CASE LAW COVER PAGE TEMPLATE

Name of the court [1] (English name in brackets if the court's language is not English):
Beit Hamishpat Haelyion Beshivto KeBeit Mishpat Gavohah LeTzedek (Israeli High Court Of Justice)

Date of the decision:	**(2014/09/22)**	**Case number:[2]**	HCJ 8425/13, HCJ 7385/13

Parties to the case:

Petitioners in HCJ 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

Petitioners in HCJ 7385/13

Eitan – Israeli Immigration Policy Center, et al.

VS.

Respondents in HCJ 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

Decision available on the internet? ☒Yes ☐No

If yes, please provide the link: http://elyon2.court.gov.il/files/13/850/073/M19/13073850.M19.htm

(If no, please attach the decision as a Word or PDF file):

Language(s) in which the decision is written:
Hebrew

Official court translation available in any other languages? ☐Yes ☒No
(If so, which):

Countr(y)(ies) of origin of the applicant(s): Eritrea and Sudan	
Country of asylum (or for cases with statelessness aspects, country of habitual residence) of the applicant(s): Israel	
Any third country of relevance to the case:[3]	
Is the country of asylum or habitual residence party to:	
The 1951 Convention relating to the Status of Refugees ☒**Yes** ☐**No**	Relevant articles of the Convention on which the decision is based: Articles 1(2); 9; 33
(Only for cases with statelessness aspects) The 1954 Convention relating to the Status of Stateless Persons ☐**Yes** ☐**No**	Relevant articles of the Convention on which the decision is based:
(Only for cases with statelessness aspects) The 1961 Convention on the Reduction of Statelessness ☐**Yes** ☐**No**	Relevant articles of the Convention on which the decision is based:
(For AU member states): The 1969 OAU Convention governing the specific aspects of refugee problems in Africa ☐**Yes** ☐**No**	Relevant articles of the Convention on which the decision is based:
For EU member states: please indicate which EU instruments are referred to in the decision	Relevant articles of the EU instruments referred to in the decision:

Topics / Key terms: (see attached 'Topics' annex):

- Detention of asylum seekers
- Non-refoulement
- Right to liberty and freedom of movement

Key facts (as reflected in the decision):

The large wave of "infiltration" into Israel from mostly Eritrea and Sudan, has, to a large extent, ceased (decrease from 17,298 "infiltrators" who entered in 2011 to 45 "infiltrators" in 2013 to 17 "infiltrators" between January and June 2014). Simultaneously, the number of "infiltrators" leaving Israel has drastically increased (during the first half of 2014 close to 5,000 "infiltrators" left Israel), in part due to agreements with third countries to receive, on a gradual basis, a limited number of individuals who voluntarily consent. Nevertheless, Israel must cope with the tens of thousands of "infiltrators" within its territory, without any real possibility of deporting those not interested in leaving the country.

Israel does not return Eritreans based on the principle of non-refoulement, nor does it return Sudanese due to the practical difficulties of deporting them stemming from the absence of diplomatic relations between the two states.

Israel did not begin to examine asylum claims by Eritreans and Sudanese until the end of 2013. Further, unlike in other countries, the filing of an asylum claim in Israel does not exempt the individual from detention in Saharonim or from mandatory residence in Holot. Israel also differs from other countries in that less than 1% of asylum claims by Sudanese and Eritreans have been accepted compared to other countries where according to UNHCR Report recognition rates are 81.9% and 68.2% respectively.

Amendment No. 4 to the Anti-Infiltration Law was enacted less than three months after the High Court of Justice struck down Amendment No. 3 of the same law in the Adam case. Amendment No. 3 defined persons who entered Israel through an unauthorized border point as "infiltrators". Amendment No. 3 then allowed the detention of infiltrators for a period of three years, subject to several release grounds. The Amendment was held to be unconstitutional by the Supreme Court on the ground that a three-year detention period was a disproportionate violation of the right to liberty enshrined in the Israeli Basic Law: Human Dignity and Liberty.

