Unofficial translation

[Emblem of the State of Israel]

In the Supreme Court Sitting as High Court of Justice

HCJ 2293/17

Before: Honorable President E. Chayut
Honorable Vice President H. Meltzer
Honorable Judge N. Hendel
Honorable Judge U. Vogelman
Honorable Judge Y. Amit
Honorable Judge N. Solberg
Honorable Judge G. Kara

The Petitioners:

1. Esther Segai Gersagher
2. Zaga Kibrum Mahrtav
3. Salomon Kasa
4. Samson Maspan
5. Ibrahim Yossef Mohammad Ahmad
6. Yohanes Fresney
7. Yakob Jamal
8. Kav Laoved
9. ASSAF - Aid Organization for Refugees and Asylum Seekers in Israel
10. The Hotline for Refugees and Migrants
11. Association for Civil Rights in Israel
12. ARDC – African Refugee Development Center
13. Physicians for Human Rights–Israel
14. Israeli Restaurants Association

-Versus-

The Respondents:

1. Knesset
2. Minister of Interior
3. Minister of Finance
4. Minister of Labor, Social Affairs and Social Services
5. Bank Mizrahi-Tefahot Bank
6. Eitan – Israeli Immigration Policy

	7-42. Sinoni Ayala and 35 others
Parties requesting to join as amici curiae:	1. Israel Women's Network 2. IATCH-MAACHI Women Lawyers for Social Justice 3. Achoti (Sister) - for Women in Israel 4. The Center for Eritrean Women in Israel 5. UNITAF 6. Women's Spirit: Financial Independence - for Women Victims of Violence 7. ADVA Center 8. Economic Empowerment for Women 9. Her Academy: School for women returning to the employment market 10. Arous Elbahar Association for Women in Jaffa 11. No'am - Association for Arab Women Center
	Objection to making the order nisi a decree absolute
Dates of sessions:	3 Av 5777 (26.7.2017) 17 Kislev 5778 (5.12.2017) 12 Av 5778 (24.7.2018) 2 Iyar 5779 (7.5.2019)
On behalf of Petitioners 1-13:	Adv. Elad Cahana; Adv. Michal Tajar
On behalf of Petitioner 14:	Adv. Rani Schwartz; Adv. Osher Harush; Adv. Hilit Simchoni
On behalf of Respondent 1:	Adv. Avital Sompolinsky
On behalf of Respondents 2-4:	Adv. Shosh Shmueli; Adv. Ran Rosenberg
Respondent 5:	Adv. Droit Hamberg; Adv. Ran Feldman
On behalf of Respondents 6-42:	Adv. Doron Taubman; Adv. Yana Luria
On behalf of the parties seeking to join:	Adv. Sara Lewis; Adv. Nimrod Avigal; Adv. Gitit Shriki

Judgment

President E. Chayut:

In the petition before us the Court is requested to order the voidness of section 4 of the Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel 5775-2014 (Legislative Amendments and Temporary Provisions) 5775-2014 (hereinafter: the "Amending Law") that obliges foreign workers who entered Israel not through a border crossing (hereinafter: "Infiltrator Workers") and their employers to deposit in a special

bank account a total amount at a rate of 36% of the worker's wages that will be paid to the worker only at the time of his departure from Israel (hereinafter: the "Deposit Scheme"). The petition in question was filed by Infiltrator Workers, citizens of Eritrea and Sudan, civil society organizations and associations (hereinafter: the "Petitioners") to which the Israel Restaurants Association joined during the proceeding (hereinafter: the "Restaurants Association") as an additional Petitioner. In short, the Petitioners argue that the Deposit Scheme, in general, or in the least some of its components, is unconstitutional and therefore should be voided.

1. As of 2007 a number of nationals from African countries entered Israel illegally, usually by crossing the Israel-Egypt border in an unregulated manner – especially nationals of Eritrea and the Republic of Sudan (hereinafter: "Sudan"). The border with Egypt was since blocked with a fence extending throughout its entire The border with Egypt was blocked in the meantime with a fence extending throughout its entire length, in such manner that in the past few years no additional entries through this border were detected, however as of the end of 2019 there are 31,547 people in Israel who entered Israel not through a border crossing (see: Population and Immigration Authority – Policy and Strategy Planning Division, Data about Foreign Nationals in Israel: Summary Edition for 2019 (hereinafter: the "Foreign Nationals Data 2019")). Pursuant to the provisions of section 1 of the Prevention of Infiltration Law (Offenses and Adjudication) 5714-1954 (hereinafter: the "Prevention of Infiltration Law") these persons were defined as "infiltrators" (for the purpose of this term see HCJ 7146/12 Adam v. Israel Knesset, P.D. 64(2) 717, 831-832 (2013) (hereinafter: the "Adam Case"); HCJ 7385/13 Eitan – Israeli Immigration Policy v. Government of Israel, para. 5 in the judgment of Honorable Judge U. Vogelman (22.9.2014) (hereinafter: the "Eitan Case")). Out of all the infiltrators who stay in Israel, approximately 71% are from Eritrea and approximately 20% are from Sudan. The State does not take any action for the purpose of deporting these nationals, both as a result of practical difficulties (such as lack of a diplomatic relations between Israel and the state of origin) and by virtue of the "temporary non-refoulement" policy, according to the recognized principle in International Customary Law, according to which a person may not be deported to a place where his life or his liberty is at risk (see: HCJ 8665/14 Desta v. The Knesset, para. 5 in the judgment of Honorable President M. Naor and the references thereat (11.8.2015) (hereinafter: the "Desta Case")). Accordingly, the infiltrators who are the subject matter of the deportation order however their deportation is impossible at this stage, receive renewable visas by virtue of section 2(a)(5) of the Entry to Israel Law 5712-1952, and that are defined as "a temporary visa for a visit to whoever is in Israel without a stay permit and who received a deportation order" (Adam Case, pp. 757-758). It shall be further noted that a considerable part of these infiltrators submitted asylum applications to the Population and Immigration Authority (hereinafter: the "Population Authority") for

an asylum in Israel however, and as described further below, most of these applications are still pending in the Population Authority.

2. The existence of a large population of infiltrators in different areas in the country, and in particular in neighborhoods in the southern parts of Tel Aviv-Yafo, creates many difficulties (see: Eitan Case, para. 29 in the judgment of Honorable Judge U. Vogelman). Consequently, over the years the Knesset, following the initiative of the Government, legislated a series of laws that laid down different measures that were intended to deal with these difficulties. The court stated, with respect to some of these measures that are related to the limitation of freedom and the freedom of movement of the infiltrators, that they were unconstitutional, and therefore the Knesset made different adjustments and revisions in these laws (the Adam Case, the Eitan Case and the Desta Case). Another route through which the State tried to handle the phenomenon of infiltration was the deportation of infiltrators to third countries, and the encouragement of infiltrators to depart voluntarily to these countries. For that purpose, at the end of 2013 and in the beginning of 2014 the State of Israel signed agreements with two African countries (hereinafter: the "Third Countries") that agreed to accept to their territory infiltrators from Israel "who cannot be deported to their country of origin" (see: APA 8101/15 *Zagata v. Minister of Interior*, para. 2 in the judgment of Honorable President M. Naor (28.8.2017). Infiltrators who decided to leave Israel voluntarily were transferred to these countries, and they even received a grant at the time they left the country (ibid, para. 4 in the judgment of Honorable President M. Naor). At a certain stage the State asked to deport to the Third Countries infiltrators even without obtaining their consent, and acted for the purpose of reaching agreements that would facilitate such action, however eventually this initiative did not materialize into actual implementation (see: HCJ 679/18 *Kook Avivi v. The Prime Minister and the Minister of Foreign Affairs* (10.4.2018); HCJ 7501/17 *The Hotline for Refugees and Migrants v. Minister of Interior*, para. 2 (9.5.2018)).

3. The Petition in question concerns another measure that was incorporated in the Deposit Scheme and that is intended to encourage the departure of infiltrators from the country, and that is a financial measure that concerns the wages paid to the infiltrators in the territory of the State of Israel. As a general comment for the purpose of this matter it should be noted that the law indeed prohibits the employment of infiltrators, however in practice the State refrains from enforcing this prohibition and even declared that to the extent that it would decide to change this policy, it would notify 30 days prior to commencing to perform actual enforcement (see: HCJ 6312/10 *Kav LaOved – Worker's Hotline v. The Government* (16.1.2011); resolution no. 3936 of the 32nd Government, dated 11.12.2011).

The principles of the Deposit Scheme and the developments in the case in question

4. The legislative procedures that are related to the Deposit Scheme which is the subject matter of the Petition in question started after the judgment in the *Eitan* Case was given. In that case the court stated, *inter alia*, that the legal provisions relating to the transfer of infiltrators to an "open" detention facility (hereinafter: the "Detention Facility") for an unlimited period of time (Chapter D in the Prevention of Infiltration Law (Offenses and Adjudication) (Amendment no. 4 and Temporary Provisions), 5774-2013 are void, and their voidness was suspended for a period of 90 days for the purpose of allowing the legislator to make the necessary preparations. On December 1, 2014, following the judgment, and a short time prior to the expiration of the suspension of the declaration on the voidness of the operation of the Detention Facility, the Government put on the Knesset table the bill for the Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Workers from Israel (Legislative Amendments and Temporary Provisions) 5775-2014 (hereinafter: the "Bill"). The Bill was approved in a first reading already on the same day, and was forwarded to a discussion in the Knesset Internal Affairs and Environmental Protection Committee (hereinafter: the "Internal Affairs Committee") that held a number of meetings in the beginning of December 2014. On December 8, 2014 the Amending Law was passed in the second and third reading and was published in the Official Gazette on December 17, 2014.

Chapter A of the Bill includes provisions concerning the holding of infiltrators in custody and their placement in the Detention Facility, and chapter B proposes to amend the provisions of the Foreign Workers Law 5751-1991 (hereinafter: the "Foreign Workers Law") and add to it provisions regarding the obligation of an employer of foreign workers (infiltrators and non-infiltrators) to deposit a certain amount in a special fund or in a bank account that will be transferred, under certain conditions, to the foreign workers at the time they leave the country. It should be noted that a basic scheme with respect to the deposits made to foreign workers was already laid down in 2000, in section 1K of the Foreign Workers Law, titled: "Making deposits for the benefit of the foreign worker and for ensuring his timely departure from Israel, and the use of such amounts" (hereinafter: the "Deposit Scheme concerning All Foreign Workers"). However, and according to the position that the Knesset clarified in the position it submitted in the proceeding in question, this was a general arrangement, that empowered the Minister of Economy to impose a duty on an employer of a foreign worker to pay that worker a monthly deposit for that worker in an amount that will not be greater than NIS 700. It was further clarified that since no regulations were promulgated by virtue of this section, except for with respect to the construction sector, this arrangement, with respect to the entire foreign workers, was not actually applied. The Bill therefore proposed to lay down in the primary legislation the particulars of the said Deposit Scheme with respect to foreign

workers who are not infiltrators and add a unique arrangement regarding the deposit of the deposit for Infiltrator Workers. Following the meetings that were held in the Internal Affairs Committee, and taking into consideration the opinion of the Knesset legal counsel, according to which the part in the Bill relating to the entire foreign workers "exceeds the scope of handling the issue of infiltrators and gives rise to a series of difficulties" it was decided to revise this chapter, in such manner that this chapter would apply only to infiltrators – i.e., to those who are not Israeli residents and who entered Israel not through a border crossing (see: section 1 in the Prevention of Infiltration Law).

5. The Deposit Scheme, in the manner it was adopted in the second and third reading, and that was incorporated in section 4 of the Amending Law, states that an employer of a Infiltrator Worker is obligated to make a deposit for an amount equal to 36% of his wages: 20% would be deducted from the wages of the Infiltrator Workers (hereinafter: the "Employee's Component") and an additional 16% would be paid by the employer as an additional deposit, beyond the worker's wages (hereinafter: the "Employer's Component") (section 1K1(a) of the Foreign Workers Law). The wages for the purpose of the Deposit Scheme (hereinafter: the "Determining Wages") are the wages taken into consideration for the purpose of calculating the severance pay pursuant to section 13 of the Severance Pay Law 5723-1963, or the gross basic wages (before deductions) without the variable components of the wages, such as overtime (section 1K1(f) of the Foreign Workers Law). It was further decided that the deposit amounts would be deposited in a bank account or in a fund each month and would accrue profits with deduction of fees and management fees (section 1K(d) and section 1K1(c) of the Foreign Workers Law).

   According to the arrangement, the Infiltrator Worker will be entitled to 67% of the deposit amounts with the addition of the profits accrued by these amounts at the time of his departure from Israel, when the departure is permanent and not temporary (section 1K4(a)(1) of the Foreign Workers Law). Since the Employee's Component constitutes approximately 55% of the amounts that accrued in the deposit, the Infiltrator Worker is in fact entitled to the full Employee's Component, with the addition of the Employer's Component, at the time of his departure from Israel. As regards the balance of the deposit amounts, it was stated that their receipt is conditional on the departure from the country no later than six months as of the expiration of the stay period applicable to it. The date of the "expiration of the stay period in Israel" was defined as the date in which the Infiltrator Worker was required to leave Israel according to a peremptory judgment or a notice from the Minister of Interior or the Director-General of the Population and Immigration Authority. Respondents 2-4 (hereinafter: the "Government Respondents") argue that this is a

notice that will be delivered to the extent that the outline of involuntary deportation is applied, and that will set a specific date for the departure from Israel. The expenses related to the deportation of the Infiltrator Workers from Israel will be deducted from the balance of the deposit amounts (33%); another amount that would increase according to the period of time that was passed as of the date in which the Infiltrator Worker was required leave the country and until his actual departure date, and therefore if the worker departs after six months as of the expiration of the stay period, the entire balance of the deposit would be subtracted (hereinafter: "Administrative Deduction Component"); and tax at a rate of 15% on the balance of the amount (section 1K4(a) of the Foreign Workers Law).

The Deposit Scheme further orders that upon the fulfillment of certain conditions, the officer on behalf of the Ministry of Interior or anyone acting on his behalf is entitled to decide to reduce the period following the end of the staying period that will be held against the Infiltrator Worker for the purpose of the Administrative Deduction Component (sections 1K4(b)-(c) of the Foreign Workers Law); and that the Minister of Interior, with the approval of the Minister of Finance and with the approval of the Labor, Welfare and Health Committee (hereinafter: the "Labor Committee") is entitled to lay down the types of events and conditions upon whose fulfillment a Infiltrator Worker is entitled to the deposit amounts, in whole or in part, on an earlier date (section 1K4(e) of the Foreign Workers Law).

For the purpose of providing a full account it should be noted that according to other provisions that were set out in the Foreign Workers Law as part of the Deposit Scheme relating to all foreign workers, even prior to the legislation of the Amending Law subject matter of this Petition, social-benefit payments that the employer owes by virtue of a collective agreement or an extension order, such as the deposits that the employer makes to a pension fund and payment of severance pay would also be paid to the fund or the bank account that were opened for the purpose of depositing the deposit (section 1K(f)(1) of the Foreign Workers Law). The social-benefit payments would be offset from the amount that the employer is obligated to deposit according to the Deposit Scheme, in such manner that in practice the employer is required to add to these payments the difference between the two amounts and to transfer the said amount to a fund or to a trust account (section 1K(f)(2) of the Foreign Workers Law).

6. The date in which the Deposit Scheme would enter into force was set out in the Foreign Workers Law to the 1st of the month after the end of a period of six months as of the publication date of the order by the Minister of Finance, with the approval of the Minister of Interior, for the purpose of opening a fund or a bank account for

the purpose of depositing the deposit amounts. In practice, such an order was not issued, and the said arrangement that was set out in the Amending Law did not enter into force. A petition that was filed against the Amending Law (see the Desta Case), dealt with the detention agreements in custody and in the Detention Facility and not with the Deposit Scheme.

7. On January 2, 2017 the Knesset plenum passed the Prevention of Infiltration and Assurance of Departure of Infiltrators from Israel Law (Legislative Amendments and Temporary Provisions) (Amendment) 5777-2017 (hereinafter: the "2017 Amendment") that revised some of the provisions of the Amending Law. As part of the meetings that were held in the Internal Affairs Committee regarding the proposed 2017 Amendment that the Government submitted, it was clarified that the delay in the coming into force of the Deposit Scheme stemmed from a delay in the completion of the tender for the management of the deposit amounts, and after Respondent 5 was elected as the winning bidder in this tender, a bill that was intended to simplify the taxation mechanisms in the Deposit Scheme and order its coming into force was submitted. The 2017 Amendment states, *inter alia*, that the duty to withhold tax at source would apply each month to the wages of the Infiltrator Worker, including the Employee's Component, however the said tax provision would not reduce the Employee's Component that would be deposited in the deposit, that would continue to be at a rate of 20% of the determining wages. At the same time, the Employer's Component and the interest, linkage differentials and the other profits that accrued would be taxed at a rate of 15%, only on the date the deposit amounts are disbursed from the deposit, at the time the worker exits Israel, without any right to an exemption, deduction or setoff. In addition, within the framework of the 2017 Amendment, the Minister of Labor, Social Affairs and Social Services and the Minister of Finance, in consultation with the Minister of Interior and with the approval of the Labor Committee, were authorized to lay down in an order a reduced rate of the Employee's Component and of the Employer's Component, provided that the Employer's Component would be no less than 12.5% of the Determining Wages of the infiltrator, and that the Employee's Component would be no less than 16% thereof (section 1K1(a1) of the Foreign Workers Law). Finally, it was decided that the Deposit Scheme would enter into force on May 1, 2017.

8. In the background we shall remind that the particulars of the Deposit Scheme relating to foreign workers other than infiltrators were not eventually incorporated in the Amending Law. Nevertheless, on July 19, 2016 the Foreign Workers Regulations (Deposit for Foreign Workers), 5776-2016 (hereinafter: the "Foreign Workers Regulations") were published, when these Regulations oblige the employers of foreign workers with a license and who work in the construction sector in unique

technological works, in the long-term care sector and in the hotel sector to deposit each month a deposit in the amount of the components of the compensation components and the employer's benefits, and that will not be greater than NIS 700. This is based on the general arrangement set out in section 1K of the Foreign Workers Law. Regulation 8 of the Foreign Workers Regulations sets out a mechanism of an Administrative Deduction Component that is similar to the one stated in the Deposit Scheme that applies to Infiltrator Workers. The Deposit Scheme relating to foreign workers other than infiltrators is not the subject matter of this Petition, and separate petitions for the purpose of this matter were filed and are still pending (HCJ 6942/19 *Chabano v. Minister of Interior*) and HCJ 6948/19 *Zhu Longjum v. Minister of Interior*) however, and as stated hereunder, this arrangement is relevant to certain aspects in the Petition in question.

The Petition

9. The Petition in question was filed on March 13, 2017, approximately one month and a half prior to the coming into force of the Deposit Scheme, when in the Petition the Petitioners petitioned for an order nisi that would suspend the coming into force of the duty to deduct the Employee's Component until a decision in the Petition is given. This petition for an order nisi was denied on April 19, 2017 and a first hearing in the Petition was held on July 26, 2017, during which the request of the Restaurants Association to join as a petitioner in the Petition was granted and the request that was made by Eitan – Israeli Immigration Policy and 36 residents from south Tel Aviv to join as respondents to the Petition was granted (hereinafter: "Eitan and the Residents"). Other requests to join the proceeding on behalf of the Israel Women's Network and on behalf of additional movements and associations as amici curiae (hereinafter: the "Parties Requesting to Join") were also considered, and it was stated that they would be allowed to present verbal arguments in addition to submitting their position in writing. At the end of the hearing the panel that debated the Petition (judges U. Vogelman, U. Shoham and G. Kara) issued an order nisi that limited the discussion of the Petition to two components in the Deposit Scheme – the Employee's Component and the Administrative Deduction Component. Regarding the other components in the scheme, the court did not find a reason justifying the issuance of an order nisi. The court further decided that the hearing about the objection to the making of the order nisi into a decree absolute would be held before an extended panel.

10. Three sessions were held before the extended panel, during which updates regarding the implementation of the arrangement and data regarding the deposits that were actually made were also presented; regarding the enforcement that was applied against employers for the purpose of this matter; and regarding the transfer of the

deposit amounts to Infiltrator Workers who left the country. In addition, the Government and Knesset Respondents informed that the Foreign Workers Regulations (Types of Cases and Conditions on whose Fulfillment a Foreign Worker who is an Infiltrator is Entitled to the Deposit Amounts prior to his Departure from Israel not for Temporary Purposes) 5778-2018 were legislated, and were published on July 19, 2018 and entered into force on November 1, 2018. According to these Regulations, Infiltrator Workers who are part of one of the groups that were listed (minors, women, anyone over 60 years of age, single fathers, patients in need of the deposit amounts and victims of human trafficking offenses and slavery) would be entitled to a part equal to 70% of the Employer's Component in the deposit (hereinafter: the "Relative Part of the Employee's Component") by way of avoidance from its deduction by the employer. This should be done in such manner that the rate of the Employee's Component that would be deposited for those entitled in accordance with the Exemption Regulations would be at a rate of 6% of their Determining Wages, similar to the rate that any other worker in the market is required to deposit to his pension savings plan. Later on in the proceeding, the Government Respondents informed that pursuant to section D.3 of the Population and Immigration Authority Procedure 9.0.0004 "Procedure for the deposit for foreign workers who are infiltrators" (hereinafter: the "Infiltrator Workers Procedure") that was updated on November 7, 2018 it was stated that the party that satisfied the conditions set forth in the Exemption Regulations would be entitled, subject to the submission of a proper application, to a retroactive refund of the Relative Part of the Employee's Component that was already deposited for him; and in section E.5 of the said Procedure it was stated that a Infiltrator Worker whose status was upgraded and who received a permit for a temporary stay (A/5), permanent stay permit or Israeli citizenship, would be released from the obligation to make a deposit and would be entitled to redeem the deposit amounts without leaving Israel.

Arguments of the parties

11. The order nisi that was issued in the Petition in question limited the discussion, as said, to the Employee's Component and the Administrative Deduction Component. Therefore, the presentation of the arguments of the parties will also concentrate solely on these components.

12. The Petitioners argue that the Employee's Component in the Deposit Scheme affects the constitutional rights granted to the worker. According to their line of reasoning, the deduction of the Employee's Component contrary to the will of the Infiltrator Workers and its deposit in the deposit withholds one fifth of his wages for an unlimited period. This withholding, it was argued, amounts to infringement of the fundamental constitutional right to property and while taking into consideration the

disadvantaged population we are dealing with, it also infringes the right to live in dignity of the Infiltrator Workers and their family members. It was further argued that the deduction of the Employee's Component discriminated the Infiltrator Workers compared to other foreign workers and that this amounted to violation of the constitutional right to equality. The Petitioners are of the opinion that the infringement of these rights does not comply with the terms set forth in the limitation clause set out in Basic Law: Human Dignity and Liberty. According to their line of reasoning, in the absence of an option to deport from the country most of the population of infiltrators – nationals of Sudan and Eritrea – and while taking into consideration the "foot-dragging" in the review process of the applications for an asylum that were submitted by a considerable part of this population, the Amending Law with respect to these populations amounted to abusing, whose entire purpose was to break the spirit of the Infiltrator Workers so that they would leave Israel. This purpose, as argued, was inappropriate and was even in contravention of the principle of non-refoulement to which the State is committed by virtue of international law. The Petitioners are of the opinion that the provisions of the Amending Law amount to "constructive deportation of the infiltrators, i.e. de facto deportation of those entitled to international protection, as a result of the deliberate imposition of unbearable conditions whose purpose is to encourage departure. The Petitioners argue that the State indeed recognizes that it should provide "temporary protection" to the Infiltrator Workers, but at the same time it puts on them pressure so that they waive this defense.

13. The Petitioners stress that it suffices that the purpose of the Amending Law is inappropriate to assert that it is unconstitutional, but they further add that the infringement caused by the Deposit Scheme also fails to meet the conditions of proportionality in the limitation clause. The Petitioners argue that the data of the departure of infiltrators from Israel prove that there is no rational connection between the means that was selected and the purpose it is intended to achieve. This is because the departure rate of the infiltrators from Israel in the years after the arrangement entered into force decreased, and most of the infiltrators who left Israel did so after they were granted a status in other western countries, following a lengthy process that started, probably, even before the arrangement entered into force. In addition, in the course of the proceeding the Petitioners submitted affidavits and data that prove the extensive damage that was caused to the population of Infiltrator Workers and their family members as a result of the Deposit Scheme. This damage further supports, according to their line of reasoning, the conclusion that the deduction of the Employee's Component caused disproportionate damage to constitutional rights. It was further argued that the State did not act sufficiently for the purpose of assuring that the amounts that were deducted were indeed transferred by the employers to the

deposit account, and that it would be possible to obtain all the amounts to the extent that the Infiltrator Worker would leave the country. As regards the Exemption Regulations, it was argued that the conditions that were set out for the purpose of obtaining an exemption did not mitigate the serious harm caused to the right to live in dignity that was part in the deduction of the Employee's Component, and do not provide any answers to anyone whose wages is under the minimum wages or a little above the minimum wages and who is not part of the groups listed in the Regulations.

The Petitioners argue that even the Administrative Deduction Component infringes constitutional rights in a manner that is not commensurate with the provisions of the limitation clause. The Petitioners argue that even if the purpose of assuring the departure of the worker from Israel on the date set for that worker is a legitimate purpose, the benefit that allegedly arises from this component is incommensurate with the intensity of the infringement of the rights of the Infiltrator Workers. This is particularly relevant, as argued by the Petitioners, in circumstances in which the deduction of amounts that would not be returned to the worker from the Employer's Component – even though this is the worker's property and it belongs to the worker in accordance with the law – constitutes significant infringement of the right to property of the Infiltrator Worker and undermines the worker's ability to maintain himself with dignity after he leaves Israel.

14. The Restaurants Association – a registered association acting for the purpose of advancing the common interests of those engaged in the restaurant business – joined the arguments of the Petitioners against the Employer's Component and the Administrative Deduction Component. The Association is of the opinion that the provisions set out in the scheme that was set out in the law might cause an economic disaster in the sector that employs approximately 20,000 Infiltrator Workers and, consequently – harm the employment of the other workers in the sector. The Restaurants Association emphasizes that the duty to deposit 36% of the worker's wages would eventually result in mass abandonment and resignation of the Infiltrator Workers employed in the restaurants sector, unless they are compensated for the decrease of their wages by way of increase of their wages. Alternatively, it was argued that the arrangement would cause Infiltrator Workers to work without a paycheck, without protection, and without payments made to the State.

15. The Parties Seeking to Join – that are mainly associations that engage in the protection and in the advancement of the rights of women and children in Israeli society – concentrated on the critical damage that the Deposit Scheme causes, according to their line of reasoning, to the basic rights of women and children. The Parties Seeking to Join are of the opinion that the deduction of the Employee's

Component might result in critical harm to the ability of the families of the infiltrators to purchase food, dwelling and medical care and, consequently, increase the number of children who are under risk, in a manner that is in contravention of the obligations of the State by virtue of international treaties.

16. The Government Respondents and the Knesset are of the opinion that the court should not order the voidness of the Amending Law or any part thereof. Regarding the violation of the constitutional rights, the Government Respondents argue – and the Knesset also joined these arguments in the constitutional realm – that the Petitioners did not present to the court sufficient legal and factual grounds to prove violation of the right of the Infiltrator Workers to equality or their right to exist in dignity. At the same time, the Government Respondents agree that deducting 20% of the wages of the Infiltrator Worker constitute infringement of his right to property however, in their opinion, such violation is not so critical since this is not a permanent withholding of wages; the deduction is in fact at an additional rate of 14% beyond the deduction that any worker is obligated to perform in any event, according to the customary pension arrangement in the market; and the arrangement benefits with the worker compared to the circumstances that existed prior to its legislation, in the sense that it assures that the Infiltrator Worker will have access to the deposits made by the employer.

    Regarding the constitutional nature of the infringement, it was argued that the Deposit Scheme was intended to accomplish four legitimate causes – the creation of a financial incentive for the departure of infiltrators from Israel; protection of the social rights of the Infiltrator Workers; reduction of the existing damage in the employment rates and the wages of Israeli workers by equalizing the employment costs of Infiltrator Workers to the ones of Israeli workers; and providing a proper starting point to the Infiltrator Workers once they start their life outside Israel. The Government Respondents deny the argument of the Petitioners, namely that the deduction of the Employee's Component amounts to constructive deportation since, according to their line of reasoning, it does not put undue pressure on the Infiltrator Workers in such manner that frustrates the existence of a free choice to leave the country. It was further argued that the infringement that is part of the provisions of the Amending Law was proportionate, and therefore the law overcame the terms of the limitation clause and even more forcefully so in light of the legislation of the Exemption Regulations that exclude the populations that were listed therein from the duty to deposit the Relative Part of the Employee's Component.

