamental interests. Indeed, in this state of affairs it will be possible to say that the benefit is equivalent to the damage, and the Israeli society cannot endanger itself for residents of other countries" (*ibid*, para. 115).

Article 30A of the Law is one of the components that was specifically designated to prevent reaching such a state. Unfortunately, in light of the difficult situation in Africa, millions of people are seeking to arrive to western destination countries. The State's responsibility to these individuals that entered its territory is not the same responsibility to those who are not in its borders. For years, the State left its physical and normative borders open. Having reached this point, the State must ambivalently "pay", as well as in relation to compassion and humanity towards its guests that have crowded our cities for some time, even when we are dealing with uninvited guests. I reviewed this above when we discussed Chapter 4 of the Law. However, in contrast to a specific group to which the provisions of Chapter 4 are directed, the State is permitted to act and operate in order to prevent henceforth the arrival of additional uninvited guests, by means of placing normative watch towers in the form of Article 30A of the Law alongside the physical barrier of the fence.

While it is still possible to wonder about the effectiveness of the removal of thousands of "infiltrators" from the urban cities to the Residency Center, this is not the case with regard to the effectiveness of Article 30A of the Law. The figures presented by my colleague Justice Vogelman in para. 38 of his ruling are self-evident. Only 19 "infiltrators" entered into our country following Amendment No. 4 of the Law (amongst of which 13 are in detention). The dramatic decrease in the number of "infiltrators" raises questions concerning the second unknown in the equation concerning the characteristics of the "infiltrators", and strengthens the assumption that the economic incentive has considerable weight in the selection of the target country for "infiltrators". In any event, it appears that the Law contributed to the purposes of intercepting the "infiltrators" phenomenon by means of deterring potential "infiltrators".

The claim that the State is "firing a potent cannon" in the form of detainment in detention for a period of up to one year, as a response to the miniscule-scope phenomenon of the new "infiltrators" is flawed in the assumption that there is no causal relationship between the normative barrier in the form of Article 30A of the Law and the dramatic decrease in the number of "infiltrators" following the Amendment. However as aforementioned, the question of the causal relationship is one of the two unknowns in the equation, and when we are repealing a law of the Knesset, we must consider the possibility that there is in fact a causal relationship between the provisions of the Law and the great decrease in the number of "infiltrators". One of two possibilities: if the normative barrier in the form of Article 30A of the Law contributed to this result of deterring the potential "infiltrators", then clearly the amendment realized its purpose, and anyone who did not "infiltrate" following the Amendment, in any case, his liberty was not infringed in detention. However, if Article 30A did not contribute by itself to the dramatic decrease in the number of the "infiltrators", then its application to a reduced number of "infiltrators" dulls the general perception of the intensity of the infringement of liberty.

Please note: clearly, the infringement on liberty is examined from the perspective of the individual affected, while examining each individual's whole world. Notwithstanding, when we examine the constitutionality of a law, the numerical figures are also significant in the perspective of the total aggregate infringement on the liberty and welfare of tens of thousands of people, as the infringement of several people.

10. The examination of the purpose of the Law precedes the examination of the measures within the fundamental framework of proportionality. While the scope of the second sub-test examines the possibility of adopting less offensive measures, the purpose is "binary" – proper or not-proper, and therefore should not be amalgamated. One of the primary purposes of Article 30A of the Law is to assist in the interception of the "infiltrators" phenomenon. It is a proper purpose that is designated to protect a series of material interests of the State and the society in Israel – preserving the sovereignty of the State, its characteristics, its national identity and its social-cultural characteristics, alongside additional aspects including density, the welfare and economy, public security and public order. As the State was permitted to establish a physical barrier on its border from those seeking entry, it also permitted to establish a normative barrier as supplementary protective measures.

Is the deterrent purpose of the Law invalid from the outset following the infringement on liberty? Ordinarily, because of the element of "guilt" we tend to examine between *punitive* deterrence and *administrative* deterrence. However on the theoretical sphere, it is possible to claim that punitive deterrence is also flawed while infringing human dignity, while using the criminal as an instrument for the general benefit and not only for the independent purpose (see Rinat Sanajaro –Kitait – *Arrest: Depriving liberty prior to a Determination of the Deprivation of Liberty Prior to the Ruling* (162-163) (5771)). Furthermore, since punishment is individualistic, then in the event when we punish the accused who has been convicted and we add to his punishment an element for the sake of deterring others (see Article 40g of the Criminal Law, 5737-1977 following amendment 113), thus it also has a measure of retroactivity, since the accused certainly did not anticipate in advance that a harsher punishment would be imposed upon him for the sake of deterring others. However, the deterrence was designated to obtain certain social benefits, and it is a legitimate tool to apply to criminal and administrative policies. Administrative deterrence is not foreign to the legislator, and is expressed in several outlets, including inter alia, monetary sanctions in many laws in different fields, for example, environmental laws (see, for example, Articles 50-62 of the Clean Air Law, 5768-2008; Articles 58-69 of the Law for the Prevention of Asbestos Hazards and Dust Hazards, 5771-2011). Deterring others as an objective may be ethically problematic, since a person who is not guilty will pay the price with respect to an act of others for the sake of setting an example for others, however; even then I would be wary of categorically stating that all administrative deterrence is forbidden, since we are not dealing with absolute rights. In any event, the deterrent purposes of Article 30A are directed at the potential "infiltrator" himself, and not any other innocent person. The *unlawful* entry of an "infiltrator" to Israel is accompanied with a shade of "guilt" which

justly reinforces proportionate use of deterrence. Since the application of Article 30A is progressive, it is not stricken with retroactivity, and is directed towards the potential "infiltrator" himself along with others like him, whom are partners to the behavior which is the object of the deterrence. From this perspective, the placement of the potential "infiltrator", who willingly unlawfully "infiltrates" into the country, in detention is far from being a "bargaining chip" or an administrative arrest or assigned living, similar to the examples presented by my colleague Justice Arbel in the *Adam* Case (*ibid*, paragraphs 86-93). Moreover, as the Court noted with respect to assigned living:

> "The military commander is not permitted, therefore, to adopt any measure of assigned living for reasons that are solely for general deterrence. Notwithstanding, when the assigned living is just due to the danger posed by the person, the question is merely whether to exercise the authority, *there is no flaw that the military commander will consider considerations for the deterrence of others*. Thus, for example, this consideration may be considered in the choice between arrest and assigned living. This approach strikes an appropriate balance between the essential condition for the existence of personal danger – which the assigned living is designated to prevent – and the essential need for the preservation of safety in the region (High Court of Justice 7015/02 *Adjuri v. the Commander of the IDF Forces in the West Bank*, PADI Journal 56(6) 352, 374 (2002); my emphases – YA).

Similarly, there is no flaw in the legislative framework concerning immigration policies the State will also consider deterrent considerations, and the deterrent purpose does not make the potential "infiltrator" a means to the end. I will also note that my colleague, Justice Joubran, when reviewing the *Adam* Case with respect to the interception of the "infiltrators", believed that "it is plausible that the normative state prevailing in a certain state, may be part of the overall considerations, with the power to influence the decision of migrant workers to infiltrate to it. Similarly, there is no principle impediment from adopting measures which constitute "normative barriers" before these migrant workers" (*ibid*, para. 10). Similarly, my colleague, Justice Hendel believed that "the deterrence of the potential "infiltrators" is not a purpose in and of itself. It constitutes quasi intermediate-purposes, towards the realization of the primary purpose of the law (*ibid,* para.2).

The proper purpose is surprisingly protecting of the sovereignty of the State and all that it entails, by means of progressively negating the economic incentive for the arrival to Israel, which is directed towards an unspecified group of potential "infiltrators", which can therefore justify the inherent deterrent purpose in detainment in detention for a period of up to one year. However, this is alongside additional purposes of the identification and characterization of the "infiltrator", locating his country of origin, obtaining documentation for him and formulating departure channels from Israel to other countries. These purposes are interrelated. From this perspective, and as the State noted in its response, insofar and to the extent that the purposes of the law will be realized and the

"infiltrators" phenomenon will decrease, thus there will not be a need to exercise it and the infringement on the right of liberty and dignity will decrease, if at all.

11. Hence the proportionality element.

There is a correlation between the degree of the derived social benefit from the Law and the degree of the infringement on a constitutional right. The third proportionality secondary test is perceived as a test of values of consideration and balance between the infringement and the benefit. Insofar, and to the extent that the infringement is more severe, the need of the public interest must be greater in order to justify the infringement. My colleague Justice Vogelman examined and determined that the Law failed the final hurdle in the form of the third proportionality sub-test and that "the marginal supplement or the "extra benefit" of the Law for the realization of the deterrent purpose, does not appropriately correlate to the to the damage sustained by the "infiltrator" detained in detention for a period of one year, to the infringement on the right to liberty and dignity entailed.

I disagree with this conclusion, since in my opinion the "extra benefit" is material in light of the robust public interest of preserving the State's sovereignty and as a result preserving the national-social-economic resilience, as the main purpose of the underlying purposes of Article 30A.

12. According to my colleague's opinion, the primary change in Article 30A, in contrast to Amendment No. 3 which we repealed in the *Adam* Case, is the reduction of the period of detainment in detention from three years to a maximum period of one year. This is without a doubt an actual change, a material-qualitative reduction and not only quantitative. However, in my opinion, the primary change in Amendment No. 4 is the prospective application of Article 30A which is progressive towards an unspecified group of potential "infiltrators", and its non-application to a specified group of "infiltrators" already in Israel.

I will note that the distinction between a specified group and unspecified group is relevant in all fields of law. For example, in administrative law we tend to distinguish between the security of a general unspecified group since it is then a *policy* that is subject to change and the administrative of a concrete promise to the insured or to a concrete group, when the Court can then instruct upon its enforcement within the framework of the structure *the administrative security* (see Yoav Dotan "Administrative Security for the Public" *Haifa University Law Review 5*, 465 (5760)). In torts, negligence towards a specified group may cause imposing liability on the public authorities, contrary to negligence towards an unspecified group which may exempt the authority (see Israel Gilad "Tort Liability of Public Authorities and Public Employees" (Part A) *Haifa University Law Review 2*, 339, 366 (5755)).

13. Within the framework of the legislative *latitude* granted to it, the legislator selected to instruct upon detainment in detention of the "infiltrators" who entered the State following Amendment No. 4 of the Law for a period of *up to one year*, when the Head of Border Control is permitted to immediately release an "infiltrator" brought before him if he is convinced that his detainment in detention will risk his health due to his age or the condition of his health, or if other unique humanitarian grounds exist, for example, human trafficking, slavery and abuse en route to Israel (Articles 163-164 and 168 of the State's response). During the course of the one year period, the detainment in detention is subject to periodic review *once a month* by the Detention Review Tribunal for Infiltrators. During the course of the year, the legislator established two intermediate stations regarding "infiltrators" who may submit an asylum request, in the form of allocating periods of time until *three months* for the handling of the request and until *six months* for the receipt of an answer for the request, and if not there is a *duty* to release them from detention (Articles 30A(b)(5) +(6) of the Law). Hence, the legislator distinguishes between those who raise immediate and tangible claims for political asylum and those who do not, while the submission of the request may accelerate the applicant's release, at the very least, the examination of the issue weakens the claim of arbitrary detainment in detention. Insofar and to the extent the request will be dismissed, we have prima facie indication that we are not dealing with asylum seekers or war refugees, and moreover there is a possibility to submit an appeal to the Appeals Tribunal on the dismissal of the asylum request, and thus there is judicial review on the decision of the Head of Border Control.

In my opinion, the fabric of the provisions of Article 30A of the Law as described above, also dulls the "marginal supplement" of the infringement on the "infiltrator's" right to liberty and dignity.

14. In short, I do not believe that the legislator's choice to determine detainment in detention for a period of one year, is what conveys Article 30A of the Law into the area of non-constitutionality, after it passed, also according to my colleague's opinion, the barriers of the proper purpose and the two initial secondary tests of the proportionality principle. On the contrary, the added damage that will be sustained by the unspecified group of potential "infiltrators" that will choose to unlawfully enter into Israel, and to date the number is miniscule, is smitten with the overwhelming benefit of the Law for the sovereignty of the State. Therefore, I believe that Article 30A of the Law firmly stands in the center of the third secondary test of the proportionality principle.

15. The enlightening overview of my colleague, Justice Vogelman, with respect to what is occurring in the rest of the world did not go unnoticed by me, and it indicates that the common upper limit for detention is up to six months, as is practiced in the United States. Exceptions include Australia – a western country with vast territory and resources – whereby according to its laws it is possible to detain an illegal immigrant in detention for an unlimited period of time, and in Greece, Malta and Italy, whereby according to their

laws it is possible to detain in detention for a period of up to 18 months (see the *Adam* Case, para. 7 of Justice Hendel's ruling).

It is interesting to note that Australia, Greece, Malta and Italy are countries on the "first line" in the face of the "infiltrators" *by sea*, which could explain the strict regulations in these countries towards the illegal immigrants. In this respect, Israel's status, is even more unique than these countries, since it is *the only western country accessible by land to* Africa (contrary to the long border of Israel, Spain maintains two small colonies in Morocco which is dealing with the "storming" phenomenon of its borders in order to enter the colonies). Notwithstanding it is worthy to note the unique geopolitical state of Israel as a dense, small country in land and its population and the surrounding ring of hostilities, and we should note that almost a quarter of the "infiltrators" are originally from northern Sudan, a country hostile to Israel. There is no other country in Europe where the nationals of significantly hostile countries enter its territory. Needless to say that the State of Israel – unlike the European Union countries which can coordinate amongst themselves and set up different arrangements and agreements concerning the "infiltrators" – cannot do so with its neighbors.

16. Finally, and not last in the order of its importance, we will mention that this is the second time that this matter reaches the tables of the Supreme Court in a relatively short timeframe. The matter before us concerns a law which is a temporary order for a period of three years; a law that formulates the policies of the legislator in a very sensitive issue of immigration and settlement in the State of Israel, which is at the core of the legislative and executive branches prerogative. As such, there is a need to permit constitutional *latitude* to the legislator and be required to declare the repeal of a law only as a last resort and as a derivative of the degree of the infringement on human rights. I am not convinced at all that the additional impact of several months in detainment – in comparison to some of the countries in Europe – justifies repealing the Law.

In my opinion, the significance of Article 30A of the Law is greater than Chapter 4 of the Law, since this Article is the normative watch tower projecting over the fence, looking towards the desert and forward-looking. I wish I was wrong, however the repeal of a Article could have impacts on the motivation of the smuggling networks and the "infiltrators" attempting to cross the border or throwing themselves on the gate in the scorching sun, and anyone would be exasperate in light of this current situation, which is better to avoid in the first place.

17. *In summary*: considering that there is a necessity of time for the sake of identifying and characterizing the "infiltrators" and the treatment of their requests; considering that there is a necessity of time to formulate and exhaust departure channels that will secure the well-being of the "infiltrators" to third world countries; considering that the application of Article 30A is forward-looking; considering that the Article looks outside towards an unspecified group of potential "infiltrators" and not towards the "infiltrators" already in the country prior to the enactment of the Law; considering that the legislator reduced

the period to one year; considering that during the course of that year periodic monthly reviews are conducted by the Detention Tribunal; considering that the State is compelled to handle within three months and render a decision within six month the requests of asylum seekers; considering the possibility of release based upon humanitarian and other grounds, for example, trafficking, slavery and abuse; considering the presumed effectiveness of the Law in light of the dramatic decrease of more than 99% in the number of "infiltrators" following the Amendment to the Law; considering the unique geopolitical state of the State of Israel and similar arrangements in other western countries on the first line of the "infiltrators"; considering that we are dealing with the repeal of a law, considering that the Amendment to the Law follows the repeal of Amendment No. 3 of the Law; considering that this is a question of immigration policy which is at the core of the legislative and executive branches prerogative – in consideration of all of these, I believe that there is no place to repeal the arrangement in Article 30A of the Law.

18. In conclusion, I concur with the opinion of my colleague, Justice Vogelman, concerning only the repeal of Chapter 4 of the Law however, regarding Article 30A of the Law I opine that it should be left intact.

Justice

Chief Justice A. Grunis:

> "With all due respect to the law of the Knesset: it is still a law that expresses the will of the sovereign, the people, and therefore the law is the vanguard, as is the Court. Is it necessary to repeat this banal truth?...Indeed, today the law is that the Basic Laws conferred upon the court the authority to repeal laws. This authority, in my opinion, is essential in an enlightened society.. it must be preserved well, so that it will be used in the proper cases, and for this very reason to be vigilant that is be used correctly and not as an impediment."
>
> High Court of Justice 7111/95 *The Local Center for Government v. the Knesset*, PADI Journal 50(3) 485, 496 (1996) (hereinafter – *Local Center for Government Case)*.

1. Eighteen years have passed since those words of rebuke were echoed by Justice *I. Zamir*. We are compelled to repeat and memorize it even today. The declaration of the repeal of a law is not trivial. In constitutional petitions, it is imposed upon the Court to act with restraint, vigilance and unique continence, lest it substitute its discretion in place of the legislator. The Court should not fill the shoes of the legislator, and in practice determine, instead of the legislator, the proper constitutional arrangement. Indeed, there is no doubt that the role of judicial review is important for the protection of human rights in Israel. However, under no circumstances, should it constitute a measure for the replacement of

the legislator's discretion by the Court. In light of these warning signs, we have already determined in the past that each of the two phases of constitutional scrutiny (the phase of infringement and the phase of proportionality) is an important objective in the comprehensive constitutional analysis, and therefore it is not appropriate, as a rule, to omit the first phase (see for example, Criminal Appeals 4424/98 *Silgado v. The State of Israel*, PADI Journal 56(5) 529, 553-554 (Justice *T. Strasberg-Cohen*) (2002); High Court of Justice 2442/11 *Shtenger v. The State of Israel*, para. 24 of my opinion (June 26, 2013) (hereinafter –*Shtenger Case*)). It was further stated in the past that prudence must be exercised when interpreting a certain constitutional right, in order to prevent the contempt and dilution of constitutional rights (see for example, High Court of Justice 7052/03 *Adalah – The Legal Center for Minority Rights of Israeli Arabs v. The Minister of Interior*, PADI Journal 61(2) 202, 395-396 (Senior Associate Justice (retired) *M. Cheshin* (2006) (hereinafter –*Adalah Case*)). In light of this we also repeatedly recognized the "latitude" in the framework of which the legislator may select the proportionate measure to realize the purpose of the legislative bill, amongst an array of tools and measures at his disposal.

This is reinforced in this matter. This is not the first time that constitutional scrutiny is exercised regarding an amendment to the law dealing with "infiltrators". As is known, and we will revert to this, approximately one year ago this Court repealed the previous amendment to the relevant law. Thereafter the Law was amended a second time, while the Knesset paid attention to the comments and criticisms of the Court. It is apparent, that in this instance the Court must be all the more so prudent when it is subjecting primary legislation under constitutional scrutiny.

2. With considerable interest I read the comprehensive opinion of my colleague, Justice *U. Vogelman*, who provided an in depth and profound review. My colleague ultimately suggests that we instruct upon the comprehensive repeal of Amendment No. 4 of the Prevention of Infiltration Law (Offenses and Jurisdiction) 5714-1954 (hereinafter – *Law for the Prevention of Infiltration*, or – *the Law*), concerning the detainment of "infiltrators" in detention for a period of one year, and the establishment and operation of the Residency Center for "infiltrators" residing in Israel. I disagree with my colleague on many points. I will already state now that I do not agree that there is a need to repeal the provision which permits detaining an "infiltrator" in detention for a period of up to one year. Notwithstanding, I do agree with my colleague that the provision prescribing thrice a day reporting for attendance registration per day in the Residency Center for "infiltrators" (Article 32H(a) of the Law) infringes in a disproportionate manner the constitutional right to liberty, and therefore must be repealed, insofar and to the extent with regard to reporting in the afternoon hours. Nevertheless, in my opinion an identical constitutional conclusion relating to the arrangements prescribed by the Knesset with respect to Amendment No. 4 of the Law for the Prevention of Infiltration, with respect to the Residency Center, cannot be derived. In other words, my opinion is that there is no constitutional flaw in the provisions arranging the establishment and operation of the Residency Center save for the exception requiring thrice a day reporting. My

opinion is primarily based upon the proper consideration to be given, in my view, to the necessary prudence when exercising judicial review on the primary legislation of the Knesset. My stance requests to provide significant expression to the *latitude* granted to the legislator. My constitutional conclusion is derived, inter alia, upon the basis of the concern from contempt and dilution of important constitutional rights.

Background

3. On September 16, 2013, the ruling in High Court of Justice 7146/12 *Adam v. The Knesset* (the primary opinion was written by Justice *E. Arbel*) was rendered. In the aforementioned proceeding, an extended panel of nine justices considered the question of constitutionality concerning the arrangement determined by the Knesset in 2012, permitting the detainment of "infiltrators" in detention for a period of three years (hereinafter – *the Previous Petition*). This arrangement was set forth in Article 30A of the Law for the Prevention of Infiltration, within the framework of Amendment No. 3 of the Law. All nine judges of the panel, with whom I was enumerated, unanimously determined, that the aforesaid arrangement does not comply with the limitations clause of the Basic Law: Human Dignity and Liberty, since it infringes, in a disproportionate manner, the constitutional right to liberty. With respect to the constitutional remedy, in the majority opinion of eight justices it was determined, with whom I was also enumerated (contrary to the dissenting opinion of my colleague Justice *N. Hendel*) to repeal the various arrangements in Article 30A of the Law for the Prevention of Infiltration. This is all detailed in the ruling given in the Previous Petition.

4. Following the repeal of Article 30A of the Law by this Court, the Knesset enacted an additional amendment to the Law for the Prevention of Infiltration, which is at the focus of the proceedings before us, which was published in the Official Gazette in December 2013 (Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Order), 5774-2013, legislation ledger 2419, 74; hereinafter – *Amendment No. 4*)). Amendment No. 4 includes two new lawful arrangements for handling the "infiltrators" phenomenon in Israel. *The first arrangement* (Article 30A of the Law for the Prevention of Infiltration in its new version) deals with the detainment of "infiltrators" in custody, in other words, a closed Residency Facility. According to the current version of Article 30A of the Law, the maximum duration of detainment of an "infiltrator" in detention is up to one year (subject to certain exceptions set forth in the Law). Likewise, the new arrangement determines, inter alia, that its application shall be prospective, thus it will only be permissible to detain in custody those "infiltrators" that entered into Israel following the effective date of Amendment No. 4 of the Law. *The second central statutory arrangement* in Amendment No. 4 of the Law is set forth in Chapter 4 of the Law, which deals with the establishment of a Residency Center for "infiltrators". The arrangement determined by the legislator with respect to the Residency Center is very detailed. It was arranged, inter alia, within the framework of extensive secondary legislation which was enacted following Amendment No. 4 of the Law. In its essence it stipulates that an "infiltrator" detained in the Residency Center is

required to be there during all the hours of the night (between the hours of 10:00 PM through 6:00 AM) without any possibility of leaving. In contrast, during the hours of the day the "infiltrator" is free to leave the Residency Center. Nevertheless, he must attend three times a day for reporting registration. According to the regulations promulgated by virtue of Chapter 4 of the Law, the residents in the Center must report for reporting at any time within the range of the following hours: 6:00-7:30 AM, 1:00-2:30 PM and 8:30-10:00 PM (see Regulations for the Prevention of Infiltration (Offenses and Jurisdiction) (Reporting and Exit of the Resident in the Residency Center) (Temporary Order), 5744 – 2013, (hereinafter – *Reporting Regulations in the Center*)). It is imperative to note that the provisions of Chapter 4 of the Law, concerning the establishment and operation of the Residency Center, were set forth as a temporary order for a period of three years commencing from the effective date of Amendment No. 4 (see Article 14 of Amendment No.4).

5. As was indicated, my opinion is that, there is no constitutional flaw of any kind in Article 30A of the Law for the Prevention of Infiltration in its current version. As aforementioned, I do not believe that we ought to repeal the arrangement prescribed by the Knesset in the matter of the detainment of "infiltrators" in custody for a period of one year, at best. With respect to the Residency Center, I concur with my colleague, Justice *Vogelman*, the provision determining the thrice a day reporting requirement in the Residency Center, for the sake of reporting recordings, infringes in a disproportionate manner the constitutional right to liberty, and therefore as aforesaid ought to be repealed. Notwithstanding, in my opinion the identical constitutional conclusion cannot be derived with respect to the remaining arrangements prescribed by the Knesset in Chapter 4 of the Law. My position is, that there is no place to repeal the arrangements concerning the Residency Center, save for only the arrangement which determines the thrice a day reporting requirement, such that the reporting requirement will only be applicable twice a day: in the morning hours and the evening hours, but not during the afternoon. I will explain below.

Article 30A of the Law for the Prevention of Infiltration – Detainment in Detention

6. I will open the discussion with the question of the constitutionality of the arrangement permitting the placement of the "infiltrators" in detention for a period of one year, at most (Article 30A of the Law for the Prevention of Infiltration). As was indicated, I joined the opinion of the ruling in the Previous Petition whereby the arrangement by its virtue permitted a period of detention for three years at most, contradicted the Basic Law: Human Dignity and Liberty. In his opinion, my colleague, Justice *Vogelman*, determined that even the detainment of the "infiltrators" in detention for a period of one year at most, constitutes a constitutional infringement which does not comply with the provisions of the limitations clause. I cannot concur with this conclusion. I signed off my opinion in the Previous Petition as follows:

"…[] our ruling, which determines the repeal of Article 30A of the Law, is true and correct for now, and in light of the existing circumstances. *A material adverse change in the conditions shall justify renewed judicial review of the matter, if the Knesset shall enact a similar law*. Moreover, our ruling refers to the Law that prescribes detainment in detention for a period of three years. *Despite the circumstances that exist today, in my opinion, there is no impediment to enact a new law that shall permit detainment in detention for a significantly shorter period than three years*." (*ibid*, para. 5 of my opinion [my emphases –A.G.]).

