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

HIGH COURT OF JUSTICE 8665/14

Before:

The Honorable Chief Justice M. Naor
The Honorable Justice S. Joubran
The Honorable Justice E. Hayut
The Honorable Justice H. Meltzer
The Honorable Justice Y. Danziger
The Honorable Justice N. Hendel
The Honorable Justice U. Vogelman
The Honorable Justice I. Amit
The Honorable Justice Z. Zilbertal

Petitioners

1. Tashuma Noga Desta
2. Anwar Suliman Arbav Ismail
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

v.

Respondents

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

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

1. Eitan – Israeli Immigration Policy Center
2. Kohelet Policy Forum
3. The Legal Forum for Israel
4. Concord Center for Research of the Absorption of

Opposition to the Order Nisi

Date of the Session: 14 Shevat 5775 (February 3, 2015)

In the Name of the Petitioners in High Court Justice 8425/13:	Adv. Oded Peller; Adv. Anat Ben-Dor; Adv. Assaf Wiezen; Adv. Osnat Cohen-Lifshitz; Adv. Elad Kahana; Adv. Rachel Friedman; Adv. Jonathan Berman
In the Name of the Respondent 1	Adv. Dr. Gur Blei
In the Name of Respondents 2 – 5	Adv. Yochi Gennisin; Adv. Ran Rosenberg; Adv. Moriah Friedman; Adv. Noam Moulla
In the Name of Respondent 1 requesting to join as “amicus curiae”	Adv. Guy Zabari
In the Name of Respondent 2 requesting to join as “amicus curiae”	Adv. Ariel Erlich
In the Name of Respondent 3 requesting to join as “amicus curiae”	Adv. Idan Abouhav
In the Name of Respondent 4 requesting to join as “amicus curiae”	Adv. Avinoam Cohen

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JUDGMENT

Chief Justice M. Naor

In the Petition before us the constitutionality of Chapter 1 of the Law for the Prevention of Infiltration and Ensuring the Departure of the Infiltrators from Israel (Amendments to the Legislation and Temporary Orders), 5775 – 2014 (hereinafter: the "*Amendment to the Law*") is challenged. Within the framework of this Chapter, the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714 – 1954 (hereinafter: the *"Law"*) was amended and it set forth provisions whereby it is possible to hold "infiltrators" in detention for a period

of up to three months and order their stay in the Residency Center for a period of up to twenty months. The Amendment to the Law, which was approved during the second reading and the third reading in the Knesset on December 8, 2014, was enacted after this Court determined in two judgments that certain provisions which were added to the Law within the framework of its previous amendments were not constitutional (High Court of Justice 7146/12 *Adam v. The Knesset* (September 16, 2013) (hereinafter: the "*Adam Case*"); High Court of Justice 7385/13 *Eitan – Israeli Immigration Policy Center v. The Israeli Government* (September 22, 2014) (hereinafter: the "*Eitan Case*")).

General Overview

1. In the last few years, tens of thousands of people entered into Israel by means other than border patrol stations, many of them nationals of African countries. These individuals are defined in the Law as "infiltrators" since they illegally entered into Israel. This is contrary to those individuals who legally entered into Israel, however they did not exit the country on the required date and continued to reside therein illegally.

2. In light of the "infiltrator phenomenon", Israel stands before complex challenges. Simultaneous to preventing illegal immigration, the State must fulfill its obligations to help the persecuted and ensure that they will not be placed in an inherent risk to their lives or liberty should they be deported from its borders (High Court of Justice 7302/07, *Center for Aid for Foreign Workers v. The Minister of Defense*, para. 14 (July 7, 2011) (hereinafter: "*Center for Aid for Foreign Workers Case*"). In the Adam Case and in the Eitan Case, we emphasized that these challenges are not unique to Israel and that in the last decades there is a continuous increase in the number of men and women migrants leaving their countries for different and various reasons.

3. According to the updated data from the Population and Immigration Authority, as of June 30, 2015, a total of 64,309 "infiltrators" entered Israel, of which 45,091 "infiltrators" are currently residing in Israel. Until 2012, the "infiltrator phenomenon" was on the rise, however as of this year the trend changed. Whereas in 2011, 17,258 "infiltrators" entered Israel, in 2013 only 45 "infiltrators" entered Israel and in 2014, 21 "infiltrators" entered Israel. During the first half of 2015, only 39 "infiltrators" entered Israel. At the same time, during the years 2013 – 2014, there was an increase in the number of "infiltrators" leaving Israel. Despite the changes described in the scope of the "infiltrator phenomenon", the State of Israel is still required to cope with the large number of "infiltrators" residing within its borders (also see the Eitan Case, para. 40 of *Justice U. Vogelman's* ruling; the references below to this ruling shall refer to *Justice U. Vogelman's* ruling, unless otherwise noted). The majority of the "infiltrators" residing in Israel (approximately 92%) are nationals from Eritrea and the Republic of Sudan (hereinafter: *"North Sudan*") (the Population and Immigration Authority, the Department for Planning Policies for *Foreigners in Israel – Edition No. 2/2015* (July 2015)).

4. In the previous proceedings, the Court reviewed the dispute between the parties with respect to the reasons which brought the "infiltrators" to Israel. This dispute has arisen again in the proceeding before us. The State's position is that the vast majority of the "infiltrators" are migrant workers who left their countries with the intent to improve their condition. Consequently, except for the statutory arrangements subject of our deliberations, including the Amendment to the Law as well as Chapter 2 (which is not being attacked in the present Petition), which indirectly amends the Foreign Workers Law, 5751 – 1991 and imposes different restrictions on the employment of the "infiltrators". Conversely, the Appellants' position is that these are individuals who escaped from the inherent dangers to their lives or liberty from their country of origin. They note that Eritrea and Sudan – the country of origin of the majority of the "infiltrators" – are countries which suffered from a lack of internal stability and in the last few years suffered from severe crisis and war (Adam Case, para. 6 of *Justice Arbel's* ruling; the references to this ruling shall refer to *Justice Arbel's* ruling, unless otherwise noted; Eitan Case, para. 31). In light of this, according to the Petitioners' opinion, many of the "infiltrators" are entitled to the status of refugees. According to their claims, this status is not limited only to the prohibition of deporting them to the country of their origin, but also affords them additional rights in different areas (International Convention relating to the Status of the Refugees, Convention Treaty from 1951, Convention Treaty 3, 5 (opened for signatures in 1951) and the 1967 Protocol relating to the Status of the Refugees, Convention Treaty 21, 23 (opened for signatures in 1967) (hereinafter to be jointly referred to as the "*Refugee Convention*"); Adam Case, paras. 32 – 36).

5. As noted in the previous proceedings, "the accurate picture regarding the identity of the “infiltrators” is certainly more complex than that 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" (*ibid*, para. 31). This is also correct in the case before us. Either way, at the present time, Israel is not deporting the nationals of Eritrea and North Sudan directly to their countries. According to the information before us, the nationals of North Sudan are not being deported directly to their countries due to pragmatic difficulties, originating from the absence of diplomatic relations with this country (for further discussion on this topic see: *ibid*, paras. 31 – 32; Adam Case, para. 8). Conversely, due to the state in Eritrea and with respect to its nationals, the State is adopting a "temporary non – deportation" policy. This is in accordance with the customary principle of international law whereby a person shall not be deported to a place where there is an inherent danger to his life or liberty (the *Non – Refoulement* principle; also see, *inter alia*, section 33 of the Refugee Convention). The non – deportation policy, as it is applied in Israel, was extensively reviewed by this Court in previous rulings (Adam Case, paras. 8 – 9; Appeal on Administrative Appeal 8908/11 *Asefo v. The Minister of Interior* (July 17, 2012) (hereinafter: the *"Asefo Case*")). As of now, this is only " temporary non – deportation" without determining alongside it a specific arrangement which deals with the significance of the practices and which relates

to the rights granted to those entitled to it (for criticism of this normative state, see, *ibid, Justice Hayut's* ruling).

6. For the sake of completing the picture, it should be noted that the specified policy does not prevent nationals of Eritrea and North Sudan from submitting individual requests to recognize them as refugees, even though in the past the State did restrict this (see: Eitan Case, para. 34; Asefo Case, para. 18 of *Justice U. Vogelman's* ruling). Up until several years ago, requests for asylum were first submitted to the United Nations High Commissioner for Refugees in their entirety and thereafter in collaboration with them (see 8675/11 *Tedessa v. Division for the Treatment of Asylum Seekers*, paras. 9-11 (May 14, 2012); Sharon Harel "Israel's Asylum Mechanism: The Process for Transferring the Handling of Requests for Asylum from the United Nations High Commissioner for Refugees to the State of Israel", from *Levinski, Corner of Asmara: Social and Political Aspects of the Asylum Policy in Israel*, 43 (2015) (hereinafter: "*Levinski, Corner of Asmara*")). During the last few years, the requests for asylum are transferred to the RSD Unit (Refugee Status Determination) (hereinafter: the "*RSD Unit*") in the Population and Immigration Authority, which operates according to the instructions by the Minister of Interior (see: The Ministry of Interior: "The Procedure for Handling Requests for Asylum in the State of Israel" (January 2, 2011)).

The Previous Proceedings – The Adam Case and the Eitan Case

7. In light of the difficulty of deporting the majority of the "infiltrators" to their country of origin, the State of Israel was required to find alternate solutions. At first, Israel acted according to a policy whereby "infiltrators" they caught were returned to Egypt. However, the implementation of this policy was repealed in light of the geopolitical state in Egypt (Center for Aid for Foreign Workers Case, paras. 11 – 12, for additional arrangements which were applied in the past see: Yonathan Berman "Refugee Arrests and Asylum Seekers in Israel", from Levinski, Corner of Asmara 147, High Court of Justice 10463/98, *African Refugee Development Center v. The Minister of Interior* (August 17, 2009); High Court of Justice 5616/09 *African Refugee Development Center v. The Minister of Interior* (June 28, 2009)). Another policy which Israel adopted was placing the "infiltrators" in detention according to the Law of Entry into Israel, 5712-1952 (hereinafter: "*Law of Entry into Israel*"). The problem was that the "infiltrators" were released from detention within a relatively short period of time, *inter alia*, since the Law of Entry into Israel does not permit, in general, holding a person in detention for more than 60 days.

8. With the rise of the "infiltrator phenomenon", the State's authorities adopted other measures, including erecting a physical barrier along the land border with Egypt and legislation which was intended to apply unique legal arrangements to the "infiltrators". These arrangements are more severe than the arrangements applicable to illegal immigrants residing in Israel according to the Law of Entry into Israel. This policy was initially expressed in the Law for the Prevention of Infiltration (Offenses and

Jurisdiction) (Amendment No. 3 and Temporary Order), 5772 – 2012, (hereinafter: *"Amendment No. 3*"), in the framework of which section 30A was added to the Law. The primary provision of section 30A – which was enacted as a temporary order – permitted detaining "infiltrators" in detention for a period of up to three years, subject to the grounds of release with a guarantee set forth in section 30A of the Law. This Court, in an expanded panel of nine justices, ruled in the Adam Case that Amendment No. 3 is not constitutional because of its disproportionate infringement of the constitutional rights to liberty. In the majority opinion, we instructed upon the repeal of the arrangement prescribed in section 30A of the Law. We also ruled there that with the repeal of the arrangement prescribed in section 30A of the Law, the detention and deportation orders by virtue of which the "infiltrators" were held in detention shall be deemed as though they were issued according to the Law of Entry into Israel and the individual examination of those held in detention should begin immediately, releasing them if necessary.

9. As a result of the ruling in the Adam Case, the Knesset enacted the Law for the Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 4 and Temporary Order), 5774 – 2013, (hereinafter: *Amendment No.4*). Within the framework of this amendment – which was also enacted as a temporary order – section 30A was reenacted, while shortening the maximum period for detention to one year. Alongside this, Chapter 4 was added to the Law which arranged the establishment of a residency center for the "infiltrators" (hereinafter: the "*Residency Center*") and authorized the Head of Border Control (hereinafter: the "*Head of Border Control*") to transfer any "infiltrator" to the Residency Center for whom there is any difficulty, of any nature, of deporting from Israel. Within the framework of Chapter 4, various provisions were set forth regarding the nature of the operations of the Residency Center. Amongst other things, the "infiltrators" residing in the Residency Center were required to report three times a day for attendance registration and remain there during the hours of the night. Shortly following the enactment of Amendment No. 4, the Order for the Prevention of Infiltration (Offenses and Judgment) (Declaration of Residency Center for "Infiltrators") (Temporary Order), 5774 – 2013, was published in the Official Gazette. In this Declaratory Order, which was promulgated pursuant to section 32B of the Law, the Minister of Public Security declared the "Holot" Facility, located in the Negev, as 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, the Immigration Authority began transferring the "infiltrators" held in detention to the "Holot" Facility.

10. In the Eitan Case, this Court ruled in the majority opinion that the two tiers mentioned in Amendment No. 4 are not constitutional and instructed upon their repeal. The Court ruled that the detention of an individual cannot be ordered when there is no expectation for his deportation from Israel, all the more so for an extended period of one year. Even though the State argued that one of the purposes of section 30A of the Law was clarifying the identity of the "infiltrator" and exhausting channels for his deportation, it was ruled that a gap exists between the declared purpose of the Law and its wording. Therefore, it was ruled that placing "infiltrators" in detention when there is no deportation on the

horizon for the duration of a period of one whole year – when it is not as a punishment for their actions, and without the ability to do anything to advance their release –establishes a severe infringement on their rights. With respect to the Residency Center, it was determined that it too was not constitutional. First and foremost since it does not determine a time limit in the matter of the residency in the Residency Center or offer any grounds for release from it; but also due to the individual arrangements set forth therein, for example, the reporting requirement for the purposes of attendance registration and being required to stay in the Residency Center overnight. The Court ruled that Chapter 4 reflects in general a bleak picture of a facility which, by its characteristics and management is closer to a detention facility, contrary to an open or quasi – open residency center. Therefore, it was ruled that the two tiers of the law ought to be repealed.

11. Instead of the arrangement set forth in section 30A, which was repealed, it was ruled that the arrangement provided for in the Law of Entry into Israel would replace it. In addition, the declaration of the repeal with respect to Chapter 4 of the Law was suspended for a period of ninety days; with the exception of a limited number of provisions, with respect to which it was determined that the declaration of their repeal would be in effect prior to this, in accordance with the terms set forth in the judgment.

The Law Subject of the Petition

12. On December 8, 2014 – approximately three months after the ruling was rendered in the Eitan Case – an amendment to the Law subject of our deliberations was accepted, which was also enacted as a temporary order. The fundamental amendments to the Law are as follows: first, section 30A of the Law was reenacted, while limiting the period of detention to a maximum of up to three months. Secondly, Chapter 4 of the Law was enacted once again, which reestablished the Residency Center and arranged its activities. Similar to Chapter 4 in its previous version, as well as in the current version, the Head of Border Control is authorized to require an "infiltrator" to reside in the Residency Center. At the same time, the maximum period of residency in the Residency Center was restricted to twenty months and it was determined that a special populace, for example, minors and victims of certain crimes, would not be summoned to the Center. As in the past, it was determined that the "infiltrators" must report for the purposes of attendance registration in the evening hours and that they are not permitted to leave the boundaries of the Residency Center during the hours of the night. Notwithstanding this, the reporting requirement during the hours of the day was repealed and grounds for release from the Residency Center were determined. I will review the complete details of the arrangement prescribed in Chapter 4 of the Law below. I will already note that according to the explanatory notes of the Amendment to the Law, these arrangements were designated to modify the "infiltrators’" set of incentives who are considering entering Israel by means other than border patrol stations; to permit the authorities to exhaust the identification process of the "infiltrators" and the procedures for their deportation from Israel; to provide a response to the State of Israel's right to protect its borders and sovereignty; and

to prevent the settling down of the “infiltrators” in Israel (explanatory notes for the Proposal of the Law for the Prevention of Infiltration and Ensuring the Departure of the Infiltrators and Foreign Workers from Israel (Amendments to the Law and Temporary Order), 5775 – 2014, Government’s proposed law 904 (hereinafter: "*Explanatory Notes*")).

Shortly after the legislation of the Amendment to the Law, the Petition before us was submitted.

Developments Following the Submission of the Petition

13. On December 30, 2014, *Chief Justice A. Grunis* instructed upon issuing the *order nisi* instructing the Respondents to provide a reason why section 30A and Chapter 4 of the Law should not be repealed as it was amended in the Amendment to the Law subject of the Petition before us. *Chief Justice A. Grunis* further instructed that the Petition would be deliberated before an extended panel of nine justices.

14. On February 3, 2015, we conducted a session of the oral arguments of the Petition. At the end of the court session, and in light of the questions and claims raised during its course, we instructed the Respondents to provide a supplementary affidavit on their behalf. In the affidavit, the Respondents were requested to specify different figures, *inter alia*, regarding the segmentation of the population located in the "Holot" Residency Center; with respect to the requests for asylum submitted to the RSD Unit; and with respect to the asylum seekers who voluntarily left Israel during the course of their stay in the Residency Center or in detention. I will refer to the figures specified in the supplementary affidavit which was submitted on February 16, 2015, below.

Presenting the Petitioners and the Fundamental Claims of the Parties

15. Petitioner 1 is 34 years old and is an Eritrean citizen. According to his claims, he served in the Eritrean army for several years and afterwards was detained in prison for more than one year without a trial. In 2008, Petitioner 1 left Eritrea and "infiltrated" into Israel. During the years 2008 – 2013, Petitioner 1 resided in Beer Sheva, Eilat and Tel Aviv and worked in hotels. In January 2014, the Head of Border Control issued a residency order against him for the "Holot" Residency Center, where he resided until the filing date of this Petition. Petitioner 1 submitted a request for asylum which has not yet been decided. Petitioner 2, is 35 years old, a citizen of North Sudan and a native of Darfur. According to his claim, during the course of his studies at the university he was involved in political activities within the framework of the movement the "Darfur People" and as a result was arrested twice without a trial, was beaten and detained in inhumane conditions. Following his release from prison, in 2004 Petitioner 2 escaped from North Sudan to Libya. In 2008, after the Libyan authorities began extraditing the activists of the movement to North Sudan, Petitioner 2 escaped from there and "infiltrated" into Israel on November 17, 2008. Upon his arrival to Israel, he was held for five months in detention. After his release from detention, he resided in Jerusalem and Tel Aviv and worked in hotels. In

February 2014, a residency order for the "Holot" Facility was issued to Petitioner 2, where he has been staying since the beginning of March of the same year. According to his claims, the residency order for "Holot" was issued after he refused to leave Israel and depart to a third country. Petitioner 2 also submitted a request for asylum, for which a decision also has yet to be provided.

The remaining Petitioners in this Petition, Petitioners 3 – 8 are a series of human rights organizations: The Hotline for Refugees and Migrants; The Association for Civil Rights in Israel; ASSAF- Aid Organization for Refugees & Asylum Seekers in Israel; Kav LaOved – Worker's Hotline; Physicians for Human Rights in Israel; and the African Refugee Development Center.

16. The Petition is directed against the two tiers of Chapter 1 of the Amendment to the Law. The first arrangement being attacked is detention by virtue of section 30A of the Law. Even though the period of detainment was shortened from one year to three months, the Petitioners believe that the section is still unconstitutional. According to the Petitioners' claims, similarly to Amendment No. 4, section 30A in its current version permits holding an individual in detention when there is no actual feasibility of his deportation. According to their positon, under these circumstances, this constitutes unlawful arrest.

The second arrangement being attacked by the Petitioners is the Residency Center, whose establishment was arranged, as aforementioned, in Chapter 4 of the Law. According to the Petitioners' claims, there are several constitutional flaws in Chapter 4 which justify the repeal of this entire Chapter. The Petitioners' primary claim is that the period of detention in the Residency Center – albeit restricted to twenty months – is still exceedingly longer than what is customary in the world and discernibly infringes on the rights of the "infiltrators". The Petitioners also believe that the purposes of Chapter 4 are not proper. Their central claim in this context is that the real purpose of the provisions of Chapter 4 is to encourage the "infiltrators" to leave the country through "breaking their spirit, deterrence and separating between the populations." According to their opinion, this is not a proper purpose when referring to a group to whom a prohibition of deportation is applicable. In any event, the Petitioners claim that the Residency Center does not obtain that purpose, when taking into consideration that following the release of the "infiltrators" from the Residency Center, they return to urban cities and settle there. The Petitioners also have numerous complaints with respect to the individual arrangements in Chapter 4, in particular with respect to the arrangement authorizing the Head of Border Control to transfer an "infiltrator" residing in the Residency Center to detention, if it was determined that he violated the different rules of the Residency Center.

In light of the aforementioned, the Petitioners requested from this Court to repeal for the third time the provisions of the Law, as they were promulgated in the Amendment subject of this Petition.

17. The Knesset and the State believe that the Petition should be rejected. According to their position, the purposes of the Law are proper and the arrangements prescribed therein are proportionate. According to the Knesset's claim, there are material differences between the arrangement which was repealed in the Eitan Case and the arrangement enacted in its place and which is being attacked in the framework of this Petition. The changes made by the Knesset in the legislative arrangement – which includes the reduction of the maximum period of detention to three months; shortening the maximum period of detention in the Residency Center to twenty months; reducing the reporting requirement and the management of proactive judicial review by the Tribunal for Infiltrators for this decision – and as it was claimed, the constitutional flaws in the previous arrangement were resolved. Taking into consideration the legislative latitude afforded to the legislator, the Knesset believes that an interpretive solution for the classification of this Petition should be preferred over the Court's involvement regarding the legislation. This is particularly true in light of the fact that we are dealing with the third constitutional review of the same Law and considering that this Law relates to the formation of an immigration policy, an issue which is at the core of the State's sovereign powers.

The State also claimed that even though the provisions of Chapter 4 regarding the Residency Center infringe on the right to liberty, they do not negate it. According to its claims, the changes made by the Knesset in this Arrangement significantly reduced the scope of the infringement and they meet the tests of the limitations clause. Similarly, it was claimed, the provisions regarding placement in detention were enacted for a proper purpose and meet the proportionality tests.

Parties Requesting to Join as Amicus Curiae

18. Four non–profit and other organizations requested to join this Petition as amicus curiae. The first– the Kohelet Forum (hereinafter: the "*Forum*") – is a public non-profit organization which operates "for the reinforcement of democracy in Israel, promotes personal liberty and encourages the application of the free market principles in Israel and anchors the permanent status of Israel as a nation state for the Jewish people". According to the Forum's claims, the purposes of the Law – curbing the "infiltrator phenomenon" and deterring future "infiltrators" alongside preventing the "infiltrators" currently residing in Israel from settling down and ensuring their departure – are proper. It was also argued that in accordance with the acceptable normative structure in Israel, the power of the local law supersedes the provisions of international law. Therefore, according to the Forum's claims, there is no place to rely upon the provisions of international law in the framework of the scrutiny of the constitutionality of the Law.

19. The second non – profit organization requesting to join this Petition as amicus curiae is the Legal Forum for Israel, which engages "for the sake of governmental integrity in general and, in particular, the legal system, including the issue of separation of powers and checks and balances between the three powers". In summation, the non – profit

organizations claimed that the Petition should to be dismissed, first and foremost in light of the legislative latitude granted to the legislator as a material component in the principle of separation of powers. It was also argued in this case that the legislative latitude is particularly great, given the primary issue which is on the agenda – the duration of time permissible to detain "infiltrators" in detention and in the Residency Center – is a "quantitative" issue in its nature.

20. The third non – profit organization requesting to join this Petition, as a Respondent and alternately as amicus curiae is Eitan – Israeli Immigration Policy Center, which engages "for the sake of forming an organized immigration policy in Israel". Eitan's primary claim is that within the framework of the constitutional scrutiny of the Law, the necessary balance between the rights of the "infiltrators" and the rights of the residents of the urban cities in general, and in particular south Tel Aviv, must be reviewed. According to Eitan's opinion, this is a "vertical balance" in the framework of which the citizens of Israel and its residents' hand must be superior. Now, so it was claimed, the arrangements anchored in the Law are not only proportionate but are required because of the reality, since otherwise a disproportionate infringement on the rights of the residents of its urban cities will be created.

21. The fourth entity requesting to join the Petition is the Concord Research Center for Integration of International Law in Israel (hereinafter: the "*Concord Center*"). The Concord Center emphasized that international law affords countries the right and authority to enforce their immigration laws through deporting foreigners situated within their borders without a permit. It should be noted that in principle there is nothing wrong with adopting measures for detention which were designated to ensure the enforcement of decisions in matters of deportation and alienation. Notwithstanding this, it was emphasized that use of this measure is subject to the fundamental principles, such as necessity, proportionality and reasonableness. According to the Concord Center's claims, the provisions of the Law are not consistent with these principles. According to their claim, a clear linkage between the power to hold in detention or in the Residency Center and the actual possibilities to deport an individual defined as an "infiltrator" from Israel, is absent. The absence of this linkage, so it was claimed, in practice allows for an arbitrary infringement on the right of liberty – an infringement which is prohibited by international law.

Deliberation and Ruling

22. As aforementioned, the question of the constitutionality of the two arrangements of the Law has been brought before us for review. The starting point in examining the constitutionality is that the Court must act with restraint when examining laws enacted by the Knesset, which express the will of the people (see for example, High Court of Justice 1213/10 *Nir v. The Chairman of the Knesset*, para. 27 (Chief Justice *D. Beinisch*) (February 23, 2014) (hereinafter: the "*Nir Case*"); High Court of Justice 1548/07 *The Israeli Bar Association v. The Minister of Public Security*, para. 17 (July 14, 2008)). This

is reinforced in our case where we are requested to examine the constitutionality of a law which was repealed by this Court and re-enacted by the Knesset for a third time. *Justice U. Vogelman* noted in the Eitan Case that under these circumstances particular prudence is required when scrutinizing the constitutionality of the Law (*ibid*, para. 23). Notwithstanding this, this does not mean that the Law is immune from judicial review. This is similar to what I noted in the Eitan Case:

> "…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 the Basic Laws themselves" (ibid., p. 388). (*ibid*, para. 3 of my ruling)."

Consequently, a duty is imposed upon us to also scrutinize whether the Law in question this time around is also constitutional. As known, constitutional scrutiny is not conducted in a vacuum: it is conducted in light of the reality of life with which the examined law was intended to cope (see: Adam Case, para. 1 of *Justice U. Vogelman's* ruling). As described above, the provisions of the Law being attacked in this proceeding includes measures adopted by the State as an attempt to cope with the "infiltrator phenomenon". According to the information we have, the scope of this phenomenon is in a downward trend. Nonetheless, since the number of "infiltrators" residing in Israel is still great, the necessity to handle the challenges arising from this remains unchanged. In light of these matters, I will turn to the constitutional analysis.

23. In principle, the constitutional analysis is performed in stages. First, there is a need to examine whether the Law infringes on an individual's protected right. If the answer is negative – the constitutional analysis will conclude. If the answer is positive, there is a need to examine whether the infringement is lawful, in accordance with the conditions of the limitations clause (see for example: High Court of Justice 2605/05 *The Academic Center for Law and Business v. The Minister of Finance*, padi 63(2) 545, 623 (2009) (hereinafter: "*Privatization of Prisons Case*"). These rules are supported by the approach to constitutionality whereby constitutional human rights are relative, and therefore may be restricted when there is a justification to do so.

24. The limitations clause contains four cumulative conditions for which a law infringing on human rights must meet in order for the infringement to be deemed lawful. First, there

shall be no infringement of constitutional rights except by a law which befits the values of the State of Israel as a Jewish and democratic state. Furthermore, the law must have a proper purpose. In essence, a purpose is proper if it intended to realize important public interests (see for example, High Court of Justice 6893/05 *Levy v. The Government of Israel*, padi 59(2) 876, 890 (2005); High Court of Justice 6784/06 *Shlitner v. The Commissioner for Pension Payments*, para. 78 of *Justice A. Procaccia's* ruling (January 12, 2011); Aaron Barak, *Interpretation of the Law – Constitutional Interpretation* 525 (1994)). Finally, the infringement of the right must be proportionate. The proportionality of the law is examined by three secondary tests. The first secondary test is the "reasonable relationship" test in the framework of which, there is a need to actually examine the purpose for which it was enacted. The selected measure must lead to the realization of the purpose of the law with a serious probability which is not minimal or solely theoretical (see: Nir Case, para. 23 of Chief Justice D. Beinisch's ruling; High Court of Justice 7052/03 *Adalah – The Legal Center for Minority Rights of Israeli Arabs v. The Minister of Defense*, padi 61(2) 202, 343 (2006) (hereinafter: the "*Adalah Case*"); High Court of Justice 6133/14 *Gorwitz v. The Israeli Knesset*, para. 54 of Senior Justice A. Rubinstein's ruling (March 26, 2015) (hereinafter: the "*Gorwitz Case*"), Aaron Barak, *Proportionality in the Law – the Infringement of a Constitutional Right and its Limitations* 377, 382 (2010) (hereinafter: "*Barak – Proportionality*"). The second secondary test – the "least offensive measure test" – examines if amongst the measures which realize the purpose of the law, the legislator selected the measure which least violates human rights. The legislator is not required to select an alternate measure which is not sufficient to realize the purpose of the law to the same degree or to a similar degree as the selected measure (Adam Case, para. 24; High Court of Justice 3752/10 *Rubinstein v. The Knesset*, para. 74 of Justice *E. Arbel's* (emeritus) ruling (September 17, 2014)). The third secondary test is referred to as the proportionality test in the "strict sense". In its framework, it is necessary to examine whether there is a proper relationship between the benefit which will develop from realizing the purposes of the law and the infringement of the constitutional rights accompanying it. This is a test of values based upon the balance between rights and interests. It weighs the social importance of the infringed right, the type of infringement and its proportion against the inherent benefit in the law (see: High Court of Justice 6304/09 *Lah"av - The Office for the Independent Businesses v. The Attorney General of the Government*, para. 116 of *Justice A. Procaccia's* ruling (September 2, 2010); High Court of Justice 6055/95 *Zemach v. The Minister of Defense*, padi 53(5) 241, 273 (1999) (hereinafter: *"Zemach Case*").

If the Court concludes that the law in question does not meet the conditions of the limitations clause, the law is not constitutional. In such a case, the Court must determine the ramifications of the unconstitutionality within the realm of the relief (see: for example, High Court of Justice 2344/02 *Shtenger v. The Chairman of the Knesset*, para.5 of Chief Justice *A. Barak's* ruling (November 26, 2003); High Court of Justice 2254/13 *Samuel v. The Minister of Finance*, para. 8 of Justice *N. Hendel's* ruling (May 15, 2014)).

25. Following the general principles, I will proceed to the constitutional scrutiny of the Law which is at issue before us. First, the constitutionality of section 30A of the Law, whereby "infiltrators" are detained for a period of three months shall be examined. Subsequently, the constitutionality of Chapter 4 of the Law, which rearranges the operations of the Residency Center for the "infiltrators" shall be examined.

Section 30A of the Law – General

26. The starting point for the deliberations is section 30A of the Law, which authorized the Minister of Defense to issue a deportation order regarding an "infiltrator". The deportation order serves as legal attestation for holding the "infiltrator" in detention until his deportation, subject to various restrictions (also see: the Eitan Case, para. 42). Section 30A of the Law, which was under judicial review in the Eitan Case, allowed holding an "infiltrator" against whom a deportation order was issued in detention for a maximum period of three years. Section 30A in its version in Amendment No. 4, which we examined in the Eitan Case, prescribes a shorter maximum holding time in detention of one year. The section under our review now, once again shortens the maximum holding time in detention to three months. Section 30A prescribes as follows:

Bringing before the Head of Border Control and his authorities (Temporary Order) 5774 – 2013

30A. (a) An infiltrator located in detention will be brought before the Head of Border Control no later than five days from the day the detention 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 his physical condition, his detention may harm his health, including his mental health, as aforementioned, and there is no other means of preventing the aforementioned 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;

(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 according to the Law of Entry into Israel and the processing of his requests has not begun despite the fact that sixty days have passed;

(c) The Head of Border Control shall release an

infiltrator with guarantee if three months have passed since the beginning of the infiltrator's detention.

(d) Notwithstanding the instructions in section (b)(2) or (4), (5) or section (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 section, 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, as the case may be.

(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 section (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.

(k) If the Head of Border Control instructed that an infiltrator be released with a guarantee according to this section, and all the conditions for granting the residency order have been fulfilled for the infiltrator according to section 32D, the Head of Border Control shall issue a residency order against the infiltrator as stated according to the provisions of the same section.

Similar to the arrangement which we reviewed in Amendment No, 4, section 30A in its current version prescribes the Head of Border Control's authorities regarding detention and release therefrom. As in the past, the arrangement was enacted in the framework of a temporary order which is in effect for three years and comes into effect in a prospective manner (section 8(b) of the Amendment of the Law).

27. Section 30A, as aforementioned, authorizes the Head of Border Control to hold an "infiltrator" in detention for a maximum period of time of three months (section30A(c) of the Law), subject to the grounds of release with a guarantee, including the "infiltrator's" age, physical condition or other humanitarian grounds (section 30A(b) of the Law). In addition, if the "infiltrator" submitted a request to receive a visa and permit for residency in Israel, and the processing of his requests did not begin despite the fact that sixty days passed, then it will constitute additional grounds for his release with a guarantee. Alongside this, section 30A permits holding an "infiltrator" in detention, who is not cooperating with his deportation or if his release poses a danger for a period of time, which is greater than three months. All of this, unless the Head of Border Control is convinced that due to a certain "infiltrator's" circumstances, his detention may cause harm to his health (section 30A (d) of the Law). An "infiltrator" being detained must be brought before the Detention Review Tribunal for Infiltrators (hereinafter: the "*Tribunal*"), no later than ten days from the commencement date of his detention (section 30E (1) of the Law). If the Tribunal approves the detention of the "infiltrator" in custody, the "infiltrator" shall be brought before him for a periodic examination of his case within

a time frame that shall not exceed thirty days (section 30D of the Law). The Tribunal's decision is subject to appeal in the Court for Administrative Affairs (section 30F of the Law).

28. These are, in essence, the provisions which arrange the detention of an "infiltrator" in detention and his release therefrom. The primary difference between these provisions and the provisions of the arrangement which we reviewed in the Eitan Case is the maximum period for holding an "infiltrator" in detention. Whereas, Amendment No. 4, as stated, permitted holding an "infiltrator" in detention for the duration of one year, the current arrangement restricts the duration of detention to only three months. In addition, the period to release an "infiltrator" who submitted a request to receive a visa and permit for residency in Israel and the processing of his requests did not begin was reduced from three months to sixty days. In addition , a further ground for release with a guarantee due to the infiltrator's mental state (section 30A(b)(1) of the Law) was added and a different ground for release with a guarantee regarding the passage of time until receiving a decision in the request for a visa and permit for residency was revoked.

29. The Petitioners claimed, as aforementioned, that section 30A in its current version also does not pass the limitations clause tests. According to their claim, even this arrangement – similar to the arrangement we reviewed in the Eitan Case – permits holding an "infiltrator" in detention without it being dependent on the existence of an effective possibility for his deportation. According to the Petitioners' opinion, this can be inferred from the Knesset's decision *not* to include an explicit provision in the Law whereby the "infiltrator" would be released from detention if the identification process ended and there is no actual possibility to deport him from Israel within a reasonable time. According to their claims, this indicates that the purpose of section 30A is not to establish the "infiltrators'" identity and exhaust all existing departure channels but rather to deter potential "infiltrators". The Petitioners believe that deterrence is not a proper purpose. In light of this, the Petitioners also claimed that section 30A in its current version should be repealed.

30. In its response, the State claimed that section 30A was enacted for a proper purpose and does not excessively infringe the rights beyond what is necessary. According to the State's claims, the primary purpose of the section is exhausting the clarification process of the "infiltrator" and setting up a necessary period of time for the purposes of establishing channels of departure from Israel. In consideration of this process, the State believes that the three month period prescribed in the Law is proportionate.

31. In its response, the Knesset concurred with the State's position that section 30A is constitutional. The Knesset noted that albeit the section has another underlying purpose with respect to reducing the incentives for potential "infiltrators" coming to Israel, with regard to which the Court expressed its doubts if it is a proper purpose. However, considering that the period of time for detention is consistent with realizing the purpose of identifying and exhausting channels of departure, it believes that the infringement on

rights in the current arrangement is not excessive. Finally, the Knesset claimed that even though the current arrangement does not include explicit grounds for release from detention under the circumstances which the proceedings of a certain "infiltrator" and the examination channels of departure for him have been exhausted, it is preferable to interpret this arrangement in a manner which is consistent with the Basic Law, instead of repealing it.

After I have considered the Parties' claims, I have reached the conclusion that subject to the interpretation which shall be described below with respect to the arrangement permitting detention, the Petition on this issue ought to be dismissed.