17. Eitan and the Residents are also of the opinion that it is necessary to dismiss the Petition. According to their line of reasoning, even if the provisions of the Amending

Law infringe the right to property, then this is a violation whose intensity is less extensive and satisfies the conditions of the limitation clause. They are of the opinion that the main purpose of the Amending Law is to encourage the departure of infiltrators from Israel and to prevent their integration in Israel, and that this purpose is proper and does not amount to improper constructive deportation.

18. Respondent 5, Bank Mizrahi-Tefahot that won as said in the tender to manage the deposit, announced that it asked to be considered as a formal respondent and that it would honor any decision made in the Petition.

19. After the arguments of the parties and after collecting the data relevant to the court case and before the judgment was given the Coronavirus pandemic broke out in Israel, and most of the sectors in the market were shut down. Consequently, many workers, and also Infiltrator Workers, lost their jobs. To the extent that this is related to the Infiltrator Workers, we should keep in mind that the severance pay component that the employer is supposed to deposit in their favor is actually deposited to the deposit as part of the Employer's Component. Therefore, the Infiltrator Worker has no access to these funds until his actual departure from the country. As part of an update that was submitted in another proceeding, that is conducted before part of the members of the panel hearing the Petition in question, the court learned about the existence of a Legislative Memorandum of the Law for Payment of a Deposit to a Foreign Worker who is an Infiltrator (Temporary Provision – The New Coronavirus) 5780-2020 that was circulated for public comments on April 1, 2020. According to the Legislative Memorandum, an infiltrator who was dismissed or who was forced to take an unpaid leave as a result of the Coronavirus crisis, would be entitled to submit an application to redeem part of the deposit amounts under the conditions set out in the law, for the purpose of his subsistence during the period in which he is unemployed. As a result of this update the parties in the Petition were afforded an opportunity to present their position regarding the possible ramifications of the Legislative Memorandum, to the extent that there are any, with respect to the Petition in question and it was clarified that the court intended to give a judgment in the Petition at the earliest opportunity.

The Government Respondents argue that the arrangement proposed in the Legislative Memorandum – whose final version was not formulated yet – is a "specific and limited arrangement [...] and therefore it is different compared to the existing arrangement for the constitutional scrutiny of the court [...] within the framework of the Petition in the title" (section 10 in the response of the Government Respondents dated April 21, 2020). Therefore, according to the line of reasoning presented by the Government Respondents, "the decision in the Petition in question should be given

based on all the pleadings that were submitted already by the parties, irrespective of the arrangement that is formulated at present." The Petitioners, the Restaurants Association and the Parties Seeking to Join also argued that the Legislative Memorandum does not affect the overall situation that is the subject matter of the Petition, and added that at most this is an arrangement that strengthens the need to reach a decision in the Petition at present, since it does not provide an adequate solution for the distress of the Infiltrator Workers, many of whom lost their livelihood as a result of the Coronavirus crisis. At the same time, Eitan and the Residents argue that the Legislative Memorandum affects the Petition directly since this illustrates the concrete need in keeping savings for the infiltrators that allow to provide specific assistance during a period of an unforeseeable crisis. According to the line of reasoning of Eitan and the residents, the need to apply a tool that will encourage voluntary departure is required, and even more urgently at present, since the presence of the Infiltrator Workers will impede the integration of Israeli workers back in the labor market after the end of the Coronavirus crisis.

20. Indeed, the outbreak of the Coronavirus pandemic has rattled our lives from one end to another, and its impact did not skip the Infiltrator Workers who also deal with the consequences of this pandemic. However, and as noted by the Government Respondents in their response, and rightfully so, the specific arrangement that is considered for the purpose giving a temporary solution for the distress of the Infiltrator Worker in the upcoming period does not affect the constitutional scrutiny of the Deposit Scheme in general. As stated above this arrangement sets out, *inter alia*, the obligation to deposit 20% of the monthly wages of the Infiltrator Worker (the "Employee's Component") together with an administrative deduction (the "Administrative Deduction Component"), and these aspects in the Deposit Law – that are at the core of the Petition in question – are not expected to change as a result of the temporary provisions that are formulated in accordance with the Legislative Memorandum as stated above. Therefore, we accept the argument of the Government Respondents, namely that it is necessary to limit the chapter of discussion and decision to the pleadings that were submitted in the Petition and that refer to the provisions of the Deposit Law in respect of which an order nisi was issued.

Discussion and decision

21. The question that is at the core of the Petition in question is whether the Employee's Component and the Administrative Deduction Component that were set out in the Deposit Scheme are constitutional. For the purpose of answering this question, we have to review each of these components according to the stages of constitutional scrutiny that are customary in our legal system. First, we have to determine whether the arrangement that is considered violates a constitutional right. If the answer to this

question is in the affirmative, we have to continue and examine whether the violation complies with the terms set forth in the limitation clause set out in section 8 of Basic Law: Human Dignity and Liberty. In the event the violation fails to satisfy the conditions of the limitation clause, then it is necessary to decide what relief will cure the violation (for further details regarding the constitutional scrutiny procedure see, *inter alia*, the Desta Case, paras. 23-24 in the judgment of President M. Naor; Aharon Barak "The constitutional right and its infringement: The three-stage theory" Law and Government S 119 (2018); CA 6821/93 *Bank HaMizrachi HaMeuchad v. Migdal Cooperative Village*, P.D. 49(4) 221, 428 (1995)).

The Employee's Component – Violation of constitutional rights

22. The Petitioners argue that the Employee's Component violates the constitutional rights of the Infiltrator Workers to property, and their right to live in dignity and equality. I am of the opinion that for the purpose of deciding in the infringement of constitutional rights, it suffices if we concentrate the discussion on the infringement of the right of the Infiltrator Worker to property, an issue that is not disputed by the parties to the Petition.

23. The Government Respondents agree, as said, that the deduction of the component for the Infiltrator Worker violates his right to property (see para. 53 in the Statement of Reply on their behalf). Even Eitan and the Residents acknowledge the existence of such a violation as said, when they note that payment of wages constitutes the core of the constitutional right to property (para. 216 in their reply to the order nisi dated November 15, 2017). Therefore, the arguments of the Respondents are mainly related to the scope of the constitutional protection of the right to property and the compliance of the arrangement with the conditions of the limitation clause.

24. The position of all the parties in the Petition for the purpose of this matter is consistent with the legal precedents relating to the scope of the constitutional right to property in respect of which it was argued that: "…the property in the Basic Law is not limited to property rights only. Indeed, it is not the property, in its constitutional sense, is the same as property in private law…therefore, the constitutional concept of property also includes the right to possession and the obligatory rights…the property, in its constitutional sense, means a property right, whether a right in rem and whether in personam." (HCJ 4593/05 *HaMizrachi HaMeuchad Bank v. The Prime Minister*, para. 9 in the judgment of the Honorable President (ret.) A. Barak (20.9.2006); see also: HCJ 1661/05 *Regional Council Coast of Gaza et Ors. v. The Prime Minister et Ors.*, P.D. 59(2) 481, 583 (2005)); HCJ 8276/05 *Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. Minister of Defense et al.*, P.D. SB(1) 1, 32-34 (2006)). Different discussed referred to the essence of the

worker's right to wages for the purpose of this matter, while noting that his right to wages is part of his "property" in the legal sense, since this concept stems from the purpose of assuring the individual economic freedom (Aharon Barak: "The constitutional right to property: economic freedom and social responsibility" Selected Writings Volume C – Constitutional Readings 479, 489 (2017); see also: Steve Adler: "Delayed payment compensation: Law and legal precedents" Labor Law Almanac F 5, 45 (1996)). It was further ruled that "The protection of the constitutional right to property is also granted to any person in Israel, including to foreign workers" (HCJ 11437/05 *Kav LaOved – Worker's Hotline v. Ministry of Interior*, P.D. 64(3) 122, 165 (2011)).

It is therefore possible to state that the Employee's Component in the Deposit Scheme constitutes a clear infringement of the constitutional right to property. It is also possible to say that this is actual infringement since according to this scheme one fifth of the Infiltrator Worker's wage is withheld, when the said wages are the primary asset, if not the only asset, out of his assets in Israel. This withholding of the Employee's Component is made for an unlimited period of time, when its end is unknown, and it may last for many years, thereby bringing closer this withholding to the actual forfeiture of the amounts. Indeed, the fact that this is withholding that is not permanent withholding has, at most, an effect on the intensity of the violation. It shall be further emphasized that, as opposed to the deposits made the wages that Israeli workers are obligated to make and that entitle them, *inter alia*, to pension insurance, the Employee's Component does not entitle the Infiltrator Worker to social-benefit payments.

The Employee's Component infringes the right to property – the terms laid down in the limitation clause

25. The limitation clause set out in section 8 of the Basic Law: Human Dignity and Liberty sets out four conditions that, upon whose fulfillment, it is possible to justify the infringement of the constitutional right protected thereunder. The infringement should be by the law or in accordance with a law by virtue of an express authorization of the law; the law must comply with the values of the State of Israel; the law must be for a legitimate cause; and the infringement of the right should be in a scope that does not exceed the scope that is required. According to the arguments of the Petitioners, an examination of the Employee's Component from the prism of the limitation clause will concentrate on the two last conditions in the paragraph – the existence of a legitimate cause for the purpose of deducting the Employee's Component and the proportionality of this arrangement.

The purpose of the Employee's Component

26. The Government Respondents responded in their arguments as stated above to the four purposes that the Deposit Scheme is intended to promote: the first purpose is to create a positive financial incentive for the departure of infiltrators from Israel; the second purpose is to protect the social rights of the Infiltrator Workers; the third purpose is to reduce the damage to the Israeli workers; and the fourth purpose is to provide a proper starting point to the Infiltrator Workers after their departure from Israel.

    I shall already emphasize that these purposes that the Government Respondents presented are at the core of the Deposit Scheme in general. However, since the constitutional scrutiny concentrates at present on the Employee's Component only, it necessary to consider first which of these purposes is relevant to this component.

    An examination of each of the four purposes that were noted leads to the conclusion that two of them – the second and the third purpose – are relevant to the other components in the Deposit Scheme, however are not relevant to the Employee's Component, and therefore there is no need, with respect to these components, to examine whether these are legitimate causes. The two additional purposes – the first and the fourth purpose – are purposes that the Employee's Component is intended to attain and therefore we have to concentrate the constitutional scrutiny on these two purposes. Nevertheless, I saw fit to respond briefly also to the other purposes that were stated by the Government Respondents.

27. The second purpose, that concerns protection of the social rights of the Infiltrator Worker, is intended to advance the public interest so that social payments that were deposited in favor of the worker would indeed be kept for the worker and would be available for the worker in the future. According to the extension order regarding the increase of the deposits to the pension insurance in the market, in an arrangement that applies, according to the Government Respondents, also to the Infiltrator Workers, each employer is obligated to deposit for each of the workers 12.5% of his wages for the pension and the severance pay components and, in addition, to deduct 6% of the worker's wages for pension. The Government Respondents are of the opinion that in light of the reality in which most of the Infiltrator Workers have no pension fund in their name as a result of the refusal of the pension fund to admit them as members, or as a result of the violation of their rights by the employer, the Deposit Scheme is intended to provide to the Infiltrator Workers: a simple tool that can be used for the purpose of depositing the said social-benefit payments" (para. 41 in the

Statement of Reply on behalf of the Government Respondents). I do not accept this argument, to the extent that it is related to the Employee's Component.

In the discussions held by the Knesset Labor Committee regarding the Foreign Workers Regulations – discussions that were held after the legislation of the Deposit Scheme that is at the center of this Petition – the legal counsel of the Committee clarified for the purpose of this matter that the provision in section 1K(f)(1) of the Foreign Workers Law, according to which the employer is required to deposit the social-benefit payments he is obligated to make to the deposit account, "refers to the payments that are part of the liability of the employer or for severance pay or the liability of the employer to pay benefits. It does not gives rise to the obligation of the worker's liability and it is possible to see in the history of that amendment of the section that it does not mandate a deposit of the worker's part (minutes of the meeting of the Labor Committee dated May 24, 2016, p. 24). These things clarify that even if the purpose of protecting the social rights of the Infiltrator Worker is relevant to the Employer's Component, we should not find in it an explanation for the existence of the Employee's Component in the Deposit Scheme, since the deposit of the Employee's Component does not render the payment of the worker to the pension fund unnecessary – whether or not such payment is actually made.

As regards the third purpose that concerns the decrease in the harm to the employment and wage levels of Israeli workers by equalizing the costs of employment of the Infiltrator Workers to the costs of employment of Israeli workers. This purpose definitely explains the Employer's Component in the Deposit Scheme. However, taking part of the worker's wages does not result in an increase of the costs of employment of the Infiltrator Workers, and certainly not directly. Therefore, we cannot say that the Employee's Component serves this purpose.

Therefore, the constitutional scrutiny that concerns the Employee's Component in the case in question will concentrate on the two remaining purposes.

28. The Government Respondents emphasized in their arguments that the "main purpose [of the Deposit Scheme] is to create a positive financial incentive that will encourage the voluntary departure from Israel" (para. 14 in the main arguments of the Government Respondents). The Petitioners also agree that the effort to encourage the departure of the infiltrators from Israel underlies the purpose of the Deposit Scheme however, according to their line of reasoning, to the extent that this is the Employee's Component, the arrangement is intended to put on them under undue pressure that constitutes a "constructive deportation" of asylum seekers and those entitled to protection by virtue of the non-refoulement principle.

Is this purpose, namely the encouragement of voluntary departure from Israel, a legitimate purpose?

29. In the judgments that were given in the cases of Adam, Eitan and Desta, the opinions diverged on the question whether it was necessary to consider the purpose of the prevention of settling in Israel as a proper and legitimate purpose, in light of the amendments that were made in the Prevention of Infiltration Law and in particular the provisions relating to the detention of infiltrators in custody for a long period, and their obligation to stay for long periods in the Detention Facility (see: the Adam Case, para. 85 in the judgment of Honorable Judge Arbel and para. 19 in the judgment of Judge U. Vogelman; the Eitan Case, para. 101 in the judgment Honorable Judge U. Vogelman; and for the purpose of this matter compare the Desta Case, where the court considered the purpose of "Prevention of integration in city centers" – paras. 67-75 in the judgment given by Honorable Judge M. Naor; paras. 17-19 in the judgment of Honorable Judge U. Vogelman; para. 5 in the judgment of Honorable Judge Y. Amit).

Nevertheless, it seems that to the extent that the purpose regarding the encouragement of departure from the country means positive encouragement for voluntary departure, even the Petitioners agree that there is nothing wrong in that. Each state has a range of discretion allowing it to lay down its immigration policy. Therefore, applying measures that create a positive incentive for the Infiltrator Workers to leave Israel voluntarily, according to the immigration policy, serves a legitimate and worthy purpose. At the same time, putting "constant pressures" on the infiltrator to break his spirit so that he would leave the country, is inappropriate, and cannot be considered as a legitimate purpose (Eitan Case, para. 112 in the judgment of Honorable Judge U. Vogelman; the Desta Case, para. 81 in the judgment given by Honorable President M. Naor, and paras. 24-28 in the judgment of Honorable Judge U. Vogelman). It might also conflict with the principles of international law in connection with this issue (see: Penelope Mathew, Constructive Refoulement, in RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW 207, 220-222 (Satvinder Singh Juss Ed., 2019) (hereinafter: "Mathew")).

Honorable Judge U. Vogelman elaborated the issue of the thin line passing between positive encouragement to depart and "breaking the spirit" of the infiltrators so that they decide to depart when he noted, in the Eitan Case, that "…certain difficulties are the part of any person who decides to immigrate to another country in an unrecognized manner. It is impossible – and in a certain sense, it is even undesirable – to make them completely disappear. There is therefore a thin line between

legitimate incentives (such as a financial incentive) and departure from the country and putting extensive and unfair pressure that actually denies the ability of infiltrators not to leave the country" (ibid, para. 113 in his judgment; see also: Mathew, p. 208). The difference that exists for the purpose of this matter between the Employee's Component and the Employer's Component in the Deposit Scheme is clear. While the Employer's Component is a "carrot" – i.e. a financial incentive that does not affect adversely the monthly wages of the Infiltrator Workers – the Employee's Component is the "stick" that can cross the said "thin line" between setting out a legitimate incentive and exercising undue pressure on the infiltrators so that they would be forced to leave. Nevertheless, in the case in question it seems that there is no need to decide this question since even if we operate under the assumption that the said purpose is legitimate, the Employee's Component incorporated in the Deposit Scheme does not meet the requirements of proportionality, for the reasons stated hereunder.

30. As regards the fourth purpose to which the Government Respondents referred – the creation of a proper economic "starting point" for the next chapter in the life of the infiltrator outside Israel. The Employee's Component indeed occupies a central part (55%) in the amounts of money accumulated in the deposit of the Infiltrator Worker and these can be used by the Infiltrator Worker on the day after the departure from Israel and the Petitioners themselves do not deny that this is a legitimate purpose, in this aspect, even though it involves a paternalistic attitude as far as the management of the funds of the Infiltrator Workers.

31. The next stage in the constitutional scrutiny process concerns the proportionality in the infringement of the right to property that inheres in the Employee's Component in the Deposit Scheme. The existence of the principle of proportionality in the limitation clause will be considered in the prism of these two purposes and for with purpose we will operate under the assumption, without laying down principles, that there is no illegitimate purpose underlying the Employee's Component, namely "breaking the spirit" of the Infiltrator Worker.

Proportionality of the Employee's Component

32. The proportionality of the infringement that inheres in the Employee's Component is examined according to the three secondary criteria: (a) the criterion of commensurability or the rational connection criterion; (b) the criterion of the least drastic means; (c) the proportionality criterion in its narrow sense (for further details regarding the secondary criteria of the proportionality see, *inter alia*, HCJ 1877/14 *Movement for Quality Government in Israel v. The Knesset*, para. 53 (12.9.2017)).

A. The rational connection criterion

33. The Respondents argue that there is adequacy between the purposes of the arrangement and the means that was selected – the deposit of amounts in the deposit and their accrual until the Infiltrator Worker leaves the country. The Government Respondents argue that the accrual of the amounts constitutes a "significant financial incentive for the departure of the Infiltrator Worker from Israel, when the conditions for this action are opportune, and in fact even today there is voluntary departure from Israel to third-party countries or to other countries, and some even return to their country of origin voluntarily" (para. 92 in the Statement of Reply on behalf of the Government Respondents). The Petitioners on their behalf argued that there is no rational connection between the Employee's Component and the purpose. This is based on the data of the Government Respondents, from which it transpires that in the last few years there has been a decrease in the number of infiltrators that left Israel voluntarily.

34. Apparently, the existence of a clear financial incentive, namely a deposit that accrued for each Infiltrator Worker – and most of which comprises of the Employee's Component – creates motivation for the worker to leave Israel and to receive the deposit. Therefore, we could say that in the theoretical realm there is a rational connection between the means that the worker chose and its underlying purpose. Nevertheless, at the point in time in which we are in – approximately three years after the coming into force of the Deposit Scheme – we cannot just settle for a theoretical rational connection between the means that was chosen and its underlying purposes, and it is also necessary to examine the actual impact of the scheme. This court has already stated in the past that in certain cases an examination of the rational connection, "should be done [...] not as a theoretical manner, but as a practical manner, that is examined according to the consequences of its implementation. Indeed, as a theoretical question that is debated at the time of legislating the law, it is possible that the arrangements set out in the law can attain its purposes" however "this (prior) examination is insufficient. When the underlying purpose of a law is to cause a social change, whose occurrence is not only a theoretical estimate but is measured in actual life, it is necessary to examine the conformance of the means that were selected for the purpose of attaining this purpose in the criterion of the outcome" (HCJ 6427/02 *The Movement for the Quality of Governance in Israel v. The Knesset*, P.D. 61(1) 619, 710 (2006) (hereinafter: the "Movement for Quality Government in Israel Case").

35. The impression that we gain from the data that were presented to us and from the 2019 Foreign Nationals Data is not conclusive:

	Departure of infiltrators from Sudan	Departure of infiltrators from Eritrea	Total departure of African nationals
2014	4,112	1,691	6,414
2015	(-85%) 600	(+46%) 2,480	(-47%) 3,381
2016	(-35%) 390	(+6%) 2,629	(-4%) 3,246
2017	(-40%) 233	(+10%) 2,895	(+4%) 3,375
2018	(-33%) 156	(-21%) 2,270	(-21%) 2,667
2019	(+38%) 216	(-1%) 2,239	(+2%) 2,723

These data indeed point to a decrease in the number of infiltrators who departed Israel voluntarily in the years 2017 – the year in which the Deposit Scheme entered into force – and the years 2018 and 2019. However, according to the numerical figures only, we cannot infer the impact of the Deposit Scheme, since it is possible that this decrease stems from changes that are not related directly to the arrangement, such as the closing of the Detention Facility in the beginning of 2018. At the same time, another data, that was stressed in the arguments of the Government Respondents, shows that the number of infiltrators that leave the country out of those for whom funds were actually deposited in the deposit increased significantly – from 102 in May-December 2017 (approximately 5.4% out of the total number of infiltrators that left Israel) to 369 in January-May 2019 (approximately 36.5% of all infiltrators who left the country). The Government Respondents argue that this data proves that "already in a relatively early stage" of the implementation of the Deposit Scheme, the scheme encourages infiltrators to decide to leave Israel. This is indeed a possible conclusion that emerges from the data, but it does not necessarily stem from these data, since as time passed from the time the arrangement entered into force, the number of infiltrators for whom funds are actually deposited in the deposit increases, and it is clear that the more Infiltrator Workers benefit from the Deposit Scheme, the rate of these workers that leave the country will also increase. If we had been presented with the data about the percentage of the infiltrators who actually received amounts in the deposit from among all the infiltrators, maybe it was possible to examine whether their rate among the infiltrators who leave the country is higher compared to their rate among the general population of infiltrators. We were not presented with such data. Therefore, we cannot lay down principles on either way for the purpose of this matter. In fact, even the Government Respondents admitted that "it is impossible to link in a unique manner between the deposit and the departure of the infiltrators" (section 14 in the update notice on their behalf dated June 27, 2019).

36. Another trend that emerges from the data concerns the different destinations of the infiltrators with the deposit:

	Departure of infiltrators with a deposit to their countries of origin and to other African countries	Departure of infiltrators with a deposit to western countries
May – December 2017	(45%) 46	(55%) 56
2018	(30%) 194	(70%) 455
2019, until May 14, 2019	(37%) 137	(63%) 230

These data show that most of the Infiltrator Workers for whom a deposit was made, left the country to countries in the West. The departure to these countries is conditional on the completion of nationality procedures based on certain criteria and therefore it is definitely possible that the Infiltrator Workers who left to countries in the West acted in the said manner at the time of completing the procedures for attaining their status that started before the Deposit Scheme entered into force. In other words, it is definitely possible that their departure is not necessarily related to the incentive that the deposit amounts create, however to their aspiration to live in a western country that would grant them rights that they do not receive in Israel at this stage. Therefore, this data also raises a certain doubt regarding the existence of a rational connection between the Deposit Scheme and the encouragement of the departure from Israel.

However, in light of the ambivalence that emerges from the data as a whole, and given the legal precedent according to which: "it suffices to reach partial attainment that is not marginal or negligible for the purpose of fulfilling the demand of the rational connection" (HCJ 1213/10 *Nir v. Knesset Chairman*, para. 23 in the judgment of Honorable President D. Beinisch (23.2.2012)) we cannot say that there is no rational connection between the Deposit Scheme in general and the Employee's Component in particular and the purpose that concerns encouragement of the voluntary departure.

37. As regards the fourth purpose, it seems that for the purpose of this matter there is a clear rational connection between this purpose and the Employee's Component. The Employee's Component constitutes a significant part of the deposit, that is not subject to an administrative deduction at the time of leaving the country. Therefore, it is clear that its deposit leads to the accumulation of an amount of money – that would not have necessarily been saved but for the Deposit Scheme – that is given to the infiltrator at the time of his departure from the country, and that can be used as a "starting point" for his new life outside Israel.

38. The conclusion from the aforesaid is that even though no clear rational connection between the Employee's Component and the purpose of encouragement of the voluntary departure was established, we cannot say that there is no rational

connection, even a partial connection, between the means and the purposes underlying the Employee's Component and therefore it is necessary to assert that this aspect in the Deposit Scheme passes the first sub-criterion.

B. The criterion of the least drastic means

39. The question that the second sub-criterion presents is whether there is another means, whose infringement of human rights is least drastic, and that can attain in the same degree, or in a similar degree, the purposes of the Deposit Scheme (Eitan Case, para. 60 in the judgment of Honorable Judge U. Vogelman; Adam Case, p. 806).

The Petitioners hold that the Employee's Component does not meet this sub-criterion. According to the Petitioners, there are alternative means that attain its purposes, when the harm that they cause is less drastic. In that manner, for example, it was argued that the provision of a "voluntary departure" grant to anyone willing to leave Israel can also encourage the departure from Israel. It was further argued that the Employer's Component in the Deposit Scheme attains this purpose without infringing the rights of the Infiltrator Worker in the same degree. The Respondents on their behalf acknowledge that the alternative means that were noted also attain the purposes of the arrangement however according to their line of reasoning they do not act in the said manner with the same degree of effectiveness. Therefore, they are of the opinion that they should not be considered as an alternative means with the least drastic effect.

I accept this position of the Respondents. Indeed, there is no doubt that the Employer's Component attains the purposes underlying the Employee's Component, but it does not attain them in the same degree. The amounts that accrued in the deposit in favor of the Infiltrator Worker will significantly decrease without the Employee's Component, given the fact that this component constitutes more than half of the amounts that are deposited. The reduction in the deposit amount will therefore lead to decrease the incentive from departure from the country and a decrease of the amount that will be available to the infiltrator at the time he departs from the country and, consequently, to the attainment in a lesser scope of the purposes underlying the Employee's Component.

The Petitioners argued in later stages of the proceeding that another alternative means whose infringement of human rights is less drastic is the document of understandings that was signed with the United Nations High Commissioner for Refugees (UNHCR) on April 2, 2018, according to which the status of approximately half of the infiltrators would be regulated in different countries outside Israel, while the rest of the infiltrators would receive status in the State of Israel. This document of

understandings was canceled a shortly after it was signed, and this option is no longer relevant to us today. Consequently, I do not see any need to consider the question whether this is indeed a mean one of the least drastic means. This issue requires a decision in complex questions including, *inter alia*, the question of whether an arrangement within the framework of the foreign relations of the State of Israel can even be considered as an alternative means to the means set out in a statute, and the question of whether a means that came to the world after the legislation of the law affects its legitimacy.

40. Taking into consideration the aforesaid. I reached the conclusion that there is no means whose effect is less drastic than the one caused from the Employee's Component whose efficiency in attaining the purposes is identical or similar. Therefore, the means that was applied also satisfies the conditions of the second sub-criterion. Nevertheless, the existence of alternative means that attain the purposes of the law, albeit to a lesser extent, are significant for the purpose of applying the third sub-criterion that concerns proportionality in its narrow sense (see: Eitan Case, para. 65 in the judgment of Honorable Judge U. Vogelman) and we shall now consider this third sub-criterion.

C. The criterion of proportionality in its narrow sense

41. The third sub-criterion stipulates the extent of proportionality in the violation of a proper relationship between the benefit that is part of the arrangement that is under scrutiny, and the damage that it causes to constitutional rights. For the purpose of this matter it is necessary to consider the degree of necessity and the essential nature of attaining the purpose vis-à-vis the importance of the right that was infringed and the intensity of its infringement (see: Aharon Barak Proportionality in Law 439-445 (2010)). In addition, it is necessary to consider the additional benefit that is produced from the arrangement compared to the benefit produced from other possible alternative means, which are less offensive, and whether this addition justifies the addition to the infringement of constitutional rights, P.D. 58(5) 807, 840 (2004)).