7. The figures presented to us indicate that after the ruling in the Previous Petition, there was no material adverse change, with respect to the entry of new "infiltrators" to Israel. On the contrary, apparently there was a favorable change in the circumstances. Thus, already in 2011, 1,400 "infiltrators" entered into Israel, per month, and in 2012 there was a change and the number of "infiltrators" began to decline. Later, in the first four months of 2013, less than 10 people "infiltrated" into Israel per month (see para. 2 of my opinion in the Previous Petition). In the response affidavit on their behalf, Respondents 2-5 of High Court of Justice 8425/13, represented by the State Attorney's Office (hereinafter – *the Respondents*) noted that in all 2012, only 45 "infiltrators" entered into Israel. The Respondents also noted and emphasized that the number of "infiltrators" in 2013 represents a decrease of approximately 99.5% (!) in contrast to the number of "infiltrators" in the previous year, 2012 (approximately 10,000 "infiltrators"). In the ruling of the Previous Petition, I already noted that it is not clear if the sharp decline in the number of "infiltrators" can be attributed to the physical barrier that was placed on the Israeli-Egyptian border or the Law which permits detaining "infiltrators" in detention. In addition, I also noted, as did some of my colleagues, that it is possible to attribute the trend of decline of the entry of "infiltrators" into Israel to a certain combination of the mentioned factors and even additional reasons.

8. Following the ruling in the Previous Petition the legislative branch decided to set a new arrangement, which also permits the detainment of "infiltrators" in custody. We will briefly review the differences between Article 30A of the Law in its previous version, the Article that was repealed by the ruling in the Previous Petition (hereinafter – *the Previous* Arrangement). And the new arrangement determined by the Knesset in the same Article of the Law (hereinafter – *the Current Arrangement*). First, the maximum period for detention was reduced, as aforementioned from three years to one year. In addition, contrary to the Previous Arrangement, the Current Arrangement is applied prospectively, as explicitly determined by the legislator (see Article 15 of Amendment No. 4, which determines that "the provisions of Article 30A of the primary Law, according to its wording in Article 5 of this Law, shall be applied to an "infiltrator" who enters Israel following the effective date of this Law"). Therefore, the provision concerning detention for one year is not applicable to the "infiltrators" who are already in Israel, but merely to the "infiltrators" that enter the country following the effective date of the Amendment (which is its publication date in the Official Gazette – December 11, 2013). In light of the limited scope of the recent entry of "infiltrators", it is clear that the

application of the Article of Amendment No.4 significantly reduced the number of "infiltrators" that could be detained in detention by virtue of the new arrangement. It is imperative to note that Article 30A of the Law in the Previous Arrangement, which was repealed by this Court, was designated to apply to the entire population of "infiltrators", including those whom resided in Israel on the effective date of Amendment No. 3. It should be noted, that while the Previous Arrangement determined that the Head of Border Control *is permitted* to release an "infiltrator" on a guarantee if "three years transpired from the commencement date of the detainment of the "infiltrator" in detention" (Article 30A (c) of the Law in its previous version), whereas the Current Arrangement uses the word *must*, and determines that "the Head of Border Control shall release an "infiltrator" on a guarantee if one year transpired from the commencement date of the detainment of an "infiltrator" in detention" (Article 30A in its current version; however, see the exceptions that appear in Article 30A(d) of the Law). In addition, the determined time period for bringing the "infiltrator" before the Head of Border Control was reduced. According to the Previous Arrangement it was mandatory to bring the "infiltrator" before the Head of Border Control within seven days from the commencement date of detainment in detention. In the Current Arrangement the period was reduced to five days (see Article 30A(a) of the Law in its previous version and in its current version). The period for bringing the "infiltrator" before the Detention Review Tribunal for Infiltrators was also reduced. According to the Previous Arrangement it was mandatory to bring him before the Tribunal within 14 days from the commencement date of the detention (Article 30E(1)(a) of the Previous Arrangement). According to the new arrangement, in its current version, the period was reduced to ten days (Article 7 of Amendment No. 4). It should be noted that the Previous Arrangement determined that with regard to an "infiltrator" in detention he must be brought before the Detention Review Tribunal for Infiltrators for periodic examinations every 60 days (Article 30D (a)(1) of the previous version). According to the Current version, he must be brought for periodic review every 30 days (Article 6 of Amendment No. 4). Thus, the Knesset internalized, to a great extent, its obligation to adapt the statutory arrangement to the constitutional requirements.

9. In any event, it is clear that the central change between the Previous Arrangement and the Current Arrangement is the reduction of the upper threshold of detainment in detention from a period of three years to one year, and the prospective application of the new arrangement. It is imperative to note, that even the additional changes which were noted reduced the degree of the harm to the "infiltrators". It seems, however that at this phase there is no need to delve into all the new arrangements that were determined within the framework of Article 30A in its current version, in order to reach the obvious conclusion that even the new arrangement infringes the constitutional right to liberty which is anchored in Article 5 of the Basic Law: Human Dignity and Liberty. However, if only because of the authority to detain "infiltrators" in detention. Clearly, the mere physical detainment of a person in detention infringes his constitutional right to liberty (for an overview concerning the manner in which the constitutional right to liberty was interpreted in the Israeli case law, see Aaron Barak *Human Dignity – The Constitutional Right and its Subsidiaries*, Volume A 343-344 (2013)). In my view, this conclusion

warrants that the constitutional right to liberty be interpreted in the broad sense, due to its significance and central role in itself, and as a measure for promoting other rights (See *Shtenger Case*, para. 28 and the references *there)*. When we determined that even the new arrangement in Article 30A of the Law for the Prevention of Infiltration infringes the constitutional right to liberty, we must approach and examine if it complies with the conditions of the limitations clause.

10. The limitations clause which is fixed in Article 8 of the Basic Law: Human Dignity and Liberty, stipulates the validity of a constitutional infringement provided that it complies with four cumulative conditions: the violation is by law or by virtue of express authorization; the law is befitting of the values of the State of Israel; it was enacted for a proper purpose; and to an extent no greater than is required (the proportionality condition). I agree with my colleague, Justice *Vogelman,* that in our case the first two conditions are met, in other words it is an infringement "by law" and that the infringing law is befitting of the values of the State of Israel. I also agree with my colleague that the law was designated for a proper purpose. It should be noted, in this context, that the Respondents emphasized in their answer that the new amendment, with respect to the possibility of detainment in detention, was designated to realize the two purposes. The first purpose is to permit the authorities to act and identify the "infiltrator" and formulate a "channel of departure" for him from the country. The second purpose, according to the claims of the Respondents, is to prevent the recurrence of the "infiltrators" phenomenon, in other words, to serve as a deterrent measure regarding potential "infiltrators". I agree with my colleague's position that the first purpose is proper (para. 51 of his opinion). With respect to the second purpose – preventing the recurrence of the "infiltrators" phenomenon – my colleague abstained from stating a resolute position (para. 52 of his opinion). As for myself, I am prepared to assume that even the purpose for deterring potential "infiltrators" may be deemed a proper purpose; however, I accept that it is not necessary to rule on the matter. In any event, I summarized my position concerning the question of the purpose of detainment of "infiltrators" in detention in my opinion in the Previous Position, and what I said there is true for the current Petition:

> "I am willing to accept that there are quite a few advantages in detaining the "infiltrators" in detainment. Therefore, in due course, and given that they may be deported from Israel, the authorities will be able to do so with ease; as long as they are in detention they are not competing in the workforce opposite Israeli employees; they do not have the possibility of carrying out crimes that harm Israeli citizens and residents, etc. I would even go so far to assume that the achievement of the deterrence of potential "infiltrators" is a proper purpose under the circumstances, and it is possible to indicate additional advantages (*ibid*, para. 4 of my opinion).

11. With regard to the proportionality condition: my colleague, Justive *Vogelman*, is prepared to assume that the new arrangement passes the first proportionality secondary test: the existence of a rational relationship between the purpose and the measure selected for its

realization; the test that examines the least offensive measure which infringes the constitutional right. It is acceptable to me that the new amendment passes the aforementioned two tests (see my statements in my opinion in the Previous Petition, para. 3). The dispute between my colleague and I is whether Article 30A of the Law, in its current version, complies with the third condition of proportionality in the third secondary test, also known as the "strict proportionality test". In the framework of this test the Court is compelled to examine whether an "appropriate relationship" exists between the benefit derived from the law and the constitutional infringement. Contrary to my colleague's position, I believe that the response to this question should be negative. In my opinion, the law's infringement on the constitutional right to liberty is significantly less than the infringement than the effect led by the original arrangement, which was repealed in the ruling of the Previous Petition. Therefore, in light of the significant reduction of the period of detainment in detention from three years to one year and considering the legislative *latitude* conferred to the legislator, I do not believe that there is room to instruct upon the repeal of Article 30A of the Law for the Prevention of Infiltration.

12. As is known, within the framework of constitutional scrutiny, significant weight is granted to the *latitude* of the legislator. It should be noted that the principle in the matter of *latitude* was afforded different names in the case law and legal literature, including "the proportionality domain", "the infringement domain", "the restriction domain", "the consideration domain", etc. (see Appeal on Administrative Petition 4366/02 *The Ninety Bullets - Restaurant, Club Members v. The Municipality of Haifa*, PADI Journal 58(3) 782, 812 (2004) (hereinafter –*Ninety Bullets Case*)). The rule is that within the scope of the latitude, the legislator is permitted to select measures that it wishes to adopt for the sake of the realization of the purpose, provided that they are proportionate see, for example *Ninety Bullets Case*, pp. 812-813; High Court of Justice 8276/05 *Adalah – The Legal Center for Minority Rights of Israeli Arabs v. The Minister of Defense*, PADI Journal 62(1)1, 37 (Chief Justice *A. Barak* (retired) (2006); High Court of Justice 10662/04 *Hassan v. the National Insurance Foundation*, para. 58 of Chief Justice *D. Beinisch's* opinion (February 28, 2012) (hereinafter – *Hassan Case*)). Please note, a court that conducts constitutional scrutiny does not assume, *necessarily*, that the legislator has only one sole legislative (and constitutional) possibility to realize the underlying purpose of the legislation, and that it shall only choose that one alone. The judicial review practiced by us presumes that in a majority of the cases the legislative branch has an array of tools and measures to realize the purpose it selected to promote. Indeed, proportionality acknowledges, by its nature, the *latitude* of legislative discretion (an approach whereby the discretion of the legislator gradually diminishes insofar and to the extent that we progress with the judicial scrutiny, see Aaron Barak *Proportionality in the Law – the Infringement of a Constitutional Right and its Limitations* 508 (hereinafter – *Barak, Proportionality in the Law*). Therefore, if the selection of the legislator, which received its expression in a certain provision of the law, does not deviate from the leeway, the Court ought to respect the legislator's choice. The words of Chief Justice *D. Beinisch* in High Court of Justice 2605/05 *The Academic Center for Law and Business v.*

The Minister of Finance, PADI Journal 63(2) 545, 623 (2009) (hereinafter – *the Privatization of Prisons Case*) are correct and true here as well:

> "When there are different options that may meet the proportionality requirement, the legislator is given legislative latitude, which we refer to as the "proportionality domain", in which the legislator is permitted to select the option that it sees fit. The boundaries of the *latitude* granted to the legislator in a concrete case are determined by the court in accordance with the essence and the interests on the agenda. *The Court will intervene in the legislator's decision only when the measure it selected substantially deviates from the legislative latitude given to it in a clear disproportionate manner*." [emphases added – A.G.]).

It should be noted that we can find in the case law different statements from which we can learn that not every deviation from the *latitude* shall justify the Court's intervention, but rather a *substantial* or *significant* or *clear* deviation thereof, or when the measure selected by the legislator is *clearly* disproportionate (see for example, Civil Appeal 6821/93 *The United Mizrahi Bank v. Migdal Kfar Shitufi*, PADI Journal 49(4) 221, 438 (Chief Justice *A. Barak*) (1995) (hereinafter – *The United Mizrahi Case*); High Court Justice 1661/05 *The Local Council of the Gaza Strip Beach v. the Israeli Knesse*t, PADI Journal 49(2) 481, 693 (2005) (hereinafter – *Gaza Strip Beach Case*); Civil Appeals 6659/06 *Doe v. The State of Israel*, PADI Journal 62 (4) 329, 375 (2005) (hereinafter – *Law of Imprisonment of Illegal Combatants Case*); *Privatization of Prisons* Case, *ibid*; *Hassan* Case, para. 58). It should be noted, nonetheless, that in the legal literature there is an opinion that expresses that *any* deviation from the *latitude* and not only a significant or substantial deviation , in theory, justifies a constitutional remedy (see *Barak, Proportionality in the Law*, pp. 507-508). Nevertheless, it seems that this position does not reflect the actual law (for an overview of the differences between the two approaches see Guy Davidov "Constitutional Scrutiny in Matters with Budgetary Implications", *Hapraklit* 49 345, 364-366 (2008) (hereinafter – *Davidov*). Nonetheless, it may be possible to reconcile between the two different approaches. It appears difficult to accept that in every case of judicial scrutiny of the legislator's domain or *latitude* will be identical. It appears that this matter has great importance to the nature and essence of a specific constitutional right and even the characteristic of the constitutional infringement. In other words, the domain changes in consideration of the relevant constitutional right and its infringement thereof (also see *the Ninety Bullets Case*, p. 813).

13. It is also pertinent to note that when we are dealing with judicial review of the primary legislation of the Knesset, the acknowledgment of the constitutional *latitude* is a clear expression of the *principle* of separation of powers (see *United Bank Mizrahi Case*, p. 438). The principle of separation of powers is the cornerstone of the system of governance in Israel (see High Court of Justice 4491/13 *The Academic Center for Law and Business v. The Government of Israel*, para. 15 of my opinion (July 2, 2014); Aaron Barak A Judge in a Democratic Society 103-104 (2004)). Therefore, the legislator's *latitude* outlines the "limited boundaries" of the Court, within the framework of the

principle of separation of powers, when it examines the constitutionality of the primary legislation of the Knesset. We shall reiterate that the declaration of the repeal of a law is a serious matter and ought not to be easily done by the Court (High Court of Justice 1715/97 *The Office of Managing Investors in Israel v. the Minister of Finance*, PADI Journal 51(4) 367, 386 (1997). Therefore, the Court must respect the discretion given to the legislator. As long as the selection of the legislator does not deviate from the *latitude* granted to it, the Court should not intervene in the primary legislation of the Knesset. Indeed, the acknowledgment in the *latitude* primarily designated to manifest that the legislator has an array of measures and tools to realize the underlying purpose of the law. Notwithstanding, at the same time the principle of *latitude* is intended to manifest judicial restraint and prudence that the courts are obligated to follow during judicial review of primary legislation of the Knesset. Chief Justice *A. Barak* reviewed this issue in *United Mizrahi Bank:*

> "The question that a judge needs to ask himself is not what is the law that needs to be adequately balanced between the general and individual needs that the judge would have enacted if he were in the House of Representatives. The question that the judge must ask himself is does the law fall within the boundary of the limitations domain. *The Court must examine the constitutionality of the law and not its insight. It is not a question whether the law is good, efficient or just. The question is whether the law is constitutional…*" (*United Mizrahi Bank* Case, p. 438 [emphasis added – AG]).

14. Indeed, "…when applying the constitutional test set forth in the limitations clause on legislation of the Knesset, the Court will act with judicial restraint, prudence and continence" (High Court of Justice 4769/95 *Menachem v. The Minister of Transportation*, PADI Journal 57 (1) 235, 263 (2002) (hereinafter –*Menachem Case*), for if not the Court may exchange its discretion with the discretion of the legislator (High Court of Justice 1213/10 *Nir v. The Chairman of the Knesset*, para. 27 (Chief Justice *D. Beinisch*) (February 23, 2014)). Therefore, it appears that the legislator's *latitude* is ultimately derived from this judicial prudence (*Gaza Strip Beach* Case, p. 553). It should be noted that the legislative leeway, that serves us when examining the proportionality conditions, is routinely analogous to the domain of rationality customary in the field of administrative law. This is also because within the domain of rationality the Court recognizes the selection of several reasonable options is granted to the governmental authority and not the Court (see *Barak, Proportionality in the Law*, p. 509). Nevertheless, it is important to remember that here there are significant differences between the grounds for proportionality and the grounds for rationality (see High Court of Justice 5853/07 *Emunah – The Women's National Religious Movement v. The Prime Minister*, para. 9 of my opinion (December 6, 2007); *Davidov*, p. 364). In any event, it is clear that repealing a law for being unconstitutional is not similar to repealing an administrative provision or secondary regulation for being unconstitutional. We must remember that "with the repeal of a law for being unconstitutional we are dealing with the repeal of a

law *that was enacted by the body selected by the people*" (*Gaza Strip Beach* Case, ibid; [emphases added –AG]).

15. My colleague, Justice *Vogelman*, believes that detaining "infiltrators" in detention for a period of one year at best causes a disproportionate infringement on the constitutional rights. Scrutiny of the opinion of my colleague, Justice *Vogelman*, raises the inevitable questions: what is the period of detainment in detention which according to his opinion would meet the proportionality conditions. My colleague does not supply a response to this question, however it is implied that the arrangements set forth in other countries are preferable to the arrangements set forth by the Knesset. Please note, from the words of my colleague we learn that the legislator is permitted, in theory, to et forth a lawful arrangement permitting the detainment of "infiltrators" in detention, however, for a period that is less than one year. Nonetheless, it is difficult to distinguish from the words of my colleague what is the maximum period for detainment in detention, which in his opinion meets the proportionality conditions, and what are the exact boundaries for the legislative *latitude* granted to the legislator in the matter which is our focal point in these proceedings. I will assume that even according to my colleague's opinion the legislator has some *latitude*. It is clear that there is an inherent difficulty to respond to the question what is the length of time that will meet the test. This is the reason that even in the Previous Petition no precise answer was given. I will mention that in the ruling of the Previous Petition I noted that "there is no impediment, in my opinion, to enact a new law that will permit detainment in detention for the duration of *a significantly shorter period than three years*"(*ibid*, para. 5 of my opinion; emphases added AG). I deliberately refrained from mentioning an exact figure, since had I done so I would be stepping the shoes of the legislator. This is not my role as a judge.

16. In this case, one must consider that we are referring to a question of constitutionality with "quantitative" characteristics. Namely, contrary to cases where the *mere existence* of a specific arrangement is under judicial review (for example, the arrangement which was at the focus in the *Privatization of Prisons* Case)), in the case before us, the *mere detainment in detention* is not the focus but rather the *length of the period of detainment in detention*. In other words, the exact constitutional question in our case is whether the specific balance point selected by the legislator, upon the spectrum of possibilities before it, meets the conditions of the Basic Law: Human Dignity and Liberty. We shall note that a constitutional question with similar characteristics was on the agenda in the well-known case that was clarified in High Court of Justice 6055/95 *Zemach v. the Minister of Defense*, PADI Journal 53(5) 241 (1999) (hereinafter – *Zemach Case*). In this case, the Court reviewed the constitutional arrangement that determined the maximum length of the period of arrest of a soldier by a disciplinary officer (96 hours; the arrangement was repealed by the Court). It should be noted that in the *Zemach* Case

the Court did not refer to *latitude* (see *Davidov*, p. 368, footnote 97). My opinion is that it is not advisable to ignore this important principle. In any event, after reviewing other cases that were clarified in our case law we can learn of the difficulty presented before the Court, when it is requested to examine the third proportionality secondary test, and when it is dealing with the constitutional issue with "quantitative" characteristics. Thus, for example, in the *Menachem* Case, the question of proportionality arose relating to a certain provision in the Transportation Ordinance [New Version] which conditioned the receipt of a permit to operate a taxi by payment of a fee of NIS 185,000. The Court answered this question in the affirmative, however did not ignore the embedded difficulty in the judicial scrutiny that is based upon "…an assessment that is with intrinsic uncertainty, […] [that] involves professional forecasts and considerations that are not always in the Court's field of expertise" (*ibid*., p. 263). In another case (whereby regulations and not primary legislation were attacked) the question that arose regarding whether the addition of NIS 150 to the amount of a certain fee maintains a reasonable relationship between the benefit and the damage, within the framework of the proportionality test in the "strict" sense. The judges that adjudicated the aforesaid proceeding were not naïve in the aforesaid matter (see High Court of Justice 2651/09 *The Civil Rights Society in Israel v. The Minister of Interior*, paras. 20-25 of the opinion of my colleague *Y. Danziger*; paras. 22-27 of the opinion of my colleague Justice *M. Naor* (June 15, 2011)).

17. In my opinion, when the Court is required to apply the second and third proportionality conditions, namely the question of a reasonable relationship between the benefit and the infringement on a constitutional right, and when doing so with regard to the constitutional question that is "quantitative" in its characteristics, similar to the examples presented above, it must give considerable weight to the *latitude* granted to the legislator. This is primarily due to the additional consideration that must be considered, which may affect the legislative latitude: concern from a judicial error (see and compare to my opinion in the *Adalah* Case pp. 517-518; and see *Davidov*, pp. 369-370). This concern significantly intensifies when we are dealing with a constitutional question with quantitative characteristics. Please note, it should not be construed from my words that that there *latitude* should be unmitigated beyond what is necessary to the point that it subjugates constitutional decision. This Court correctly noted that the prudence required during judicial review of the legislation of the Knesset, "should not lead to stagnation" (*The Gaza Strip Beach Case*, p. 553). Notwithstanding, there will be cases whereby the domain will be relatively broad, and on the other hand there will be cases where the domain is narrower, or may not exist at all (*the Ninety Bullets* Case, p. 813; also see para. 12 above). My position is that when we are dealing with a constitutional question with "quantitative" characteristics there is a heightened duty to consider the *latitude* granted to the legislator to determine the degree or rate (whether it is the length of a period, an amount or any other quantitative characteristic.

18. According to the circumstances in the matter before us we cannot obviously ignore the volume of the infringement on the constitutional right of personal liberty. The new arrangement permits detainment of "infiltrators" in custody for a period of one year at most, and in exceptional cases it is even permitted to extend the period. Placing a person in detention, in a closed Residency Facility where one cannot freely enter and exit constitutes a significant infringement on the "hard core" constitutional right of liberty. It should be noted that in light of this conclusion I do not see the necessity to review if the new arrangement also infringes the right of dignity. Nevertheless, on the other hand, one must remember that the infringement on the constitutional right of liberty in the Current Arrangement is less offensive than the inherent infringement in the Previous Arrangement. This is with respect to both the time an "infiltrator" may be detained in detention and the applicability of the new amendment. Likewise, we must remember that the constitutional purpose of deporting illegal "infiltrators" from Israel is important and essential. This purpose allows the State to examine and exhaust the different departure channels for the "infiltrators" from Israel. When examining the degree of benefit of the Law, we must consider the sovereignty principle which grants the State discretion when determining its immigration and settlement policies, with all that it entails. In light of these matters, especially in consideration of the more limited application of the Current Arrangement, such as the reduction of the period permitted to detain an "infiltrator" in detention, I arrived at the conclusion that the legislator did not deviate from the legislative *latitude* granted to it. I will reiterate that in the Previous Petition I noted that in my view, there is no impediment to enact a new law that will permit detainment in detention "for a period that is significantly shorter than three years." The legislator did in fact significantly shorten the period (to a period of one year) and set arrangements that limit the infringement on the constitutional right of liberty. The fabric of the arrangements prescribed by the legislator in the new amendment significantly reduced the infringement on the constitutional right. Therefore, when examining the extent of the relationship between the obtained benefit of the Law and the infringement on the constitutional right, I arrived at the conclusion that the legislator's decision is within the boundaries of such leeway. We must respect this decision and not intervene.

19. In his opinion my colleague, Justice *Vogelman*, interpreted other arrangements that were determined by countries overseas, with regard to the detainment of "infiltrators" in detention. The in-depth overview of my colleague indicates that in most of the western world countries, the periods prescribed permitting the detainment of "infiltrators" in detention were shorter than one year. Notwithstanding, as indicated in my colleague's overview there were other countries (Australia, Greece, Malta and Italy) whereby the arrangements prescribed were more stringent than Israel. With this regard, I concur with the

position of my colleague, Justice *I. Amit*, who correctly pointed out that the basic differences between the unique challenges which Israel faces in the area of immigration and those which most of the other countries face as mentioned in the overview presented by my colleague, Justice *Vogelman* (see para. 15 of the opinion of my colleague, Justice *Amit*). Suffice it to say that Israel is essentially the single western country with a significant land border with the African continent (by means of the Sinai Peninsula). Likewise, it should be noted that for other reasons, including geopolitical and diplomatic reasons, the possibility for any person to leave Israel to one of these bordering countries is limited. As a result, the possibilities of departure from Israel of "infiltrators" who entered is extremely limited. Clearly, the situation is quite different with the majority of the countries in Europe.

20. I will consent with the following: perhaps it is advisable that the legislator determine a period of detainment in detention that is shorter than one year. Nonetheless, some may claim that the maximum period for detainment in detention is six months, similar to majority of the western world countries, which is the proper standard for the maximum period of detainment of the "infiltrators" in detention. In light of the aforementioned, my opinion is that the selection between the periods of detainment in detention of one year or six months is clearly part of the legislator's *latitude* and is certainly not an evident deviation. Therefore, there is no place for the intervention of the Court in the legislative arrangement prescribed by the Knesset. The ruling by this Court that one detainment period is preferable over another period, when both periods are within the confined of the legislator's leeway, is as if the Court filled the shoes of the legislator. Justice *Beinisch* correctly noted in the *Menachem* Case (p. 280) that –

> "… the requirement that the legislator select a less offensive measure of the constitutional right to an extent no greater than is required for the sake of realizing the law *does not mean that the legislator must always adhere to the lowest rung of the ladder*. Such a ruling would be too difficult for the legislator, who would not be able to penetrate the barrier of judicial review…" [emphasis added – AG].

The approach of my colleague, Justice *Vogelman*, leads to a situation where there is practically no *latitude* that remains for the legislator. According to my colleague's opinion, one year is too long a period and apparently the period of six months is acceptable to him. And what about a period of eight months?! The presentation of the question in this manner suggests that if we accept my colleague's opinion, this Court becomes the entity that practically determines what the precise norm is, without leaving any actual *latitude* for the legislator. I cannot consent to this constitutional stance, according to which the Court becomes the legislator, if not in theory than certainly by practice.

Therefore, if my opinion shall be considered, we shall refrain from declaring the repeal of Article 30A of the Law for the Prevention of Infiltration.