Amendment No. 4 retains the definition of "infiltrators" and reduces the mandatory detention period to

one-year for new infiltrators (Article 30A). It also established the legal basis for a residence facility to which infiltrators could be sent for an unspecified duration (Chapter D of the law) with no judicial review. The Amendment requires thrice a day reporting within the facility and mandatory overnight stay and prohibits working outside the facility. The Amendment enables the Ministry of Interior to transfer residents to detention for violating the reporting and other behavioural requirements of the facility. The Holot Residence Facility was established soon after passage of Amendment 4 and pursuant to criteria issued by the Population and Immigration Border Authority (PIBA), long-staying Eritrean and Sudanese men were ordered to reside in the center.

Civil Society organizations petitioned the High Court of Justice claiming that Amendment No. 4 – like its predecessor – is unconstitutional and should be declared null and void.

On 22 September 2014, the High Court of Justice ruled in favour of the Petitioners, overturning Amendment No. 4 to the Anti-Infiltration Law. The High Court of Justice deemed the Law to be in violation of Israel's Basic Law on Human Dignity and Liberty and ruled Article 30A (one-year detention) and Chapter D unconstitutional (Residence Centre Holot).

A majority of seven justices to two ordered the closure of the detention facility Holot within 90 days. However, an order was given to suspend this ruling for a period of 90 days to allow the formulation of an appropriate legislative arrangement that would meet the limitations of the Basic Law on Human Dignity and Liberty.
The panel also struck down, by a vote of six to three, the section of the law allowing imprisonment for a year of individuals entering Israel irregularly.

Key considerations of the court

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A one-year mandatory detention for infiltration into Israel disproportionately infringes on the rights to liberty and dignity regardless of legitimacy of its purpose and is therefore unconstitutional

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."*

Potentially indefinite mandatory residence in the detention-like facility disproportionally infringes on the rights to liberty, dignity and due process and is therefore unconstitutional

- **Summary**

***"208**. Thereafter, we examined the constitutionality of Chapter 4 of the Law, which permits the 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."

- **Purposes of residency**
  - Preventing the settling down of "infiltrators"

***"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.*

  - 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…*

***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, water, 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 46(5), 72, 84-85 (1992)'; also see High Court of Justice 144/74 Levana v. The Commissioner of the Prison Services, padi 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 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.

- Inducing Voluntary return/Constructive expulsion

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, where as 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…*

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 compulsory 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…*

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."

- **Thrice a day reporting requirements**

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 (pp91–95) (1981), it was determined that an arrangement which included, inter alia, mandatory attendance 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 the right to Liberty, even if is not referring to the complete deprivation of the right but its limitation…

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 attendance 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 attendance 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?...

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…*

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.

- **Administration of the facility by the Israeli prison services**

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.*

- **No limitation on duration of residence and absence of release grounds**

147. *The third matter that requires our examination, which is not 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.*

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.*

160. *… 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 who 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…*

164. *… 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…*

- **Transfer to detention of residents as a sanction for violation of facility's rules**

168. *Article 32T of the Law infringes on 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 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 which 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…

***179**. Does Article 32T of the Law infringe 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 32T of 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 depravation 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 4-5 of 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 who 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.

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 of 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 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 be upheld – 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…

- ***Legality of the residence regime as a whole***

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 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 to 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...

Other comments or references

- The decision in this case is linked to the decision in the Adam case that annulled the previous amendment to the Anti-Infiltration Law (Amendment No. 4). Summary of the Adam case is available at http://www.refworld.org/docid/524e7ab54.html.

- This is the first time that the Israeli High Court of Justice annuls a law for a second time.

- As a result of the judgment the Knesset passed a third amendment of the Anti-Infiltration Law in December 2014 (Amendment No. 5). Amendment No. 5 is similar in structure to Amendment No. 4. It reduced the detention period of new "infiltrators" to three months (before one year) and mandatory residence to twenty months (before indefinite). It also added exemption and release grounds for residence (women, minors, parents to dependent children, persons over the age of sixty, victims of trafficking/slavery and persons whose health – physical and mental – might be compromised as a result of residence). Reporting requirements have been reduced to once a day (previously three) and detention periods as sanctions for violation of the law have also been reduced.

EXPLANATORY NOTE

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