42. What is, therefore, the benefit that is produced from the Employee's Component? As regards the fourth purpose that underlies the Employee's Component – assuring a proper start for a life outside Israel, the measurement of the marginal benefit that is produced from the Employee's Component is relatively simple: the addition of the Employee's Component to the deposit increases significantly the total amount of the deposit (an addition of more than twice its amount). Therefore, if the provisions of the law are observed and employers assure that the amounts that were deducted from the wages of the Infiltrator Worker were indeed deposited in the deposit (a matter that is questionable, as clarified further below), this is indeed a significant addition.

Nevertheless, it should be emphasized that this is not the main benefit that the Deposit Scheme in general, and the Employee's Component in particular, are intended to attain. The Government Respondents define this in their response to the proportionality criterion in its narrow sense, the major benefit in the Deposit Scheme is the decrease in the scope of the integration of the infiltrators in Israel (section 17 in the main argument on behalf of the Government Respondents). According to the data presented above regarding the scope of departure of Infiltrator Workers from the country, it transpires that even if we could say that the deduction of the Employee's Component encourages voluntary departure, this is a benefit that is limited in scope. As noted above, the numerical data that were presented for the purpose of this matter are not conclusive and can be interpreted in different ways. Taking into consideration the decrease in the number of infiltrators that left the country since the Deposit Scheme entered into force, and the fact that the vast majority of the infiltrators with the deposit is questionable, I am of the opinion that we cannot point to a clear benefit of the Deposit Scheme to the extent that this is related to this purpose. The argument of the Government Respondents, namely that before considering the benefit produced from the Deposit Scheme, it is necessary to allow a proper period of time for the purpose of its application and for the accumulation of considerable sums in the deposits of the Infiltrator Workers (section 12 in the update notice on their behalf dated June 27, 2019) also proves that at this stage the benefit from the arrangement is still questionable. To this we should add that the deposit also includes the Employer's Component, when the employer has an incentive to encourage the voluntary departure, while the infringement of human rights caused by this component is significantly smaller compared to the Employee's Component. Therefore, I reach the conclusion that in anything related to the main purpose that the Deposit Scheme is intended to accomplish – the encouragement of departure from the country of infiltrators – the marginal benefit in the Employee's Component is not that significant.

43. On the other side there is the infringement of the right to property of the Infiltrator Workers. Allegedly, we could have argued that if the benefit from the Deposit Scheme is limited for the time being, this proves that the infringement of the rights of the Infiltrator Workers is also not that dramatic, and that the fact that most of them stay in Israel proves, as argued by the Government Respondents, that no undue pressure is put on the Infiltrator Workers to such degree that causes them to go to a place that poses a risk to their lives or their freedom. Indeed, the choice that the Infiltrator Workers made, namely, to continue and stay in Israel despite the existence of the Deposit Scheme probably proves that this is an option that is less drastic than other options that they can pursue. However, this choice does not render the infringement of their rights into a triviality. The existence of the Employee's

Component denies from the infiltrator the use 20% of his wages as long as he stays in the country, and the longer the period of his stay in the country is, the damage increases and reaches substantial amounts.

I also took into consideration the fact that the infiltrator can, at any given time, decide that he leaves the country and then he will receive the deposit amounts (on the condition that they were indeed deposited by his employer to his deposit). However, this does not lessen the damage caused to the infiltrator during his stay in the country. When coming to examine the intensity of the infringement of the right to property, it is necessary to assign weight to the nature of the asset that is the subject matter of the damage and the meaning it has in the life of its owner. In the case in question, the worker's wages, when one fifth of these wages is withheld for an unlimited period, is an asset whose importance cannot be overstated, and sometimes this is the only property of the Infiltrator Workers in Israel who, in general, are part of the most disadvantaged populations in Israel that have no access to the social support mechanisms in the country, and the Government Respondents also admit that they are exposed to exploitation (section 29 of the update notice of the Government Respondents dated November 28, 2018). From the time the wages of these Infiltrator Workers are sometimes their only source of subsistence, any damage to it might have a substantial effect on their life. It is for a good reason that the Knesset legal counsel noted, already during the first meetings that considered the bill, that the Deposit Scheme raises "constitutional difficulties" while emphasizing in particular the fact that this is a "reduction of 20% from their wages [of the Infiltrator Workers] when in any event their wages are not high from the start…" (minutes of the meeting of the Internal Affairs Committee dated December 2, 2014, p. 12).

And note well – the intensity of the infringement of the right to property is not uniform. The withholding of 20% of the wages of a person who earns NIS 5,000 is not the same as the withholding of 20% of the wages of a person who earns NIS 10,000. The diminishing marginal utility principle shows us that the value of the money for the former is higher compared to its value for the latter and, consequently, the damage caused in the first case is greater compared to the damage caused in the second case (see, *inter alia*, regarding the rule and the exceptions to the rule: Milton Friedman & L. J. Savage, The Utility Analysis of Choices Involving Risk, 56 J. POL. ECON. 279 (1948); CAP 4456/14 *Kelner v. The State of Israel*, para. 3 in the judgment of Honorable Judge N. Hendel (29.12.2015)). According to the data presented before us it transpires that the average wages of the infiltrators' population is approximately NIS 5,000 per month, and the average of the total wages, with the addition of overtime and before deduction of the deposit, totals approximately NIS 6,500 per month. These are amounts that are considerably lower than the average

monthly wages which is more than NIS 10,000 ("The gross average wages for salaried Israeli employees in the year 2019" a press release on behalf of the Central Bureau of Statistics dated March 4, 2020). More importantly, according to the updated data presented by the Government Respondents as of May 2019, almost 40% of the Infiltrator Workers (6,921 out of 17,787 Infiltrator Workers in respect of whom data were presented) earns amounts that are less than the monthly minimum wages – which is NIS 5,300 in accordance with the provisions of the Minimum Wage Law, and even less than NIS 5,000, before deduction of the Employee's Component. We can therefore estimate that the intensity of the damage to the wages of the Infiltrator Worker who earns such amounts is very high, even without responding to the affidavits that the Petitioners attached, that describe significant difficulties for the Infiltrator Workers in paying for food, housing and proper activities for their children, and even the practice of prostitution among women as a result of the deduction of the Employee's Component.

44. The prohibition "Thou shalt not oppress thy neighbour, nor rob him; the wages of a hired servant shall not abide with thee all night until the morning" also appears in the Bible (Leviticus 19, 13). The book of Deuteronomy elaborates on the reasons for this prohibition: "Thou shalt not oppress a hired servant that is poor and needy, whether he be of thy brethren, or of thy strangers that are in thy land within thy gates. In the same day thou shalt give him his hire, neither shall the sun go down upon it; for he is poor, and setteth his heart upon it: lest he cry against thee unto the LORD and it be sin in thee" (Deuteronomy 24, 14-15). Indeed, in the case in question this is not "delay of wages" in its ordinary sense since the employers are not responsible for withholding one fifth of the wages of the Infiltrator Workers, and it stems only from the legal provision that obliges them to act in the said manner. However, the underlying premise of these verses is that the salaried worker needs his wages immediately, and longs for it. Withholding – even if such withholding is temporary – of a significant part of the wages, and in particular from a disadvantaged worker, is therefore also in conflict with the biblical edict.

In his book Labor Laws in Hebrew Law (Volume One, 5729) in p. 345 et seq. Shillem Warhaftig elaborated on the reasons prohibiting the "withholding" of the worker's wages, and in particular an impoverished worker, as follows:

> "The reason for the prohibition on the withholding of the wages of a salaried worker is the poverty of such workers which is also the reason for hiring such a worker, and for which the worker expects to receive his wages…and the Ramban interpreted this as follows: '"because he is poor'

> same as other hired workers 'and he yearns for his wages' to buy food to enliven his spirit…and if you do not pay him at the time he finishes his work he will immediately go to his home…and will starve to death'…a vivid example of the hardships that befall workers who do not receive their wages on time is provided in Shmot Raba [31, 7]: "For a salaried worker it is written 'you shall pay him his wages when the day is due' for example when he used to walk with the donkey behind him, they sold him one sheaf and he holds it on his shoulder and the donkey follows the sheaf and hopes to eat it, so what did his master do? He tied the sheaf in a place which was high and beyond its reach, and they said unto him: 'you are evil for you ran this road and you did not give it to him' and the same also applies to a salaried worker who yearns for his wages all day and does not receive it and therefore it is written 'and he yearns for it.""

As regards workers who are subject matter of the prohibition, the Rambam (Rabbi Moshe Ben Maymon) wrote the following in the "Obligatory mitzvahs" 200:

> "And the 200th mitzvah is that we are obligated to pay to the salaried workers his wages on their due day and not later and he said "when the day comes you will pay him his wages"…and the sentences of this mitzvah were already clarified in full in the ninth part of [Bava] Mezia (110 – 113 A). Where it was clarified that this was obligatory for any salaried workers, whether a stranger and whether from Israel, an obligatory mitzvah to make timely payment."

These sources emphasize – then as well as now – the major role of wages in the life of the worker, irrespective of his status, and summarize the severe harm caused to the property of the Infiltrator Workers caused as a result of the Deposit Scheme.

45. Furthermore, the information that was provided during the proceeding in anything related to the implementation of the Deposit Scheme gives rise to an even more significant damage to the property of the Infiltrator Workers, since they can find out retroactively, at the time of their departure from the country, that their employer did not even deposit to the account the amounts he deducted from their wages. In 2019 the Population and Immigration Authority started operating an internet website in

English and in Hebrew, in which infiltrators can receive information about the amounts that were deposited for them as said, and this improves their ability to oversee, by themselves, the existence of deposits and act in the event of any deficiencies. And indeed, according to the affidavits that were attached on behalf of Petitioner 8, "Kav LaOved – Worker's Hotline" Association, it transpires that there is a substantial number of cases in which the workers find that the Employee's Component was not even transferred by the employer to the deposit (see, for example, the statements made in the affidavit of Ms. Noa Kauffman dated July 10, 2019). Petitioner 8 even contacted the Population and Immigration Authority regarding 2,573 infiltrators in respect of whom it was found that there was a difference between the deduction from their wages and the amounts that were actually deposited for them. This information is disturbing, especially when dealing with a population that in any event is exposed to exploitation and is having difficulties in protecting its rights. These negative circumstances further intensify in light of the updates provided by the Government Respondents regarding the enforcement actions that they applied both towards employers who did not deposit any deposit and towards employers who deducted the Employee's Component from his wages or did not transfer it to the deposit: until June 2019, more than two years after the arrangement entered into force, the Government settled for delivering notices on behalf of the Enforcement and Foreign Nationals Administration in the Population and Immigration Authority, informing the employers about their obligation to make the deposit and warning them that failure to act in the said manner might result in legal action. The Government Respondents further reported about inquiries and investigations that were conducted by the Regulation and Enforcement Administration in the Ministry of Labor against 71 employers with relation to 158 workers for whom the Employee's Component was not transferred to the deposit. These actions resulted in the delivery of an administrative warning to 31 employers and to the imposition of financial sanctions in a total amount of NIS 733,320 on 6 additional employers, The limited scope of these enforcement activities are mockery, to say the least, and from the time the State does not take sufficient action for the purpose of assuring the depositing of the funds in accordance with the law, it seems that for certain Infiltrator Workers the infringement of the right to property as a result of the deduction of the Employee's Component might become a permanent forfeiture and permanent withholding of these amounts.

46. Are there elements that mitigate the intensity of the infringement of the right to property in the case in question? Apparently, we could argue that the harm caused to the Infiltrator Workers is not that significant, since infiltrators whose status will be upgraded and who will receive a temporary stay visa (A/5) will receive the deposit amounts without leaving Israel, according to the Infiltrator Workers procedure. The

same also applies to asylum seekers whose application was approved and are entitled to receiving a stay permit in Israel according to Population and Immigration Authority Procedure 5.2.0012 "Procedure for handling asylum seekers in Israel" and as of this date they are entitled to the deposit amounts and the harm to their property ends. However, at present, this is a scenario which is mainly theoretical, in light of the prolongation of the procedures for the review of asylum applications that were submitted by many of the Infiltrator Workers and that were not processed yet. As seen in the notice of the Government Respondents dated June 27, 2019, as of May 14, 2019 there were 4,673 pending asylum applications that were submitted by Sudanese nationals, and 10,647 pending applications that were submitted by Eritrean nationals. The long period of time that was required for the purpose of processing these applications – not to say the "foot-dragging" that the State practices in these matters – leads to circumstances in which the asylum seekers who submitted these applications are "trapped in an ongoing and impossible situation of normative uncertainty about their status, including all difficult consequences stemming from their rights in connection therewith" (the Desta Case, para. 4 in my opinion). It therefore follows that the long period of time in which the asylum applications are pending, intensifies the infringement of the right to property of the Infiltrator Workers, which is caused as a result of the deduction of the Employee's Component. This will hold true, in the least, in anything related to the workers who submitted asylum applications and whose applications are found, if considered on their merit, as justified.

According to the position of the Government Respondents for the purpose of this matter we cannot reach a conclusion that a significant change in the rate of processing the applications for asylum is expected. And so, according to the statements made in the update notice on behalf of the Petitioners dated December 8, 2019, it transpires that the current policy of the Population and Immigration Authority is that there is no room to reach specific decisions in asylum applications that were submitted by infiltrators who are Sudanese nationals from the Darfur region, the Nuba Mountains and the Blue Nile. Therefore, in practice these applications are not processed at present. As regards asylum applications that were submitted by Eritrean nationals, the Authority formulated new guidelines with respect to the manner of their processing and announced in other proceeding that these guidelines would be applied both to the pending applications that were not decided yet, and to approximately 3,000 asylum applications that were rejected in the past and that were reported as closed applications in the proceeding in question. Therefore, in light of the information presented above it transpires that the population of the asylum seekers from Eritrea and Sudan whose applications are still pending is almost 20,000 persons, that constitute approximately two thirds of the population of infiltrators in Israel, and

as a result of the passing of time the infringement of their right to property only increases. It shall be further emphasized that despite the prolongation of the process of review of the asylum applications, the Government Respondents renowned the interim proposal that was presented during the hearing that was held on July 24, 2018, to exclude from the application of the arrangement the Infiltrator Workers who submitted an asylum application before the Deposit Scheme entered into force.

47. The Government Respondents are of the opinion that the Exemption Regulations that entered into force in November 2018 decrease the intensity of the infringement caused to the rights of the Infiltrator Workers. According to their line of reasoning, the Regulations strike a balance between the need to lower the Employee's Component to workers whose circumstances should be taken into consideration for humanitarian reasons, and protecting the effectiveness of the incentive that the legislator purported to create by the arrangement, that should be assigned weight at the time of considering the conformance of the Deposit Scheme to the terms of the third sub-criterion of proportionality. Eitan and the Residents join the position of the Government Respondents for the purpose of this matter and are of the opinion that the legislation of the Exemption Regulations completely eliminated the argued infringement of the constitutional rights.

Regulation 1 of the Exemption Regulations lists six categories, and in the event a Infiltrator Workers corresponds to these categories he will be entitled to some of the deposit by way of no-deduction a rate of 70% of the Employee's Component, in such manner that the amount that will be deducted and that will be transferred to the deposit will be 6%, similar to the rate of deposit to pension of any worker in the market:

> (1) A minor;
> (2) Whose age is over 60;
> (3) A woman;
> (4) The father of a minor who is under his sole care as a result of the medical condition of the minor's mother, or following the death of the mother, or in the event the mother does not stay in Israel, and he is not married to another, and in the event there is no other person known as his common law spouse;
> (5) Any person in respect of whom the border control officer was convinced that, as a result of his age or his health condition, including his mental health, failure to receive the deposit amounts before the date set out in

> section 1K4(a) of the Law might cause damage to his health as said, and there is no other way to prevent the said damage;
> (6) Any person in respect of whom Israel Police announced that there is alleged evidence against him indicating that an offense was committed pursuant to sections 375A or 377A(a) of the Penal Law 5737-1977 [Offenses regarding the keeping under conditions of slavery or human trafficking]."

I find acceptable the position of the Government Respondents, namely that these Regulations mitigate, to a certain degree, the damage caused to the Infiltrator Workers. Nevertheless, based on the data presented for the purpose of this matter, it seems that this mitigatory effect is limited in scope. First, the Regulations do not grant an exemption to a major group that suffers from a particularly serious infringement of its right to property – the group that earns less than the minimum wages or the workers who, as a result of the deduction of the Employee's Component, will receive wages that are actually lower than the minimum wages. Any person who is part of this group will be entitled to an exemption only if he is also part of one of the populations listed in the Exemption Regulations. Second, in anything related to the retroactive return of the deposit amounts to the populations that were excluded, then according to the data that was presented in the update notice of the Government Respondents dated June 27, 2019, it transpires that as of May 14, 2019 the rate of the Infiltrator Workers who filed a proper application and their application for a reimbursement was approved is low – 777 women out of 3,438 women are entitled to reimbursement by virtue of the Regulations (approximately 22%) and 56 Infiltrator Workers over the age of 60, out of 195 entitled workers (approximately 29%); 53 applications on behalf of victims of offenses of keeping under conditions of slavery and human trafficking; 3 applications on behalf of single parents of minors; 4 applications for medical reasons; and zero applications regarding minors. The meaning of this is that even practically there is a barrier that impedes the receipt of the amounts, and that also decreases the benefit in the Regulations. I therefore reach the conclusion that even though the Regulations mitigate the infringement caused by Employee's Component, their actual impact is not extensive.

48. The Government Respondents also argued that the infringement of the right to property concerned only the 14% that were beyond the deposit rate of each worker for pension. However, and as clarified above, we should not accept this argument since according to the provisions set forth in the Deposit Scheme, the Deposit Scheme is not intended to serve as a replacement for the worker's pension deposit,

however it adds to them. In any event, even if the Employee's Component had canceled the duty to provision payments by the workers to a pension fund, there is substance to the arguments of the Petitioners, namely that it is impossible to make a comparison between a deposit made to an account managed as a savings account in a bank and the pension rights granted to Israeli workers in return for the provision of the said 6%, and first and foremost the mere existence of pension insurance that is intended to assure the welfare of the worker on the day the worker will not be able to work. Therefore, damage to property is not just caused as a result of the 14% that is added to the deposit rate of each worker for pension, however for the full deduction at a rate of 20% as the Employee's Component.

49. Another argument that Eitan and the Residents make is that there are other provisions in the Israeli law that enable a deduction of up to 20% of the worker's wages, and therefore the deduction of the Employee's Component is proportionate and not exceptional. For the purpose of this matter Eitan and the Residents refer to the provisions of section 8(a) of the Wage Protection Law 5718-1958, section 111(a) of the Bankruptcy Ordinance [New Version] 5740-1980, and Regulation 382 of the Civil Procedure Regulations 5744-1984. What is common to these provisions is that they enable the attachment, transfer or the charge of the amounts paid as wages of a person and at significant rates, and that the part that cannot be attached is 80% of a person's wages at most. As part of the meetings that preceded the legislation of the arrangement in 2014 and its amendment in 2017, the representative on behalf of the Ministry of Justice also referred to part of these provisions of the law, and argued that in light of these provisions the deduction of 20% from the worker's wages is proportionate (see: minutes of the meeting of the Internal Affairs Committee dated December 3, 2014, pp. 36-37; minutes of the meeting of the Internal Affairs Committee dated November 21, 2016, p. 16). However, the arguments that were made for the purpose of this matter were general and did not address the existing difference between the arrangement subject matter of the Petition in question and the other arrangements. In particular, Eitan and the Residents did not refer to the fact that the underlying rationale of the other arrangements there was the aspiration to protect rights and interests of creditors against a debtor, i.e. they deal with striking a balance between conflicting and other property rights that are based on, *inter alia*, past commitments of the debtor. Given this significant difference, I do not think that the provisions set out in these arrangements affect an examination of the proportionality of the arrangement considered in this case.

50. Finally, I shall note that an examination of comparative law with respect to deductions or any other infringement of the rights to property of similar populations also stresses the extraordinary nature of the Deposit Scheme set out in the Israeli law.

This is because, while applying the necessary caution for the purpose of this matter, the differences between different regimes and different societies (for the purpose of this matter see the Desta Case, para. 101 in the judgment of Honorable President M. Naor; the Eitan Case, para. 71 in the judgment of Judge U. Vogelman), and as a result of a specific difficulty stemming from the fact that in most legal systems that were considered there is a distinction between illegal works and legal workers, and there is no category of "ignored" workers according to the undesirable state of affairs in our jurisdiction.

In general, the states that were part of this survey allow withholding of part of the wages of the asylum seeker only for the purpose of paying for essential services that the asylum seeker received from the state. In that manner, for example, the EU reception directive sets out the standards for the reception of international asylum seekers in the EU member states and obliges the states to provide a basket of essential services for the asylum seeker that include, *inter alia*, health services, access to the education system and assurance of basic living conditions (see: Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on Laying Down Standards for the Reception of Applicants for International Protection (recast), art. 14-19, 2013 O.J. (L 180) 96, 104-106 (hereinafter: the "Directive")). In this framework the Directive allows the member states to stipulate the performance of such services on the participation of the asylum seekers in the cost of the performance of the services, to the extent that he has sufficient resources for the purpose of this matter. In addition, the Directive allows to demand reimbursement of expenses from the asylum seeker in the event it was found, retroactively, that he had sufficient resources for the purpose of covering these expenses (Article 17(3)-(4) of the Directive).

Some of the EU member states indeed chose to legislate laws that impose on asylum seekers whose wages exceed a certain level the duty to participate in the financing of the expenses of their stay in the country (see, for example: Belgium (Art. 35/1 and 35/2 Loi sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers of Jan. 12, 2007, Moniteur Belge, May 7, 2007, 24027); Ireland (Reception Conditions Regulations 2018 (SI 230/2018); France (Article R744-10 Code de l'entrée et du séjour des étrangers et du droit d'asile du 12 décembre 2019); Germany (§7 Asylbewerberleistungsgesetz in der Fassung der Bekanntmachung vom 5. August 1997 BGBl. I S. 2022, last amended by Artikel 38 des Gesetzes vom 20. November 2019 BGBl. I S. 1626) (hereinafter: "AsylbLG"); and the Netherlands (Article 20 Regeling verstrekking asielzoekers en andere categorieën vreemdelingen 2005)). Certain states even allow the confiscation of property of asylum seekers for the purpose of covering the expenses of their stay in the country (see, for example

the customary practice in Germany (§7(4) AsylbLG); and see the exclusions in sub-section (2) ibid)).

However, as opposed to the Deposit Scheme in the case in question, the underlying foundation of these laws is the aspiration of the said states to recover part of the amounts they paid in kind for the purpose of assuring the wellbeing of asylum seekers in areas such as health, housing and education. This is not the underlying purpose of the Deposit Scheme, and this stresses the extraordinary nature of the Israeli arrangement, even though such a deviation, in and of itself, does not lead to the conclusion that the Amending Law is not constitutional.

51. In conclusion, we should say that in general the use of financial incentives constitutes a legitimate means to implement immigration policy, however the means that was selected in the case in question – withholding of one fifth of the worker's wages until the time the worker leaves Israel – causes clear, concrete and significant infringement to the right to property of the Infiltrator Worker, while the benefit that stems from this action is limited in scope.

Therefore, there is no other alternative but to reach the conclusion that the Employee's Component fails to satisfy the third sub-criterion of proportionality, and therefore it is unconstitutional.

The Employee's Component – The relief

52. From the time we found that the Employee's Component set out in the Deposit Scheme is unconstitutional in light of its disproportionate infringement of the right to property, we have to consider the relief that should be granted for the purpose of curing the said unconstitutional condition. In light of the circumstances of the case in question, we will see that the Employee's Component can be separated from the other components of the Deposit Scheme and therefore it is possible to grant a relief of partial voidness (the "blue pencil" doctrine or "reading out"), while severing the unconstitutional parts of the statute from its other parts. A condition for granting such a relief is that this is possible "taking into consideration the purpose and the texture of the law" (HCJ 781/15 *Arad-Pinkas v. The Committee for Approval of Agreements to Carry Fetuses in accordance with the Fetuses Law (Approval of Agreement and Status of the Newborn), 5756-1996*, para. 36 in my opinion (27.2.2020)). Without the Employee's Component, the deposit for Infiltrator Workers will be based on the Employer's Component only, together with an administrative deduction mechanism according to the date the Infiltrator Worker leaves Israel (similar to the mechanism that is already implemented at present for foreign workers other than infiltrators within the framework of the Foreign Workers Regulations, when the legality of the

said mechanism lies beyond the scope of this Petition). Such an arrangement will allow to attain the primary goal in the Deposit Scheme – the creation of a positive financial incentive for the departure of infiltrators from Israel, albeit to a lesser scope, without causing such serious damage to the property of the Infiltrator Workers.

Therefore, I suggest that we order the voidness of the Employee's Component, and that the declaration regarding the voidness will enter into force forthwith, in the sense that as of the date of the judgment the Employee's Component will no longer be deducted from the wages of Infiltrator Workers. I will further suggest that with respect to the amounts that accrued in the deposit until the date of giving the judgment in the proceeding in question, we will state that Respondent 5 will return to the Infiltrator Workers the Employee's Component from the amounts deposited for them, in 30 days, with the addition of all the amounts that accumulated in the deposit and that stem from the Employee's Component (with deduction of tax in accordance with the provisions of the law).

The Administrative Deduction Component

53. Section 1K4 of the Foreign Workers Law regulates the entitlement of the Infiltrator Worker who left Israel not as part of a temporary departure to receive the amounts that accumulated in his favor in the deposit. This section states that at the time of his departure the Infiltrator Worker will be entitled to 67% of the amounts in the deposit and the profits accumulated therein, with deduction of management fees, commissions and tax in accordance with the law. The entitlement of the Infiltrator Worker to the balance of the deposit – 33% - is conditional on his departure from the country shortly after the expiration of the period of stay applicable to him, and that was defined in section 1J2 of the Foreign Workers Law as the "date in which he is obligated to leave Israel as stated in a peremptory judgment or in a notice from the Minister of Interior or the Director of the Population and Immigration Authority in the Ministry of Interior." To the extent that the Infiltrator Worker leaves the country no later than six months as of the end of the staying period, he will be entitled to the balance of the amounts with deduction of the expenses of his deportation; the deduction of the "administrative component" that increases according to the period of time that passed as of the end of the stay period and until the actual departure date; and lawful deduction of tax for the remaining amount. Sections 1K4(b) and (c) of the Foreign Workers Law further state that the Director of Permits in the Ministry of Interior or anyone acting on his behalf are authorized to reduce the staying period that will be held against the infiltrator and if it was found that the infiltrator cannot leave Israel until the end of the period of his stay, or that his failure to leave was done in good faith as a result of a mistake, provided that the application of the Infiltrator

Workers is granted before the period of 18 months as of the end of the stay period lapsed.

54. The Petitioners argue that the Administrative Deduction Component also causes disproportionate infringement to the constitutional right to property, subsistence with dignity and equality. I shall further note that the Petitioners did not substantiate the infringement to the right to live in dignity and the right to equality caused as a result of the Administrative Deduction Component in accordance with the criteria set out in the law. As regards the right to equality, even if the argument of the Petitioners regarding discrimination is granted – a matter that is questionable in light of the existence of an administrative deduction component also in the Foreign Workers Regulations with respect to workers other than the infiltrators – then there is significant difficulty in arguing that measures that are intended to enforce the departure date from the country that was set out for the worker (and that apply, as said, also to part of the foreign workers other than infiltrators) amount to infringement of equality that is tightly related to human dignity (Movement for Quality Government in Israel Case, p. 687). In addition, the only thing that was stated in connection with the infringement of the right to live in dignity caused by this component is that "these are social rights, when according to the legislator's approach these rights are intended to assure a minimum level of subsistence. Therefore, there is high probability, even according to the line of reasoning of the Respondents themselves, that the deduction of the fines from these rights will also infringe the right to live in dignity" (section 100 in the main argument of the Petitioners). This does not lift the burden imposed on the party seeking the invalidation of a law to prove that the law infringes a constitutional right (HCJ 10662/04 *Hassan v. National Insurance Institute*, P.D. 65(1) 782, 824 (2012)).

As regards the right to property, the Petitioners argue that from the time amounts were deposited in the deposit in favor of the Infiltrator Worker, even if these amounts stem from the Employer's Component, it is possible to consider these amounts as the property of the Infiltrator Worker that is under the constitutional right to property of the Infiltrator Worker. This is especially true in light of the fact that the Employer's Component actually replaces the social-benefit payments that the employer is required to deposit for the Infiltrator Worker. Therefore, the deduction of an increasing rate from the deposit amounts, while completely withholding such amounts constitutes, according to their contention, infringement of the constitutional right to property. For the sake of discussion, I will operate under the assumption that the right to property is indeed infringed in the case in question however, as stated hereunder, even if there is infringement of this right in such circumstances, it satisfies the conditions set out in the limitation clause.