Chapter 4 of the Law for the Prevention of Infiltration – the Establishment of a Residency Center for the Infiltrators

21. The second tier of Amendment No. 4 of the Law for the Prevention of Infiltration is the establishment of a Residency Center for the Infiltrators, and determining its characteristics and methods of operation (Chapter 4 of the Law). My colleague, Justice *Vogelman*, described in detail the arrangements set forth in Chapter 4 of the Law regarding the establishment of the Residency Center (paragraphs 82-85 of his opinion). I will mention in brief that the transfer of an "infiltrator" residing in Israel to the Residency Center, whether or not he is detained in detention, is done by the Head of Border Control (hereinafter – *the Commissioner*), if he did not find any difficulty in executing the "infiltrator's" deportation (Article 32D(a) of the Law). The Commissioner is permitted to issue to the infiltrator a "residency order" requiring him to reside in the Center until his departure from the country or until any other time (Articles 32D(a) and 32D(b) of the Law; for discussion of the criteria which are at the basis of issuing orders of stay see paragraphs 86-89 of the opinion of my colleague, Justice *Vogelman*). We shall note that the question whereby there is no duty to conduct a hearing *prior* to issuing a residency order is an issue that is pending in this Court (Appeal on Administrative Appeal 2863/14 *Ali v. the Ministry of Interior – The Population and Immigration Authority*). Within the framework of the noted proceeding the respondents indicated that commencing from June 6, 2014 a "pilot" has been implemented whereby a hearing is held prior to granting a residency order, and not afterwards. The aforesaid proceeding is pending since the question concerning the rule of the orders of stay issued until the respondents commenced with the implementation of the aforesaid "pilot" has not yet been determined (see the partial ruling from August 10, 2014 in the aforesaid Appeal of Administrative Appeal 2863/14). In any event, the Law for the Prevention of Infiltration further states that when a residency order is applicable to an "infiltrator: he may not receive a visa and permit for residency in Israel in accordance with the Entry into Israel Law, 5712-1952 (Article 32D(d) of the Law; hereinafter – *the Entry into Israel Law*). Moreover, the Law clarifies that an "infiltrator" residing in the Center is not permitted to work in Israel (Article 132 of the Law). Nevertheless, provisions were prescribed in the Law which permit the employment of a resident in the Center in maintenance and other ongoing services jobs, in consideration of "reasonable compensation" (Article 32G (a)-(b) of the Law); however see Article 32G(c) of the Law which determines that no employer-employee relationship *shall apply* between the resident in the Center and the State; and see Regulations for the Prevention of

Infiltration (Offenses and Jurisdiction) (Employment of Residents in Maintenance Jobs and Ongoing Services) (Temporary Order), 5774 – 2014).

22. One of the arrangements with the greatest impact on the characteristic of the Residency Center was set forth in Article 32H of the Law, concerning the attendance in and the exit from the Residency Center. Article 32H(b) of the Law determines that the Residency Center will be "closed" during the hours of the night (between 10:00 PM through 6:00 AM) and that during these hours the resident shall not be outside the Center. With regard to the hours of the day, Article 32H(a) of the Law sets forth that the resident must report three times a day for the purposes of registering attendance, during the times set forth in the regulations promulgated by the Minister of Interior, with the consent of the Minister of Public Security. It is imperative to note right now that Article 32H (d) of the Law empowers the Minister of Interior to set forth the reporting times in the Center for the sake of registering attendance, provided that "the aforesaid reporting times shall be prescribed in such a manner which prevents the infiltrator from working in Israel." It has already been noted above that the Minister of Interior promulgated regulations in the matter of reporting times in the Center, which are the Reporting Regulations in the Center. The aforesaid Regulations set forth that the residents in the Center must report for registration within the range of the following hours: 6:00-7:30 AM; 1:00-2:30 PM and 8:30-10:00 PM. It should be noted, nevertheless, that Article 32H(c) of the Law the Head of Border Control was authorized to, according to the request of the resident and according to special circumstances, to exempt the resident from reporting or from the prohibition of being outside the Residency Center during the hours of the night, for a period of time that shall not exceed 48 hours and in exceptional circumstances for a period that exceeds 48 hours (medical hospitalization of the resident or family member of the first degree). It should be noted that the aforesaid Article permits appealing to the Detention Review Tribunal for Infiltrators, which is permitted to examine the Commissioner's decision. The Respondents' Response stated that correct as of March 5, 2014, the Commissioner *authorized* approximately 96% of the applications for granting an exemption from reporting according to Article 32H(c) of the Law (see Article 218 of the Respondents' Response).

23. The provisions of Chapter 4 do not determine a maximum period of time where it is possible to instruct the "infiltrator" to reside in the Residency Center. Likewise, also no grounds of release for the mandatory residence in the Residency Center were determined. Notwithstanding, Article 14 of Amendment No. 4 explicitly stipulates that part of the provisions determined therein, including *all* of the provisions concerning the Residency Center will be in effect for a period of three years from the effective date of the Law. My colleague, Justice *Vogelman*, did an extensive review of the remaining provisions set forth in Chapter 4 of the Law, including: those provisions concerning the operation of

the Center and the preservation of security, safety, order and discipline (Article 32J of the Law); those that confer different powers to the employees of the Center (Articles 32N, 32O, 32P and 32S of the Law); and the provisions that authorize the Head of Border Control to instruct upon the transfer of an "infiltrator" from the Residency Center to detention, following the conduction of a hearing, in the case of violation or recurring violations of the residency conditions in the Center. This is in accordance with the different timeframes set forth in the Law (Article 32T of the Law).

24. In the introductory marks it is imperative to note the unequivocal position of my colleague, Justice Vogelman, is that within the scope of the *latitude* granted to the legislator "…there is also the possibility of establishing *open* Residency Centers" [emphases in original – AG], which could provide a response to the inherent difficulties of an unorganized immigration phenomenon (para. 97 of his opinion). In other words, my colleague does not invalidate the possibility of the principle of establishing open Residency Centers for the residency order (also see para. 40 of his opinion in the Previous Petition, where my colleague wrote: "it is possible to compel the residency order to live in *open or semi-open* Residency Centers, while imposing proportionate restrictions upon the freedom of movement" [emphases added – AG]). It should be noted that this similar approach of my colleague was expressed in the Previous Petition by some of the other justices enumerated on the panel there. Thus, for example, my colleague, Justice *E. Arbel*, who penned the primary opinion in the Previous Petition, clarified (in para. 104) in her ruling there that –

> "I believe that it is possible to formulate an array of alternate measures that may be adopted in order to obtain the requested purpose in the least offensive manner. Thus, for example, it is possible to create different reporting requirements and different guarantees…; the residence restrictions upon the "infiltrators" in a manner that will permit the State to control and supervise the places where they settle and the dispersal to different populated areas…; *it is possible to consider compelling the "infiltrators" to reside overnight in the Residency Facilities prepared for them and which will satisfy their needs, and at the same time it will circumvent any other hardships for them…"* [emphases added – AG].

25. My colleague, Justice *Vogelman*, believes that this Court must instruct on the repeal of Chapter 4 *in its entirety*, and declare the repeal of all the arrangements that permit the operation of the Residency Center. Alongside his fundamental position that there is no principle flaw in the mere existence of an open or semi-open Residency Centers. In his opinion, my colleague refers to four elements in the Law, where he finds a problem with each one of them. *First*, the provisions

that set forth the thrice a day reporting requirement for attendance registration, and more specifically, the requirement to report for registration during the afternoon hours. *Secondly*, my colleague reviews the arrangement that stipulates that the Residency Center will be operated by the Israeli Prison Services. In this context, my colleague refers also to the authorities conferred upon the employees of the Center. *Thirdly*, my colleague refers to the fact that there is no provision in Chapter 4 which restricts the time of residency in the Center. This is beyond the provision in Amendment No. 4 whereby Articles of the Law concerning the Residency Center will be in effect for the duration of a period for three years. *Lastly*, my colleague refers to the authority granted to the Head of Border Control, for the transfer of an "infiltrator" from the open Residency Facility to detention. My colleague primarily focuses, in his opinion, on the fact that there is no "proactive judicial review" on such types of decisions.

While I agree that there is a flaw in the constitutional arrangement requiring the residents in the Center to report three times a day for attendance registration, and this ought to be repealed, I do not agree with my colleague relating to his conclusions regarding the remaining arrangements which he reviewed. In any event, the proposed conclusions by my colleague, whereby all of Chapter 4 comprehensively must be repealed, are not acceptable to me.

26. I will begin with the common factor between the position of my colleague, Justice Vogelman, and my position. Even according to my opinion, the reporting requirement for thrice a day registration constitutes a difficult and significant restriction on the constitutional right of liberty. Indeed, this infringement is not equivalent to the severity of the infringement on the right to liberty sustained as a result of detainment in detention, namely in a closed Residency Facility where one cannot leave whatsoever. Notwithstanding, the thrice a day reporting requirement for attendance registration, comes close to almost the absolute deprivation of the right to liberty. This is because as a result of this requirement the resident in the Center is required to report for attendance registration during different times which significantly and considerably make it difficult to leave the boundaries of the Residency Center. In this context, there is a duty to review two facts which intensify the infringement of the constitutional right in this case. First, at the foundation of the provision determined in the Law, with respect to the requirement to report for three attendance registrations a day, there is the obvious assumption of the legislator, whereby attendance registration (three in number) can be spread out throughout the entire day, in other words the morning hours, afternoon hours and evening hours. Accordingly, the legislator did not clearly stipulate that the reporting requirement for registration will occur in the hours in the morning, afternoon and evening hours. The legislator left the authority to determine the exact time intervals to the Minister of Interior. However, it is clear that the intent of the legislator was that the second reporting requirement in number (every day) shall

occur during the afternoon house and not the morning hours or afternoon hours. Therefore it can be construed, inter alia, and also what is stated in the end of Article 32(d) of the Law, which stipulates that the reporting times will be determined in the regulation by the appointed Minister "*…in a manner which will prevent the "infiltrator" from working in Israel"* [emphases added – AG]. Indeed, the Reporting Regulations in the Center the Minister set forth the range of hours for reporting in the morning hours, afternoon and evening hours. The second requirement which makes the constitutional infringement particularly difficult is with regard to the geographical location of the Residency Center. As is known, the only Residency Center that was established following the enactment of Amendment No. 4 of the Law, which is also named "Holot". The Center is located in the south of the country, within the precinct of Regional Council Ramat Hanegev, about 60 kilometers away from Beer Sheva (see Order for Prevention of Infiltration (Offenses and Jurisdiction) (Announcement of the Residency Center for Infiltrators) (Temporary Order), 5774-2013). The requirement to report for attendance registration even during the afternoon hours, alongside the geographical location of the Residency Center, makes the possibility of leaving the Center more difficult in practical terms. As a result, the constitutional infringement on the right to liberty is substantially impaired, as noted by my colleague. Given this conclusion, I do not see the need to review the question whether the requirement to report for attendance registration in the afternoon hours, in itself, infringes the constitutional right to dignity, more specifically the right to personal autonomy, as my colleague determines in his opinion. It is sufficient for us to rule that there is a severe infringement of the right to liberty in order to conduct an examination, whether the infringement meets the conditions of the limitations clause. I will clarify that I did not overlook the Respondents' claims that the "infiltrators" residing in the Center can make use of the public transportation and that there is intent to increase the amount of bus lines and their frequency. This should facilitate the possibility of leaving the Center during the day. Notwithstanding, I did not see any place to attribute considerable weight to this fact, considering, as aforementioned, the geographical location of the Residency Center and in light of the requirement to report for attendance registration during the afternoon hours as well.

27. I agree with my colleague, Justice *Vogelman*, that the requirement imposed upon the residents in the Residency Center to report thrice a day for attendance registration (and in light of the distribution of the reporting hours) does not fulfill the proportionality condition in the "strict" sense (namely, the third proportionality secondary test) and therefore constitutes an infringement on the right of liberty that does not reasonably meet the benefit of the Law. As noted by my colleague, there are two central underlying purpose of the establishment of the Residency Center: preventing the settling down and integration of the "infiltrators" in the work force and providing a response to their human, economic and social needs. While my colleague refrained from expressing a

position with regard to the question if the first mentioned purpose is proper, I believe that the second reason is proper. Likewise, my colleague mentions the Petitioners' claims whereby the real purpose of the arrangement prescribed in Chapter 4 of the Law is to "break the spirit" of the "infiltrators" with the goal that they agree to voluntarily leave Israel (the Respondents, on their part, *adamantly insisted* that this is not the purpose of the Law). Like my colleague, I will not review the question whether this is in fact one of the purposes of the Law. Moreover, my colleague examines the proportionality condition solely in connection with the purpose concerning the prevention of the settling down of the "infiltrators". This is because none of the litigants referred to the proportionality condition in relation to the purpose concerning providing a response for the needs of the "infiltrators". I agree in this sense the arrangement passes the first and second subtests of the proportionality condition. Nevertheless, and similar to my colleague, I too believe that the reporting requirement for attendance registration during the afternoon, practically makes the Residency Center a center that is "virtually closed" by its characteristic. This is particular in light of the location of the Center. I agree with my colleague, and based on his reasons, that the provision does not present a proportionate and proper relationship between the infringement on the constitutional right of liberty and the derived benefit as a result of the desire to prevent the settling down of the "infiltrators" and their integration into the Israeli workforce.

28. In summation, the provision of Article 32H(a) of the Law, which stipulates that "A resident shall report to the Center three times a day, according to the times stipulated in the Regulations in accordance with sub-Article (d), for the purpose of the attendance registration", disproportionately infringes the constitutional right to liberty. As a result of this provision an "infiltrator" residing in the Center shall report for attendance registration also in the afternoon hours. The reporting requirement during the afternoon hours in addition to the morning and evening hours makes the Residency Center such that it cannot be defined as an "open" or "semi-open" Center. These reporting requirements prevent a practical and viable option of leaving the Residency Center during the day, in light of the location of the Center. For these reasons, I believe that we must declare Article 32H(a) of the Law for the Prevention of Infiltration as a provision of the law which is unconstitutional, which contradicts the Basic Law: Human Dignity and Liberty and thus must to be repealed.

29. As I noted, my colleague, Justice *Vogelman* is not satisfied with the repeal of Article 32H(a) of the Law. According to his opinion, all the *provisions* of Chapter 4 of the Law ought to be repealed, and thus repeal the comprehensive arrangement set forth by the legislator concerning the establishment of a Residency Center for "infiltrators". My colleague arrived at this conclusion after he "adjoins" the inherent infringement of Article 32H(a) of the Law to three elements that raise problems in his opinion. These elements are: the lack of "proactive judicial review" regarding the decision to transfer an

infiltrator from the Residency Center to custody; the management of the Center by the Israeli Prison Services; and the lack of a provision limiting the time of residency in the compound. With respect to these elements, and *only* these elements, my colleague's opinion is that "not only are some of the arrangements of Chapter 4 of the Law disproportionate, but the *accumulation of the perspectives* that are not constitutional in this Chapter taint the entire arrangement and make it disproportionate" (para. 187 of my colleague's opinion [emphases added – AG]). All this, as mentioned, even though my colleague does not find a flaw in the *mere* possibility of establishing an open residency center for "infiltrators" (according to his opinion even in the Previous Petition). I cannot concur with my colleague, Justice *Vogelman's* approach. First, I do not believe that the three mentioned elements teach us about the problematic character in the intensity indicated by my colleague. However, moreover, even if I would agree with my colleague that some of the arrangements that he reviewed give rise to a constitutional problem, I still would not agree with him that the "accumulation" would entail the appeal of the *entire* constitutional arrangement, which permits the establishment and operation of the Residency Center. I will first review the three elements referred to by my colleague.

30. The first constitutional arrangement that my colleague, Justice *Vogelman* (save for the reporting hours for registration) refers to, concerns the provision set forth by the legislator relating to the management of the Residency Center by the Israeli Prison Services and the personnel (paras. 136-146 of his opinion). It should be noted that the exact lawful provision that my colleague refers to is Article 32C of the Law which stipulates that "The Minister of Public Security declared that the Residency Center shall appoint a senior warden for the purposes of managing and operating the Center, whom shall be the Center Manager; the Commissioner shall appoint warders who shall be employees of the Center, provided that they have undergone the appropriate training as has been instructed." Ultimately, *my colleague refrained* from determining whether Article 32C of the Law *in itself* established an independent infringement on the constitutional right. In his words, it is sufficient to determine that the provision "intensifies and exacerbates" the infringement on the "infiltrators'" constitutional rights "and project on the proportionality of the entire arrangement" (para. 146 of his opinion).

My colleague's approach appears to be rigid. As I noted, I do not believe that we must instruct on the appeal of the *entire* Chapter 4 of the Law due to the "aggregate infringement" on the "infiltrators'" rights, and I will elaborate on this issue later. In any event, it is possible to indicate considerable difficulties with the underlying approach for the operation of the Residency Center by the Israeli Prison Services as an arrangement which establishes, *in itself*, an independent infringement on the "infiltrators'" rights. I believe that we must be wary of making sweeping statements which cast doubt, even if only implied, on the skills of the Israeli Prison Services personnel and the degree of their compatibility to perform the roles conferred upon them. It should be noted that in order to examine

the existence of the aforesaid infringement we must ask ourselves what is the alternate, hypothetical system of law if the Israeli Prison Services were not in charge of the operations of the Residency Center. In my view, the inherent difficulty of the possibility that the entity that will manage the Residency Center will be a private or other non-governmental entity (such as non-profit organizations or foundations) cannot be ignored. We shall mention, in this context, the *Privatization of Prisons* Case which examined the constitutional arrangement which determined that a prison would be established and managed by a private entity, and not the State. This Court ruled that the aforesaid arrangement infringes the right to personal liberty, in that it "subordinates the prisoners to a private organization which operates on economic motives (*ibid.*, pp. 612-613) (Chief Justice *D. Beinisch*)). In light of the aforesaid, it can be understood that the preferred approach is that the entity that operates the Residency Center is the Israeli Prison Services and no other entity. I do not ignore the fact that the manner of the treatment of the "infiltrator" must be different than the treatment of an individual in prison after being convicted by law. This, and if only for the reason that the "infiltrator" was not criminally convicted, and his residence in the Residency Center is on the basis of the lack of the possibility of his deportation from Israel. Nevertheless, the management of the Residency Center by a private entity raises at least some of the issues addressed by this Court in the *Privatization of Prisons* Case.

31. My colleague, Justice *Vogelman*, notes that the expertise of the Israeli Prison Services personnel is not the management of an open Residency Center whose characteristics are civil and not punitive. Nonetheless, in Article 32C of the Law the legislator clarified that "the Commissioner shall appoint warders who shall be employees of the Center, *provided that they have undergone the appropriate training as has been instructed*" [emphases added – AG]. Therefore, we see that the warders that serve in the Residency Center are not the "same" warders that serve in the "regular" prisons, and therefore in my opinion there is a response to the difficulty indicated by my colleague. Indeed, even though my colleague referred to the fact that the warders serving in the Residency Center underwent appropriate training and they do not wear warder clothing but "civilian" clothing. It can be further claimed that it is appropriate that a governmental entity which is not the Israeli Prison Services be in charge of the management of the Residency Center, for example, welfare officials or other personnel in public service. Except that the selection of a solution of such kind, over the Current Arrangement, in my opinion is clearly within the confines of the legislator's latitude. In any event, such an arrangement may raise difficulties from another angle. What I mean is that the presence of many people centralized in one Residency Center, may by its nature entail various problems in the disciplinary perspective and other perspectives. Therefore, for the sake of order in the Residency Center , it would not be unrealistic to determine that the entity of the Israeli Prison Services is the most qualified to prevent various disruptions of order, after they underwent the appropriate training aimed at unique treatment of the civilian population.

I only presented my position in brief concerning all the issues relating to entrusting the management of the Residency Center to the Israeli Prison Services. This is even though my colleague, Justice *Vogelman*, does not determine that Article 32C of the Law establishes *in itself* an independent infringement on a constitutional right. Later, I will question whether this Article, alongside the other arrangements in the Law, in order to indicate a cumulative infringement of the "infiltrators'" rights, in a manner which justifies the repeal of Chapter 4 of the Law in its entirety.

32. An additional issue in connection with the Residency Center, which is referred to by my colleague, Justice *Vogelman*, is with respect to the length of the period of detainment in the Residency Center. My colleague indicates the difficulty deriving from such that there are no grounds for release that were stipulated in Chapter 4 of the Law and that no maximum period of residency in the Center was determined. Nevertheless, my colleague emphasizes, and rightfully so, that from a practical sense the time of residency in the Center is not unrestricted, since Chapter 4 of the Law was enacted as *a temporary order that is valid for three years* (see Article 14 of Amendment No. 4). I agree with my colleague, that the absence of grounds for release, and the unrestricted time of the period of detainment in detention (subject to the validity of the Temporary Order), establish a constitutional infringement on the right to liberty. Naturally, an infringement on the right to liberty is closely associated with the length of the period of the person's detention, whether in a closed detention facility or an open or semi-open residency center. It should be noted that in light of my conclusion in relation to the infringement on the right to liberty, I will refrain again from the possibility of viewing the aforesaid arrangement as an infringement also on the right to dignity and the question whether there is an infringement on the right to dignity because of the lack of uncertainty concerning the release date from the Residency Center. Nevertheless, I do not agree with my colleague that the Current Arrangement does not pass, at this time, the proportionality conditions. This is due to a number of cumulative reasons. *The first reason* is that there is no need to examine the Current Arrangement regarding the maximum residency period, considering the conclusion whereby the arrangement determining the reporting requirement in the afternoon hours be repealed. If my opinion will be accepted and we will instruct upon the repeal of the arrangement requiring the "infiltrators" in the Residency Center to report for attendance registration in the afternoon hours, then it will weaken the intensity of the infringement on the right to liberty deriving from the length of the period of residency in the Center. Likewise, it is imperative to consider that even though no specific grounds for release from the Residency Center were determined, it still does not mean that an "infiltrator" who received a residency order cannot leave the Center. Therefore it can be construed from Article 32D(a) of the Law, which arranges the authority of the Head of Border Control to issue to the infiltrator a residency order . In the

residency orders the Head of Border Control is permitted to determine until such time that the "infiltrator" will reside in the Center. This was set forth in the beginning of Article 32X(a) of the Law:

> "If the Head of Border Control found that there is a difficulty in the execution of the deportation of the "infiltrator", he is permitted to instruct that the "infiltrator" reside in the Residency Center until his deportation from Israel, until his departure or any other such time that he shall determine…:

Therefore we see that the Head of Border Control is permitted to limit the period of residency in the Center "until such time that he shall determine" and not necessarily until the deportation date of the "infiltrator" from Israel or until his departure. Please note that even if the Head of Border Control did not limit *in advance* the period of detainment ("until any other such time that he will determine"), it is clear that it is possible to appeal before him, after the commencement of the residency, with an application to limit the period. If the Head of Border Control refuses to do so, his decision is subject to judicial review. Therefore based upon the absence of specific grounds for release in the Law it cannot be construed that the residency period in the Center cannot be limited.

33. *The second reason* that currently justifies, in my opinion, the conclusion that the arrangement passes the conditions of the limitations clause, is the fact that we are dealing with an arrangement prescribed in the Law as a temporary order for a period of three years. The case law is that this court must adopt increased judicial restraint when it is examining the constitutionality of the temporary order. "A 'permanent' law is not like a 'temporary' law when examining the constitutionality of the law" (*The Regional Council of the Gaza Beach*, p. 553; and see the *Adalah* Case, p. 450 (Senior Associate Justice *M. Cheshin* (retired)). The Court's intervention in a temporary order is far-more reaching than intervention in an "ordinary" law of the Knesset (see Mordechai Kremintzer and Yael Cohen-Riemer "The Cumulative Effect of Proportionality: A New Tier in the Constitutional Scrutiny in Israel", *The Israeli Institute for Democracy* http://www.idi.org.il/BreakingNews/Pages/191.aspx (hereinafter - *Kremnitzer and Cohen-Riemer*). It should not be construed from my statements, obviously, that the restriction of the validity of the law, like a temporary order, should "immunize" the law from judicial review. Nevertheless, it has already been determined in our case law by this Court that "… there may be cases whereby the Court will decide that on the basis of the considerations of judicial review to consider the 'availability' of a law as being 'temporary' as grounds for its proportionality, and on this basis to assume – *not to rule* – because a law meets the remaining tests for constitutional scrutiny" [emphases in the original – AG] (High Court of

Justice 21/01 *Ressler v. The Israeli Knesset,* PADI Journal 56(2) 699, 713-714 (Justice *A. Matza*) (2002) (and the references, *ibid*.).

34. As I noted, the repeal of the reporting requirement during the afternoon hours, along with the fact that we are dealing with a temporary order that is valid for three years, constitutes two cumulative facts that justify refraining, at this current time, from determining that the arrangement does not pass the conditions of the limitations clause. I will clarify that according to my opinion the Current Arrangement, even *following* the appeal of the reporting requirement during the afternoon, is an arrangement that is *quite marginal* concerning compliance with the conditions of the restriction clause, with regard to the period of three years. Therefore I am willing to go so far and determine that in the *current* circumstances it is not possible to detain an "infiltrator" in the Residency Center beyond a period of three years. This is in accordance with the arrangements prescribed *to date* in Chapter 4 of the Law (for example, with respect to the absence of grounds for release), and even with the assumption that there is no reporting requirement during the afternoon hours. Surely the aforesaid matters have relevance if the possibility to extend the temporary order will be considered, in the absence of a material adverse change; *currently* it passes the tests of the limitations clause, as it relates to the duration of the period of residency in the Center.

35. In his opinion my colleague adds and refers to the arrangements prescribed in Chapter 4 of the Law with regard to the possibility of transferring an "infiltrator" residing in the Center to detention or an "infiltrator" that does not reside in the Residency Center and did not act to renew his temporary visa and permit for residency. My colleague reviewed these arrangements in detail in his opinion (paragraphs 165-167 of his opinion). Ultimately, my colleague focuses upon the format of the judicial review on the decision to transfer an "infiltrator" into custody. As noted, the authorized entity to instruct upon the transfer to detention is the Head of Border Control. The Head of Border Control is permitted to instruct upon transfer to detention if he determined that the "infiltrator" residing in the Center committed a disciplinary violation from amongst those enumerated in the Law. Article 32T(a) of the Law determines a series of grounds whereby their virtue the Head of Border Control is permitted to instruct by order upon the transfer of an "infiltrator" into detention. This is according to the periods that will be set forth in the order by the Head of Border Control and subject to the timeframes defined by the legislator in Article 32T (b) of the Law. The maximum period of time is one year, however, only with regard to certain grounds, and only after the "infiltrator" received concrete orders for the transfer into detention on the same grounds.