Infringement on Constitutional Rights

32. There is no dispute that section 30A infringes the "infiltrators" constitutional rights to liberty. When taking into consideration that in the previous proceedings, this Court reviewed in depth the importance of the right to liberty (Adam Case, paras. 71 – 76; Eitan Case, para. 46), I will suffice with expressing the essence of these matters. The right to personal liberty is anchored in section 5 of the Basic Law: Human Dignity and Liberty, whereby "there shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise". The right to liberty is granted to every person residing in Israel, even if he illegally entered the borders. This right "[…] 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" (Eitan Case, para. 46, also see for example, *Privatization of Prisons Case*, pp.597 - 598). Holding an "infiltrator" in detention infringes his right to physical liberty, an infringement which also has consequences on additional rights. Alongside the infringement on the right to liberty, holding an "infiltrator" in detention also infringes his right to dignity (Eitan Case, para. 47). Naturally, reducing the term of detention alone does not negate the described infringement on the "infiltrators'" constitutional rights.

33. Since there is an infringement on constitutional rights, it is necessary to examine whether this infringement is lawful. The first condition, which deals with whether the infringement was made through a law, exists. Even in the current proceeding – similar to the previous proceedings – the Parties did not expand with respect to the second condition which is the correlation between the provisions of the Law and the values of the State of Israel. Therefore, I will assume that this condition exists and I will refer to the examination of the additional conditions of the limitations clause – whether the provisions of the infringing law were designated for a proper purpose; and if its infringement is not excessive.

The Purpose of Detention

34. The State declared, as aforementioned, in its response and in the deliberations before us, that the primary purpose of section 30A is "exhausting the identification process of the "infiltrator"'and setting up a necessary time frame for the State for the purposes of forming voluntary channels of departure or deportation from Israel (para. 119). In the Eitan Case, we ruled that the purposes of clarification and deportation, in itself, is a proper purpose. "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 will permit its proper operations and affords protection to the rights to its citizens and residents" (Eitan Case, para. 51). Detention for the purposes of clarifying the identity of the "infiltrator" and for the purposes of exhausting his channels of departure in Israel is consistent with our case law, whereby it is not possible to detain a person in custody if he cannot be deported within a certain period of time. Therefore. "[…] the validity of the arrest by virtue of a deportation order does not continue to stand if an effective deportation process does not exist" (Adam Case, para. 2 of my ruling; also see High Court of Justice 4702/94 *Al-Tai v. The Minister of Interior*, padi 49(3), 843, 851 (1995) (hereinafter: the "*Al-Tai Case*")). This Court reiterated this rule in the Eitan Case:

> "This is the rule that has been formulated in our case law, there is no denying that 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 of the channel of deportation" (para. 199).

Consequently, it is possible to hold "infiltrators" in detention if necessary for the purposes of clarifying their identity and for the purposes of exhausting channels for their deportation from Israel (also see: GUY GOODWIN-GILL AND JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 462 (3RD ED., OXFORD.) (UNIVERSITY PRESS, 2009) (hereinafter: *"Goodwin-Gill and Mcadam, Refugee").*

35. At the basis of the detention arrangement, there is an *additional* purpose concerning setting up "a normative barrier… which will reduce the motivation of potential "infiltrators" from coming to Israel (Explanatory Note, p. 424). The meaning of this purpose is deterring the masses (Eitan Case, para. 52). In the Eitan Case, I noted that "general deterrence *in itself* is not a legitimate purpose" (*ibid*, para. 2. of my ruling, emphasis in the original). Nevertheless, there is no flaw in the purpose of deterrence when it accompanies another legitimate purpose. Similar to the ruling in High Court of Justice 7015/02 *Adjuri v. the Commander of the IDF Forces in the West Bank*, padi 56(6) 352, 374 (2002):

> "Consequently, the Military Commander is not permitted to adopt a measure of assigning a place of residence due to reasons of only general deterrence.

> Nevertheless, when due to the danger posed by the person, assigning a place of residence is justified, and the question is only whether to use this authority, then there is no flaw if the Military Commander will also consider considerations to deter the masses…."

Albeit that these statements were said in a different context, they are also true in our case. Similarly, it was ruled in in the Eitan Case, that "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... Nevertheless, it should not be assumed that it is possible to hold an “infiltrator” in detention for the sake of deterring others, even after his identity has been established, and after it has been determined that there are no effective measures to deport him from the country" (para. 52; also compare to *Justice I. Amit's* ruling).

36. When considering that there are two underlying purposes for section 30A, it is necessary to examine the relationship between them and focus on the dominant purpose of the two (*Adalah Case,* p. 319). Indeed, "[…] the Knesset's legislation may have more than one purpose. We have already ruled in our case law, that in a situation where a law has several purposes which are interlinked, greater weight shall be given to its dominant purpose and the constitutional scrutiny will focus on that, nevertheless, the secondary purposes of the law cannot be ignored, in order to examine their consequences on human rights. (High Court of Justice *Menachem v. The Minister of Transportation*, padi 57 (1) 235, 264 and the references therein (2002)).

37. Consequently, then what is the dominant purpose of section 30A? A historical constitutional examination of this section indicates that the primary underlying purpose is the identification of the "infiltrator" and exhausting channels of his departure from Israel, while at the very most, deterrence is a secondary purpose which accompanies it. Thus, in the Explanatory Notes of section 30A, the purpose of identification and exhausting channels of departure was given a central role:

> "Determining the period of detention for three months […] is required, amongst other things, *in order to exhaust the identification process and deportation of the infiltrator, including identifying his race, arranging travelling papers for him and exhausting departure channels for him or his deportation from Israel* (Explanatory Notes, p. 425; emphasis added – M.N.).

The significance of this purpose is also indicated in the statements of the Minister of Interior during the course of the deliberations of the Knesset's Internal Affairs and Environmental Committee for the proposed law:

> "I think that the outline which we are presenting today is 3 months detention. Here, we will debate what this means. With all due respect, the Knesset can define what it considers to be an effective process for examining deportation. I do not know if in the Even Shushan Dictionary, Mr. Attorney General of the

> Knesset, if there is a precise definition for the effectiveness of the deportation process [...] We are very interested that the process be effective, we need time. It is very difficult when the legal advisors define for us formulas which are not scientific, what is the effective time for the deportation process. I thought that three months will not necessarily be enough time for us (Official Minutes of Meeting No. 428 of the Internal and Environmental Protection Committee of the 19th Knesset, p. 7 (December 2, 2014)).

Even the Knesset claimed in its response that when it examined the constitutionality of section 30A it is sufficient to focus on the purpose of identification and deportation (para. 88). Even according to the Knesset's opinion, consequently at the basis of section 30A of the Law in its current version, there is a necessity for the identification process of the "infiltrators" and exhausting channels for their deportation from Israel. The State even emphasized in its oral arguments before us that according to its opinion, this is the primary purpose of this arrangement.

38. Locating the dominant purpose is not summed up by reviewing the historical legislation of the Law. The question whether a certain purpose is the dominant purpose of the law is also examined in light of particular arrangements set forth therein (compare to: the Adalah Case, pp. 336 – 339). In our case, does the primary purpose of section 30A arise from its arrangements? According to the Petitioners' claims, even the current Law – similar to arrangement which we examined in the Eitan Case and the Adam Case – does not condition the detention of the "infiltrator" on the identification or deportation processes. According to their claims, in the absence of a clear connection in the Law between detention and a reasonable feasibility of deportation, "the real purpose of this section [section 30A – M.N.]" is the improper purpose of deterrence. On the other hand, the Respondents for the *first time* claimed in the framework of this Petition that the current arrangement can be interpreted in a manner which establishes a clear link between detention and the identification of the "infiltrator" and between an effective processes of deportation. After reviewing the Parties' claims, my opinion is that in light of the current legislative outline, the Respondents' position should be accepted.

39. There is no dispute that on its surface there is a connection between holding an "infiltrator" in detention and the purpose of identification and exhausting the channels of his deportation from Israel. We reviewed this in the Eitan Case:

> "There is no dispute that holding an “infiltrator” in detention makes it easier to establish his identity in a controlled and organized process – a matter which has great importance due to 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 section 13g(a)(2) of the Entry into Israel Law)" (*ibid,* para. 54)

Moreover, I believe that in the current version of the Law there is a foothold for such that detention is subject to this purpose. The starting point is found in the provisions of section 30(a) of the Law, which authorizes the Minister of Defense to instruct in writing the deportation of an "infiltrator" and prescribes that the deportation order shall serve as legal attestation for his detention until his deportation. The authority to hold an "infiltrator" in detention is consequently dependent upon the deportation order. A similar authority – which permits detaining illegal immigrants in detention, provided that a deportation order has been issued against him – also exists in the Law of Entry into Israel. The periods of time for detention in both laws are also similar (three months in the current Law, sixty days in the Law of Entry into Israel). I accept the Respondents' claims whereby the difference between the detention periods is embedded in the complexity of the identification process of the "infiltrators, who, unlike other persons who are not lawfully residing in Israel, entered Israel by means other than border patrol stations. None of the "infiltrators" carry any identifying documents and significant factual disputes arise with respect to the country of their origin (see for example: Appeal on Administrative Petition 6994/13 *Gidai v. The Minister of Interior – The State of Israel* (February 15, 2015); Administrative Appeal (Central District) 37598 – 06 – 10 *Gabermiam v. The Minister of Interior* (July 6, 2010)). In light of the background of the stipulation of the legitimacy of the arrest when issuing a *deportation order*, the case law interpreted the authority to detain, which is anchored in the Law of Entry into Israel as an accompanying authority to the authority to deport, whose purpose is to ensure the detainee's departure from Israel (see: High Court of Justice 1468/90 *Ben Israel v. The Minister of Interior*, padi 44(4) 149, 151 – 152 (1990) (hereinafter: *Ben Israel* Case); Leave for Request of Administrative Appeal 696/06 *Alkanov v. The Detention Review Tribunal for Illegal Immigrants*, para. 16 (December 18, 2006). This is the case even though no explicit provision was included in this Law which links the detention of a person with a feasibility of his deportation from Israel. In light of the similarity between the arrangement which we are examining and the arrangement set forth in the Law of Entry into Israel, I believe that in our case we can infer the same conclusion from this law. An additional reinforcement for my conclusion is found in the provisions of sections 30D and 30E of the current Law, whereby holding an "infiltrator" in detention is subject to a periodic examination of his case within thirty days, at the very most. The requirement to periodically examine the detainee's matter assists to ensure that there are still grounds to detain him in detention and support the conclusion that detention was designated to assist in the deportation of the "infiltrator". Deterrence is only an accompanying purpose for this (see and compare: Eitan Case, para. 199).

40. The cited provisions were also included in the arrangement which we examined in the Eitan Case. Nevertheless, in the Eitan Case we ruled that there is a gap between the

provisions of the arrangement set forth in section 30A of the Law and the declared purpose for holding in detention – clarifying the "infiltrator's" identity and forming channels of his departure from Israel. Our ruling relied upon the absence of relevant arrangements in the Law, for example, an explicit provision which conditions the continuation of detaining the "infiltrator" on the existence of "a departure channel which is expected to materialize within a reasonable period of time" (Eitan Case, paras. 55, 199; also see: the Adam Case, para. 34 of *Justice U. Vogelman's* ruling). Even the legislative arrangement before us contains no explicit provision which conditions the detention of an "infiltrator" onthe feasibility for his deportation. Nevertheless, I believe that reducing the period in detention currently permits – unlike in the Eitan Case – an interpretation of the Law as the Knesset proposed. In the Eitan Case, even though Justice *U. Vogelman* assumed that it is possible to adopt an interpretive effort, he did not see " how, when we stand before a provision of the legislator which determines detention for a period of one year … we can avoid its repeal" (para 202); and he also ruled that "a section of a law that authorizes a person to instruct upon the detention *for a long period* of someone until their deportation (*contrary to the limiting timeframes in the Law of Entry into Israel*) must demonstrate the connection between the deportation process and the detention (para. 199, emphasis added – M.N.). Contrary to the arrangement which we examined in the Eitan Case, the new period of time for holding an individual in detention, as aforementioned, is closer to the period of time set forth in the Law of Entry into Israel. This is a relatively shorter period of time which befits the declared purpose of the Law. This period of time is also not unusual in comparison to arrangements in other countries, whose purpose is establishing the identity of the "infiltrator" and exhausting the channels of deportation. Most western countries permit detaining illegal immigrants who are awaiting their deportation for the duration of a period of time which is restricted to several months. In the absence of extraordinary circumstances, an acceptable period of time ranges between one month to six months on average (for more details, see: Eitan Case, paras. 73 – 77; for an updated review of the average time illegal immigrants are detained in detention in Europe, see: THE USE OF DETENTION AND ALTERNATIVES TO DETENTION IN THE CONTEXT OF IMMIGRATION POLICIES, SYNTHESIS REPORT FOR THE EMN FOCUSED STUDY (2014). Thus, consequently, the maximum period of three months is acceptable in most countries, where the purpose of detention is similar to the declared purpose in our case (compare to: Eitan Case, para. 72).

41. In light of the above, my conclusion is that it is possible to interpret the provisions of the current Law – similar to the provisions of the Law of Entry into Israel – as provisions which were intended to establish the identity of the "infiltrator" and exhaust the channels of his deportation from Israel. As a result, when it is determined that the continuation of the "infiltrator's" detention does not serve the purposes of identification and deportation, there is no longer any justification to hold him in detention. This is also the case if three months have not yet transpired since the commencement date of his detention. Otherwise, the significance would be that it is possible to arbitrarily hold a person in detention. Such a result is not consistent with the fundamental principles of our legal system. There were similar rulings concerning the Law of Entry into Israel:

> "Reviewing this section [section 13 of the Law of Entry into Israel in its version at that time – M.N.] clearly indicates that the purpose of the detention mentioned in paragraph (c) of the section [which determines that the person who can issue a deportation order, can also detain him until his departure or his deportation from Israel – M.N.] is to ensure the departure of an individual against whom a deportation order from Israel was issued, or until his deportation from Israel… the source of the sole authority for the detention of the Petitioner, according to the Respondents' stance, in the case before us, are the provisions of section 13 (c) of the Law. *Since it was determined that continuing to detain the Petitioner does not serve the purpose for which his detention was permitted according to section 13 (c), then once again there is no justification to continue to hold him in detention*." (Ben Israel Case, pp. 151 – 152; emphasis added – M.N.).

In the same case, the Court ruled that it is possible to continue to detain illegal immigrants , insofar as the detention was designated to serve the purpose for which at the onset it was executed. This determination – which relies upon the underlying purpose for the authority to detain – was accepted despite the fact that the Law of Entry into Israel *did not* include relevant grounds for release from detention (Civil Appeals 9656/08 *The State of Israel v. Saiidi*, para. 26 (December 15, 2011)); also see: Al – Tai Case, p. 851; High Court of Justice 199/53 *Doe v. The Minister of Interior*, padi 8, 243, 247 (1954)). This is also true in our case.

42. Alongside this, selecting this interpretive option is consistent with the rule the constitutional law that has been adopted, whereby insofar as is *possible*, the interpretative manner which fulfills the law should be preferred over one which repeals it (see, for example: 4662/92 *Zandberg v. The Broadcasting Authority*, padi 50(2) 793, 808, 812 (1996) (hereinafter: the "*Zandberg Case*"); High Court of Justice 9098/01 *Janice v. The Ministry of Construction and Housing*, padi 59(4) 241, 257-258, 276 (2004); Criminal Appeal 6659/06 *Doe v. the State of Israel*, para. 8 (June 11, 2008)). It is also consistent with the principle *Cessante ratione legis cessat ipse lex* – the legal rule is not applicable in circumstances where its purpose does not exist (Zadvydas v. Davis, 533 U.S. 678, 699 (2001) (hereinafter: the "*Zadvydas Case*")).

43. This interpretative approach is not only unique to our system. In other countries, courts also adopted a strict interpretation for the authority to hold asylum seekers and illegal immigrants in detention. The most salient example for this – which was mentioned both in the Adam Case and in the Eitan Case – is the United States' Supreme Court ruling in the Zadvydas Case. This case examined the constitutionality of an arrangement in the American Law which permitted holding an illegal immigrant in detention which exceeded the "ordinary" period of ninety days prescribed in the law – in cases where for whatever reason the deportation was not executed. Since the period of detention was not restricted in time, it was allegedly permissible to detain an illegal immigrant for an unlimited period of time. The Supreme Court (Justice Breyer) interpreted this authority in

accordance with its purpose – ensuring the deportation – and ruled that it is possible to detain a person only for the period of time necessary for his deportation, provided that there is an effective channel of deportation (*ibid*, pp. 699 – 700). The Court, in a majority opinion, adopted the refutable preemption whereby after six months of detention beyond the initial period of ninety days, an effective deportation process does not exist. Therefore, as a rule it should be instructed upon the release of an illegal immigrant with a guarantee at the end of this period (*ibid*, p. 701). There was a similar ruling in the Supreme Court of Australia (*Plaintiff s4- 2014 v. Minister for Immigration and Border Protection*, ¶¶ 21 – 35 [2014] HCA, 34).

44. The interpretative conclusion which I reviewed above is also consistent with the provisions of international law. According to sections 9, 26 and 31 of the Refugee Convention, a country is permitted – subject to the requirements of urgency and proportionality – to impose restrictions upon the freedom of movement of the asylum seekers (also see: THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 1243, 1268 (Andreas Zimmerman, ed. 2011) (hereinafter: "*COMMENTARY TO THE REFUGEES CONVENTION*"); R. v. Uxbridge Magistrates Court & Another Ex Parte Adimi [1999] EWJC 765, para. 26; Goodwin – Gill and McAdam, Refugees, at 522; The UN Refugee Agency [UNHCR], *Alternatives to Detention of Asylum Seekers and Refugees,* April 2006, POLAS/2006/04, at 6, para. 18) (hereinafter: "*UNHACR, Alternatives to Detention*)). Even though these sections deal with restrictions on freedom of movement, according to the accepted interpretation they also apply to the *detention* of individuals who illegally entered a country with the intent of submitting requests for asylum (see, for example: JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW, 414 – 418, (Cambridge University Press, 2005) (hereinafter: "*Hathaway*")).

45. Limiting the movement of asylum seekers is permissible for the sake of realizing the legal purposes according to international law (Commentary to the Refugees Convention, p. 1270). In the guidelines by the U.N. High Commissioner for Refugees, legal purposes mentioned, *inter alia,* maintaining the public order, including in the sense of establishing the identity of the illegal immigrant; protecting the public welfare and protecting national security (The UN Refugee Agency [UNHCR], Detention Guidelines: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS AND ALTERNATIVES TO DETENTION, 15 – 19 (2012), available at http://www.unhcr.org/505b10ee9.html (hereinafter: the "*Guidelines*"); also see: Adam Case, para. 92). Furthermore, it was noted in the Guidelines that it is possible to detain a person in order to ensure his deportation only when there is a feasibility of such and when detention solely for purposes of general deterrence or punishment is not proper (*ibid*, p. 19). Moreover, the state is required to assess the need for detention on the basis of an "infiltrator's" personal circumstances and not apply this measure broadly (*ibid*, p. 15; also see: International Law Commission, Draft Articles on the expulsion of Aliens, art. 19 (2004), http://legal.un.org/ilc/texts/english/draft%20articles/9_12_2014.pdf)

46. Finally, the interpretive conclusion in our case is reinforced in consideration of the State's position. In the oral hearings conducted before us, the State *explicitly* declared *for the first time* that despite the absence of a contingent provision for continuing to hold an "infiltrator" in detention when conducting the identification and deportation processes, it recognizes that the authority to detain is *subject to* the existence of a reasonable feasibility of his deportation (Official Minutes of the Hearing from February 3, 2015, pp. 4 – 5). This is the case insofar as the "infiltrator" whose matter is on the agenda is participating with the processes for his deportation from Israel (for this matter, also see: section 30A(d) above, which permits detaining an "infiltrator" if he does not cooperate with the processes for his deportation from Israel). The State's declaration has substantial weight in our case.

47. The Petitioners were referred to the position of the Knesset's Attorney General in its response to the proposed law, who believed that there is room to create a *written* link between the period of detention and its purpose (the opinion of the Knesset's Attorney General; also see the Attorney General's position before the Internal Affairs and Environmental Committee, as it was expressed in the committee's deliberations for the proposed law (Official Minutes of Meeting No. 429 of the Internal and Environmental Protection Committee, the 19th Knesset, pp. 9 – 10 (December 2, 2014)). The Petitioners complained that ultimately no explicit provision which determined that an "infiltrator" ought to be released when there is no reasonable feasibility for his deportation, was included. I considered this claim, however, I did not see any place to change my conclusion in this matter. Although it would have been desirable to include an explicit correlation in the Law between the detention and the deportation processes, my conclusion, as aforementioned, is that the current arrangement permits reaching an identical conclusion by means of interpreting the legislation.

48. In summation, I believe that when considering all of the factors – the purpose of the Law, reducing the maximum period of detention and the Respondents' declarations – there is a possibility to interpret the Law in a manner which would establish its missing link. I am aware that this interpretative result is different from our rulings in the previous proceeding. However, adopting this interpretative measure – which in this current case is reasonable and possible – was impossible with respect to the arrangement which we examined in the Eitan Case (see there, paras. 200 -201; also see the Zandberg Case, p. 813). This is because the maximum period of detention in the previous proceeding was not consistent with the declared purpose of the Law. If this interpretation would have been adopted in the Eitan Case, it would have permitted holding a person in detention for a longer period than which it reasonable. As a result, Justice *U. Vogleman* noted in the Eitan Case: "I share my colleague's (Justice *A. Grunis* – M.N.) 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 detention for a period of one year (a period of time which in my opinion is not proportionate) we can avoid its repeal"(*ibid*, para. 202, also see para. 2 of my ruling in the Eitan Case). As stated, our case is different. As was described in detail

above, the maximum period of time set forth in the Law which we are currently examining is a relatively short period of time, which is consistent with the Law and supports it.

49. In light of all of these and based upon the interpretation which was outlined for the Law, I will now continue with the examination in accordance with the proportionality tests.

The Proportionality Tests

50. As I will show below, I believe that when considering the interpretation of the Law, section 30A passes the proportionality tests. In the Eitan Case, we expressed doubt as to whether the legislative outline which we examined indeed has a rational relationship between detention and the realization of the purpose of the law. This was in view of the absence of an explicit contingent provision for continuing the detention of an "infiltrator" when there was a reasonable feasibility of his deportation from Israel. In our case, as aforementioned, this difficulty has been resolved. Given the linkage between detaining an "infiltrator" and the existence of an identification process and exhausting channels of deportation, it is difficult to doubt that the Law subject of our deliberations fulfills the rational relationship requirement. The current Law also passes the second proportionality test, the least offensive measure test. Even though other possible alternatives to detention exist, primarily the open or semi –open residency centers, in the end these measures do not realize the purpose of the Law to a similar degree of effectiveness (Eitan Case, paras. 60 – 66). Consequently, the proportionality test in the "strict sense" remains, which is the primary test regarding the issue before us.

51. As aforementioned, within the framework of the third proportionality test, there is a need to examine if there is an appropriate relationship between the benefit to the public from the legislation and the infringement on the constitutional right which may be caused as a result of its exercise. In the Eitan Case, we also reviewed the arrangement anchored in section 30A which also provided a benefit to the public, a limited benefit. In light of this background, we determined that the Law in its previous version excessively infringed constitutional rights. This conclusion is based upon two primary foundations: the first being the "default" which arose from the Law, whereby it is possible to hold "illegal immigrants" in detention *when there is no possibility of deporting them* for a maximum period of one year. The second is the determination that is also based upon the assumption that holding an "infiltrator" in detention is subject to having effective deportation processes; a time period which is limited up to one year is an excessive and long period of time. There it was ruled as follows (para. 71):

> "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 light of our ruling in the Eitan Case, I believe that the current Law does pass the third proportionality test. Shortening the maximum period of time for detention, which is subject to the purpose which I reviewed, significantly reduced the infringement on the rights of the "infiltrators". As aforementioned, a three month period is not an anomaly in comparison to other arrangements in the Israeli law as well as in comparison to similar arrangements in other western countries. It appears that there is no dispute that detention, if only for a short period of time, severely infringes the rights of the detainee. Nevertheless, when it is a maximum period of several months – and considering that detaining the "infiltrator" is for a purpose recognized in our legal system, international law and comparative law as a proper purpose – this time and subject to this interpretation, I do not think that there is any place for our intervention.

52. Thus, it follows that two times we have ruled that the provisions of the Law in the matter of holding the "infiltrators" in detention did not pass the constitutionality tests. The version that we are now reviewing, when it is clearly interpreted as actually agreed upon by the Respondents – meets the requirements of the limitations clause and it should not be repealed.

Chapter 4 of the Law – General

53. Chapter 4 of the Law was added within the framework of Amendment No. 4. By its virtue, as aforementioned, the "Holot" Residency Center in the Negev was established. Repealing Chapter 4 of the Law in the Eitan Case constituted the Court's first intervention in the provisions of the Law concerning the Residency Center. The particular arrangements and actual conduct of the "Holot" Residency Center until its repeal were specifically described in the Eitan Case. Chapter 4 in its previous version authorized the Head of Border Control to instruct the "infiltrator" to arrive to the Residency Center, where there is a difficulty of deporting him. In contrast to the provisions of section 30A of the Law which would be prospectively applied, it was possible to exercise this authority also towards the "infiltrators" within Israel's borders. In addition, the Head of Border Control was not required to limit the length of the residency period . Therefore, an "infiltrator" summoned to the Residency Center may have resided there until the expiration of Amendment No. 4, which as mentioned, was enacted as a temporary order to be in effect for three years. Theoretically – if the temporary order would have been extended – the infiltrator could have stayed in the Center for an unlimited period of time (see: Eitan Case, para. 149, 151). In the previous Law, no grounds of release from the Residency Center were determined as well as provisions which require the Head of Border Control to exempt a certain populace from staying there. The residents were required to report to the Residency Center three times a day for attendance registration – in the morning, afternoon and evening. The Residency Center was closed at night. The

Residency Center was managed by prison guards from the Israeli Prison Services who were trained for the position and who were granted broad authorities of enforcement, for example, authorities of delay, search and seizure. Alongside these authorities, the Head of Border Control was granted the authority to transfer residents who infringed the different rules of the Residency Center into detention.

54. Following the Eitan Case where we ruled on the repeal of Chapter 4, it was reenacted within the framework of the Amendment of the Law which we are reviewing. Similar to the previous law, Chapter 4 in its current version authorizes the Minister of Defense to declare by means of an order a certain place as a Residency Center for "infiltrators" (section 32B of the Law) and sets out the operations of the Residency Center and its rules. The majority of the individual arrangements remained intact. Thus, the Head of Border Control is permitted to provide a temporary order for each "infiltrator" who has "any sort" of difficulty to be deported from Israel, including "infiltrators" within the borders of Israel and "infiltrators" held in detention according to section 30A of the Law (sections 32D and 30D (d) of the Law). In accordance with these provisions, the Population and Immigration Authority issued a directive whereby Sudanese nationals who "infiltrated" into Israel before May 31, 2011 and Eritrean nationals who "infiltrated" into Israel before May 31, 2009 (Respondents' Appendix 6 to the State's Response) would be referred to the Residency Center. In their application for an interim order from July 20, 2015, the Petitioners noted that on July 14, 2015, updated criteria were published. Commencing from July 19, 2015, Sudanese nationals who "infiltrated" into Israel before December 31, 2011 and Eritrean nationals who "infiltrated" before July 31, 2011 would be referred to the Residency Center (http://www.piba.gov.il/ SpokesmanshipMessages/ Document/ holot_criteria_14072015.pdf). The Residency Center is still managed by the Israeli Prison Services; the authorities of delay, search and seizure still remain intact; the authorities of the Head of Border Control to instruct on the transfer of residents to detention is not *void ab initio.* On the other hand, Chapter 4 in its current version was changed from its previous version in several aspects: the duration of stay in the Center was limited in time (up to twenty months); the reporting requirement in the Residency Center was reduced to once a day; the authorities of the Head of Border Control for instructing upon the transfer of residents in the Residency Center to detention were limited; the Head of Border Control was authorized to instruct upon the release of a resident from the Residency Center upon the fulfillment of certain conditions; and the applicability of its provisions in certain populations were excluded, for example, minors, women and victims of certain crimes.

55. In the past, the maximum capacity of the "Holot" Residency Center was 3,360 people. The supplementary affidavit indicates that as of February 9, 2015, there were 1,950 "infiltrators" in the Center, 76% of whom were North Sudan nationals and the remaining 24% were Eritrean nationals. In addition, as of this date, the maximum period of time during which the "infiltrators" remained in the Center was fourteen months. The affidavit also indicates that more than 60% of the residents in "Holot" infiltrated into Israel prior to 2008 and that 1,521 of the residents submitted requests for asylum to the RSDUnit, half

of which were filed *after* the beginning of their period of residency in the Center. According to the Population and Immigration Authority, handling the requests for asylum of the residents are given priority.

56. The quality of the living conditions in the Residency Center is disputed by the parties. According to the Petitioners' claim, the structure of the rooms does not allow for any privacy, and employment options in the Center are minimal and sparse. In addition, the Petitioners complained about the healthcare and social welfare services in the Residency Center; the quality of the food being supplied; the amount of the pocket money payable to the residents. On the other hand, the State claims that there are recreational activities in the Residency Center, educational frameworks are operated and healthcare and social welfare services are provided. The State also added and noted that in each unit of the Residency Center – which accommodates 140 residents – there is a clubhouse which is operated and open all hours of the day, there are two libraries, a sports field, a laundromat and general store, where the prices of the products sold are controlled. In addition, the State noted that section 32G of the Law and the Regulations for the Prevention of Infiltration (Offenses and Jurisdiction) (Employment of Residents in Maintenance Jobs and Ongoing Services) (Temporary Order), 5775 – 2015, which were promulgated by its virtue arranges the possibilities to work within the confines of the Residency Center for the payment set forth in the regulations. There is an employment office which is operated in the Residency Center and the residents were offered work, *inter alia*, for the maintenance and cleanliness of the Center, store keeping and the laundromat. Simultaneously, the State claims that the participation rates in the various activities offered to the residents and the employment rates within the framework of the Residency Center are extremely low (see and compare to: Eitan Case, paras. 91 – 96).

In light of this background, I will now refer to the examination of the parties' claims concerning the constitutionality of Chapter 4 in its current format, but I will first begin with introductory words.

57. In my ruling in the Adam Case, I wrote: "The state faces a reality – 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. This could be the state's finest hour, whereby in a reality imposed on it, it will manage to find humane solutions consistent not only with international law but also with the Jewish approach." *Inter alia*, there I suggested to convert the detention facility into an *open* Residency Center where stay is voluntary.

I will not deny: when I wrote those words I did not see the "Holot" Residency Center before me. As a citizen, I would be happy to see my country having more compassion, even for someone who was suspected of "infiltrating" into Israel, even at desperate times. Nevertheless, just like we do not examine the wisdom of the law, we cannot also place ourselves in the place of the legislator. Our role is to examine the constitutionality of the

law. I will begin by stating that after examining the provisions of Chapter 4 of the Law, my conclusion is that other than the maximum period of time in the Residency Center, Chapter 4 passes – although at times barely – the limitations clause tests.

The Infringement on Constitutional Rights

58. There is no dispute that the arrangements fixed in Chapter 4 of the Law infringe on constitutional rights. Nevertheless, there exists a dispute between the Parties concerning the type of infringement, its severity and scope. According to the Petitioners' claims, the different arrangements in Chapter 4 – which outline the requirement to stay in the Residency Center and its scope –infringe, independently and severely, the constitutional right to liberty. Even though the changes were made in the Law, according to their claims the Residency Center remained the same. In other words, a center whose traits are similar to a detention facility rather than to an "open" or "semi – open" center. The State on its part does not dispute that Chapter 4 in its current version still limits the constitutional right of liberty. However, through the changes made in the Law, according to its claim "the limitation imposed on the residents' ability to *discernibly* exercise his liberty, such that the requirement to stay there infringes his right to liberty only at night…" was reduced. The State also claimed that "Chapter 4 indeed limits the right to liberty and thus infringes it. Notwithstanding… the Petitioners' claim whereby the Residency Center is equivalent to depriving the right to liberty, should not be accepted (para. 103 of the State's Response).

59. Indeed, Chapter 4 in its current version of the Law implemented changes in comparison to the previous version. Notwithstanding this, even though these changes reduced the infringement on the constitutional right to liberty, the infringement still exists. The residency requirement in the Center still is not the fruit of the resident's free choice. As such, it infringes the residents' freedom of movement and even infringes on their right to liberty. This infringement is reinforced in light of the requirement of the residents in the Center to report in the evening for registration and remain there overnight and in light of the restriction imposed on them to work outside its confines. As was ruled in the Eitan Case, every arrangement which compels a person to stay in a certain place and requires a person to stay there, if only during the day, naturally entails an infringement on the right to liberty:

> "An infringement on the right to liberty… 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 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 prevents 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 core 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). '"
(*Ibid*, para. 117; emphases added – M.N.).

This is also the situation in our case. In general, the difference between an infringement on the freedom of movement and the right to liberty is embedded in the *degree and severity* of the infringement (OPHELIA FIELD, U.N. HIGH COMM'R FOR REFUGEES, DIV. OF INT'L PROTECTION SERVS., ALTERNATIVES TO DETENTION OF ASYLUM SEEKERS AND REFUGEES 2, 11-12, U.N. DOC POLAS/2006/03 (April Guzzardi v. Italy, 30 Eur. Ct. H.R. (ser. A) at 23 – 25 (¶¶ 92 – 95) (1981); 2006) (hereinafter: "*Guzzardi Case*"); Also see: Department of Economics and Social Affairs, Study of the right of everyone to be free from arbitrary arrest, detention and exile (United Nations publication, Sales No. 65.XIV. 2), ¶21). The changes implemented in the Law – for example, reduction to the reporting requirement and the time limitations in the Residency Center – reduced the degree of the infringement on constitutional rights. However, it cannot be said that the infringement was reduced to the extent that it only consists of placing limitations on the freedom of movement.

60. To summarize this point: the current version of Chapter 4 still significantly infringes the rights of the residents in the Residency Center, primarily their freedom. Since this is the case, we need to examine whether this infringement passes the constitutional filter. I will now proceed to this examination.

The Purpose of Chapter 4

61. According to the Explanatory Notes of the Law and the Respondents' Response it appears that the primary purpose of Chapter 4 of the Law is to cease the settling down of the population of the "infiltrators" in the urban cities and to prevent the possibility that they will work in Israel. Alongside this, the Law was designed to provide an appropriate

response to the "needs of the "infiltrators". An additional declared purpose is to create a normative barrier for potential "infiltrators".

62. The Petitioners' primary claim is that the true main purpose of Chapter 4 of the Law is "to break the spirit" of the "infiltrators" and to encourage them to leave Israel (also see: the Petitioners' main argument, paras. 4 – 6). According to their claim, this purpose was expressed in the deliberations on the proposed law. In any event, reality indicates, thus it was argued, that sending the "infiltrators" to the "Holot" Residency Center actually breaks their spirt and causes them to leave Israel. The Petitioners believe that the desire to encourage leaving Israel is not a proper purpose: whether this purpose was designed to prevent a long – term stay in Israel or whether it was meant to distance these people from society – this is an illegitimate purpose. Lastly, the Petitioners claimed that deterrence is also not a proper purpose.

63. The Respondents – both the State and the Knesset – believe, as aforementioned, that these purposes are proper, since they are "aimed … at the benefit of realizing clear social interests which relate to the sovereignty of Israel and its ability to cope with the accompanying consequence of the "settling down" of tens of thousands of "infiltrators" in its cities…" (para. 178 of the State's Response).

Preventing "Settling Down"

64. The purpose of preventing the "settling down" of the "infiltrators" was reviewed in the Adam Case and in the Eitan Case. In the Adam Case, *Justice E. Arbel* believed (albeit in relation to the detention) that it is a proper purpose. According to her view, the State has the "right to determine its immigration policies which derive from the sovereign character of the state", from which "even the right to determine measures for coping with illegal immigrants, assuming that the latter have not been recognized as refugees" originates. It would have been correct to "see as an important social goal the State's will to prevent negative ramifications… and thwart the possibility of the "infiltrators" from settling down in any place in the State of Israel, to integrate into its job market, and to force the local society to cope with entry of the "infiltrators" into its borders and with all it entails" (*ibid*, para. 84). Contrary to her opinion, in the same case *Justice U. Vogelman* believed that "the question of compliance of the purposes of the law with the 'proper purpose' test as was outlined in the case law, rouses difficulties", however this question needs to be reviewed at a later date (*ibid*, para. 19; also see: Adam Case, para. 103).The remaining justices concurred with the rulings of both *Justice E. Arbel and Justice U. Vogelman*. In the Adam Case, consequently there was no ruling for this issue and the majority of the justices preferred leaving the question of whether this is a proper purpose to be deliberated at a later date.

65. Even in the Eitan Case, the question whether preventing the settling down is a proper purpose was left undecided. For a second time, *Justice U. Vogelman* refrained from deciding the question whether this is a proper purpose "in light of the difficulties which

arise", according to his opinion, when "the purpose is based upon separating one population from another population" (para. 103). The majority of the justices – those who concurred with the majority opinion of *Justice U. Vogelman* as well as the minority justices –did not relate to the issue concerning this purpose. *Justice S. Joubran*, believed that this purpose "in itself, is not legitimate" and noted that "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…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 "infiltrator phenomenon". In my opinion, this protection is proper[…]" (*ibid*, paras. 7 – 8). I even noted there (para.5 of my ruling) that in order to solve the plight of the residents of south Tel Aviv it is worth thinking of creative solutions, such as organized boundaries of residential areas for the "infiltrators".