55. The purpose of encouraging the departure of the infiltrator from the country at the end of the staying period that was set out in the case in question underlies the Administrative Deduction Component. This purpose indeed stems from the first purpose of the Deposit Scheme in general – that is related to the encouragement of departure of the Infiltrator Workers from the country – but as opposed to this purpose it concentrates on assuring the departure of the Infiltrator Worker from Israel on the specific date set out for that worker in the law. This is a legitimate purpose. It reflects the principle of sovereignty of the state to lay down an immigration policy, and in this regard to decide who will stay in its territory and until when his stay in the territory will be allowed, including in respect to "illegal immigrants, assuming that they were not recognized as refugees" (Adam Case, pp. 793-794). Even the Petitioners acknowledge the fact that this is a legitimate purpose (para. 102 in the main argument on their behalf). Under these circumstances, it is necessary to continue and examine whether the infringement stemming from the Administrative Deduction Component satisfies the conditions of proportionality.

56. The Petitioners are of the opinion that the entire sub-criteria of the proportionality are not fulfilled in this context. According to the line of reasoning applied by the Petitioners, it is doubtful whether the Administrative Deduction Component meets the criterion of the rational connection, since even if this is a means that will assist in advancing the purpose regarding the assurance of the departure of the infiltrator at the end of the staying period set out for the infiltrator, then at the same time it will have a negative effect on other purposes of the Deposit Scheme – assuring the social rights of the Infiltrator Worker and creating a proper "starting point" for their lives outside Israel. I am of the opinion that the Administrative Deduction Component satisfies the rational connection criterion, since this creates a clear incentive to leave the country upon expiration of the staying period, and the arguments of the Petitioners regarding the negative effect on the other purposes of the arrangement are immaterial Regulation the mere existence of a rational connection between the Administrative Deduction Component and the main purpose that it is intended to attain.

57. As regards the second sub-criterion that concerns the least drastic means, the Petitioners argue that the Administrative Deduction Component is not necessary, since in any event there are a number of means, economic and other, that can attain its underlying purpose. For the purpose of this matter the Petitioners refer to the arrest and deportation authorities that can be exercised in the case of those who stay in Israel without a permit and to the voluntary departure grant and the Employer's Component in the deposit. The Government Respondents also acknowledge the efficiency of the other means but argue that these are not means whose degree of

effectiveness is identical, and that "it is important to apply a number of means at the same time" for the purpose of assuring the departure of the infiltrator from the country. I find acceptable this argument of the Government Respondents. The efficiency in the Administrative Deduction Component is obvious, since it incentivizes the Infiltrator Worker to act in person for the purpose of his departure, as opposed to actions that the State is required to take for the purpose of this matter. In addition, some of the means that the Petitioners mentioned are offensive, in and of themselves, and it is possible that as a result of the existence of the Administrative Deduction Component it will be possible to avoid the infringement of the rights associated with their application. Therefore, it is necessary to state that the Administrative Deduction Component also meets the second criterion of proportionality.

58. We now reach the third sub-criterion of proportionality, the criterion of proportionality in its narrow sense. Does the Administrative Deduction Component indeed maintain a proper relationship between the benefit that the public will have from it and the harm caused as a result of its application? The Petitioners are of the opinion that the answer to this question is in the negative. According to the Petitioners, the marginal benefit that lies in the component disappears in light of the damage it causes, damage that is manifested in the withholding of considerable amounts of money from the Infiltrator Workers, and that also defeats the other purposes in respect of which it was argued that they underlie the Deposit Scheme as a whole.

The benefit in the deposit component is clear – it incentivizes the Infiltrator Worker to leave the country shortly after the staying period that was set for him, thereby preventing the continuation of his integration in Israel, and in the event he fails to act in the said manner, he will not receive part of the deposit. The marginal benefit of this means compared to the mere existence of the Employer's Component without the deduction component is also obvious and significant – the Employer's Component incentivizes the departure of the Infiltrator Worker from Israel but not on a clear date, since but for the Administrative Deduction Component what difference does it make for the Infiltrator Worker if he leaves now or in one year?

59. It seems that the infringement of the right to property is not that substantial compared to this benefit under the circumstances of the case, for a number of reasons, some of which also depend on the cancellation of the Employee's Component in the Deposit Scheme. First, we should keep in mind that the Administrative Deduction Component applies to 33% of the amounts in the deposit only. In the present version of the arrangement, shortly before the filing of the Petition, this is an amount at a rate

of 11.88% of the Determining Wages of the worker, which consists mostly of the Employer's Component (16% of the Determining Wages). Nevertheless, from the time I suggested to cancel the Employee's Component in the deposit, as stated above, the meaning of this is that the Administrative Deduction Component applies to one third of the Employer's Component only, i.e. to amounts at a maximum rate of 5.28% of the Determining Wages of the Infiltrator Worker while the balance of the Employer's Component – 10.72% of his Determining Wages – will be transferred to the Infiltrator Worker in any event. In fact, as a result of the gradual application of the Administrative Deduction Component in the Foreign Workers Law, only a delay of five months and above, and for which approximately 4.22% (in the event of a delay of more than five months up to six months) to 5.28% (in the event of a delay of more than six months) of the Determining Wages will be deducted, will result in circumstances in which the total amount of the amounts that the Infiltrator Worker will receive at the time of his departure from the country will be less than the rate that any employer is obligated to deposit for his workers for benefits and severance pay by virtue of the extension order (12.5%). As you may recall, the employer transfers these social-benefit payments to a deposit for Infiltrator Workers pursuant to section 1K4(f)(1) of the Foreign Workers Law. In other words, the Administrative Deduction Component functions both as a "carrot" and as a "stick." The "carrot" allows the Infiltrator Worker to receive to his possession an amount of deposit whose rate is even greater than the amount of the deposits made by the employers to the other workers in the Israeli market, if he leaves Israel up to five months after the end of the staying period set for him. The "stick" somewhat lowers this amount, if the worker decides to leave Israel afterwards. Consequently, the infringement of the right to property caused as a result of such circumstances is not extensive, and I am of the opinion that the benefit in this mechanism is commensurate with this infringement.

Second, we shall remind that in 2016 the Foreign Workers Regulations were legislated and imposed the obligation to make a deposit also to foreign workers with a work permit in different sectors in the Israeli market. The scheme includes an administrative deduction mechanism from the deposit, according to which a foreign worker who did not leave the country after six months as of the end of the staying period will not be entitled to any amount out of the deposit amounts that the employer deposited for him. This is as opposed to an Infiltrator Worker who will not be entitled to one half of the deposit amounts, in similar circumstances. In this sense, and without stating my opinion regarding the legality of the Administrative Deduction Component in the Foreign Workers Regulations, it is clear that after the declaration about the voidness of the Employee's Component as a result of which the Infiltrator Worker receives a larger part of the Employer's Component irrespective of his departure date, the harm caused as a result of the Administrative Deduction

Component in the arrangement subject matter of the Petition in question is more moderate and more proportionate. A third reason explaining why the infringement of the Administrative Deduction Component of the rights is less extensive lies in the discretion granted to the officer on behalf of the Ministry of Interior not to hold part of the staying period against the Infiltrator Worker, in the event it is found that his failure to leave the country by the end of the staying period was done by mistake and in good faith, or in the event he is unable to leave the country. In other words, the provisions of the scheme lay down a specific mechanism of exclusions that also decreases from the harm caused to it. Fourth, the Government Respondents stated in the Statement of Reply on their behalf that past experience proves that the Population and Immigration Authority announced a reasonable time in advance (an preparation period of 60 days) regarding the departure date that was set for different infiltrators (para. 51 in the Statement of Reply on behalf of the Government Respondents). The meaning of this is that even in the event that the authority will conduct in a similar manner in the future – and it is presumed that it will – the Infiltrator Worker will have a period of time of three months before the administrative deduction mechanism starts its action (60 preparation days plus one month in which the deduction rate is 0% according to the Second Schedule of the Foreign Workers Law). This period of time, in which no amounts will be deducted from the deposit, also lessens the impact of infringement caused by it. The conclusion from all of the above is that the Administrative Deduction Component has concrete benefits while the damage that is caused to the right to property is fairly limited. Therefore, this component also passes the third sub-criterion of proportionality.

60. In conclusion – to the extent that the Administrative Deduction Component infringes the right to property, then this infringement satisfies the conditions set out in the limitation clause, since it is intended or a legitimate purpose and it satisfies all three sub-criteria of the condition of proportionality. Therefore, the court has no grounds to order the invalidation of this legal provision on the grounds of its unconstitutionality.

    Therefore, I suggest dismissing the relief that was sought with respect to the Administrative Deduction Component.

Conclusion

61. This Petition is another link in a series of petitions that this court is required to address and it concerns the manner that the State of Israel handles the difficulties that arose as a result of the phenomenon of the infiltrators who stay in its territory. As opposed to other petitions, the arrangement that is at the center of this Petition is not related to the deprivation of freedom of the Infiltrator Workers, but to the economic

means that the State decided to apply. However, it is also clear that such means may cause severe infringement to constitutional rights and the same also applies to the case in question with respect to one of the components of the arrangement – the Employee's Component. I am of the opinion that this conclusion is valid irrespective of the state of emergency the country is in as a result of the outbreak of the novel Coronavirus. However, this conclusion is further reaffirmed in light of the economic ramifications of this condition and their effect on the entire population, and especially on disadvantaged populations such as the Infiltrator Workers. Therefore, if my opinion is accepted, we should proclaim the voidness of the Employee's Component in the Deposit Scheme, forthwith, as stated in paragraph 51 above. There are no constitutional grounds justifying the intervention of this court with respect to the other components of the Deposit Scheme.

President

Judge Y. Amit:

1. I concur with the judgment of my colleague, Honorable President Judge E. Chayut, namely that the Employee's Component, pursuant to section 4 of the Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel (Legislative Amendments and Temporary Provisions) 5775-2014 (hereinafter: the "Law"), does not meet the third sub-criterion of the condition of proportionality. I also agree with her conclusion, namely that the deduction of the Administrative Deduction Component is made for a legitimate purpose and meets the criterion of proportionality.

2. In light of the conclusion that my colleague reached, my colleague left for future discussion the question whether the deduction of the Employee's Component in the law is made for a legitimate purpose. To the best of my knowledge, in all cases in which this court voided a law, it was not stated that its purpose was not legitimate. The President actually pursued the legal precedents that shifted the center of the constitutional scrutiny almost exclusively to the demand of proportionality (for a criticism about this approach see Barak Medina and Ilan Saban "Human rights and assuming risks: on democracy, 'ethnic labeling' and the criteria of the limitation clause (following the judgment given in the Law of Citizenship and the Entry to Israel Law)" Mishpatim (Hebrew University Law Review) 39 47, 88-89 (2009); Barak Medina "On 'infringement' of a constitutional right and a 'legitimate purpose'" Law and Business, O 281, 314 (2012) (hereinafter: "Barak Medina"), where the author proposes that the third sub-criterion of the demand for proportionality will become a residual framework for handling extraordinary and exceptional cases).

The President proved clearly in her judgment that the means that was applied with respect to the "Employee's Component" in the Deposit Scheme was disproportionate. I fully concur with this conclusion. I am of the opinion that the disproportionate means in the case in question also reflects back on the previous stages of the constitutional analysis.

3. The theory of stages in constitutional analysis is well-known:

Infringement: does the arrangement under consideration infringe a constitutional right? A positive answer will lead us to proportionality in the flowchart.

Proportionality (limitation clause);

(-) In the law or by operation of the law by virtue of an express authorization in the law;
(-) The law is commensurate with the values of the State of Israel (as a Jewish and democratic state);
(-) The law is for a legitimate purpose;
(-) The infringement of the right is to such degree that is not greater than required (three sub-criteria: rational connection, necessity and proportionality, in its narrow sense).

To the extent that the law fails to pass these four stages, we proceed to the relief.

The relief: what relief should be applied for the purpose of curing the breach.

According to the theory of stages in the constitutional analysis, the demand for a "legitimate purpose" is a preliminary and necessary condition before reaching the stage of the demand of proportionality and its three sub-criteria. I am of the opinion that the stages are not completely separated from each other. Each stage can project to the previous or the following stage, and therefore there is a relationship between the demand for a "legitimate purpose" and the demand for proportionality.

Deduction of the Employee's Component in the Law presented before us is a far-reaching action, which amounts to plunder from the poor and the gentile. I am of the opinion that it is about time, ever since the legislation of the Basic Law – Human Dignity and Liberty in 1992, to void that part of the Law already in the first stages of the limitation clause – as a law that is not commensurate with the values of the State of Israel and as a law that is made not for a legitimate purpose. And I shall explain.

4. According to the line of reasoning of the State, there are four declared purposes that underlie the Law: the first – the creation of a positive economic incentive for the voluntary departure of infiltrators from Israel, when this is possible, thereby preventing their integration in Israel; the second – assurance of the social rights of the Infiltrator Workers; the third – decreasing the harm to Israeli workers; and the fourth – assuring a proper start for the Infiltrator Workers after their departure from Israel.

The second and the third purposes are irrelevant to the deduction of the Employee's Component. The fourth purpose is a paternalistic purpose that is allegedly aimed at assisting the infiltrators at the time they leave the country. I do not see any point to elaborate on this purpose, since both the State and all parties agree that the first purpose is the main purpose.

In the Desta Case (HCJ 8665/14 *Desta v. The Knesset* (11.8.2015)) I expressed the following concern:

> "Whether, behind the declared purpose of prevention of integration in the city centers there is a purpose of 'hassling' the infiltrators and breaking their spirit, as argued by the Petitioners. Therefore, I will join the questions that Judge Vogelman presented in his discussion of the purpose of the encouragement of voluntary departure, with respect to the difference between the declared purpose and the hidden purpose of the Law" (ibid, para. 5 in my judgment)."

The deduction of the Employee's Component in accordance with the law eliminates the doubts and the question marks that arose in the other times in which we were required to address the measures that the State applied while limiting the freedom and the freedom of movement of the infiltrators. This time the infringement is the infringement of the right to property, a flagrant and direct harm to the financial position and the income of the Infiltrator Workers, and maybe even infringement of their right to live in dignity. I am of the opinion that it is necessary to pierce the veil concealing the declared purpose of the "encouragement of voluntary departure" and expose the undeclared purpose that is aimed at making the lives of the infiltrators miserable to such degree that they will say "I want to leave," similar to the husband who refuses to divorce his wife until he is properly penalized and then his "true" will is revealed and he acquiesces and agrees to divorce.

5. The President said in her judgment that more than 90% of the infiltrators arrived from Eritrea and from Sudan. We cannot apply deportation means to these populations on the grounds of the principal of non-refoulment to which the State is committed, and as long as they stay in Israel the State conducts towards them according to a principle of "non-temporary deportation." This court did not deny the outline that was laid down by the State, namely, to transfer infiltrators to a third-party country even against their will (as seen in HCJ 679/18 Kook Avivi v. The Prime Minister and the Minister of Foreign Affairs (10.4.2018)). However, a third-party country is nowhere to be found. The infiltrators themselves would have probably preferred to arrive to other Western countries, in which the treatment of asylum seekers is better than the treatment that they receive in Israel, and this was indeed done by most of the asylum seekers who left the country. The Infiltrator Workers in Israel do not act in the said manner, for the reason that even these countries are not too eager to receive to their territory additional asylum seekers, and they put barriers on the way of those seeking asylum in their territory. The law comes to encourage and urgent the infiltrators to leave Israel, however there is no clear "recipient" of such a request.

   In HCJ 7146/12 *Adam v. Israel Knesset*, P.D. 64(2) 717 (2013) I expressed my opinion that the "constitutional scrutiny and the leveling of the balances is not made in a vacuum, in a quasi-judicial laboratory, in which the parties consider, strike a balance and calculate the concentration of the solutions with respect to the infringement of the rights and freedoms vis-à-vis the weight and the volume of different critical interests." Within the framework of the legal scrutiny, it is also necessary to consider the data in the field and, as already shown by the Honorable President in her judgment, there is a "certain doubt regarding the existence of a rational connection between the Deposit Scheme and the encouragement of the departure from the country." The constitutional infringement, which is clear and immediate, is far from producing the benefit that the legislator intended to accomplish. When there is a high level of uncertainty regarding the necessity of the infringement of the constitutional right for the purpose of attaining the declared purposes of the law, this affects the question whether the law is made for a legitimate purpose (Barak Medina, p. 313).

6. The declared purpose is legitimate and proper, and this court already acknowledged the fact that as part of its immigration policy the State is entitled to encourage the voluntary departure of infiltrators and even deport them to a third country, even without their consent (HCJ 5190/94 *Al Tai v. Minister of Interior*, P.D. 49(3) 843, 850 (1995); Desta Case, para. 82 in the judgment of President Naor; APA 8101/15 *Zegata v. Minister of Interior* (28.8.2017)). All of this is part of the general immigration policy that is a matter that the State should address, including the interest or the value of the preservation of the Jewish majority in the State (which is irrelevant to the case in question, in light of the low number of infiltrators-immigrants, and in

light of the assumption that when the conditions for this are fulfilled, they are supposed to return to their country and to their homeland).

A party may argue that when the declared purpose is legitimate, it is necessary to examine the means that were applied for the purpose of attaining it within the framework of the proportionality component, in the manner that the President did in her judgment. I do not hold the same view. I am of the opinion that, in light of the disproportionate means that the legislator applied, it is sometimes possible to identify the inappropriate purpose.

For example, let us assume that within the framework of the amendment of the Maintenance of Cleanliness Law 5744-1984, whose name attests to its proper and lofty purpose, the legislator will state that an infiltrator who discards waste in public will be sentenced to forty floggings in public. The analytical "flowchart" for the purpose of examining the legality of the law might lead us to the conclusion that the purpose of maintenance of cleanliness is indeed legitimate, however the means is disproportionate according to the third criterion, since the level of its benefit (deterrence against littering in public) does not justify its cost (bodily impairment). However, our basic intuition will guide us and indicate that the harsh means of flogging in public is illegitimate, in and of itself, which reflects back on the "legitimate purpose" and leads to the conclusion that even the purpose is illegitimate – the supreme purpose of maintenance of cleanliness does not justify violation of the constitutional right to the integrity of the body. In this manner, we set a "red line" that denies, from the start, the legitimacy of a scheme that causes serious and intense harm to a constitutional right (Barak Medina, 311).

In the case in question, the deduction of the Employee's Component, in addition to the Employer's Component, is a harsh and offensive means that is intended to put pressure on the "voluntary" departure from the country (cf. with the words of Honorable Judge Vogelman in HCJ 7385/13 *Eitan – Israeli Immigration Policy v. The Government of Israel*, paras. 110-113 (22.9.2014) and in the Desta Case, in paras. 24-28). The means attests to the hidden purpose, which is breaking the spirit of the infiltrators in an illegitimate way of putting pressure so that they leave the country "voluntarily" even though there is no safe country that expressed its wish to accept them. This purpose is inappropriate, "taking into consideration the fact that it allegedly undermines the non-refoulement principle that prohibits the deportation of a person to a country in which there is a risk to his freedom or his life" (words of President Naor in the Desta Case, para. 81).

7. At this point, and without laying down principles, I will present the argument that there is a reciprocal relationship between the disproportionate means and the purpose.

In HCJ 7052/03 *Adalah – The Legal Center for the Rights of the Arab Minority in Israel v. The Minister of Interior*, P.D. 61(2) 202 (2006) (hereinafter: the "Adalah Case") the court stated the following:

> "When the infringement is the infringement of a major right – such as the violation of human dignity – the purpose of the infringing law will justify the infringement if the purpose purports to attain a substantial social goal or a pressing social need" (ibid, para. 63 in the judgment of Honorable President Barak).

According to this approach, an examination of the content of the purpose is insufficient, and it is necessary to consider whether the advancement of the purpose (the encouragement of voluntarily departure) by way of infringement of a constitutional right (the right to property) is necessary and essential (Aharon Barak Proportionality in Law – The infringement of the constitutional right and its limitations, 353 (2010)). In the case in question, it is highly doubtful, to say the least, whether the purpose of encouraging the departure is so pressing and urgent to such degree that justifies the deprivation of the infiltrators' subsistence. My colleague the President mentioned, in para. 38 of its judgment, the document of understandings that was signed with the United Nations High Commissioner for Refugees (UNHCR) on April 2, 2018, according to which the status of approximately half of the infiltrators would be regulated in different countries outside Israel, while the rest infiltrators would receive status in the State of Israel. The particulars of this agreement – that was rescinded a number of hours after the declaration about its existence was published – are unknown to us, however in the absence of denial from the State regarding the mere existence of this agreement, the rescission of the Agreement can weaken the argument regarding the pressing need to encourage the departure.

8. The State wishes to encourage the settlement in the Galilee and the Negev. However, it is hard to think that the legislator will order a deduction of 20% of the wages of the residents of Givatayim and Ramat Gan, for the purpose of "encouraging" them to leave to the Galilee or the Negev. And still, according to the law we are considering in this case, we withhold one fifth of the wages of the Infiltrator Worker, when even the State agrees that he is part of the most disadvantaged populations in Israeli society. The major if not the only asset that the worker has is the monthly wages he

receives from his employer. My colleague, the Honorable President, provided an apt description of the meaning of these things, when she said that the delay of wages "is made for an unknown period of time, whose end date is unknown, and it might continue for many years thereby bringing near the withholding of the funds to actual confiscation of the funds." This disproportionate means is very close to stealing the livelihood from those who have no official visa, those who perform their work "blindly," those who do not have even the minimal social rights, those whose accessibility to the welfare and to health services is limited. We heard an argument that the decrease in the wages resulted, inter alia, in cutbacks in the purchase of food and medications, discontinuation of the payments for health insurance, movement to apartments that are more crowded and that have more occupants, leaving children alone or in the "children's warehouses" in southern Tel Aviv for many hours for the purpose of working overtime or working in an additional work for the purpose of making up for the income that was lost.

In short, the application of a disproportionate means, by way of taking 20% of the wages of a population that is disadvantaged from the start, could lead to conclusion that the underlying purpose of the law is illegitimate. The disproportionate means that was applied reveals the illegitimate purpose of the Law.

9. I am willing to assume that the purpose of the law should not be "pressing" or "urgent" and that there are different purposes that are important, in and of themselves, even if their attainment or preservation are not urgent or pressing. However, for the purpose of considering the question whether the infringing law is made for a legitimate purpose, there is a kind of a "parallelogram of forces" between the public interest and the violation of the basic right. It is necessary to examine whether the purpose of the law, "is intended to attain important social goals whose attainment is commensurate with the nature of the society as protecting human rights" (words of Honorable Judge Or in HCJ 1030/99 *Oron v. Chairman of the Knesset*, P.D. 56(3) 640, 662 (2002)); and an "examination of the legitimate purpose is made in light of the background of the infringement of the human right that is considered in the case" (HCJ 6304/09 *Lahav - The Umbrella Organization for Independent Businesspeople v. The Attorney General*, para. 107 (2.9.2010)).

> "The question whether a purpose is legitimate is considered, *inter alia*, in two realms. In the first realm, a purpose is legitimate if it maintains the proper balance between the public interest and human rights [...] <u>in the second</u> realm, the purpose is legitimate whether the need to attain it is important for the values of society and the State. The degree

> of importance of this requirement, that is necessary for the purpose of justifying a violation that might vary according to the essence of the infringed right. When the infringement is of a major right, a legitimate purpose is a purpose that purports to attain a material social goal, or a pressing social need" (HCJ 951/06 *Stein v. General Commissioner Israel Police*, para. 18 in the judgment of President Barak (30.4.2006)).
>
> "A purpose is legitimate if it wishes to strike a balance between the interests of the public and the infringement of individual rights. [...] when debating the question whether a purpose is legitimate, it is necessary to consider two aspects: the first aspect concerns the content of the purpose. A purpose is legitimate if it constitutes a social goal that is sensitive to human rights or if it is intended to attain social goals, such as a welfare policy or protection of a public interest; the second interest concerns the degree in which it is necessary to attain the purpose. A purpose is legitimate if the need to attain it is important for the values of the society and the State" (words of Honorable President Barak in HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd. v. Supervision Department in the Ministry of Labor and Welfare*, P.D. 60(1) 38, 56 (2005), emphasis at source – Y.A.).

Therefore, the purpose of the law is not considered separately from the infringement of the constitutional right and the intensity of the infringement. The deeper the infringement of the right is, the more necessary it is to have a social purpose that is important and more essential for the purpose of justifying it. Indeed, the harm in the case in question is "only" to the pocket of the workers, and without even making a distinction between them – such as the amount that they earn, whether they also provide for a family, how many years they are in the country, and whether they submitted an application for an asylum that was not reviewed yet. The declared purpose does not justify the disproportionate means that was applied – taking directly the amount that the disadvantaged workers earn, and withholding the amount that was taken for an unknown period of time, since, as noted by the State, the purpose is to encourage departure, when this is possible (the explanatory notes of the bill. I shall note that this changed the deduction of the Employee's Component from the Administrative Deduction Component that anticipates a specific departure date that

was set for the worker). This means infringes a fundamental right, in a manner that is illegitimate in a Jewish and democratic state, and at this point I will take another step backwards in the constitutional scrutiny.

10. There is a connection between the demand that the law will be commensurate with the values of the State of Israel as a Jewish and democratic state, and the purpose of the law:

> "The purpose of a law that is in violation of human dignity is legitimate if it is intended to attain social goals that are commensurate with the values of the State in general, and that are sensitive to the place of human rights in the overall social scheme" (Adalah Case, para. 62 in the judgment of President Barak, emphasis added – Y.A.

Section 1A of the Basic Law – Human Dignity and Liberty states the following:

> "The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law, the values of the State of Israel as a Jewish and democratic state."

The limitation clause in section 8 of the Basic Law states the following:

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

"By a law befitting the values of the State of Israel" and all interpret and add as a trivial thing into the text the words "**as a Jewish and democratic state**." And now I will dare, and I will reach the conclusion that the law is not befitting the values of the State of Israel as a democratic state, buy it also, and especially, not befitting a Jewish state.

11. "And a stranger shalt thou not wrong, neither shalt thou oppress him; for ye were strangers in the land of Egypt." (Exodus 22, 20). Some maintain that "a stranger" is a person who converted to Judaism or, in the least, accepted the seven laws of the sons of Noah. However, it seems that the customary and common interruption of the text is that a "stranger" is anyone who arrived in Israel from another country. And,

as Rashi writes in his interpretation of this verse: "In any language 'stranger': a person who was not born in the same country but came from another country to live there."

My colleague, the Honorable President, presented the biblical-social edict: "Thou shalt not oppress thy neighbour, nor rob him; the wages of a hired servant shall not abide with thee all night until the morning" (Leviticus 19, 13) and "Thou shalt not oppress a hired servant that is poor and needy, whether he be of thy brethren, or of thy strangers that are in thy land within thy gates. In the same day thou shalt give him his hire, neither shall the sun go down upon it; for he is poor, and setteth his heart upon it: lest he cry against thee unto the LORD and it be sin in thee" (Deuteronomy 24, 14-15).

This is an express biblical prohibition on the practice of delay of wages. An express prohibition that, for the purpose of understanding it, we do not have to revert to the 13 virtues that the Torah required, not per a fortiori and without drawing equal conclusions, but by using explicit and simple words. And note well: The Law debated in this case does not concern delay of wages "until the morning" only, but delay of wages for an unknown period, that might extend over many years. We are not dealing with delay of wages, but with extortion and plunder and, as said in the Gemara: "Whoever withholds the wages of a worker violates five offenses and an edict; since you are prohibited from extorting your neighbor and you shall not plunder and you shall not extort a poor worker and you should not deprive him from his wages" (Bavli, Bava-Metzia 210, 71). The intensity of the prohibition is so extensive, that it is for a good reason that it is said that: "Whoever withholds wages from a worker is deemed to have taken his life away from him" (Rambam, rules of wages, chapter K, rule B), and in the manner interpreted by Rabbi Shimshon Ben Rafael Hirsh ("RASHAR Hirsh) from the 19th century: "In order to add a warning about the wages of a worker, we should say: not only he who takes with violence – but anyone depriving from the other person what is due to him shall be deemed in our eyes as a real plunderer; and an even more extreme warning with respect to the wages paid to a worker: you shall not withhold the work of a worker until the morning."