36. My colleague, Justice *Vogelman*, maintains that the *mere* possibility that the instruction of the transfer of an "infiltrator" into detention was vested to an

administrative authority, in his opinion infringes the constitutional right to liberty (see paragraph 168 of his opinion). My colleague further indicated that the arrangement concerning transfer into detention also infringes on the right to dignity, due to the infringement on the "subsidiary right" of due process. In this context, my colleague focuses on the fact that the decision to transfer into custody is made by an administrative entity – the Head of Border Control – and not a judicial entity. My colleague further determined that there is a difficulty that there is no "proactive judicial review" on the decisions of the Head of Border Control to transfer a person into detention from the Residency Center. Further in his statements my colleague clarifies that the absence of proactive judicial review leads to a disproportionate infringement on the right of due process, a subsidiary right of the right to human dignity. Therefore, my colleague refrained from examining the conditions of the limitations clause in connection to the infringement on the right to liberty arising from the mere fact that the power was vested to an administrative authority to instruct upon the transfer of a person into detention (para. `84 of his opinion).

37. As aforesaid, with respect to judicial review on the *mere* decision concerning the transfer into detention, my colleague determined that the Law did not predicate a particular arrangement of proactive judicial review and it appears that this is the primary difficulty that my colleague finds in the arrangements he reviewed above. In his opinion the only way to object to the Head of Border Control's decision is by means of filing an administrative appeal on the decision of an authority by virtue of the Law for the Prevention of Infiltration (see, Article 5(1) and in particular 12(8) of the First Addendum of the Law of Court for Administrative Affairs, 5760-2000). *However, my opinion is that a meticulous reading of the Articles of the Law leads to the conclusion whereby there is accordingly "proactive judicial review" on the decision of transfer into custody.* Therefore, there is no constitutional problem that arises regarding the absence of proactive judicial review. In order to clarify my conclusion there is no other alternative but to focus on several statutory provisions prescribed in Amendment No. 4.

38. The first statutory provision that is important in our matter is dictated in Article 32T(h) of the Law. The *provision* dictates as follows [emphases added –AG]:

> "(h) The provisions of Articles 30B through 30B *shall be applicable to who was transferred into custody*, mutatis mutandis, including this change: Article 30E(1)(a), instead of 'no later than ten days' it shall read 'no later than seven days'."

Article 32T(h) of the law thus determines that the provisions of Article 30B through 30F of the Law shall also be applicable to who was transferred from the

Residency Center into detention, according to Article 32T of the Law. The application shall be *mutatis mutandis* and with the additional change required further in the Article. Article 30B through 30F of the Law, which are applied to Article 32T(h) of the Law upon whom was transferred to detention according to Article 32T, is part of the arrangement concerning the transfer of an "infiltrator" into custody for a period of up to one year at most, an arrangement set forth in Article 30A of the Law. As mentioned, Article 30A of the Law ascribes the possibility of transferring an "infiltrator" that entered into Israel following the effective date of the Law. I reviewed this arrangement in the first part of my opinion. Article 30C of the Law, which is one of the Articles where applicable changes are applied by virtue of Article 32T(h), names the institution Detention Review Tribunal for Infiltrators (hereinafter – *the Tribunal*). Later, Article 30D(a) of the Law stipulates, a Article which is also applicable upon an individual who was transferred into detention by virtue of Article 32T of the Law, the framework of the Tribunal's authorities. The authorities of the Detention Review Tribunal for Infiltrators were defined as follows in Article 30D(a) of the Law [emphases added – AG]:

> "(a) The Detention Review Tribunal for Infiltrators shall be permitted to –
>
> (1) *To authorize the detainment of an infiltrator in detention , and if it authorized the aforesaid it shall determine that the matter of the infiltrator shall be brought before it for additional examination upon the fulfillment of conditions that shall be determined or within a period of time that shall not exceed 30 days*;
>
> (2) To instruct upon the release on guarantee of the infiltrator upon the culmination of the specified period, if it was convinced that the conditions for his release on guarantee have been fulfilled in accordance with Article 30A(b) or (c) or subject to the exceptions set forth in Article 30A(d);
>
> (3) To instruct upon the amendment of the guarantee conditions that were determined according to Article 30A(e), and upon the forfeiture of guarantee following the violation of the conditions of release on guarantee.

I will reiterate that by virtue of Article 32T(h) of the Law, Article 32D(a) of the Law cited above shall apply, mutatis mutandis, *even on the decision to transfer an "infiltrator" from the Residency Center to detention, based upon the grounds listed in Article 32T(a) of the Law.*

39. My opinion is that the provisions of Article 30D(a) of the Law which authorize the Tribunal to exercise complete judicial review on the decision that was resolved by virtue of Article 32T of the Law, to transfer a resident in the Residency Center to detention. Article 30D(a) of the Law stipulates that the Tribunal is permitted to "*to authorize* the detainment of an "infiltrator" in

detention…" [my emphasis - AG]. It is clear that with respect to the scope of the authorities of the Tribunal that when it examines if "to authorize the detainment of an "infiltrator" in detention", the Tribunal is permitted to check if there was a flaw, of any kind, in the Head of Border Control's decision to transfer a resident in the Center to detention. When I say flaw of any kind, my intent, is obviously, also with regard to the question if indeed one of the grounds exists whereby their virtue the Commissioner decided to transfer the resident in the Center to detention. In my opinion this is the obvious interpretation of Article 30D(a) of the Law, when it is applicable, mutatis mutandis, upon the arrangement set forth in Article 32T of the Law. It is imperative to add and note that the judicial review conducted by the Tribunal is proactive judicial review for all intents and purposes. The legislator explicitly determined that an "infiltrator" who is transferred to detention by virtue of the Head of Border Control's decision in accordance with Article 32T of the Law, *shall be brought before the Tribunal no later than seven days from the commencement date of his detainment in detention* (also see the combination of the following Articles: Article 32T(h) and Article 30(e)(1)(a) of the Law for the Prevention of Infiltration and Article 13N(a) of the Law of Entry into Israel). This is not a judicial proceeding that the "infiltrator" who was transferred to detention is required to initiate. The proceeding occurs automatically, shortly after his transfer into detention and by virtue of the explicit statutory provision set forth by the legislator. We will also note that Article 30D(a)(1) of the Law adds and clarifies that in the event that the Tribunal authorized the detainment of the infiltrator in detention, it must determine "…shall determine that the matter of the "infiltrator" shall be brought before it for additional examination upon the fulfillment of conditions that shall be determined or within a period of time that shall not exceed 30 days." Therefore, we can see that the legislator did not suffice with proactive judicial review immediately after the decision to transfer to detention. The legislator added and required that there will be periodic judicial review, at least every 30 days, insofar and to the extent that the "infiltrator" is in detention and this all occurs without the "infiltrator" taking any initiative regarding the proceeding. Moreover, Article 30F(a) of the Law also stipulated that the decision of the Detention Review Tribunal for Infiltrators "is subject to an appeal before the Court of Administrative Matters." Namely, the legislator even arranged the manner of objecting the decision of the Tribunal.

40. The statutory provision mentioned above leads us to the conclusion of the unequivocal interpretation that the legislator prescribed a mechanism of proactive judicial review on the Head of Border Control's decision, according to Article 32T of the Law, to transfer a resident in the Center to detention. Therefore, I do not concur with the words of my colleague, Justice *Vogelman*, in paragraph 167 of his opinion that "the mere decision to instruct the transfer of an "infiltrator" into detention is not subject then to a proactive judicial review by a judicial or quasi-judicial entity whatsoever, save for the grounds of release enumerated in Article 30A(b) of the Law." Indeed, it appears that my interpretative stance is also the declared stance of the Respondents who noted in Article 247 of their Response that "every decision of the Head of Border Control concerning the transfer of a resident in the Center to detention is subject to review by the Detention

Review Tribunal for Infiltrators, in accordance with the relevant provisions set forth in Chapter 3." For all of these reasons, I do not believe that there is any problem with the "lack of proactive judicial review" or the "absence of procedural guarantees" regarding the decision of transfer to detention by virtue of Article 32T of the Law. This is consideration of the fact that the legislator prescribe a statutory mechanism of proactive judicial review on the Tribunal by virtue of the arrangements set forth in Articles 30C-30F of the Law, that are applicable "mutatis mutandis" on the decision made in accordance with Article 32T of the Law. The existence of proactive judicial review, in which framework the Tribunal is permitted "*to authorize* the detainment of an "infiltrator" in detention" provides a response to the difficulties pointed out by my colleague, Justice *Vogelman* in his opinion. In light of this conclusion, there is no need to review the principle question that my colleague raises concerning the scope of the right to due process, as a derivative of the constitution right to human dignity, and more specifically the question if the absence of "proactive" judicial review on the decision of an administrative authority, infringes the right to liberty, may justify the repeal of a primary law of the legislative branch. Indeed, since an arrangement for proactive judicial review concerning the decision of transfer to detention according to Article 32T of the Law was prescribed by the legislator in our case, there is no need to deal with this complex issue, since the answer is not self-evident (see for example the discussion in Prof. Yitzchak Zamir's book *The Administrative Authority*, Volume I – Public Administration 278-280 (second edition, 2010)).

Prior to Conclusion

41. The discussion thus far indicates, in my opinion, to grant a constitutional remedy only with regard to the reporting requirement in the afternoon hours. My colleague, Justice *Vogelman*, clarified in his statements that the arrangements he reviewed in his opinion concerning Chapter 4 of the Law, "are not exhaustive of all the aspects of the Law which raise constitutional difficulties" (paragraph 183 of his opinion). I do not know to which other arrangements my colleague is referring to in this statement. It should be suffice to mention that the constitutional petition pending our decision (High Court of Justice 8425/13) was formulated in a general manner, with general reference to the provisions of Chapter 4 of the Law. The Petitioners essentially requested to instruct on the repeal of Chapter 4 of the Law in its entirety, in light of their claims the mere residence of an "infiltrator" in the Residency Center is not constitutional. The Respondents correctly noted in their Response to this Petition, when referring to it that "this Petition is not directed to attack a particular provision, one way or another, of Chapter 4 of the Law for the Prevention of Infiltration. It is directed at the repeal of this entire Chapter" (paragraph 176 of the Respondents' Response). I will note that my colleague, Justice *Vogelman*, clarified in both the Previous Petition and this Petition that in principle there is no problem with the existence of an open or semi-open Residency Center for "infiltrators". Indeed, I do not reject the possibility, and without expressing an opinion in this matter, that there are constitutional difficulties in different specific arrangements set forth in Chapter 4 of the Law which were not reviewed by my colleague in his opinion. I will

clarify that even if there is a difficulty in a specific statutory provision, it is still imperative to ask if it proper to instruct upon its repeal. Nevertheless, with respect to particular arrangements set forth in Chapter 4 of the Law, *which were not reviewed by my colleague*, no sufficient legal and factual foundation was presented to us in order for us to conduct a specific judicial scrutiny within the framework of the current proceeding. In this context it is imperative for us to note that the constitutional presumption practiced by us, requires the Court to assume an interpretative assumption that a law of the Knesset was not designated to infringe on constitutional principles (see: High Court of Justice 3434/96 *Haupnong v. The Chairman of the Knesset*, PADI Journal 50(3) 57, 67-68 (1996) (hereinafter: *Haupnong Case*); *Zemach* Case, pp. 267-269)).

42. Given these conclusions, I do not believe that it is proper to instruct upon the comprehensive repeal of Chapter 4 of the Law for the Prevention of Infiltration, as proposed by my colleague. According to the opinion of my colleague, Justice *Vogelman* "[] not only are some of the arrangements of Chapter 4 of the Law disproportionate, but rather the cumulative non-constitutional aspects of this Chapter taint the entire arrangement making it disproportionate" (paragraph 187 of his opinion). However, contrary to my colleague, I only find a flaw justifying constitutional relief in connection with the provision requiring residents in the Residency Center to report thrice a day (Article 32H(a) of the Law). Therefore, this Court can instruct only upon a moderate constitutional relief, which repeals only this provision. I do not ignore the fact that in the Previous Petition, in the majority opinion, we instructed upon the repeal of the entire Article 30A of the Law (in its previous version). The arrangement which at the time that stipulated in Article 30A of the Law which permitted, as noted, the detainment of "infiltrators" in detention for a period that shall not exceed three years. In the Previous Petition we instructed upon the repeal of the entire Article 30A of the Law, even though we found problems primarily in the arrangement which prescribed that the Head of Border Control is permitted to release an "infiltrator" on guarantee if three years passed since the commencement date of his detainment (Article 30A (c)(3) of the Law in its previous version). However, as noted by my colleague, Justice *E. Arbel*, in her opinion in the Previous Petition:

> "The repeal of the provision in Article 30A(c)(3) will create a vacuum that cannot be filled by the Court, and this matter lies within the sphere of the Knesset… The Court cannot place itself in the legislator's shoes and establish another arrangement in place of that which has been repealed, and this case certainly does not warrant this. Any determination will lead to diverse implications which the Court does not have the tools to examine. Moreover, the significance of the repeal of the aforesaid Article is broad. The arrangement enacted in the amendment of the Law for the Prevention of Infiltration largely depends on the determination that it is possible to detain an "infiltrator" in detention for

up to three years. Other periods determined in the Law are dependent upon this period. Thus, for example, it would be absurd to determine that it is not possible to detain an "infiltrator" in detention for three years, but that there are grounds for his release after nine months have passed from the date on which the "infiltrator" submitted an application for recognition as a refugee. The periods for judicial review were also determined considering the length of the period for which an infiltrator may be detained in detention. Regarding other provisions, which are in any case already present in the existing arrangement in the Law of Entry into Israel. Accordingly, the significance is that it is not possible to separate the parts of the Amendment of the Law for the Prevention of Infiltration when its central provision is void."

43. However, in our case, it is also possible to instruct upon the repeal of the provision requiring the "infiltrator" who is the Residency Center to report for attendance registration in the afternoon hours, without creating a vacuum that cannot be filled by the Court. In our case, it is possible to repeal the requirement regarding reporting as aforesaid (Article 32H(a) of the Law), without it leading to implications that this Court does not have the tools to examine. In our case, the arrangement enacted concerning the Residency Center, does not largely depend on the determination that requires the residents to report thrice a day for attendance registration (Article 32H(a) of the Law). Accordingly, it should not be said that it not possible to separate the different parts of Chapter 4 of the Law for the Prevention of Infiltration, insofar and to the extent that my position which maintains that there is only a constitutional flaw with the thrice a day reporting requirement for attendance registration (Article 32H(a) of the Law) is accepted. I will add, beyond what is necessary, and without exhausting the matter, that the position of my colleague, where it is possible to instruct on the repeal of Chapter 4 of the Law in its entirety, due to the "accumulation" of the inherent non-constitutional aspects, in his opinion, in the concrete provisions set forth in Chapter 4 of the Law, raises substantial constitutional questions. My colleague's position seeks to construe the existence of the "cumulative effect" of constitutional infringements which justify according to his approach the repeal of the entire statutory arrangement. This position is not free of difficulties. Please note, in Miscellaneous Criminal Motions 8823/07 *Doe v. The State of Israel*, PADI Journal 63(3) 500 (2010) the opinion expressed that it is possible to instruct upon the repeal of the provisions of a *certain* law, not only due its infringement, *in itself*, of a protected constitutional right, but also because of the consideration of additional statutory arrangements which infringe on fundamental rights "in several aspect or incrementally" (*ibid.*, p. 540 (Senior Associate *A. Rivlin*), and also see my opinion *there*, pp. 573-576). Notwithstanding, in the same case the doctrine of review is criticized (see primarily the words of my colleague, Justice *M. Naor*, *ibid.*,pp. 551-552; also see Zamar Blondheim and Nadiv Mordechai "Towards the Cumulative Effect Doctrine:

Aggregation of Constitutional Judicial Review" *Hebrew University Law Review*, 44 549 (2014); and see the critique of *Kremnitzer and Cohen-Riemer*). It should be sufficient if I note in this context, and without exhausting the issue, that there is a vast difference between the conclusion this Court reached in Miscellaneous Criminal Motions 8823/07 and the conclusion proposed by my colleague, Justice *Vogelman*, in this case. While there at least some of the judges believed (myself included) that the "cumulative effect" justifies the repeal of a specified statutory provision (without repealing other provisions that were found to be problematic due to the contribution of the "cumulative effect"), in our case my colleague requests to repeal Chapter 4 in its *entirety*, because of the accumulation of concrete and specific infringements which in his opinion are intrinsic in the arrangement itself. I do not concur with this position of my colleague, which leads, in my opinion, to an overreaching conclusion. As aforementioned, contrary to the Previous Petition, I do not believe that the repeal of the arrangement requiring the residents in the Center to report thrice a day requires the repeal of Chapter 4 of the Law in its entirety.

44. Thus far we referred to in detail to the constitutional Petition pending before us (High Court of Justice 8425/13). Nevertheless there is also an additional petition that was submitted in High Court of Justice 7385/13 by the non-profit organization Eitan – Israeli Immigration Policy Center and the residents and the property owners in south Tel Aviv. This Petition was filed after the ruling in the Previous Petition was given, however prior to the enactment of Amendment No. 4. In the Petition, the Petitioners requested that the relevant authorities adopt measures to handle the "infiltrator's" phenomenon. Following the legislation of Amendment No. 4, the Petitioners position relied upon the stance expressed by the Respondents in relation to the constitutionality of Amendment No. 4. The plight of the residents of south Tel Aviv and the business owners, which was of course before us when examining the benefit of Amendment No. 4, within the framework of how the Israeli society is handling the "infiltrator's" phenomenon. The Petitioners claims in High Court of Justice 7385/13 were to some extent a response to some of the claims that were raised in the constitutional petition. In any event, since I reached the conclusion that there is no place for the intervention of the Court in the arrangements set forth in Amendment No. 4, save for the thrice a day reporting requirement for attendance registration, my opinion is that the Petition in High Court of Justice 7385/13 has run its course and therefore ought to be dismissed.

Conclusions

45. The ruling in the constitutional petition before us is not simple. At the basis of the decision we should remember that not even one year ago the Court intervened in primary legislation designated to provide a response to the "infiltrator's" phenomenon. In the Previous Petition, the Court repealed the statutory arrangement that permitted the detainment of an "infiltrator" in detention for a

period of three years at best. In general it can be said that in Amendment No. 4 the Knesset internalized majority of the comments of the Court that adjudicated the Previous Petition. Undeniably, Amendment No. 4 is still not free of any difficulties. Thus, I too reached the conclusion that there is a need to declare the repeal of the provision requiring the residents in the Center to report for attendance registration during the afternoon hours. Nevertheless, we must not ignore the many favorable changes the Knesset made in Amendment No. 4 which we reviewed in detail. The intervention of the Court in Amendment No. 3 led to a new and better legislative arrangement. We must remember that the detention period in Amendment No. was significantly reduced from three years to one year. The new amendment took out the vast majority of "infiltrators" in Israel from the scope of the arrangement permitting detainment in detention (because of its prospective application). The character of the Residency Center (according to Chapter 4 of the Law) is radically different from the character of the detainment in detention (according to Article 30A of the Law). This, inter alia, following the repeal of the requirement to report for registration during the afternoon hours.

46. The conclusion of my colleague, Justice *Vogelman*, which maintains that we instruct upon the comprehensive repeal of Amendment No. 4, is overreaching. I cannot concur with it. In this case, the Court must exercise multifold prudence; since we cannot ignore the fact that only one year ago we intervened in the "preexisting version" of the Law which was designated to handle the "infiltrator's" phenomenon. It is apparent this background fact should not prevent the Court from conducting proper constitutional scrutiny of the new amendment. Nevertheless, it certainly bears weight considering the degree of judicial restraint. The Court must also give weight to the latitude granted to the legislator, in particular when we are dealing with a legislative bill that is quantitative in nature. Insofar and to the extent that we are referring to an arrangement that permits detaining an "infiltrator" in detention for a period of one year (Article 30A of the Law), my opinion is, that are no grounds for the intervention of this Court in the arrangement set forth by the Knesset. Insofar and to the extent that we are dealing with a Residency Center for the "infiltrators" (Chapter 4 of the Law), I was not convinced by the words of my colleague, Justice *Vogelman*, that there is a flaw that justifies a constitutional remedy for some of the arrangements set forth in Chapter 4 of the Law. This, save, for the arrangement requiring thrice a day reporting for attendance registration (Article 32H(a) of the Law). As I noted, the other arrangements that were reviewed by my colleague do not justify, in my opinion, an additional constitutional remedy. My colleague himself refrained from determining if a constitutional infringement was sustained by the "infiltrators" due to the fact that the Residency Center is operated by the personnel of the Israeli Prison Services. My colleague reviewed in detail the inherent infringement, in his opinion, in the fact that Amendment No. 4 does not include proactive judicial

review on the decision of transfer to detention. As I indicated and presented, from meticulously reading the provisions of the Law it can be construed that a mechanism of proactive judicial review was determined. I do not ignore the inherent problem that no particular grounds for release were determined for those in the Residency Center. Nevertheless, we must remember that the decision instructing on the transfer on an "infiltrator" to the Residency Center is subject to judicial review in each case on the basis of its circumstances. I will mention that the Head of Border Control is permitted to limit the period of residency in the Center "until such other time that shall be determined" (Article 42D(a) of the Law) (**NOTE THIS IS HOW IT APPEARS IN THE ORIGINAL.) I will clarify once again that in my opinion there is no room in the existing circumstances to detain "infiltrators" in the Residency Center for a period that exceeds three years.

47. My colleague emphasizes in his opinion, as he noted in the Previous Petition, that he does not find any problem in principle of the possibility of establishing an open or semi-open Residency Center for the "infiltrators". Namely, it can be construed from his words that the establishment of an open or semi-open Residency Center is a legitimate tool in the toolbox of the legislative branch and executive branch to cope with the "infiltrator's" phenomenon. Nevertheless, my colleague ultimately repeals Chapter 4 of the Law in its entirety, because of the "accumulation" of constitutional infringements. I do not concur with this move, since not only are some of the infringements that he refers to not infringements whatsoever; it is highly doubtful that it is proper to instruct upon the repeal of Chapter 4 of the Law in its entirety for constitutional infringements that can be solved by means of a more moderate constitutional remedy. I am apprehensive that my colleague's approach does not provide the appropriate weight to the principle we have practiced for time immemorial concerning heightened judicial restraint when intervening in the primary legislation of the Knesset. As Justice *Y. Zamir* stated in *The Local Center for Government* Case (p. 496):

> "Human dignity does not mandate oppressing the dignity of the law."

48. Therefore, my opinion is that the Petition in High Court of Justice 7385/13 be dismissed. With respect to the constitutional petition (High Court of Justice 8425/13), in my opinion the order-nisi shall be made permanent and that we declare the repeal of Article 32H(a) of the Law for the Prevention of Infiltration, which requires the resident in the Residency Center to report to the Center "three times a day" according to such times to be determined in the Regulations, and this regards the reporting requirement during the afternoon.

    In order to allow the Knesset to set a new arrangement that meets the constitutional criteria that I reviewed, with respect to the reporting hours, and if my opinion shall be heard, I suggest to my colleagues to *delay the declaration of*

the constitutional repeal for 150 days. During the course of this delayed period for the declaration of the repeal, in my opinion, there is no place to require the residents in the Center to report for attendance registration during the afternoon hours. Therefore, and in order to allow the authorized entities to prepare for this, I would suggest to my colleagues to determine *that within 15 days from the date of this ruling*, the Reporting Regulations in the Center should be read as such that the reporting requirement in the Center "between the hours of 1:00 - 2:30 PM" (Regulation 3(2) of the Reporting Regulations in the Center) was never prescribed.

Comments Following the Conclusion

49. After I circulated my opinion, I received opinions of the majority Justices who support the position of my colleague Justice *Vogelman* and the additional statements that were written by my colleague, Justice *Vogelman* in reference to the stipulated in my opinion. As noted by my colleague, Justice *Vogelman*, we disagreed on several key points. I find it compulsory to refer to the additional statements of my colleague and some of the statements of the majority Justices.

50. In his reference to my opinion, my colleague, Justice *Vogelman*, clarifies that the repeal of Article 30A of the Law is justified since there is no place to detain a person in detention if there is no effective deportation proceeding in his matter (and in his words "there should be no instruction for detainment in detention if there is no forecast in his deportation, *a fortiori* for a period longer than one year"). It appears that my colleague refers to the "infiltrators" that entered into Israel from countries which Israel applies to them a "non-deportation" policy (Eritrea and the Republic of Sudan). I do not ignore the underlying reasons of the principle approach of my colleague. Nevertheless, I believe that there is a fundamental difficulty in the manner which the majority Justices rely upon the figures concerning the number of "infiltrators" where the non-deportation policy is applicable to them. My colleague, Justice *Vogelman* notes that in this context "[] in the cases of majority of the "infiltrators" in any event at this present time no effective deportation proceeding can take place…" My colleague, Justice *E. Hayut* added and determined that the "infiltrators" in Israel whom the non-deportation policy is applicable "to the majority of the comprised population of "infiltrators" in Israel…" (paragraph 1 of her opinion). However, by referring to these figures, my colleagues ignore the fact that Amendment No. 4 is not designated to apply to the *entire* population of "infiltrators" who are already in Israel, but only to those who entered and will enter to Israel following the effective date of Amendment No. 4. As noted, contrary to the arrangement prescribed in Amendment No. 3, Article 30A of the Law in its current version *was applied prospectively*, namely regarding only those that entered as an "infiltrator" *following the effective date of Amendment No. 4*. In other words, the arrangement in Article 30A of the Law, does not apply to anyone in Israel prior

to the effective date of Amendment No. 4. As noted, the overall number of "infiltrators" that entered into Israel since the effective date of Amendment No. 4 is minimal in comparison to the number of "infiltrators" in previous years. It is not clear from the number of "infiltrators" that entered into Israel since the effective date of Amendment No. 4 how many of them are from Eritrea or the Republic of Sudan, namely countries where a non-deportation policy is applicable. This is however in striking contrast to the figures that were before the Court in the Previous Petition, whereby Amendment No. 3 was examined, and which was designated to apply to the entire population of "infiltrators". At the same phase before the Court there was a clear factual basis where it was possible to construe that the absolute majority of the "infiltrators" to whom the arrangement would be applicable were "infiltrators" who would be difficult to deport due to the non-deportation policy. Now, in our examination of the constitutionality of Amendment No. 4 we do not have the aforementioned figures. I do not agree with my colleague, Justice *E. Arbel* (retired) who indicates that "the determination in the matter of the proportionality of the arrangements that are based upon *the existing figures before us*" [my emphases – AG]. Before the Court *there is no* figure concerning the distribution of the "infiltrators" on whom Amendment No. 4 shall be applicable and upon whom Israel applies a non-deportation policy.