66. In the rulings in the Adam Case and the Eitan Case, there was no unanimous ruling that preventing the settling down in the urban cities is a proper purpose. *Justice E. Arbel (emeritus)* and *Justices N. Hendel and S. Joubran* explicitly recognized this. I also expressed support in adopting measures which could realize this purpose. I will expressly suggest to my colleagues that preventing the settling down in urban cities is a proper purpose, based upon the reasons I will present below.

67. In the Eitan Case, it was illustrated that many of the "infiltrators" reside in Tel Aviv – Jaffa (in particular the south neighborhoods) and the rest reside primarily in Eilat, Ashdod, Ashkelon, Beer Sheva, Petach Tikva, Rishon LeZion and Ramla (para. 29). The reality which was created in these aforementioned cities raised – and is continuing to raise – considerable difficulties. In my opinion, there is nothing wrong with a law which seeks to reduce these difficulties by means of dispersing the population of the "infiltrators". In the Eitan Case, as aforementioned, I reviewed that there is nothing wrong with the State adopting measures which would lead to dispersing the "infiltrators" and alleviating the burden imposed on urban cities in Israel.

68. International law recognizes the challenges a state faces when foreigners arrive and permits a state, as aforementioned, to adopt different measures – including those which limit their freedom of movement and their right to liberty – in the framework of the state coping with these challenges (sections 26 and 31 of the Refugee Convention; also see section 9 of the Convention, which anchors the derogation clause) which in extraordinary cases allows a country to adopt different measures against asylum seekers, *inter alia*, measures which could limit their freedom of movement (COMMENTARY TO THE REFUGEE CONVENTION, p. 789)). As specified above, limiting liberty must be for a lawful purpose and should only be applied when necessary.

69. The purpose of preventing the settling down in urban cities – when it deals with reducing the burden imposed on the urban cities where there is a significant concentration of foreigners – is consistent with the criteria and is consistent with the rules of international law. The interest to prevent the concentration of asylum seekers in certain cities is the underlying basis for the different measures preventing the freedom of movement for asylum seekers which were adopted in Holland (see: UNHCR, Alternatives to Detention, p. 166), in Switzerland (European Council on Refugees and Exiles [ECRE], Forum Refugies – Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Switzerland*, at 52 AIDA Doc. (17.2.2015) (hereinafter: "*Switzerland*"), in Germany (European Council on Refugees and Exiles [ECRE], Forum Refugies – Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Germany* at 62, AIDA Doc.(January 2015) and Kenya (see: Kitu Cha Sheria v. Attorney General [2013] eKLR (H.C.K.) (Kenya) (hereinafter: "*Kitu Cha Sheria*"); Samow Mumin Mohamed v. Cabinet Secretary, Ministry of Interior Security and Co-ordination [2014] eKLR (H.C.K.) (Kenya) (hereinafter: "*Mohamed*"); Coalition for Reform v. Republic of Kenya [2015] eKLR, paras. 401 – 406 (H.C.K.) (Kenya). Even the U.N. High Commissioner for Refugees – in its comments to the proposed law subject of the Petition before us – recognized that in order to reduce the burden on the cities where the "infiltrators" are concentrated there is a need to disperse the population of asylum seekers to different cities (see Petitioners Appendix/10 of the Petition).

70. A similar approach is anchored in the European Council's Directive concerning the absorption of asylum seekers (Council Directive 2003/9, 2003 O.J. (L31) 18 (EC)). In light of the fact that in general asylum seekers are granted freedom of movement in the area of the host country, it was determined in section 7 of the Directive that countries are entitled to set geographical areas where asylum seekers will reside, and at times even specific residential areas:

> 1. Asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. *The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.*
> 2. *Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.*
> 3. *When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.*
> 4. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national legislation.

5. Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 4 and/or the assigned area mentioned in paragraph 1. Decisions shall be taken individually, objectively and impartially and reasons shall be given if they are negative. The applicant shall not require permission to keep appointments with authorities and courts if his or her appearance is necessary.
6. Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible.
(emphases added – M.N.)

Consequently, adopting measures in order to determine assigned areas for asylum seekers is proper, provided that it is connected to public interests, the public order or the need to effectively and quickly handle requests for asylum. This Directive was also recently updated in the framework of which similar provisions were applied to anyone who submitted a request for international protection of any nature whatsoever (Directive 2013/33, 2013, O.J. (L180) 96 (EU)).

71. The European policies anchored in the Directive and its updates were criticized, *inter alia*, in light of the broad discretion which was reserved for application by the countries (COMMENTARY TO THE REFUGEES CONVENTION, pp. 1161 – 1163) and since it permits imposing restrictions on the freedom of movement due to considerations of public order, even if they do not pass the necessity tests (UNHCR ANNOTATED COMMENTS TO DIRECTIVE 2013/13/EU OF THE EUROPEAN PARLIAMENT AND COUNCIL OF 26 JUNE 2013, LAYING DOWN STANDARDS FOR THE RECEPTION OF APPLICANTS FOR INTERNATIONAL PROTECTION (Recast) 14 (2015) (hereinafter: "*UNHCR Comments to EU 2013 Directive*"). Notwithstanding this, in the updated commentary to the Refugee Convention it was noted that it is possible to justify the European policies if it will be applied in situations wherein there is a pressing need to do so, for example, circumstances where there is a "*mass influx*" of asylum seekers *(ibid*, p. 1164; emphases added – M.N.):

> "[Article 7] can, however, […] be regarded to be in accordance with Art. 26 of the 1951 Convention if it is restricted to situations of a mass influx, or to the procedural situation of investigating the identity of, and possible security threat poses by, an individual seeking recognition of refugee status."

The U.N. High Commissioner for Refugees also responded to the updated Directive and presented a similar stance (UNHCR Comments to EU 2013 Directive):

> "UNHCR recognises that there are circumstances, however, in which the freedom of movement or choice of residence of applicants for international protection may be needed to be restricted, subject to relevant safeguards under international law."

72. Consequently, international law recognized that in extraordinary circumstances it is possible to adopt measures restricting freedom of movement and at times even the liberty of the asylum seekers (compare to: COMMENTARY TO THE REFUGEE CONVENTION, p. 790; UNHCR COMMENTS TO EU 2013 DIRECTIVE, pp. 20 – 21). This is for the public's needs and alleviating the burden on urban cities, in extraordinary circumstances, for example, a "*mass influx*" of asylum seekers (also see: COMMENTARY TO THE REFUGEE CONVENTION, pp. 789 – 790; HATHAWAY, p. 420.; GOODWIN-GILL AND MCADAM, p. 465; for the irregularity of these circumstances also compare to the European Directive in the matter of temporary protection at times of a mass influx: Council Directive 2001/55, 2001 O.J. (L212) 12 (EC); for the analysis of this Directive see the Asefo Case, para. 26).

73. If we view the Israeli legislation through the spectacles of international law, it may be discerned that the situation which the State is facing justifies, at face value, adopting liberty – limiting measures. As described above, in the last decade the State of Israel is dealing with a large amount of people who illegally entered its borders and as of this time it does not have the possibility of deporting them. A significant portion of them are concentrated in specific geographic areas, in particular south Tel Aviv. In my opinion, in these circumstances there is no place to intervene in the State's position whereby there is an essential need to prevent the settling down of the "infiltrators" in the urban cities. It could even be said that this sort of situation is tantamount to a "*mass influx*" which requires the use of appropriate measures. "*Mass influx*" is not only measured in quantity but is also examined relatively, *inter alia*, considering the country's resources and absorption system, and in particular its abilities (GOODWIN-GILL AND MCADAM, REFUGEE, p. 335).

74. The purpose of preventing the settling down of concentrations of populations is also seemingly consistent with the State's right to shape its immigration policies and choose to whom it will grant a status in Israel. This right originates from the principles of a sovereign state (Adam Case, para. 84). Notwithstanding this, this right is not absolute and is subject to the State's commitment with respect to foreigners including refugees and asylum seekers. This point of view is acceptable in our constitutional system. As known, basic human rights are not deprived from a person, even though he illegally entered the State. Thus, not every legal arrangement whose purpose is to promote immigration policies will be consistent with the constitutional criteria (see and compare to: Al – Tai Case, p. 848). Nonetheless, this does not mean that such an arrangement will necessarily be repealed due to its *purpose* (see and compare to the Adalah Case, p. 412).

75. In summation: my position is that under the existing circumstances, preventing the settling down in urban cities is a proper purpose.

Preventing Earnings of the "Infiltrators" in Israel

76. The Respondents claimed that another underlying purpose for establishing the Residency Center is to prevent the earnings of the "infiltrators" in Israel. Nonetheless, even though the residents in the Center were prohibited from working, it seems that this purpose, at the most, accompanies the primary purpose of preventing the settling down in urban cities. This conclusion is reinforced in light of the fact that most of the provisions relating to the "infiltrators'" jobs and earnings set forth in Chapter 2 of the Amendment of the Law, whose provisions, as aforesaid, were not challenged in the framework of the Petition before us. Even the Petitioners themselves did not specifically relate to this purpose and did not present any concrete claims regarding the constitutionality of the provision whereby residents in the Center are prohibited from working outside its confines. Since this is the case, I do not see any reason to resolve the complex question (compare, *inter alia*, to the U.N. High Commissioner for Refugees' response to the proposed law, Petitioners' Appendix 10 of the Petition) of whether this is a proper purpose.

Preventing the Resurfacing of the "Infiltrator Phenomenon"

77. According to the State's claim, an additional underlying purpose of the Law is to create a "normative barrier" for the arrival of additional "infiltrators" into Israel. The State believes that this purpose, in itself, is proper. I referred to the deterrence purpose within the framework of the chapter dealing with section 30A of the Law. I ruled, as I noted in the Eitan Case, that "general deterrence, *in itself*, is not a legitimate purpose (*ibid,* para. 2 of my ruling; emphases in original). Nevertheless, as I noted, since there is a proper purpose in limiting the rights of an individual or infringing on them, there is nothing wrong in such that the legislator will consider a secondary *accompanying* purpose of deterrence. The same is true in our case. Since we recognized, in principle, that the purpose of preventing the settling down in urban cities is a proper purpose, there is no impediment that its application will be accompanied by a measure of deterrence.

A Response to the Needs of the "Infiltrators"

78. According to the State's claim, an additional underlying purpose of the Law is to provide a response to the needs of the "infiltrators". This purpose was recognized as proper in the Eitan Case, where it was determined 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" (*ibid*, para. 104). I concur with this conclusion and do not see any place to expand beyond this. There is no doubt that a social purpose, such as this, is a proper purpose. Similarly, different countries established residency centers which were intended to grant asylum seekers who cannot provide shelter for themselves and basic rights (for more details, see *ibid,* paras. 133 – 134). Nevertheless, we cannot ignore the fact that in reality the "infiltrators" do not view the "Holot" Residency Center as a place which provides a response to their needs. Subsequently, I will relate to this matter.

A "Latent" Purpose – Encouraging Voluntary Returns?

79. The Petitioners' primary claim, as aforementioned, is that the genuine purpose of the Residency Center is to "break the spirit" of the "infiltrators" and encourage their supposed "voluntary" return from Israel. This claim was also raised in the Eitan Case, which *Justice U. Vogelman* left to be resolved in the future. The claim before us was refuted in the State's Response and in the Knesset's Response. There is also no mention of this in the wording of the Law and the Explanatory Notes. More importantly: in the oral hearings, Adv. Gennisin, the State's legal counsel, explicitly declared before us that no measures whose purpose encourages "infiltrators" to leave Israel, were adopted, nor shall they be adopted:

> "The Honorable Chief Justice M. Naor:
> Nevertheless, this is the recurring motive in the Petition. Will the madam, please clearly state such that no activities to break the spirit were adopted nor shall they be adopted?
>
> Adv. Gennisin: *Certainly and certainly* (emphases added –M.N.).

80. The Respondents noted that not every policy whose purpose is not "inclusive and absorbing" is a policy which is designated to break the spirit of the individuals who "infiltrated" into Israel. I accept this legal position. In our case, it cannot be determined that breaking the spirit of the "infiltrators" is one of the purposes of the Law. "Infiltrators" who cannot be deported are entitled to remain in the State's borders following the conclusion of the period of residency. In the Statement of Response and in the hearing before us, the State claimed that the Residency Center provides a response to the needs of majority of the "infiltrators" – even beyond their basic needs – and, *inter alia*, recreational activities, employment opportunities, professional training courses, etc., are offered there. According to the Petitioners, although there were faults and different objections concerning the nature of the Residency Center and the opportunities provided therein, they did however emphasize that this subject is not the focus of their Petition. Even if I assume that there is room to improve the living conditions in the Residency Center – and I am not ruling in this matter – at this *present time*, it is not possible to determine whether the current conditions are *actually* causing the "infiltrators" to leave Israel by breaking their spirit.

81. Thus, it follows that I did not find the current Law was intended to break the spirit of the "infiltrators". If the Law would have been intended for this purpose, then there would have been great difficulties. On face value, such a purpose would be improper, considering that it allegedly undermines the *non – refoulement policy* which prohibits deporting an individual to a country where he faces imminent danger to his liberty or life. It should be clarified that nothing contained herein can prevent the State from deporting "infiltrators" to a *safe* country. Sending an "infiltrator" to such a country is subject to different conditions whose purpose is to ensure that the country will surely not send an

"infiltrator" to another country which is *not safe* (Al – Tai Case, pp. 850 – 848, Adam Case, for foreign case law see, for example: Plaintiff M70/2011 v. Minister for Immigration and Citizenship [2011], EM (Eritrea) v. Secretary of State for the Home Department [2012]; H.C.A. 32 49 EWCA Civ. 1336). The question of how it is determined that a given country is indeed a safe country is a complex question which does not arise in our case.

82. Alongside the possibility to send an individual – even when against his will – to a safe country, the individual is obviously entitled to *voluntarily* leave Israel, even to a country where he faces inherent danger (Eitan Case, para. 109; section (4)(C)1 of the Refugee Convention whereby the Convention shall cease to apply to one who "[…] has voluntarily re-established himself in the country which he left or outside which he remained […]"; also see section 12 of the Refugee Convention regarding civil rights and policies; Hathaway, pp. 953 – 961). At the foundation of a person's free will is the principle of free choice. This principle is expressed in section (4) (C) 1 of the Refugee Convention in the voluntariness requirement (see: Hathaway, p. 960; UNHCR, HANDBOOK: VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION (1996)). A free and voluntary decision to leave the country is one which was made "without external inducement and certainly without any coercion of any kind (Hathaway, p. 960). Voluntary returns which do not meet these demands may expose the "infiltrators" to persecution in their countries and is tantamount to "constructive expulsion" which is contrary, as aforementioned, to the non –refoulement principle (for discussion about constructive expulsion in context of Israel, see Christian Mommers "Between Voluntary Repatriation and Constructive Expulsion? Exploring the Limits of Israel's actions to Induce the Repatriation of Sudanese Asylum Seekers, in Levinski, Corner of Asmara, 386 (2015); for discussions in context of other countries, see Hathaway, p. 319, 959 – 961; also compare to the Mahmoud Case, para. 26).

83. As a result of the aforementioned, the State in not permitted to exercise sanctions or any other measure which could deprive the free will of a group of people to which the non–refoulement policy applies with the intent of breaking their spirit. As quoted, Adv. Gennisin, the State's attorney, stated before us that in the Residency Center no actions would be taken which are intended to break the spirit of the "infiltrators". Consequently, the State is required – as it also appears from its' declaration – to abstain from tying the stay in the Residency Center with any voluntary return. Accordingly, within the framework of the Residency Center it is not possible to adopt activities whose goals are voluntary returns, including activities with the intent of exerting pressure on the "infiltrators" to encourage them or convince them in any manner whatsoever. In particular, no such activities shall be executed in the contact between the "infiltrators" and the administrative agents of the Residency Center, for example, when the "infiltrators" are referred to receive medical treatment, social assistance, an exemption from reporting in the Center, etc.

84. In summation: as it appears from this chapter, my conclusion is that preventing the settling down in the urban cities, with respect to the issues which I reviewed, is a proper purpose. This conclusion is consistent, as aforementioned, with the rules of international law. When my conclusion in mind, I will now proceed to examine the proportionality of the measures adopted in the Law for the purposes of realizing the aforementioned purpose.

Chapter 4: Proportionality

85. As is well known, an infringement of a right must be proportionate. "Proper purposes do not justify all means (High Court of Justice 6427/02 6427/02 *The Movement for the Quality of Government in Israel v. The Israeli Knesset*, padi 61(1) 619, 694 (2006); High Court of Justice 5100/94 *The Public Committee against Torture in Israel v. The Israeli Government*, padi 53(4) 817, 845 (1999)). In the Eitan Case, the majority opinion ruled that Chapter 4 includes specific arrangements – for example, the scope of the reporting requirement and the duration of the stay therein – which are fraught with constitutional flaws which lie at the root of Chapter 4 in its entirety. Therefore, there was no alternative other than repealing Chapter 4 in its entirety (see, for example, *ibid*, para. 4 of my ruling). Now, I will begin to examine the primary specific arrangements which were prescribed in the Law. Meanwhile, interrelationships between these particular arrangements will also be examined.

86. I will precede with the conclusion before the analysis: I did not find any place for our intervention in the authorities of the Head of Border Control when granting a certain "infiltrator" a residency order. I also did not find any flaw in the provisions of the Law which arrange the manner of the operations of the Residency Center and the daily routine of the "infiltrators" residing there. In my opinion, the sole provision containing a constitutional flaw is the one prescribing that the maximum period of time for detention in the Residency Centers is twenty months. In my opinion, this period disproportionality infringes the constitutional rights of the "infiltrators".

The Authorities of the Head of Border Control to Instruct an "Infiltrator" to Reside in the Residency Center and its Scope

87. Similar to Amendment No. 4, the Law subject of our deliberations, authorizes the Head of Border Control to instruct an "infiltrator" to reside in the Residency Center. This authority was limited in its current version of the Law in several manners. First, it was prescribed that the Head of Border Control is permitted to provide a residency order for a period which shall not exceed twenty months. Secondly, it was prescribed that the Head of Border Control *is not* permitted to grant a residency order to vulnerable populations, such as minors, human trafficking victims or families (section 32D (b) of the Law). In addition, grounds of release, including a change of circumstances or medical reasons (sections 32D (g) and 32E(c) of the Law) were prescribed. In the previous law, the powers of the Head of Border Control were not explicitly limited in this manner. The

questions which are before us today are whether – when considering the changes which were integrated in relation to the scope of the authorities of Head of Border Control – these authorities pass the proportionality test.

A. The Rational Relationship Test

88. The first test is the rational relationship test which examines whether the selected measure realizes the purpose of the law and if it leads to the rational realization (see: Nir Case, para. 23; *Barak – Proportionality*, pp. 373 – 374). Do the provisions in question fulfill this test? The Petitioners' primary claim is that the residency period of up to twenty months does not realize the purposes of the Law. On the other hand, the State believes that the residency in the Center prevents the settling down, albeit for a limited period, yet during this period the purpose is effectively obtained.

89. In the Eitan Case, we ruled that providing a residency order which is not limited in time passed the rational relationship test. We noted that a residency order permanently disconnects the "infiltrator" from the surroundings in which he settled down and makes it difficult for him to persist in his work (*ibid*, para. 158). The question asked is whether we can refer a syllogism from this determination in our case, wherein as aforementioned, the residency in the Center was limited in time. In my opinion, this question should be answered in the affirmative. First, there is no doubt that during the time of residency in the Center, the "infiltrator" does not have the ability to settle down in the urban cities. This is considerating that the center of his life during this period is in the Residency Center. During the course of his period of residency, consequently, the purpose of the Law is obtained in its entirety. Moreover, disconnecting an "infiltrator" – even if only for a limited period of time – can impact his ability to return and settle down in the urban cities. Also, being disconnected for a limited period of time has a significant impact on his lifestyle (see and compare to the figures presented by the Petitioners themselves in this context: paras. 138 – 140 of the Petition and their affidavits which were attached as Appendix 13). In addition, "Eitan – Israeli Immigration Policy Center" – who requested to join the Petition – attached to its motion several affidavits from residents of the neighborhoods of south Tel Aviv, who declared that the measures adopted by the State have a significant impact in the area. According to their statements, since the application of the new policy, the situation has fundamentally improved (p.2 of Ms. Shefi Paz' affidavit, a resident of the Shapira neighborhood and social activist; also see: Mr. Oved Hoogi's affidavit, Chairman of the Tel-Chaim committee; Mr. Meir Goren's affidavit, a resident of the Shapira neighborhood).

90. In any event, even if a limited period of time of residency does not absolutely obtain the purpose of the law, it is not necessarily the case that the measure selected will realize the purpose of the law in its entirety (see and compare to: Nir Case, para. 24; *Barak – Proportionality*, pp. 376 – 382; Adalah Case, p. 323). It should be noted that at the basis of Chapter 4, there is the primary desire to alleviate the burden carried by several cities which constitute focal points for the "infiltrators". In these circumstances – based upon

the reasonable assumption that after the release of "infiltrators" from the Residency Center other "infiltrators" will enter in their place – I believe that limiting the residency for a certain period for any "infiltrator" is consistent with the purpose of the Law.

91. Considering that the maximum number of "infiltrators" that can be held in the Residency Center, constitutes, according to the Petitioners' claim, a marginal percentage of the entire population of "infiltrators", a doubt has been cast in the Petition as to whether the Residency Center will have a concrete impact on their settling down as *a group*. However, this claim ignores the fact that the Law permits increasing the capacity of the "Holot" Residency Center and establishing additional Residency Centers. Accordingly, the State declared that the Center is being used as a "pilot". In light of the aforementioned, it can be determined that the examined provision meets the first proportionality test. This Court expressed a similar stance in prior proceedings (see: Eitan Case, para. 28; also see: Adam Case, para. 97). Nevertheless, it is not inconceivable that as time passes or if circumstances change, there will be a need to present this matter for re-examination. "[…] the rational relationship test must be maintained throughout the duration of the entire life of the law. The question of constitutionality accompanies the law throughout its life. It is constantly being examined according to the reality" (*Barak – Proportionality*, p. 384; 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. 60 of *Justice E. Arbel's* ruling (June 4, 2013); High Court of Justice 9333/03 *Kaniel v. The Israeli Government*, padi 60(1) 277, 293 (2005)). Thus it follows that, as of this time, the reviewed measure realizes the primary purpose of Chapter 4.

92. The residency requirement in the Center also fulfills, to a certain degree, the accompanying purpose which is deterring potential "infiltrators". However, it should be assumed that "infiltrators" escaping for their life will not abstain from entering Israel, despite the possibility that they will be placed in the Residency Center. Yet, it is reasonable that those amongst the "infiltrators" who set a target to settle down in the target country and earn a living there may consider the period of residency in the Center amongst their considerations (see and compare to: Eitan Case, para. 58; Adam Case, para. 98; also see UNHCR, Legal and Protection Policy Research Series, Back to basics: The Right to Liberty and Security of a Person and 'Alternative to Detention' for Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, p. 2, PPLA/2011/01.Rev 1 (April 2011) (*prepared by Alice Edwards*).

93. With respect to the purpose of providing a response to the needs of the "infiltrators", this is a desirable purpose. However, as aforementioned, I am not convinced that it is realized through the measure selected by the legislator. As is known, residency in the Center is forced upon the residents therein without there being any guarantee for such that they indeed are in need of assistance (see and compare to the Eitan Case, paras. 105 – 106; Kitu Cha Sheria, para. 82). In any event, there is no need to expand on this matter because in any case, as noted the Residency Center realizes the main purpose for which it was established.

B. The Least Restrictive Means Test

94. My opinion is that the measure in question– requiring an "infiltrator" to reside in the Residency Center for a period of up to twenty months – also meets the least restrictive means test. In the Eitan Case, it was ruled that the residency orders which are not restrained by time (or are limited to three years) constitute a least restrictive means, since there is no other measure which can obtain the purpose of the Law in a similar degree of effectiveness (*ibid*, para. 159). This conclusion is also correct in the case before us, where we are dealing with residency orders whose validity is limited to twenty months. Other measures which the Petitioners pointed out – for example, a voluntary residency center – will not realize the purpose of the law in a similar degree of effectiveness. It should be assumed that a person who already settled in a certain place in Israel will not choose to leave and voluntarily move to and reside in a residency center (see and compare: *ibid*, paras. 129, 181). Indeed, the legislator is not required to adopt the least restrictive means, when adopting this measure reduces the possibility of realizing its purpose (*Barak – Proportionality, p. 500; Eitan Case, para. 130).*

C. The Proportionality Test in the Strict Sense

95. Within the framework of the third proportionality test, the proportionality test in the strict sense, it must be examined whether the provisions of the law fulfill the proper balance between the social benefit produced from it and between the damage caused as a result of infringing the constitutional rights (*Barak – Proportionality, p.423; Gorvich Case, para. 58*). In the Eitan Case we ruled that the absence of the restriction of the duration of the residency and the absence of grounds for release led to the conclusion to declare the repeal of Chapter 4 in its entirety (*para. 195).* As has been described above, these requirements have received a certain response in the current Law. Does this mean that there was a change in the proportion between the benefit and the damage?

96. As described above, the changes implemented in the Law minimized the infringement on the constitutional rights. It is clear that the twenty month period set forth in the current version of the Law is an infringement on the rights of the "infiltrators" which is less in comparison to the longer period prescribed in the previous law. Similarly, the detention of a person in the Residency Center for a limited period of time – in comparison to a time which is not restrained in time (or which may be extended for an unknown period of time) – reduces the intensity of the infringement on his rights, since it creates certainty regarding the date of release. In addition to this, the law contains several provisions which restrict the discretion granted to the Head of Border Control when issuing residency orders and determining their duration, which outlines the procedural mechanism through which a decision is made. First, it appears from the Law that there are two separate decisions which the Head of Border Control must make. For starters, he must decide whether there is a place to issue a residency order to a specific "infiltrator";

if he determined that there is indeed place to issue a residency order, he must determine at the second phase what will be the length of time which the "infiltrator" will reside in the Residency Center. Secondly, the residency period of twenty months does not constitute a default option, but determines the upper limit of the Head of Border Control's authorities. This is suggested by the explicit language of the Law, which prescribes that the duration of the residency will be "[…] no more than a period of 20 months as prescribed in section 32(21)" (emphases added – M.N.). Consequently, this is about a mechanism requiring an individual examination for each and every "infiltrator". This mechanism is proper and worth maintaining. Thirdly, the Head of Border Control must conduct a hearing for the "infiltrator" in the framework of which he will hear his claims, prior to issuing a residency order and prior to determining the duration of the residency (section 32D (d) of the Law; also see Appeal on Administrative Appeal 2863/14 *Ali v. the Ministry of Interior – The Population and Immigration Authority* (court rulings from August 10, 2014 and October 2, 2014)). Finally, the procedure for issuing a residency order and determining its duration is individualized. The Head of Border Control is required to exercise his authority and use the discretion granted to him in accordance with the particular circumstances of each and every "infiltrator" (compare to: Kitu Cha Sheria, paras. 62 and 87; also see: Mohamed, para. 24). In this framework, he must consider the relevant figures while taking notice of the purpose of the law and the scope of the anticipated harm to the "infiltrator" (see and compare to: Appeal on Administrative Appeal 1758/10, *Israeli Bar Association v. Sagi*, para. 12 (August 15, 2011); *Al – Tai Case, p. 848;* Yitzchak Zamir, *The Administrative Authority,* Volume B, 119 – 1130 (second edition, 2011)). In light of this background, the State's position which was heard by its legal counsel in the deliberations before us – whereby as of now *all* of the "infiltrators" are given residency orders for twenty months – is not consistent with the Law and is contradictory to its purpose.

97. Even though it is difficult to dispute – particularly in light of the aforementioned – ultimately there is no doubt that the infringement of the current version of Chapter 4 on the "infiltrators'" constitutional right to liberty is reduced in its scope in comparison to its previous version. Even when the legislator adopted an arrangement which is less offensive than the previous measure – a situation referred to as a "better law" – the Court is not exempt from examining the constitutionality of such a law which infringes constitutional rights. As ruled in the Zemach Case:

> "The distinction between a corrective law which is a better law and a corrective law which is not a better law may be quite difficult. Often, the corrective law is mingled with one piece, beneficial provisions and infringing provisions, and at times the provision itself, simultaneously is better in one aspect and infringing in another aspect, without it being possible to separate them. The difficulties entailed in the experience to determine what a better provision is in a corrective law, and which provision is not better, may result in extreme and complex litigation and affect certainty and stability. Also due to this reason one can say

> that every corrective law enacted following the Basic Law, is subject to review according to the Basic Law, and one is whether the law is better or not (p.260; also see: Eitan Case).

Indeed, we are dealing with an arrangement adopted by the legislator after this Court repealed the previous arrangement because it was unconstitutional. However, this does not exempt the Court from examining the new Law enacted in accordance with the customary constitutional criteria. The Court acted in this manner in the Eitan Case with respect to section 30A of the Law; and it will also do the same in our case regarding the provisions of Chapter 4 of the Law. I will begin and state that I believe that despite the proper changes made in Chapter 4 – which led to the conclusion that the majority of its provisions currently do pass the constitutional filter – the maximum period determined for residency in the Center is unconstitutional. It does not properly balance between the benefit in the Law and the severe infringement on the rights of the residents in the Residency Center. As a result, it does not pass the third proportionality test. I will now explain.

98. This Court ruled, as aforementioned, that even the detention of an "infiltrator" in the Residency Center for a limited period of time causes an infringement on his constitutional right to liberty. "An infringement on the right to liberty…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 requires the attendance of the resident, even if it is for some part of the day – by nature, infringe the right to liberty" (Eitan Case, para. 117). An "infiltrator" who was issued a residency order is required to abandon his lifestyle, his work, his home, his family and acquaintances. His day is managed in accordance with the rules of the Residency Center and he is not free to manage his life independently and autonomously. "[…] 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" (*ibid*, para. 150). This infringement is intensified in the matters of a portion of the "infiltrators", in light of the troubles and hardships they experienced in their country of origin and on their journey to Israel (Adam Case, para. 112). This Court added that insofar as the period of time is extended where an individual's liberty is deprived, thus the intensity of the infringement increases, "[…] 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" (Eitan Case, para. 154).

99. In light of these facts, it was ruled that setting an upper threshold for detention in the Residency Center is not enough; this threshold must also be proportionate (see: *ibid*, para. 162). A person's liberty is the basic right to his life and existence. Its denial, even if for only one day, significantly infringes his rights (compare to: *ibid*, paras. 152 – 153). Weighing the severe infringement on the rights of the "infiltrators" on the one hand and the benefit arising from this Law on the other, led me to the conclusion that a period of twenty months is an excessively lengthy amount of time for detaining "infiltrators" in

conditions which limit liberty of the type being reviewed. It should be noted that these are "infiltrators" who cannot be deported from Israel and they face no concrete danger to the security of the state or the life of its citizens. Their only sin is illegally entering our borders, with respect to which the State, as a rule, is not permitted to punish them (see and compare to: section 31(a) of the Refugee Convention). Even though the "infiltrator phenomenon" is undesirable and it is possible to find solutions for the residents of cities in Israel, these are not the only considerations. A solution which entails depriving rights of individuals for such long periods of time is not proportionate.

100. Now, I will revert to the primary purpose of the Law according to the aforementioned – preventing the settling down in urban cities. This purpose does not focus on an *individual* "infiltrator" or the danger he poses to society; the issue is about the need to alleviate the general burden imposed upon the urban cities and particularly its residents. I believe that in order to realize this purpose, there is no need to detain specifically a *certain* "infiltrator" in the Residency Center. For this purpose, it is sufficient to detain a group of *different* "infiltrators" in the Residency Center. Indeed, it should be assumed that upon the release of a certain "infiltrator" from the Residency Center another "infiltrator" will be caught in his place. I believe that this turnover created between "infiltrators" residing in the Residency Center and other "infiltrators" outside realizes the purpose of the Law. At any given moment, it is sufficient that a portion of the population of "infiltrators" – according to the absorption ability of the "Holot" Facility and other facilities which the State intends to erect – will be removed from the urban cities. This manner is a sort of "revolving door" which infringes to a lesser degree the constitutional rights of the "infiltrators" summoned to the Residency Center and realizes the purpose of the Law. Consequently, a significantly shorter maximum period of detention in the Residency Center is sufficient which still realizes the purpose of the Law.

101. The longer period of time prescribed in the Law is unparalleled in the comparative law. Although, as is known, a comparative analysis should be conducted cautiously, since cultural and social differences may impact the nature of the comparison (see: Eitan Case, para. 72, and the references therein). Nevertheless, "it should be recalled that democratic countries share 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 [...]" (*ibid*). From the comparative analysis, we see that in the majority of countries, residency in the different types of residency centers is voluntary, although it often serves as a condition to receive social benefits. In some countries, asylum seekers are required to reside in the residency centers as an alternative to detention, however this is for a period of several months. Alongside this, it is important to note that in some countries there is a trend to shorten the period of mandatory residence in the different types of residency centers and reduce the limitations on the freedom of movement. Thus, for example, in Germany and Switzerland, although upon their arrival to the country, the asylum seekers are required to reside in the residence centers, yet this is only for a period of three months (Asylverfahrensgesets [Asylum Procedure Act]. Nov. 22, 2011, BGBI. I S 2258 Art. 47

(hereinafter: "*Germany, Asylum Procedure Act*"); Art. . 16 al. 2 Ordonnance 1 sur l'asile relative à la procedure).

102. After this period there is no requirement to reside in the residency center, yet in Germany it constitutes a condition to receive social benefits (Germany, Asylum Procedure Act, Art. 47, Art. 60 Oberverwaltungsgericht [OVG] Freie Hansestadt; para 2 Nr. 1, Art. 85 para 3 Act) Bremen [Higher Administrative Court of Bremen], 01.10.1993 - 1 B 120/93, beck- online.). In Holland, an asylum seeker is permitted to reside in an open residency center insofar as his request is being examined, on the basis of economic need. An asylum seeker residing in this type of center is entitled to freely leave the confines of the center, but must report to the authorities weekly (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database*: *National Country Report, the Netherlands*, at 43-46, AIDA Doc. Even in Belgium and Finland there are open residency centers which were designed for social needs. Asylum seekers residing therein enjoy full freedom of movement (see: European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, Asylum Information Database: National Country Report, Belgium, at 68, MAAHANMUUTTOVIRASTO: The Finnish ;AIDA Doc. (28.2.2015) Immigration Service, http://www.migri.fi/ asylum_in_finland/ reception_activities/ reception_centers). In Hungary, Poland and Ireland there is no requirement to reside in the Residency Center, however residing there is a condition for the purpose of receiving social benefits (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report*, Hungary, at 14, AIDA Doc. (17.2.2015); European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Poland*, at 5, AIDA Doc. (January 2015) European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report: Ireland*, at 50-51, AIDA Doc.(1.2.2015). In France, there is also no requirement to reside in the residency centers during the examination of the asylum request, however being absent from the residency center for a period of more than five days may lead to deprivation of the right to receive allowance (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, France*, at 57, AIDA Doc. (26.1.2015); L348-2 Code de l'action sociale et des familles).

103. In Italy, the residency in the facilities is deemed – for a maximum period of ten months – a benefit (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Italy*, at 15, 53, AIDA Doc. (January 2015) (hereinafter: "*Italy*"). Failing to arrive to the facility without any authorization will lead to the resident losing his place there (*ibid*, p. 66). In Malta, the stay in the residency centers is also

limited – until a decision is reached in the request for asylum which was submitted by the resident, unless it was extended – and is voluntary (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Malta*, at 40, AIDA Doc. (February 2015) (hereinafter: "*Malta*")). Even though the residents enjoy freedom of movement, they are required to sign in order to continue to live in the facility and receive the social benefits entailed therein (*ibid*, p. 44). In Croatia, residency in the residency centers is voluntary and was designed to provide social needs to the asylum seekers. The asylum seekers enjoy freedom of movement, yet they are required to return to the center every day by 10:00 PM – unless they received special authorization from the director of the center for their absence (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Croatia*, at 44, AIDA Doc. (5.3.2015) (hereinafter: "*Croatia*")). Compare this to Lithuania, where it is possible to detain asylum seekers as long as the clarification process of the request for asylum continues (EMN Focused Study 2013, *The Organisation of Reception Facilities for Asylum Seekers in different Member States, National Contribution from Lithuania; The* UN Refugee Agency [UNHCR], *Integration of refugees in Lithuania: Participation and Empowerment* (Oct. – Nov. 2013)).