Our sages had the foresight to predict that he who commences with delay of wages will end in extortion and plunder. As seen in the discouraging information presented to us, many employers deducted from the wages of the workers but left the deducted amount in their pocket, and the prophets warned about such circumstances: "if ye oppress not the stranger, the fatherless, and the widow, and shed not innocent blood in this place" (Jeremiah, 7, 6); "and have oppressed the stranger unlawfully" (Ezekiel 22, 29). And here we return back to the "legitimate purpose." Reality in the field proves that the law undermines its declared purpose, namely that if the legislator

wished to encourage the Infiltrator Workers to leave, then the application of the Law in the field actually encourages them to stay, until they receive the amounts that were deducted from their wages however, as said, in many cases these amounts were not even actually deposited for the benefit of these workers. In addition to this severe outcome, that follows from the law, we should assume that the phenomenon of undocumented work expanded, i.e., work for "undeclared payment," without a paycheck, for the purpose of avoiding the deduction. This has an effect not only on the asylum seekers but also on the economy and the job market in general.

12. As a court, we are required to examine the legality of the Law and not the intelligence of the legislator. Nevertheless, it is hard to avoid the question whether the real distress that the residents of south Tel Aviv are in will not worsen the more we cause the infiltrators to be poorer, with all ensuing consequences, from the aspects of crime, violence and density, and, in the present day of the Coronavirus – also in aspects relating to public health.

It is for a good reason that the Israeli Restaurants Association asked to join the Petition as a Petitioner. The infiltrators work in restaurants in jobs that Israelis are not willing to do, and they are also the cleaning workers and those that provide care to our elderly population. And so, when the option that an agreement would be signed with the United Nation High Commission for Refugees (UNHCR) was considered, the Association for Nursing Homes and Assisted Living Residences filed a petition with the High Court of Justice, and the court was requested to order to the State to arrange immediately the employment of 6,000 foreign workers in the long-term care sector. The petition argued that there was a deficiency of thousands of workers in the sector, and that the "serious problem, in and of itself, might even worsen in the near future. This is given the fact that approximately 3,500 workers who are employed in the long-term care sector – and who, as argued by the Petitioners, constitute the last safety net of the long-term care institutions – are asylum seekers whose future is vague at present, in light of the different initiatives to deport them from the country." In the judgment that was given in the petition, we noted that in light of the manpower deficiency "the government ordered the allocation of a quota of up to 1,000 Palestinian workers to the long-term care sector. These workers will undergo training of 120 hours, when later on the number of maximum auxiliary workers in each institution and in each department where Palestinian workers are employed will be determined – taking into consideration the number of foreign workers compared to the number of Israeli workers. For the purpose of this matter the Respondents further updated that at this stage the outline of the involuntary deportation of infiltrators is not implemented, so that there is no substance to the arguments of the Petitioners on this issue and its effect on the institutions that filed the petition (HCJ 918/17

Association for Nursing Homes and Assisted Living Residences v. The Government of Israel, (31.12.2018)).
We can therefore see that on the one hand the State wishes to urge the infiltrators to leave, while on the other hand the State is aware of the shortage of workers in certain sectors in which these infiltrators work.

13. The State is entitled to defend its borders and to determine the identity of the persons who will enter it. However, this is not the question that we are required to consider. The phenomenon of infiltration to Israel was eliminated in the last few years as a result of the construction of a barrier in the border with Egypt. The infiltrators are already part of us, and they are entitled to the basic things that any other human being needs.

The State is not required to open its borders to immigrants, job seekers and asylum seekers – all of these are part of the category of "infiltrators." The State is not requested to grant to the infiltrators' social rights, same as the rights that they are granted in different Western countries. The State is not even requested to find work for the infiltrators. The State is only requested to let the infiltrators take care of themselves without taking from the wages that they earn while performing menial jobs, jobs that in any event are in dire need of working hands. These works, that are in the margins of the job market, are the leftovers left for the infiltrators. They do not ask for them for themselves for free, in such manner that the State is not even required to observe the instructions in the verse: " When thou reapest thy harvest in thy field, and hast forgot a sheaf in the field, thou shalt not go back to fetch it; it shall be for the stranger, for the fatherless, and for the widow… When thou beatest thine olive-tree, thou shalt not go over the boughs again; it shall be for the stranger, for the fatherless, and for the widow" (Deuteronomy 24, 19-21).

In conclusion, we shall repeat the statements we made from the start – the deduction of the Employee's Component in the Deposit Scheme should be voided.

14. And now, after I read the judgment of my colleague Judge N. Solberg, I will respond concisely to the points that were presented in his opinion.

A. My colleague starts his judgment with the "history of the manner that the court handled the phenomenon of infiltrators" (I am of the opinion that the issue is the manner that the State handled the phenomenon of infiltrators) and argues that this case concerns financial loss only, and that the scheme creates a financial incentive for the Infiltrator Worker to leave the country.

I agree that the purpose to encourage the departure of infiltrators from the country is a legitimate purpose and for this reason I am of the opinion that the administrative deduction is indeed performed for a legitimate purpose. However, as long as the infiltrators do not have another safe country to go to however only "when this is possible" (section 7 in the judgment of my colleague) the Employee's Component is nothing but bullying and is not part of an immigration policy.

B. In paragraph 8 of his judgment my colleague points that the deduction of the Employee's Component, in practice, totals "only" 14%, since but for the Deposit Scheme, in any event the Infiltrator Workers would have been obligated to deduct 6% of their wages in favor of pension deposits.

I do not hold the same view. The deduction of the Employer's Component is at a rate of 16%, and if we were to add to this 6%, according to the argument made by my colleague, we would have reached a deposit at a rate of 22% - even more than the rate of 18.5% that the extension order that applies to all workers in the market requires (employer – 12.5% + deduction from the worker's wages – 6%) and did the legislator want to "take care of" the Infiltrator Workers more than the other workers in the market? I wonder. All the more so that the deduction of the Employer's Component, that was supposed to come in lieu of the social-benefit payments that an ordinary employer is obligated to make according to the extension order, does not entitle the Infiltrator Workers any pension rights.

C. The comparison to a deduction of up to 20% of the monthly wages of a person for the purpose of charging, attaching and paying creditors is irrelevant, since we are not dealing with striking a balance between a debtor and creditors. To this we should add that the assumption is that an Israeli resident and citizen has a social safety net by operation of the law, as seen in section 8(a) of the Wage Protection Law 5718-1958 that states that it is necessary to keep an amount equal to the wage assurance benefits that is commensurate with the number of members in his family. It is also necessary to add that the Wage Protection Law sets out a criminal prohibition on delay of wages, which attests to the level of severity that the legislator attributes to delay of wages.

To the extent that I have to make a comparison with other enactments, then pursuant to the provisions of section 34(6) of the State Service Law (Discipline) 5723-1963, it is possible to impose a penalty of forfeiture of up to one sixth of the worker's monthly wages, even for a maximum period of up to

six months. Therefore, even for sentencing purposes, the legislator limited the deduction from the wages to a lower rate and for a maximum period of up to six months, while the deduction in the case in question is made for an unlimited period of time.

D. In paragraph 20 of his judgment my colleague notes that there is no dispute that a deduction of 20% of the wages of the infiltrators "is associated with an additional burdening on their economic condition, which is deteriorated in any event" however he thinks that the Petitioners were unable to substantiate an actual violation of their constitutional right to live in dignity. My colleague also presented the estimate that Infiltrator Workers are capable of sending each month an amount of approximately NIS 1,000 overseas, and from this he learns that the workers can bear a deduction of 20% of the wages "without reaching actual impoverishment."

For the sake of discussion, I am also willing to assume that even after deducting the Employee's Component, the infiltrators will not fall below the minimum threshold of under which they will no longer live with dignity, and will not find themselves in a state of impoverishment (due to their intense work in the struggle for their subsistence). However, the combination of the two – taking the money from their pocket while committing a clear violation of their right to property and bringing them to the bare minimum justifies the invalidation of the deduction of the Employee's Component. A person who reached the minimum threshold of living with dignity and does not have a "positive" right to increase beyond that level is not similar to a person to whom the State caused, by way of a direct and flagrant harm to his property, to drop to the minimal level.

E. In HCJ 10662/04 *Hassan v. National Insurance Institute*, P.D. 65(1) 782 (2012) (hereinafter: the "Hassan Case") the court stated that the scheme that was set out in the law:

> "Infringes the right to live in dignity since it sets out a categorical rule according to which anyone who owns or uses a vehicle will not be entitled to income support benefits; and this is irrespective of the Supervisor question whether indeed that person has an income at a rate that will assure the realization of his right to live with minimum human dignity. Hence, it is clear that when the income support benefits are denied from those who need them to

live with a minimum level of dignity, the right to live in dignity is infringed."

We can therefore learn that the Income Support Law that was considered in the Hassan Case comes to complete the defense on the right to live in minimum dignity, as one of the components in the welfare schemes that are practiced in Israel and that provide the necessary "basket" for the purpose providing minimum subsistence with dignity. While in the case in question the deduction of the Employee's Component comes to eliminate and to harm the protection of the right to live in dignity in a minimum level. This is done without making a distinction between the different workers, without considering whether the worker has an income that assures his right to a minimum of human dignity, and while the Infiltrator Workers is not entitled to all the welfare schemes that are provided to the citizens and the residents of the State. In other words, the invalidation of the Law in the case in question is required per a fortiori compared to the Hassan Case.

F. My colleague wonders about the difference in principle between the Deposit Scheme in question and tax benefits for the purpose of encouraging settlement in the Negev and in the Galilee. I am of the opinion that the difference is noticeable. The case in question does not concern a tax benefit but deduction that is performed in gross violation of the right to property. This is the reason why it is inconceivable to deduct 20% of the wages of the residents of Givatayim and Ramat Gan for the purpose of encouraging them to move to the Negev and to the Galilee.

G. My colleague is right when he says that we are not dealing with a standard case of delay of wages, since delay of wages is a matter between an employer and an employee. But the fact that the sovereign is the party that ordered the employer to withhold the wages of the workers until and when their departure to a safe country is enabled does not change materially the outcome that we are dealing with delay of wages for an unlimited period of time. Hence, I reached the conclusion that we are dealing with extortion and plunder.

15. The Legislative Memorandum of the Law for Payment of a Deposit to a Foreign Worker who is an Infiltrator (Temporary Provision – The New Coronavirus) 5780-2020 (hereinafter: the "Memorandum") did not yet evolve into a government bill, and therefore at this stage this is an egg that did not yet hatch. In any event, even if the Memorandum evolves into a temporary provision, then on the one hand it takes the money of disadvantaged populations ("a marginal population" according to the

definition provided by the State in section 5 of the update) while on the other hand it returns them a meagre amount out of their own money, and some even suggest that this amount will be considered as a loan only. However, as the Honorable President wrote, in light of the outcome we reached, we are not required to refer to the Memorandum.

Judge

Judge N. Solberg:

1. The Petition in question is based on three foundations – the infringement of the right to property of Infiltrator Workers who are Eritrean and Sudanese nationals; the infringement of their constitutional right to equality; and the infringement of their right to live in dignity. According to the line of reasoning applied by my colleague the Honorable President, and my colleagues hold the same views, due to the infringement of the right to property, it is necessary to declare that section 4 of the Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel 5775-2014 (Legislative Amendments and Temporary Provisions) 5775-2014 (hereinafter: the "Amending Law") as unconstitutional and order the invalidation of the Deposit Scheme, to the extent that it is related to the wage component deposited from the worker's wages (hereinafter: the "Employee's Component"). I hold a different view. I am of the opinion that none of the arguments that were presented by the Petitioners should cause the granting of the Petition and the issuance of an order that will void the section of the said law or any part thereof.

A short history of the manner the court handled infiltrators

2. At first, the legislator aspired to limit the stay of the infiltrators under custody for a period of three years, subject to the grounds for release in return for a security that were set out in the law; however, this court found that this scheme was unconstitutional, in light of its disproportionate harm to the constitutional right to freedom (HCJ 7146/12 *Adam v. Israel Knesset*, P.D. 66(1) 717 (2013)). The legislator internalized the criticism leveled by the court, debated, amended and revised, and set out a new scheme that mainly concerned shortening of the stay period under custody for one year while at the same time the infiltrator stays in an open detention facility. However, the court also found that this scheme was unconstitutional, and the issue was referred back to the legislator (HCJ 8425/13 *Eitan – Israeli Immigration Policy v. The Government of Israel* (22.9.2014); hereinafter: the "Eitan Case"). Heedful to the position expressed by the court, the legislator created a new mechanism, a third one, that includes staying in custody for a period of up to three months, and the operation of a detention facility in which the infiltrator

could stay for a maximum period of 20 months. Even this scheme – with respect to the limitation on the stay in the detention facility – was found to be unconstitutional, and the court ordered its invalidation (HCJ 8665/14 *Desta v. The Knesset* (11.8.2015)).

3. Therefore, this court ordered, not once, not twice, but three times, that a constitutional scheme concerning the case in question was void, and now we are at the fourth round. We have to stay away from the habit, because the habit will become a nature. And note well: so far, the enactments regarding the infiltrators were invalidated in light of the infringement of the hard core of human rights, deprivation of freedom and limitation of the freedom of movement. The legislator took these issues into consideration, and now another issue is on the agenda, namely an issue that is purely economic. Furthermore, this court took action before the legislator when it offered a mechanism of money guarantees as a financial incentive for the departure of illegal infiltrators from the country (see: the words of Honorable Judge A. Procaccia in HCJ 11437/05 Kav *LaOved – Worker's Hotline v. The Minister of Interior*, P.D. 64(3) 122, para. 63 (2011)); and later on, the court offered to implement this also to infiltrators (words of Honorable Judge E. Arbel in the Adam Case, pp. 807-808).

4. Another 'caveat' before we start, which concerns the problem in linking quantitative aspects to questions relating to the balancing between different values, a question whose decision is not nominal-numeric. According to the words of my colleague, the President, it seems that it is not the mere imposition of the duty to deposit part of the worker's wages to the deposit that is unconstitutional, but it is the high deposit rate that "is taken" from the worker's which is the unconstitutional element. However, if a deposit rate of 20% is disproportionate, what is the proper rate for the purpose of striking a proper balance? Is it 13%? Is it 8%? How are we to know? This is the "Sorites Paradox." How many grains should a heap have for it to be considered a heap? It is clear that one grain is not a heap, in the same manner that many grains will be considered a heap. What is the number until which the collection of grains is not considered a heap, and what is the number from which a collection of grains is considered a heap? "When the court is required to apply the third sub-criterion of the conditions of proportionality, i.e. the question of the reasonable relationship between the benefit and the infringement of the constitutional right, and the court acts in the said manner with respect to a 'quantitative' constitutional question by nature…then the court is required to assign a considerable weight to the range of maneuvering that the legislator has" (words of Honorable President (ret.) A. Grunis in the Eitan Case, para. 17). When dealing with a 'quantitative' case, we have to qualify the range that the court has to maneuver in light of the concern of making a judicial mistake. Determining the exact manner in which the purpose of the law might be attained

sometimes involves professional considerations that are not within the expertise of the court. Then, when we have to make a decision in a numeric point of balance, or within a criterion nominal range, we have to be careful; we might be wrong.

Protection of property

5. My opinion differs from that of my colleague with respect to the following two points:

   (a) The main purpose of the Deposit Scheme is to create a financial incentive that will encourage infiltrators to leave Israel on time, once this is possible, thereby preventing their integration in the State. My colleague, the President, is skeptic about this scheme, and refers to the "thin line between positive encouragement and 'breaking the spirit' of the infiltrators so that they decide to leave" (following the words of my colleague, Honorable Judge U. Vogelman in the Eitan Case) (para. 28). My colleague, Honorable Judge Y. Amit, is firm in his position: the purpose is not legitimate (para. 8). I hold a different view. I am of the opinion that the purpose of the aforesaid Deposit Scheme is legitimate and, as already ruled in the Desta Case (in the majority opinion, from Honorable President M. Naor, para. 75), in the Adam Case (Honorable Judge E. Arbel, para. 84) and in the Eitan Case (Honorable Judge (ret.) S. Joubran, paras. 6-8).

   (b) My colleague, the President, states that: "The Employee's Component does not meet the third sub-criterion of proportionality and therefore this is unconstitutional" (para. 50). I am of the opinion that the Employee's Component does meet this criterion (the criterion of proportionality in its narrow sense). We should not deny there is violation to the right to property of the infiltrators, but we should not overstate its severity; at the same time, the social benefit that inheres in the Deposit Scheme is concrete.

6. I will explain: The Deposit Scheme creates a financial incentive for the Infiltrator Workers to leave the country. The continuation of integration in the cities and the stay in Israel strengthens the motivation of the infiltrators not to leave the country, even when this is possible. The Deposit Scheme aims at creating a counter scheme vis-à-vis this negative incentive, an arrangement that is proportionate, for the purpose of encouraging the departure from Israel, once this is possible, thereby attaining the immigration policy of the Government. The illegal infiltration – causes damage (see: the words of Honorable Judge S. Joubran in the Eitan Case, para. 7). The sense of interior security is shaken, the sense of personal security is shaken, and crime is on the rise (see: para. 102 in the reply of the State and the references thereat). The residents of southern Tel Aviv, Netanya city center, Petah Tikva, Neighborhood A

in Eilat, Neighborhood B in Ashdod, and other neighborhoods in which there are infiltrators – suffer; the burden on the public treasury for welfare, medical, police and education services is heavy. The enforcement of civil duties such as tax payments – is difficult (see: words of Honorable Judge E. Arbel in the Adam Case, para. 14). It is not illegitimate to prevent infiltrators from becoming a part of Israeli society. The State is not just entitled to handle this phenomenon; it must handle it. The State of Israel, as a sovereign state, has a right, a right that is an obligation, to set out the immigration policy to Israel. This principle, which is known in international law, grants to the state a very broad range of discretion in forming the immigration policy, and in deciding on the means that will enable its implementation. The State is required to act in the said manner before tens of thousands of infiltrators settle in Israel and create a fait accompli that can no longer be changed.

7. Financial incentives assist in directing public behavior in general, and in the field of immigration in particular (para. 103 in the reply of the State); the data regarding voluntary departure of infiltrators shows that their departure destinations are varied (para. 84). The professionals in the Population and Immigration Authority estimate that increasing the positive financial incentive that inheres in the amounts of the deposit that accumulate in the accounts of the infiltrators is expected to strengthen this tendency. In an update notice on behalf of the State, the State presented tables containing data from which we can learn about an increase of almost 7 times in the average number of infiltrators that left and that withdrew the deposit each month since the first half of 2017 and until the first half of 2019; and this is at a relatively early stage – both with respect to the application and the enforcement of the law, and with respect to the accumulation of the deposit. My colleague the President is of the opinion that, "this is a benefit that is limited in scope" since the numerical data "is inconclusive and can be interpreted in different ways" (para. 41). My colleague refers to the argument of the State that "it is necessary to give a reasonable period of time for the application of the Deposit Scheme and the accumulation of substantial amounts of money in the deposits for the Infiltrator Workers." My colleague argues that this argument of the State, "also proves that at this stage the benefit stemming from this scheme is still questionable" and her conclusion is that, "the marginal benefit in the Employee's Component is not that substantial." I am of the opinion that the numeric data contain more than direct evidence for the benefit that the Deposit Scheme has. The position of the attorney for the State is that it is necessary to have more time for the purpose of applying the Deposit Scheme before its benefit can be actually determined, and that this should not be held against the State at this stage. This is because one of the main purposes of the Deposit Scheme is to create a financial incentive, and this incentive evolves over time, is created each month, until a sufficient amount of money accumulates for the infiltrator, an amount that is

sufficient enough to encourage him to leave Israel, when possible. The necessary period of time is therefore not a disadvantage; it is a component in the scheme, this is the main advantage of the incentive. And if there is any doubt, then it should act in favor of applying the law; not for the purpose of invalidating it. I am of the opinion that the data of increase in the number of the infiltrators, the assessment of professionals regarding the expected increase in this tendency, and the reason in the position according to which the accumulation of a considerable amount of money will incentivize the departure from Israel, all prove that the benefit is substantial; both potential and actual.

8. The damage to the property of infiltrators is disturbing, however it also should not be overstated. This is not "constructive deportation" as argued by the Petitioners; this is not "extortion" nor "plunder" according to the opinion expressed by my colleague, Judge Y. Amit. But for the Deposit Scheme, the Infiltrator Workers would have been obligated to deduct 6% of their wages in favor of pension deposit, by virtue of the extension order. Which proves that the excess marginal harm in the Deposit Scheme does not reflect a deduction of 20% of the worker's wages, but 14% only. Certainly, we should not take this rate lightly, but we should see it as it is. When applying such a Deposit Scheme, there is no need to put undue pressure on the infiltrators to such degree that they will prefer to leave the country against their own free will, to a place in which their lives would be at risk, or their freedom would be at risk. Contrary to the argument that was made, the Deposit Scheme does not create an "extensive pressure" that frustrates the existence of free choice with respect to the departure from the country. This is not forfeiture of the money, not its confiscation, but the denial of the ability to enjoy in the present, the said rate of 20% deducted from the wages, and the deposit of this amount in a personal deposit that would be managed for the Infiltrator Workers; the deposit would be kept for the Infiltrator Workers and would be given to the Infiltrator Workers with the addition of returns, to the extent that such returns accrue, once the Infiltrator Worker leaves the country. We should also not ignore the aspects benefitting with the infiltrators in the Deposit Scheme: the scheme creates an administrative mechanism that assures that the employers of the Infiltrator Workers will deposit for them the amounts they are obligated to deposit (16%) for the purpose of assuring their entitlement to social rights and severance pay. This is no trivial thing, in a reality in which depositing social-benefit payments for the Infiltrator Workers is not always practiced properly, whether as a result of a violation committed by the employers, or as a result of lack of cooperation on behalf of the pension funds. Furthermore, the amount of money that the Infiltrator Worker will receive at the time he leaves the country includes a deposit at a rate that is greater than his wages, and an additional deposit from the employer, and this amount would

give him a better starting point for the purpose of integrating in the country that will receive him.

9. The harm caused by the infringement of the right to property became even less drastic after the Foreign Workers Regulations (Types of Cases and Conditions on whose Fulfillment a Foreign Worker who is an Infiltrator is Entitled to the Deposit Amounts prior to his Departure from Israel not for Temporary Purposes) 5778-2018 were legislated (hereinafter: the "Exemption Regulations"). These Regulations state that a Infiltrator Workers is entitled to 70% of the amount of the deposit he is obligated to deposit, by way of non-deduction of this part by the employer, i.e., the part of the worker that the employer will deposit will be 6% of his wages. The Exemption Regulations apply to minors, women, anyone over 60 years of age, single fathers, patients in need of the deposit amounts and victims of offenses of human trafficking and slavery. Therefore, together with the financial mechanism that was created for the purpose of encouraging the departure of infiltrators from Israel, there are also humanitarian considerations, and there should be, and in such circumstances as said the mechanism will not be applied to its fullest extent, but only in a minimal rate that is corresponding to the one set out in the extension order for compulsory pension. The Exemption Regulations provide an answer to a considerable part of the contentions asserted in the Petition, that refers repeatedly to women and children; and certainly that this holds true with respect to the arguments of the Applicants to join as amici curiae, when the main part of these arguments concerned women and children. It should be further noted that humanitarian considerations were also taken into consideration by the mere opportunity that was afforded to the infiltrators to work, which is not something trivial. Their employment is prohibited in accordance with the law, but the State refrains from enforcing this prohibition.

10. Based on these arguments, and the other arguments I will present hereunder in my discussion regarding the right to live in dignity, I believe that the Employee's Component meets the criterion of proportionality in its narrow sense.

The right to live in dignity

11. Petitioners 1-13 (hereinafter: the "Petitioners") argue that the deduction of the Employee's Component from the wages of infiltrators infringes their constitutional right to live in dignity, and even more forcefully so since they are not entitled to benefits or to social aid on behalf of the State. The Petitioners support their argument regarding violation of the right to live in dignity on affidavits on behalf of Petitioners 1-7; and during the hearing of the Petition the Petitioners attached the affidavits of other Infiltrator Workers – both in a motion for an interim order dated June 29, 2017, and in an update notice that was filed on November 5, 2017.

12. At the same time, the attorneys for the State argue that the Petitioners failed to lift the burden imposed on them, namely, to prove the harm caused by the deduction of the Employee's Component to the constitutional right to live in dignity. In addition, we were informed, in an update notice dated June 26, 2019, that Petitioners 1 and 7 left Israel, that at the time of submitting the notice no deposit was made according to the Amending Law from the wages of Petitioner 4, and that 7 deposits only were made for Petitioner 3, the last of which was in May 2018. It was further noted that the legislation of the Exemption Regulations as said (para. 9) provided an adequate solution for extraordinary cases that require a specific humanitarian response.

13. Respondents 6-42 (hereinafter: "Eitan and the Residents") also argue that the contentions asserted in the Petition, including attachments thereof, do not substantiate infringement of the rights of the Infiltrator Workers to live in dignity. It was further argued that many infiltrators transfer to their countries of origin amounts of money from their monthly wages, and that in light of this background the Prevention of Infiltration Law (Offenses and Adjudication) (Temporary Provisions), 5774-2013 was legislated, a law that prohibits, in general, the transfer of money of infiltrators from Israel (hereinafter: the "Law Prohibiting the Transfer of Infiltrators' Moneys"). The Respondents further argued that Petitioners 10-11 (The Hotline for Refugees and Migrants and the Association for Civil Rights in Israel) objected to the said law at the time, and that the amounts of money were indeed transferred by infiltrators outside Israel, and we may assume that this practice still continues at present. It was argued that the average of the amounts of money that the infiltrators transferred to their countries of origin each month is close to the average rate of the Employee's Component that is deducted from the wages of Infiltrator Workers by virtue of the Amending Law, and therefore the deduction does not affect their right to live in dignity.

14. Eitan and the Residents also substantiate their argument on the schemes set out in the Wage Protection Law 5718-1958 and other laws that enable a deduction of at least 20% of the monthly wages of a person for the purpose of attachment, payment to creditors and the like. These schemes reflect, according to the line of reasoning of Eitan and the Residents, the approach of the legislator regarding the necessary wages for the purpose of maintaining minimum life in dignity, and we can therefore learn from them that deductions of 20% of the wages of the Infiltrator Workers do not deprive from them minimal subsistence as said. Eitan and the Residents also argue (as stated in para. 9 above) that the Exemption Regulations refute the arguments of the Petitioners, since a considerable part of the data presented by them refers to women and children that are excluded from the Amending Law according to these Regulations.

15. In light of the said the Petitioners further argue, *inter alia*, that there is no substance to the argument of Eitan and the Residents in anything related to the transfer of the funds of infiltrators outside Israel, since the data on which this argument relies is not updated and insufficient. It was further argued that it is possible that there are indeed Infiltrator Workers who receive wages that allow them to transfer any amounts of money to their countries of origin, but this is not the case with respect to a considerable part of this population. In addition, the Petitioners argue that the Exemption Regulations do not provide a sufficient solution to the harm caused by the Amending Law, since these do not refer to other relevant populations such as workers earning wages that is lower than the minimum wages; and for the reason that even the populations that are part of the populations listed in the Exemption Regulations are still obligated to deposit 30% of the Employee's Component (i.e. 6% of their wages). So far, I have referred to the main arguments of the attorneys for the parties in connection with the right to live in dignity.

16. There is no question about the lofty status of the right to a minimum existence with dignity about which much has been written. This right was recognized, many years ago, as a constitutional right stemming directly from the Basic Law – Human Dignity and Liberty, and it is part of the rights that are at the core of human dignity. The assurance of minimal subsistence – food to eat and clothes to wear, a roof over one's head and basic medical care – all of these are necessary and stem from the protection of human dignity, in the most fundamental sense of this term, and these are even necessary for the purpose of exercising other important rights. The words of Honorable President D. Beinisch are relevant for the purpose of this matter:

> "Out of the various meanings that should be assigned to the term 'human dignity,' and in particular when emphasizing the word 'human,' then the most basic right is the right related to the basic dignity of man, his most essential conditions for survival. If we provided a metaphorical definition of the foundations of this right as resting on the fact that man was created in the image of God, it seems that his image is first and foremost impaired if he reaches a degrading and humiliating state of poverty" (HCJ 10662/04 *Hassan v. National Insurance Institute*, P.D. 65(1) 782, paras. 33-36 (2012); see also: HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance*, P.D. 60(3) 464, 479-484 (2005); for additional details see:

Aharon Barak, Human Dignity – The constitutional right and its successors 547-614 (2014)).