51. Accordingly, it is certainly possible that even the new arrangement will catch "infiltrators" in its net from countries where Israel applies a non-deportation policy. In light of such speculation, when there is no factual figure before this Court from which we can construe the distribution of the "new" "infiltrators" according to the country of their origin, is it justifiable to *repeal primary legislation of the* Knesset and instruct already at this stage the repeal of Article 30A in its entirety? I opine that this question must be answered in the negative. This is against the background of what we know for certain that in the recent period there has been a dramatic change in the volume of the entry of "infiltrators" into Israel, and that commencing as of the effective date of Amendment No. 4 very few "infiltrators" entered into Israel in comparison to the past. This is when we do not have substantial grounds to assume the distribution of "infiltrators" (according to the country of their origin) that will enter into Israel in the future will be identical to the distribution of the "infiltrators" that entered into Israel (according to the country of their origin) prior to the effective date of Amendment No. 4. My colleagues, the majority Justices do not deal with this difficulty.

52. Even if I was willing to assume that the distribution of the "infiltrators" who entered and who will enter following Amendment No. 4 (according to the country of their origin) will be identical or similar to what was prior to the effective date of Amendment No. 4, it still does not justify the repeal of Article 30A of the Law in its entirety, and I will explain. Undeniably, approximately

90% of all the "infiltrators" residing in Israel today are from countries where a non-deportation policy is applicable: The Republic of Sudan and Eritrea. However what about the remaining 10%, who did not come to Israel from these countries? Why is it justified to repeal the provisions of Article 30A of the Law with regard to them? Why is not possible (even if we go along with my colleagues) *to interpret the Law* in a manner which requires, on the one hand, the release of the "infiltrators" to whom the non-deportation policy is applicable, however permits, on the other hand, the detainment of "infiltrators" where the non-deportation countries is not relevant in their matter and where there is an effective deportation process with respect to them? My colleagues do not provide a response to these questions. In fact, at the basis of the aforementioned questions is a fundamental underlying question: why did my colleagues choose, even according to their approach, not to provide reasonable interpretation of the provisions of the Law, which excludes the "infiltrators" who cannot be deported due to the application of Article 30A, instead of the drastic measure of repealing primary legislation of the Knesset? Our deeply rooted and established rule is that the Court should take every legitimate interpretative effort to provide the provisions of the Law with reasonable interpretation instead of constitutionally repealing it. In brief, this is the constitutionality presumption reviewed by Justice *M. Cheshin* as follows:

> "However, as we learned and memorized, until we are required to repeal a law, we must, first and foremost, interpret the law according to its letter and purpose; to add and determine the scope of its interpretation, and by means of this interpretation *the burden imposed upon us is that we take our best efforts and attempt to complement between the provisions of the Law and the provisions of the Basic Laws,"* (High Court of Justice 9098/01 *Janice v. The State of Israel*, PADI Journal 59(4) 241, 257-258 (2004) [emphases added – AG]).

In a similar fashion, Chief Justice *D. Beinisch* noted in the *Law of Imprisonment of Illegal Combatants Case*:

> "…in our legal system there is a presumption whereby the legislator should be regarded as being aware to the content and ramifications of the Basic Laws on any law that will be subsequently enacted. In accordance with this presumption, the provisions of the law are examined while attempting to interpret them in a manner which shall be consistent with the protection afforded to the human rights in the Basic Laws…" (*ibid.*, p. 351).

In fact, this Court reiterated, time and again, that the reasonable interpretation of a law is preferable to a decision in the question of constitutionality (see and compare: *Haupnong Case*, pp. 66-76; High Court of Justice 3267/97 *Rubinstein v. The*

Minister of Defense, PADI Journal 52(5) 481, 524 (Chief Justice *A. Barak*) (1998); High Court of Justice 5113/12 *Friedman v. The Israeli Knesset*, paragraph 5 of the opinion of Justice *E. Arbel* and the opinion of Justice *U. Vogelman* (August 7, 2012)). Why, then, do my colleagues choose to repeal Article 30A of the Law instead of interpreting it in a reasonable manner, while providing a response to the constitutional difficulty which they point out? It should be noted that a solution which provides a reasonable interpretation of the Law deals with the detainment period, instead of the repeal of the law, was adopted by the United States Supreme Court in the matter of Zadvydas v. Davis, 533 U.S. 678, 701 (2001) which is cited by my colleague, Justice *Vogelman*, in para. 74 of his opinion. In the same case, the United States Supreme Court interpreted a law, which permitted, according to its letter, to detain illegal immigrants in detention for an *unlimited period of time*. The majority opinion in the same case reviewed the significant inherent constitutional difficulties during the detainment period of the "infiltrators" which is not limited in time (*ibid*,. p. 690: "A statute permitting indefinite detention of an alien would raise a serious constitutional problem"). However, instead of repealing the law, the United States Supreme Court determined, in the majority opinion, that it must be interpreted in a manner which is consistent with the constitutionality criteria (*ibid*., pp. 696-697). Therefore, the Supreme Court ruled (Justice Breyer's opinion) that it is possible to detain an illegal immigrant in detention only for a reasonable period of time which is necessary for his deportation. In this context, a presumption was determined whereby a period of six months is reasonable, and thereafter, if there is no reasonable likelihood for his deportation in the future, he should be released from detention (*ibid*., p. 701). The significant point for our case is that the relevant law that was examined by the United States Supreme Court *had no mention of the period of six months*. In other words, the benchmark of six months determined there, as a benchmark which is not rigid, was the product of judicial interpretation. This solution is preferable over the comprehensive repeal of a law (and see the critique of the minority, Justice Kennedy who claimed that the majority Justices "invented" the six month benchmark ("The 6-month period invented by the Court…"), *ibid.*, p. 708).

Please note that in the Previous Petition, I was enumerated with the majority Justices who believed that we must instruct upon the comprehensive repeal of Article 30A of the Law. However, Article 30A in its previous version allowed a detainment period in detention for a period of three years. Now, Article 30A of the Law permits a period of detainment for one year. In my opinion, a period of detainment in detention for a period of three years does not pass the constitutionality tests, whether it be an "infiltrator" where there is a difficulty to deport him or an infiltrator where such difficulty does not exist, as aforementioned. The situation is different regarding a detainment period of one year.

53. I will add that from the words of my colleague, Justice *Vogelman*, in reference to my opinion, it indicates that the current law, insofar and to the extent that is refers to detainment in detention for a period of one year, would also be flawed, in his opinion, even it would be several weeks or a few days. From his approach it appears that any detainment period may "be deemed unconstitutional - it is all

dependent upon the question of the existence of an effective deportation proceeding in the matter of the detained." According to my colleague's view, as it appears in the supplement of his opinion, detainment in detention shall not be permitted "if there is no forecast in his deportation". This resolute position is not consistent with other statements of my colleague, where it can be construed, even if implicitly, that a detainment period shorter than one year could have passed the constitutionality test (see primarily paragraphs 78-79 of his opinion). This is even given the intrinsic difficulty in the absence of a forecast for the deportation of "infiltrators" who arrived to Israel from countries where a non-deportation policy is applicable. Moreover, my colleague presents an overview of the arrangements that were set forth in other countries. As my colleague emphasized, these arrangements concern the length of the detention period of the illegal immigrants *who cannot be deported for reasons which are not related to them* (paragraph 72 of my colleague's opinion, my emphases – AG). For the sake of illustration, I will once again refer to the American law (this is what my colleague, Justice *Vogelman*, wrote in reference to the law applicable there, paragraph 74 of his opinion: "in the absence of negating reasons, illegal immigrants detained in detention for a period greater than *six months* shall be released if there is no likelihood that it will be possible to execute the deportation order in their matter in the near future [emphasis in the original – AG]). Thus, we see that, from my colleague's overview it appears there are different countries whereby it possible to hold "infiltrators" in detention, for a certain period or otherwise, even when there is no effective deportation process being conducted in their matter (also see the review by my colleague, Justice *N. Hendel*, in paragraph 7 of his opinion in the Previous Petition). Thus, the question that must be asked is why did my colleague present this "quantitative" and comparative review, if now it can be construed from his words that there is no place *whatsoever* to instruct upon detainment in detention?!

My colleague notes that it is possible that in the future the quantitative question concerning the maximum duration of the detainment of "infiltrators" in detention may arise. However, I am not convinced from his statements that in *this Petition* the constitutional question which is "quantitative" in nature does not arise. My colleagues', the majority Justices, various statements, indicate that the quantitative aspect plays a role in the constitutional ruling in these proceedings (see for example the words of my colleague, Justice *E. Arbel* (retired) in paras. 4 and 6 of her opinion). As I noted in my opinion, the "quantitative" nature of the constitutional question must affect the scope of the latitude which must remain in legislator's hands.

54. In addition, I read what my colleague, Justice *Vogelman*, wrote in response to my position regarding Chapter 4 of the Law concerning the establishment of the Residency Center for the "infiltrators". I would like to refer to two points that arise from the words of my colleague. First, my colleague bases his constitutional conclusion also on the fact that no grounds of release from the Residency Center were stipulated in the Law. In my opinion, I noted (paragraph

32) that by virtue of Article 32X(a) of the Law, the Head of Border Control is permitted to limit the period of residency in the Center. Therefore, it is clear that it is not correct to state that there is no possibility from leaving the Residency Center after entering it. In any event, my opinion is, the fact that no specific grounds for release were set forth in the Law, could indicate – by means of expanded interpretation of Article 32X(a) of the Law – that the legislator did not limit the Head of Border Control's discretion to limit the period of an "infiltrator's- residency in the Residency Center, in other words, the Head of Border Control was granted broad discretion in this context to consider all the necessary considerations in this matter. In other words, by precisely determining specific grounds for release in the Law, a solution which may colleague determines is more proper than that which was chosen by the legislator, may have limited the Head of Border Control's discretion regarding limiting the period of residency in the Center with respect to an "infiltrator" or with respect to a group of "infiltrators" who were transferred to the Center on the basis of similar circumstances. However, the limitation is *permissible*, and it is explicitly anchored in the statutory provisions. Likewise, it is also clear that the Head of Border Control's discretion is subject to judicial review. In its ruling, within the framework of the exercise of judicial review, the Court could have outlined the various considerations that the Head of Border Control must consider when limiting the residency period. Instead of selecting the option of this reasonable interpretation, my colleagues, the majority Justices, choose to repeal the entire law.

55. In the supplement to his opinion, my colleague, Justive *Vogelman*, adds and refers to the question of the existence of "proactive judicial review" on the decision of the Head of Border Control regarding the transfer into detention by virtue of Article 32T of the Law. As for myself, the interpretative matter indicates that the existence of proactive judicial review does not raise any unique complexity, and therefore I referred to the subject briefly in my opinion. I will note, that in his opinion my colleague wrote that according to his view *no proactive judicial review exists whatsoever* on the decision to transfer into detention by virtue of Article 32T of the Law (see paras. 182 and 184 of his opinion). However, as I noted in my opinion, in my view there is proactive judicial review on the decision resolved by virtue of Article 32T of the Law. Please note, the existence of proactive judicial review is evident even in the Explanatory Notes of Article 30D of the Law (which was enacted in Amendment No. 3 and was not repealed in the Previous Petition) [my emphases – AG]"

> "…with respect to the matter brought before the Tribunal, the "infiltrator" will be brought forth for judicial review…*this proactive judicial review* is designated to ensure that review will be conducted *with respect to detainment in detention*, even for one who did not appeal to the Tribunal or Court from his own initiative…" (Explanatory Notes for

the Proposal of the Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 3 and Temporary Order), 5771 – 2011, law proposals 577, p. 599).

Similarly, then, the *real* dispute between my colleague and I, is not actually with respect to the question of the mere existence of proactive judicial review but rather the interpretative matter concerning the scope of the Tribunal's powers to exercise proactive judicial review. As aforementioned, the relevant provision in our case which was set forth in Article 30D(a) of the Law, which authorizes the Tribunal "to approve the detainment of the "infiltrator" into detention…" My colleague does not dispute the fact that the application of the provision is in two scenarios: *The first scenario* is when we are dealing with who "infiltrated" into Israel following the effective date of Amendment No. 4 and who was transferred into custody immediately after his entry into Israel, for a period that shall not exceed one year, by virtue of Article 30A of the Law (subject to the exception set forth in the Law). *The second scenario* is relevant when we are referring to the transfer into detention by virtue of the Head of Border Control's decision according to Article 32T of the Law.

56. From the words of my colleague, Justice *Vogelman*, in the supplement to his opinion, it appears that the Tribunal is authorized, in two scenarios, to examine if one of the grounds set forth in the Law exists, permitting the release on humanitarian grounds. However, my opinion is that the Tribunal is permitted to examine the two scenarios even if there is a flaw *in the mere reason* with respect of which the "infiltrator" was transferred to detention. As aforementioned, in the first scenario the question whether grounds for placement into detention exist at all, namely if the person brought to detention is an "infiltrator" (claims of this kind were already raised in the past; see and compare: Appeal on Administrative Appeal *Halalu v. The Minister of Interior*, paragraph 3 (July 9, 2013), If the Tribunal determined that the detainee in detention is in fact not an "infiltrator" according to the Law, is it permitted *not to authorize* his detainment in detention? In my opinion, this question must also be answered in the affirmative. This is if we consider the clear provisions of Article 30D(a)(1) of the Law. This too is the rule concerning the second scenario, concerning the transfer into detention by virtue of Article 32T of the Law. My opinion is that also in this case the Tribunal is authorized to examine if, at the offset, the grounds with respect to the transfer of the "infiltrator" to detention exist whatsoever. Thus, for example, let us assume that the resident in the Residency Center was transferred to detention following the Head of Border Control's conclusion that the grounds for "causing bodily harm" (Article 32T(a)(4) of the Law) exist. The resident transferred to detention shall be brought forth before the Tribunal *in a proactive manner* no later than seven days from the date he was transferred to detention (Article 32T(h) of the Law). In such a case the resident is permitted, in my opinion, to claim that at the offset the grounds for his transfer do not exist, namely the Head of Border Control erred when he determined that he "caused bodily harm." If the Tribunal determined to accept

this claim, then certainly it does not have to approve the continuation of his detainment in detention. This is clearly indicated from Article 30D(a)(1) of the Law.

57. Considering the aforesaid, in my opinion, it is not correct to interpret Article 30D(a) narrowly, *which prevents* the Tribunal from clarifying if the grounds with respect to the transfer of an individual into detention at the offset existed. I will add that the interpretative conclusion of my colleague is not consistent, in my opinion, with the evident letter of the Law. Article 30D(a)(1) of the Law stipulates that the Tribunal shall "authorize the detainment of an "infiltrator" in detention , *and if it authorized the aforesaid* it shall determine that the matter of the "infiltrator" shall be brought before it for additional examination…" [emphases added – AG]. The use of the words "and if it authorized the aforesaid" teaches us that the legislator believed that the Tribunal is also permitted *not to authorize* the detainment in detention. I will note that Article 30D(a)(2) of the Law anchors the Tribunal's authority to release an individual from detention upon the fulfillment of humanitarian grounds. Hence, the authority "not to authorize" detainment in detention does not only refer to release for humanitarian grounds. It appears, that there is a difference which *is not* purely semantic between the decision to *release* based on humanitarian grounds and the decision *not to authorize* detainment in detention. If the approach of my colleague is correct whereby the Tribunal is permitted to instruct upon the release from detention only for humanitarian grounds by virtue of Article 30D(a)(2) of the Law, the question then arises why not be satisfied with this provision by the legislator, to approve or not approve the detainment of an "infiltrator". According to my colleague's approach this provision is meaningless. I will add, that contrary to the words of my colleague, my interpretation of the relevant statutory provisions regarding proactive judicial review coincides with the position presented by the State before this Court, and in this context, I can only refer to the State's claims which were cited in paragraph 40 of my opinion.

58. In any event, and this in fact is the primary point, even with regard to the question of the existence of proactive judicial review and with respect to the scope of the authorities of the Tribunal, my colleague, Justice *Vogelman*, chooses to provide a certain narrow interpretation of the provisions of the Law, and in light of the same interpretation he arrives at the conclusion that the provisions are not constitutional. Nevertheless, there is another interpretative possibility, which is broader. In light of this interpretation, which is acceptable to me, and in consideration of the constitutionality presumption (see paragraph 52 above), it is not necessary to conduct constitutional scrutiny. It is not clear why, in this state of affairs, my colleague specifically selected the narrow interpretation. Why use non-conventional weapons – the repeal of the provisions of the Law – when we can use the conventional weapons – the interpretation of the Law – and in fact reach the same result?!

59. I will add, prior to summation, that in reference to my opinion, my colleague maintains that it is sufficient in the absence of the limitation of the duration of

residency in the Residency Center and in the absence of grounds for release from the Residency Center to lead to the conclusion to declare on the repeal of Chapter 4 in its entirety. As for myself, I am finding it difficult to reconcile these issues with what my colleague wrote in his opinion, where he reiterated that the *accumulation* of the problematic aspects of the Law justifies the repeal of Chapter 4 (in this context, see paragraph 100 and 194 of my colleague's opinion). My colleague, even referred to, in this context, to the issues where *he is willing to assume that they alone meet the tests of judicial review*. The intent is to the discussion conducted by my colleague concerning placing the management of the Residency Center in the hands of the Israeli Prison Services (which only "intensifies", according to my colleague's approach the infringement of the "infiltrators'" rights as aforementioned in paras. 138 and 146 of his opinion). Therefore, it is definitely possible to say that in this case my colleague uses the doctrine of the "cumulative effect" and overreaches far beyond the manner in which this is used in the case law. Ultimately, my colleague reiterates that there *is no fundamental flaw in the mere establishment of the Residency Center* (para. 97 of his opinion). In my opinion it is difficult to bridge the gap between my colleague's position and the comprehensive constitutional relief proposed by him: the repeal of Chapter 4 of the Law in its entirety.

60. Final conclusion: If my opinion would be accepted we would determine in accordance with the provided in para. 48 above.

Chief Justice

Senior Associate Justice M. Naor

I concur with the opinion of my colleague, Justice *U. Vogelman*. I also believe that there is no other alternative other than to repeal Article 30A and Chapter 4, which were enacted within the framework of the Law for the Prevention of Infiltration (Amendment No. 4), 5774-2013 (hereinafter: *the Law*).

Article 30A of the Law authorizes the Head of Border Control, inter alia, to detain "infiltrators" in detention for a maximum period of time of one year. In this matter, I accept the position of my colleague, Justice *U. Vogelman*, whereby the examination of the arrangement prescribed in Article 30A of the Law does not exhaust the question what is the maximum period of time for detainment in detention which will be deemed constitutional. The constitutionality of this arrangement is also dependent upon the question if detainment in detention is permitted for those where an effective deportation proceeding cannot be conducted. This was also our position in High Court of Justice 7146/12 *Adam v. The Knesset* (September 19, 2013) (hereinafter: *Adam* Case), whereby, we reviewed the constitutionality of the arrangement before us for examination, in its previous version. My colleague, Justice *E. Arbel* asserted there that detainment in detention cannot be arbitrary, and there needs to be a purpose such as the promotion of the deportation

proceedings of the detainee from the country. My colleague also reviewed the great difficulty intrinsic to the detainment in detention when the primary purpose is deterrence and voiced doubt if this is a proper purpose (ibid., paragraphs 90-93; also see there paragraphs 17-19 of the opinion of my colleague, Justice *U. Vogelman*). My colleague, Justice *U. Vogelman* also insisted in the *Adam* Case that the authority of arrest towards the residents which is unlawful cannot continue to exist if there is no effective deportation proceeding (ibid., paras. 33-37). Similar to my colleagues, I noted in the *Adam* Case an embedded principle in our case law is that "…it is not possible to detain a person in detention if it is not possible to deport him within a certain period of time" and that "…the validity of detention by virtue of an order of deportation cannot continue to exist if there is no effective deportation proceeding (ibid., para. 2; also see High Court of Justice 4702/94 *Al-Tahi v. the Minister of Interior*, *PADI Journal* 49(3), 843, 848 (1995)). On this basis, our conclusion was that the provisions of Article 30A in its previous version were not constitutional.

Even though the fixed period was significantly reduced, the arrangement set forth in Article 30A of the Law in its current version, in my opinion, suffers from the same flaw that the previous version of the Law suffered from. As noted by my colleague, Justice *U. Vogelman*, there is a gap between the provisions set forth in Article 30A of the Law and the declared purpose for the detainment in detention – identification of the "infiltrator" and formulation of departure channels from the country for him (see the details in paras. 54-55 of his opinion). The arrangement in the current version permits detaining an individual in detention during one year, even he is non-deportable. Detainment in detention, whatever its length may be, cannot be without a legitimate purpose. General detention *in itself* is not a legitimate purpose – even if its application is prospective. Infringement of liberty by way of detainment in detention can serve as a short-term solution for the sake of identifying the "infiltrator", for clarifying his status and if necessary, for the sake of exhausting the effective proceedings of his deportation (insofar and to the extent that they exist). Considering the overall matters that were noted above, detainment in detention for a maximum period of one year does not pass the proportionality tests (in this context see the practiced arrangements in various countries in the world in this area, as detailed in paras. 73-77 of the opinion of my colleague, Justice *U. Vogelman*; also compare to the arrangement set forth in Articles 30A(b)(5) and 30A(b)(6) of the Law, which permit the Head of Border Control to release on guarantee an "infiltrator" when the handling of his application for a visa did not commence within 3 months or when a decision was not given in his application for a visa within 6 months).

My conclusion is that the arrangement set forth in Article 30A of the Law is not constitutional. The meaning of this ruling is that Article 30A of the Law must be repealed, despite the fact that only one year ago this Court repealed the previous amendment of the relevant law. This result is compulsory in light of the constitutional flaws of the Law. As noted by my colleague, Justice *U. Vogelman* (paragraph 212 of his opinion): "we did not willingly do this; we did this by virtue of our duty". There is a constitutional dialogue that exists between the legislative branch and the executive branch: The Knesset enacts the law, which is compatible, in its opinion, with the constitutional tests; the Court passes the law under the wand of constitutional scrutiny. At times, following the review, the Court reaches the conclusion that the law or any part thereof is not constitutional. The dialogue is not exhausted here: if necessary, the Knesset will re-enact a new

law (see Aaron Barak *A Judge in the Democratic Society* 383-384 (2004)). Nevertheless, after the Court determined that a legislative bill is unconstitutional, the legislative branch cannot go back and re-enact it with no change whatsoever, or with a change that does not solve the contradiction with the Basic Laws, as was pointed out by the Court; because then such a legislation "will infringe on the Basic Laws themselves" (ibid., p. 388). The Knesset did not correct the flaw in the Law which we pointed out and before it and which is now under our scrutiny. Therefore, with all the apprehension of repealing part of a law for the second time in such a short period – I do not see any other alternative other than to repeal this arrangement as well, which suffers from the same flaw which, as aforementioned, the previous arrangement also suffered from.

With respect to Chapter 4 of the Law, concerning the establishment of a Residency Center: this is an arrangement that did not exist in the previous law. My colleagues, Chief Justice *A. Grunis* and Justice *U. Vogelman*, agree that Article 32H of the Law, which prescribes the mandatory reporting in the Residency Center, infringes the constitutional right to liberty by a disproportionate infringement, and is therefore unconstitutional. I concur with this ruling. The dispute between my colleagues is the question whether to repeal Chapter 4 of the Law in its entirety, or only the provision prescribing mandatory reporting. In this dispute, my opinion is like the opinion of my colleague, Justice *U. Vogelman*. Save for the mandatory reporting, there are additional central constitutional flaws, which relate to the essence of Chapter 4 of the Law: one flaw is the unlimited duration of time – which could reach up to three years (this is the validity of the temporary order within the framework of which Chapter 4 was enacted) – where it possible to detain an "infiltrator" in the Residency Center. Another flaw is the absence of grounds for release from the Residency Center. I concur with my colleague, Justice *U. Vogelman*, that in the absence of arrangements concerning the limitation of the duration of residency in the Center and the release therefrom, Chapter 4 is unconstitutional. This is sufficient for me to concur with the position, according to which we instruct upon the repeal of Chapter 4 in its entirety. In light of my position, I have no need to enter into the dispute between my colleagues with respect the existence of proactive judicial review in the decision to transfer the infiltrator from the Residency Center to detention, or lack thereof; a matter which in any event is at the margins of the Amendment of the Law, and which does not, in my opinion, impact the results of the Petitions before us.

I would like to somewhat expand on the matter of the second petition presented before us, which is the petition of the residents of south Tel-Aviv (High Court of Justice 7385/13).The residents of south Tel-Aviv indicated the hardships arising from the settling down of a significant portion of the "infiltrators" in this area. The responses of the State and the Knesset do not supply a sufficient response to these hardships. In Amendment No.4, even we would not intervene, has no remedy for the residents of south Tel-Aviv, considering that its actual application, at this time, only relates to approximately 3,000 "infiltrators". The result that we reached in the first petition (High Court of Justice 8425/13) renders the discussion in the petition of the residents of south Tel-Aviv superfluous in the matter of the Amendment of the Law. Nevertheless, it is important to note that the State is required to protect the security and the rights of the residents of south Tel-Aviv, and this protection requires, more than once, adopting creative solutions. As I noted in the *Adam* Case:

> "The state faces the reality of life – which is imposed on it against its wishes – and it must cope with this reality. This coping presents difficulties accompanied by challenges. These challenges require creative solutions" (ibid., paragraph 5 of my ruling).