104. In order to complete the picture, it should be noted that in countries where under certain circumstances it is possible to send asylum seekers to closed detention facilities, the duration of the limitation on liberty usually does not exceed several days, and at the very most it is just a few months (compare to: Eitan Case, paras. 73 – 74; The Global Detention Project [GDP], *The detention of Asylum Seekers in the Mediterranean Region, Global Detention Project Backgrounder* (April 2015). There are several countries where it is possible to detain asylum seekers in closed detention facilities for longer periods of time. In Malta, for example, currently, the majority of asylum seekers are placed in detention for a maximum period of twelve months (Malta, p. 47). This policy was severely criticized (see: for example: 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). In Bulgaria, it is possible to detain illegal residents for a maximum period of six months, which can be extended from time to time by the Court up to a period of eighteen months. In the Bulgarian law, it was determined that although as a rule asylum seekers should not be held in detention, in reality, anyone who failed to submit a request for asylum at the border – will be arrested (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Bulgaria* , at 34-35, AIDA Doc (31.1.2015); recently a legislative bill was submitted permitting the detention of asylum seekers in the closed detention facilities in an overwhelming manner; *ibid*, p. 48). Similarly, in Cyprus it is possible to detain an illegal resident in detention for a maximum period of eighteen months, which in certain cases may be extended (European

Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Bulgaria* , at 64, AIDA Doc (February 2015)). Notwithstanding this, in some of these countries there is also a trend to shorten the periods of detention. Thus, in Greece the law permits detention for a relatively longer period of time, eighteen months. However, recently the government declared that the period would be shortened to six months (for the Greek government's announcement from 17.2.2015, see: http://www.mopcop.gov.gr/index.php?option=ozo_content&lang=&perform=view&id=5374&Itemid=607 (in Greek); Asylum Information Database [AIDA], *An end to indefinite immigration detention in Greece*? http://www.asylimineurope.org/news/16-02-2015/end-indefinite-immigration-detention-greece#sthash.Zn3XJD6S.dpuf); for the criticism of detention in Greece by U.N. High Commissioner for Refugees, see: The UN Refugee Agency [UNHCR], *Greece As A Country of Asylum – UNHCR's Recommendations* (April 2015)). Similarly, according to the Italian law until recently the maximum period of detention was eighteen months, however, in November 2014, the period was reduced to four months (Italy, pp. 72-73). Even in Croatia, where it is possible to detain foreigners in detention for a period of up to eighteen months, it was determined that it is possible to detain foreigners who submitted requests for asylum only for a period of three months, which under certain circumstances can be extended for a period of an additional three months (Croatia, p. 53).

105. Moreover: residency centers in different countries were usually designated for purposes such as initial identification of those entering its borders, examining requests for asylum or exhausting channels of deportation (for more details in this matter see: Eitan Case, para. 163; STEPS, Consulting Social Study for European Parliament, *The Conditions in centers for third country national (detention camps, open centers as well as transit centers and transit zones) with a particular focus on provisions and facilities with special needs in the 25 EU member states,* IP/C/LIBE/IC/2006-181, 193). As far as I know, there are no residency centers in western countries which are not voluntary, where asylum seekers or other migrants reside for the purpose of dispersing the population. This purpose is usually obtained by other means (see, for example, what was done in Norway, Switzerland and Turkey: UNHCR, Alternatives to Detention, at 165, p. 71; Asylum European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Turkey* , AIDA Doc (18.5.2015); it should be noted that recently Turkey adopted regulations arranging the status of foreigners enjoying temporary protection prior to deportation, see *ibid*, pp. 65 – 74). In addition, in many countries a distinction is made between different groups of infiltrators who cannot be deported, concerning the scope of the limitations on their liberty (see, for example: 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*, EU Doc. HOME/2010/RFXX/PR/1001 (March 11, 2013)). As a rule, the distinctions are dependent upon the reasons with respect to which it is not possible to deport a certain infiltrator from the borders of the country. As a result, there are differences in the scope of the limitations imposed upon the liberty of asylum

seekers or anyone entitled to receive international protection in its class, as opposed to other foreigners. The arrangement which we are reviewing does not include any of these types of distinctions, but rather refers to all of the "infiltrators", with respect to whom there is a difficulty to deport, as one unit. I will emphasize that nothing contained in these matters indicates that it is not possible to detain the "infiltrators" in Residency Centers for the purposes of distributing the burden between the cities; as aforementioned, my opinion is that it can be done. However, these matters can cast implications on the reasonable and proportionate period of time for which they can be detained.

106. It cannot be denied: albeit the conditions for residency in the center were improved, they are not sufficient. As we ruled in the Eitan Case, "…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" (*ibid*, para. 162). In our case, the maximum period of time for detention in the Residency Center is not consistent with the scope of the restrictions imposed in the current version of the Law on the liberty of the "infiltrators" residing in the Center. The residents in the Center are still subject to a strict disciplinary regime and are subject to the authority of the Israeli Prison Services' employees (section 32C of the Law). In the Eitan Case, we ruled that even though the management by the employees of the Israeli Prison Services is not an independent infringement on the right to liberty and the right to dignity, it does intensify the infringement on the rights of the "infiltrators" (*ibid*, paras. 138 – 146). The enforcement powers are added to this – including authorities of delay, search and seizure – which are granted to Israeli Prison Services' employees. Management of the Residency Center by the Israeli Prison Services' employees who are granted policing enforcement powers consequently strengthens the infringement on the residents' right to liberty. It reinforces the imbalance between the severe infringement in particular and the inherent benefit in the Law. Alongside this, the Law explicitly prohibits the residents from working outside its confines. Even though the residents have the ability to work in the Center, in reality the Law is implemented in such a way that this possibility is extremely limited with respect to the scope of the maximum working hours per month and with respect to the salary for this job (see: Regulations for the Prevention of Infiltration (Offenses and Jurisdiction) (Employment of Residents in Maintenance Jobs and Ongoing Services) (Temporary Order), 5775 – 2015; Regulations for the Prevention of Infiltration (Offenses and Jurisdiction) (Granting Pocket Money and Other Benefits and the Conditions for the Denial) (Temporary Order), 5775 – 2015). The State itself insisted on this in its Response that these employment options are limited and there are not enough places of work for all of the "infiltrators" residing in the Center (paras. 77 – 78). As a result of imposing these restrictions, the infringement on the liberty of the residents is intensified. Even though to date, the residents are permitted to stay outside the Center's walls during the daytime, the lack of employment options or a reasonable ability support themselves significantly affected their right to shape their lives. These are strengthened

considering the location of the Residency Center, which has remained as it was – distant from any other settlement (Eitan Case, para. 126).

The combinations of the supporting matters also support the conclusion that the maximum period of time which the "infiltrators" reside in the Center – is excessive.

107. The State claimed, as aforementioned, that some of the constitutional flaws regarding the matter of the Residency Center in the previous Law were cured in the current Law. Thus, two secondary arguments can be inferred: first, there is no room for the Court to intervene in these arrangements; and second, the proportionality of the maximum period of detention in the Residency Center in light of these arrangements were amended. Now, I will review these claims.

The Constitutionality of Additional Individual Arrangements and their Implications

108. The first arrangement that was amended deals with the release from the Residency Center. In the Law we reviewed in the Eitan Case, Head of Border Control did not have the authority to release a resident from the Residency Center. Now, grounds of release were prescribed in the Law. An additional arrangement deals with the reporting requirement in the Center. Whereas in the previous Law, the "infiltrators" residing in the Center were required to report for attendance purposes three times a day, currently they are required to do only one. Following the repeal of the requirement to report during the afternoon, a resident can relatively move around freely during all hours of the day (see and compare to: Eitan Case, para. 127). Repealing the reporting requirement in the morning saves a resident valuable time and permits him to leave the Residency Center without unnecessary delays. In my opinion, these changes transform the reporting requirement in the Residency Center to proportionate.

109. Another arrangement which was amended is one which grants the Head of Border Control the authority – upon the fulfillment of one of the grounds specified in the Law – to instruct by means of an order the transfer of an "infiltrator" to a detention center. Most of these grounds which were in the previous Law remained intact, which are led by committing significant offenses – in matters concerning violating the disciplinary rules of the Residency Center – which are specified in the Law. The Head of Border Control was authorized to determine the duration of the detention period to be imposed upon the resident, subject to the maximum periods of time prescribed by the legislator. Similarly to the previous law, periods of time for detention were prescribed in consideration of the number of violations the resident committed, their severity and duration. Notwithstanding this, the *maximum* periods of time for detention were significantly shortened. Thus, the shortest period of time is currently fifteen days (as opposed to thirty days in the previous Law) and the longest period of time is 120 days (as opposed to one year in the previous Law).

110. In contrast to the previous Law, the current version of the Law prescribed an explicit mechanism for judicial review of the Head of Border Control's decision. In accordance with this mechanism, the detention order must be approved by the Detention Review Tribunal for Infiltrators (hereinafter: the "*Tribunal*") as soon as possible and no later than the conclusion of 96 hours from the commencement of the resident's detention (section 32T (g) of the Law). The Tribunal is required to examine if there were grounds for transfer to detention in the matter of the resident and they are permitted to approve the order *with modifications* or without any modifications or *not to approve it* (section 32T (h) of the Law). This is proactive and automatic judicial review, which constitutes an integral and inseparable part of the transfer proceeding of the resident to detention and which grants it validity (see and compare to: High Court of Justice 2320/98 *Al – Amla v. The Commander of the IDF Forces in the West Bank*, padi 52(3) 346, 360 – 362 (1998); Appeal for Administrative Arrest 8788/03 *Federman v. The Minister of Defense*, padi 58(1) 176, 188 (2004) (hereinafter: "*Federman Case*"); Isaac Klinghopper "Preventative Arrest for Security Reasons: Appeal for Administrative Arrest 1/80 Ben – Joseph (Green) v. The Minister of Defense" *Hebrew University Law Review* 11, 286, 291 (1981) (hereinafter: "*Klinghopper*")). This interpretative conclusion is supported by the provisions of the Law and its purpose and the Respondents' positions themselves, who clarified in the deliberations before us, that in their opinion the judicial review exercised by the Tribunal concerning the decision of the Head of Border Control is *de novo* judicial review (also see: paras. 61 – 63, 168, 229 – 247 of the State's Response). Alongside this, according to section 4 of the Administrative Courts Law, 5752 – 1992 (hereinafter: "*Administrative Courts Law*"*)* along with article 22 of the addendum to the Law, exercise of the Tribunal's judicial review is subject to the provisions of this Law. The Administrative Courts Law prescribes, *inter alia*, that the Tribunal is an independent agency, with regard to judicial matters it is not under the authority of anyone except for the authority of the law (section 3). This law also determines provisions concerning legal procedures and evidentiary rules (sections 20 – 21). Furthermore, the law determines that the hearing before the Tribunal is public and the litigants are permitted to be represented by their attorneys, present evidence and request that the Tribunal instruct that witnesses be subpoenaed and documents be presented (sections 25, 27, 28).

111. The main hurdle which section 32T of the Law is required to pass is the third proportionality test, the proportionality test in the strict sense. I believe that the arrangement in the current version of the Law passes the test. The enforcement mechanism anchored in section 32T of the Law grants, as aforementioned, effective measures for the management of the Residency Center, without which the rules of conduct for residency would be a mockery (see and compare to: Eitan Case, para. 180). Against the benefit in the arrangement, there is no dispute that it causes an infringement on the rights of the residents. Nevertheless, in light of the procedural guarantees set forth in the current Law, this is a less severe infringement in comparison to the previous Law. After weighing the benefit arising from the arrangement on the one hand and the

infringement on the rights of the residents on the other hand, I believe that the infringement in the current version of the Law maintains a proper relationship to the benefit arising therefrom. Even though the Head of Border Control's power to instruct upon the transfer to detention remained intact, it was subject, as aforementioned, to the Tribunal's approval. Therefore, the constitutionality of the detention order is actually subject to a two –component decision, one being the Head of Border Control – appointed by the executive branch, and the Tribunal – of a judicial nature (Federman Case, para. 12, Klinghopper, p. 287). In this manner, "[losing] denying the personal liberty, which is a result of issuing the detention order, by its pure administrative nature and provides a certain satisfaction to the great rule of the rule of the law, which instructs that an individual's personal liberty shall not be taken unless a judge decided to do so" (*ibid*, p. 286). The review proceeding is accompanied by additional procedural guarantees, which apply, as aforementioned, to the activities of the Tribunal pursuant to the Administrative Courts Law. These procedural guarantees bring the examined disciplinary trial closer, insofar as to the extent possible, to an ordinary judicial proceeding, without affecting its purpose (also see: Dalia Dorner "Constitutional Aspects of a Disciplinary Trial, *Law and the Army* 16, 463, 468 (5762 – 5763) (hereinafter: "*Dorner*"); Assaf Porat "On the Right to Legal Representation in Disciplinary Trials – the Extraordinary Case of Disciplinary Trials in the Army" *Business and the Law* 17 469 (2014)).

112. Surely, the Petitioners are correct in their claims that only a portion of the detention periods prescribed in the Law – the periods of which are 75, 90 and even 120 days – are lengthy. For purposes of comparison, within the framework of the disciplinary trial in the army, a junior judicial officer is authorized to impose upon a soldier a penalty of imprisonment of up to seven days and a senior judicial officer is authorized to impose a penalty of imprisonment of up thirty five days (sections 152(5) and 153(a) (6) to the Military Judgment Law, 5715 – 1955). In circumstances where several violations were committed it is possible to instruct a penalty of 70 consecutive days imprisonment, at the very most (section 162A of the Military Judgment Law; Dorner, p. 464; also see: Emanuel Gross "Constitutional Aspects of the Arrest Laws in the Army" *Law and Government* 5 437, 449 – 453 (5760)). However, even though the detention periods in the arrangement in the current Law, in my opinion, are on the border of legality, they do not justify our intervention in the legislator's discretion. It should be noted that these are *maximum* periods which do not necessarily need to be "exploited" to the fullest. The Head of Border Control must exercise his discretion on an individual basis with respect to each "infiltrator" and with respect to each disciplinary offense. He does not automatically have the authority to send "infiltrators" to detention for the duration of maximum periods of time. In addition, the maximum period of detention of 20 days exists only regarding one disciplinary offense concerning an absence of more than 90 days from the Residency Center. Other periods of time are dependent on the severity of the actions and there is a clear hierarchy of punishment regarding recurring violations. Moreover, in light of the severity of the measure of transferring to detention, clearly the offenses should be interpreted by permitting the minimal adoption of this measure. The State itself also recognized this (see: paras. 244 – 245 of the State's Response). Moreover, an additional

"hierarchy" can be seen in the Law concerning the type of *enforcement measures* which should be adopted. The starting point of this hierarchy for other enforcement measures which are prescribed in section 32S of the Law (warning, reprimand, denying allowance, etc.) and finally with the measure to transfer to detention. As a result, the presumption is that the Head of Border Control and the Tribunal, prior to making a decision concerning the transfer of a resident to detention, must consider imposing less severe sanctions. This interpretative conclusion is self – evident also when considering the purpose of the enforcement powers in the current Law. This purpose seeks to balance between the need to maintain the rules of residency in the Center and the need to protect the basic rights of the residents therein. Finally, it should be noted that both the determination that a violation occurred and determining the appropriate sanction in the circumstances of the case, are subject to judicial review by the Tribunal. Therefore, even though the maximum periods for detention are prolonged, my opinion is that the provisions of section 32T of the Law do not disproportionately infringe on the rights of the "infiltrators".

113. Consequently, there are several individual arrangements in the Law which now meet the tests of the limitations clause. Therefore, in my opinion there is no place to repeal them. Nevertheless, one cannot ignore the fact that the main flaw in the Law in our case, the duration of the residency in the Center, remains intact. Even though the lives of the "infiltrators" residing in the Center were improved and even though they were granted broader latitude and freedom, there is still a secluded provision which permits *coerced* detention in the Residency Center for a very long period of time. Even though the "infiltrator" allegedly enjoys during this period a greater degree of freedom of movement, he is still required to move the center of his life to the Residency Center. During a significant portion of the day he is not his own master. He must spend his nights and part of his days in the company of others, while his constitutional rights are being infringed. In the hearing before us, the Petitioners' counsel described the intensity of the infringement and the sense of humiliation which compulsory residency in the Residency Center causes to a person. These current issues would have also been acceptable to me regarding the Law which was repealed in the Eitan Case; they are also correct to date with respect to the Law subject of our deliberations. I will not deny it: in the current arrangement there is a certain inherent public interest. Placing the "infiltrators" in the Residency Center may assist in reducing the negative phenomenon related to the broad – scope immigration which is not arranged and to alleviate the burden hanging on the residents of the large cities (see: Eitan Case, paras. 131, 160 and 180). However, one should not accept the limitation on the liberty of the "infiltrators" residing in the Residency Center for the duration of such a long period of time, even if it has a proper purpose at its underlying basis.

Epilogue

114. The Petition before us is the third in the series of petitions which this Court has reviewed in the matter concerning the constitutionality of liberty restraining measures which were adopted against the "infiltrators". Unlike the previous rulings, I believe that there is no place to leave issues entailed in the Law we are reviewing to be discussed at a later date,

even if the ruling is not entirely necessary for the purposes of our case. As a whole – and subject to the interpretation described in the framework of my ruling – I believe that the current law passes the constitutional filter, except with respect to the maximum threshold for detention in the Residency Center. As aforementioned, I will suggest to my colleagues to find that this threshold is not proportionate and ought to be repealed.

115. In the previous rulings we determined within the framework of the constitutional remedy transition provisions for a period of three months. Our experience has taught us that this period is not sufficient. The legislative process was expedited and the legislator did not allow for the implementation of an in depth analysis prior to adopting any new legislation. Therefore, in the current case, I will suggest to my colleagues to grant the legislator a longer period of time – six months – before the repeal of the maximum period of detention in the Residency Center will enter into effect. During the course of this time – or until the legislation of a new maximum period of detention in the Residency Center, whichever is earlier – sections 32D (a) and 32U of the Law, which anchor the power to instruct upon the detention of an "infiltrator" in the Residency Center will remain in effect; however, it should be read as such that the Head of Border Control shall be permitted to transfer an "infiltrator" to the Residency Center for a period which shall not exceed twelve months. For the avoidance of doubt: the Head of Border Control is still required to exercise his discretion on an individual basis and determine whether there is room to grant a residency order to an "infiltrator", and if so, what the duration will be. The residents in the Residency Center on the date of this ruling shall be released at the end of twelve months of their detention or at the end of the time which was set for them by the Head of Border Control – whichever is earlier. Residents who on the date of this ruling have resided in the Residency Center for more than twelve months – including Petitioners 1 and 2 – shall be released immediately and no later than fifteen days from the date of our ruling. It should be emphasized: in the absence of any new legislation at the end of a period of six months, the authority to issue residency orders to the "infiltrators" shall expire.

116. With respect to the maximum period of detention in the Residency Center, consequently, this Petition is accepted in part, and in this sense sections 32D (a) and 32U of the Law are repealed. With regard to section 30A of the Law and the remaining individual arrangements set forth in Chapter 4 of the Law, subject to the interpretation of the Law which I reviewed above, the Petition is dismissed. The Respondents shall bear the Petitioners' expense in an amount of NIS 30,000.

The Chief Justice

<u>*Justice U. Vogelman*</u>

Twice, this Court has declared the repeal of the amendments to the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714 – 1954 (hereinafter: the *"Law"* or the "*Law for the Prevention of Infiltration*"). Currently before us are additional amendments which were made to this Law through Chapter 1 of the Law for the

Prevention of Infiltration and Ensuring the Departure of the Infiltrators from Israel (Amendments to the Legislation and Temporary Orders), 5775 – 2014. My colleague, *Chief Justice M. Naor*, formulated in her comprehensive ruling an enlightening constitutional analysis where she was required – as was this Court required – to examine for a third time the detention arrangement applicable to "infiltrators" who came to Israel in an unorganized manner of immigration; and for the second time the examination of normative provisions which establish a residency center for the "infiltrators" (hereinafter: also the "*Center*" or the "*Facility*") – the "Holot" Center. We will first begin with the conclusion: it is possible that this amendment of the Law is not within the confines of better legislation. In our ruling, we pointed out many other legislative possibilities. However, the question as usual is not what the ideal legal arrangement is; the question is whether the fixed arrangement meets the constitutional criteria. As will be specified below, my opinion, as is the opinion of my colleague, the Chief Justice, is that section 30A of the provisions determining the duration of maximum residency of 20 months in the Residency Center ought to be repealed. In addition, I believe that the arrangement permitting the transfer of an "infiltrator" from the Residency Center to detention should be repealed. All of this will be specified below.

Before the Constitutional Analysis – The Factual Background for the Ruling

1. Like other countries, Israel is required to deal with the asylum and immigration crisis haunting the world – the most severe since World War II (U.N. HIGH COMER FOR REFUGEES. GLOBAL TRENDS: FORCED DISPLACEMENT IN 2014 (2015) (available here)). Israel is the only western country accessible by land to Africa (see and compare to the opinion of *Justice I. Amit*'s ruling in 7385/13 *Eitan – Israeli Immigration Policy Center v. The Israeli Government*, para. 15 of his opinion (September 22, 2014) (hereinafter: the "*Eitan Case*")). The fence which was built on the Israeli – Egyptian border does not absolutely curb unorganized immigration (and the continuing trickle of the "infiltration" into Israel's borders attests to this). Even before that tens of thousands "infiltrated" into our borders, and the burden derived from it – to our great sorrow – seems to weigh primarily on the population of the enfeebled and powerless in the State – is significant and substantial. In the attempt to cope with this phenomenon, the Knesset prepared amendments to different provisions to the Law for the Prevention of Infiltration. First, it was determined that an "infiltrator" entering Israel's borders and against whom a residency order was issued can remain in detention for a period of up to three years. In the Adam Case (High Court of Justice 7146/12, *Adam v. The Knesset* (September 16, 2013) (hereinafter: the "*Adam Case*") it was ruled in a unanimous opinion by a panel of nine justices that the maximum period of detention (which was determined in section 30A of the Law in its version then in effect) – to be unconstitutional. It was ruled in a majority opinion of 8 justices to declare the repeal of section 30A of the Law for the Prevention of Infiltration against the dissenting opinion of *Justice N. Hendel* (who believed that only section 30A(c) of the Law should be repealed). After this ruling the Law was amended (hereinafter: "*Amendment No. 4*") – as a temporary order for three years – and it was determined that it is possible to detain "infiltrators" against whom residency orders were issued in detention for a period of one year (section 30A of the

Law). Alongside this the Law set up a "Residency Center" for "infiltrators". The Law set forth, in Chapter 4 of the Law which was supplemented to it that it is possible to instruct upon the transfer of "infiltrators" to the Residency Center without any time restraints (and detention for up to three years, according to the validity of the temporary order). In the Eitan Case, it was decided in the majority decision that section 30A of the Law and Chapter 4 are not constitutional and ought to be repealed. In the two previous cases, I reviewed that in the background of the constitutional review, a picture of the present situation must be presented in order to serve as the basis for the deliberations and sharpen the legal questions which require a resolution (Adam Case, para. 1; Eitan Case, para. 37). The time that passed since our previous ruling requires us to return and do it again now.

2. First, with respect to the composition of the population of "infiltrators" in Israel (for the difficulty of the use of the adjective "infiltrator", see para. 10 of my opinion in the Adam Case and para. 5 in the Adam Case). The figures concerning the identity of the "infiltrators" was discussed at length in the previous rulings and in the absence of any material changes in this plane since the Eitan Case, it is not necessary to elaborate. Suffice it to say that the countries of origin of 92% of the "infiltrators" currently in Israel are Eritrea and the Republic of Sudan (hereinafter: "*Sudan*"). To say that the situation in these two countries is not easy would be an understatement. According to the current reports which I referred to in the Eitan Case, the Eritrean government violates human rights methodically and extensively (see *ibid*, para. 31). In Sudan, a country versed in military coups and internal struggles, the majority of its residents are subject to substantial poverty (*ibid*). The nationals of these two countries are not directly deported to the countries of their origin. Eritrean nationals are not deported given the temporary non – deportation policy and in accordance with the Non – Refoulement principle. The Sudanese nationals are not returned to their country due to the absence of diplomatic relations with this country (Eitan Case, para. 32). I will not reiterate what I said concerning the reasons which brought the "infiltrators" into our borders, however I will note that there are amongst them – in my opinion – those who seek to improve their economic state – however, there are also those requesting to escape the imminent dangers in their country. The State is not rushing to determine the requests for asylum which were submitted (see the figures in this context in para. 35 of the Eitan Case), and therefore there is a difficultly to reach a conclusive outcome in this context.

3. The situation is different with respect to the number of "infiltrators" in Israel, a number which was subject to change in the last few years. In her opinion, the Chief Justice requested updated figures in this matter (para. 3 of her opinion). It was noted – based upon the publication from the Population and Immigration Authority – that in Israel, as of March 31, 2015, 45,711 "infiltrators" reside in Israel as opposed to approximately 50,000 "infiltrators" who resided in Israel as of our ruling in the Eitan Case (at the end of September 2014). From the figures presented by the Chief Justice, which should be read alongside those presented in the Eitan Case, it is clear that there is a declining trend in the number of "infiltrators" in Israel, which commenced in 2012 and which is still continuing. This also became clear from the stability of the number of individuals exiting

Israel in comparison to the number of those entering it: as aforementioned, in the opinion of the Chief Justice, since the beginning of 2014 and until the end of the second quarter of 2015, 104 "infiltrators" in total entered Israel. In contrast, 6,414 "infiltrators" left Israel in 2014 and 1,382 left our borders in the second quarter of this year alone (see: *Population and Immigration Authority, the Department for Planning Policies for Foreigners in Israel – Summary for 2014* (January 2015); *Population and Immigration Authority, the Department for Planning Policies for Foreigners in Israel, Figures for Foreigners in Israel* (July 2015) (hereinafter: "*July Figures of the Population and Immigration Authority*)).

This, consequently is the background of the deliberations and in light of the aforementioned, we will begin with the constitutional scrutiny. Since this Court has adjudicated the matter twice before and in light of the broad spectrum which was explained by the Chief Justice, I do not see the need to begin the constitutional scrutiny from the beginning, and with respect to that which is articulated below, I would like to emphasize and explain several points.

Section 30A of the Law

4. Section 30A of the Law prescribes the rule concerning an individual who "infiltrated" into Israel and against whom a residency order was issued. The section allows holding him in detention for a maximum period of *three months*, as opposed to a period of three years as was the situation which we reviewed in the Adam Case; and a period of one year which we were required to review in the Eitan Case. Alongside this, additional changes were implemented to the section which are not an issue at hand in this case. Similarly, there is no dispute that this section infringes the constitutional rights available to the "infiltrators" – as they are available to every person –liberty and dignity (see the opinion of the Chief Justice, para. 32; Eitan Case, paras. 46 – 47; Adam Case, paras. 71 – 72). In light of this infringement, we are required to review the tests of the limitations clause and first examine if this section was designed to serve a proper purpose.

"For a Proper Purpose"

5. The State insisted in its Response (p. 35 of the Statement of Response) that the main purpose of the section is exhausting the identification process of the "infiltrator" and setting up a necessary period of time to formulate voluntary channels of departure or deportation from Israel. The Knesset added that the legal arrangement has another purpose, which can be learned from the Explanatory Notes of the proposed law, which is reducing the incentive for potential "infiltrators" coming to Israel (p .20 of the Knesset's Statement of Response; also see the explanatory notes for the Proposal of the Law for the Prevention of Infiltration and Ensuring the Departure of the Infiltrators and Foreign Workers from Israel (Amendments to the Law and Temporary Order), 5775 – 2014, Government's proposed law 904, p. 424). My colleague, the Chief Justice found that the State's claim was the dominant claim amongst the two purposes of section 30A of the Law. I agree with that because of the Chief Justice's rationale (without requiring the

purpose argued by the Knesset at this stage of the hearing, which is actually "deterrence", euphemistically speaking (and also see the Eitan Case, para. 52)). As I indicated in the Eitan Case, the purpose of clarifying and identifying channels of departure for deportation is a proper purpose (*ibid*, para. 51). The State has the right deport from its borders any individual who entered in an unorganized fashion, subject to local Israeli law and international law to which Israel is bound. Notwithstanding this, I emphasized there that the State it permitted to hold a person in detention for this purpose – identification and deportation – provided: "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" (*ibid*).

6. The problem is that in section 30A of the Law in its amended version, and in spite of our rulings in the Adam and Eitan Cases, the legislator did not think to include a direct connection between detention and the deportation process (for the necessity of establishing this connection, also see para. 5 of my opinion in the Eitan Case). There is no denying that if the legislator would have issued a legal arrangement including a connection of this kind, alongside a periodic examination of the matter of the detainee which would be focused on this question and appropriate grounds of release in the case when his deportation is not feasible (also see: Eitan Case, para. 199) – then our job would be easier, and the arrangement would pass the constitutional scrutiny without any difficulty in this aspect. It appears that after this has already been said twice by extended panels of this Court – it would only have been proper to have done so (see and compare to para. 48 of the Chief Justice's opinion). Nevertheless, I agree that what the legislator missed can be added by judicial interpretation which would realize the wording of the law and its purpose. In this sense, I am concur with the opinion of my colleague, the Chief Justice, since it is not necessary for us to instruct upon the repeal of this section, since I also believe that in the case before us it is possible to interpret the provisions of the Law so that they will be consistent with the constitutional criteria.

7. My colleague, the Chief Justice, described in detail in her opinion what changed overnight and why currently it is possible to abstain from declaring the repeal of section 30A of the Law. In essence, the Chief Justice noted the relationship between this arrangement and the arrangement prescribed in the Law of Entry into Israel, which was interpreted in our case law as requiring a feasible deportation from Israel (paras. 39 – 40 of her opinion); and this conclusion being consistent with the provisions of international law (*ibid*, paras. 44 – 45). The Chief Justice further emphasized that for the first time in this proceeding the State agrees with this interpretation (para. 46 of her opinion; see and compare to: Eitan Case, para. 200). Insofar as the Chief Justice explained, I would like to add my point of view, the detention period set forth in section 30A of the Law – three months – also supports this interpretation. The period of time which the legislator prescribed for the maximum period of detention is not long. As was mentioned, this is a

period of time which is greater than the period set in the Law of Entry into Israel by thirty days only (compare to section 13(f) of the Law of Entry into Israel, 5712 – 1952 (hereinafter: the "*Law of Entry into Israel*")). This short extension in contrast to the Law of Entry into Israel is derived by the nature of the "infiltration" into Israel which is done without any organized documentation and not through the border patrol stations, a manner which makes it difficult to clarify the identity of the "infiltrator" (see: Eitan Case, para. 54). Even though this is an additional period of time than that which was set forth in the Law of Entry into Israel, before us is a relatively shorter period of time which in itself can impel the authority to adopt effective measures to clarify the identity of the "infiltrator" and examine the possibility to deport him in accordance with the provisions of the Law (also see: Eitan Case, para. 54). Thus, whereas in the Eitan Case it was possible to reflect upon the question whether the one year period of detention is a possible normative expression for the claimed purpose – clarifying and exhausting channels of departure for deportation (even though there is no dispute, as aforementioned, about the relative complexity of the identification process in the case of illegal immigration) – in the case before us it is correct to observe the exact opposite. Just as the previous version of the Law made it difficult to reach the conclusion whereby its purpose was clarifying and exhausting channels of departure for deportation, shortening the detention period and setting it at three months is sufficient to teach us – even in the absence of explicit linguistic expression – of the built – in connection between detention and an effective deportation process. In this sense, the "quantitative aspect" – the maximum permissible period of detention – "speaks of" and influences the interpretation of the "qualitative aspect"(an affinity to the existence of an effective deportation process).

8. This change in the quantitative aspect allows for an interpretation which fulfills the section in an additional manner. The Eitan Case required a cautious and respectful approach to resolve the constitutional difficulty which arose specifically when declaring the repeal of the section (there we stood head-on against a provision of the legislation which prescribed a period of time of one year for detention, a period of time which in itself is disproportionate). If we would have requested to indicate another period in its place, we would have been deemed as engaging in judicial legislation (also see *ibid*, para. 201)) – in the case before us, the determined period of detention, as will be further described, does not raise constitutional difficulties. Consequently, we remain only with the necessity to ensure that the arrest of the "infiltrator" – insofar as with respect to any arrest as such – shall not be an arbitrary arrest, but rather one which was designed to promote its underlying purpose. Indeed, this purpose cannot be directly read between the lines of the Law, yet this time it is possible to resolve the provisions of the law with the necessity by means of an interpretative-ruling, which is consistent with the State's position (it was also possible to arrive at this interpretation even if the State did not agree to this), and abstain from the declaration of its repeal. Consequently, the provisions of the Law should be read as such that an "infiltrator" who has been identified and it was determined that he cannot be deported – should be immediately released (subject to the grounds in section 30A(d) of the Law). Given the aforementioned, my conclusion is that section 30A of the Law passed the proper purpose test.

Proportionality

9. In this case, once again no legal dispute was opened between the Petitioners and the Respondents concerning the question whether the infringement was made by a law based on the values of the State of Israel as a Jewish and democratic state (not with respect to this section and not with respect to Chapter 4 which will be subsequently reviewed), and as such we will turn to the analysis of the proportionality tests. I will say immediately that according to my opinion, this section also passes the three secondary tests of the proportionality test. First, with respect to the question whether this section has a *rational connection* to the purpose of the Law. The underlying basis for the purpose of the deliberations before us now – in consideration of the interpretative outline which was assumed above – in legislation which allows detention only concerning individuals for whom there are identification and deportation proceedings. In the Eitan Case, I noted that there is no dispute that holding an "infiltrator" in detention alleviates the possibility of clarifying his identity in an organized and supervised process and relieving the concern that he might escape, thus thwarting the identification process of his identity and deportation from the country, it is not clear if in fact it is a channel of effective deportation concerning the majority of the "infiltrators" held in detention by virtue of section 30A of the Law (*ibid*, paras. 54 – 56; para. 62). This is based on the fact that the majority of the "infiltrators", as aforementioned, are from Eritrea and Sudan, countries to which deportation at the present time is not possible. Even though there has been no change in the identity of the "infiltrators" to Israel, as aforementioned, currently the State is arguing that it has the possibility of deporting the "infiltrators" to countries which are not the countries of their origin but to "safe third world countries" (and as was provided on its behalf, in the last year approximately 1,093 "infiltrators" left Israel's borders to the aforementioned countries). The debate over these arrangements which the State reached with other countries deviates from the current procedural framework and I am not determining any rules (as well as regarding an additional question raised by the State in this context, which is what will be considered as the lack of cooperation in this context). However, it is sufficient to pass the first secondary test.

10. Now, we will examine if this section fulfills the second proportionality test – *the least offensive measure* – which was already reviewed in the previous cases. In the Eitan Case, I noted that although there are alternatives to detention, which have been adopted by some countries in the world, their known effectiveness is not analogous to the one offered by closed detention. The scope of the latitude given to the legislator in this context is broad, and in the absence of a measure which could realize the purpose of the Law in the same degree or similar degree of effectiveness, the conclusion is that section 30A of the Law passes this test (also see: Eitan Case, paras. 60 – 66). The detention arrangement also passes the third proportionality test – *the proportionality test in the strict sense* – in contrast to what this section determined in its former versions in the Adam Case and the Eitan Case. As aforementioned, in these cases, the reviewed periods of maximum detention were three years and one year, respectively. As I noted in the Eitan Case, for the duration of time in which liberty is deprived, the impact on the intensity of the

infringement on rights: insofar as depriving liberty is prolonged – thus the intensity of the infringement increases (*ibid*, para. 153). The mirror image of the aforementioned is that reducing the period of detention reduces the infringement of rights. Indeed, detention for a period of three months is not a trivial matter. However, setting the period of detention at a limit of three months (instead of one year) caused a significant reduction in the degree of the infringement on the right of liberty and the right to dignity. With respect to the scope of the infringement on the right, there is also a need to weigh the State's position, whereby the grounds of release "for other special humanitarian reasons" for the release of an "infiltrator" (section 30(b)(2) of the Law), should be broadly interpreted as a notion of a dynamic valve which will permit the agents responsible for applying this umbrella clause "to disclose the required sensitivity in order to reduce the infringement on the right to liberty (I will add – and additional rights – as the case may be) (see p. 43 of the State's Statement of Response). In the balance between the weight of the infringement and the weight of the benefit, I did not find the need to reiterate that there is a constitutional impediment to detain, for a certain period of time, an individual who illegally immigrated to a country, for the sake of clarifying his identity and deporting him. This is acceptable in the world (see: Eitan Case, paras. 73 – 77), and this can also be done according to our internal constitutional law and underlying principles upon which they are based.

In summation, there are no grounds to declare the repeal of section 30A of the Law given the consensual interpretation which we are declaring. Now we will review Chapter 4 of the Law.

Chapter 4 of the Law

11. Within the confines of the Petition before us, as aforementioned, the provisions of Chapter 4 of the Law allowing for the establishment of a "Residency Center" for "infiltrators" were also attacked. In the Eitan Case, we reached the conclusion that the arrangement which was prescribed in Chapter 4 of the Law disproportionately infringed the right to liberty and the right to dignity, and as such –should be repealed (*ibid*, para. 98). Since then, this Chapter has been revived with modifications. The Chief Justice reviewed these modifications (paras. 53 – 54 of her opinion), which are mainly as follows: the duration of residency in the Center was limited at most to 20 months; a once a day reporting requirement in the Center was prescribed; the authorities of the Head of Border Control to instruct upon the transfer of a resident in the Residency Center to detention were limited; it was possible to instruct upon the release of an "infiltrator" from the Center based on certain grounds; and it was also determined that specific groups, for example, women and minors, shall not be sent to the Residency Center. Despite these changes, Chapter 4 of the Law still infringes protected constitutional rights. Now, we will review this matter.