17. The constitutional protection of the right to live in minimum dignity has two facets – negative and positive. In its negative sense the protection of the right to live in dignity is similar to the constitutional right of other civil-political rights and it means – that the State is required to avoid damage by the means that are at the disposal of a person for the purpose of providing basic subsistence. At the same time, the positive facet of this protection imposes on the state a duty to act for the purpose of providing a 'safety net' that will protect all parts of society from dearth (Hassan Case, para. 34; HCJ 6133/14 *Gurevich v. Israel Knesset*, para. 69 (26.3.2015)). In the case in question we shall therefore refer to the negative aspect of the right to live in dignity and in this regard we will examine whether when deducting the Employee's Component from the wages of the Infiltrator Workers the State infringes – an infringement that is unconstitutional – their right to live in dignity.

18. Before I consider the circumstances of the case in question, I shall further note that the acknowledgment of the right to live in dignity and its necessity and its lofty status is insufficient. We are dealing with a petition against the primary legislation of the Knesset, and in order to justify intervention in such matters the Petitioners are required to prove that their right to live in dignity was indeed infringed, in a level of proof that justifies a judicial-constitutional intervention. For that purpose, this court ruled, more than once, that the party arguing for violation of the right to live in dignity must prove that the law in question might actually result in circumstances that any of the persons who are the subject matter of this law are in a state of dearth that reaches a state of deprivation of minimum subsistence. It was further noted that a mere assessment regarding any financial burdening was insufficient, a burdening that the legal mechanism would probably cause, however that the "examination is always concrete and consequential." This examination is made in light of the entire circumstances of the case, and in this framework the Petitioners are required to present to the court "a full factual infrastructure from which it is possible to determine the infringement of dignity. Therefore the court will need information supported with proper documentation of the sources of income and the current and the regular expenses that the said person bears…the performance of all State and other support systems that provide aid to that person will be considered, including his actions vis-à-vis these institutions for the purpose of exercising his rights. It will be necessary to clarify whether the person works, and what employment alternatives that person has. If a party presents an argument on behalf of a group – he will have to substantiate the common characteristics of this group that prove that the dignity of all its members was infringed. Given such factual infrastructure that will convince the court – according to the proper interpretation of the right to live in dignity that is set out in

the Basic Law – Human Dignity and Liberty – that indeed a person's condition reached such a degree of prohibited violation of his dignity, the court will have to give an instruction to the authorities to act for the purpose of eliminating the infringement" (the Commitment to Peace and Social Justice Society Case, pp. 484-486; emphases added – N.S.; see also: HCJ 7245/10 *Adalah – The Legal Center for the Rights of the Arab Minority in Israel v. Minister of Welfare and Social Affairs*, P.D. 66(2) 442, 484 (2013) (hereinafter: the "Adalah Case"); HCJ 4511/12 *Gamlieli v. National Insurance Institute*, para. 5 (6.1.2013)).

19. In light of this background, I examined the arguments of the Petitioners regarding the infringement caused by the deduction of the Employee's Component of the rights of the Infiltrator Workers to live in dignity; I gave my opinion about the content of the affidavits that were attached, the data, the different references, and I reached the conclusion that the Petitioners failed to substantiate properly their argument regarding a constitutional violation as said. And I will explain.

20. The Petitioners argue that the deduction of the Employee's Component actually infringes the right of the Infiltrator Workers to live in dignity, and the relevant evidence that the Petitioners attached for the purpose of this matter is in the affidavits of the Petitioners 1-7, as well as in the affidavits on behalf of 37 additional infiltrators for whom this component was deducted from their wages. And indeed, these affidavits present deplorable circumstances of extreme dearth – when we read the heartbreaking descriptions of parents and children, men and women, young and old, who toil every day for many hours for the purpose of making a living, receive very little payment and live in scarcity. It is therefore clear that a deduction of 20% from the wages of the infiltrators will include additional burdening on their financial condition, which is deteriorated in any event. I believe that this fact is not disputed; however, and as stated above, this fact is insufficient.

21. In practice, a careful reading of the 44 affidavits that the Plaintiffs attached to their pleadings show that approximately 52% of the Infiltrator Workers who declared about their difficulties in light of the application of the Amending Law are women (23 women) when the Exemption Regulations apply to these women at present. Furthermore, seven additional affiants out of the 19 remaining men (approximately 16%) are probably part of the populations to which the Exemption Regulations apply – whether they were allegedly the victims of human trafficking, or because a deteriorated medical condition – each according to his own circumstances. In the meantime, some of the affiants even left Israel, and some were not even employed at the time of submitting their affidavit. Furthermore, and this is the main thing, all the affidavits that the Petitioners attached as said are insufficiently detailed, but we can

find in them a clear description of all the sources of income and the support (community, family or other) of the affiants and their family members, and not even clear information regarding all the essential expenses and the costs associated therewith. These affidavits are also not supported with any evidence or documentation substantiating the data provided therein (cf.: the Commitment to Peace and Social Justice Society Case, pp. 486-487); and in light of the aforesaid, they do not prove any substantial infringement of the right of any of the affiants to minimum life in dignity.

22. Moreover, it is also necessary to take into consideration the fact that the Petitioners actually argue about the infringement of a right of a group, as opposed to specific infringement of the rights of Petitioners 1-7 only, and therefore, and as stated above, they had to "substantiate the traits that are common to this group and that prove that the dignity of all its members was violated" (the Commitment to Peace and Social Justice Society Case, p. 486). However, it is insufficient that the affidavits that the Petitioners attached fail to give rise to a foundation that will substantiate violation of all the Infiltrator Workers; on the contrary – upon reading these affidavits we can learn about various socioeconomic circumstances, a varying earning potential of these and other affiants – some are young, some are old or single, with families and some are single parents. In any event, these affidavits also attest to a difference in the employment alternatives that the affiants have, their essential expenses, possible sources of support and the like.

23. I found further support to the arguments above in the wage data that the attorneys for the State presented in an update notice dated June 26, 2019, based on the data that were collected regarding the application of the Amending Law. This notice presented, *inter alia*, a breakdown of the wages of the Infiltrator Workers, that reflects a rather broad distribution of these workers over different wage levels – some earn very little wages, many earn approximately NIS 4,000 – 7,000, and some earn more than NIS 10,000 and some even earn more than NIS 20,000.

24. The Infiltrator Workers are therefore not one homogenous group, and therefore I am of the opinion that the Petitioners failed to lift the burden imposed on them to prove violation of the right of all Infiltrator Workers to live in dignity. In light of these circumstances, "in the least, and if we apply a lenient approach, they had to show specific cases that prove such alleged violation, and then the burden of proof would have passed to the State" (Adalah Case, ibid); however they even failed to provide proof for this, as stated in detail above.

25. Therefore, the Petitioners failed to prove properly that the deduction of the Employee's Component from their wages actually infringed, in practice, the right of any of the Infiltrator Workers to live in dignity, and certainly that no such infringement of the rights of all the Infiltrator Workers was proven. Since this is my conclusion regarding the violation of the right, in any event I will not be required to continue and follow the stages of the constitutional analysis according to the limitation clause and examine the purpose of the Amending Law and its proportionality. We could have ended the discussion here.

26. Nevertheless, I shall note that the absence of sufficient facts that will support the case in question is also compensated by different data that emerge from the pleadings that were submitted by the Respondents, that can further undermine the alleged infringement of the Amending Law of the right to live in dignity. It is indeed true that the data that the Respondents presented are mainly statistical, approximate and general, and certainly they do not attest to the financial position of this or that infiltrator. The problem is that since the Petitioners did not present to us sufficient specific data, then it is clear that the Respondents will not have such information. We are therefore required to conduct the following discussion through a prism of a collective-general group but in any event, I think that the following discussion will provoke some thought.

Transfer of the moneys of infiltrators outside Israel

27. First, I have considerable doubts in anything related to the infringement caused by the deduction of the Employee's Component of the right to live in dignity, in light of the argument of Eitan and the Residents, that is supported with proof, according to which in the past years many infiltrators used to transfer amounts of money that they earned as wages for the purpose of assisting family members and relatives that were left behind. These circumstances even resulted in the legislation of the Law Prohibiting the Transfer of Infiltrators' Moneys in the year 2013. The explanatory notes of the said Law prove this:

> "The estimate, that is based on, *inter alia*, the findings that emerge in the interrogations that the Population and Immigration Authority conducts to the infiltrators immediately after their entry to Israel, is that a large part of the infiltrators are Infiltrator Workers. These infiltrators arrive to Israel, where the wages for work are considerably higher compared to wages in their countries of origin, for the purpose of working, earning a living and transfer moneys to their family business and their relatives who

> stayed in their countries of origin. According to the data of the World Bank and the African Development Bank, the scope of transfer of such moneys to Africa by African immigrants who are around the world is significant and was estimated in the year 2010 in the amount of approximately 40 billion dollars. This is an amount that is double than the amount of the moneys that were received as said in Africa in the year 2005, and more than four times of the amount that Africa received in 1991. According to these data, the amounts that are actually transferred are double than the said amount, and are transferred in informal routes and not through the banking system (the explanatory notes of the Prevention of Infiltration Law (Offenses and Adjudication) (Prohibition on Taking out of Moneys of an Infiltrator from Israel – Temporary Provision), 5772-2012, Government Bill 1368).

28. In addition to the said, as part of the meetings that the Knesset Internal Affairs and Environmental Protection Committee held regarding the said bill, Adv. Avital Steinberg, Director of the Consulting Department in the Ministry of Justice, presented a careful estimate according to which the amounts of money that are transferred by infiltrators from Israel outside Israel totals an amount of approximately NIS 600M each year (transcript of meeting no. 605 of the Knesset Internal Affairs and Environmental Protection Committee, the 18th Knesset, 4 (10.9.2012)). It is interesting to see that even during the meeting in the committee Adv. Rotem Yadlin, the representative of the Prime Minister's Office, as well as Adv. Lilach Wagner, the representative of the Criminal department in the Ministry of Justice, noted that according to the data in their possession it transpires that Infiltrator Workers save on average approximately NIS 1,000-1,100 per month – an amount of money that they estimated was transferred outside Israel (ibid, pp. 22 and 31).

29. Another important data for the purpose of this matter emerges from the letter that Eitan and the Residents attached to the Statement of Reply on their behalf, and that was sent by Petitioners 10-11 (Petitioner 10 in its name at the time – "Call center for foreign workers" and the Association for Civil Rights in Israel) to the Knesset Members, prior to the approval of the Law Prohibiting the Transfer of Infiltrators' Moneys. In this letter Petitioners 10-11 implored the Knesset Members to object to the bill whose approval would result, according to their line of reasoning, in "denial of the right of a person…to assist his relatives who were left behind with the money he was able to earn himself." In addition, the representatives on behalf of these

Petitioners even attended the meetings of the Knesset Internal Affairs and Environmental Protection Committee as said and Adv. Oded Feller argued, on behalf of Petitioner 11, that the proposed law is a "punishment that the public cannot bear" (ibid, p. 48; and see also his words in the transcript of meeting no. 609 of the Knesset Internal Affairs and Environmental Protection Committee, 43 (15.10.2012)).

30. We therefore learn that prior to the legislation of the Law Prohibiting the Transfer of Infiltrators' Moneys, many Infiltrator Worker transferred amounts of money from their wages to their relatives who are outside Israel. The data that were presented in the meetings of the Knesset Internal Affairs and Environmental Protection Committee prove that these amounts of money totaled on average an amount of approximately NIS 1,000 per month – an amount that is close to the average rate of the Employee's Component that is deducted by virtue of the Amending Law, as seen in the data that the attorneys for the State presented in their notice dated June 26, 2019. We can therefore reach the conclusion that the Infiltrator Workers would not have transferred to their relatives each year such substantial amounts of money as presented in the meetings of the Committee as said, unless the transfer of such amounts had left them sufficient money for the purpose of living in dignity at least in a minimal level. Furthermore, we may also assume that Petitioners 10-11 would not have insisted at the time on the right of the Infiltrator Workers to continue and transfer amounts of money to their relatives, if these transfers had been resulted in extreme dearth.

31. It is indeed true that a number of years passed since the Law Prohibiting the Transfer of Infiltrators' Moneys was approved, and at present we do not have the sufficient means to examine whether at present Infiltrator Workers still transfer amounts of money to their relatives outside Israel, by applying different measures. Nevertheless, recently we heard that the Eritrean embassy in Israel raised funds among the supporters of the regime in Eritrea who stay in Israel, for the struggle of this country against the Coronavirus pandemic. We were presented with a news item that was published on April 16, 2020 in the internet website of the Eritrean Ministry of Health, according to which Eritrean nationals staying in Israel contributed an amount of NIS 883,000 (252,000 dollars) for the struggle against the outbreak of the Coronavirus in the country (see: paragraphs 16-18 in the response of Eitan and the residents dated April 19, 2020). It therefore seems that the entire data presented above can prove to a certain degree about the balance of expenses and income of the average Infiltrator Worker and his ability to incur a deduction of 20% of the wages without reaching an actual state of dearth.

32. For the purpose of this matter we should regret the clear contradiction between the arguments of Petitioners 10-11 in connection with the Law Prohibiting the Transfer of Infiltrators' Moneys and their arguments that were presented in the case in question. While prior to the ratification of the law Petitioners 10-11 argued that the imposition of a prohibition on infiltrators to transfer to their relatives amounts of money estimated in the amount of approximately NIS 1,000 per month is a punishment that the population of infiltrators cannot observe; in the case in question they argue that the population of Infiltrator Workers cannot accept the deduction of a component for a similar amount of money that is deposited in a deposit earmarked to its owner. How can these arguments be presented at the same time? I wonder. Petitioners 10-11 did not even bother to resolve the said conflict in the arguments presented before us.

Rate of the wages protected from attachment, charge or transfer

33. I found further support to my conclusion regarding the lack of infringement of the right to live in dignity in the comparison that Eitan and the Residents made between the Deposit Scheme herein and the provisions of the Wage Protection Law. Section 8(a) of the Wage Protection Law states that with respect to an attachment, charge or the transfer of amounts from the wages that a person makes, it is necessary to leave for that person an amount equal to the income support benefits that are commensurate with the size of his family, and at most 80% of his monthly wages. In other words, section 8(a) of the Wage Protection Law allows a reduction in the wages of a person at a minimum of 20% and sometimes even more. Indeed, it is impossible to extrapolate accurately from the scheme that is described in the Wage Protection Law to the Deposit Scheme herein, since the wage components considered in that law are somewhat different, and even their underlying principles are not identical. However, the provisions of section 8(a) of the Wage Protection Law give us a clue about the position of the legislator regarding the necessary wage threshold for the purpose of maintaining minimum subsistence (Pablo Lerner "On the attachment of wages in Israeli law" HaPraklit 48 30, 41 (5765-5766)); it seems that based on this principle the deduction of the Employee's Component at a rate of 20% from the wages does not necessarily lead to a state of dearth that violates the constitutional right to live in dignity.

The Exemption Regulations

34. The Exemption Regulations (I have elaborated on their meaning and their application in paragraph 9 above) also provide a certain relief to the burdening that naturally accompanies the deduction of the Employee's Component. These Regulations exempt women and children, anyone who is over 60 years of age, single fathers,

patients and victims of human trafficking and slavery offenses, from deduction of the main part of the Employee's Component; by this the Exemption Regulations diminish from the start the possibility that this deduction will infringe the right to live in dignity. For the purpose of this matter the Petitioners further argue that even after the application of the Exemption Regulations, 6% of the wages of the populations listed in the Regulations are deducted. However, such a deduction is identical to the provision from the wages of most of the workers in Israel for the pension fund, that is not performed, for practical reasons, in the wages of the Infiltrator Workers. It is indeed true that the deposit is not a pension fund, and the amounts accrued in it do not entitle the infiltrators to the rights for pension accrual however, and as said above, an examination of the violation of the right to live in dignity is "always concrete and consequential" (the Commitment to Peace and Social Justice Society Case, p. 485; emphasis added – N.S.). Hence, in the same manner that a deduction of 6% from the wages of most of the workers in Israel does not actually infringe their right to live in dignity, then we cannot say that such a deduction necessarily prevents minimal subsistence from the populations subject matter of the Exemption Regulations.

Parenthetical remarks

35. Recently, on April 1, 2020, the Legislative Memorandum for the Legislative Memorandum of the Law for Payment of a Deposit to a Foreign Worker who is an Infiltrator (Temporary Provision – The New Coronavirus) 5780-2020 was circulated for public comments. This Legislative Memorandum is intended to allow to an infiltrator who was fired from his work or who was forced to take an unpaid leave as a result of the outbreak of the Coronavirus to request and redeem part of the deposit amounts "for his subsistence requirements during the period of the Coronavirus crisis in which he is not employed" (the explanatory notes of the Legislative Memorandum). Therefore, while the State engaged in a different aspect of this issue, the amounts that accrued from the wages of infiltrators for the purpose of encouraging their departure from Israel might now be used for the purpose assuring their life in dignity while they are staying in Israel during these tumultuous times of the Coronavirus pandemic. Therefore, but for the deposit, and in the absence of social rights that the citizens of the State have, the infiltrators would certainly have difficulties to maintain themselves at the present time, and their dignity would have been significantly impaired. These things are added to the benefit that the Infiltrator Workers would gain from the Deposit Scheme during a normal period – whether by way of assuring their social rights, whether by way of contributing to their integration in the countries that will accept them, after their departure from Israel (see in para. 8 *supra*) – and I am of the opinion that these arguments also support the conclusion regarding the legality of the Amending Law.

The right to equality

36. Finally, we should reject the argument regarding the infringement caused by the deduction of the Employee's Component to the constitutional right to equality. As known, the constitutional protection of the right to equality stems from the provisions of Basic Law – Human Dignity and Liberty. Not any distinction that the legislator makes will therefore be considered as infringement of the constitutional right to equality, but only such that is tightly related to human dignity. We did not find such an infringement in the case in question. The legislator aspires to lay down an immigration policy and handle the issue of the illegal infiltrators. Therefore, the legislator laid down a scheme that distinguishes these workers from other workers – Israeli residents and citizens, or foreign workers who entered Israel and are lawfully employed in Israel, whose stay is defined for specific period and whose departure on time from Israel can be enforced upon expiration of the term of the license. This is not a 'suspicious' distinction, that is tightly related to human dignity, but an objective, legitimate and realistic distinction that is applied as part of the effort to attain the legitimate purposes of the law.

Afterthought

37. I will add the following 3 comments that are parenthetical to the opinion of my colleague, Judge Y. Amit:

(a) According to my colleague – "The State wishes to encourage the settlement in the Galilee and the Negev. However, it is hard to think that the legislator will order a deduction of 20% of the wages of the residents of Givatayim and Ramat Gan, for the purpose of "encouraging" them to leave to the Galilee or the Negev" (para. 8). I will also answer him that indeed, the State encourages the settlement in the periphery at the expense of the central part of the country, and what is the difference in principle between the Deposit Scheme in question and the tax benefits for the purpose of encouraging the settlement in the Negev and the Galilee? Is the money of the residents of Givatayim and Ramat Gan not allocated for the benefit of the residents of the Negev and the Galilee?

(b) My colleague repeatedly referred to the Deposit Scheme as "plunder." And with respect to plunder you "deal with a penny as you would with a fortune"; and can a deduction at a rate of 1% instead of 20% also be considered as plunder?

(c) My colleague stated firmly that "this is an express biblical prohibition on delay of wages" (para. 11). Indeed, Judaism assigns great importance to the

prohibition on delay of wages, as proven by my colleague the President and according to the words of my colleague. However, this is not the same as evidence. Delay of wages concerns employer-employee relationship. In the Deposit Scheme the employer did not commit a wrong against the employee. The sovereign is the party that ordered in the law on the required action. My colleague referred to this (para. 43) however, my colleague exaggerated. In the case in question, the rule "the court can forfeit the property from its owner without justification" means that the court has the power to forfeit the assets of any person (Bavli, Yevamot 89, 2), The court has the power to render the property of a person forfeited property. If the court acted in the said manner, the assets shall be deemed to have been forfeited by the court. This is also one of the authorities that were conferred on the court for the purpose of resolving circumstances to which the law does not find any answers. The source of this authority of the court is in the words said in the Book of Ezra (10, 7-8) when all members of the diaspora were called and were told to go to Jerusalem: "and that whosoever came not…according to the counsel of the princes and the elders, all his substance should be forfeited" (Ezra 10, 7-8) (Nachum Rakover and Rafi Yaakobi, "Talmudic Idioms" 128 (5751-1990)). Furthermore, "The ones living in the city are entitled to stipulate on the measures and the rates and the wages paid to the workers and enforce them" (Bavli, Bava Batra, 8, 2). In other words, those living in the city are entitled to enact regulations and lay down procedures that will include the forfeiture of funds such as – changing dimensions, the price of produce, wages paid to workers, and even punish those who transgress their words. However, it seems to me that the main thing in the case in question is: we were ordered: "Neither shalt thou favor a poor man in his cause" (Exodus 23, 3). Rashi interprets this as follows: "Neither shall thou favor – you shall not honor him in the law and say, he is poor, I shall favor him and honor him." Rabbi Avraham Ben Ezra provides a similar interpretation: "You should think and help the poor." It is a human predisposition, namely, to pity the poor, and make the law help the poor, against the party that is stronger and wealthier. He who acts in the said manner thinks that he does good, but he does not: "Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor favor the person of the mighty; but in righteousness shalt thou judge thy neighbour" (Leviticus 19, 15).

Conclusion

38. In theory – the State has a very broad range of discretion in formulating its immigration policy; in practice, primary legislation laid down repeatedly different schemes that were found to be unconstitutional. The period that was set for the stay of the infiltrators in custody was shortened from one scheme to the next, the

conditions were improved but still, due to the concern of infringement of human rights, the deprivation of freedom and the violation of the freedom of movement, these schemes were rejected by this court. Now, we are dealing with a financial issue. This issue is also cumbersome and offensive; however, I believe that the Deposit Scheme is satisfying, and I see no reason justifying the extraordinary relief that the Petition sought – invalidation of primary legislation made by the Israeli Knesset.

Judge

Judge U. Vogelman:

I concur with the comprehensive opinion expressed by my colleague, the President E. Chayut, and the relief she proposed.

1. In the Petition in question section 4 of the Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Workers from Israel (Legislative Amendments and Temporary Provisions) 5775-2014 (hereinafter: the "Amending Law") is the subject matter of judicial scrutiny, on the grounds that it causes unconstitutional infringement of human rights that are protected in Basic Law – Human Dignity and Liberty. As noted by my colleague, Honorable Judge N. Solberg, this is the fourth time that this court is required to debate primary legislation of the Knesset regarding the infiltrators, on the grounds of argued infringement of the most fundamental rights that are granted to any person, and that fall in our legal system under the protection granted by Basic Law – Human Dignity and Liberty. Indeed, we are aware of the weight of the results of the previous proceedings, and the due caution in the examination of the Amending Law – today, same as in previous proceedings – is a guiding milestone in the judicial scrutiny we are required to apply. This does not derogate from the obligation imposed on us to consider the legal question that was presented to us: does the Deposit Scheme that is laid down in the Amending Law pass the constitutional analysis. As said, I think that the answer to this question – in anything related to the deduction of the Employee's Component – as stated by my colleague the President, is in the negative, and that for the purpose of this matter the Amending Law causes disproportionate infringement of the constitutional right of Infiltrator Workers to property. Therefore, where a law infringes a basic right that is protected under a Basic Law in contravention of the provisions of the limitation clause, this court should grant a relief to the injured party – and in the case in question order the voidness of the unconstitutional part. This is the duty, and this is the role of the court, and as I have already noted in the Eitan Case:

> "We also take into consideration the fact that the consequence of this judgment that we give is that again we repeal primary legislation of the Knesset. We are aware of the weight and importance of the doctrine of separation of powers. We do not aspire 'to go without permission to the Legislature,' and 'we will go very carefully until we order the voidness of a provision in a Knesset law' [...] however the arrangements set out by the new Prevention of Infiltration Law cause material, comprehensive and fundamental violation of human rights. They fail to meet the conditions set forth in the limitation clause, and they fail to meet the criteria of constitutional scrutiny. Therefore, the court can only declare their voidness. We do not do this willingly; we did it by virtue of our duty (HCJ 7385/13 *Eitan – Israeli Immigration Policy v. The Government of Israel*, para. 212 in my judgment (22.9.2014) (hereinabove and hereinafter: "Eitan Case"); the references for the purpose of this matter are to my judgment, unless otherwise stated).

These things are also in effect when we come to decide in the Petition in question, when, regretfully, the State decides, again, to select out of the many tools that are at its disposal, an offensive means that deviates from the constitutional framework that Basic Law – Human Dignity and Liberty outlines (and the legal counsels of the Knesset and the Internal Affairs Committee already referred to the constitutional difficulties in this means during the process of drafting of the bill, as stated in the preliminary response on behalf of the Knesset).

My colleague the President presented a wide spectrum supporting the conclusions in her opinion, and I side with her conclusions and with her line of reasoning. In light of the importance of this issue, I wish to highlight a few points in the constitutional analysis that we were asked to provide.

2. The President elaborated on the steps that the State of Israel took for the purpose of handling the stay of the infiltrators in its territory, given the difficulty to deport the major part of this population to their countries of origin, and the history of the proceedings that commenced with respect to these means and that were debated in this court (ibid, para. 2; see also HCJ 8665/14 *Desta v. The Knesset*, paras. 7-10 in the judgment of Honorable President M. Naor (11.8.2015) (hereinafter: the "Desta Case"); the Eitan Case, paras. 6-10; APA 8101/15 Zegata v. The Minister of Interior

(28.8.2017)), and I will not elaborate. At this stage we are deliberating the Deposit Scheme that was legislated in section 4 of the Amending Law, and in particular the discussion concentrates on the duty that was imposed in it on an employer, namely to deduct 20% of the wages of a Infiltrator Worker and transfer this amount to the deposit whose withdrawal will be allowed in general only at the time the Infiltrator Worker leaves Israel, and in the Administrative Deduction Scheme that was laid down with respect to 33% of the amounts that accrued in the deposit, where an infiltrator did not leave the country at the end of the stay period applicable to him, and in respect of whom an order nisi was issued on July 26, 2017.

3. I shall first refer to the deduction of the Employee's Component. According to the Amending Law, the employer of a foreign worker who is an infiltrator (and regarding the difficulty in using the said expression to the persons who are the subject matter of the constitutional scheme subject matter of the Petition see HCJ 7146/12 *Adam v. Israel Knesset*, P.D. 66(1) 717, 831-833 (2013) (hereinafter: the "Adam Case"); the Eitan Case, para. 5) is required to deposit a deposit in an amount equal to 36% of the wages of the infiltrator, in such manner that the part of the deposit that is equal to 20% of the wages will be deducted from the wages of the worker for that month (section 1K1(a) of the Foreign Workers Law 5751-1991 (hereinafter: the "Foreign Workers Law" or the "Law") and see section 1K1(f) of this Law regarding the definition of wages). The employer is required to transfer the balance of the amount, at a rate of 16% of the wages of a worker who is an infiltrator, to a deposit, in addition to the wages paid to the worker (hereinafter: the "Employer's Component"). According to the Amending Law, the Infiltrator Worker will be entitled to 67% of the amounts in the deposit, that ordinarily include the Employee's Component, with the addition of part of the Employer's Component, at the time the Infiltrator Worker leaves the country not for temporary period (the worker is entitled to the remaining 33% according to the administrative deduction scheme which I shall elaborate further below).

4. The parties are not in disagreement with respect to the starting point according to which a deduction of 20% from the wages of the Infiltrator Worker constitutes infringement of his right to property. I shall elaborate further below about the scope of the infringement of the right to property however at this stage I have two comments: first, we should not accept the argument of the State, according to which the argued damage caused to the worker's wages is at a rate of 14% of his wages at most, since in any event the worker is required to deposit 6% of the wages for a pension fund. As clarified by the President in her opinion, as opposed to the Employer's Component, whose provision to the deposit comes in lieu of social-benefit payments that the employer is obligated to pay (according to the specific

scheme laid down for the purpose of this matter in section 1K(f) of the Foreign Workers Law) the deduction of the Employee's Component to the deposit does not release the Infiltrator Worker from the duty to deposit sums to a pension fund (President's opinion, paras. 26 and 47). Therefore, the conclusion of my colleague, Judge N. Solberg is that "but for the Deposit Scheme the Infiltrator Workers would have been obligated to deduct 6% of their wages in favor of pension deposit, by virtue of the extension order" (ibid, paras. 6) is not incorporated in the language of the Law, as opposed to the corresponding provisions that were set out with respect to the Employer's Component.