It is possible to consider different solutions which require examination, without ranking the possible solutions within confines of a "secured" solution from constitutional scrutiny. Thus, it is possible to consider the solution whereby the Head of Border Control will be authorized *by law* to fix the geographical limits where the "infiltrators" will live, in a manner which will lead to the distribution of the population of "infiltrators" amongst *all* the different regions of the country (compare to the Gedera-Hadera Procedure whereby in its framework asylum seekers were not permitted to reside and work in a *certain* geographic location, between Hadera and Gedera. A petition was filed against this Procedure, whereby in its framework the unconstitutionality of the Procedure was claimed. The Petition was withdrawn after the State notified that it will permit the residency of the "infiltrator", who at such time cannot be deported to the country of their origin (High Court of Justice 5616/09 *African Refugee Development Center v. The Minister of Interior* (June 28, 2009); also see the regulations that were recently promulgated, and it should be noted that no constitutional scrutiny was conducted in connection therewith – Regulations for the Entry into Israel (Determining Geographical Locations for the Employment of Foreign Workers in the Nursing Care Industry), 5774 – 2014)). This type of practice exists in other countries in the world (see: OPHELIA FIELD, U.N. HIGH COMM'R FOR REFUGEES, DIV. OF INT'L PROTECTION SERVS., ALTERNATIVES TO DETENTION OF ASYLUM SEEKERS AND REFUGEES 30-34, U.N. Doc. POLAS/2006/03 (April 2006); ANDREAS MÜLLER, FEDERAL OFFICE FOR MIGRATION & REFUGEES & EUR. MIGRATION NETWORK, THE ORGANISATION OF RECEPTION FACILITIES FOR ASYLUM SEEKERS IN GERMANY 28 (2013); also see the comprehensive review conducted by my colleague, Justice *U. Vogelman* in paras. 133-134 of his opinion). This is only one solution amongst many. It is possible to consider other solutions. In the *Adam* Case I noted that the State could consider establishing an open Residency Center, where residency would be *voluntary*, and that it "is possible to consider imposing restrictions on the ability to receive working visas such as training for certain positions, and thus recruit the "infiltrators" for the needs of the industry, and this is not within the confines of an exhaustive list" (ibid., para. 4 of my ruling; also see: para. 104 of the ruling of my colleague, Justice *E. Arbel*). Whatever the solution may be, it must find a remedy for the problems of the residents of south Tel-Aviv; however it must simultaneously express the view that all people, including refuges, asylum seekers and immigrants, are entitled to protection of human rights (see: Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO. IMMIGR. L.J. 507 (2010); Aaron Barak –*Human Dignity – the Constitutional Right and its Subsidiaries*, Volume A 379-382 (2014)).

Between our ruling in the *Adam* Case and the effective date of Amendment No. 4 nearly three months passed. I hope that adopting an additional statutory now which permits renewed and creative thinking in the manner of the treatment of the "infiltrators",

legislation whereby in its framework it will allow all the relevant factors, as a rule, including the residents of south Tel Aviv to state their claims.

After these matters, I read the opinions of my colleagues and I concur with the position of my colleague, Justice *U. Vogelman* also with respect to the supplemented comments he wrote in response to the comments of my colleague, Chief Justice *A. Grunis*.

As aforementioned, I join the position of my colleague, Justice *U. Vogelman*, according to which he instructs upon the repeal of Article 30A of the Law and Chapter 4 of the Law.

Senior Justice

Justice E.Arbel (Retired)

The matter before us concerns the law that seeks to cope with the sensitive and important subject of immigration and the concern that Israel will become an attractive destination country for "infiltrators". The identity of many of them are complex and majority of them arrive from countries where the living conditions are difficult and many times they face imminent danger.

I concur with the comprehensive opinion of my colleague, Justice U. Vogelman, on all its facets, as well as the second part which refers to the opinion of the Chief Justice, A. Grunis. I consent with those claiming that the State is "'firing a potent cannon' in the form of detainment in detention for a period of one year, as a response to the minimal-volume of the new "infiltrators"" (see para. 9 of Justice. I. Amit's ruling).

1. In the matter before us, we are asked to examine the constitutionality of two arrangements that were enacted in Amendment No. 4 of the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714-1954 (hereinafter: *Amendment No.4* and *the Law for the Prevention of Infiltration* or *the Law*, respectively), which follows the repeal of Amendment No. 3 of the Law for the Prevention of Infiltration in the *Adam* Case. Amendment No. 4 includes two central arrangements: the first, which is anchored in Article 30A of the Law, permitting the detainment of an "infiltrator" in detention for a maximum period of one year; and the second, which is anchored in Chapter 4 of the Law, which for the first time determines the establishment of an open "Residency Center" for "infiltrators".

2. Before I refer to each of the arrangements separately, I would like to note that the starting point of our discussion, from my perspective, are the principles that we set forth in High Court of Justice 7146/12 *Adam v. The Knesset* (September 19, 2013) (hereinafter: *Adam Case*). In the same case, I discussed the phenomenon of the

widespread infiltration that Israel is coping with, and that majority of the "infiltrators" originated from Eritrea and another portion unlawfully arrived from Sudan. For our purposes it is important to note, that today, just like then, Israel has adopted a "temporary non-deportation" policy for Eritreans to their origin country, in accordance with the *non-refoulement* policy ,which is anchored in Article 33 of the International Convention relating to the Status of the Refugees, Convention Treaty from 1951, Convention Treaty, 65 (hereinafter: *the Refugee Convention)*, which means that the State cannot deport an individual to a place where they face imminent danger to their life or liberty. With respect to the Republic of Sudan (Northern Sudan) the return of its citizens is not possible due to actual difficulties arising from the absence of diplomatic relations between this country and Israel. With regard to nationals from southern Sudan, the State of Israel began deporting the "infiltrators" to its territory (see para. 32 of the ruling of my colleague, Justice Vogelman; *Adam* Case, paras. 7-10 of my ruling). As indicated, majority of the "infiltrators" that arrived from these countries, whether they are in already in Israel or they will arrive here in the future, cannot be deported to the countries of their origin and therefore they continue to reside in Israel according to Israel's international commitment to them. As noted by my colleague, Justice Vogelman, at this stage it seems that the solution of deporting the "infiltrators" to a third world country that is safe for them, does not provide "a near and concrete horizon for deportation with respect to majority of the population of "infiltrators"" (paragraph 40 of the ruling of my colleague, Justice U. Vogelman). The aforesaid has significance when we are examining the constitutionality of arrangements that were designated to cope with the "infiltrators" phenomenon and with the "infiltrators", and I will return to this matter later.

3. As noted in the opinion of my colleague, Justice U. Vogelman, and as a continuation to the stated in the *Adam* Case, the Refugee Convention defines the term "refugee" as one owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country (Article 1(2) of the Refugee Convention). The Convention requires granting an individual recognized as a refugee rights in different fields and prohibits deporting him to countries where he will find himself in danger. Parenthetically, I will note that the Refugee Convention raises difficulties, in my opinion, not because what it contains but because what is lacking. The Convention does not distribute the burden to cope with the refuge and asylum seekers' phenomenon between the countries of the world. Thus, a situation can be created whereby the burden is placed in unequally and unfairly on a certain country for different and various reasons, for example, geographical proximity, economic attractiveness, regulatory obstacles, etc. Therefore, I believe that the solution of deportation to a third world country, provided that it meets the conditions of international law, is a proper and viable solution to promote. Nevertheless, it should be noted that even though it appears to be different in the media, currently as indicated from the figures, the burden imposed on Israel for coping with asylum seekers in no greater than in other western countries, and certainly no more than developing countries, which surprisingly the burden is placed on them (see Tally Kritzman- Amir "Introduction" *Refugees ad Asylum Seekers in the State of Israel: Social and Legal Perspectives* 7, 16 (Tally Kritzman-Amir editor, expected to be published in 2014); also see the *Adam* Case,

para. 105 of my ruling). This burden needs to be accepted with understanding, certainly in light of the history of the Jewish people, the values of the State of Israel and its commitment to human rights, even when it is not an Israeli.

Article 30A of the Law – Detention for the Duration of One Year

4. In the *Adam* Case we ruled that Article 30A of the Law, which permitted detainment of an "infiltrator" in detention for a maximum period of three years, infringes the right to liberty and the right to dignity, whose importance I discussed there:

> "The right to liberty is one of the foundations of the democratic system and is based on the values of the state as a Jewish and democratic state…Depriving a person of his liberty is a serious, comprehensive and broad infringement in a wide range of areas of life, and it what renders this right so central in any democratic regime. A person who has been deprived of his liberty cannot enjoy the array of choices which life offers to a free person, including inter alia, the choice of a place of work, maintaining a normal family and social life, consumption of culture and leisure, etc. The infringement of a person's right to liberty is irreversible an no financial compensation could make amends for such (see Petition for Civil Appeal, *Jarais v. State of Israel*, para. 6 (July 8, 2012); Criminal Appeal 4620/03 *Abu Rashed v. State of Israel*, para. 5 (September 8, 2003)). The infringement to a person's liberty person's liberty automatically also entails infringement to his dignity. "It is hard to dispute that the mere act of incarceration of a person behind bars and bolts and his subjugation to the accepted rules of conduct in prison infringes his right to human dignity" (*Human Rights Division* Case, para. 30 of Chief Justice Beinisch's ruling). Namely, the right to liberty is also derived from the right concerning human dignity. "Human dignity is the value of an individual, the sanctity of his life and his being a free person" (Aaron Barak, *Interpretation of the Law* 421 (Vol. 3, Constitutional Interpretation, 1994) (hereinafter: *Barak, Constitutional Interpretation*)). The deprivation of a person's liberty in my view also amounts to his humiliation and degradation, the prevention of which is the heart and core of the right to human dignity. It is important to emphasize that these rights to liberty and dignity extend to every person in Israel, even if he is not residing lawfully therein. The rights are granted to a person in that he is human (*Kav LaOved* II, para. 36 of Justice Procaccia's ruling; Livnat, p. 254; Appeal on Administrative Appeal 1038/08 *State of Israel v. Geavitz*, comments of Chief Justice Beinisch (August 11, 2009)) (*Adam* Case, para. 72 of my ruling).

The primary distinction between Article 30A according to Amendment No. 3 and Article 30A according to Amendment No. 4 is the maximum period of detention. In fact, the maximum period of detention was reduced from three years to one year, and the Amendment is applicable only to those who unlawfully entered into Israel following

the effective date of Amendment No. 4 (for additional distinctions see paragraph 44 of the ruling of my colleague, Justice Vogelman). This decrease is indeed a significant decrease. Nevertheless, a period of detention of one year is still an infringement on the constitutional rights to liberty and dignity, and it appears that one cannot dispute this. Although the infringement is less than what is was in Amendment No. 3, it is still significant and harsh, when liberty is deprived for one year behind bars and bolts.

5. In the *Adam* Case, the State presented two underlying purposes of Article 30A of the Law. One purpose was to prevent the settling down of "infiltrators" in Israel and the State's coping with the broad implications of the "infiltrators" phenomenon. I believed that this purpose does not raise any difficulty (nevertheless, see the doubts of my colleague, Justice Vogelman, paragraph 103 of his ruling). It should be noted that this purpose is not cited by the State in relation to Article 30A according to Amendment No. 4. The second purpose that was presented in the *Adam* Case, and which is also presented today for the basis of the new Article 30A, is the purpose to prevent the recurrence of the "infiltrators" phenomenon which is directed actually to the potential population of "infiltrators" who will arrive to the territory of the State of Israel. In the *Adam* Case I insisted that the significance of this purpose is in essence deterrence, and even now the State clarifies that Article 30A was intended to serve as a "normative barrier" that will change the incentives of the potential "infiltrators" seeking to come to Israel. I explained, that the difficulty which arises, is the State's use of the incarceration of the "infiltrators" for the sake of the deterrence of potential "infiltrators":

> "The difficulty in the purpose of deterrence is clear. A person is placed in detention not because he personally presents any danger, but in order to deter others. The person is regarded not as the ends but as the means. This reference undoubtedly constitutes an additional infringement of his human dignity. "Human dignity regards a person as the ends and not the means for securing the goals of others" (*Barak, Constitutional Interpretation*, 421). "Humans always stand as a purpose and a value by themselves. They are not be seen as a mere means or as a negotiable commodity – however noble the goal" (*First Kav LaOved*, 399). I have also noted that "a person is not to be treated as a mere means for securing ancillary and external purposes, since this entails an infringement to his dignity," as construed in the theories of the philosopher Immanuel Kant (*Human Rights Division*, para. 3 of my ruling) (*Adam* Case, para. 86 of my opinion).

This is also correct and applicable here. My colleague, Justice Amit, who determined that Article 30A of the Law passes the tests of the limitations clause, clarifies that "the deterrent purpose does not make the potential "infiltrator" a means to the end" (para. 10 of his ruling). I do not agree with these statements. Indeed, as noted by my colleague, many times deterrence accompanies both punitive and administrative measures. Undeniably, so long the deterrence of the masses is not the single underlying consideration for adopting a certain measure,

it may be legitimate. The difficulty is when the single or primary purpose is the deterrence of the masses. In such a case, the State's use of the "infiltrator" as the means for the overall benefit raises significant difficulties. The quote cited by my colleague from High Court of Justice 7015/02 *Adjuri v. the Commander of the IDF Forces in the West Bank*, PADI Journal 56(6) 352, 374 (2002) describes this explicitly when it prohibits limiting assigned living for reasons that are solely for general deterrence and not due to the danger posed by the same person. The fact that we are referring to "infiltrators" who unlawfully entered Israel does not make deterrence as the sole purpose legitimate. If we want to punish "infiltrators" for unlawfully entering Israel we must do so within the confines of the criminal law and in accordance with its rules (see Yonatan Berman "Detention of Refugees and Asylum Seekers in Israel" *Refugees and Asylum Seekers in Israel: Social and Legal Aspects*, 144, 151 (Tally Kritzman-Amir editor, expected to be published in 2014). Such a punishment, which is accompanied by deterrence of the masses, may be legitimate when it is done in a proportionate manner and according to criminal and international rules of law. This reason may not be used for the purpose of imposing an administrative measure whose sole purpose is deterrence of the masses and not punishment. It should be noted that in the example of the "bargaining chips", which my colleague, Justice Amit, opposes, presumably it could be argued that this refers to people who committed more severe and difficult acts than the infiltrators, and the Court still refused to approve the use of administrative arrests solely for deterrence purposes, since the arrest was not designated for punitive purposes but solely for deterrent purposes (see the *Adam* Case, para. 87 of my ruling; Criminal Re-trial 7048/97 *Does v. The Minister of Defense*, *PADI Journal* 54(1) 2000)). Finally, I will note that the U.N. High Commissioner Guidelines prohibit the detention of an individual for the sake of deterrence of future asylum seekers (see UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention, September 21, 2012, http://www.unhcr.org/505b10ee9.html). There is a need to examine, if so, whether an additional purpose exists for placing the "infiltrators" in detention for the period of one year, to which the deterrent purpose can adhere to as an accompanying legitimate purpose.

6. The State insists that the second underlying purpose of Article 30A in its current version is to permit the State to exhaust the identification process of the "infiltrators", while allocating the required period of time for the formulation and exhaustion of the departure channels from Israel. I consent with my colleague, Justice Vogelman, that this purpose is proper. Notwithstanding, I also concur with his conclusion that the Article does not meet the proportionality requirements set forth in the limitations clause. Clearly a period of one year in detention is too long a period for the exhaustion of the identification process of the "infiltrator". It is common to detain "infiltrators" in detention for a period of several months, however this is in order to exhaust the actual possibility of deporting the "infiltrator" (see the *Adam* Case, para. 19 of my opinion). In our case, insofar and to the extent that we are referring to "infiltrators" who are non-deportable, as described above, then there is no justification to detain them in detention beyond the required time for the purpose of their identification. Indeed, to date there is a horizon of deportation to third world countries. Nevertheless, this proceeding is currently conditional to the consent of the "infiltrator" for his deportation. Detainment of an "infiltrator" only for the purpose of convincing

him to consent to his own deportation to a third world country may make his consent as such that it was obtained without voluntary consent, out of fear that his liberty will continue to be deprived for an excess period of time insofar that he will not consent to his deportation. In light of the aforementioned, I also am a partner of the opinion that a period of an entire year behind the prison walls, given that we are referring to "infiltrators" who are non-deportable, is disproportionate and therefore I cannot agree with Chief Justice Grunis' position. The proportionality of the duration period in detention is dependent upon its purpose. Detainment of an "infiltrator" when done for measures to deport him back the country of his origin in accordance with international law, is not the same as detaining an "infiltrator" when there is no possibility of deporting him from Israel. With regard to the last scenario I believe the period of one year is by no means proportionate. I do not believe, therefore, that Article 30A firmly stands opposite the tests of the limitations clause.

7. I will further stress, as I noted in the *Adam* Case, that the determination in the matter of the proportionality of the arrangements is done in light of the existing figures before us. If these figures will change, it is possible that the balance for the sake of the examination of the proportionality of the arrangement will change:

> "It is indeed possible that the worst will come to pass, that "infiltrators" will continue to flood to the State of Israel in their masses despite the sophisticated physical barriers, the ramifications for local society will only worsen despite the honest and vigorous efforts of the State and its authorities to prevent this by various and diverse means, and the State of Israel will face a threat and concern of severe harm to its vital interests. Indeed, in such a state of affairs, it will be possible to state that the benefit is equal to the harm, and that Israeli society cannot endanger itself for the sake of the residents of other countries. In my opinion, however, we are very far removed from such a bleak picture" (*Adam* Case, para. 115 of my ruling).

These matters have only been reinforced since the time that has passed since the ruling in the *Adam* Case. Despite the repeal of Amendment No. 3, in the last three months following the ruling in the *Adam* Case, only 4 "infiltrators" entered Israel. Following the effective date of Amendment No. 4 and through June 2014 only 19 "infiltrators" entered (see para. 38 of the ruling of my colleague, Justice Vogelman). We see that in fact we are far from a situation whereby there is a need to change the balance point for the examination of the purposes of the arrangements or the examination of their proportionality.

8. My colleague, Justice Amit, determines that the deterrent arrangement set forth in Article 30A was designated to prevent a situation of the flooding of the masses of additional "infiltrators" on our doorstep. In my opinion we are in a state of great uncertainty concerning the reasons why there was a drastic decline in the number of "infiltrators" and regarding the flow of future "infiltrators" given these measures or

otherwise. It is indeed possible that my colleague's assumptions are correct, but he may also be mistaken. It is possible that the placement of the fence on the border with Egypt, alongside the arrangement prohibiting the removal of the "infiltrator's" property from Israel, and alongside the additional normative changes taking place in the countries of the world, will result in the continual slowing down of the trend of "infiltrators" entering into Israel. As I indicated in the *Adam* Case, even then there was not a conclusive explanation for the decline of the arrival of the "infiltrators", since the authorities simultaneously promoted two initiatives – building the fence and Amendment No. 3 (see the *Adam* Case, para. 3 of my ruling). Thus, there is a lack of great certainty concerning the question of the added benefit obtained from the measures that were dictated, along with the lack of the possibility of knowing the number of "infiltrators" that would have entered Israel without the enactment of Article 30A. At the very least, in the months where Article 30A was not applicable following its repeal in the *Adam* Case, the flow of the "infiltrators" was less, as aforementioned. There is even more uncertainty concerning the additional harm that would be sustained if not for adopting the offensive measures. In my opinion, in such a state of uncertainty, in the circumstances of the matter before us, and in light of the severe infringement on human rights, significant consideration must be given to the uncertainty in the checks and balances between the benefit and the harm. This is in particular when there is no great harm when providing an opportunity to prove the accuracy of this assumption. The State of Israel can always "fire a potent cannon" (according to the wording of my colleague, Justice Amit) and adopt drastic measures if it sees that the flow of the "infiltrators" increases.

9. The last comment in this matter concerns the distinction made by my colleague, Justice Amit, between the harm to the existing group of "infiltrators" and the potential "infiltrators". I do not see any place for such distinction in context with the subject matter. The examples brought by my colleague, from the fields of administrative and civil law, do not help. The distinction between a specified group and unspecified group may be relevant when a person does not posses a vested right or when his vested right is not infringed. Thus with regard to the enforcement of administrative guarantee which is directed to an unspecified group in contrast to what is directed to a concrete individual, and thus with regard to the claim not to impose tort liability when referring to general duty of the authority towards the public, since then the assumption is that the individual does not have the civil right to a remedy (see Israel Gilad "Tort Liability of Public Authorities and Public Employees" (Part A) *Haifa University Law Review 2,* 339, 366 (5755)). The matter is different in our case since we are dealing with infringement on fundamental rights of an individual and not the interest on an unspecified group (see High Court of Justice 7052/03 *Adalah – The Legal Center for Minority Rights of Israeli Arabs v. The Minister of Defense*, PADI Journal 61(2) 202, para. 15 of the ruling Justice (his former title) Rivlin (2006)). It cannot be disputed that an "infiltrator" who will arrive tomorrow in Israel is afforded the right to liberty and human dignity. Therefore, in this regard I do not see any place for the distinction between the present infringement of residents currently in the State and the infringement on rights of residents that will arrive to the State in the future. My colleague's claim is somewhat reminiscent of the rule "there is no penalty without first providing

a warning", however since we are not dealing with criminal law, in my opinion it is not relevant for the subject matter.

As aforementioned, I concur with the conclusion of my colleague, Justice Vogelman, that Article 30A does not meet the conditions of the limitations clause and therefore must be repealed.

Chapter 4 of the Law – Residency Facility

10. Chapter 4 of the Law establishes for the first time a Residency Facility for "infiltrators". In the *Adam* Case I noted that there are many possibilities before the State, some of which are applied in different countries throughout the world, to cope with the "infiltrators" phenomenon in a measure less offensive that long-term detention:

> "It appears to me that it is possible to formulate multifarious alternative measures that could be adopted and would secure the desired purpose in a less offensive manner. Thus, for example, it is possible to create obligations of reporting and miscellaneous guarantees (compare with *Second Kav LaOved*, para. 63 of Justice Procaccia's ruling); restrictions on the place of residence of the "infiltrators" in a manner that will enable the State to control and supervise the places in which they settle down and to disperse them to different population points (a procedure in this spirit existed in the past and was repealed by the Minister of Interior before its legality was reviewed by this Court. See High Court of Justice 5616/09 *African Refugee Development Center v. The Ministry of the Interior* (August 26, 2009)); it is possible to consider requiring the "infiltrators" to spend their nights is a residential facility that was prepared for them and that will supply their needs while preventing from them other hardships…
>
> Another idea raised in the Knesset was to replace some of the foreign workers with "infiltrators", thereby solving many problems in both these sectors while also helping Israeli employers in need of working hands (see the protocols of the Committee for the Examination of the Foreign Workers Problems of the Knesset, June 11, 2012 – http://www.knesset.gov.il/protocols/data/rtf/zarim/2012-06-11.rtf).; it was also proposed to amplify the struggle against smugglers aiding the "infiltrators" to penetrate the borders of the State and indemnify the authorities for their costs with respect to the treatments of the "infiltrators" (ibid.); in addition, it is also possible to amplify police supervision in the areas concentrated with the "infiltrators" in order to handle the crime phenomenon, and primarily enhance the sense of personal security of the local residents; it is possible to strictly enforce the labor laws such that there will be no preference to cheaper labor of the infiltrators; etc. Measures of this kind can be applied alongside measures of supervision and punishment for those who fail to meet their conditions, and this is of course is alongside the actions that the State of Israel is continuing to adopt therein for the sake of the deportation of the

"infiltrators" who can be deported from the borders of the State of Israel" (*Adam* Case, para. 104 of my ruling).

As can be seen, one of the measures that were mentioned was the night "Residency Facility" for the "infiltrators". Amendment No. 4 did in fact establish a closed Residency Facility during the nights, in addition to the thrice a day reporting requirement. Residency in the Center does not require the consent of the "infiltrator" but it is rather against his will and it is not limited in time. Once cannot ignore the fact that the location of the Facility is distant from any settlement center, and the cities closest to it, Beer Sheva and Yerucham are also remote with a distance of approximately 60 kilometers. One can also not ignore the accompanying provisions of the Residency Facility, which include its management by the Israeli Prison Services and the authorities conferred upon its employees, including powers to search, identification requirements, seizing objects, delay, use of force and transferring the "infiltrator" to detention with respect to a violation of the residency conditions, etc.

11. The overall picture received from all of the aforementioned is the same thing – meaning this is Amendment No. 3 – in a different guise. It is not an "open" or nightly "Residency Center" but rather a detention facility. It is possible that it is a detention center with some relief, but it is still a Facility that significantly restrains the liberty and life of a person placed therein against his will and without any limitation of time. In addition to the requirement of spending their nights in the Facility, a resident in the Center cannot go and come as he pleases because of its distance from any settlement center and requirement to report during the afternoon hours for registration, and if not he will be subject to transfer to detention. The significance is that majority of the resident's time is spent behind the walls of the Center, without being free to run his life as he desires, to realize his longings, desires and aspirations. He cannot enjoy his time, meet with his family and friends, do the necessary errands as he desires, to learn and develop his skills as he so desires, etc. Thus his liberty is significantly limited and he does not even have a horizon to aspire to, since the residency in the Facility in not limited in time (while the residency in the detention facility in Amendment No. 3 was limited to three years). I do not see, then, a significant change between the constitutional analysis I performed in the *Adam* Case and the required analysis with respect to the Residency Facility established in accordance with Chapter 4 of the Law. Even if we say that, which indeed is the case, the infringement of the "infiltrator's" right is diminished, this decrease is not sufficient in order to reach the required balance with the inherent benefit. Nevertheless, it should be noted, that we are dealing with approximately 2,000 residents from a population of "infiltrators" that amounts to approximately 50,000 people, and when the figures indicate that only several "infiltrators" arrived to Israel in the last year and a half. The benefit, then, which is questionable, does not exceed the harm and infringement on the "infiltrator's" liberty and dignity.