The Infringement on Constitutional Rights

12. With respect to the question of the infringement on the intrinsic rights in Chapter 4 of the Law, I reviewed them in depth in the Eitan Case (*ibid*, paras 117 – 127). The State

recognizes that indeed Chapter 4 of the Law limits the right to liberty and thus infringes it, however it reiterates its argument in this proceeding – as it argued previously – that the infringement does not reach the point of depriving it. The State also believed that the infringement on the right to liberty "is only at night (between the hours of 10:00 PM and 6:00 AM)" (p. 31 of its Statement of Response) – the hours when the Facility is closed and entry and exit therefrom is prohibited. I cannot agree with this claim. First, even though there is significance to the exact standing of the scope of the infringement on the right at later stages in the constitutional scrutiny, it is sufficient that any infringement – from the least to the most harsh – in order for us to transfer it to the analysis of the limitations clause. At this stage, there is no significance to the question whether we are dealing with a "limitation" of the right or its "deprivation", since "every infringement, whatever the scope may be, is unconstitutional unless it is proportionate" (Aaron Barak, *Proportionality in the Law – the Infringement of a Constitutional Right and its Limitations,* 136 (2010); see: Eitan Case, para 117; also see para. 59 of the Chief Justice's opinion above).

13. Second and foremost, I do not believe that the infringement on the right to liberty "is only at night". Walls alone do not infringe a person's liberty. Section 5 of the 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". How should the word "otherwise" be interpreted? Does it apply only to the physical limitation of liberty or does it also span on an individual's right to autonomy (also see: Eitan Case, para.171)? The interpretation which the State requested to adopt is the strictest interpretation: in any manner which limits a person's physical freedom. In my opinion this interpretation is not appropriate. "Personal liberty is not only a person's physical liberty" (Aaron Barak, *Human Dignity – The Constitutional Right and its Subsidiaries*, Volume A, 344 (2014) (hereinafter: *Barak, Human Dignity*)). Truthfully, not every infringement on the right to volition and autonomy of volition is equal to an infringement on the right to liberty (see *ibid*). However, in my opinion, even an *extreme deprivation*, of the possibility to choose which is available to an individual is equal to an infringement on the right to liberty. An "infiltrator" who is – lest not forget, coerced – to be in the Residency Center, is also not a free person during the day when he is not residing in his home. We must consider that even though in the new Law the thrice a day reporting requirement in the Residency Center was repealed, and even though the Center is closed and locked during the nighttime only, it is doubtful if many of the residents there have an *effective possibility* of leaving or distancing themselves from the Center. Thus, when considering that the "pocket money" which is given to the residents is 16 Shekels per day (regulation 2 of the Regulations for the Prevention of Infiltration (Offenses and Jurisdiction) (Granting Pocket Money and Other Benefits and the Conditions for the Denial) (Temporary Order), 5774 – 2014; the regulations in our case were not attacked); the prohibition to work in Israel which is applicable to the "infiltrators" residing in the Residency Center (section 32F of the Law); and the geographical location of the "Holot" Facility. Under these circumstances, I am not convinced that it is possible for a resident to routinely leave the Facility and support himself during

the day. This normative state of affairs significantly reduces the personal autonomy given to the "infiltrators" – who are subject to the rules of conduct and discipline even when they leave the gates of the Residency Center – and this reduction also impacts the right to liberty. The words of *Justice A. Goldberg* are also appropriate in our case:

> "According to the statement by Thomas Hobbes 'a free person is one who…is not actually disrupted from what he wants to do'. The positive significance of this term was reviewed by the scholar, Yeshayahu Berlin, is his treatise 'Two Notions of Liberty': 'the positive meaning' of the word 'liberty is derived from an individual's desire to be his own master. I request that my life and decisions would be dependent on me only without any external forces whatsoever. I request to be the instrument of my own voluntary actions, not my fellowman. I request to be subjective and not objective; to be moved by considerations, by sensible purposes, which are mine and not by agents who supposedly influence me on the outside (Y. Berlin, Four Treatises on Liberty (Reshafim, 1987), 182 and page 175 footnote 5, where Hobbes words are presented). Indeed, between the right to liberty, and its derivative the autonomy of will, and human dignity, there is an intimate affinity" (Additional Civil Appeal 2401/95 *Nachmani v. Nachmani*, padi 50(4) 661, 723 (1996)).

Also in other contexts in our case law we found an infringement on the right to liberty whose source is not only "locking the gates" (see and compare to: High Court of Justice 4542/02 *Kav La'Oved – The Worker's Hotline v. the Government of Israel*, padi 61(1) 346, 378 (2006) ("a binding arrangement for the employer infringes basic rights of the foreign workers. It infringes the inherent right to liberty (*Justice A. A. Levy*); "the arrangement infringed the autonomy of the employees as people, and in practice deprived them of their freedom (the words of *Senior Associate Justice M. Cheshin*, *ibid*, p. 403); Leave for Civil Appeal 10520/03 *Ben Gabir v. Dankner* (November 12, 2006) ("the right to a good reputation is derived from a person's right to liberty, which in its essence does not only protect his body, but also his spirit" (para .12 of *Justice A. Procaccia's* opinion); High Court of Justice 2123/08 *Doe v. Doe*, padi 62(4) 678, 696 (2008) ("the phenomenon of refusing to grant a Jewish divorce […] is entailed in a severe and hurtful infringement to the woman who remains chained to a marriage which she is no longer interested in; her freedom is affected, her dignity and feelings are hurt[…]") (*Justice E. Arbel*); High Court of Justice 3368/10 *The Palestinian Prisoners Office v. The Minister of Defense*, para. 52 (April 6, 2014) ("depriving the liberty is not only expressed by the mere fact that a person is subject to detention by the State but also from receiving meaning on a daily basis, during the period which a person is subject to the rules of conduct and discipline customary in the place of detention which also limit his liberty") (*Justice E. Arbel*); High Court of Justice 2605/05, *The Human Rights Division v. The Minister of Finance*, padi 63(2)545,

592-59603 – 604 (2009) ("the actual infringement on the right of liberty occurs on a daily basis and any given moment when the prisoner is behind prison bars […] [and] the rules of conduct in prison [] also limit his personal liberty" (*Chief Justice D. Beinisch).* See additional citations by *Barak, Human Dignity*, pp. 343 – 344 and compare to the approach whereby "the proper interpretation for the term 'otherwise' is usually when there are physical limitations on a person's liberty or any other freedom with a similar impact", *ibid*., p. 345).

14. If we determine that the right of liberty of the residents in the Residency Center was also infringed during the hours when they are not ordered to stay there, in light of the residency requirement in the Center to which the center of gravity of their lives was moved, it is then clear that the residency in the Residency Center also infringes on the right to dignity, the possibility to choose how to conduct themselves and tell their story. I already reviewed this in depth in the Eitan Case (see *ibid*, paras. 120 – 127).

15. What is the profundity of the rights in Chapter 4 in its current version? Indeed, intensifying the openness of the Residency Center (by means of a once a day reporting requirement); granting authority to the Head of Border Control to exempt an "infiltrator" from the reporting requirement in the Center for a duration of 4 days (instead of two days as was in the past); determining a maximum residency period of 20 months; excluding extraordinary groups of the population; and certain changes which were implemented to the authority of the Head of Border Control to instruct upon the transfer of a resident to detention – all of these significantly reduced the infringement on rights. Clearly, the "Holot" Facility is still remote in the desert. We are still dealing with a Facility in which a compulsory residency was mandated on a person and he was torn away from his life to stay and reside there for an extended period. His privacy is infringed; guards are around him. The infringement on rights, consequently, remains in effect.

"For A Proper Purpose"

16. Since we determined that there is an infringement on rights, it is incumbent upon us to examine whether the legislation meets the tests of the limitations clause. In her opinion, the Chief Justice reviewed that the main purpose of Chapter 4 of the Law is "ceasing the settling down of the population of 'infiltrators' in the urban cities and preventing the possibility for them to work in Israel", and alongside this –providing an appropriate response to their needs (*ibid*, para. 61). The Chief Justice also noted the Petitioners' claim, which was also argued in the Eitan Case, whereby this Chapter of the Law has a concealed purpose – which is its genuine purpose – "breaking the spirit" of the "infiltrators" so that they will leave Israel. I reviewed all of these purposes in the Eitan Case (the debate of the purpose concerning preventing the settling down, see *ibid*, para. 103; for the purpose relating to a response to the needs of the "infiltrators", see *ibid*, paras. 104 – 106); with respect to the argued claim – "encouraging a voluntary departure" – see the debate in *ibid*, paras. 107 – 113) and therefore, I will briefly relate to the matters.

"Preventing the Settling Down"

17. We will begin with the purpose concerning preventing the settling down (or "ceasing the settling down"), which in the Eitan Case I left unresolved (*ibid*, para. 103). *There*, I explained that in my view the provisions of Amendment No. 4 – the amendment which was reviewed in that case and which for the first time were presented in Chapter 4 – in any event did not pass the constitutional analysis, and therefore there was no need to determine any rules regarding the question if it was indeed a proper purpose (also see my positon in the Adam Case, para. 19 of my opinion). Clearly, it was correct for me to assume for the purposes of the debate that this was a proper purpose. Now, the Chief Justice suggested that it was expressly determined that this purpose is proper (para. 66 of her opinion). Consequently, it is necessary to examine this question.

18. "Preventing the settling down" – of whom? In the Eitan Case, I reviewed the difficulty that exists when separating one population from another population (see *ibid*, para. 103 of my opinion). The reason for this is clear: the population of "infiltrators" – as a matter of fact – have been with us for quite some time. Despite the vagueness of their normative status (see: Appeal on Administrative Appeal 8908/11 *Asefo v. The Minister of Interior*; the opinion of my colleague, *Justice E. Hayut* (July 17, 2012); Eitan Case, para. 104) – which should not be commended – there is no dispute that to date they are amongst the "infiltrators" in the "Holot" Facility (and this is the majority of the population of "infiltrators"; see para. 55 of the Chief Justice's opinion) they are actually conducting their lives in Israeli cities. The State requests not to accept this reality. It is permitted to do so. In this context, the State provided to us that it formulated and it is continuing to formulate arrangements, which according to its opinion, will allow the "infiltrators" to depart from Israel. In our opinion, these arrangements are not within the confines of this Petition, however, in any event it is clear – and it was not argued otherwise – that there is no concrete forecast for the mass deportation of tens of thousands in the near future. Since this is the picture of the factual state, and since at the present time we cannot instruct these people to leave our borders and return to their countries of their origin, is it really proper for us to request to "prevent their settling down"?

19. At the end of the day, I reached the conclusion that on the one hand it can be assumed, albeit that it is not without difficulty, that this is a proper purpose. My intention regarding the interpretation of this purpose is that "reducing the burden" from the cities where the majority of the "infiltrators" are concentrated – and this particularly so regarding south Tel Aviv. There is no need to exaggerate as the number of "infiltrators" who cannot be deported is considerable. During the years 2009 – 2011, thousands of "infiltrators" – even more than that – entered Israel every year (see: Eitan Case, para. 38). The majority of the "infiltrators" are concentrated in one geographical region. This concentration imposes a particular heavy burden on the population of the area: the settling down of the "infiltrators" in the south neighborhoods of the city changed the nature of the area, added congestion and intensified the daily difficulties of the residents of the area. I reviewed this in detail in the Eitan Case (*ibid*, para. 210). This burden – in term of the State of

Israel, tiny in its area and population – is an exception. In the existing circumstances, consequently there is no place to deny that we are witnesses to the "mass influx" of "infiltrators". Given this type of mass influx, I do not see the need to dispute the fact that legislation which seeks to prevent the settling down of "infiltrators", is at this present time, a proper purpose. All of this, as aforementioned, is subject to reading the "preventing of the settling down" with the intent to temporarily cause the distribution of the burden (with an emphasis that this is a "temporary order"). Alongside the aforementioned, it should be noted that thousands of "infiltrators" left Israel in 2014, in contrast to the few dozen who entered. Consequently, the number of "infiltrators" is decreasing, and as I have recently noted, "different factual figures may […] lead to a different legal result" (Eitan Case, para. 37). It is possible in the future – maybe even in the near future – that the pressing social need for a pendant normative arrangement for the "infiltrator phenomenon" will take on a different identity (see and compare to: Eitan Case, para. 69), and if the declining trend of the number of "infiltrators" in Israel remains intact, and insofar as to the extent that the temporary order will be extended, the question whether it is a "proper purpose" will once again require a decision.

20. In summation, I do not deem it necessary, at this time, to negate the State's position in this matter. Alongside this, as my colleague, the Chief Justice believes, at this stage it is not necessary to interpret the purpose concerning preventing the earnings from the "infiltrators" in Israel, in light of parts of the Law on which the Petitioners focused their Petition (para. 76 of the Chief Justice's opinion).

"Preventing the Renewal of the 'Infiltrator Phenomenon' in Israel"

21. Despite the heading given to this purpose, we will once again clarify that before us is a deterrent purpose, the difficulties of which were already reviewed in the Adam Case and in the Eitan Case (*ibid*, para. 53 of my opinion), since the State clearly noted that the significance of this purpose is to reduce the economic motivation of potential "infiltrators" – located in African countries – to immigrate to Israel (p. 52 of the State's Statement of Response). In the Adam Case and in the Eitan Case, I abstained from making any determination regarding the deterrent purpose (which was incidentally claimed for section 30A of the Law), since in any event this section does not pass the proportionality tests (see: Adam Case, para. 19 of my opinion; Eitan Case, para. 52). This time, in my opinion, an explicit ruling is required for the question whether this purpose meets the proper purpose test. In my opinion, other than in particularly extraordinary circumstances which can be contradicted – and this is not the case in these circumstances – this purpose is not proper. My colleague, the Chief Justice (para. 77 of her opinion) insisted that since we recognized that "in principle, the purpose of preventing the settling down in urban cities is proper, there is no impediment that its application will be accompanied with a deterrent affect". I agree with this. As I noted in the Eitan Case, also in my opinion "there is no flaw in the detention of an “infiltrator”, when it is aimed at promoting the process of his deportation, with an accompanying deterrent affect" (*ibid*,

para. 52), and this is not only true for detention but also with respect to the Residency Center. However, the State's argument indicates that it believes that deterrence is not an accompanying purpose, which is attached to another purpose, which is proper, but that the purpose is noticeable and distinct, and is also proper in its own right. It even refers to it as the "second purpose" (alongside the "initial purpose" which is ceasing the settling down of the population of "infiltrators" and the "third purpose" which is providing an appropriate response to the needs of this population). I cannot agree with this distinction. In my opinion, this purpose cannot stand alone, and as an independent purpose it is invalid. *Justice E. Arbel* reviewed the matters in depth in the Adam Case and I do not see the need to review it once again (*ibid*, paras. 85 -93; however, compare to *Justice I. Amit's* opinion in the Eitan Case, whereby a change in the series of incentives with respect to the potential "infiltrators" constitutes a proper social purpose which is derived from the principle of the sovereignty of the State, paras. 9 – 10 of his opinion).

22. Moreover: the State noted that the source of the change in the system of incentives for potential "infiltrators" is in the integration of the provisions of section 30A of the Law (concerning detention) and the provisions of Chapter 4 of the Law (which arranges the establishment of the Residency Center). The connection between these two is determined in section 30A(K) of the Law, whereby a residency order would be issued to an "infiltrator" after he is released from detention. These two, according to the State, change the series of incentives and encourages potential "infiltrators" to abstain from trying to come to Israel. I reviewed and reexamined the State's claims, and it is not clear to me – even if I was willing to recognize that this is a proper purpose (and this is not the case) – why for the sake of "changing the series of incentives for the 'potential infiltrator'", or deterring him from coming to Israel, it is not sufficient to convert the provisions of the Law with respect to Chapter 4 of the Law to provisions with a prospective application. Insofar as the State seeks to deter anyone from coming to Israel – in any event it is sufficient that the aforementioned normative arrangement would apply only to the same potential "infiltrator" who is currently somewhere and considering whether to make his way to Israel. This was not done concerning the legislation we are reviewing.

23. On the other hand, according to the Knesset's position, the purpose of reducing the economic incentive is also relevant with respect to the present "infiltrators" remaining in Israel (p. 13 of the Knesset's Statement of Response). The presentation of these issues raises questions with respect to the possibility of encouraging "voluntary returns" by means of this kind (see and compare to the Eitan Case, paras. 107 – 113 of my opinion), and I will interpret this matter below. Thus, we are left to review two purposes, the purpose concerning providing a response to the needs of the "infiltrators" and an additional claimed purpose – "encouraging voluntary returns". I will say briefly, as I have already stated in the Eitan Case, the purpose concerning "providing a response to the needs of the infiltrators" is proper (*ibid*, para. 104 of my opinion). Indeed, I still have my doubts, if indeed the Residency Center, in fact realizes this purpose, but I do not believe that the constitutional framework is the appropriate framework to clarify the dispute

concerning the operation of the "Holot" Center, a dispute which again was abandoned by the Parties in this proceeding.

And finally – the argued purpose: "encouraging voluntary returns".

Encouraging Voluntary Returns

24. The starting point for the debate on this purpose is that a person cannot be forced to leave to a country where he faces imminent danger to his life or liberty. However, what happens when a person does it voluntarily? In the Eitan Case, I noted that departure from Israel may be considered a prohibited deportation or "constructive deportation" (and not a "voluntary" return) not only in the situations where the State officially instructs on the deportation of an individual, but also when the State adopts particular severe and offensive measures which were designed to exert pressure leading to the "voluntary" return from Israel. The choice to leave Israel – which is a choice in which one should not interfere – must consequently be free of any unreasonable pressure (*ibid*, paras. 110 – 112). In the Eitan Case, I interpreted the question whether the purpose of Chapter 4 of Amendment No. 4 of the Law was to deny the aforementioned free choice, which in my opinion was not easy to rule and was not free from any doubts. This is what I said there:

> " 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 this, 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." (*ibid*, para. 113).

25. In contrast, in this case the Chief Justice noted that in her opinion the current Law was not designed to "break the spirit" of the "infiltrators" (paras. 80 – 81 of her opinion). In this matter, the Chief Justice relied upon, *inter alia*, the claim that there is a "concealed" purpose of the Law, of this type, which was refuted in the deliberations before us by the

State's legal counsel as well as in the Statements of Response by the Knesset and State (para. 79 of her opinion); and even mentioned the State's claim that there is a set of activities and employment in the Residency Center (*ibid*, para. 80). I stated my opinion regarding the aforementioned, but I do not believe that it is sufficient to permit the doubts which I reviewed in the Eitan Case. First, it should be noted that during the course of the sessions which preceded the legislation of Amendment No. 4, the authorities' representatives expressed themselves in a manner which indicated the possibility that encouraging "voluntary returns" hovered in the background of the legislation (see: Eitan Case, para. 113). On the day of the ruling in the Eitan Case, the presiding Minister of Defense at the time notified that "the second Amendment of the Law significantly contributed to the process of voluntary returns" (his notice was attached to the Petition and marked as Petitioners/20). This issue was also not abandoned in the deliberations of the Law in our case. Thus, for example, in the hearing on October 6, 2014, in the Knesset's Internal and Environmental Protection Committee, the chairman of the committee noted: "[…] through the Law, we succeeded in voluntarily returning […] a significant number of "infiltrators", and the Minister of Interior added: "I set a goal for removing 'infiltrators' […]" (Official Minutes of Meeting No. 384 of the Internal and Environmental Protection Committee of the 19th Knesset, 4 and 6 (October 6, 2014)). On November 11, 2013, the Director of the Enforcement and Foreigners Administration in the Population and Immigration Authority, noted in this meeting that "anyone with respect to whom it shall be decided will enter the Residency Facility will receive a referral, and at the same moment, the residency visa which he has to date will be cancelled and his employment will be heavily enforced. From the moment he enters the Facility, we will continue with all processes to encourage voluntary departure" (Official Minutes of Meeting No. 117 of the Internal and Environmental Protection Committee of the 19th Knesset, 14 (November 11, 2013)). In the deliberations of this committee on December 8, 2014, Knesset Member David Zur noted" " 'Holot' must not be closed. We need to create a situation here which reinforces the incentive for "infiltrators" to leave. This is what I have to say." (Official Minutes of Meeting No. 435 of the Internal and Environmental Protection Committee of the 19th Knesset, 6 (December 8, 2014)).

26. This is not sufficient. Despite the State's legal counsel's declaration in the proceeding before us, whereby "surely, surely and surely" that no actions were taken or will be taken to "break the spirit" and even though my colleague, the Chief Justice, clearly expressed that "[…] within the framework of the Residency Center it is not possible to engage in activities whose goals are voluntary returns, including activities with the intent of exerting pressure on the "infiltrators" to encourage them or convince them in any manner whatsoever" (para. 83 of her opinion), the State did not relate to the Petitioners' concrete claims in the proceeding before us – which were supported in their affidavits – whereby the Residency Center indeed exerted substantial pressure on them to leave Israel. For example, Petitioner 2 stated as follows:

> "Every meeting with the wardens and clerks, and even the medical staff, was always accompanied with one question on their part: "Why are you not leaving"?

> The fact that my request for asylum was not examined for more than one year, did not interest anyone. The only thing anyone in 'Holot' was interested in was when I would leave and the pressure in this matter was really unbearable" (para 23. of Petitioner 2's Affidavit, attached to the Petition and marked as Petitioners/3).

The Petitioners also claimed in their Petition that when meeting with personnel from the Population and Immigration Authority for the purposes of submitting an application for "vacation", pressure is exerted on the residents to "voluntarily return" (p. 55 of the Petition). They further claimed, and even presented additional examples, but we did not find a real genuine response from the Respondents.

27. Finally: the question of the identity of the people who are sent to the "Holot" Facility and the criteria determined, in this context, by the administrating authority, continues to accompany us from the Eitan Case (see *ibid*, paras. 90 – 91). I will briefly touch on this shortly. At this stage, I would only like to emphasize that a result of applying these criteria 76% of the "Holot" residents are Sudanese nationals and 24% are Eritrean nationals. This is almost the exact opposite with respect to their numbers in the populace: according to the *July Figures from the Population and Immigration Authority*, 19% of the "infiltrators" in Israel are from Sudan and 73% are from Eritrea. According to the Petitioners' claim – a claim which I do not intend to determine in this proceeding – "the Respondents assess that there is a better chance to break the spirit of the Sudanese citizens, and compel them to 'agree' to leave Israel" (p. 48 of the Petition). Indeed, aspects relating to the application of the Law are not found, certainly not directly, in its constitutional plane. Notwithstanding this, it is possible that the question of applying the Law will be influential for the purposes of determining whether it fulfills the proportionality tests (High Court of Justice, 3809/08, *Human Rights Association in Israel v. The Israeli Police*, para. 33 (May 28, 2012) (hereinafter: the "*Human Right Association Case*")), and in my opinion, these aspects can even assist in analyzing the purpose of the Law with the attempt to track the gap – to the extent that there is one – between the declared purpose and the genuine purpose of the Law.

28. Once again, I do not request to place exclamation marks after these question marks and determine the existence or absence of this argued claim, and I am not taking the State's declarations before us in this context lightly. Nevertheless, it also seems that we cannot determine that the purpose of Chapter 4 of the Law is to "exert pressure" on the "infiltrators" to agree to leave Israel, the aforementioned is sufficient to abstain from a positive ruling in this case. In summation, it is possible, at this time, to suffice with a ruling that the main purpose of Chapter 4 is preventing the settling down of the population of the "infiltrators" in urban cities. It cannot be said that this purpose, in the existing circumstances and at this present time, is not a proper purpose. Consequently, we will proceed to the proportionality test of the provisions of the Law.

Proportionality

29. In the arrangement before us, the legislator implemented several changes which were reviewed in depth in the Chief Justice's opinion, but the principals of Chapter 4 remained the same. In these circumstances, I do not see the need for a broad individual analysis of the different arrangements which I reviewed in depth in the Eitan Case, and I will present the essence of the matter. I will focus the analysis on two specific arrangements which require extraordinary attention: one, the authority to issue a residency order to an "infiltrator" for the maximum period of twenty months, which was prescribed by the legislator; and the second, the arrangement which permits transferring an "infiltrator" into detention due to various disciplinary infractions. Regarding the first arrangement, I concur with the relief proposed by the Chief Justice; and regarding the second arrangement, if my opinion will be accepted, we will declare its repeal while determining the appropriate transition provisions.

The Authority to Issue a Residency Order and the Duration of Residency in the Residency Center

30. If the Head of Border Control determined that there is a difficulty, of any nature whatsoever, in executing an "infiltrator's" deportation to the country of his origin, "he is permitted to instruct that the 'infiltrator' reside in the Residency Center until his deportation from Israel, until his departure or any other date to be determined, for a total period of 20 months (section 32D and 32U of the Law). The residency orders shall not be issued to specific groups of the population, for example, minors and women, as will be further specified below. This is the arrangement which is at the core of Chapter 4 of the Law, which authorizes – alongside the criteria determined by the administrative authority – the detention of an "infiltrator" in the Residency Center and determines the maximum period of time for his residency in the Center. Examining the proportionality of this arrangement also requires, as was noted by my colleague, the Chief Justice, a review of the relationship between this arrangement and other individual arrangements in the Law (para. 85 of her opinion), and this is what I will do.

The Rational Relationship Test

31. Examining the rational relationship requires that the selected measure be compatible with realizing the underlying purpose of the law. I previously reviewed several possible purposes, and I will focus the proportionality examination of the arrangement on the purpose concerning the "preventing of the settling down" which is the main purpose amongst the purposes of Chapter 4 of the Law. Is there a rational relationship between the power granted to the Head of Border Control and the purpose of the Law – preventing the settling down? Determining this question became more complex after the stay in the Residency Center was *time restrained* (20 months). In the Eitan Case, I noted that the absence of any time restraints of the residency ensures realizing the purpose of the legislation in a manner which fulfills the rational relationship to the purpose of the Law (para. 158). *There*, I added that any limitation on the period of residency means that after a certain period of time has passed, the "infiltrator" can return and join the labor forces (since the State had undertaken that it will not enforce the employment prohibition with

respect to any individual not held in the Residency Center). Indeed, the mere time restraints of the residency in the Residency Center creates "revolving doors" – in and out of the Residency Center – in a manner which does not prevent the settling down, but at the very most *delays* it, until the "infiltrator" returns to his home and job. Even if one says that the settling down is prevented, if only for a limited time (albeit this is the State's move – see p. 67 of the Statement of Response; in addition see the wording of the Law that there is no "one, single measure, which carries the entire scope of the proper purpose for preventing the settling down of approximately 48,000 'infiltrators' in Israel, *ibid*) – then it is about a law which obtains the purpose in a limited fashion only, since clearly after the release from the Residency Center, the "infiltrator" – when there is no concrete date for his deportation – will return to the urban cities. It should also be added that as of now "Holot" Facility's capacity stands at 3,360 residents (according to the State's words on p. 66 of its Statement of Response) – which is a small portion of the population of "infiltrators". The settling down, consequently, "prevents" (or delays) only with respect to a minority amongst the population of "infiltrators". Notwithstanding this, we must consider that the Law does not determine any limitation on the size of the Residency Center and even the number of Residency Centers which will be erected pursuant thereto. In fact, according to the State's claim the "Holot" Center is serving as a form of a "pilot" (Eitan Case, para. 128).

32. Ultimately, in my opinion the rational relationship in this case is not pronounced. Despite the doubts, I cannot say that this type of relationship does not exist. As was indicated by the Chief Justice, there is no need that the selected measure would realize the purpose of the Law in its entirety (para. 90 of her opinion), and I am willing to assume that this arrangement passes the first proportionality test. In any event, as time passes it will be possible to also reexamine this question (see para. 91 of the Chief Justice's opinion).

The Least Restrictive Means Test

33. An "infiltrator" who is required to report to the Residency Center cannot "settle down" in the urban cities. For the duration of his required residency period – most of his life is in the Residency Center. In this sense, the Residency Center obtains the primary purpose of the Law – preventing the settling down – to a significant degree of effectiveness. Indeed, it is possible to consider the different measures which could have assisted in obtaining this purpose, for example geographic dispersion or different grants which would be incentivized – according to the "carrot on a stick" approach – residency and employment in different places and not necessarily in the urban cities. Clearly, the residency in the Residency Center is compulsory. It is not dependent upon the "infiltrator's" good will. Anyone who chooses not to arrive at the Residency Center – is liable to the severe sanction in the form of being transferred to detention, which I will still review in depth later. Consequently, I am inclined to say that it is doubtful that there is a less restrictive means that has the power to obtain the purpose of the Law to a similar degree of effectiveness (Eitan Case, para. 159).

The Proportionality in the Strictest Sense

34. Until this point, the arrangement passes the proportionality tests. In my opinion, the arrangement does not pass the last test – which is the ideological and primary test. This is because the violation of the provisions which permit detention in the Residency Center for a maximum period of 20 months does not directly meet the benefit extracted therefrom. When reviewing the balance between the sustained damage resulting from the infringement on constitutional rights and the benefit which arises from obtaining the purpose of the Law, we will begin with the side of the benefit. In the Eitan Case, I emphasized that "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" (*ibid*, para. 160). However, the purpose entailed in this arrangement is not considered an infringement on rights. This was explained in depth in the Eitan Case and I do not see a need to reiterate it, and therefore I will focus the discussion on the changes made in Chapter 4 of the Law and their significance. First, it should be noted that Chapter 4 of the Law in Amendment No. 4 did not exclude unique population groups, who were particularly vulnerable, from its application. This is not the case in the current version of Chapter 4, where section 32D (b) of the Law set forth that it is prohibited to issue residency orders to minors; women; anyone over 60 years of age; a parent caring for a minor; "an individual with respect to whom the Head of Border Control was convinced that due to his age or state of health, including his mental health, his residency in the Residency Center may cause harm to his health, as aforementioned, and there is no other way to prevent the aforementioned harm", etc. In the Eitan Case, I noted that "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 in an insignificant degree, Thus, an individual examination would not prevent the realization of the purpose of the Law, and the absence of exceptions “significantly emphasizes the lack of proportionality (in the strict sense) of the comprehensive prohibition” (*ibid,* para 187). In many aspects the Amendment of the Law solved this problem.

35. An additional change implemented by the legislator concerns the reporting requirement in the Center. In Amendment No. 4 it was determined that during the course of the day – during which the Facility is "open" and the residents can freely enter and leave it – there was a thrice a day reporting requirement for attendance. In the Eitan case, I reviewed that having mandatory attendance for a headcount 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 (*ibid*, para. 118), since "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" (*ibid*, para. 127). Now, the provisions of the Law

determine that the Residency Center is closed at night (between the hours of 10:00 PM and 6:00 AM), and the resident must report to the Center for purposes of attendance registration once a day, between 8:00 PM to 10:00 PM (section 32H of the Law). This change significantly numbed the intensity of the infringement on the right to liberty and the right to dignity. It provides the "infiltrator" greater latitude, since he is permitted to depart from the Center early in the morning and return in the evening. Clearly, as I noted above, one does not have to go that far to assess the weight of this change as it relates to reducing the infringement on rights. "Permitted" does not necessarily mean "can". The center of life of an "infiltrator" summoned to report to the Residency Center is moved to there. He is not a free person, since his day is conducted in the shadow of the requirement to return to the Center during the night hours; and his ability to exercise his autonomy is dictated by the provisions of the Law which prohibit him from working; the small amount of "pocket money" he receives; and the "Holot" Facility's location. Therefore, it is clear that this arrangement – even though improvements were implemented – is still infringing (also see paras. 12 – 15 above).

36. In a different arrangement which I reviewed in the Eitan Case – management of the Residency Center by the Israel Prison Services – there was almost no change. The source for giving powers to manage the Facility to the Israeli Prison Services is in the provisions of section 32C of the Law, whereby the Minister of Public Security declared the Residency Center, he must appoint a senior warden to be the director of the Center; and the Commissioner will appoint wardens to be employees of the Center (all those involved must have the appropriate training). In the Eitan Case, I noted that charging the management of the Residency Center to the Israeli Prison Services – intensifies the infringement on the rights of the "infiltrators" (*ibid*, para. 138), since the managing and operating entity 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, and it is a crucial component concerning the question of how the Facility is perceived amongst the residents there: an open facility with civilian characteristics or an incarceration or detention center with criminal characteristics (*ibid*, para. 144). Nevertheless, I emphasized that "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" (*ibid*, para. 146). In our case, the main points of the arrangement remained intact, and the warders still manage the Residency Center.

37. What can we learn from all of this? It appears that even though the infringement on the rights of a person which were intrinsic in Chapter 4 of the Law in its version of Amendment No. 4 was significantly reduced, when considering the provisions which arrange the lives of the residents in the Residency Center, including the provisions which determine when he must report to the Center and

when he may leave from there; who is the managing entity and what powers were granted to him – there is still an infringement on his rights and it is severe. As I noted in the Eitan Case, "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 –will reduce the compulsory residency in the Facility" (*ibid,* para, 162). The reason for this is that Chapter 4 of the Law is constructed as an equation. "One arrangement (for example the strict requirement to appear for attendance in the Center) may be balanced by a different arrangement (for example a set time of stay in the Center for a short period of time)" (Eitan Case, para. 100). The 20 month period determined in the legislation is an extended time (in fact, the period of this extended duration which was allotted for residency in the Residency Center – is unparalleled to the rest of the world. See the comprehensive review in paras. 101 – 105 of the Chief Justice's opinion; also see: Eitan Case, para. 163).The dimension of time 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 to the course of their life within a short time frame. This is not the case for extended periods of time (Eitan Case, para. 154). Since the connection between the intensity of the infringement on the rights in the Facility where residency is compulsory and between the maximum period a person can be detained is inseparable, and in light of the degree of the infringement of the intrinsic rights in Chapter 4 of the Law, I believe that the maximum period of residency which was determined in the Law does not preserve the proper relationship, despite the benefit it provides. The conclusion is that sections 32D(a) and 32U of the Law are not proportionate and thus unconstitutional. Subject to the aforesaid, I concur with the opinion of the Chief Justice and the relief she proposed.

Now, I will continue with the examination of an additional specific arrangement – the arrangement which permits the transfer of an "infiltrator" to detention.

Transferring an "Infiltrator" to Detention

38. The State is interested in compulsory reporting in the Residency Center. It requests to manage it according to specified rules of conduct. In order to so, it must have a "coercive power" which would deter "infiltrators" from executing these violations (Eitan Case, para. 183). The State chose to make use of the measure of transferring an "infiltrator" who committed several infractions to detention. Thus, the duration of detention is dependent upon the type of infraction and the number of orders given with respect to the infractions which transpired. In the Eitan Case, the periods of detention ranged from 30 days with respect to a trivial infraction and up to one year with respect to recurring infractions with regard to certain types of infractions (*ibid*, para. 166). As I noted in the Eitan Case, transfer to detention from the Residency Center (as well as an individual who is not in the Residency Center) infringes the "infiltrator's" constitutional rights to liberty. Thus, since "the transfer from the Residency

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 [...] [it] prevents the possibility given to the "infiltrator" in the Residency Center from exiting its boundaries during the permitted times; it restricts the possibility of creating social contacts; it disrupts the daily routine that the infiltrator adopted during the course of his residency in the Center" (*ibid*, para. 168).

39. In the Eitan Case, I assumed that in addition to the infringement on the right to liberty, section 32T in its previous version also infringed the constitutional rights of due process. This section granted the Head of Border Control the authority to instruct upon the transfer of an "infiltrator" to detention without his decision being subject to proactive judicial review by any judicial entity or quasi – judicial entity, except for the grounds of release in section 30A (b) of the Law, and does not include any appropriate "procedural guarantees" *which are a prerequisite to maintaining the constitutional right of due process* (Eitan Case, paras. 167, 179). In the Eitan Case, it was determined that the infringement on the right of due process was disproportionate. This conclusion *made it superfluous to examine whether the section passes the other tests of the limitations clause as a result of the infringement on the constitutional right to liberty* (*ibid*, paras. 183 – 184). Notwithstanding this, there I noted that the question of the independent infringement is worthy of a separate examination, mainly in light of the detention periods that were determined, since placement into detention for long periods of time "crosses the line between a 'disciplinary' sanction which is primarily deterrent and a 'punitive' sanction which is inherent in its essence". I specifically emphasized that 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" (*ibid*, para. 184).

40. Also, in the arrangement before us, the Law conferred upon an administrative authority – and to be exact: the Head of Border Control – to impose sanctions for the deprivation or limitation of a person's liberty as part of a disciplinary arrangement. Before reaching a decision, the Head of Border Control is required to permit the "infiltrator" to "state his arguments before him" (section 32T (f) of the Law). To what extent does the Head of Border Control have the ability to make an informed decision about the case brought before him? Needless to say, that when making the decision the Head of Border Control is subject to the rules of administrative law and he must strictly adhere to them. *Inter alia*, the "infiltrator" must be informed of the nature of the charge or claim against him; he must be given a fair opportunity to respond to the information he received concerning his case; and some of the "infiltrators'" lack of knowledge of the language must be considered and arrangements for this must be made accordingly (see and compare to, for example *Appeal on Administrative Appeal* 7201/11 *Rachmani D.A. Soil Work Ltd. v. The Israeli Airports Authority*, paras.