5. Second, when evaluating the intensity of the violation of the right to property, I do not think that we should assign decisive weight to the fact that the Deposit Scheme does not order permanent withholding of one fifth of the monthly wages of the Infiltrator Worker. In this realm the State argued that the damage to the worker's property is limited since this is at most denial of his ability to use the said amount as long as he stays in the country. However, given the "normative mist" that surrounds the status of the infiltrators in the State and that stems, *inter alia*, however not only, from the incompetence of the authorities in handling and in deciding the applications for asylum that were submitted on behalf of approximately two thirds of the infiltrators who stay in Israel at present (see the President's opinion, para. 45) – the practical meaning of the Deposit Scheme, at least for those who are not willing to forgo the protection granted to them by virtue of the non-refoulement principle or their application for an asylum is that the deprivation of his property will be in effect until an unknown date. In light of these circumstances, depriving Infiltrator Workers from using one fifth of their wages is deemed as withholding for an unlimited period of time. I therefore join the analysis conducted by the President, namely that the deduction of one fifth of the wages of Infiltrator Workers according to the Deposit Scheme, under the circumstances that were described, infringes their constitutional right to property (para. 23 in her opinion). In light of this conclusion, we have to refer to the criteria set out in the limitation clause, and first to the purposes of the scheme.

6. The State argued before us that the major purpose underlying the deduction of the Employee's Component set out in the Deposit Scheme is the creation of a significant financial incentive for the Infiltrator Worker to leave voluntarily to another country or to his country of origin, when this is possible, thereby preventing the continuation of his integration in Israel (and I agree with the statements made by the President regarding the purpose concerning assurance of saving that will be used by the infiltrators at the time of their departure, even though it is clear that this is not the primary purpose that underlies the deduction of the Employee's Component). In principle, I am willing to assume that the purpose that concerns the creation of a

financial incentive for voluntarily departure from Israel is a legitimate purpose and that a financial consideration can serve as a motive for a voluntary decision to leave the country, that does not stem from exercising of unreasonable pressure to act in the said manner. However, same as the proceedings that concerned the holding of infiltrators in custody or in a detention facility, the proceeding in question also includes a dispute between the parties regarding the real purpose of the Deposit Scheme in the part that includes the wages paid to the Infiltrator Workers, in the prism of the reality of life of the latter, and their socioeconomic condition even before the planned deduction. According to the line of reasoning of the Petitioners, the harm to one fifth of the wages of the infiltrators is actually intended to attain the improper goal of breaking their spirit, degrading them and pushing them to a state of acute poverty to such degree that they will agree to waive the protections granted to them in accordance with the law.

7. And indeed, certain aspects relating to the deduction of the Employee's Component in accordance with the Deposit Scheme, including, *inter alia*, its sweeping application to any Infiltrator Worker, irrespective of his wages, can support the arguments of the Petitioners, namely that it is intended to put on the population of the infiltrators "significant and undue pressure" to leave the State of Israel by creating unbearable living conditions for them (cf. Eitan Case, paras. 110-113; Desta Case, paras. 17-19 and 24-28 in my judgment). My colleague, Judge Y. Amit holds the same view, and thinks that the means that were applied in the Deposit Scheme in anything related to the Employee's Component and the disproportionate harm that they cause reveal the illegitimate cause of the law "to make the lives of the infiltrators unbearable to such degree that they will say that 'I want to leave the country'" (para. 4 of his opinion). In general, I am willing to acknowledge that a certain normative reality might amount, under extraordinary circumstances, to "heavy pressure" that frustrates the existence of free choice to leave the country. Unreasonable pressures and means that compel a person to leave the country might render his departure to compulsory and prohibited deportation (Eitan Case, para. 112). In the Desta Case I referred to the fact that the particulars of the scheme "from the quantitative aspect" might affect the interpretation of its "qualitative aspect" and I said the following in that case:

> "While in the Eitan Case it was possible to debate the question whether indeed a period of custody of one year is a possible normative expression of the argued cause – identification and exhaustion of different possible departure tracks for deportation [...] – in the case in question it is proper to consider the opposite. In the same manner that the

> previous version of the law impeded reaching the conclusion that its purpose is indeed to identify and exhaust different tracks for deportation, shortening of the custody period and setting this period on three months, which proves that [...] there is an inherent connection between keeping in custody and an effective deportation procedure. In this sense, the 'quantitative aspect' – namely the maximum permitted custody period – 'speaks' and affects the interpretation of the 'qualitative aspect' (a relationship to the existence of an effective deportation procedure)" (ibid, para. 7).

8. In the case in question, I do not see a reason to change the conclusion reached by my colleague Judge Y. Amit; however, even if there is doubt regarding the question whether the reduction of 20% of the wages of Infiltrator Workers can be considered as part of the definition of a "possible normative expression" of the argued purpose of the Deposit Scheme to encourage infiltrators to leave Israel voluntarily by providing a financial incentive, I am of the opinion that there is no need to decide this question, since in any event according to my point of view the provision regarding the Employee's Component should be voided due to its disproportionate violation of the right of the Infiltrator Worker to property. I shall elaborate on this now.

9. I shall first try and answer the question whether the deduction of the Employee's Component as set out in the Deposit Scheme maintains a rational connection to the purpose of the Law. My colleague the President elaborated in detail on the data that the State presented in connection with the departure of infiltrators from Israel in the period after the Deposit Scheme entered into force. I shall already note that I am willing to accept the assessment made by the State according to which the effectiveness of the deduction to the depositing as a financial incentive for the purpose of leaving the country voluntarily will increase over time, when a considerable amount accrues in the deposit. At the same time, I do not think that according to the data presented before us, after two years from the time the Deposit Scheme enters into force it is possible to reach a conclusion that during this period the Deposit Scheme resulted directly in an increase in the number of the infiltrators who leave Israeli voluntarily. And so, the number of infiltrators who left Israel, compared to the period prior to the Deposit Scheme, dropped, and the part occupied by the Western countries in the countries of destination in the years since its legislation – increased. When we add up these two elements in the information that was presented to us, we can see that at present the deposit does not produce the

benefit it was intended to produce. This is particularly relevant in light of the destinations to which the infiltrators left since it entered into force – we can only conclude that the decision of those who left to other Western countries did not stem from a deduction of one fifth of their wages or that, in the least, that this step was not the decisive element in the considerations that they entertained for the purpose leaving. Alongside these doubts, I do not think that the data that was presented in the case leads necessarily to the conclusion that the demand for a rationale connection, as outlined in legal precedents, is not fulfilled in the case in question (and see HCJ 6427/02 *The Movement for the Quality of Governance in Israel v. The Knesset*, P.D. 61(1) 619, 706-707 (2006); Aharon Barak Proportionality in Law – The Violation of the Constitutional Right and its Limitations 377-378, 382-383 (2010) (hereinafter: "Proportionality in Law")). Therefore, I am willing to assume for the sake of discussion that the Deposit Scheme meets the first criterion of proportionality, even though it is understandable that the doubts that were presented will have an effect on the continuation of the constitutional analysis (and in any event we could have challenged this assumption over time; see the Desta Case, para. 91 in the judgment of President Naor; HCJ 10662/04 *Hassan v. National Insurance Institute*, P.D. 65(1) 782, 845 (2012); HCJ 7052/03 *Adalah – The Legal Center for the Rights of the Arab Minority in Israel v. The Minister of Interior*, P.D. 61(2) 202, 323-324 (2006); Proportionality in Law, pp. 384-385).

10. From here we will go and examine whether there is a means whose infringement of the right of the Infiltrator Worker to property is less drastic, and that attains the purpose of deduction from his wages, in the same degree or a similar degree. There is no dispute that there are financial incentives that concern additional compensation of the infiltrator for departure, such as the adaptation grants that are provided to the infiltrators who leave Israeli voluntarily or that part in the Employer's Component that expresses the addition on the provisions that he is obligated to deposit in accordance with the law and that can be part of the considerations that support departure from Israel, to the extent that this option is relevant as far as the infiltrator is concerned. However, I do not think that it is possible to state that these incentives can attain the purpose of the Deposit Scheme considered in this case in a similar level of effectiveness (Proportionality in Law, pp. 395-398). Even though there are no doubts regarding the effectiveness of the financial incentive in encouraging voluntary departure, it seems to me that it is possible to assume that the higher the amount that accrued in the deposit fund whose withdrawal is permitted only at the time the infiltrator leaves the country is – the greater the financial incentive can be. Therefore, I am willing to operate under the assumption, for the sake of discussion, that the deduction of the Employee's Component meets the second sub-criterion of the criterion of proportionality.

11. As opposed to the said, I am of the opinion that the Deposit Scheme (in anything related to the deduction of the Employee's Component) cannot overcome the obstacle that the criterion of proportionality sets in its narrow sense. According to this criterion, there must be a proper relationship between the benefit that the public will gain from attaining the purposes of the law and the violation of human rights that accompanies it. The third sub-criterion for the purpose of evaluating the proportionality of the means that was selected in the Law is "in essence a criterion of balance. The more severe and extensive the violation of the constitutional right is, the benefit that is produced from the law should me greater. At the same time, in the event there is a social purpose of higher importance or that presents a pressing social need, it will be more justified to cause a more severe violation of basic rights" (Eitan Case, para. 25). The Deposit Scheme instructs that one fifth of the monthly wages of an Infiltrator Worker will be denied from him each month. This violation of the right to property of the worker is severe and hard. The Infiltrator Workers are ordinarily employed as dish washers, in catering works, in cleaning and maintenance – works that from the start are not characterized by high wages, to say the least. Taking one fifth of the wages that are paid for these works has an immediate and direct effect on the ability of infiltrators to bear the most ordinary and daily expenses, such as food, dwelling and medical care. When we are dealing with workers who earn very low wages, and in many cases meagre wages each month, and who do not receive the social support network that is provided to the citizens of the State, their wages are their property. The wages paid to the infiltrator is therefore his only (or, in the least the major) asset that he has for the purpose of providing for himself and for his family members. Under these circumstances, even if this is not a permanent deprivation of the wages (and for the purpose of this matter see my comments in paragraph 5 hereinabove and hereunder) the deduction causes serious damage to the property of the Infiltrator Worker.

12. Indeed, taking one fifth of the wages of a worker who earns minimum wages or a little more than that, is not the same as taking one fifth of the wages of a person who earns NIS 10,000 per month. However, the Deposit Scheme orders that the deducted part of the Infiltrator Worker component, at a rate of 20% of his wages, will be permanent, irrespective and without any connection to the rate of the wages from the start. And so, if the Infiltrator Worker earns minimum wages (when the deduction of one fifth of these wages will result in reduction of the wages under this level) and whether his wages are even below the minimum wages – one fifth of the amount will be taken according to the scheme from the Infiltrator Worker and will be returned to him only after his departure from Israel. For the purpose of this matter, and in response to the statements made by my colleague Judge N. Solberg, I shall note, with

all due caution, that in my opinion when dealing with income in such amounts and taking into consideration the fact that the wages for his work is usually the only asset that the infiltrator has (as already noted), there is a considerable difference between a moderate deduction from the wages and deduction of one fifth of the wages, and the damage stems from the last option that was selected in the Deposit Scheme – and, as said, the damage is extensive (para. 4 in his opinion; see also and compare the Eitan Case, para. 193). The almost sweeping and static application of the provision regarding the deduction of the Employee's Component therefore ignores the importance and the critical nature of the wages for those who struggle for their financial survival on a daily basis, and thereby it exacerbates the infringement of the right to property (and I hold the same view for the purpose of this matter with the President in her conclusion, namely that the effect of the Foreign Workers Regulations (Types of Cases and Conditions on whose Fulfillment a Foreign Worker who is an Infiltrator is Entitled to the Deposit Amounts prior to his Departure from Israel not for Temporary Purposes) 5778-2018 on the examination of the proportionality of the scheme – is limited (ibid, para. 46)).

13. Furthermore, given the type of the visa that was issued to them, the accessibility of the infiltrators, when some of the infiltrators have children they have to provide for, and to health and welfare services is very limited (and see also the State Comptroller report that pointed to a series of defects in the manner that the authorities delayed in handling these populations, the State Comptroller "Foreign nationals who are not deportable from Israel" Annual Report 64C, 59, 60-67 (2014)). Beyond that, and as I have already noted in the Eitan Case, indeed in another context in that case, the population of infiltrators includes disadvantaged persons, who are far from being wealthy. Many of them do not speak the language and lack sufficient knowledge of the particulars of the normative schemes that apply to them (Eitan Case, para. 179). Therefore, in any event this group is in a position of inferiority in anything related to asserting their rights and approaching the court. And so, in general, and in particular in the realm of industrial relations, the Infiltrator Workers are exposed to exploitation and to infringement of their rights (see the argument of the State itself that the Employer's Component is intended, *inter alia*, to assure the performance of the duty of making deposits to the workers that is imposed on the law on employers; see also sections 114-115 of the Petition and the arguments presented before us regarding complaints about employers who deduct the Employee's Component without transferring it to the deposit as required, for example in section 33 of the main argument presented on behalf of the Petitioners).

14. To all of these we should add, as I have already noted in the beginning of my opinion, that when evaluating the severity of the damage to the property of the Infiltrator

Workers, it is possible not to take into consideration the fact that the applications for an asylum that were filed by almost two thirds of the infiltrators who stay in the country – were not decided by the authority yet (and regarding the rate of recognition of asylum applications see the Eitan Case, para. 35; and the Desta Case, paras. 12-13 in the judgment of Honorable Judge (ret.) H. Meltzer, and para. 3 in the judgment of Honorable Judge (ret.) E. Chayut). The result of the actions performed by the State in processing the asylum applications that are submitted by Sudanese and Eritrean nationals is that "they are trapped in a continuous and impossible circumstances of a normative mist surrounding their status including all difficult consequences stemming from this with respect to their rights" (*ibid*, para. 4). The Deposit Scheme therefore adds "another catch" to the impossible situation the asylum seekers are in. And so, as long as they are interested to insist on their arguments regarding their entitlement to an asylum in Israel as a result of a well-substantiated fear from persecution in their country of origin, and even when with respect to many of them these arguments were not decided, they have to bear a deduction of one fifth of their wages each month, until an unknown date. This aspect is yet another severe aspect in the damage caused to the property of the Infiltrator Workers who sought asylum in Israel since for them, in practice, and as seen in the conduct of the State so far – the deduction would be performed for an unlimited period, or until they waive all their arguments regarding an asylum and they leave the country.

15. It is necessary to make a comparison between the intensity of the damage to which I referred and the benefit in the deduction of the Employee's Component as an incentive that encourages voluntary departure. In the examination of the benefit that arises from this arrangement, it is necessary to consider our conclusions following an examination of the first and second criteria of proportionality. As I have already noted, the data that were presented to us regarding the first two years that passed from the time the Deposit Scheme enters into force give rise to doubts regarding the benefit produced from it in the encouragement of infiltrators to depart the country out of their own free will, and therefore it is impossible to assign to its application so far a significant increase in the voluntary departure of infiltrators or, in the least, it cannot be considered as the dominant consideration that leads to this decision in most cases, even when such a decision was made. As part of the examination of the alternative least drastic means, I indeed found that the inclusion of the Employee's Component could certainly add to the efficiency in attaining the goal of the Deposit Scheme, however given the existence of other potential or actual financial incentives (as stated above) the deduction of the Employee's Component is in fact "another means that assists and that is part of other means" (cf., Eitan Case, para. 69) and we should also take this element into consideration.

16. The outcome we reach following this analysis so far is that vis-à-vis the possibility that the deduction of the Employee's Component will produce the required benefit (when its practicability is currently questionable) the latter causes certain and serious harm to the property of Infiltrator Workers who are part of the most disadvantaged populations. Therefore, the social benefit expected from this scheme does not justify the extensive infringement of the right of the Infiltrator Workers to property, and as such it is disproportionate. Therefore, there is no other alternative but to state that the provision regarding the deduction of the Employee's Component is unconstitutional, and I side with the opinion of the Honorable President about this component, as well as the relief that the Honorable President proposed.

17. I will now discuss the Administrative Deduction Component. I side with the conclusion of the Honorable President in her opinion, namely that this component, given our conclusion regarding the voidness of the Employee's Component, meets the conditions of the limitation clause. For the purpose of this matter I shall note that in my opinion, where the main part of the Employer's Component comprises of amounts that the employer is obligated to deposit in accordance with the extension order (12.5% out of 16%) the withholding of part of these amounts in the Administrative Deduction Component infringes the right to property of the Infiltrator Worker. For the purpose of conducting the analysis of the point at hand it is necessary to consider the amounts that the employer deposits in favor of the worker for pension and severance pay components according to the requirements laid down in the law as the property of the employee for all intents and purposes. However, and as already shown by the Honorable President, given our conclusions regarding the illegal nature of the deduction of the Employee's Component in the Deposit Scheme, the damage to these deposits will be relevant only in circumstances in which the Infiltrator Worker did not leave the country after 5 months from the date in which he was required to leave (and see section 1J2 of the Law) and even then its rate is relatively limited (the President's opinion, para. 58). Given the said, and for the other reasons that the President referred to (including the concrete benefit of the Administrative Deduction Component in the encouragement of the departure of the Infiltrator Worker on the date set for the worker) I am also of the opinion that there are no grounds justifying the voidness of the Administrative Deduction Component in the Deposit Scheme.

In conclusion, I side with the conclusion reached by my colleague, Honorable President E. Chayut, namely that the Employee's Component in the Deposit Scheme should be voided, and the declaration on voidness shall enter into force forthwith, as proposed by the Honorable President.

Judge N. Hendel:

1. I reviewed the materials; I heard the arguments of the parties and I read the opinions of my colleagues. I side with the opinion of Honorable President E. Chayut regarding the legality of the Administrative Deduction Component set out in the Law, as defined by the Honorable President. Regarding the Employee's Component, I would make a distinction between two elements. Regarding the outcome of voidness of this component on the grounds of its unconstitutionality, I join the conclusion of the Honorable President and the main part of her opinion. However, there is a certain difference in the analytical tools and in the emphases, I will present, even though eventually my arguments are connected to hers. Regarding the relief that should be granted, my reasons lead to a conclusion that is different than the conclusion reached by the Honorable President, and therefore I hold a different opinion for the purpose of this matter. As clarified, I am of the opinion that it is necessary to suspend the voidness of the Employee's Component for a short period.

   I will concentrate on five points that are interrelated and that lead to my conclusion as said: the first – the quantification and the constitutional range; the second – the connection between the right to property, the right to human dignity and the right to live in a minimum level of dignity; the third – two models examining the proportionality in its narrow sense; the fourth – the point of view of Jewish law; and the fifth – the relief.

Quantitative damage and the range of constitutionality

2. The conclusion of unconstitutionality wears different forms in Israeli law. One form is that the law should be voided on the grounds of an illegitimate cause. Another form is that the means that was applied by the legislator – in light of its very own nature and type – fails to meet the relevant criteria in section 8 of Basic Law – Human Dignity and Liberty. For example, a sentence of imprisonment that as such is disproportionate, is irrational or made without permission granted by law. These forms, and this is not an exhaustive list, do not deal with quantification, but we may say, with quality. On the one hand, there is a form that concerns the quantification regarding the legislation. For example, when it is possible to use the means of imprisonment solely for the purpose of removing the detainee only or, according to some of the approaches, also for reasons relating to deterrence – and not as a punishment, and therefore the imprisonment period of three years to anyone entering Israel unlawfully does not meet the certain of proportionality in the narrow sense

(see: HCJ 7146/12 *Adam v. Israel Knesset*, P.D. 66(1) 717 (2013) (hereinafter: the "Adam Case")).

The constitutional analysis of a law on the grounds of quantification as set out by the legislator in a certain part of its components – is complicated work. In other words: the purpose of the means is legitimate; it maintains a rational connection and there is no means whose damage is less drastic and that attains the purpose in the same level. However, we should ask whether the quantification of the means in question creates a damage that is greater than the benefit within the framework of the criterion of proportionality in its narrow sense. The court should determine whether the "how much" is too much. This is a number, but there is no exact mathematical formula that cause determine, for example, that one hundred units pass the constitutional criterion, but that two hundred units do not. For the purpose of this matter, it is clear that the legislator has a broad range for maneuvering for the purpose of deciding in these questions. However, in what way should be draw the line?

My colleague Judge N. Solberg referred to the Sorites Paradox that asks when a collection of grains becomes a heap. To be more exact, the question is not what grain caused this collection of grains to be defined as a heap. I would actually use another parable, whose advantage is that we all know it in everyday life, which asks the following: how does a person decide when to get a haircut? At what length should a person's hair be for the purpose of deciding whether or not to get a haircut? It seems that no one has an accurate answer to this question. When hearing any answer to this question, we can ask why not set a hair length that is a bit longer or shorter? Why not get the haircut tomorrow and not today? However, life experience proves that a person will not avoid getting a haircut and even will wait to extreme circumstances. Hence, we find that the "paradox of quantification" does not prevent a decision. In the theory of logic, which is a branch of philosophy, this issue is known by the name of as "vagueness" and "fuzzy logic" (see: GREG RESTALL, LOGIC: AN INTRODUCTION 77-87 (2006). Even according to this theory, the paradox does not paralyze a person to such degree that the person cannot make a decision.

Intuition may help us decide in quantitative questions in the realm of the law. For example, if, in the case in question, this was a deduction of 50% of the employee's wages, I am of the opinion that we could have agreed that the quantification did not succeed the criterion of proportionality in its narrow sense. I also think, for example, that if the deduction was at a rate of 30% or 40%. On the other hand, if we operate under the assumption, which I find acceptable, that the purpose is legitimate and that there is nothing wrong in the means itself, if the deduction was 5% only – there was no room to intervene. The difficulty is that these are extreme cases in which the

decision is easy. There is still the question that we should ask regarding numbers that are not necessarily extreme from the intuitive aspect, for example – 25%, 20% or 15%. Here intuition is less helpful and might leave the question under dispute.

We have reached the point: on the one hand – it is impossible that questions of law of quantitative nature are located outside the realm of constitutional judicial scrutiny. The legislator – by section 8 of Basic Law – Human Dignity and Liberty – acknowledged the existence of constitutional judicial scrutiny and we should not allow that means of quantitative nature will be immune to such scrutiny. The number of a datum that, more than once, is at the heart of the law – it is a component that is too important to be ignored. Accordingly, I am of the opinion that if the number seems to be extreme – same as in the example of a deduction of 50% from the employee's wages – this suffices to result in the invalidation of the means. However, in circumstances in which the quantitative means might not pass the constitutional scrutiny, but it is not an extreme number – the court examining the law should receive rational reasons. A statement that the number is too high is insufficient as a conclusion. The court is required to receive outside assistance on which it can support its conclusion to substantiate its reservations from the decisions made by the legislator. This outside support should not be of one type. It can be, for example, a rational explanation, a law, a precedent, a basic legal principle or any other outside source. The emphasis is that in cases that are not extreme and clear in quantitative terms, the application of intuition for the purpose reaching conclusions about illegality is insufficient.

Now that we are equipped with these tools, we will analyze the scheme subject matter of the Petition

3. Section 1K1 of the Foreign Workers Law 5751-1991 that was legislated in 2014 and that entered into force in 2017 applies to workers who entered in not through a proper border crossing (while taking into consideration the case in question, these shall be referred hereinafter: the "Workers"). The section states that 20% of the wages of the Workers will be deducted by the employer and will be transferred to them when they leave Israel. The question that we have to consider is whether this provision (hereinafter: the "Deposit Scheme" or the "Scheme") is constitutional. The main purpose of the Deposit Scheme – the creation of a positive financial incentive encouraging the Workers to leave Israel – is legitimate, and in the least possible. The President stated that the Scheme passes the first two criteria of proportionality, as a result of the rational connection between the Scheme and the lack of a means that attains the purpose in the same manner and whose violation of the constitutional rights is less drastic. However, the Scheme failed in the criterion of proportionality in its narrow sense, since its damage outweighs its benefit.

I find these conclusions acceptable. However, according to the analysis I presented above, this is a means with quantitative nature, when the legislator has a broad constitutional range in its formulation. In other words, the intensity of the infringement of the right to property that lies in the Deposit Scheme is examined as depending on the rate of deduction that was set therein. And we should take into consideration here that the criteria of proportionality include the means that was set out by the legislator. In other words, if we return to the Sorites Paradox: we are not required to decide in the theoretical question when the collection of grains can be defined as a heap, but we have to decide in the concrete and the actual question – whether the means before us is already considered a heap. The 20% deduction rate in the Deposit Scheme before us does not "shout on its own" – contrary, for example, to a rate of 50%. Therefore, it is necessary to consider whether there is an external element that will help us to determine whether or not the 20% deduction rate passes the constitutional criteria.

In the case in question, the means that is considered is a uniform and equal deduction of 20% of the wages of all Workers, irrespective of the wages that they earn (except for a limited number of groups that were excluded from the application of the Scheme in the regulations that were enacted approximately one year and a half after it entered into force, as stated in the President's opinion). Of course, the legislator was entitled to set a uniform and equal deduction rate, and this also facilitates the application of the law. However, we are required to examine the means that was set while concentrating on the manner in which it affected the entire members of the group to which it applied, including the disadvantaged members of this group.

And we can find the external support here. According to the data that the State presented, it transpires that approximately 40% of the Workers earn an amount that is lower than the minimum wages even before the deduction, and approximately 17% earn an amount of up to NIS 6,000, in such manner that after the deduction of 20% of their wages this amount drops under the minimum wages. It transpires that as a result of the Deposit Scheme, more than half of the Workers earn an amount that is lower than the minimum wages. This is a significant group that also constitutes a majority out of the group of workers to which the law applies. There is a clear indication that exists in the law regarding disproportionate violation of the right to property and it is the deduction that sets the wages that the worker actually receives on an amount that is lower than the minimum wages. The Minimum Wage Law 5747-1987 applies to all employees in Israel, without exception, and constitutes elementary protective legislation in labor law. This is a cogent law that cannot be breached even with the employee's consent (see, for example: LA (National) 1054/01 *Twili v. Dahri*,

P.D. 37(2002) 746, para. 6 (2002)). Its purpose is to "protect the right of the working man to earn a living and live in dignity from it" (HCJ 1163/98 *Sadot v. Israel Prison Service*, P.D. 55(4) 817, 861 (2001) (hereinafter: the "Sadot Case")).

A deduction of 20% of the wages in a manner that leads a person to circumstances in which the wages that he actually earns is lower than the minimum wages, for many years, deprives from him the ability to earn his living with dignity. Therefore, not only that the deduction harms his property, but it also amounts to violation of his dignity as a man (cf.: the Sadot Case, p. 865; see also: HCJ 3512/04 *Shezifi v. National Labor Court*, P.D. 59(4) 70, paras. 2-3 in the opinion of Honorable Judge E. Arbel (2004); LA (National) 440/99 *Berman v. Pilas Pastry Shop*, P.D. 37(2002) 807, 813 (2002)). And it should be emphasized that the State declared in its arguments that there was no preclusion that the Workers would work. Therefore, as legitimate as the purpose of the Deposit Scheme might be, we cannot accept circumstances in which Workers have to provide for themselves and for their families in Israel regularly in an amount that is lower than the minimum wages, despite the many hours of work that they invested. This is even more relevant, taking into consideration the fact that they, like most other members of their community, cannot benefit from National Insurance Institute benefits, welfare services or national healthcare, and therefore their wages support them and their relatives who live in Israel and who cannot work. At the same time it should be noted that the consideration of decrease under the minimum wages is not the only consideration that affects the question of the legality of the Scheme, and this consideration should be entertained with other considerations that intensify the damage caused from it, and that are listed in the President's opinion. The meaning is, *inter alia*, that the entire group is a disadvantaged population and its members lack social rights or a financial safety net. And we shall remind that the group of workers, as a result of their life circumstances, has no property and assets, and they live only by virtue of their wages.

Therefore, we found an external support by way of the Minimum Wage Law. This is not just a number but a normative-empirical assertion made by the legislator. The minimum wages, as its name suggests – creates a mechanism that sets a low threshold of wages for subsistence. The exclusion of the worker from this low threshold constitutes serious damage. This damage, at a deduction rate of 20% - is a significant damage to the life of the single worker. As already clarified, two additional elements in this external support are: the source of the income that was taken – wages and not a benefit; and the lack of clarity with relation to the date of receiving the deposit because of external circumstances that are not depending on the worker. It is possible that the legal situation would have been different if the legislator had laid down another Deposit Scheme with a lower deduction rate that was practicable or

inconsistent, while making a reference to other workers who earn a considerable amount above the minimum wages. I do not express my opinion as opposed to what degree this outcome is desirable, but I wish to clarify my reasons and the conclusions stemming from them. In any event, as said, we are dealing with a petition against the law in the manner it was legislated. I reach the conclusion that the violation associated with a uniform deduction of 20% of the worker's wages constitutes damage whose impact is considerably higher than required, and accordingly it is unconstitutional.