Likewise, I also agree with the comments of my colleague, Justice Vogelman, concerning Chief Justice Grunis' position in this matter. I also believe that the repeal of

the reporting requirement during the afternoon hours is not sufficient in order to make the arrangement proportionate, and this is primarily because of the absence of an actual limitation of time for residency in the Facility, and due to the lack of proactive judicial review. The proportionality of the arrangement is dependent upon an integration of parameters different from which it is construed. Thus, insofar and to the extent that the infringement to liberty is greater, a shorter residency period in the Facility shall be required in order to preserve the proportionality of the arrangement. In my opinion, even the requirement to report two times a day, in the morning and the evening, without any constraint of the residency in an open Residency Center, disproportionately infringes the liberty and autonomy of the residents of the Facility. One should not underestimate the infringement on a person's liberty who is required to spend a significant portion of his day in a certain place, who cannot come and go freely, who cannot live in the place he so desires, and to his liberty which is substantially reduced according to the constraints imposed upon him. Notwithstanding, I am willing to assume that the benefit outweighs the harm if the residency was limited in time which provides the resident in the Center hope and strive for a horizon beyond which he would attain complete liberty similar to the general Israeli population.

12. Similar to the past I will also currently stress that I cannot ignore the outcry of the residents of south Tel Aviv, who are compelled, with no justification, to bear the bulk of the ethical burden on their shoulders which is imposed on us all as citizens of the State. As I noted, I also believed then that we must alleviate these residents and find solutions that will distribute the burden and alleviate the plight of these residents, without further disproportionately infringing the "infiltrators'" rights. I will reiterate that even if we would view the Residency Facility in utilitarian lenses only we would discover that no remedy for the plight of the residents of south Tel-Aviv has been granted, since only the minutest portion (approximately 4% only) of all the "infiltrators" are actually in the Residency Facility to date.

13. I wish to further note that I have no doubt that the amendment was done with the purpose of solving a real, painful problem in the belief that the Amendment of the Law would result in its solution. Nevertheless, in the overall balance I still believe that it is neither correct nor proper to attempt to resolve the complex "infiltrators" problem and its accompanying difficulties in the most offensive and severe way such as taking an individual's liberty.

I believe that what I said in summation in the *Adam* Case, mutatis mutandis, are still correct today regarding Amendment No.4, and I will conclude with these words:

> "Regarding the ramifications on the local population, it should be noted that this population is continuing to cope with these difficulties even now, since the vast majority of the "infiltrators" are not in detention, but are among or alongside the local population. Considering this figure; and considering the numerous alternate measures that the State could adopt in order to cope with these ramifications; and

> in consideration of fence on the border with Egypt, whose construction has recently been almost totally completed, and the ability to improve its efficiency; the it cannot be said that the benefit from custody exceeds the severe infringement on the "infiltrators'" constitutional right. Coping with the "infiltrators" phenomenon is not simple. It requires considerable thought, investment of resources and intensive care over time. The difficulties faced by the local residents in the areas where the "infiltrators" are concentrated, who are required to absorb the results and ramifications of the "infiltrators" phenomenon, demand the attention and consideration of the authorities. However, the ostensibly simple solution of placing the "infiltrators" in detention is a solution that is disproportionate and inconsistent with the social, legal and moral values of the State of Israel. This is a solution that "morally stains then network of human values espoused by Israeli society" (*Second Kav LaOved*, para. 64 of Justice Procaccia's ruling). The Jewish people, which throughout history has known extensive suffering and toil, and which has sometimes been forced to wander from place to place, must rise to cope with the difficult, bold and moral challenge posed by the numerous foreigners who have now wandered to the State of Israel seeking relief from their plight, in so long as they cannot return to their countries, until another suitable location is located so that they can be absorbed. This does not mean that it is not possible at this stage to impose upon them various restrictions, rules and procedures which will bind during their stay in the host country, including even placing them in detention for a proportionate period of time (see *Tasfahuna*, para. 5 of Justice Danziger's ruling). However, these restrictions cannot, at least at the present time, amount to the complete deprivation of their liberty for such a significant period" (*Adam* Case, para, 115).

Therefore there is hope, expectation and belief that the State will do everything in its power and discretion to solve the plight of the residents of south Tel Aviv.

As aforementioned, my opinion has been left unchanged and I concur with the ruling of my colleague, Justice Vogelman, on both its facets.

Justice (Retired).

Justice S. Joubran

I concur with the thorough ruling of my colleague, Justice Vogelman,

1. For years, the State of Israel has been coping with the increasing entry of "infiltrators" primarily by way of the Israeli – Egyptian border. Majority of the "infiltrators" arrive from Eritrea and Sudan, countries in east Africa. The reasons for the arrival of the "infiltrators" is controversial – are they migrant workers or asylum seekers. Either way, due to the great extent of the "infiltrators" phenomenon it is

subject to certain negative consequences on the State and its citizens. As part of the framework of its immigration policies the State of Israel acted in various ways to minimize the "infiltrators" phenomenon in its territory. A fence was erected on the border; agreements were executed with other countries for the transfer of the "infiltrators"; and the legislation become stricter with regard to the conditions concerning the "infiltrators'" residence in Israel. It cannot be disputed that an immigration policy, in general, is the expression of the sovereignty of the state on its territory. However, the unique circumstances to describe this "infiltrators" phenomenon creates a complex reality: there is an actual difficulty to deport the "infiltrators" to the country of their origin because of the concern for their life, and in the current reality in Israel majority of the "infiltrators" clearly cannot be deported from the territory of the State. In light of this complex reality Amendment No. 4 of the Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Order), 5774-2031 (hereinafter *Amendment No. 4*) was born. Amendment No. 4 included two central parts. One is Chapter 3 which arranges the conditions of detention for "infiltrators" for whom detention orders were issued in accordance with the Entry into Israel Law, 5712-1952. Article 30A is the focal point here. Secondly, Chapter 4, which arranges the establishment and conditions of operation of the Residency Center for "infiltrators" who cannot be deported from Israel due to the aforementioned difficulty.

I will begin with Chapter 3 of the Law. I accept the comments of my colleague, Justice Vogelman, whereby the nuclear and profound infringement of Article 30A of the Law persists and remains in effect in the current version of the Law, and in the descriptive words of Justice (his former title) *Cheshin* "these words shall be heard from my own mouth, which shall be loud and conveyed over the majestic mountains" (Criminal Appeal, 2045/91 *The State of Israel v. The Estate of the Late Rabbi Pinchas Davi Horowitz, OBM*, PADI Journal 51(5)23, 63 (1997).

There is a dispute between my colleagues, Justice Vogelman and the Chief Justice concerning the constitutionality of Article 30A of the Law, which I deem correct to refer to briefly. My colleague, the Chief Justice, believes that the question regarding the duration of time that an "infiltrator" can be detained in detention is ultimately a "quantitative matter". According to his view, Justice Vogelman's opinion does not provide a response to the question concerning what is the period that is deemed proportionate for the detainment in detention. My colleague, Justice Vogelman, believes that it is not possible to detain an individual in detention when there is no effective deportation proceeding being conducted in his regard and this is irrelevant of the duration of time in detention.

As for myself, I believe that the quantitative nature of the question concerning the constitutionality of detainment in detention also included the ruling therein. The ways to repeal Article 30A of the Law passes the station of the tests of the limitations clause, in particular by means of the third proportionality secondary test. As noted, within the framework of this test, proportionality is examined in the "strict sense" which requires

a proper relationship between the derived public benefit from the realization of the purposes of the provisions of the Law and the infringement on human rights entailed therein. I accept the comments of my colleague, the Chief Justice, that detention of one year is significantly shorter than detention of three years. I do not disagree that the quantitative difference significantly minimizes the infringement on the "infiltrators'" fundamental rights. However, the derived benefit from this infringement in comparison to the harm sustained by detention, in light of the existing figures before us, leaves us no choice but to instruct upon the repeal of Article 30A of the Law.

The question of the benefit of the detention process as a "normative barrier" arose before us in the *Adam* Case (High Court of Justice 7146/12 *Adam v. the Knesset* (September 16, 2013)). Then, we decided not to resolve it (see: Adam Case, para. 99 of Justice *Arbel*'s ruling; para. 23 of Justice Vogelman's ruling). Since the appeal of Amendment No. 3 of the Law (the relevant Articles of the Entry into Israel Law were applied in its place) and until the enactment of Amendment No. 4, only four "infiltrators" entered Israel. In fact, in January 2014 – immediately after the enactment of the Amendment – twelve "infiltrators" entered Israel. These figures are not sufficiently factually based in order to determine absolute findings that concerning the benefit of the normative barrier; however it appears, that the Amendment did not have any effect whatsoever on the scope of the "infiltrators" phenomenon in Israel. Only three months passed between the repeal of Amendment No. 3 and the enactment of Amendment No. 4. It seems that if the legislator would have waited a longer period of time, it would be possible to assess with a degree of greater certainty what was the derived benefit of placing the "infiltrators" in detention. In light of the aforementioned, and since it not possible to adequately assess the contribution of this "normative barrier", it is difficult to accept the result that an "infiltrator" will be placed in detention for a period of one year when there is no deportation proceeding from the country is being conducted in his regard. While there is a difficulty in quantifying the benefit obtained from detention, the harm to the fundamental rights is clear. In this state of affairs, I agree with Justice Vogelman's conclusion and like him I do not see how we cannot declare the repeal of Article 30A of the Law.

Now I will refer to Chapter 4. I agree with my colleague, Justice Vogelman, that Chapter 4 fails to meet the conditions of the limitations clause and we have choice other than to instruct on its entire repeal. In contrast to my colleague, I do not find fault with the declared purpose of Chapter 4, and in my opinion the reason for its appeal is primarily embedded in the fact that it is disproportionate.

The first purpose of Chapter 4 which also seems to be the primary purpose is the prevention of the settling down of the "infiltrators" in the population points and their integration into the workforce. The question whether the purpose is proper was not decided in the opinion of my colleague, Justice Vogelman. This purpose was discussed by Justice Arbel in the Adam Case, and the reason that it is concerned with preventing "infiltrators" that have already penetrated the borders of the State of Israel are

embedded at its core; from integrating into the workforce; and from the negative consequences which are subject to the "infiltrators" phenomenon. In light of this, my colleague believed that this is proper purpose and the reasoning is "as is known, the State has the right to determine its immigration policies into it which emanates from the sovereign nature of the State" (para. 84 of her ruling in the Adam Case). My colleague, Justice Amit, also referred to the sovereignty of the State as an "extremely proper purpose" – even though the comments were said in the context of the examination of the purpose for preventing entry into Israel contrary to the purpose of preventing their settling down (see the end of paragraph 10 of his opinion). In a similar fashion my colleague, the Chief Justice, noted that "we must consider the sovereignty principle which grants the State discretion when determining its immigration and settlement policies, with all that it entails" (paragraph 18 of his opinion).

Similar to my colleague, Justice Arbel in the Adam Case, I believe that the purpose for preventing settling down and integration, in itself, is not legitimate. As is known, the proper purpose test provides a response to the question whether the purpose of a legislative bill endows sufficient justification for the infringement on the constitutional right (High Court of Justice 6427/02 *The Movement for the Quality of Government in Israel v. the Israeli Knesset*, para. 50 of Chief Justice *Barak*'s ruling (May 11, 2006). Within this framework it is customary to examine whether the purpose which entails the infringement was intended to serve a proper public interest and what is the extent of the significance of this interest (High Court of Justice 52/06 *Al-Aksa Company for the Development of the Assets of the Muslim Land Trust of Israel Ltd. v. Simon Wiesenthal Center*, para. 222 of Justice *Procaccia*'s ruling (October 29, 2008); High Court of Justice 7052/03 *Adalah – The Legal Center for Minority Rights of Israeli Arabs v. The Minister of Defense*, PADI Journal 61(2) 202, 319 (2006); Aaron Barak *Proportionality in the Law – the Infringement of a Constitutional Right and its Limitations* 301 (2010)).

There is no dispute that the exercise of measures whose purpose is to prevent the settling down and integration in cities and the workplace entails an infringement of human rights. However, this infringement per se does not necessarily negate the legitimate purpose "one cannot say that the purpose is proper only if it does not infringe on a human right… the predetermination that any infringement is not proper contravenes the purpose of any provision concerning a proper purpose, and should not be adopted" (Chief Justice *Barak* in *The Movement for the Quality of Government in Israel* Case, para. 51). At the basis of the immigration policies is a proper and significant social interest. The immigration policy seeks, inter alia, to minimize undesired demographic changes which are the product of inevitable illegal immigration and specifically "infiltration". These changes have led to, in the Israeli reality, negative consequences, such as an increase in crime, a burden on the State's budget and the health and welfare systems in certain regions; difficulties in enforcing civic obligations such as tax payments, etc. (see:
paras. 6-11 of the State's Statement of Response dated March 11, 2014).

The State's desire to prevent the settling down of the "infiltrators" in urban cities is one of the manifestations of the immigration policy. This policy intrinsically entails the limitation of certain

basic rights which were discussed in detail in the opinion of my colleague, Justice Vogelman. However, this limitation per se does not negate it being a proper purpose. At the basis of this policy are essential interests. The purpose of these interests expresses the protection of the society from negative consequences which may be the result of the "infiltrators" phenomenon. In my opinion, this protection is proper, and therefore I believe that this purposes meets the purpose test, regardless of the means adopted for its realization, of which the limitations clause's tests designated a separate examination for them.

Hence, the matter of the proportionality for the thrice a day reporting requirement in the Residency Center. I concur with my colleague, Justice Vogelman, that the requirement does not pass the third secondary test – the proportionality test in the "strict sense". I accept his position whereby the obtained benefit by means of the reporting requirement does not justify the severe constitutional infringement sustained by the "infiltrators". Since this is in fact my conclusion, I cannot accept my colleague's position with respect to the second secondary test, whereby there are no less offensive measures. It is within this framework of this test that we examine whether there are other measures instead of the proposed offensive measure, which possess the power to obtain the purpose in a similar degree of effectiveness. My colleague is willing to assume that there are no other measures that will secure the prevention of the settling down of the "infiltrators" in the urban centers. Although he proposes other alternate measures such as strict enforcement of the labor laws; increasing the wages of the "infiltrators" working in the Residency Center; and the requirement of depositing guarantees which shall be forfeited if the employment prohibition will be violated. However, he believes that they do not obtain a similar degree of effectiveness for the purpose of the prevention of settling down in urban centers. According to his approach, if the "infiltrator" is permitted to be absent from the Residency Center during the hours of the day, the likelihood that he will seek to join the Israeli workforce increases (para. 129 of his opinion).

My position differs from my colleague's position. I believe that there are sufficient measures to obtain the aforesaid purpose. It appears that unless otherwise stated – that there are other less offensive measures – it will mean that we have accepted the infringement on those same vital interests which are at the foundation of the purpose. As aforementioned, the assumption is that the reporting requirement does not meet the third secondary test; in other words, the balance between the benefit of the public interest and the ham to the "infiltrators'" fundamental rights – the benefit is less and inadequate. In this state, for the sake of the realization of the purpose preventing the settling down, it appears that it is inevitable from using other measures that will secure the provision of sufficient weight to the underlying vital interests. In other words, if on the one hand we determine that the purpose is proper, however, on the other hand the existing measure unduly infringes the fundamental rights, we must recognize the power of the other measures to realize the requested purpose. With regard to the concrete measures proposed by my colleague, and the measures proposed by Senior Associate Justice Naor, I believe that it is not possible to invalidate the possibility of their cumulative use when there is an appropriate response for the realization of the purpose.

My conclusion, then, is that if the law adopts measures whose degree of infringement on the "infiltrators'" rights is significantly less, however they have the power to realize the purpose for preventing settling down in a sufficient degree, then there would be no place to repeal it. The repeal is inevitably necessary due to the excessive infringement on fundamental rights and not the infringement per se; the same supplement to the harm of fundamental rights which do not cause any actual benefit for the realization of the purpose.

Now, briefly with respect to the authority of the Israeli Prison Services to operate the Residency Facility and its powers: I am aware of the fact that my colleague, Justice Vogelman, clarifies that he does not seek to cast aspersions on the loyal work of the Israeli Prison Services, and it appears that his concerns are embedded in the fact that the mere presence of the warders in the Residency Facility constitutes an additional infringement on the "infiltrators'" fundamental rights (para. 145 of his opinion). I would like to clarify that I also believe that the presumption that the Israeli Prison Services reasonably and proportionately exercises its powers. I particularly believe, similar to the comments of my colleague, that there is no other impediment in the normative framework that will arrange the manner of operations of the Residency Center in a proportionate manner – the Israeli Prison Services will be responsible for its management, subject to advanced training which already exists in Amendment No. 4.

Subject to these comments, I consent, as aforesaid, to the ruling of my colleague, Justice *Vogelman*. I also concur to the remedies he proposes in paras. 80-83 and 188-191.

Justice

Justice E. Hayut

1. I concur with the extensive opinion of my colleague, Justice U. Vogelman. Indeed, Article 30A of the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714-1954 (hereinafter: *the Law*), even according to the new "softer" version according to Amendment No. 4 of the Law does not pass the constitutional test since it adheres to an approach whereby it is possible to detain in detention "infiltrators" when there is no effective deportation proceeding being conducted in their matter for reasons which are beyond their control, for example "infiltrators" who are Eritrean nationals, in respect of which the State has adopted a temporary non-deportation policy in accordance with the *Non-refoulement* principle, and for example nationals of the Republic of Sudan who also cannot be actually deported as a matter of policy. These nationals from Eritrea and the Republic of Sudan constitute, as noted by my colleague, Justice U. Vogelman, the greater part of the population of "infiltrators" in Israel and the reduction of the period of detention in a manner that puts it at one year according to Amendment No. 4 of the Law instead of three years according to its previous version, and there is no response to the intrinsic constitutional difficulty of the detainment of "infiltrators" in detention, other than for deportation purposes, after identifying and classifying them as those who cannot be deported.

2. With respect to Chapter 4 of the Law concerning the establishment of a Residency Center and with respect to the Petition in High Court of Justice 7385/13 which was submitted by the residents of south Tel-Aviv, I can only concur with the comments of my colleague, Senior Associate Justice M. Naor in paras. 4-6 of her opinion. This is the rule with respect to what was written by my colleague in para. 3 of her opinion regarding our duty within the framework of the constitutional dialogue we have with the legislative branch, to once again determine the repeal of the provisions of Amendment No. 4 of the Law since this amendment does not provide the response to the non-constitutionality of the Law which we noted in High Court of Justice 7146/12 *Adam. v. The Knesset* (September 9, 2013).

Justice

Justice N. Hendel

1. The large-scale "infiltrators" phenomenon created many difficulties for a large portion of the Israeli citizens. Many, primarily the residents of disadvantaged neighborhoods, were required to pay the heavy daily toll with respect to events beyond their control.

It is important to remember that when we are examining the matter of the "infiltrators", that a large portion of the "infiltrators" are actually comprised of a mosaic of individuals. Each "infiltrator" – is a person. That same person, typically, lives in harsh conditions in his home country. It will not be an exaggeration to say that at times fate treated him cruelly. Most of the "infiltrators" are economically limited. Let us not, as those who can regularly drink from the cup of relative liberty and abundance – fail to recognize the desires of those who have not tasted it.

However, looking at the human dignity of a single "infiltrator", and his liberty, there is not only an abstract general public interest. The constitutional balance that we are required to examine does not exist at the level of the individual – public, and it is not about the rights of one single "infiltrator" versus the public interest of the residents of the State of Israel (compare para. 186 of Justice Vogelman's opinion). We are dealing at the level of person versus another person; an individual opposite another individual. The intent is not to create a personal confrontation; however, the reality remains intact. This perspective is also an essential part of recognizing the fact. As I wrote in the *Adam* Case:

> "The primary victims, if not the only ones, from sudden massive illegal immigration are members from the weakest socio-economic tiers… the public well-being in the broad sense and the sense of public well-being – all of them suffered severe damage" (para. 2).

Even the State Comptroller referred to the fact that there are two groups – the "infiltrators" and the citizens of the State – are intertwined, and the "neglect of one group by the State worsens the living conditions of the members of the other group."

Thus, we can all see: the reality of the wave of uncontrolled "infiltration" was accompanied by real problems in the social and economic areas, problems which made it difficult and even hindered the everyday life of many residents, specifically in disadvantaged neighborhoods. Thus, it follows that the demand to formulate a comprehensive solution for the "infiltration" issue prospered on ground no longer pristine. The fabric of life for many was profoundly and persistently affected. A legitimate and important question is to what degree is it just to invalidate the suffering of one group against the suffering of another group.

2. In the operative sphere, I will point out that my opinion is the opinion of Chief Justice, A. Grunis. However, I believe that the Petitions against the Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Order), 5774 – 2013 (hereinafter: *Amendment No.4*) must be dismissed. In my view, there is no place to instruct on the repeal of Article 30A of the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714 – 1954 (hereinafter: *the Law*), which refers to placing an "infiltrator" in detainment. Taking into account the reduction of the duration of the maximum time for a period of one year in comparison to the period of time at the center of our discussion in High Court of Justice 7146/12 *Adam v. The Knesset* (September 16, 2013), and because of the additional defense mechanisms which were currently added by the legislator. Even Chapter 4 of the Law – an open Residency Center – in my opinion passes the constitutional hurdle, save for one aspect – the *thrice a day* reporting requirement for registration.

The Chief Justice's approach and reasons, including the perspective that he presented concerning the constitutional scrutiny and the scope of the constitutional domain conferred upon the Knesset, are acceptable to me. In light of the staunch polar positions of the Chief Justice and my colleague, Justice *U. Vogelman* – I found it necessary to add a few of my own highlights. Some of them specifically deal with the parts of the Petition before us – detention and an open Residency Center, and some are with respect to the principle constitutional approach, express or implied.

Detainment of Infiltrators in Detention

3. In the *Adam* Case, this Court was required to decide with respect the previous version of the Law for the Prevention of Infiltration – Amendment No. 3. There, I presented different approaches in the comparative law concerning the issue of placement in detention, with an emphasis on the United States (para. 7 of my opinion). The commonality to all the approaches is that it is possible to justify detaining an "infiltrator" in detention for a period that is not long. Detainment in detention – yes; a long period – no. In other words: it is possible to justify detainment on the administrative level but not on the criminal level, since it is not about punishment. Thus, my conclusion in the High Court of Justice *Adam*, and thus I concurred with the opinion with my colleague that the upper limit set forth in Amendment No. 3 - detainment in detention for a period of three years – is not constitutional.

4. It should be noted that in the *Adam* Case, my colleagues did not express, save for the Chief Justice and myself, an express or even general position with regard to the reasonable limit of the detainment in detention, however, simultaneously they also did not express

comprehensive and overwhelming reservations from the use of placement in detention. Thus, it suggests that the debate is about the duration of time for detention – and not the mere placement in detention. What, then, is the desired upper limit for detainment in detention? The answer is unequivocal – none; however, there is a general outline. For this purpose, comparative law can assist.

After reading Justice Vogelman's opinion, one gets the impression that six months is the upper limit that is accepted throughout the world. This is not the case. Many countries exceed the six month limit. In Canada and Britain there is no upper legal limit. In Britain, except for approximately 10% of the "infiltrators" are detained for a period that exceeds one year. In Europe, the situation is not strikingly different, and many countries deviate from the limit of six months. Thus, for example, Switzerland and Italy determined a period of 18 months. In other western countries, for example, Denmark, Finland, Ireland and New Zealand there is no upper limit. Even in Australia, there is no upper limit, and often the "infiltrators" are detained in detention for a period that exceeds one year (Migration Act 1958, §198; Al-Kateb v. Godwin, [2004] 219 CLR 562; for further information on the countries mentioned here, see Global Detention Project, Country Profiles (http://www.globaldetentionproject.org/countries.html)). It should be noted that in a ruling rendered several days ago by the Supreme Court of Australia they did not negate in principle or comprehensively the possibility to detain an "infiltrator" in detainment, however, it noted that detainment is not a stand-alone purpose. It was ruled that detainment in detention is permitted only if its purpose will examine the "infiltrator's" eligibility for a visa of the possibility of his deportation, and only for the necessary time for the sale of a decision in his matter. It was also ruled that the deportation must be executed – "as soon as reasonably practicable", in other words, expediently insofar to the extent that it is reasonably practicable (Plaintiff S4/2014 v. Minister for Immigration and Border Protection, [2014] HCA 34 (11.9.2014).

Also with reference to the United States we need to sharpen the legal situation. Following the ruling of the Supreme Court of the United States in Zadvydas v. Davis, 533 U.S. 678 (2001) case, the prevalent perception is that at the end of the six months of detainment in detention – a quasi "presumption of release" is created: the presumption whereby the continuation of the detention is not constitutional, and a burden is imposed on the State to prove that there are good reasons for the continuation of detention. Thus, it is correct, that in the United States there is quasi an initial upper limit of six months and not one year. However, this comparison is not accurate: In the United States, after six months at most the "presumption of release" is established. In the event that this presumption is rebutted, the law and case law did not set an absolute upper limit. In contrast, within the framework of Amendment No. 4 it was determined that there is a *duty* to release following one year of detainment in detention. In fact, the numbers in reference to the United States illustrate this point: 10% of the "infiltrators" with pre-removal orders cases are in detainment for more than three months and up to one year, and 3% are in detainment even more than one year (Donald Kerwin & Serena Ying-Yi-Li, IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND

CASE MANAGEMENT RESPONSIBILITIES? (2009). In contrast, amongst those with deportation orders issued in their matter – more than 10% are in detainment for a period that exceeds one year.

5. I will return, then, to the question that I opened with: what is the upper constitutional limit for detainment in detention? In the *Adam* Case the three year limit was brought before us. This limit was repealed, as aforementioned, and with that I concurred. This period by it nature constitutes a punishment in the punitive sense, even if this is not the intention. In the *Adam* Case, my colleague, the Chief Justice, added and noted in his opinion there is no impediment "to enact a new law that will permit detainment in a detention for a significantly shore period than three years (para. 5 of his opinion). I, myself emphasized there that "the period of three years is quite long" (para. 5 of my opinion), however, it is also possible to be satisfied with a more proportionate measure: "determining an upper limit for detention that does not reach or come near to a period of three years" (para. 6, ibid.). To this effect the statutory proposal for Amendment No. 4 was written, which included a prospective provision:

> "The reason that was at the underlying base of the Supreme Court's ruling [in High Court of Justice *Adam*] was that the arrangement was unconstitutional since the same arrangement entailed a disproportionate infringement to the right of liberty ascribed in the Basic Law: Human Dignity and Liberty. The proposed arrangement in this Article is primarily the reduction of the duration of the three year period of detention which was invalidated in the ruling, and applying a detainment period of one year for "infiltrators" who have not yet entered Israel, as well as the reduction of the maximum period for the examination of asylum requests for those in detention, constitutes a more proportionate and balanced arrangement (the Government's law proposal, 817, p. 124).