43 – 45 (January 7, 2014) (hereinafter: the "*Rachmani Case*"); Appeal on Administrative Appeal 1038/08 *State of Israel v. Geavitz* (August 11, 2009); Leave for Request of Criminal Appeal 2060/97 *Vilenchik v. The Tel Aviv Region Psychiatrist*, padi 42(1) 697 (1998); High Court of Justice 656/80 *Abu Romi v. The Minister of Health,* padi 35(3) 185 (1981); Dafna Barak – Erez, *Administrative Law*, volume 1 498 – 529 (2010)). In addition, the Head of Border Control must insist upon supporting his decision with the proper factual basis, with respect to the direct infringement on basic rights which is intrinsic in the decision of the transfer to detention (see and compare to High Court of Justice 394/99 *Maximov v. The Ministry of Interior*, padi 58(1), 919, 928 – 931 (2003); High Court of Justice 3615/98 *Nimoshin v. The Ministry of Interior*, padi 54(5) 780, 787 (2000); also see High Court of Justice 7015/02 *Adjuri v. the Commander of the IDF Forces in the West Bank,* padi 56(6) 352, 372 (2002)). Clearly, the Law did not furnish the Head of Border Control with authorities such as the authority to subpoena witnesses or the power to charge someone with providing testimony. These powers could increase the likelihood that the proceeding will culminate and 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 (see and compare to: Eitan Case, para. 174). This fact – in light of the degree of the infringement on rights – raises difficulties.

41. Notwithstanding this, and as opposed to the Eitan Case, the current legislation subordinates the discretion of the Head of Border Control to the Detention Review Tribunal for Infiltrators (hereinafter: the "*Tribunal*"). The Head of Border Control's decision is examined *de novo* by the Tribunal, who can decide to approve the order granted by the Head of Border Control *or not to approve it* (section 32T (h) of the Law). The Tribunal is not limited to the grounds for terminating detention which are set forth in sections 30A (b) (1)-(3) of the Law, and is required to also examine the legality and plausibility of the Head of Borer Control's decision. For this purpose, it is important that the Head of Border Control's decision be properly substantiated, so that it will be possible to examine the consideration which led to the decision and conduct judicial review in its regard (see and compare to Rachmani Case, para. 9 of *Justice S. Joubran's* opinion). In my opinion, within the scope of this review, the Tribunal must interpret the totality of the decision by the Head of Border Control, similar to a "dual instance of law". In other words, they must allow the resident to present his arguments and present evidence to support them (see and compare to Chemi Ben Nun and Tal Havkin, *The Civil Appeal 13* (third edition, 2012)). For this purpose, in contrast to the Head of Border Control, the Tribunal has extended powers whose source is such that the review exercised by the Tribunal is made according to the outline in the Administrative Courts Law, 5752 – 1992 (see para. 110 of the Chief Justice's opinion). It should be emphasized that the present proceeding determined proactive judicial review by the Tribunal,

without the "infiltrator" being required to "induce" the proceeding himself. This is an improvement in contrast to the situation prior to the ruling in the Eitan Case. Clearly, as can be seen from the wording of the section, the Tribunal is required to examine the discretion of the Head of Border Control only *after* a decision on the transfer to detention was reached. Even though the "infiltrator" must be brought "as soon as possible" the first encounter with the Tribunal may also occur after *96 hours* passed from the commencement of the "infiltrator's" detention (section 32T (g) of the Law). This is a considerable period of time (see High Court of Justice 6055/95 *Zemach v. the Minister of Defense*, padi 53(5) 241 (1999) (hereinafter: the "*Zemach Case*"); section 237A of the Military Judgment Law, 5715 – 1955 (hereinafter: the "*Military Judgment Law*"); section 29(a) of the Criminal Law Procedure (Powers of Enforcement – Arrest) Law 5756-1996; also compare to section 13N(a) of the Law of Entry into Israel Law, which determines that "a detainee in detention shall be brought before the detention review as soon as possible and no later than 96 hours from the commencement of his detention").

42. In any event, and assuming that the judicial review determined in the Law is sufficient, conferring this type of power to an administrative authority is within the confines of an exception. In the Eitan Case, I already reviewed that "the authority to restrict liberty and supervise it is at the core of the role of the judiciary branch" (*ibid*, para. 179). The judicial branch executes the criminal law. In order to ensure the constitutional protection of the right to liberty, the penal code set forth strict procedural and evidentiary rules, which outline the judicial supervision over investigative acts and subsequently the manner in which a person's guilt will be decided (Ron Shapira, "An Administrative Procedure that Determines the Boundaries and Scope of Criminal Punishment" *Hamishpat* 12 – Adi Azar Book 485, 488 (2007) (hereinafter: "*Shapira*"). Alongside the aforementioned, it is possible to find in the Israeli legislation several arrangements which afford the administrative authority the power to limit the liberty of an individual. *First*, in hierarchical entities whose essence and nature require having stringent disciplinary rules, the legislator granted the managing entity the power to deprive a person's liberty as punishment for the infraction of disciplinary rules. These rules – which are applicable to the Israeli Army, the Israeli Prison Services and the Israeli Police – allow judicial officers or detention tribunals to impose punishments of detention or imprisonment on anyone who committed a disciplinary offense according to the relevant legal system (see sections 152 – 153 of the Military Judgment Law; sections 110.30 and 100.44 of the Prisons Ordinance [New Version], 5732 – 1971 (hereinafter: the "*Prisons Ordinance*"); sections 37 and 51 of the Police Law, 5766 – 2006 (hereinafter: the "*Police Law*")). *Secondly*, in situations relating to enforcing disciplinary arrangements in prisons and detention facilities as well, the managing entity of the incarceration or detention facility is authorized to instruct upon holding the prisoner or detainee in isolation, or – with respect to prisoners – to instruct on

reducing the administrative discharge days or parole (see section 58 of the Prison Ordinance; section 10(b) of the Law of Arrests).

43. Thus it follows that the legislator recognized that in certain hierarchical organizations, the administrative authority is authorized to impose punishments which include depriving liberty for *significant* purposes (also see: Shimon Shitrit, "*The Money Ransom: Punitive Sanctions by the Administration*", *Law Review* B, 577, 579 – 581 (1970)). The problem is that it cannot be inferred from these arrangements that it is possible to exclude the role of *punitive* sanctions from the judiciary branch. Consequently, there is a need to erect a secure pillar on the fine line between punitive sanctions and disciplinary sanctions, which in the appropriate circumstances – can be granted to the administrative authority (however, also see Shapira regarding the importance of judicial review over an administrative entity, in the case discussed there – Israeli Prison Services, *ibid*, pp. 488 – 493). Clearly, insofar as powers were granted to the Head of Border Control to penalize an "infiltrator" with *punitive* sanctions – this power cannot endure. This is a severely excessive disproportionate infringement of rights – the right to liberty and the right to due process. These rights are interlaced. Depriving liberty as disciplinary matters – ostensibly crosses the Rubicon to the "criminal" dry land which requires a criminal proceeding in the courtroom, which ensures the right of due process. Punitive sanctions – are bestowed upon the courts, and the courts only. Not retroactively and not post factum, not as "judicial review" and not even by means of a new hearing. A criminal proceeding is required in court, according to all its rules and pedantry.

44. The question of where the borderline passes between the punishment which relies upon essentially compensatory purposes (punitive sanction) and the punishment whose senses is preventative – disciplinary is difficult to determine. It also appears in this context that "there is a great deal of perplexity and uncertainty", and "it may be that the aforesaid theoretical issue has not yet been properly developed" (Criminal Appeal 758/80 *Yesh Li Ltd., a private company v. The State of Israel*, padi 35(4) 625, 629 (1981) (hereinafter: "*Yesh Li*") (concerning the question of whether a certain fine is considered a punitive sanction); also see: Leave for Civil Appeal 4096/04 *Boteach v. The State of Israel,* padi 50(1), 913, 917 – 920 (2004) (hereinafter: the *"Boteach Case*")). An interpretive ruling is required in this matter. "By means of interpretation the "genetic code" can be found for the rule being examined – namely, the nature and characteristic and whether it is indeed "criminal" or not" (High Court of Justice, 2651/09 *The Civil Rights Society in Israel v. The Minister of Interior,* para. 6 of the opinion of *Justice* (her former title) *M. Naor* (June 15, 2011) (hereinafter: the "*Passport Regulations Case*"); also see: Yesh Li, p. 629; Leave to Appeal 277/82 *Nirosta Ltd. v. The State of Israel*, padi 37(1) 826, 830 (1983); Criminal Appeals 474/65 *Mirometh Metal Factories Ashkelon Ltd. v. The Attorney General*, padi 20(1) 374, 376 – 377 (1966)). This classification depends on the

circumstances of the reviewed case and the wording of the authorizing legislation (also see examples in the Passport Regulations Case, para. 10).

45. And this is the crux of the discussion before us: the Head of Border Control is authorized to issue orders for transfer to detention for periods which may reach 75, 90 and 120 days. In other words, with respect to various disciplinary infractions – for example absenteeism from the Residency Center or the non – renewal for of the temporary permit for a visit residency according to section 2(a)(5) of the Law of Entry into Israel – the Head of Border Control can "sentence" prison-like punishments upon the "infiltrator" for a period of three and even four months. Is this a "punitive" sanction as opposed to a "disciplinary" sanction? We will begin to interpret this section. According to my opinion, for this purpose it is possible to seek assistance from the examination of the nature of the disciplinary "sanction" – is it a part of the penal corpus or not (the existence of a parallel punitive norm may support the opinion that it is not a disciplinary measure but an attempt to create a "detour" to a criminal proceeding; also see the ruling of the European Court of Human Rights, Campbell v. United Kingdom, 7 E.H.R.R. 165 ¶68 (1984) (hereinafter: the "*Campbell Case*")); the severity of the offense (to the extent that the offense ascribed to a person is known to be of greater severity, thus the inclination to view the punishment in its regard as a punitive sanction will increase); the maximum deprivation of the right to liberty (An extended period of time puts the punishment closer to a punitive sanction, while a shorter period of time – a disciplinary sanction); and the manner of executing the punishment (insofar as to the extent that the punishment has a greater infringement on liberty, thus the scales will tip in favor of its classification as punitive) (see and compare to the European Court of Human Right's ruling which reviewed the question when is a person, upon whom a disciplinary sanction was imposed, entitled to the defenses afforded in section 6 of the European Convention on Human Rights, which anchors procedural guarantees for a defendant in criminal cases: Engel v. The Netherlands, 1 E.H.R.R. 647 ¶ 82 (1976); the Campbell Case, paras. 69 – 73; Ezeh v. United Kingdom, 39 E.H.R.R. 1 ¶ 82 – 86 (2003). In the last case, the European Court noted that these criteria constitute cumulative conditions and there will be cases in which the existence of only one of them will be sufficient to determine that the discussed punishment belongs to a punitive "enumeration", *ibid*, para. 86).

46. We will apply these tests to the arrangement before us. First, regarding the existence of a parallel punitive norm. Scrutiny of the arrangement specified in section 32T of the Law indicates that with respect to the few prescribed violations therein, there is no parallel punitive sanction, and on the other hand, with respect to some of the violations – "caused actual damage to property" (section 32T (a)(3) of the Law) and "caused bodily harm" (section 32T (a) (4) of the Law) – it is possible to consider punitive prohibitions which can be applied when necessary. Consequently, this test does not tip the scales in any direction one way or another.

This is also with respect to the severity of the offenses – some relate to fulfilling the rules of conduct of the Residency Center (for example, the reporting requirement), others, as aforementioned, are related to more severe damage – to property or to the body. Consequently, these two secondary tests do not provide a conclusive outcome. Clearly, these two additional tests sway, according to my opinion, in the direction of the opinion that this is a punitive sanction at its core. With respect to the way the punishment is executed, which in this case refers to transferring the "infiltrator" to detention, conditions are similar to incarceration. This is clearly an extremely severe sanction concerning the infringement on liberty (also see: Eitan Case, para. 47). The duration of the deprivation of liberty also supports this conclusion. Some of the periods of the detention prescribed in this section are distinctly longer and reach up to 120 days – or 4 months – for the deprivation of liberty. My colleague, the Chief Justice emphasized that the periods of detention determined in the Law are "maximum" periods which do not necessarily need to be "exploited" in their entirety (para. 112 of her opinion). In my opinion, this is not sufficient to conclude the discussion. In the Eitan Case, as a response to the opinion of *Chief Justice A. Grunis*, I interpreted the question of weight which should be afforded to the fact that the Head of Border Control was authorized in the Law to instruct upon the residency of an "infiltrator" in the Residency Center "until such other date which shall be determined". I insisted that according to my approach the discretion afforded to the Head of Border Control does not alter any main points, since the Head of Border Control was authorized to allocate time – alongside this, he was authorized, in the beginning of the section, not to allocate any time. Indeed, the Head of Border Control may properly exercise his discretion and abstain from sending an "infiltrator" to detention for longer periods than those specified in the Law. However, we cannot hang our hopes only on the discretion of the administrative authority –that he will opt to allot punishments on a lower hierarchy of severity than what is permitted in the Law. We must turn our eyes to the provisions of the Law. The legislator deposited with the administrative authority the possibility to impose prison-like punishments which last for months. Consequently, the power, which was granted – as opposed to the individual discretion – is what we are currently reviewing.

47. Finally, I will suggest to examine the balances made by the legislator in a similar state of affairs, since "it is acceptable in the tradition of our legal system, that the statements in a certain text can be interpreted while learning the significance which is given to a statement in another text" (Aaron Barak, *Interpretation of the Law*, Volume 3 – Constitutional Interpretation 243 (1995) (hereinafter: "*Barak, Interpretation*")). Parallel disciplinary arrangements which were outlined in the Israeli legislation limited the deprivation of liberty for much shorter periods than those prescribed in section 32T of the Law before us. In the army, as was noted by my colleague, the Chief Justice, a senior judicial officer can impose on a soldier a maximum period of imprisonment of 35 days. If an *additional punishment* is imposed before the soldier carried out his punishment, he will carry

out his punishment concurrently, provided that the maximum consecutive period of imprisonment is 70 days (see section 153(a)(6) and section 162A of the Military Judgment Law; para. 112 of the Chief Justice's opinion).When we are referring to warders, the Disciplinary Tribunal is authorized to sentence a warder who was convicted of a disciplinary offense to a punishment of imprisonment up to a maximum period of 45 days. If the warder is sentenced to an *additional* punishment of imprisonment before he completed carrying out his previous punishment, he will carry out the longer punishment, however the panel is permitted to instruct on cumulative punishments provided that the maximum consecutive period of punishment will not exceed 70 days (section 110.44(5) and section 110.61 of the Prisons Ordinance). For a police officer convicted of a disciplinary offense by the Disciplinary Tribunal it is possible to impose a punishment of imprisonment of a maximum period of 45days (section 51(a) (5) of the Police Law). Also in this case, if a police officer is sentenced to an *additional* punishment of imprisonment, when he is carrying out another punishment of imprisonment, he will bear one punishment according to the longer period, however the panel is permitted to instruct on cumulative punishments provided that the maximum consecutive period of punishment will not exceed 70 days (section 66 of this Law). Needless to say that the power to impose maximum punishments, as aforementioned, on police officers and warders is given to a panel of three, when at least two of them are jurisprudents (see section 110.37 of the Prisons Ordinance; section 44 of the Police Law). Consequently, it appears that when in the Israeli legislation a managing entity was afforded the power to deprive an individual's liberty for *disciplinary* purposes – it was time restrained. The acceptable limitation is for a period of up to 45 days with respect to one disciplinary offense and no more than 70 consecutive days with respect to several offenses.

48. And it should be noted: section 32T of the Law sets a "hierarchy of severity" to impose punishments which is dependent upon the question of how many times before an order was given to transfer to detention "on the same grounds". Thus, for example, if an order was given, as aforementioned, twice for the same grounds specified in section 32T(a)(5) of the Law (working as opposed to the provisions of section 32F of the Law), such that the "infiltrator" already carried out two periods of detention pursuant to the offenses "which were determined" that he committed – it is possible to instruct upon his transfer to detention for a third time for a period of 60 days (section 32T(b)(3)(c) of the Law). However, it is not similar to the provisions in the opinion of the Chief Justice concerning an "additional" punishment of imprisonment which I reviewed above: these provisions relate to a situation during a time when one is carrying out his punishment and an additional punishment was imposed upon the recipient of the punishment. In these cases, the relevant legislation also determined that even when *cumulatively* carrying out the punishments- it cannot exceed a period of 70 days. In all of the disciplinary arrangements which I reviewed, no similar period

of punishment with respect to one disciplinary offense is recognized (even if there were prior additional offenses regarding the punishment being served). Yet, in the case before us the Head of Border Control is authorized to instruct on the transfer to detention for this kind of period – and even longer – with respect to one infraction (even if it is the third infraction in number). On the comparative level, we should note that as indicated in the opinion of my colleague, *Justice H. Meltzer*, a violation of the conditions placed on "anyone who infiltrated into Germany who requests asylum", leads to the *criminal track* (see para. 10 of his opinion). As aforementioned, this is not the situation in our case.

49. Based on the aforementioned, it appears that the provisions of the arrangement determined in section 32T of the Law cross the line between a disciplinary sanction and a punitive sanction. Thus, it is not possible to place with the Head of Border Control – or any other administrative agent – powers of this kind. Indeed, the legislator is given latitude regarding the duration of disciplinary sanctions. He is not required to precisely adopt the duration of time determined in other disciplinary arrangements which are applicable to soldiers, police officers or warders. However, the periods determined in the arrangement in the Law for Prevention of Infiltration are in fact far off from that – much too far. They do not pass the *proportionality test in the strict sense*, which as noted by the Chief Justice is the main test in our case (para. 111 of the opinion). Yet in order to manage a facility where attendance is compulsory, rules are necessary. These rules require enforcement, otherwise it will be a mockery. However, not every punishment is an option. And it should be stressed: the State is obviously permitted *to conduct criminal proceedings in the appropriate cases "*which *by its nature, also permit imposing strict penalties*" (Eitan Case, para 184). *However, this kind of power cannot be granted to an administrative entity even if* his decision is subject to proactive judicial review. As I noted in the Eitan Case, "a sanction of this type cannot stand – irrelevant of the dependency upon the question of whether judicial review follows or not" (*ibid*, para. 184). Consequently, my conclusion is that granting this type of power does not stand in a direct fashion against the intrinsic infringement therein.

The Relief

50. I have reached the conclusion that section 32T of the Law is disproportionate. This constitutional flaw cannot be cured by means of interpretation and there is no choice other than to declare the repeal of the section. In the Eitan Case, I suggested to my colleagues that this section be read such that with regard to each and every one of the grounds enumerated therein, the Head of Border Control will be authorized to instruct upon the transfer of an "infiltrator" to detention for a period which shall not exceed 30 days; and that the detainees in detention on the date the ruling was granted pursuant to a decision of the Head of Border Control, as aforementioned, be released at the end of 30 days of their detention or at the end of the period allotted by the Head of Border Control – whichever is earlier

(*ibid*, para. 191). Now, given the proactive judicial review which was added to the Law on the decision of the Head of Border Control – review which could moderate, if only to some degree, the infringement on rights – I would suggest waiting 6 months before the declaration of the repeal would enter into effect. During the course of this period, or until the legislation of a new arrangement in this matter, section 32T shall remain in effect, but will be read in a manner with respect to all of the grounds set forth therein where an order transferring to detention which exceeds 45 days shall not be issued (as is acceptable regarding a disciplinary sanction with respect to one offense). The detainees in detention on the day of this ruling pursuant to a decision by the Head of Border Control, as aforementioned, shall be released upon the conclusion of 45 days of their detention or at the end of the period allotted to them by the Head of Border Control, whichever is earlier.

As We Approach the Conclusion – Comments for the Future

51. The result which I reached at the conclusion of the legal analysis is consequently that: sections 30D (A) and 32U of the Law ought to be repealed. Section 32T of the Law ought to be repealed. What will the Knesset do now? The dialogue will continue. The same legislation cannot remain intact as though nothing occurred (also see the opinion of the *Senior Associate Justice (her former title) M. Naor* in the Eitan Case, para. 3). The Knesset can act to legislate a legal arrangement which will pass the constitutional criteria. Instead of the extended periods of detention which were set forth in section 32T of the Law it is possible to present shorter periods. Also, instead of the provision which we are currently suggesting to declare as repealed – which determines the duration of the maximum period of residency in the Residency Center – the Knesset can determine another period, *a significantly* shorter period, which could pass the constitutional examination. The legislature could also examine new and different possibilities. I would like to add another comment in this matter.

52. The Law for the Prevention of Infiltration permits the Head of Border Control to issue, as aforementioned, a residency order to any "infiltrator" for whom it was determined that there is a difficulty "of any nature whatsoever" to deport him to the country of his origin (section 32D of the Law). The administrative authority itself directed the criteria in this matter. According to the criteria which was published by the Population and Immigration Authority dated on July 14, 2015, "infiltrators" to whom residency orders can be issued are "Sudanese nationals who 'infiltrated' into Israel prior to December 31, 2011" and "Eritrean nationals who 'infiltrated' into Israel prior to July 31, 2011, including anyone who received a B/1 residency visa to date". Thus it follows that: the administrative authority selected to apply the arrangement set forth in the Law for the Prevention of Infiltration on "veteran infiltrators" – those who arrived to Israel almost 4 years ago. I do not seek to determine any rules concerning the different questions which incidentally arise as a result of the reference to these criteria. As I have already

noted, since this is about criteria which entail an infringement on the right to liberty and the right to dignity – the question arises whether the place for these arrangements were required to be in primary legislation (Eitan Case, para. 91). I would now like to emphasize just this: in my opinion, the scope of the infringement on rights, as well as the efficiency of the Residency Center changes with respect to two groups of the population. *First*, the group of the "veteran infiltrators"; *Second*, the group of "new infiltrators". With respect to the first group, the infringement of Chapter 4 of the Law is harsher. The majority of the "*veteran infiltrators*" – those who are sent to "Holot" pursuant to the criteria set forth in this matter – tied their lives to the urban cities. Severing the lives which they already built for themselves "draws" them away from their job, home, social environment, etc., in one fell swoop. This is an extremely severe infringement on their right to liberty and dignity and the obtained benefit from this in connection with "preventing the settling down" is limited. This is certainly the case with respect to the purpose of "providing a response to their needs". On the other hand – with respect to the second group, which is the group of "new infiltrators", it seems that the infringement of Chapter 4 is less severe. These "infiltrators" have not yet staked any claim in our borders. The infringement on them – as individuals who just entered Israel – is more restricted. With respect to them it can even be said that in retrospect it is not "changing the rules of the game" (as was noted by *Justice I. Amit* in para. 1 of his opinion in the Eitan Case). Even after we ruled that a deterrent purpose is not proper, it can be said that the infringement on the rights of an individual who knows that he is walking with open eyes to the borders of a country where these are the normative arrangements which are applicable to him – is infinitely less than that of an individual who is torn from his life and returned to it after a considerable period. The infringement on these "infiltrators" – the "new infiltrators" – in the Residency Center, is thus consequently on a lower scale than the infringement caused to the "veteran infiltrators". On the other hand, the obtained benefit from this with respect to the purpose concerning the settling down is greater, except that they have not yet succeeded in settling down. As a result of the aforementioned, there is no impediment to consider determining different "capped" periods for these two groups of the population. This kind of determination will also allow the State to provide a response to the situation where the constrained trend of immigration to Israel will change (for example, due to the closing of the immigration channels to Europe) given its stance – with which one should agree– whereby a fence alone cannot curb the "infiltrator phenomenon" (see p. 58 of the Statement of Response; and the Eitan Case, para. 64). It is clear that in any event, as noted by the Chief Justice, issuing a residency order must be individualistic and we cannot accept issuing a residency order according to a "standard outline" – in other words: a determined period with respect to the entire group of the population (para. 96 of the Chief Justice's opinion).

53. Finally, it is worth dwelling on a question which was also raised in the Eitan Case which resurfaces in the Petition before us, and that is the question of the relationship between the constitutional scrutiny and the administrative examination. The questions of who will be summoned to the Residency Center; what conditions will be provided to the residents in the Center; and where the Center will be erected – these are questions which are primarily found in the administrative plane and arranged in regulations and decisions which were made by virtue of the Law. Once again, the State and the Petitioners deserted the dispute with respect to these issues, and my opinion – as was my opinion in the Eitan Case – is that the appropriate hostelry for its clarification is not this proceeding. Clearly, I wanted to note prior to closing that a different application of the Law could have also influenced the examination of its proportionality. If more improved conditions would be provided in the Residency Center; if the "pocket money" would permit the "infiltrators" to have a greater degree of autonomy; if the Residency Center was not so remote from towns – then it could influence the confines of proportionality, and as a result – the question of constitutionality.

Conclusion

54. As is well known, "constitutional democracy is the fine balance between the rule of the majority and the fundamental principles which rule the majority" (Barak, Interpretation, p. 113). In our case this balance was infringed. Should my opinion be heard, we will declare the repeal of sections 32D (a) and 32U of the Law and the repeal of section 32T of the Law. Indeed, when we stand before the constitutional reexamination of the provision of a law this requires particular prudence (see: Eitan Case, para. 23). When we are examining a law for the third time – *a fortiori*. However, we should not hesitate to declare the repeal of legislation which is not constitutional. We are not permitted to hesitate in such an instance. *A fortiori* it is correct when the matter before us concerns the core of human rights of an enfeebled population. This is the *raison d'être* of the constitutional scrutiny. Even though this is never the last resort, legislation that is unconstitutional ought to be repealed.

Justice

<u>*Justice I. Amit*</u>

1. The prolific dialogue between the legislation branch and the judicial branch continues, and now we stand before the third round relating to the constitutionality of the Law for the Prevention of Infiltration (Offenses and Jurisdiction, 5714 – 1954 (hereinafter: the "*Law*") an unprecedented phenomenon in our constitutional legal system.

Now too we are dealing with two primary tiers of the Law: detention according to section 30A of Chapter 3 of the Law and erecting a residency center and arranging its operations according to Chapter 4 of the Law.

2. As in the Eitan Case (High Court of Justice 7385/13 *Eitan – Israeli Immigration Policy Center v. The Israeli Government* (September 22, 2014), I believe today that in the realm of the purpose of the Law and the constitutionality of the Law we need to relate to the primary purposes of the Law in dichotomies. In my opinion, the State is permitted to adopt harsh immigration policies for those outside, for the future and towards potential "infiltrators". Inversely to the same harshness, it is appropriate that the State be compassionate and humane internally and towards the past, in other words, towards the same individuals who have already been in our borders for several years, even before the legislator changed the "rules of the game".

   In light of this dichotomy, I will say a few words concerning the Law in its current version.

3. Section 30 of the Law: in the Eitan Case, I reviewed that this section as being future – forward looking, goes beyond the fence and the borders of the State, and potentially to an undefined group of potential "infiltrators". I believed, in the minority opinion, that the law which set the period of detention for one year should not be repealed and I reviewed that curbing the "infiltrator phenomenon" 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".

   In light of these interests, in my opinion there is no flaw in the purpose of reducing the incentives for "potential infiltrators" from coming to Israel, and due to the reasons I specified in the Eitan Case, I do not believe that a deterrent purpose can by force turn the potential "infiltrator" into a means to an end.

   In the Eitan Case, I also believed by means of an *a fortiori*, following the current amendment, which reduced and set the period of detention at three months. Thus, it makes it easier for me to join the conclusion of the Chief Justice that the amendment to section 30A of the Law passes the tests of the limitations clause.

4. *Chapter 4 of the Law*: I will reiterate what I said in the Eitan Case. 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… the Residency Centers

created by the legislature in Israel, completely mis-identifies the characteristics and purposes of the residency centers in the different countries in Europe". Indeed, insofar as the days go by it becomes apparent that this is the not the type of Residency Center we desire and this was reviewed by the Chief Justice in her opinion (para. 57).

5. Just think how many purposes the Parties overburdened on the meager shoulder of Chapter 4 of the Law: curbing the "infiltrator phenomenon" and preventing future "infiltration" when examining a normative barrier for potential "infiltrators"; preventing the settling down in urban cities; providing an appropriate response to the needs of the "infiltrators"; ensuring the safe departure of the "infiltrators"; preventing the "infiltrators" from any earning capacity and reducing the economic incentive to remain in Israel; breaking the spirit of the "infiltrators" and encouraging them to leave Israel.

   As was noted by the Chief Justice (para. 105 of her ruling), presumably in the western countries there are no involuntary residency centers for such a long period of residency where the residency is for the purposes of dispersing the population. The Israeli model is unique and in fact it was not only designated to *disperse* the population of "infiltrators" throughout Israel, as was claimed, but rather to *concentrate* them in one Facility which is distant and remote from any settled area.

   The present Law adopts a method of "centrifugal circulation" by means of removing the "infiltrators" from urban cities, spinning them in a centrifugal momentum to the peripheries of the desert for twenty months, and from there back to the urban cities, and simultaneously, removing others from the urban cities "to fill their place" in the Residency Center. This zigzag manner of constant turnover of the "infiltrators", "revolving doors" according to the words of *Justice U. Vogelman*, raises the concern that behind the declared purpose of preventing the settling down in the urban cities, another purpose of "harassing" the "infiltrators" and breaking their spirit is concealed, as is argued by the Petitioners. Therefore, I concur with the question mark raised by *Justice Vogelman* when he discussed the purpose of encouraging voluntary returns, regarding the gap between the declared purpose and the latent purpose of the Law.

   Ultimately, I put the State to its preemptions and declarations, and I have no other choice but to concur with the opinion of my colleague, *Justice Vogelman*, and interpret the purpose of preventing the settling down as "reducing the burden" on the cities, primarily south Tel Aviv. This purpose is proper, thus there is no place to repeal Chapter 4 of the Law at the stage of its purpose. I will note, that ordinarily the term settling down is mainly concerned with one's place of residence. In this aspect, insofar as the Law was designated to reduce the scope of *residency* of the "infiltrators" in the cities, as opposed to a place of

employment and residency, then it is a proper purpose in itself, which could have also been obtained by erecting a Residency Center outside of the cities or in the peripheries of the cities, and not specifically in such a distant place such as "Holot". Hence, it is more accurate to examine the constitutionality of the Law at the proportionality stage and not at the stage of its purpose, as was done by the Chief Justice in her opinion. In this context, I will say that the question of the *location* of the Residency Center is critical, since the proportionality of the Law is not conducted in a vacuum, but in light of a certain reality. The present Residency Center is remote and isolated form any other settled area, when the daily pocket money given to its residents is not sufficient even to travel to the closest city.

Being consistent with my opinion that preventing the resurgence of the "infiltrator phenomenon" is a proper purpose, I believe that it is also proper within the framework of Chapter 4 of the Law, as an independent purpose and not only an accompanying purpose. Therefore, I believe that there is no impediment to apply the arrangements of Chapter 4 of the Law at face value to potential "infiltrators" to be in effect prospectively from this point forward, also for a period of 20 months. In other words, for an "infiltrator" who has arrived after the enactment of the Law and on whom the provisions of section 30A(k) are applicable, then the provisions of Chapter 4 of the Law shall also apply, including the 20 month period as specified in sections 32D and 32U of the Law. This is not the case for "infiltrators" already residing in our country, where the 20 month period fails to pass the third proportionality test, and on this point I concur with the opinion of the *Chief Justice M. Naor*.

The claimed purpose of "providing a response to the needs of the 'infiltrators'" is undoubtedly a proper purpose. However, the "interpretation" of this purpose in light of the provisions of Chapter 4 of the Law in the manner which they are applied today, leaves this purpose devoid of meaning, and it should be deemed as already failing the first secondary test of the proportionality conditions.

6. In the Eitan Case we reviewed several parameters where no heart – warming picture was manifested regarding the characteristics of the Residency Facility and we repealed these and other specific arrangements which relate to Chapter 4 of the Law. We will now continue in this manner, without repealing the arrangement in Chapter 4 from its roots.

   The bottom line is, in light of the harsh and inherent infringement of Chapter 4 on the right to liberty, I concur with the opinion of the Chief Justice whereby the period of 20 months concerning "veteran infiltrators" is disproportionate and I concur with the relief she determined.

In addition, in order to alleviate insofar as is possible the sting of the infringement on liberty, I concur with the opinion of my colleague, Justice Vogelman concerning the repeal of section 32T of the Law. Insofar as in the future it will become apparent that there are severe disciplinary problems in the Residency Center, there may be room to reexamine this matter again.

Justice

Justice S. Joubran

1. The Law before us, the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714 – 1954 (hereinafter: the "*Law*") reaches the steps of this Court for a third time. My colleagues expanded and intensified the constitutional issues which arise before us, and it appears that the ruling in this Petition is reduced to three main questions: *first* – is the arrangement which is now set forth in the framework of section 30A of the Law, which relates to the possibility of detaining an "infiltrator" against whom a deportation order was issued for a period of three months, proportionate or not; *secondly* – is the arrangement which is now set forth in the framework of sections 32D and 32U of the Law, whose essence is the duration of an "infiltrator's" residency in the Residency Center, proportionate or not; *and thirdly* – is the arrangement which is now set forth in the framework of section 32T of the Law, relating to the powers of the Head of Border Control (hereinafter: the *"Head of Border Control*") to transfer an "infiltrator" from the Residency Center to detention with respect to disciplinary offenses, proportionate or not.

2. My colleagues, *Chief Justice M. Naor and Justice U. Vogelman*, share the same opinion that the answer to the first question is that the arrangement is proportionate and therefore constitutional; while the answer to the second question is that the arrangement is disproportionate and therefore unconstitutional. Notwithstanding this, they are in dispute concerning the answer to the third question.

3. Similar to my colleagues, I am also of the opinion that section 30A of the Law should remain intact subject to the interpretation outlined by my colleague, the Chief Justice, in her opinion (the first question above), and with respect to the maximum threshold for detention in the Residency Center which is set forth in sections 32D and 32U of the Law it ought to be repealed (the second question above). I do not see any need to expand and specify my rationale in light of the extensive opinion of my colleagues. I will briefly note that my stance is also that section 30A of the Law in its present format passes the tests of the limitations clause, primarily in light of reducing the maximum period of time in which detention is possible. I would like to

sharpen the point, that as I believed in High Court of Justice 7385/13 *Eitan – Israeli Immigration Policy Center v. The Israeli Government* (September 22, 2014) (hereinafter: the "*Eitan Case*"), and as was determined in the opinion of my colleague, the Chief Justice, in this proceeding, the purpose to prevent the settling down of the "infiltrators" is a proper purpose. This ruling is based upon the State's right to formulate immigration policies which seek, *inter alia*, to reduce the unwanted changes in the demographics which are an inevitable byproduct of illegal immigration, and in particular "infiltration". I stated this in para. 7 of my ruling in the Eitan Case:

> "These changes have led , in the Israeli reality, to 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)".

Just as this is what I believed then, I continue to believe today, that even though by its nature immigration policies entail a limitation of certain basic rights, it is not sufficient to negate its existence as a proper purpose. The comparison to the rules of international law which were made by my colleague, the Chief Justice, in paras. 68 – 73 of her ruling, reinforces this opinion. According to these rules, in extraordinary circumstances it is possible to adopt measures which restrain the "infiltrators'" freedom of movement and at times, the right to liberty. Thus, my position is that it is a proper purpose and that section 30A of the Law passes the remaining tests of the limitations clause, as was expanded upon by my colleagues.

4. Notwithstanding this, the determination that the primary purpose of the Law is proper, I also believe that sections 32D (a) and 32U of the Law do not pass the proportionality test in the strict sense, in light of the length of the period in which an illegal resident can be held in the Residency Center – a period of 20 months. As specified in my colleagues' opinions, the dimension of time influences the degree of infringement on the rights of the "infiltrators", in a manner which does not preserve the proper relationship between the cost and the benefit. Therefore, also in my opinion, the maximum threshold for detention in the Residency Center is disproportionate and ought to be repealed.

5. Nevertheless, the dispute between my colleagues concerning the third question – if the arrangement which grants the Head of Border Control the power to transfer an "infiltrator" from the Residency Center to detention with respect to disciplinary offenses, is proportionate or not – my positions is similar to the position of my colleague, *Chief Justice M. Naor*. I also believe that there is significance to such that the maximum periods of time

of detention were significantly reduced; that the transfer of an "infiltrator" is subject to the grounds set forth in the Law; and that a mechanism for automatic supervision of judicial review on the decision of the Head of Border Control was added, which is exercised no later than 96 hours from the commencement of the detention. When examining the proportionality test in the strict sense, I found that the arrangement set forth in section 32T of the Law is proportionate in light of the proper relationship between the benefit and cost which arises therefrom, and therefore as was analyzed by my colleague, the Chief Justice, is constitutional.

6. On the other hand, my colleague, *Justice U. Vogleman*, believes that the arrangement is unconstitutional, primarily in light of the fact that the provisions of the arrangement cross the line between a disciplinary sanction and punitive sanction. My colleague, *Justice Vogelman*, noted in para. 42 of his opinion that granting this type of power to an administrative authority is an exception, and he later suggested to compare between an administrative entity in our case (the Head of Border Control) and hierarchical entities in the framework of which were granted administrative authority to deprive an individual's liberty for infractions of disciplinary rules (para. 47 of his opinion). Thus, *Justice Vogelman* refers to disciplinary arrangements which were outlined in the Israeli legislation and which apply to the army, the Israeli Prison Services and the police, and he found that these arrangements deprive liberty for shorter periods than those which are set forth in the arrangement in section 32T of the Law.