Now, the moderate upper limit of one year is being discussed. Does this limit pass constitutional scrutiny? My opinion is that this question needs to be answered in the affirmative. The Israel legislator's selection to determine a binding upper limit of one year for detainment in detention is not extraordinary or an exception in light of the general view of the comparative law in the western countries. There is a joint approach for all the countries whereby it is possible to detain an illegal "infiltrator" in detainment. It is true that there are some countries where the average time for detainment in detention is less than the upper limit determined by the Israeli legislator. This gap may be derived from the principal differences and also from the concrete circumstances of each country. However, in my opinion the point is that the limit of one year is certainly "out of bounds", and is not greater than what is practiced in many countries – perhaps even the contrary. Therefore, there is a need to act, in my opinion, with two-fold prudence in the constitutional scrutiny. Is it possible to determine a shorter maximum period for detainment in detention? Certainly. However, this is not the question before this Court in this hearing. Just as there is domain of reasonability, so to there is a domain of constitutionality. I do not believe that the Israeli model, and all its particulars, falls outside this domain – not even in the mirror of comparative law.

Open Residency Center

6. The second focus in the Petitions before us is the open Residency Center. In general, I believe that we must be pedantic regarding the pronounced material distinction between these two tools. In other words: it is not sufficient that the open Residency Center will be a quasi "light detention facility", but ensure that is an entirely different form of detention.

In this perspective, I concur with Chief Justice Grunis' opinion whereby we must instruct on the repeal of Article 32H(a) of the Law which instruct on the thrice a day reporting requirement for attendance. These reasons are explained in the Chief Justice's opinion, and therefore I will not elaborate on them. I will only say that the central difference between an open Residency Center and detainment in detention is rooted, in my opinion, in the ability to simply leave from it. Granting significant freedom of movement, even if restricted, makes the Residency Center an *open* Center. This is contrary to detainment in detention which actually means that the detainment of detention under conditions of incarceration and confinement. The Facility that we are dealing with is located far away from any settlement and the determination of the thrice a day reporting requirement – and not for example twice a day – makes the possibility to leave the Facility an actual extraordinary hurdle if not beyond that.

7. Before I continue, I would like to note several comments concerning issues that emerged from reading the opinion of my colleague, Justice Vogelman.

My colleague insisted that that the "infiltrators" are not criminals "in the conventional sense of criminal law." The written word should be noted with due caution. It is difficult to ignore that we are dealing with individuals that do not respect the sovereignty of the State, and instead choose to cross the border while violating the law. Please do not respond that we are dealing with those who are "presumed refugees". Experience indicates that one who seeks to receive recognition as a refugee will contact the authorized authorities. The proceeding for recognition for the status of a refugee is also subject to judicial review, and we did not find many instances that a certain individual was recognized as a refugee. It would not be correct to automatically assume that each person detained in the Residency Center is presumed to be a refugee.

An additional difficulty that my colleague, Justice Vogelman, focuses on is the lack of the time limitation, presumably, for detainment in the open Residency Center. However, as aforementioned, we are dealing with a temporary order. The validity of the provisions concerning the Residency Center will be in effect for the duration of only three years commencing from the effective date of the Law, namely until the end of 2016 (the Law passed after the third call in the Knesset on December 9, 2013). My colleague is concerned with the possibility that the temporary order will be extended, such that the temporary arrangement will be in effect longer. To that I will respond that we must be prudent from determining assumptions as fact with regard to constitutional scrutiny. In any event, even if there is a factual basis to my colleague's concern in light of the past experience of various cases (and there is some basis), it is possible to adopt the Chief Justice's approach whereby it will not be correct to extend the validity of the temporary order beyond the period determined at the offset.

In his opinion, Justice Vogelman referred to the mental and social toll that it will take from the "infiltrators" as a result of their detainment in the Residency Center; even if it was open (pars. 125-127). I do not take this lightly. However, we should not forget: even in other western countries limitations are imposed, even those that are not simple, concerning "infiltrators" in detainment, one way or another. There is recognition, it can be said almost overwhelmingly, that not every one who "infiltrates" into the country – is entitled to complete civic rights. Actually, in the comparative law there are examples more extreme than our open residency centers. *In Canada*, there are approximately 300 spots in the special residency centers, so that in effect many "infiltrators" are held with the general population in the ordinary prisons (above, Global Detention Project). *In Australia,* for example, almost all the residency centers are hermetically closed in a fashion similar to the prisons. Only one facility allows its residents to leave the compounds without an escort (ibid.). In the facilities established by the Australian Government on the adjacent islands, the situation is far more difficult: the facilities are located distant from any settlement, are entirely enclosed by high walls, one can only leave for special circumstances accompanied by a supervisor, and visitors can only visit sporadically subject to restrictions (for a critical approach on this matter see: Amnesty International, OFFENDING HUMAN DIGNITY – THE PACIFIC SOLUTION, ASA 12.9.2012). *In the United States,* asylum seekers are detained in conditions similar to the prisons and are managed by the warders (Sadhbh Walshe, Expensive and Inhumane: The Shameful State of U.S Immigration Detention, in The Guardian (3.12.2012). In Britain, the state of the facilities "is worthy" of multiple criticisms and many of the facilities operate in the fashion of the prisons for all intents and purposes (Asylum Aid, Detention Conditions: United Kingdom, available at: http://www.asylumineurope.org/reports/country/united-kingdom/detention-conditions).

Consequently, there are counties where the "infiltrators" are handled by the immigration services or other entities. However, simultaneously in many countries the treatment and supervision of the population of "infiltrators" is imposed upon the prison services. This is the situation in the United States, Canada, Denmark, New Zealand and Ireland (above, Global Detention Project). Thus, it follows that it cannot be said that the Israeli legislator's choice to manage the open Residency Center by the Israeli Prison Services is exceptional and extreme in comparison to what is customary in western countries. I will add that also with respect to the merits of the issue, I am not convinced that there is a real difficulty with respect to constitutional scrutiny, in comparison to the alternatives. It should be noted that even the majority opinion did not overwhelmingly rule out the mechanism of the residency center from a constitutional perspective, and this mechanism failed the purpose test and additional tests – save for the third proportionately secondary test.

It should be mentioned that the judicial review is concerned with the constitutional domain and not the domain of reasonability. That is not to say that the first is necessarily broader than the last. The constitutional duty is to prevent the infringement of fundamental rights. However, many questions do not have one constitutional answer. I would even stress that insofar and to the extent that the infringed right is on a higher normative range – the constitutional domain decreases. And vice versa. The relevance for our case is that the legitimate constitutional period to detain a

person on the Residency Center must be longer than the period permitted to detain a person in detention. Please note: the period of three years, according to temporary order, is the longest period. Insofar and to the extent that time passes – the maximum period decreases accordingly.

The Comparative Law Concerning Detainment of the Infiltrators

8. I extensively reviewed above the range of approaches in the different various western countries with respect to the issue concerning the handling of the "infiltrators". A more general question arises: what is the contribution of the comparative law of the constitutional scrutiny in general, and in particular the constitutional scrutiny in our matter?

At times the comparison can assist in developing trains of thought, raising questions and presenting different solutions. Of course, the comparison does not require receiving automatic positions of the comparative law. A "made in Israel" legal constitutional approach needs to be developed so that it will be rooted in the Israeli experience, on all its facets. However, this may be an important tool. This is certain when we are dealing with comparisons to constitutional approached that operate according to similar fundamental values.

If this is the general condition, then how much more applies this to our case. First, all the constitutional methods which were compared - recognize an intrinsic difficulty in the infringement of human dignity and liberty. Special sensitivity is reserved to detention or similar measures, which means the physical deprivation, in one degree or another, of the individual's liberty. Secondly, it is a global issue, which places renewed challenges (in certain aspects) on the agenda of many countries. Thirdly, specifically the fact that this is a new issue where in its current version there is no precedent – it can assist the Court in determining the constitutional domain.

9. These issues are stated with respect to all the Petitions before us, and the role of the comparative law in the constitutional analysis – both with regard to the detainment of "infiltrators" in detention and with respect to placing them in open Residency Centers. However, alongside the advantage and benefit that are concealed in the comparison of other western countries, I believe that this case requires two-fold caution prior to conducting these or other comparisons. I will clarify.

Israel is the only western country that can be reached by land from the African continent. Likewise, there are no other "alluring" destination countries in proximity to Israel to where the "infiltrators" can continue. Simultaneously, Israel – as noted by my colleague Justice *I. Amit* (para.15) – is "surrounded in a ring of hostilities" in a manner which does not permit it to reach arrangements and agreements with neighboring countries. It should be noted additionally that most of the "infiltrators" are originally from northern Sudan, a country hostile to Israel. Thus, Israel is distinct from all the other western countries that are also dealing with the "infiltrators" phenomenon. The combination of figures places the government, and the legislator, at an extremely difficult starting point.

It is clear that State of Israel's situation is not similar to European countries, where one country may share a common border with a number of countries that are bound with it under one political umbrella, and are prepared to cooperate for a regional solution concerning the issue of the absorption of "infiltrators". There are countries at the forefront and the constitutional balances in their regard may be more sensitive. From this perspective, in my opinion, I do not think that it is a coincidence that specifically these countries – for example, the United States and even Australia (even after the ruling that was rendered, as aforementioned, a few days ago) – adopt immigration policies that permit detaining "infiltrators" for longer periods and sets stricter supervision conditions for the "infiltrators" that were released. In my opinion, it would be fair to say that these countries are in a position similar to Israel, more so than other countries – which were cited in my opinion in the *Adam* Case – which reduce the period and alleviate the supervision conditions. The question is not whether it is possible to adopt other policies, but rather – in light of the unique characteristic of the State – constitutional intervention by the Court regarding the selected policy is required.

To my understanding, my colleagues raise another claim whereby detainment of the "infiltrators" in detention is without cause. The underlying presumption of this claim is that currently there is no anticipated permanent lawful solution for "infiltrators" detained in detention. In light of such, it seems, my colleagues believe that detainment in detention even for a period of time of several months – is an unjust punishment, the detainment in detention is without purpose. The problem is that the factual assumption, in my opinion, is incorrect. One of the reasons is related to the unique characteristics of Israel concerning the "infiltrators" phenomenon.

For obvious reasons, as aforementioned, there are many difficulties to reach an agreement with the neighboring countries regarding the regional arrangement concerning the matter of the "infiltrators". This is due to the number of the "infiltrators" and primarily the prevailing geo-political state in our region. The State claimed before us that the many difficulties attempts are being made to formulate solutions in this direction. Thus, during the course of the first half of 2014, approximately 4,800 "infiltrators" left Israel (see para. 39 of the opinion of my colleague, Justice *U. Vogelman*). The government and the Knesset are acting expeditiously to find solutions. There is an honest and clear desire to resolve the situation, while taking into account and dealing with the difficulties.

This is the situation in Israel, and this too should be taken into account when considering the duration of period of detainment in detention. I will say it as so: if the legislator would be steadfast concerning its requirement to detain an "infiltrator" in detention for three years – then a constitutional difficulty would be created. We insisted on this in High Court of Justice *Adam*. However, this is not the situation. As a proper response, while balancing the need to handle the "infiltrators" phenomenon and the manner of treatment as a derivative from Israel's unique characteristic, a maximum limit of one year for detainment in detention was selected. All the circumstances lead to the conclusion that the period of time is appropriate and proportionate and passes the constitutional scrutiny.

The Cumulative Reading of the Facts

10. Constitutional scrutiny has great significance in all areas of law. In order for the constitutional scrutiny to be founded and accurate, there is utmost importance in the recognition and presentation of all the relevant facts. In this case, which deals with the "infiltrators" phenomenon, the factual infrastructure is exceptional and extraordinary. I will say it in a different manner: my colleague, Justice *U. Vogelman*, elaborated on the significance of the cumulative reading of all the Articles of the Law and all the constitutional flaws which occurred. In my opinion, the cumulative reading of the facts is just as important. Although my colleague noted these facts, at the time that they conducted the constitutional scrutiny, in my opinion, they did not impart sufficient weight for their accumulation as cited above.

I even have reservations, from a methodological standpoint, concerning the approach presented regarding the cumulative reading of the Articles of the Law. According to this approach, in the event that there is a constitutional flaw – for example thrice a day signing in the open Residency Facility – additional flaws add to the severity of the overall picture. I am of the opinion that this is not the way to examine a constitutional infringement, but quite the contrary. Since the Court reached a conclusion that there is a need to repeal a certain provision – then it must examine whether the remaining portion reached a level of constitutional infringement which requires repeal. I concur with the Chief Justice's opinion, that in the circumstances of the case it is sufficient to invalidate the thrice a day signing so that Chapter 4 of the Law remain intact. Even if it shall be determined, and this is not my opinion, that there was room to limit the time of residency in the Facility – even this figure doe not justify the repeal of all of Chapter 4. The remaining provisions – have the power to stand independently. If this is the case – they should remain intact.

Change of Circumstances

11. An additional point is the "surprising" success of the solution found by the State. In 2009, there was a significant increase in the volume of the "infiltrators" phenomenon. Since then and until the end of 2011 approximately 37,000 "infiltrators" entered into Israel – approximately one percent of the population, in an increasing annual rate. The population of "infiltrators" was not evenly dispersed throughout the country. It focused on small areas in their territory, for example – only but not limited to – the southern suburbs of Tel Aviv. The residents of the area were forced, against their will, to absorb in a relatively short period many "infiltrators". This situation is quite different from western countries, for example, the United States and Germany.

In June 2012, vast segments of the fence on the border between Israel and Egypt were completed, and simultaneously the implementation of Amendment No. 3 (which was later repealed in High Court of Justice *Adam*) commenced. Since that time there has been a steep decline in the number of "infiltrators" that entered Israel. Thus, for example, in the months of May-June 2014, not even one "infiltrator" entered into the territory of the State (for details see para. 38 of Justice Vogelman's opinion and para. 7 of the Chief Justice' opinion).

What is the cause for the decline of the entry of approximately 1,500 "infiltrators" per month in 2011 until the current state? Upon the fulfillment of several factors it is possible to give full weight to one factor or another. As for myself, I believe that the several factors combined can cause the change. Nevertheless, it is difficult to assess the contribution of one factor or another. The fact is that currently the integrated solution proposed and implemented by the State – succeeded. The number of "infiltrators" plummeted to the lowest levels, in all probability because of the combination of two barriers – the physical barrier (the fence on the border) and the normative barriers (the Amendment of the Infiltration Law), as well as additional factors. This is the background and the circumstances which led to the enactment of Amendment No. 4 of the Law.

Of course, and as I stressed in the *Adam* Case, if the reality significantly changes, the constitutional balance may also change. Thus, for example, if for an extended period of time the rate of the "infiltrators" in Israel will be on a lower level – it is possible to assume that most of the efforts will focus on the treatment of the "infiltrators" in Israel and the need to find them a solution. However, for the time being, it must be taken into account that Amendment No.4, a temporary order, will be in effect for a period of three years. At this present time we do not know if the current situation will persist, including all the circumstances and complexities embodied therein, and for how long. In the past, surprising upheavals occurred, and it is possible that this will also be the case in the future. Let us not forget that the phenomenon began to gain momentum in 2009. Who can guarantee what the situation will be at the end of the period of the temporary order? It seems that prudency requires us not to intervene in the sensitive legislation process at this stage, when the dynamics of change is so dramatic. At the same time, if it will become apparent towards the end of the period of the temporary order that the factual pendulum will shift, again, to another balance point – it seems that there will a necessity to formulate another solution. However in light of the pace of change, I would allow more time to examine the matter, save for the constitutional infringements that are unacceptable, for example a three year limit which was repealed in the *Adam* Case.

Proportionality in Proportionality – Review and Remedy

12. Ultimately, the majority opinion in this case is to instruct on the repeal of Chapter 4 of the Law (an open Residency Center). This is further to the accumulation of constitutional flaws in several Articles of this Chapter, with the thrice a day reporting requirement being at the acme; management of the Residency Center by the Israeli Prison Services; the lack of limiting the duration of the residency in the Center; and the absence of proactive judicial review of the transfer of an "infiltrator" from the Center to detention. In addition, it is also necessary to instruct on the repeal of Article 30A of the Law (detainment in detention).

The position of the majority Justices in my opinion is possible as a *legislative* solution. However, in my opinion is not clear of any difficulties as a result of constitutional judicial scrutiny. Thus, for example, in the presentation of the third proportionality secondary test, my colleague, Justice Vogelman, gave weight to the doubts that arose in the first two proportionality secondary tests. I

believe that this approach may obscure between the proper distinction and the stages of the constitutional analysis. Nevertheless, this is not the point. I would like to point out my reservations with regard to the four central aspects in the approach of the majority Justices: judiciary tradition, lack of operative clarity with respect to future legislation; the proportionality of the remedy; and the interpretative necessity which maintains the law.

13. First, the rule is that this Court is not eager to repeal laws. This reluctance does not stem from the fact that this Court does not exude responsibility; on the contrary. Balanced constitutional scrutiny is designated to preserve the gentle connection between this Court and the Knesset and Government. The aspiration is that whenever possible not to instruct upon the repeal of laws. This is the tradition that has formulated in this Court in recent years, even after the "revolution of the Basic Laws". It is worthy of preserving it. This is also particularly correct in this current case; we cannot ignore the fact that this is law that being brought to the doorstep of this Court a second time.

This matter leads me to the next point. It seems to me that part of the difficulty that arises from this is that there is a certain lack of clarity in my colleague's position, both in the *Adam* Case and in this ruling. As aforementioned, the two issues at the center of attention are detainment in detention and the open Residency Center. With respect to detention, there was room to direct the legislator in a clearer manner. Is detainment in detention completely unacceptable in every situation? Is the dispute indeed "quantitative" according to the definition of the Chief Justice? The present ruling is to presumably clarify matters, but it seems to me that it only complicates matters. This is also the case with the open Facility. If the duration of detention in the Center is limited in time, and the number of reporting requirements for registration is reduce – will this be sufficient from the constitutional perspective, according to my colleagues of the majority opinion? Unfortunately, the result is, also in this ruling, not steep enough, in my opinion, and I fear that it might lead to a further constitutional – legal clash. The difficulty is further honed when the Law us being repealed for a second time, after many efforts were made in order to meet the constitutional standards.

An additional aspect which relates not only to constitutional scrutiny. Let's assume that there were indeed different types of constitutional flaws that transpired in different aspects of the Law. Even given this assumption, it is important to emphasize, in my opinion, that in the constitutional dialogue we must avoid results that are disproportionate. We should strive for a reality where specific problems are answered by specific remedies, while preserving the overall framework of the law, insofar and to the extent that it is possible. In this case, for example, even my colleague, Justice Vogelman, notes that he does not object to an open or semi-open Residency Facility (para. 97 of his opinion; para. 40 of his opinion in the *Adam* Case). Given this starting point, I do not understand why it is not possible to instruct upon the remedy of specific flaws that occurred in the Law while preserving the general framework which was scrupulously outlined by the legislator. For example, it is possible to instruct, without any difficulty, on the repeal of the thrice a day reporting requirement – according the Chief Justice's opinion with which I concur. The same applies for the failure to limit the duration of residency in the open Facility, and for those who believe that the Article is not constitutional: even according to their approach, it was possible to

determine a maximum period for detainment in the open Residency Facility or at least direct the legislator in the task. Just as we look at the details in the constitutional scrutiny phase, the same applies to the constitutional remedy phase.

Another way to moderate the constitutional remedy, and I will close with this, is the matter of the interpretation of the Articles of the Law. Amongst my colleagues on the panel a dispute occurred with respect to "proactive judicial review." According the Chief Justice's approach, Article 30(a) authorized the Detention Review Tribunal for Infiltrators to authorize the transfer of an infiltrator from the open Residency Facility to detention. Consequently, the Law creates a mechanism of proactive judicial review with respect to transfer to detention (paras.37-40 of his opinion). According to Justice Vogelman's approach, on the other hand, it is difficult to reconcile this interpretation with the letter of the Law and the grounds for review exercised by the Detention Review Tribunal for Infiltrators (para. 197 of his opinion). Following my approach which was presented above, I believe that *interpretation which fulfills the law – is preferable than its repeal.* To my understanding, a fair reading of the Articles is consistent with the State's position and permits conducting review of this kind. However, even if we assume that the interpretation is more inclined to what was proposed by my colleague, Justice Vogelman (I don't believe this is the case), I still believe that in order to maintain the rule that we do not repeal laws – it is best to adopt the interpretation of the law proposed by the Chief Justice. In fact, adopting such an interpretation will not only minimize the possibility that the law will be repealed on constitutional grounds, but will also realize the purpose of the law in the best manner by determining a binding constitutional norm.

Even the proportionality examinations should be exercised in proportion. I am concerned that even the reservations of my colleagues, it is possible to reach a different and more moderate operative conclusion which fulfills the legislator's choice (even if not on all its facets).

Conclusions

14. When the Supreme Court of the State of Israel is required to examine the issue of "infiltration", we cannot ignore the significance that the according to its definition in the Basic Laws it is a Jewish and democratic state. The Jewishness of the State, in my opinion, is not limited to the principles of Jewish law, but is also the history of the nation. In this perspective, and in light of the expulsions that we experienced in different periods, we must be sensitive to one who is looking for a new home, even if it is temporary. This duty is part of the picture. One must help the extent possible, and recognize that this is a difficult situation that affects the core. In Sudan and Eritrea, the country of origin for most of the "infiltrators", life was intolerable. We should even humanize the sole "infiltrator". The aforesaid situation only adds to our gratitude that we can enjoy the fruits of democracy and prosperity. A country that does not remember its past – harms its potency and future. This is not just a practical consideration, but in my opinion, part of the definition of the nation.

Just like the State cannot forget its past, it must not fail to recognize the present. The state, in which the State of Israel finds itself, as a single country near in proximity to Africa that absorbed

into its vicinity, in a short period of time, many "infiltrators", requires reflection and restraint. A limitation of resources and the State's duty to determine an immigration policy is imperative at this time. The balance between things – past and present – represents a unique challenge for the State. It is possible that if the rate of the "infiltration" which has emerged in the last few months will remain the same – it will be possible to invest more energy in the treatment of those already here. In my opinion, the overwhelming majority of the Law passes constitutional scrutiny. Balances were determined which are situated in the constitutional domain.

Therefore, save for the thrice a day signatures, in light of the location of the Facility and the characteristics of its residents, I, myself, would leave the Law intact. However, in order to contribute to the dialogue between this Court and the government and Knesset, I will make one final comment. It is possible to understand, and this is my opinion, my colleagues' opinion in the following manner: with respect to the period of detainment in detention, it is possible that it will be necessary to further reduce the upper limit, and determine that the duration of detention shall be subject to the existence of a release or other deportation channel, even if it is not formulate. With respect to the open Residency Center, it seems that it is possible to change some of the conditions in addition to changing some of the terms in accordance with the constitutional scrutiny of my colleagues – and consequently should remain intact.

As aforementioned, I concur with the opinion of Chief Justice A. Grunis.

Justice

Therefore the result is as follows:

1. By a majority of opinions by Senior Associate Justice *M. Naor*, Justice *E. Arbel (*retired), and Justices *S. Joubran. E. Hayut, Y. Danziger and U. Vogelman*, opposite the dissenting opinion of Chief Justice *A. Grunis* and the Justices *N. Hendel and I. Amit,* it has been decided to immediately repeal Article30A of the Law for the Prevention of Infiltration. The arrangement set forth in the Entry into Israel Law shall take its place. In this matter, it has been determined that Article 13F(a)(4) of the Law of Entry into Israel, which authorizes the Head of Border Control to release a release on guarantee a person unlawfully present if he has been in custody for more than sixty consecutive days, commencing on October 2, 1014.

By a majority of opinions of Senior Associate Justice *M. Naor*, Justice *E. Arbel (*retire), and the Justices *S. Joubran. E. Hayut, Y. Danziger, U. Vogelman and I. Amit*, contrary to the dissenting opinion of Chief Justice *A. Grunis* and the Justices *N. Hendel*, to repeal Chapter 4 of the Law for the Prevention of Infiltration. Based on the majority opinion of the Justices:

(A) The declaration of the repeal of Chapter 4 in its entirety shall be delayed for a period of 90 days. The repeal of Article 38H(a) of the Law and regulation 3 of the Reporting Regulations shall enter into effect on September 24, 2014 at 1:00 PM. Until the effective date of the declaration of the repeal of Chapter 4 of the in entirety, Article 32H(a) of the Law shall be

read as such that it will require a resident to report twice a day in the Center, according to the reporting times set forth in regulations 3(1) and 3(3) of the Reporting Regulations. This means: On September 24, 2014 the afternoon reporting is repealed. The morning and evening headcounts shall remain intact, until the end of the delay period for the declaration of the repeal.

(B) With respect to the Head of Border Control's authority to transfer an "infiltrator" from the Detention Center to detention, it has been decided that as of October 2, 2014 and until the end of the 90 day period from the date of this ruling, Article 32T of the Law shall be read as such that with respect to each of the grounds enumerated in Article 32T(A) of the Law the Head of Border Control shall be authorized to instruct by order the transfer of an "infiltrator" to detention for a period that shall not exceed 30 days. Detainees in detention from the date of this ruling, by virtue of the Head of Border Control's decision as aforementioned, shall be released at the end of 30 days of their detainment in detention or at the end of the period allotted to them by the Commissioner – whichever is earlier.

According to the opinions of Chief Justice *A. Grunis* and Justice *N. Hendel* that Article 32H(a) of the Law for the Prevention of Infiltration and the regulations concerning only the second reporting requirement, which is in the afternoon, must be repealed and only the morning and evening reporting requirements shall remain intact, according to the hours stipulated in the Regulations.

The Justices unanimously consent to dismiss High Court of Justice 7385/12 without any order for expenses.

Given on this day, 27 Elul 5714 (September 22, 2014)

Chief Justice	Senior Associate Justice	Justice (Retired)
Justice	Justice	Justice
Justice	Justice	Justice