7. I myself believe that there is no room to make analogies and equate between the group of "infiltrators" to the groups of soldiers, warders and police officers. Indeed, insofar as to the extent that we look at the point of view of one detaining by authority – then in both cases it is a an administrative agent. However, insofar as to the extent that we look at the point of view of those "being punished" – these are two different groups in their essence. The group of the "infiltrators" is a group of people who at the onset are characterized as violating the law – due to unlawful entry and/or residency. On the other hand, the groups of soldiers, warders and police officers are a professional group of people serving the country. When an "infiltrator" commits a disciplinary offense it is added to an offense which he already committed (without delving into the question of why he unlawfully entered the country). On the other hand, when a person in the military, prison officials or police commit a disciplinary offense, he does so within the capacity of his position. In the two cases, the right to liberty is important and one should not underestimate the need to prevent an infringement. Notwithstanding this, it seems to me that a distinction must be made between the authority granted to an administrative agent to impose disciplinary sanctions on groups of people seeking protection under his

authority due to a violation of the law and groups of people seeking protection under his authority within the framework of their positions as professionals in the services of the country. Therefore, I accept the arrangement which granted the administrative agent the power to deprive liberty for a longer period of time when we are dealing with the first group.

8. Therefore, it should be added that in contrast to my colleague, *Justice Vogelman*, who is of the opinion that "however, we cannot hang our hopes in the graces only in the discretion of the administrative authority –and thus he will opt to allot punishments on a lower hierarchy of severity than what is permitted in the Law". I believe, as does my colleague the Chief Justice in para. 112 of her opinion, that there is no place for concern that the Head of Border Control will select to "exploit" the maximum periods set forth in the Law in their entirety.

   In general, I believe that there is no place to cast a priori doubt on the ability of an administrative or judicial authority to exercise its discretion in accordance with the specific case brought before it. The Law before us determines that the Head of Border Control is permitted to transfer to detention an "infiltrator" who committed one of the acts specified in section 32T (a) of the Law for a period which shall not exceed the periods specified in section 32T (b) of the Law. For that matter, there is no difference in the periods of maximum detention which were set forth in section 32T (b) of the Law and between, for example, the maximum penalties set forth in the penal law. Just as certain criminal offenders are at times sentenced to several months of incarceration only and at times according to the maximum years of incarceration set forth in the law (or close to that), thus it is the same with transferring "infiltrators" from the Residency Center to detention –at times they will be sent for periods shorter than what is determined in the Law, and at time for the maximum periods set forth therein.

   And it should be emphasized, that insofar as to the extent that any suspicion will arise regarding any flaw in the discretion of the Head of Border Control, his decision is automatically subject to judicial review by the Detention Review Tribunal for Infiltrators (section 30T (g) of the Law; also see para. 110 of the opinion of my colleague, the Chief Justice). Therefore, I have reached the conclusion that the arrangement set forth in section 32T of the Law is proportionate.

9. In light of the aforementioned, I concur with the opinion of my colleague, *Chief Justice M. Naor*.

Justice

Justice N. Hendel

1. This is the third round of constitutional petitions against amendments to the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714 – 1954 (hereinafter: the "*Law*"). Actually, this is one cluster and the dynamics of one amendment after another amendment. In the background –significant changes which were applied in the last few years to the "infiltrator phenomenon". This Court, received petitions, three times, including this present case. It was determined that the Law, as was amended one after another following our rulings, was 'infected' with a flaw of unconstitutionality. The crux of the matter – High Court of Justice 7146/12 *Adam v. The Knesset* (September 16, 2013) determined that it is not possible to detain an "infiltrator" in detention for a period of three years; and High Court of Justice 7385/1313 *Eitan – Israeli Immigration Policy Center v. The Israeli Government* (September 22, 2014) where we ruled that detention for a period of 12 months is unconstitutional, as well as the "Holot" Residency Center according to the format which was then prescribed in the Law. In the present ruling, we are not intervening in the amended period of detention – 3 months, however, a flaw was found in the maximum threshold of residency in the Residency Center which reaches 20 months. In its place, the State was given an extension in order to amend the Law and it was also determined that during the intermediate period it will be possible to detain "infiltrators" in the Residency Center for a period which shall not exceed 12 months.

2. During the relevant period, actual changes have occurred. In 2009, 5,235 "infiltrators" entered Israel; in 2010 – 14, 702; and in 2011 – 17, 312. The State of Israel, who is responsible for the immigration policies and the borders, dealt with this phenomenon. In the last three years – the increasing trend halted. In 2012, 10,444 "infiltrators" entered Israel; in 2013 – 46 "infiltrators"; in 2014 – 21 "infiltrators"; and in the first quarter of 2014 – only 4 "infiltrators". It seems that two primary components contributed to the decline: a physical barrier – in the form of a fence on the Israeli – Egyptian border; and a normative barrier – the provisions of the "Infiltration" Law. The contribution of the result of each component is disputed, however, in my opinion it cannot be denied that the combination left its marker on the reality.

   Additional changes concern the number of "infiltrators" leaving Israel. In 2014, 6,414 "infiltrators" left Israel; and in the first quarter of 2015 – 747 "infiltrators". As of March of this year, 45,711 "infiltrators" reside in Israel. This is in contrast to approximately 50,000 who resided at the time of the Eitan Case ruling – the end of September 2014. In this context, it should be noted that the non – refoulement principle sets forth that it is not possible to deport an individual to a place where he faces imminent danger. This principle is particularly relevant with respect to Eritrean nationals. There are

also other difficulties regarding the citizens of North Sudan due to the lack of diplomatic connections with the country. As a result, the "infiltrators" left to a "third world country". The picture today is that while there is a significant decline in the number of "infiltrators" entering Israel, this is not the case regarding the number of "infiltrators" already in Israel.

3. I carefully reviewed the opinion of *Chief Justice M. Naor*. Her conclusion is that the period of detention in the Residency Center – 20 months – is too long and ought to be repealed. The opinion is organized and comprehensive. It was emphasized that if the Court believes, even for a third time, that there is an unconstitutional and disproportionate infringement on human rights – it is its role and duty to intervene. With respect to this rule, as a rule, I do not disagree. Clearly, my point of view in the case before us is different. Just like it is the role of the Court to intervene should it find such an infringement, it is also the role of a judge whose conclusion is to abstain from intervening to present his position and reasoning.

   In my view, the result whereby the law shall be amended for a third time, even if it is possible – is far from being desirable. Within the confines of constructive criticism, and in order for matters not to be repeated, for each of the position holders – the legislation in the Knesset and the Supreme Court in constitutional scrutiny – to examine whether it is possible to prevent this situation.

   Before I refer to the core of the ruling and its rationale, I will say that in the Adam Case I believed – along with my colleagues – that detention for a period of three years, whatever the intention may be, requires the conclusion of repealing the provision since it is punitive. With respect to the Eitan Case, I believed in the minority opinion – along with my colleague *Chief Justice (emeritus) A. Grunis* – that a period of detention of 12 months is within the constitutional borders as well as the Residency Center for a period of three years (similar to the period of the temporary order) – passes the constitutional test of section 8 of the Basic Law: Human Dignity and Liberty. In light of this background, it is no wonder that even this time around my opinion is that the constitutional Petition ought to be dismissed. However, in light of the result which the majority opinion reached in this case, I believe that there is room to present additional and new reasons which can justify not repealing the Amendment of the Law. This is beyond what was written in the Eitan Case by Chief Justice (emeritus) Grunis and myself, to which I will add several points which are necessary for this Petition.

   I find it correct to emphasize three points. The first revolves around the relationship between this Court and the legislative branch. The second

concerns the justification for the type of suggested involvement. The third focuses on the examination of the issue of repeal on its merits. Each layer for a basis, from another aspect, for the result whereby there is no room for constitutional intervention.

A. *The Constitutional Dialogue between the Court and the Knesset*

4. A major rule is that the Court should not instruct upon the repeal of a law due to constitutional reasons, unless there is no other option other than to do so. This authority of the Court is defined as "non – conventional weapons". Its use should be measured and cautious. Every authority – with its own powers and roles. This was the situation in the first amendment of the Law, *a fortiori* with the second amendment, and an auxiliary *a fortiori* for the third amendment.

   It can be stated that the Residency Center was "born" as a result of our comments in the Adam Case. In the Eitan Case, within the framework of the constitutional scrutiny regarding the Residency Center, this Court emphasized the limiting conditions of the residency in the Center, which was mainly the thrice a day reporting requirement – morning, afternoon and evening; the absence of any grounds of release from the Center; and that in practice the period of residency was not limited. My opinion was that the arrangement can be seen as limited for three years only. However, the majority opinion emphasized that uncertainty was created with an individual "infiltrator" regarding the end of the period of his detention in the Residency Center. According to this approach, it was not possible to deny the possibility of extending the validity of the temporary order even beyond three years.

   My colleague, *Justice Vogelman*, who wrote the main ruling for the majority opinion in the Eitan Case, noted:

   > "The constitutional scrutiny is not limited to the question whether each provision is specific – when alone – satisfies the constitutional criteria… 'any individual arrangement could be proportionate. However, the *overall accumulation* may not be proportionate' (1715/97 *The Office of Managing Investors in Israel v. The Minister of Financ*e, padi 51 (4) 367, 402 (1997) emphasis added– 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 the protected constitutional rights. Yet, the relationship between the different provisions also reflects upon the provisions which pass the judicial review" (para 100).

> "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" (para. 154).

> "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 in which the uncertainty enhances the suffering already associated with the deprivation of liberty. Notwithstanding this, 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" (para. 155).

> "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" (para. 157).

> "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" (para. 162).

This is how the duration of the period was emphasized in light of the thrice a day reporting requirement for purposes of registration.

The issues were brought forth to present another issue: according to my understanding, it does not indicate that a limited period which is less than three years, for example, twelve months, is accompanied by grounds of release and reducing the registration requirement to once a day during the nighttime hours – it too does not pass the proportionality test. The Eitan Case noted the infringement on the right to movement, which is derived

from the residency requirement in the Residency Center. However the emphasis was placed on the totality: the combination of the extended period – at least three years, the uncertainty for the end of the detention, the absence of grounds of release, the thrice a day signing requirement, and everything about a site which is located remote from any other town. Thus, it follows that in the present Petition the spotlight was directed beyond the flaw in the Law which in the past did not receive such a senior status – setting the maximum period at 20 months, contrary to a shorter period (for example, 12 months; see below).

Indeed, there is a form of a constitutional dialogue between the Court and the Knesset. However, this is a dialogue between partners of the position. Each entity – has a purpose and different powers. In my opinion, if there was also a constitutional difficulty with the maximum period which is half the period of three years – then it would have been appropriate to have stated so in the previous ruling. It is not appropriate that the dialogue will include improvements in demands and locating additional difficulties in the second round, as well as the third, difficulties which could have already been pointed out in the previous round.

It is true that an amendment of a law, even the third time, is not immune from constitutional scrutiny. The Eitan Case expressed the difficulties and nevertheless the Court did not determine a maximum period of residency in the Residency Center – even in general outlines. This is incomplete. We are also not dealing with a situation where the Knesset ignored the comments from the ruling. For example, whereas the minority opinion in the Eitan Case (Chief Justice Grunis and myself) supported the repeal of one reporting requirement amongst three, the Knesset preferred to repeal two out of three and left only one signing requirement at night. In addition, reducing the maximum period was not symbolic – for example, 30 months instead of three years. This is a significant reduction – up to 20 months at the very most. Even the other opinions of the majority opinion in the Eitan Case did not have any reference to any alternate numbers.

My questions can be answered by stating that it is not this Court's position to draft the details of the Law. However, with the absence of intent, if only in general terms, which can create the impression which is not the focus of the problem – I think that the dialogue between the Court and the Knesset was damaged. This is also the case considering the many rounds of the amendment to the "Infiltration" Law. In my opinion, this is how the constitutional amendment in the current format could have been prevented.

B. The Limitations of a "Numerical" Constitutional Amendment

5. An additional point of view, which in my opinion is problematic, concerns the nature of the amendment. The majority opinion was to repeal the residency in the Residency Center for a period of 20 months. Instead, it was determined, temporarily, that it is possible to detain in the Residency Center for a period of 12 months. Alongside this, the majority opinion, by Chief Justice Naor para. 69) and Justice Vogelman (para. 19), recognized the purpose of preventing the settling down in the cities. This purpose – means reducing the burden on the cities, within whose borders there is a significant concentration of "infiltrators". It seems that it is not possible to obtain this purpose in a period of at least one year.

   The comparative law analysis indicates that incarceration for a period of six months – if not more than that – is customary and passes the constitutional hurdle in the relevant countries (see para. 4 of my opinion in the Eitan Case and also there paras. 72 – 78 of Justice Vogelman's opinion). If this is the situation for detention – and given the difference between the impact of the infringement on rights in detention in contrast to the Residency Center and the different purposes of these provisions – a significant distinction is self-evident also with respect to the maximum period of detention. For example, it is not reasonable that the cap for detention will be six months and the cap for the Residency Center will not exceed, for example, 10 months.

   Obviously, it is not possible to quantify the maximum period with a surgeon's scalpel. It seems that it will be difficult, for example, to distinguish between one year and 14 months or even 16 months. From this perspective, it is difficult to justify intervention only because a period of 20 months was determined. Even if we accept the assumption that the period is long, and this is not my position as I have already explained in the Eitan Case, the numerical quantity does not justify a determination that the period deviates from the constitutional confines. Incidentally, this is the reason that courts in Israel and abroad do not generally intervene from a constitutional perspective in the maximum punitive threshold in the criminal context (see: CLIFF ROBERSON, CONSTITUTIONAL LAW AND CRIMINAL JUSTICE, Chapter 8 (2009)). There are no tools for exact measurement. There may be exceptions where a quantitative constitutional scrutiny will be permitted, for example, failing to bring the prisoner before a judge and a comparison between minors and adults. However, when we are dealing with detention in the Residency Center, which permits, as aforementioned, the residents' freedom of movement during the day, I find it difficult to understand the outcome of repealing the maximum period of 20 months.

   Moreover: a residency order does not automatically determine a 20 month period, but instead clarifies that an "infiltrator" will be held in the Residency Center "no more than the 20 month period specified in section 32U" (32D

(a)). Subsequently, it was also set forth in section 32U: "an 'infiltrator' shall not reside in the Residency Center pursuant to the residency order for more than 20 months". Thus it follows that the law fixes the period of 20 months as a *maximum period*. Therefore, one who assumes that this period is excessively disproportionate from a constitutional perspective – is permitted to determine by means of interpretation that the entire period should only be exhausted in extraordinary cases. The intent: by means of interpretation it is possible to actually reduce the period in many cases, without the need of instructing upon the repeal of the section. As is known, in the constitutional scrutiny by this Court the rule is that a means of interpretation is preferred over the means of repeal (High Court of Justice 5239/11 *Avneri v. The Knesset*, para. 56 of *Justice H. Meltzer's* opinion (April 15, 2015)).

6. An additional relevant consideration according to my colleagues, the Chief Justice and Justice Vogelman, is comparative law. According to the review presented by the Chief Justice, the period of 20 months is long in comparison to other legal systems. In my opinion, it would have been correct to look at this from a different perspective.

   First, some of the countries which were presented permit residency in a confined area for a shorter period – days, weeks or several months. If this is the case, then clearly the purpose of the residency centers in these countries – is not to prevent the settling down, but rather, for example, an initial identification (also see para. 105 of the Chief Justice's opinion). In addition, in some of the countries – the residency in the confined area is actually a benefit granted to asylum seekers according to their choice (*ibid*, paras. 102-103). This too is a different type of purpose. Simultaneously, my colleagues believe that preventing the settling down is a proper purpose. I accepted this position in the Eitan Case, and it was also the position of my colleagues, *Justice S. Joubran* (*ibid*, para. 7) and *Justice E. Arbel* (para. 84 in the Adam Case). If this is the situation, there is no significance to a comparison to other countries when the purpose of detention in the Residency Center is different. The selection of a legitimate purpose by the State is within the confines of its authority.

   Secondly, if the maximum period in the legislation is significantly greater than parallel legislation in other countries – this figure alone is not sufficient to point out the unconstitutionality. Comparative law was not designed to require all counties to be consistent in the same field. Uniformity is not required in the balance between the constitutional infringement and a proper purpose. The formula for the balance is not a mathematical equation. Recognizing the constitutional confines constitutes a central portion of judicial review. Obviously if the difference is significant–it would be different, however as aforementioned, this is not the situation here. In

addition, and as shall be clarified, the State of Israel stands before extraordinary difficulties which may in itself justify a significantly longer period.

Thirdly, even if there is a trend in the comparative law which reduces the period of detention in the residency centers – there is a need to distinguish between the legislative trend and judicial review. The situation in Germany, in particular, in light of the European Union policies, in general, sharpens this matter. The starting point is the European Union Directive from 2004, and its updated version from 2013 (Directive of the European Union 2003/9/EC; Directive 2013/33/EU). Section 7 concerns residence and freedom of movement. Section 7(1), whose contents were preserved in 2013, determines: "Applicant may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope or guaranteeing access to all benefits under this Directive." The State is permitted to limit the freedom of movement and not only freedom of residency: "Member States may decide on the residence of the applicant for reasons of public interest" (section 7(2)). In our case it is important that the old and new directives do not mention any time restraints on these provisions. It should also be noted that the UN High Commissioner on Refugees expressed concern which allows for exemption and wide measures of interpretation which this section allows for member states of the Union. Clearly, there is no review of the policies for the limitation of the freedom of movement in itself or the absence of any time restraints (UNHCR, annotated comments on COUNCIL DIRECTIE 2003/9/EC, Article 7).

Now, we will refer to the German law. Indeed, the law today is that the limitation of the place of residency for asylum seekers (Residenzpflicht) is for a maximum period of three months. This law was adopted only in December 2014 and entered into effect in January 2015. Until the amendment, limitations on the place of residency applied to asylum seekers and a duty to report to the authorities before leaving the region was imposed on them (sections 55 – 58 of the Asylum Procedure Act). Regarding the length of the period of the actual limitation on the place of residency, one may receive assistance with the following figures: during the first half of 2014, the examination of asylum requests lasted approximately 11 months on average, however there was a great variation according to the country of origin. Thus, for example, regarding asylum seekers from Afghanistan – the average examination process lasted approximately 22 months (Asylum Information Database – http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/regular-procedure).

Note that the change in the legal situation in Germany came from the legislator and not the court. Up until the last few months the freedom of movement of asylum seekers was not limited to a maximum period of time. Obviously, both in the scope of the constitutional law and in the examination of the comparative law – the facts have significant weight. To clarify the point let us assume that the period of 20 months would have remained intact in Israel, and in the last few years 50 people would enter Israel on average (similar to the figures of the last quarter). It is possible that in this situation even the State would have deemed it appropriate to limit and even repeal the detention in the Residency Center. Just as the constitutional courts are not obligated to reach, at the same point in time, a similar result in a complex issue, this is also the case for different legislators .

Another dimension of the issue is that the limitation on freedom of movement in the German law was under judicial review of the European Court of Human Rights (ECHR), in the case of Omwenyeke v. Germany, App. No. 44294/04 (2007). There, the petitioner submitted an application to receive asylum in Germany. In October 1998 he was required to reside in the city Wolfsburg. In April 2000, the petitioner left the city without any authorization and did so again in May 2001. Due to these offenses a fine was imposed on him. It should be noted that in July 2001 the limitation on movement was repealed after the petitioner married a German resident. As a result, the limitation applied to the petitioner *for the duration of approximately 33 months*.

The petitioner appealed to the European Court and requested to repeal the fine imposed upon him. He claimed that his freedom of movement was infringed (according to section 2 of the fourth protocol of the European Convention). The court dismissed the lawsuit. It should be clarified that the aforementioned section grants freedom of movement to an individual who is "lawfully within the territory of a State"). Clearly, since the petitioner violated the limitations on movement – he did not lawfully reside in Germany: "it is for the domestic law and organs to lay down the conditions which must be fulfilled for a person's presence in the territory to be considered 'lawful'". In accordance with this rationale, the petitioner's departure from the city – negated his right to claim that he was lawfully in Germany, and in any case his ability to claim that his freedom of movement was infringed. The court also dismissed in limine the claim that the limitation on the freedom of movement disproportionately infringed the petitioner's right to privacy, freedom of expression and freedom of assembly and association. Indeed, it is correct that the court dismissed the petition on a narrow basis. However, in a critique it was stated that in light of the decision – the result would have been identical even if a petition against the

limitation on residency would have been filed on a different basis: "The ECHR's reasoning--that obedience to residence restrictions imposed by national law is a necessary precondition to lawful presence under the ECHR -- leaves little reason to believe that the same court would hear the merits of any case challenging the Residenzpflicht's basic rules" (Paul McDonough, *Revisiting Germany's Residenzpflicht in Light of Modern E.U. Asylum Law,* 30 MICH. J. INT'L L. 515, 531 (2009)).

Thus it indicates that in the circumstances of the case, the comparison of the amendment of the law in Israel to the law in Germany, to date – does not necessarily reflect the entire picture as it relates to the constitutional scrutiny by the Court. Even if it will be presented that the law is not desirable, and I am not expressing any position in this matter, there is a gap between the position concerning the desired law and the legal justification to repeal the existing law due to the provisions of the Basic Law: Human Dignity and Liberty.

We will also add that the condition of the State of Israel as opposed to other countries – is an exception. As we noted in the Eitan Case:

> "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" (*ibid*, para. 9).

To these figures we will add the fact that the population of the State of Israel is relatively small in comparison to Germany, for example. An additional 2,000 people in a town or neighborhood where 20,000 people reside – is much more significant than an addition to much larger cities. Thus it appears that there is a range of circumstances which permit, surely to a certain degree, striking a different balance, in the matter concerning the duration of residency in the Residency Center in comparison to other countries.

Therefore, a comparative law analysis – does not lead to the conclusion that there is a need to repeal the maximum period of residency.

Thus far I emphasized the two perspectives, which in my opinion, act against the conclusion of repealing the amendment. One – is the distribution of roles in the circumstances of the case between the Court and the Knesset and the necessary restraint for when the Court will intervene for a third time in the legislator's work. The second relates to the nature of the amendment. It indicates that the period of 20 months is legitimate. We can see this from the analysis of the purpose from the comparative law regarding the factual circumstances and in light of the transition provisions which were determined here in the majority opinion – 12 months. Now, I will refer to the third point which is that in my opinion, as to the merits of the amendment, there is no room to repeal it.

C. Examining the Detention Period of 20 Months on the Merits

7. The title of Chapter 4 of the Law is: "A Residency Center for 'Infiltrators' – A Temporary Order". It contains 22 clauses. It is constructed layer upon layer.

   In the current version many changes were embedded with respect to the previous version of the Law. In my opinion, it is not possible to examine the maximum period of 20 months when disconnected from the remaining clauses and from the changes implemented by the Knesset. These are the main points: a residency order cannot be issued to different groups – mainly, minors, women, anyone over the age of 60, a parent of a dependent minor in Israel, and anyone who may be affected in terms of health as a result of residency in the Center (section 32D (b)). The Law also sets forth grounds of release from the Center, for example, a change of circumstances or medical reasons (section 32D (g) and 32E(c)). A residency order will only be granted after the "infiltrator" was given the opportunity to state his claims before the Head of Border Control (section 32D (d)). The resident in the Center is also entitled to health and social services and allowance (section 32E (a) and 32K). It is possible to employ the resident – with his consent – in maintenance jobs and regular services in the Center (section 32F (a)). The resident is required to report for purposes of the registration of attendance between the hours of 8:00 PM – 10:00 PM and is required to be present in the Center during the hours it is closed – 10:00 PM through 6:00 AM. A temporary exemption from the reporting requirement may be granted for 96 hours (section 32H).

   Truth be told, consequently, the picture is very different from the previous legal situation – which was placed before examination in the Eitan Case. The freedom of movement is substantial. The Law grants the Head of Border

Control discretion concerning issuing a residency order and its duration. As aforementioned, the period of time of 20 months is an upper threshold. A hearing must be conducted as well as examining the information of the individual "infiltrator". Since discretion was granted to the Head of Border Control – he has an administrative duty to exercise it. Limiting the attendance requirement to once a day – means that the "infiltrator" is permitted to be outside of the Facility all day. Suitable bus lines were made available to the residents and there is even a possibility for recreational and cultural activities in the Center. Thus it follows that the totality sets the maximum period in a different constitutional light.

In the background is the purpose of preventing the settling down. This is in order to alleviate the population in the cities. Experience shows us, and it is only natural, that the majority of the "infiltrators" choose to live in specific areas in certain individual cities and not in other places. The purpose of preventing the settling down and the integration into the work force – is compatible with the State's right to determine immigration policies. This is a clear role of the sovereign. A heavy burden should not be imposed upon individual cities all at once as a result of the great concentration of "infiltrators". This is a legitimate public interest to which the government and the Knesset are permitted to pay note. Again, it should be noted that this is a fixed and limited period which at the first stage is applicable to an "infiltrator" coming to Israel. Incidentally, the Chief Justice related positively to an additional purpose noted by the State – providing a response to the needs of the "infiltrators" (para. 78). It is true that when an "infiltrator" *is required* to stay in the Facility – his right of choice is deprived. It is possible that if he would have been asked –he would have waived it. However, the State is permitted, in particularly during the first period, to ensure that the "infiltrator" will receive his basic needs, a sort of the "five basics" – for example, food, medicine, lodging, pocket money, recreational culture and courses for professional enrichment. This is alongside the freedom of movement during the hours of the day.

The Chief Justice agreed that the Law passes all of the constitutional tests, except for the third and final secondary proportionality test – namely proportionality in the strict sense. Therefore, I do not see the need to elaborate on all the tests of the limitations clause. As it relates to the last test, which balances the benefit against the harm, caution is necessary. This test should not become a sort of judicial discretion which is characterized by legal decisions in the civil and criminal areas. As aforementioned, the constitutional scrutiny focused on the gap between the period set forth in the Law and the possibility to determine a shorter period. I myself, did not find any basis for this kind of distinction or gap, certainly not to the point of repealing the section. The infringement on the freedom of movement exists

but it is limited. In practice – the "infiltrator" must lodge in an assigned area, and it is none other than the Law which stipulated its geographical location. The limitation is not during the hours of the day. It is even possible to receive an exemption from the reporting requirement for 4 days. In light of the proper purpose, I doubt that this can be called – an unconstitutional infringement on human dignity and his choice. My opinion is that Chapter 4 in its current format, including the period of 20 months, passes the constitutionality test.

It is possible to present the matter as follows: the question is whether the Residency Center is open or closed. In the format of the previous law, which was under review in the Eitan Case, it was possible to refer to the Residency Center as a closed facility. This was due to the aggregate circumstances, including the thrice a day reporting requirement, its geographic location and the absence of a certain horizon for release. This is the reason that in the Eitan Case, I expressed my opinion that a portion of the reporting requirements should be repealed in order to actually permit freedom of movement. Clearly, in my opinion, in the current law which permits freedom of movement outside the confines during the hours of the day, along with the rest of the new conditions – it appears that the Residency Center easily crosses the borderline and from now can be defined as an open facility. There are many implications to this regarding the constitutionality of the amendment. From an overall perspective, I do not believe that the determination of the 20 month period negatively affects the outcome.

8. The considerations of the relationship between the Court and the Knesset, the maximum period of 20 months as opposed to a period which is not significantly different, and the examination of the merits of the amendment, intertwine with one another. In this context, I will point out three comments.

   First, it is not possible to ignore the fact that the Knesset did indeed "internalize" the need for the amendment as is indicated in the majority opinion in the Eitan Case. With respect to detention, even though it was possible to determine a maximum period greater than 3 months, certainly up to 6 months, the Knesset was satisfied with the shortest period. With respect to the Residency Center, the reporting requirement was limited to once a day. The presence in the Facility is required between 10:00 PM through 6:00 AM. Broad exemptions were set forth for different groups of the population as well as individual grounds for release. The maximum period was reduced to 20 months in comparison to the previous period of at least 36 months. When the Knesset acts earnestly and with discretion – the Court cannot amend unless there is no other alternative. Obviously, the Knesset must respect the instructions of the Court, and the amended law is not immune from review. Clearly, the Court must provide significant weight to the

Knesset's legislation which was made while internalizing the constitutional scrutiny. It is not correct to "recalculate the route" each time and refocus the constitutional flaw. Obviously, the Court's roles is to amend clear, specific and fundamental constitutional infringements. However, not all possible disputes concerning the desired law enter this classification. In this sense, the perspective must be "from above".

The second comment is in the practical sense. The State's supplementary affidavit indicates that as of February 2015 – 1,950 "infiltrators" resided in the "Holot" Residency Center and the maximum timeframe was 14 months (also see para. 55 of the opinion of the Chief Justice). Therefore, from a practical sense – in any case, the residents would be released according to the existing law during a period which is close to the date of the ruling. Is seems that at this time it is best not to generate dramatic changes in this condition. The aggregate experience with the release of the initial residents could assist the Head of Border Control in receiving the complete picture and ensure the release in an optimal and efficient manner. This is an additional reason, which I do not place alone, why I believe that at this current phase – it is not correct to amend the Law in the suggested manner.

The third comment is in connection with the position of Justice Vogelman whereby section 32T should also be repealed. This section which permits the transfer of an "infiltrator" from the Residency Center to detention, with respect to a disciplinary infraction. Review of this section reveals that additional dates were determined, between 15 days and up to 120 days, with respect to different disciplinary infractions. The relevant maximum period is for an "infiltrator" who is absent from the Center for a period greater than 90 days from the reporting date determined for him. There is a distinction between the first and second infraction. It should also be emphasized that an order to transfer to detention is only issued after a hearing, and if the order is granted –the resident must be brought before the Detention Review Tribunal for Infiltrators within 4 days at most. In the Eitan Case, my colleagues reviewed the difficulty of granting "powers to transfer" to the Head of Border Control, mainly due to the duration of the maximum period of time set forth therein – one year, and the absence of procedural guarantees – first and foremost the absence of proactive judicial review. These flaws, as aforementioned, were fundamentally amended. The proceeding to date includes a hearing and proactive review by the Tribunal and the maximum period is 120 days. It appears that there is a clear interest for disciplinary enforcement in the Residency Facility. The detention periods are shorter, ranked and compatible with the nature of the infraction. I did not find any constitutional flaw in this section. I agree with the the reasons in the opinion of my colleague, Justice S. Joubran in this matter and they reinforce my conclusion.

In summation, my opinion is that there is no room to repeal the Law – not from a legal perspective, not from a fundamental perspective, not with respect to the relationship between the Court and the Knesset, and not from a practical perspective.

The Opposing Humanitarian Interest

9. Having arrived at the conclusion that I reached, I am not ignoring the complex and difficult situation of the "infiltrators". The vast majority suffered a bitter fate in the countries of their origin, where – in general – the living conditions in our society and other progressing societies are not evident. The "infiltrators" – are a group. However, the suffering, difficulty and severe conditions – are not only for the public domain but for each and every individual. We must be cautious and preserve the rights of the enfeebled group and *the individual* who belongs to that group.

   However, this is only one side of the coin. In the Petition, a foundation for the suffering and disturbances which are caused to the daily life of another enfeebled group – the residents of the neighborhoods where high concentrations of "infiltrators" grew – for example, south Tel Aviv, were presented. The call to this Court to balance these issues does not derive from rejecting the other, but from the residents whose living conditions which were significantly and adversely impacted. As I noted in the Adam Case, "the main victims, even if they are not the exclusive ones, from the massive and sudden illegal immigration are the weaker socio – economic tiers…the public safety in the broad sense and the sense of public safety – all of these suffered severe harm" (para. 2). Even here, the group is a society of individuals. The majority of them do not enjoy the freedom to change their place of residence by waiving a hand, if at all. The materials indicate that the suffering of this group is frank and difficult.

   Obviously, it is not easy to weigh suffering versus suffering, a group versus a group, an individual versus an individual. There are moral questions in the background. Cleary, the Court's role is to determine disputes. The significance in the factual clarification in any proceeding – indicates that rulings cannot be theoretic or disconnected from life. On the contrary, we rule in the field of reality. What is the weight that must be given, consequently, to a conflict which was created, and to both sides of the coin?

   The issue is dependent upon the type of infringement. I noted in the past that the time has come in the constitutional system, which is based upon the Basic Law: Human Dignity and Liberty which was enacted more than 20 years ago, to rank the rights (see for example para. 4 of my opinion in High

Court of Justice 466/07 *Member of Knesset, Zahava Galon Meretz – Yachad v. The Attorney General of the Government* (January 11, 2012)). This is how the system will evolve and this is how the proportionality test in the strict sense in an objective manner will be fulfilled. The significance in our case is: in a case where we are dealing with a severe infringement on human dignity, for example, placement in detention, there is no room to consider the implications of the release of the "infiltrator" on the residents. For example, in the Adam Case, it was clarified that the period of three years actually constitutes a punitive measure which causes a severe constitutional infringement to the "infiltrator" and it should not be permitted due to the suffering of another group. In the Eitan Case, I believed that the period of one year passes the constitutionality test. However, I accept that if a judge believes that the period of detention is too long – the consideration of the suffering of the residents is not decisive.

In our case, the rules for the decision are different. First, the impact of the infringement as a result of detention in the Residency Center – is certainly less than that which is caused as a result of placement in detention. We are dealing with the limitation on the freedom of movement in another sense. Moreover, even according to the majority opinion, the dispute is about the length of the period. Moreover, this time the constitutional scrutiny is based on the purpose of preventing the settling down in the cities. It is agreed that this purpose is proper. It concerns reducing the burden on the residents. It is also agreed that the reality which was created in the relevant cities – raises significant difficulties (para. 67 of the Chief Justice's opinion). Since this is the main purpose, clearly there is room to provide weight to the infringement amongst the groups of the residents due to the repeal of the different arrangements in connection with the Residency Center. While this consideration is less relevant regarding the detention, it is extremely relevant in connection with the Residency Center. This point requires a balance between the two enfeebled groups.

I will clarify that I did not mean to compare the two injured groups, and decide whose situation is more difficult. At first glance, the answer is clear. However, there is another consideration: the citizens of the State as opposed to the "infiltrators" who have arrived here illegally and not through the border stations, be the circumstances as they may. Let us not forget that due to this difficult situation in different countries in the world, every country is compelled to determine immigration policies. This is a legitimate act. As I noted in the Adam Case, Jewish law and Jewish history – are extremely sensitive to the two extremes amongst which there is tension: on the one hand: the commandment to love the foreigner, care for him and the sensitivity towards the refugee in light of the wandering of our people throughout history. On the other hand – the rule whereby "charity begins at

home". Poverty cannot only be measured in monetary terms (see para. 2 of my opinion there).

However, there are situations where an "infiltrator" cannot be deported. Yet, in our case it is not about deportation, but outlining the conditions for the initial period of residency. The humanitarian interest stands juxtaposed – it must be part of the equation. It acts towards dismissing the Petition along with the reasons specified above.

10. In conclusion, my opinion is that the Petition should be dismissed on all its facets.

Justice

<u>*Justice E. Hayut*</u>

1. The Court is requested for a third time to repeal the provisions of the same law itself and in our case – the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714 – 1954 (hereinafter: the "*Law*"), and this is not commonplace. Nevertheless and despite the complexity entailed in this, it seems to me that the dialogue that took place between the Knesset and this Court in the previous petitions (High Court of Justice 7146/12 *Adam v. The Knesset* (September 16, 2013); High Court of Justice 7385/13 *Eitan – Israeli Immigration Policy Center v. The Israeli Government* (September 22, 2014) (hereinafter: the "*Eitan Case*")), significantly contributed to the reduction of the infringement on human rights according to the same Law. This was possible since as a result of the statements in the rulings rendered in these two petitions, the Knesset was willing, time after time, to invest the effort in the amendment of the Law and to find the appropriate constitutional solutions.

2. The amended provisions in Chapter 1 of the Law for the Prevention of Infiltration and Ensuring the Departure of the Infiltrators from Israel (Amendments to the Legislation and Temporary Orders), 5775 – 2014 (hereinafter: the "*Amendment subject of the Petition*"), now prescribe, *inter alia*, that the period in which it is possible to detain "infiltrators" shall not exceed three months, and in this context I accept the position of my colleague, the Chief Justice, that these provisions pass the constitutionality test and that the third petition in our case should be dismissed, insofar as to the extent that it relates to this. On the other hand and as it relates to the arrangement concerning the maximum duration of detention in the Residency Center, there is a need to continue the dialogue with the Knesset in order for them to reexamine this issue. As was noted by my colleague, the Chief Justice, compulsory detention in the Residency Facility for a maximum period of 20 months is unparalleled in the world (paras. 101 -105 of her ruling), and it is unconstitutional. This is because the infringement caused to the constitutional rights of the detainees in the Center for such

an extended period of time, which is not directly proportionate to the benefit arising from obtaining the purposes for which the amendment of the Law was enacted (regarding the purposes of the amendment I concur with the statements in the opinion of my colleague, *Justice U. Vogelman* in paras. 16- 28 and I did not see the need to add and elaborate).

3. The disproportionate infringement on those detained in the Residency Center is sharpened in light of the very slow pace in which the State is handling requests for asylum that are submitted to the RSD Unit and in light of the miniscule percentage of requests which the State has approved thus far.

   In the Eitan Case, my colleague, *Justice Vogelman*, noted that:

   > "A comparative view indicates that the world-wide recognized percentage of requests for asylum 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 requests for asylum from Eritrean nationals were accepted and no requests were accepted from Sudanese nationals […]" (para. 35).

The supplementary affidavit submitted by Respondents 2 – 5 on February 16, 2005 in this Petition indicates that since the ruling in the Eitan Case there has been no change in the pace of handling the requests for asylum and the affidavit indicates that the rate of the requests which were approved remained negligible. Thus, commencing from July 2009 and through February 5, 2015, a total of 9 requests for asylum submitted by Sudanese and Eritrean nationals were approved and 1,037 requests were dismissed. This figure sets the approval rate of requests for asylum which were approved in Israel during the aforementioned period for Sudanese and Eritrean nationals at approximately 0.9%. If we compare the aforementioned figure to the rate of the requests for asylum approved for these nationals throughout the world, this comparison alone raises many question marks about the manner in which the State reviews and decides these requests, such that the end result attests to its beginning (compare to: High Court of Justice 11163/03 *The Supreme Tracking Committee for Arab Matters in Israel v. The Prime Minister of Israel*, paras. 18 – 20 of *Chief Justice Barak's* ruling (February 27, 2006); Appeal on Administrative Appeal 343/09 *The Open House for Pride and Tolerance v. The Municipality of Jerusalem*, paras. 45 – 47 (September 14, 2010)). The matter is reinforced also in light of the figures which appear in the supplementary affidavit and relate to the pace the State handles requests for asylum. In the supplementary affidavit it stated: "[…] *that the list of priorities in handling requests for asylum for "infiltrators" whose country of origin is Eritrea or Sudan, will be such that priority shall be given to requests of residents in the*

Residency Center". However, when reviewing the figures specified in the affidavit, it appears that in fact the pace of handling these requests are far from satisfactory. Thus, as of the submission date of the affidavit, of the 3,165 requests for asylum which were submitted commencing as of July 2009 and through February 5, 2015 by "infiltrators" who come from Sudan – 2,184 requests (approximately 70%) were still pending and of the 2,408 requests submitted by "infiltrators" who come from Eritrea – 1,355 requests (approximately 55%) were still pending. This is an important figure which is worth mentioning in this context because 1,521 of the 1,940 "infiltrators" held in the Residency Center correct as of February 9, 2015 submitted requests for asylum and the majority of them (862 "infiltrators") did so while they were still held in the Residency Center.

4. In light of the State's conduct regarding Sudanese and Eritrean nationals, it appears that these nationals are trapped in a continuous and impossible situation of a normative fog concerning their status and the harsh implications arising from this concerning their rights (see and compare to my opinion in Appeal on Administrative Appeal 8908/11 *Asefo v. The Minister of Interior* (July 17, 2012)). This is because on the one hand they are not directly deported to their counties due to practical difficulties (North Sudan) or due to the prevailing situation in the same country and the Non – Refoulement principle (Eritrea), however on the other hand the State is not deciding within a reasonable time requests for asylum which were submitted and when it finally does review them it only approve a tiny percentage of them; and this figure as aforementioned raises question marks in light of the approval rates of the requests for asylum of the same nationals in the world.

5. Finally – regarding the dispute between my colleague, the Chief Justice, and my colleague, *Justice Vogelman*, concerning the arrangement with respect to the authorities of the Head of Border Control according to section 32T to instruct upon the transfer of an "infiltrator" to detention, I believe that even though this arrangement is not free of difficulties, there is no place to adopt a far – reaching step of repealing the provision of the Law. For the reasons specified by the Chief Justice as well as with respect to this context I accept the statements by *Justice S. Joubran* that it should not be assumed in advance that the Head of Border Control will select to "exploit" the maximum periods determined in the Law to their fullest (para. 8 of *Justice S. Joubran's* opinion).

Justice

Justice Z. Zilbertal

I concur with the opinion of my colleague, *Chief Justice M. Naor*, and the outcome she reached with respect to all of the issues raised within the scope of this Petition.

Since I have been perturbed with the question of the relationship between the constitutional scrutiny and the administrative examination of the issue which is at the heart of the provisions of Chapter 4 of the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714 – 1954 (hereinafter: the "*Law*") as it was amended in Law for the Prevention of Infiltration and Ensuring the Departure of the Infiltrators from Israel (Amendments to the Legislation and Temporary Orders), 5775 – 2014 (hereinafter: the "*Amending Law*"), I found it correct to parenthetically add several words.

My colleague, the *Chief Justice*, determined that the maximum period of time during the course of which it is possible to detain "infiltrators" in the Residency Center, as was set forth in the Law following the aforementioned amendment (twenty months), is excessive and disproportionate. This is considering, *inter alia*, that the main underlying purpose regarding the possibility to instruct upon the residency of an "infiltrator" in the Residency Center is preventing the settling down of the "infiltrators" in the urban cities. This purpose was deemed proper by the *Chief Justice* and I agree. As my colleague explained, advancement of the aforementioned purpose, considering *inter alia* the restricted number of places in the Residency Center, does not focus on removing a certain "infiltrator" specifically to the Center but instead alleviating the burden imposed upon the residents of urban cities by means of referring some of the "infiltrators" to reside in the Residency Center at a given point (and in our case it does not matter who is the same "infiltrator" who is instructed by the Head of Border Control to reside in the Residency Center). In this state of affairs, and in order to promote the aforementioned purpose of relocating the place of residency (in contrast, for example, to the purpose to prevent the possibility of employment in Israel, with respect to which my colleague abstained from determining whether it is a proper purpose, and in my opinion, I doubt that it is indeed proper), the maximum period of residency of twenty months in the Center is indeed disproportionate.

Nevertheless, it is worth considering an additional figure which was presented by my colleague, the *Chief Justice,* as well as by my colleagues, *Justices U. Vogelman and I. Amit*, to reach the aforementioned conclusion in the matter of the disproportionality in the maximum period of residency determined in the Law. The intent is to the *location* of the "Holot" Residency Center.

The Law does not determine where the Residency Center will be situated. Section 32B of the Law instructs that the Minister of Public Security is permitted to declare, by means of an order, a certain place for the Residency Center for the "infiltrators". The selected location, even before the discussed amendment of the Law in this ruling, is the "Holot" Facility which is located seventy kilometers south – west to Beer Sheva, close to the Israeli – Egyptian border. Consequently, this is a facility which is extremely and significantly distant and remote from any settlement where the "infiltrators" can find employment and conduct a proper and reasonable daily routine. As indicated by *Justice U. Vogelman* in the Eitan Case (High Court of Justice 7385/13 *Eitan – Israeli Immigration Policy Center v. The Israeli Government* (September 22, 2014)), para. 126 of his ruling:

"'Holot', as indicated by its name – is surrounded by mounds of sand. It is remote from any settlement".

However, determining the location of the Residency Center is not part of the primary legislation which is undergoing constitutional scrutiny but is being done my means of an administrative decision made by a competent authority. It can be assumed, as it appears from the opinions of my colleagues, the *Chief Justice, Justice Vogelman and Justice Amit*, that if a different location would have been selected, one which is not at the "periphery of the desert" but the "periphery of the cities", and which would permit exit from the Center in the morning and return in the evening hours, so that during the day the resident could find a job and manage a lifestyle which has basic liberty, in a manner where it would truly be an "open" Center, then it *may be possible* that the conclusion regarding the disproportionality of the duration of the maximum period of residency would be different.

It seems that the conclusion concerning the disproportionality in determining the maximum period of residency is intertwined in a manner in which the Law is implemented by virtue of an administrative decision. *Justice Vogelman* reviewed this parenthetically in his opinion, when he determined that this constitutional Petition does not constitute the proper setting for clarifying the questions which are mainly in the administrative plane. However, *Justice Vogelman* saw the need to add that "another application of the Law could also influence the proportionality examination. *Justice Amit* added that: "… the proportionality of the Law is not examined in a vacuum but in light of a certain reality."

Thus, it follows that the Law before us, in the perspective of the duration of the residency period, supposedly is not necessarily unconstitutional due to its provisions, but, perhaps only by means of *applying* its provisions. Thus, for example, the situation in our case is different from the issue placed before the steps of this Court in the petition which concerned the privatization of the prisons (High Court of Justice 2605/05 *The Academic Center for Law and Business v. The Minister of Finance*, (November 19, 2009)). In the Privatization of Prisons Case, *Justice A.A. Levy*¸ a minority opinion justice, reviewed that according to the majority opinion: "the infringement on rights which bears such a harsh privatization, to the point that nothing could subdue it. By means of an example, even if a seven day feast will secure a private prison, no remedy could be found for the degradation and deprivation of liberty for the lot of those incarcerated there, since they are subject to the mercy of the private concessionaire" (para. 9 of Justice Levy's ruling). This is not the state of affairs in this case, since we determined that the mere possibility to instruct upon the residency of an "infiltrator" in the Residency Center is disproportionate in itself.

That which has been articulated to this point leads, allegedly, to the possible conclusion, that it is not necessary to repeal the provision concerning the duration of the maximum residency in the Residency Center, and instead one should focus the perspective on examining the reasonability and constitutionality of the administrative decision concerning the location of the Center.

However due to the generality of the circumstance, I believe that at this time there is no other alternative to the conclusion which my colleague, *the Chief Justice*, reached.

First, the Amending Law was enacted in the background of the existence of the "Holot" Residency Center, when this reality, and no other alternative, stands before the eyes of the legislator. Indeed, the concrete application of the Law, as was actually done, an application which constitutes a part of the reality in which the Law was "born", can be integrated in the appropriate case, in the proportionality test, as though it was part of the Law itself. As aforementioned, this is the case when the "initial arrangement" is not unconstitutional on its face, and the intrinsic disproportionality in the secondary arrangement arises from one of the aspects of the "initial arrangement".

Secondly, in this Court's ruling the relationship between the constitutional scrutiny of the Law and the manner of its concrete application by the executive branch was already recognized, for example, for the purpose of the question of when the constitutional petition will be "mature" for deliberations (see: High Court of Justice 2311/11 *Sabach v. The Knesset* (September 17, 2014)). Just as at times the *absence* of the factual figures regarding the concrete application of the Law will not permit examination under constitutional scrutiny, so too the *existence* of these figures could influence the results of its constitutional scrutiny, because if not there would be no sense in waiting for their accrual as a condition for the "maturity" of the petition. *Justice E, Hayut* reviewed this in the aforementioned case, and stated that: "…there may be cases where the Law seems to be constitutional on face value and only the manner of its application reveals the unconstitutionality therein".

In my view, the concrete application of the provisions of Chapter 4 of the Law concerning the maximum period of residency in the Center, *when it was determined that the Residency Center would be in "Holot",* emphasizes its unconstitutionality, which may be much more "mitigated", or may not even exist, had it been about applied differently, more humane and providing a proper balance to the basic rights of the population of "infiltrators" enjoying the non – deportation policies (at least temporarily). Although the State is permitted to arrange the areas of residency for the "infiltrators" with the intent of alleviating the stress of the residents of the cities, it is not however, permitted to do so while trampling on their dignity. "But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt" (Leviticus 19, 34).

Justice

<u>Justice I. Danziger</u>

We are have been required to review, for a third time, a Petition which seeks to repeal the provisions of the Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714 – 1954.

Since we have been countlessly required to review, within the scope of the two previous petitions, including issues that are before us now, I believe that it is proper to be satisfied with concurring with either one of the two main opinions written by my colleagues – *Chief Justice M. Naor and Justice U. Vogelman.*

I concur with the opinion of the Chief Justice and the outcome she reached with respect to all the issues raised within the scope of the Petition before us.

Justice

<u>*Justice H. Meltzer*</u>

1. The comprehensive and learned opinion of my colleague, the *Chief Justice M. Naor*, is primarily acceptable to me and I concur, without any reservations, to the part dealing with section 30A of the *Law for the Prevention of Infiltration (Offenses and Jurisdiction), 5714 – 1954* (hereinafter: the "*Law*" or the "*Law for the Prevention of Infiltration*") , which became part of the *Law* through the *Law for the Prevention of Infiltration and Ensuring the Departure of the Infiltrators from Israel (Amendments to the Legislation and Temporary Orders), 5775 – 2014* (hereinafter: the "*Amending Law 2014*").

   Consequently, I concur with the conclusions and the reasons of the Chief Justice that the provisions of the aforementioned section, including the maximum period of three months, within the scope of which it is possible to detain an "infiltrator" in detention, according to its definition in the Law (which entered into effect after the publication of the Amending Law 2014) – passes the constitutionality test. This is the place to note that according to my opinion – the executive branch and the legislative branch internalized the comments of this Court in the aforementioned issue in a proper and respectable fashion and took heed of the ruling in High Court of Justice 7385/13 *Eitan – Israeli Immigration Policy Center v. The Israeli Government* (September 22, 2014) (hereinafter: the "*Eitan Case*").

2. The reference to Chapter 4 of the Law, which was also enacted within the framework of the Amending Law 2014, is more complex and naturally the solution it proposes will be the same. This solution relies upon certain elements from the reasons raised here by my colleagues in their different opinions. It was formulated with respect to the basic rights of the Israeli citizens and residents of the neighborhoods where the "infiltrators" settled down on the one hand and with the necessary respect to the rights of the "infiltrators" as human beings on the other hand, while considering the interests of the State as such and the desirable dialogue which should take place between the Knesset and the Court.

Consequently, I will now explain things one by one.

3. This is the third time this Court is required to interpret the constitutionality of the statutory amendments which were introduced in the *Law for the Prevention of Infiltration* for the purposes of coping with the problem of "infiltration" from Africa as was described in the opinion of the Chief Justice. In the two previous cases (High Court of Justice 7146/12 *Adam v. The Knesset* (September 16, 2013) (hereinafter: the "*Adam Case*") and the Eitan Case) – the Court repealed certain provisions of the Law, and following the Eitan Case, the **Knesset** enacted the Amending Law 2014, where the Petitioners raised,

within the framework of the Petition before us, constitutional reservations – with respect to the new arrangements introduced there.

There is no dispute that the provisions of the Amending Law 2014 which were enacted as a *temporary order* for three years, are *improved* compared to the previous amendments to the Law. Nevertheless, the law determines that even when the changes in legislation include *improved* provisions – it is worthy to conduct a reexamination of the balances in the law when the matter is once again brought before the court for judicial review (see and compare to: High Court of Justice 6055/95 *Zemach v. The Minister of Defense,* padi 53(5) 241 (1999)); my opinion in High Court of Justice 8784/06 *Major Schlitner v. The Director of Pension Payments in the IDF* (January 12, 2011)). The aforesaid law also applies with respect to a *temporary order* (see: High Court of Justice 466/07 *Member of Knesset, Zahava Galon Meretz – Yachad v. The Attorney General of the Government* (January 11, 2012) (hereinafter: the "*Family Unification 2 Case*")). In the Family Unification 2 Case, the High Court of Justice examined *for a second time* the question of the constitutionality of the provisions of the *Law of Citizenship and Entry into Israel (Temporary Order), 5763 – 2003*, in light of the changes introduced there. In the majority opinion, the constitutionality of the aforementioned temporary order was approved.

4. Even in the rest of the world there have been many cases where the constitutionality of a law has been examined *twice* with the argument that the legislator did not respect, as required, the basic constitutional rights, as was interpreted by the Court, or it disregarded the other relevant constitutional provisions (see for example: **In the United States**: Shaw v. Reno, 509 U.S. 630 (1993); Shaw v. Hunt 517 U.S. 899 (1996); **In Germany**: the ruling of the constitutional court from July 2008, 2008 2 BvC 1/07; the ruling from the constitutional court from July 2012, 2012 2 be 9/11; **In France**: HADOPI 1, the ruling from the constitutional court from June 10, 2009; HADOPI 2, the ruling from the constitutional court from September 22, 2009. For details of the proceedings and the issues reviewed there – see my opinion in Civil Appeals 9183/09 *The Football Association Premier League Limited v. Doe*, para. 6 (May 13, 2012)).

5. The comparative law which I referred to indicates that for a *second time* that the legislator (and thereafter the court) are required to interpret a law whose constitutionality must be clarified in the future –the two relevant branches exercise maximum consideration and caution due to the need for *mutual respect*. Thus, all the more so when it is about judicial review *for the third time* concerning the acts of the legislator, which is extremely rare yetpossible and just in circumstances where parliament – when enacting a law – materially deviated from the constitutional foundation, as they were interpreted by the Court. (see, for example:

   In Germany: the litigation in the constitutional court there with respect to the *Inheritance and Gift Tax Law:*
   (a) A ruling from June 22, 1995, BVerfG, 1995 2BvR 552/91;

(b) A ruling from November 7, 2006, BVerfG, 2006 1 BvL 10/02;
(c) A ruling from December 17, 2014, BVerfG, 2014, 1 BvL 21/12.

In Italy: the litigation in the constitutional court with respect to the *Law for the Immunity of Parliament Members and Ministers* (in light of the allocations of the Former Italian Prime Minister *Silvio Berlusconi* and his arraignment):
(a) A ruling from January 2004 (Law No. 140/2003);
(b) A ruling from October 2009 (Law No. 124/2008);
(c) A ruling from January 13, 2011 (Law No. 51/2010)).

6. Beyond the description of the comparative law which is customary in the aforementioned issues, which was presented in paras. 4 – 5 above, in this context, an additional question is asked concerning whether the reviewing court must instruct the legislator upon repeal of a law – how to enact in the future a law which is supposedly immune from judicial – constitutional review, or whether it is enough to suffice with the constitutional analysis of the law which will be presented before it after the legislator has said its peace.

   Theoretically, there is a lot of talk concerning the issues of the developing dialogue in these kinds of situations between the judicial branch and the legislative branch (for the theoretical literature on the topic – see the essay by Liav Orgad and Shay Lavi "Judicial Guideline: Comments to the Legislative Amendments in the Rulings of the Supreme Court" *Iyunei Mishpat*, 34, 437, 330 (2011) (hereinafter: "*Orgad and Lavi, Judicial Guideline"*). Also see: *Ittai Bar Siman-Tov, The Puzzling Resistance To Judicial Review Of The Legislative Process*, 91 B.U. L. Rev. 1915, 1954 – 1958 (2011); Aaron Barak, *A Judge in the Democratic Society*, 382 – 389 (2004); Gideon Sapir, *The Constitutional Revolution – Past, Present, Future*, 219- 222 (2010)).

   The answers to the problem can be classified into three categories, although at times the borders between them are blurred (the analysis, the references and the wording below rely on the essay of Orgad and Lavi, Judicial Guideline):

   (a) One pattern is "judicial advice". Judicial advice is a way that permits the judge to recommend to the legislator the necessary amendments to the law. It does not express a *demand*, but rather a judicial *preference*, while leaving discretion to the legislator (compare to: *Nitya Duclos & Kent Roach, Constitutional Remedies as "Constitutional Hints": A Comment on R.V. Schachter,* 36 McGill L.J. 1 (1991)).

   (b) A second pattern is the "constitutional roadmap". A constitutional roadmap is a technique which allows the judge to suggest explicitly, or implicitly, to the legislator how to overcome the flaws in the existing law. In the constitutional context it constitutes a kind of a suggested path to amend the constitutional flaw which was declared by the court (see: *Erika Luna, Constitutional Road Maps,* 90 J. CRIM. L. & CRIMINOLOGY 1125 (2000)).

(c) A third pattern is the "judicial warning" (fire alarm). A fire alarm is a technique which permits the judge to warn the legislator of the flaws in the existing law. In the constitutional context this occurs in cases in which the court exigently approves the constitutionality of a law, and clarifies that even though the law is "still constitutional" it may become unconstitutional in the future (see: *Neal Kumar Katyal, Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1719 (1998)).

7. In Israel, in the High Court of Justice 1715/97 *The Office of Managing Investors in Israel v. The Minister of Financ*e, padi 51 (4) 367, 412 – 413 (1997) (hereinafter: the *Investment Managers Case*), Chief Justice A. Barak adopted the "constitutional roadmap" approach and indicated alternatives to the Knesset which it can adopt in order to formulate an arrangement which would withstand judicial review instead of the provision of the Law which the Court repealed in the same case and even emphasized that "selecting a proper point of balance is left to the legislator" (*ibid*).

   In a subsequent ruling it was indicated that the inclination was towards the aforementioned approach (a) (for example, some of the justices in the Eitan Case) or towards the aforementioned approach (c) (for example, the ruling in the acceptance committees; High Court of Justice 2311/11 *Sabach v. The Knesset* (September 17, 2014), or the ruling to raise the threshold requirement; High Court of Justice 3166/14 *Gutman v. The Attorney General for the Government – State of Israel* (March 12, 2015)). Nevertheless, we still do not have a decisive ruling in this matter and I do not suggest determining one here, however, I do deem it appropriate to emphasize that it would be worthy, in my opinion, that the legislators be provided not only with what is unconstitutional, but also with general guidelines of what is expected to meet the constitutional requirements, as was done by *Chief Justice Barak* in the Investment Managers Case. Moreover, the aforementioned dialogue must be conducted, in my opinion, by both sides, with candor, diligence and with mutual respect.

   This is the place to add that in the interim, unfortunately, the inclination to a *fourth approach* evolved in Europe which maintains that the court cannot declare a law to be unconstitutional – to suggest to the (state) legislator how it must amend the law (see: the majority opinion in the case, Hirst v. the United Kingdom (No. 2) 42 EHRR 41 (2006), which was rendered in the **European Court on Human Rights** and was influenced by, *inter alia*, the need to provide relative freedom to the countries which the Union is comprised of; also compare this with the leading essay, which supports the material dialogue, written by: *Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, Charter Dialogue Revisited – Or "Much Ado About Metaphors*", 45 OSGOODE HALL L.J. 1 (2007)).

8. Now, after I presented the comparative law which is customary in this matter and the current studies which indicated the possible outlines to handle it – I will soon return to the generality before us and perhaps before I even continue to the foregoing individual discussion, I will make two more preliminary comments:

(a) The reference to Chapter 4 of the Law is the examination of an arrangement which is under judicial review for *a second time* (and not a third time) because the institution of the Residency Center for "infiltrators" – did not exist in the Law which was examined in the Adam Case.

(b) Accordingly, it appears that the transition from the "judicial approach" to the approach telling the legislator how it must precisely amend the law (residency in the Residency Facility will be limited at most to one year) – is too extreme and almost entirely deprives the "legislator's latitude". Due to this I concur in part with the criticism by my colleague, *Justice N. Hendel*, which was presented in his opinion, however, simultaneously according to his basic outlook – it needs to cause the dismissal of the Petition entirely, whereas I believe that there is room for an *interim solution.* This solution will also preserve the proper "scope of the legislation" and the boundaries of judicial review and will even cause a greater degree of proportionality when dealing with the "infiltrators" and their rights, while ensuring the interests of the State and the residents of the neighborhoods in the proximity of which the "infiltrators" settled down. I will specify below.

9. My colleague, the Chief Justice, reached the conclusion that in the existing circumstances preventing the settling down in the urban cities – is a proper purpose. I too maintain this opinion, since it can reduce the impeding difficulties on the residents of the neighborhoods in the proximity of which the "infiltrators" chose to live.
Consequently, what is the first proportionate measure (the easiest from the perspective of the infringement on the rights of the "infiltrators") in order to obtain this purpose of preventing the settling down in the urban cities?

In Europe (and in Israel in 2009) the solution adopted was "dispersing the population" by means of "assigning" areas of residency for the "infiltrators" (which in Israel today consists of approximately 45,000 men and women, children and infants and considering the dimension of the country it can be seen as a mass influx). Indeed, at the time the Minister of Interior made a decision whereby asylum seekers will not be permitted to reside and work in the geographical region between Hadera and Gadera. Immediately, different human rights organizations petitioned (some are also Petitioners in this Petition before us) against this decision (which may be seen as being anchored in an explicit law, as was done, for example in Germany) – see High Court of Justice 5616/09 *African Refugee Development Center v. The Minister of Interior* (August 26, 2009). Following the petition in that case the respondents informed that the Minister decided to recant the aforementioned decision and therefore the petitioners there no longer insisted on their petition, while all the parties reserved their rights and claims, in the event that the limitation would be restored.

When looking at the perspective of time – it may be a shame that the notion of "dispersing the population of 'infiltrators'" (not necessarily by limiting residence and

employment beyond Hadera and Gadera, but rather a proportional distribution throughout all areas of the country) was not tested and did not pass the judicial review, since there is no doubt that this solution was preferable from the point of view of the Petitioners to the remote Residency Center, which is located in a place where only the sand and desert surround it. Thus, similarly, even the human rights organizations need to yield lessons from their hastiness to petition at the time, since "if you try to grasp everything, you end up with nothing ".

10. On another note, in Germany, judicial review was conducted on the constitutionality of the law – the Asylum Procedure Act (AsylVfG), which permits to "pin" anyone who "infiltrated" into Germany, who are asylum seekers – to specific geographic areas, and the aforementioned law passed the constitutional test. Nonetheless, the aforementioned law set forth, *inter alia*, that an individual who breaches another two provisions amongst the provisions of the law –shall be arrested, face a criminal trial and his request for asylum shall be terminated. Even these provisions were approved by the constitutional court in Germany (see: the German ruling from April 10, 1997 BVerfG 2 BvL 45/92). The petition to the **European Court on Human Rights** was also dismissed (see: Omwenyeke v. Germany, App. No. 44294/04 (2007)). For details in the context of the aforementioned ruling of the **European Court on Human Rights** – see the opinion of my colleague, *Justice N. Hendel*.

    This is the place to note that recently in Germany, even the provisions permitting "geographical assignment" of the "infiltrators" were reduced and their application was limited in time.

11. Reverting to our case, now when the purpose of preventing the settling down in the urban cities has been approved by us as proper and the number of "infiltrators" in Israel is still quite substantial – it seems to me that the legislator must reconsider the possibility to apply the decision concerning dispersing the population of "infiltrators", since this solution is more moderate than transferring "infiltrators" to the Residency Facility, and it is sufficient to obtain the same purpose and possibly even more efficiently (if, indeed, this is the genuine purpose, and not forcing the "infiltrators'" departure from Israel). Moreover – for anyone who does not meet the limitation of the geographical assignment – it would be possible to exercise in his regard "an additional geographical tier" (according to the "ladder model" of proportionality), which is placing him in the Residency Facility (in Germany and the European Union they even recognized the constitutionality of referring to the criminal path in these types of situations). In such a case, allegedly, even the maximum 20 month period of residency – would not constitute a significant obstacle.

    This type of outline, which was suggested by the Chief Justice already in the Eitan Case (following the Adam Case where she noted that finding humane solutions for "infiltrators" already living amongst us – could be the State's finest hour), is consequently the reverse of the current *legal requirement* within the framework of the *proportionality*

requirement – for the sake of realizing the purpose which we recognized. It is even anchored to some degree in the provisions of section 32T (d) of the Law.

It can also be argued that not adopting this manner could cause the Law to be considered as not befitting of the values of the State of Israel as a Jewish and democratic state, particularly when considering the European standard and what was practiced in Germany.

Thus it follows that it is not too late to try to apply the foregoing model here.

12. Reinforcement to my approach, as aforementioned, which obtains the permissible purpose without any undesirable side effects, should be inferred, by the process of elimination, from the treatment of the Israeli authorities (in fact, *lack of treatment*) of the "infiltrators'" requests to recognize them as refugees, to the extent that they submitted them before they were issued a residency order to report to the Residency Facility. Petitioners 1 and 2 are real life and unfortunate examples of this, not to mention the fact that the brother of Petitioner 1, who also escaped from Eritrea and whose circumstances are supposedly similar to Petitioner 1 – has already been recognized as a refugee in Switzerland.

    My colleague, *Justice E. Hayut*, in her opinion presents informative information in this context, which are indicated in the supplementary affidavit which was submitted by the State on February 16, 2015, and reveals incredible incompetence, if not deliberate negligence when relating to the aforementioned requests for recognition (even those provided to the State's authorized representatives *before* the applicants were ordered to the Residency Center).

    Moreover, from the requests which were nevertheless reviewed, only a tiny percentage were approved (approximately 0.9% amongst the Sudanese and Eritrean nationals), and this is insignificant compared to the approval rate of the requests for asylum of the same nationals in other countries in the western world.

    What is the significance of the matter to our case? I will review this below.

13. My colleague, *Justice E. Hayut*, in her opinion refers to High Court of Justice 11163/03 *The Supreme Tracking Committee for Arab Matters in Israel v. The Prime Minister of Israel* (February 27, 2006) and Appeal on Administrative Appeal 343/09 *The Open House for Pride and Tolerance v. The Municipality of Jerusalem*, (September 14, 2010) (hereinafter: the "*Open House Case*")). The petitions there were mainly based on the principles of the administrative law, and the "feet shuffling" by the authorities there who ultimately approved the applications.

    Moreover, such non –treatment also has *constitutional significance* (see the comments of my colleague, *Justice E. Hayut*, in the Open House Case concerning this issue), and I will begin with them below:

First, it appears that the lack of treatment particularly infringes upon the minority population or the enfeebled populations.

Secondly, non – treatment may attest, in our context, to the fact that the declared proper purpose (preventing the settling down in urban cities), *which we accepted,* as aforementioned – is not the primary purpose and that alongside it there are additional concealed purposes, that are not less important , in the scope of which the State is acting, at face value, in contradiction to the obligations of its authorities by virtue of the *Basic Law: Human Dignity and Liberty* (section 11 therein), and in contradiction, allegedly, to the international obligations, which the State assumed when it joined the *Convention relating to the Status of Refugees (1951)*, of which the State of Israel and various Jewish organizations were its initiators and drafters (see: Tally Krizman- Amir, introduction to the book *Levinski, Corner of Asmara: Social and Political Aspects of the Asylum Policy in Israel*, 12 – 14 (2015)).

The obligations which are allegedly violated here include the requirement to handle *with due speed* requests for asylum and not to take actions which seem to thwart the possibility of accepting them. See and compare to: Article 32 Directive 2013/32/EU, issued by the **European Council**. Also see: James C. Hathaway, The Rights of Refugees Under International Law, pp. 180 – 181 (2014).

This is the place to note that section 32D(1) of the Law, sets forth as follows:

> "Notwithstanding the provisions of section 2(a)(5) of the Law of Entry into Israel, an "infiltrator" with respect to whom a residency order applied shall not receive a visa and permit for residency in Israel according to the Law of Entry into Israel".

The provision of the aforementioned section allegedly indicates that with respect to an individual against whom a residency order was issued –the possibility of accepting his request to recognize him as a refugee , insofar as it was submitted *before* the residency order given to him – is thwarted.

Thus, the State is retracting from its aforementioned obligations and in these circumstances – the State may be considered as *precluded*, by virtue of the good faith principle, to raise claims upon which to base the residency provisions or even justify the relevant legislation. This rule is anchored in the Israeli legislation in the provisions of section 43(a) of the *Contracts Law (General Part), 5733 – 1973* and is also located in section 61(b) of the aforementioned law, concerning: "legal acts which are not is the sense of a contract and the undertakings which do not arise from the contract" (review and compare to: Appeal on Administrative Appeal, 1659/09 *The Ministry of Construction and Housing v. Malka*, para. 18 (November 17, 2013 and the attestations presented there).

This indicates that the solution of geographical assignment for the "infiltrators" (here it is worth considering, as aforementioned, the relative distribution between *all* the different regions of the country) – provides a balanced response to the problem, and therefore, in my opinion, there is room to discuss it. The reasoning concerning the *purpose of the Amending Law 2014* with respect to the Residency Facility are also appropriate here and in this context I concur with the thorough statements of my colleague, *Justice U. Vogelman*, as well as his comments regarding the enforcement, which appears selective, regarding those against whom residency orders are issued – while there are no known and controlled criteria for it.

14. The aforesaid information indicates *that without* conducting a renewed discussion about the assignment alternative, which is less infringing and therefore is requested to be anchored in the Law before exercising the alternative of reassignment to the Residency Facility – indeed the length of the period of residency in the Center cannot reach up to 20 months. Moreover – without such an alternative there is a possibility that in the future, considering the manner of its application, it will be argued that the Law is insincere (compare to: High Court of Justice 121/69 *Electra (Israel) Ltd. v. The Minister of Trade and Industry*, padi 22(2) 551 1961, about secondary legislation). Thus, only if the assignment alternative will be approved –will it be possible to accept the existing limitation in the residency arrangement (which would be 20 months), on the additional assumption that there will be a restraint on the exercise of the aforementioned authority and it usually will not be entirely expended (compare to: High Court of Justice 2442/11 *Adv. Chaim Shtenger v. The Chairman of the Knesset* (June 26, 2013) (hereinafter: the "*Shtenger Case*")).

    The solution which I am presenting entails, therefore, reverting the Law to the Knesset in order to adopt one of the aforementioned outlines, or a combination and ranking between them, or another proportionate solution, which it will find appropriate in relation to our comments. In this manner it will also properly preserve the "legislative latitude" (also referred to as: the "*scope of proportionality*) – review: the Shtenger Case and the majority opinion in the *Embargo Case* (High Court of Justice 5239/11 *Uri Avneri v. The Knesset* (April 15, 2015)).

15. Prior to concluding, I will note that I concur with the Chief Justice's approach and her other supporters regarding the validity of section 32T of the Law, which should also be exercised, in my opinion, with restraint and proportionality (again, compare to: Shtenger Case).

    Beyond the Chief Justice's reasons – even the distinction suggested by my colleague, *Justice S. Joubran*, in this context, who thought it proper to distinguish between soldiers, warders and police officers and "infiltrators" regarding punishment (and who can instruct upon it) – is agreeable to me, and an anchor can also be found in the provisions of section 9 of the Basic Law: Human Dignity and Liberty. For the interpretation of this section,

review, Hanan Meltzer, "IDF as an Army of a Jewish and Democratic State", *Rubinstein Book*, 347 370 – 389 (2012).

16. Now that I have reached this point – what are the necessary transition provisions, in my opinion, in light of the outcome of the judgment? I accept the provision to suspend the declaration of the repeal, which was proposed by the Chief Justice in para. 115 of her opinion. Notwithstanding this, it seems to me that there is no place to exclude, from the aforementioned suspension provision, all of the residents in the Residency Center, according to the breakdown proposed by the Chief Justice, but rather only those who submitted requests to be recognized as refugees *before* a residency order was issued against them and did not receive an answer (Petitioners 1 and 2 are included in the aforementioned group).

    There are reason for this that are both theoretical and practical (the latter specified by my colleague, *Justice N. Hendel* in his opinion). This is the desired outcome, *inter alia*, also due to the mutual respect requirement mentioned above – in order to allow the Knesset (who will be required to review the totality a third time) and the government and public to properly prepare for the new situation (review: Yigal Merzel, "Suspending the Declaration of the Repeal" *Law and Government I*, 39 (2006)). This is also what is accepted in Canada in similar issues (review and compare to: KENT ROACH, CONSTITUTIONAL REMEDIES IN CANADA, (2014), pp. 14-82 through 14-92.2). Thus it follows that is preferable in these matters to provide some time to formulate a more comprehensive solution for the interim term (alongside the immediate, necessary and obligatory execution) over obtaining a limited and immediate outcome.

17. In summation, I will say that the interim solution which I suggested considering – balances, in my opinion, in a reasonable manner the needs of all in the harsh circumstances before us – in the sense of being the lesser of two evils, since here there is no possibility of reaching a solution that is beneficial to all.

    Moreover, as one whose forefathers themselves, in the distant past, were themselves foreign workers in a foreign land, and in the immediate past, continued to knock on the gates of different countries when fleeing from the Nazi oppressors, and they were rejected – we are required to use the relevant legal rules with compassion and sensitivity towards all those involved. This is necessary because we are a Jewish and democratic state.

Justice

Therefore, the outcome is as follows:

1. It has been decided in the majority opinion, as aforementioned in the ruling by *Chief Justice M. Naor*, *Justices S. Joubran, E. Hayut, I. Danziger and Z. Zilbertal,* that subject to the proposed interpretation, the provisions of the Law pass the

proportionality test, except for the provisions of sections 32D (a) and 32U of the Law – which determine the maximum period for detention in the Residency Center – which ought to be repealed. According to the majority opinion, the declaration of the repeal will be suspended concerning these sections for the duration of six months. During this period, the maximum period for detention in the Residency Center specified in these sections will be twelve months. Residents residing in the Residency Center on the day this ruling is rendered for a period of twelve months or more shall be released immediately and no later than 15 days from the date of our ruling; all as stated in para. 115 of the opinion of the *Chief Justice M. Naor*).

(A) *Justices U. Vogleman and I. Amit* concur with the majority opinion, however, they ruled that section 32T should also be repealed.

(B) *Justice H. Meltzer* concurred with the majority opinion, subject to considering a preliminary alternative of geographical assignment and except in the matter of the transition provisions, as articulated in paras. 11, 14 and 16 (respectively) of his opinion.

(C) *Justice N. Hendel* believed in the minority opinion that the Petition should be dismissed on all its facets.

2. The Respondents will bear the expenses of the Petitioners in a total amount of NIS 30,000.

Given today, 26 Av 5775 (August 11, 2015).

Chief Justice	Justice	Justice
Justice	Justice	Justice
Justice	Justice	Justice