Property, human dignity and the right to live in dignity

4. This matter leads us to the second point relating to the connection between the right to property, the right to human dignity and the right to live in dignity.

The right to property is a fundamental constitutional right that is established explicitly in section 3 of Basic Law – Human Dignity and Liberty. It does not stem from the right to human dignity or freedom; this is a right that is independent and autonomous. The Deposit Scheme infringes the right to property independently. The rulings of this court debated ordinarily a constitutional infringement of the right to property in the world of commerce, tax laws and the like, while in the case in question we are dealing with violation of the right to property in the most fundamental rights of men. The wages a man earns is his property. The worker is entitled to wages. The parties are not disputed about that. The group of workers is particularly vulnerable. The infringement of the right to property is severe and clear. It is even more intense, not just in its intensity but also in its nature; first, the Deposit Scheme infringes the right of the worker to property in its simple and most fundamental sense, since it takes from the worker his property and does not allow the worker to use the property in the manner he wishes. In circumstances in which the wages are eventually paid to the worker at the time the worker departs from Israel – to the extent that the employer indeed deposited the wages – this does not void this damage. It is clear that a right of a person to property also extends to his freedom to use his property at any given time and on a date he chooses to act in the said manner (on the relationship between property and freedom see: Aharon Barak: "The Constitutional right to property: economic freedom and social responsibility" selected Writings C, 479, 486 (2017)). The ability to use the property might even be delayed for a number of years, since it is impossible to know when the worker will leave Israel. This is especially true while taking into consideration the fact that more than 90% of the workers to which the law applies come from countries towards which a policy of "temporary non-refoulement" is practiced, and many of them even submitted applications for an asylum in Israel that are still pending. This data even increases the distance between the particulars of the Deposit Scheme and its purpose.

Furthermore, the Deposit Scheme infringes the right of the employee to property in a deeper sense, that also takes into consideration the economic starting point of the owner of the property and the group of the population to which he belongs (see: Hanoch Dagan, "Property at a crossroads" 36 (2005)), and the type of the property we are dealing with and its importance and significance – the economic significance in the case in question – for its owner (for a similar approach see: Yossef M. Edrey "On declarative constitution and constitutive constitution – the status of the constitutional right to property in the hierarchy of human rights" Mishpatim (Hebrew University Law Review) 28 461, 488-489 (5757)). The wages of a person who is part of a disadvantaged population from the start, and who has no social rights or a financial safety system, and who often has to provide for his family, children or other supported relatives in Israel – is a major and cardinal asset in his life. The protection of his right to property has special importance. If we deprive from such a person to use one fifth of the asset this impairs his ability to earn a living with dignity, and it might even cause him to be in a situation in which his actual wages are lower than the minimum wages or even at a greater distance than the threshold set out in the Minimum Wage Law.

Hence, the violation of the right to property could also result in violation of human dignity. Legal precedents addressed the tight connection between these rights (CA 6821/93 Bank HaMizrachi HaMeuchad v. Migdal Cooperative Village, P.D. 49(4) 221, para. 69 in the opinion of Honorable President (ret.) M. Shamgar, and para. 87 in the opinion of President A. Barak (1995)). However, here this tight connection is further stressed. This is because of the intensity of the violation of the right to property, in light of the resource that is taken and the population to which the Deposit Scheme applies, and taking into consideration the actual consequences – in which the monthly wages of more than half of the workers to which the law applies is lower than the minimum wages (for a similar approach see: Eyal Gross: "The right to property as a constitutional right and Basic Law – Human Dignity and Liberty" Tel Aviv University Law Review 21(3) 405, 409-410 (1998)).

The circumstances also give rise to the issue of violation of the right to minimal life with dignity. We shall explain that my words will not decide on the question whether the Deposit Scheme, together with its violation of the right to property, affects the right to live in dignity, according to the criteria that are required for the purpose of proving the violation and as outlined in legal precedents (HCJ 366/03 *Commitment to Peace and Social Justice Society v. The Minister of Finance*, P.D. 60(3) 464, para. 22 in the opinion of President A. Barak and para. 2 in the opinion of Honorable Judge D. Beinisch (2005); and we have also read the dissenting opinion of Judge E. E. Levi,

paras. 5-7 of his opinion). Without referring to detailed data about the accurate amounts that the workers earn and the amounts that the workers are required to pay for the purpose of living with dignity, the Deposit Scheme violates the right to live with dignity to a certain extent. This is from a "back-to-back" perspective: when it rides on the back of the right to property (in the theoretical realm, and regarding another case, see and compare: my opinion in HCJ 781/15 *Arad-Pinkas v. The Committee for Approval of Agreements to Carry Fetuses in accordance with the Fetuses Law (Approval of Agreement and Status of the Newborn), 5756-1996* (27.2.2020)).

Regarding the right to live with minimum dignity, we should take into consideration the fact that contrary to the other cases that were considered in legal precedents, and that dealt with the citizens of the State of Israel who benefit from different social rights, the workers to whom the Deposit Scheme in question apply do not benefit from the same financial safety nets. Therefore, there is also substance to the total perspective of the case, and the degree of harm caused to the workers. In other words, even if we operate under the assumption that no foundations justifying the infringement of the right to live in dignity of some of the workers were presented, still this damage is particularly intense, and deviates from an "ordinary" infringement of the right to property.

This is the negative force to the infringement of the right. An infringement results in another infringement and results in another infringement. In the very least – one infringement could lead to infringement of other rights. This is true even though this an infringement with different intensities. In the case in question, it suffices that there is infringement of the right to property to lead to the conclusion that the Deposit Scheme is unconstitutional. However, the connection between this infringement and other infringements is meaningful in the context of the issue of quantification and the constitutional range. The court assigned weight to the external data of deprivation of the ability of the worker to subsist on minimum wages. For the purpose of this matter, within the framework of the statement that the deduction rate of 20% is disproportionate, there is also weight to the contention that these circumstances also cause a certain infringement to the right to live in dignity, and it is also possible – and certainly to a lesser extent – to the right to live in dignity. Even if these rights, in and of themselves, are not the basis for the conclusion regarding the invalidation of the law, these circumstances strengthen and intensify the infringement of the right to property.

The criterion of proportionality in the narrow sense; two models

5. My conclusion regarding the illegal nature of the Deposit Scheme regarding the Employee's Component stems from its failure in the third criterion of proportionality – the criterion of proportionality in its narrow sense. This criterion demands to maintain a proper relationship between the damage that was caused to the constitutional rights as a result of the Deposit Scheme and the social-public benefit stemming from it (see, for example: HCJ 1715/97 *Israel Investment Managers Association v. The Minister of Finance*, P.D. 51(4) 367, para. 18 (1997)). Therefore, it is customary to consider this criterion as ordering us to estimate separately the damage and the benefit, and then compare them one against the other. To the extent that the first outweighs the second – the law in question will be declared as unconstitutional; however, to the extent that the second outweighs the first – there is nothing wrong in the law. In the case in question, my colleague the President and my colleague, Judge U. Vogelman, referred in detail to the damage and to the benefit underlying the Deposit Scheme, and I hold the same opinion as them, namely that in the balance between the two the damage outweighs the benefit. This suffices to lead to the conclusion that the Deposit Scheme is unconstitutional.

This is one model, which is the most familiar model of the criterion of proportionality in its narrow sense. As said, I would not deny the conclusion leading to voidness according to this model, but this model does not fully reflect my method of analysis under the circumstances of this case. In other words: there is another model that might be more compatible with other cases, including the case in question. According to the second model, the damage that was caused is so intense, to such degree that the law cannot be kept unchanged, even without examining the benefits in it. Even if the benefit in the law is extensive – the type of the damage does not allow its attainment by the means that was selected. There are therefore situations in which the damage produced by the means is so high to such degree that its violation of the rights is unbearable and its should be voided, even irrespective of the benefit that it produces. Such a means may satisfy the first criteria of proportionality – in light of the existence of a rationale connection between this means and the purpose and the lack of another means whose infringement of the rights is less drastic and that attains the purpose in the same manner. It might even be possible that the benefit in it will be very high. However, I am of the opinion that such a means is disproportionate. The emphasis is not in the comparison between damage and benefit same as in the first model, but in the damage itself – its nature and intensity.

An example of such a means is the means that was considered in the Adam Case mentioned above: keeping in custody those who entered Israel illegally for a period of three years. In my opinion there I referred to the fact that this period of time shows – even if this was not the intention of the legislator – that keeping in custody is a punitive-criminal act and not an administrative-deterring act. This punitive means is, in and of itself, improper. And note well: I emphasized that the mere keeping in

custody of those who entered Israel illegally is not improper. What is wrong is the lengthy period – and this wrong does not depend on the purpose that it serves. It should be noted that in light of the statement regarding the length of the period, there is no need to consider the benefit that arises from keeping infiltrators in custody for a period of three years. Even if there is significant benefit in the deterrence as a result of the lengthy period, this is immaterial. It seems that this thinking is consistent with the majority opinion in the judgment that was given in the Adam Case (see, for example, para. 38 in the opinion of Judge U. Vogelman).

Even from this point of view it is possible to say that the Deposit Scheme considered in this case is unconstitutional. The emphasis for the purpose of this matter is on the intensity of its infringement of the right to property, including its different aspects as stated above, and, to a certain degree, also the right to live with dignity, with respect to the members of the group who actually earn less than the minimum wages. And this is not just intensity, but also quality: The Deposit Scheme leads to circumstances in which many workers have to earn a living from an amount that is lower than the minimum wages, even if they had worked in a full-time job scope. According to the second model, these suffice to lead to the conclusion that the Deposit Scheme should be voided, even without addressing the degree of the benefit that lies in it. Therefore, even if I held the view, same as the view held by my colleague Judge N. Solberg, that the benefit in the Deposit Scheme is considerable (and it should be noted that I did not see a reason supporting this argument), or whether: it is necessary to have more time for the purpose of considering this issue – I am of the opinion that this would not justify the infringement it causes.

6. Alongside these two models that were presented above, I also found two additional approaches in legal precedents to handle means that produce extensive damage in connection with the invalidation of the Deposit Scheme in question or other similar schemes based on the criterion of proportionality in its narrow sense. I will present these approaches and I will explain why I prefer to pursue the alternative of the second model in the appropriate cases.

The first approach was presented in the opinion of my colleague, Judge Y. Amit, in this case. My colleague is of the opinion that the Deposit Scheme should be voided since its purpose is inappropriate. My colleague is of the opinion that the declared purpose of the Law – the creation of a positive financial incentive that will encourage the voluntary departure of the workers – is legitimate and proper. However, in his opinion the disproportionate and illegitimate means that was applied for the purpose of attaining this purpose proves that the real and hidden meaning of the Law – which is breaking the spirit of the workers in an illegitimate way of putting pressure on workers to leave "voluntarily" – is not a legitimate cause, since it undermines the non-refoulement principle that prohibits the deportation of a person to a state in

which there is risk to his life or his freedom. I agree with my colleague, namely that this argued purpose is inappropriate. Accordingly, we can reach the conclusion that my colleague reached. However, I am of the opinion that the way to pursue this goal is difficult. I am of the opinion that the approach presented by my colleague is not consistent with the theory of stages that is known in constitutional analysis, according to which an examination of the purpose of the law is made prior to the examination of the means and in a manner that is separated from it (see: Aharon Barak, Proportionality in Law 297 (2010) (hereinafter: "Barak Proportionality in Law"); Aharon Barak "The constitutional right and its violation: the three stage theory" Law and Government S 119, 162 (2018) (hereinafter: "Barak "Three Stage Theory")). The reason in this theory is understandable. The legislator has broad discretion in selecting the purposes that he wishes to attain. When the court states that a law is unconstitutional since the damage caused by the means is greater than required, this does not mean that its cause was not legitimate (Barak, Proportionality in Law, p. 299; Barak "Three Stage Theory," p. 163). At the same time, when the court rules that the purpose of a law is illegitimate, this means that the legislator will never be able to aspire and attain it, irrespective of the means that he will apply. In the case in question, from the time that the declared purpose of the Deposit Scheme is legitimate – also according to my colleague's point of view, in the manner that my colleague emphasizes with respect to the Administrative Deduction Component – there is no room to try and prevent from the legislator to try and attain that purpose while applying a means that is less drastic than the one set out therein. I will further remind that in light of the caution we have to apply in judicial scrutiny of primary legislation, we should apply the presumption of regularity to the legislator, and examine the legality of the law according to its declared and legitimate purpose (see: HCJ 7052/03 *Adalah – The Legal Center for the Rights of the Arab Minority in Israel v. The Minister of Interior*, 61(2) 202, para. 14 in the opinion of Judge A. Procaccia (2006)). Even if the approach that my colleague proposes is feasible, I am of the opinion that it is highly important to maintain the order of the criteria for the purpose conducting a constitutional analysis. I am of the opinion that discovering the illegitimate nature of the purpose during the stage of analysis of the means according to the proportionality criterion in its narrow sense affects the order. Instead of the court making progress one step at a time, the court takes a step back. It seems that its approach might result in a simplification level of the purpose that is too detailed and I also do not find this outcome desirable.

The second approach was presented by the President D. Beinisch in HCJ 9593/04 *Morar, Head of Yanun Village Council and others v. IDF Commander in Judaea and Samaria*, P.D. 61(1) 844 (2006), in which the court debated a policy that restricted the ability of the residents of Palestinian villages in the Judea and Samaria area to

enter their agricultural lands and cultivate them. The court stated that the purpose of the policy – to protect the safety of the residents of the area, the Palestinians and the Israeli ones – is legitimate. However, the means that was applied for the purpose of attaining this purpose – closing the areas and preventing entry to their Palestinian owners for the purpose of protecting them in person – failed to meet the rational connection criterion. The reason for this lies in the interpretation that was assigned to the rational connection criterion according to which this is not a criterion of a mere technical causal connection between the means and the purpose, but the emphasis in this criterion is on the rational connection and therefore it mandates the application of a means that is not arbitrary, unfair or irrational (ibid, paras. 25-26). In the case in question, according to this approach, it was possible to argue that a deduction of 20% from the wages of all workers who entered Israel unlawfully for the purpose of encouraging them to leave Israel, even though they are subject to the non-refoulement principle, is not a means that maintains a rational connection. Even though this route is possible, it seems that me that it is preferable to keep clear boundaries in the constitutionality criteria, and avoid expanding the rational connection criterion beyond cases in which the said criterion is not fulfilled per se.

To conclude this point, I will clarify that there is one model of the proportionality criterion in its narrow sense and that makes a comparison between the damage and the benefit, and there is a second model in which the focus is on the damage itself – its nature and intensity. These two models are commensurate with the language of section 8 of Basic Law – Human Dignity and Liberty, that demands that the violation of the law will be "to a degree not greater than necessary." The proportionality criterion in its narrow sense, according to the two models, does not reveal any defect in the previous stages of the constitutional analysis. This issue should be clarified so that the court will present its position clearly with respect to the different stages of the constitutional analysis.

Hebrew law

7. The law of charity in Hebrew law is the fruit of the tree which one can take and become rich in the framework of our discussion. "Charity is a major mitzvah in the Torah…and it express a basic principle of Judaism…and one of the tenets of its worldview (RABBI JOSEPH B. SOLOVEITCHIK, HALAKHIC MORATITY: ESSAYS ON ETHICS AND MASORAH 123 (Joel B. Wolowelsky & Reuven Ziegler eds., 2017) (hereinafter: "Rabbi Soloveitchik"); my translation). Even the essence of charity in Hebrew law has its own qualities. We will now refer to six of its aspects.

The first aspect concerns the meaning of the word charity in English, "Giving voluntarily to those who need" (POCKET OXFORD ENGLISH DICTIONARY 137 (1992)). At the same time, the Hebrew root of the word charity is also the root of the word "justice" – law. Indeed, according to the Talmud (Talmud Bavli, Bava Batra 8, 2) and the Rambam (Mishneh, Torah, Zefer Zraim, Gifts for the Poor Chapter J Halacha J) the court may apply means of enforcement and even seize assets to assure the giving of charity (Shulchan Aruch, Choshen Law, Article 293; Rabbi Soloveitchik, pp. 129-131). The power to enforce does not just apply to the individual but also towards the public (Aruch HaShulchan, Yore Deah, Article 266, section C). Both the public and the individual – each of them are obligated to perform the mitzvah of charity. As stated in Shulchan Aruch: "Each city where the people of Israel are in must make available a collector of dues who will perform charity work" (Shulchan Aruch, Yore Deah, Article 256, section A). The public must create a treasury – for the purpose of giving money from Saturday evening to the next Saturday evening, and create a shelter for handing out of various food, fruit or money on weekdays (the principle of this edict is found in Talmud Bavli, Bava Batra 8, 2; according to Beit Yossef in his interpretation of the four columns, ibid).

The second aspect concerns the essence of the obligation. Charity in its ideal sense does not just aspire to fill the deficiencies of a person, but also to give that person the tools to be released from his dependency on charity. "The purpose of the laws of charity: assuring the subsistence of the poor. The reading of the social-economic mitzvahs of the Torah shows that these are aimed at attaining two goals: maintaining the poor and rehabilitating him" (Binyamin Porat: "Justice for the Poor: Principles of welfare laws from the Torah to the literature of Chazal, 115 (2019) (hereinafter: "Porat")). We can say more broadly that the short-term purpose of the welfare laws is to assure the subsistence of the poor, and the long-term purpose is his rehabilitation and salvage from the state of poverty (see: ibid, p. 123). In the Gifts for the Poor Rules the great eagle – the Rambam – spreads his wings over the mitzvah of charity and sets out a hierarchy for the purpose of observing this mitzvah. And in his own words: "There are eight virtues in charity, one is above the other: the greatest virtue that is unsurpassed – he who holds the hands of Israel and who gives him a gift or a loan or enters into a partnership with him or gives him work for the purpose of strengthening him until he will no longer have to borrow money from others and it was already said about this that: "and then thou shalt uphold him: as a stranger and a settler shall he live with thee (Leviticus 25, 35)" in other words: you should hold him until he no longer falls and needs" (Mishnah Torah, Gifts for the Poor, Chapter J, Halacha G). In the case in question, the emphasis is on he who gives work to the poor so that he does not need help, according to the supreme way of charity: giving an opportunity to the poor to earn a living and live from his earning.

The third aspect is the scope of the obligation. The Gemara states the following: "One sustains poor gentiles along with the poor of Israel… All this is done on account of the ways of peace" (Talmud Bavli, Gittin 61, 1). This was also ruled in the Halacha in Russia in the beginning of the 20th century by Aruch HaShulchan (Aruch HaShulchan, Yore Deah, Article 251, section M), in the middle of 20th in Algiers by Rabbi Yosef Meśaś (Rabbi Yosef Meśaś Letters B, letter TTKZV (5758)), and at the end of the 20th century by Rabbi Shlomo Goren – the former Chief Rabbi (Rabbi Shlomo Goren, Theory of the State 374-377 (5756) (hereinafter: "Rabbi Goren"); see also the Vilna Gaon in his interpretation of Shulchan Aruch, Yore Deah, Article 251, section B).

The fourth aspect concerns the connection between the mitzvah of charity and human dignity. Jewish Halacha considered the respect given to the poor – both in the positive and the negative aspects – as an integral part of the mitzvah of charity. Giving respect in the negative aspect means not to shame the poor. This is not just a good virtue and a proper advice but an actual part of the foundations of the mitzvah. In the eight stages of the mitzvahs of charity according to the Rambam, the seventh level is "To give him [to the poor] less than he ought to but with a cheerful countenance" when the eighth is "to give him with a gloomy countenance" (Mishnah Torah, Gifts for the Poor, Chapter G, Halachot 13-14). The Rambam even further stressed this point by stating: "Anyone giving charity to the poor with a gloomy countenance is a disgrace, even if he gave him one thousand coins he lost his right" (Mishnah Torah, Gifts for the Poor, Chapter J, Halacha D). In other words, if the giver does not just give to the poor with sadness but even degrades the poor in the manner of his giving – he does not fill the mitzvah of charity, even if he gave a considerable sum. In other words, giving to the poor while being angry and while harassing the poor, actions that cause the poor to feel ashamed and sorry, are a reason justifying the cancellation of the mitzvah of charity and it renders it into a transgression (Rabbi Soloveitchik, p. 146).

Our sages were very sensitive to the dignity of the poor and were well aware that the giving of charity could violate the dignity of the poor, and that this caused him a shame. For that purpose, they praised the giver of charity modestly and even in secret, and already during the period of the Mishnah set up a charity fund (Mishnah, Peah 8, 7). There are firm Halachic grounds explaining why the sages were so sensitive to the inner world of man, and therefore "they set themselves a goal to protect the dignity of the poor and prevent the poor from feeling ashamed" (Porat p. 149; and see the sources cited thereat, in pp. 137-150).

The fifth aspect concerns the perception the poor has of himself and the requirements from him. As already ruled: "A person should always construct himself and bear hardship rather than appeal to people at large and make himself a burden on the community…Even a distinguished sage who becomes poor should involve himself in a profession…There were great sages who were woodchoppers, porters of beams, water-carriers…but they did not ask anything from the community, nor did they accept gifts that were given to them." (Mishnah Torah, Gifts for the Poor, Chapter J, Halacha 18). In general, the mitzvah is to worship the Sabbath by food and by clothing, but if this requires receipt of charity – it is necessary to treat the Sabbath same as any other day (see: the words of Rabbi Akiva in Talmud Bavli, Sabbath 118, A). Every work is an honor to the one performing it; not only the simple people act in the said manner, but even the greatest sages acted in that manner.

The sixth aspect is the public aspect. There are mitzvahs that apply to individuals and there are mitzvahs that are part of the public law. The charity mitzvahs of the individual have less intensity compared to the public. For example, the individual is obligated to give charity to the single poor person, contrary to a group of poor people that have no right to demand that the charity would be given to him by an anonymous person. At the same time, Halacha developed the practice of giving charity to the community by the charity collector. They are not entitled to choose to whom to give the charity, and prefer one over the other arbitrarily, but they must lay down rules. Halachic rules that make a distinction between the duty of the individual to give charity and this duty of the public that is performed by the charity collector of dues demands from the latter to inspect carefully the state of the poor, and give the public funds according to clear criteria (see the words of Rabbi Moshe Feinstein who lived in the United States in the 20th century: Questions and Answers of the Words of Moses, Yore Deah A, Article 144; see also: Porat, pp. 112-114). However, there is another level above the law of the individual and the law of the public, and this is the law of the State. We mentioned above the reason of giving charity "on account of the ways of peace." This consideration remains unchanged, and further applies to the relationship of the State of Israel towards Jews and gentiles as one (see: Rabbi Goren, pp. 380-381).

8. In many ways, the different aspects in the Hebrew sources that were presented above are naturally incorporated in the subject matter of this case. This does not necessarily hold true with respect to all the particulars of the laws, but to the overall narrative that they portray. Nevertheless, we are not actually dealing with the laws of charity. Questions relating to budget, priorities and allocation of resources are very complicated, and the decision in these questions should be made by the legislator. The point comes from a different angle. The Deposit Scheme subject matter of the

Petition does not deal with the creation of workplaces and the general obligations of the State towards those who entered Israeli illegally. The point is considerably more limited. It was decided that it was necessary to deduct 20% of the wages of the employees and give them this amount only when they leave the territory of the State of Israel. This is not a grant that is a gift or an addition, but subtraction from the employee's wages.

We can find help here in the six aspects of the laws of charity in Hebrew law that were presented above. The first aspect is that charity is a duty; and the second aspect is that the definition of charity in its upper level is an opportunity afforded to make a living. Formally, the law does not allow to employ the workers, but the State formulated a policy of non-enforcement of the prohibition on their employment, while knowing that they work (see: HCJ 6312/10 *Kav LaOved – Worker's Hotline v. The Government of Israel* (16.1.2011)). This answers these two aspects: The State actually acknowledges the duty to enable work, make a living and subsist. This also holds true with respect to those who are not citizens with full rights and irrespective of his religion or origin. This also manifests the third aspect relating to the application of the duty of charity according to Hebrew law to any person.

The fourth aspect concerns the recognition of human dignity – and the protection of the worker in the case in question, the ability to allow the worker to continue and be independent and earn a living with dignity, even if his earnings are meagre. The fifth aspect refers to the poor man himself – he has to aspire to work and make a living. The sixth aspect ties the different aspects and stresses the responsibility of the State in regulating the worker's rights. In light of this background, it is necessary to ask whether it is justified to impair the ability of the workers to make a living and subsist from their wages by deducting these wages, and in particular by bringing workers who work in full-time job scope in terms of their hours, to circumstances in which their wages are lower than the minimum wages, with all ensuing consequences, including the violation of their dignity. And again, we shall remind that these are groups of people who work for a living, and their wages is the only financial asset that they have to support themselves and their families. The rate of the wages is critical, since they do not benefit from social rights. The emphasis is not in the giving of benefits but in preventing deduction from the wages. There is no competition of resources between the worker or another resident or citizen but this is only a connection between the worker himself – between the wages that the worker earned from his work and his access to his wages.

One final point that is not marginal. The workers to whom the Law applies are not in a condition in which they can leave. The State applies to the majority of these workers

a policy of non-deportation according to the non-refoulement principle that is set out in the 1951 Refugee Convention (a convention that the State of Israel signed), and that is known in customary international law, according to which a person may not be deported to a place where his life is at risk. Many of them even submitted applications for an asylum that are still pending and fail to provide an efficient solution (for the purpose of this matter see the opinions of my colleague the President and of my colleague, Judge U. Vogelman). The State accepts the non-refoulement principle as a fact that cannot be ignored. This state of temporary protection continues for many years and might even continue for many years with respect to many workers. This is a partial solution for the arguments of the State, namely that it is entitled to formulate an immigration policy. This is certainly true with relation to the State of Israel and other countries. However, practically this is a group whose members are here and it is completely unclear when they can move to another safe country, even if they want to. This matter must be part of the considerations. Again, I did not reject the option of applying economic measures that will constitute positive incentive for the purpose of leaving Israel, however the means we are considering in this case is disproportionate, in the manner required in section 8 of the Basic Law – Human Dignity and Liberty. This certainly holds true with respect to the members of the group whose wages after the deduction is lower than the minimum wages that the State did not see fit to exclude from the application of the law.

9. One last comment, my colleague Judge N. Solberg assigns weight that the edict in the Torah: "Neither shalt thou favor a poor man in his cause" (Exodus 23, 3) in his opinion in which he stated that it was necessary to dismiss the Petition on behalf of the workers. Irrespective of the final conclusion my colleague reached in the Petition, or other comments about Hebrew law in his opinion, I am of the opinion that in the general realm it is proper and right to qualify such statements as stated in his opinion in the final part of paragraph 37(c). In light of the importance of this principle, I will present the meaning of the edict according to the sources and to the best of my understanding.

The interpretation of the verse: "neither shalt thou favor a poor man in his cause" is that "you will not favor a poor person in his dispute, in his trial. This law refers to the adjudicator…it is necessary to mete out justice even if those who raise pity are injured" (Rabbi Adin Steinsaltz, Elucidated Bible: The Book of Exodus 23, 3). Rabbi Shimshon Rafael Hirsh, who lived in Germany in the 19th century clarified the following in his interpretation of the Torah: "When he stands in front of you in a legal dispute with his friend, you must treat the two parties in an absolutely equal manner" (Interpretation of Rabbi Shimshon Rafael Hirsh on the Book of Exodus 23, 3). Another verse in the Torah refers to the said equality: "Ye shall do no

unrighteousness in judgment; thou shalt not respect the person of the poor, nor favor the person of the mighty; but in righteousness shalt thou judge thy neighbour" (Leviticus 19, 15). This issue was elaborated as follows: "The justice is the abstract idea of the law…and the judge will equalize the justice…in his sentence he will realize the justice without taking into consideration the status of the parties" (interpretation of Rabbi Shimshon Rafael Hirsh on the book of Leviticus 19, 15). These verses are aimed at the adjudicator while judging the trial in a civil dispute between two persons. At this stage the adjudicator is required to judge in accordance with the law – and not to help the poor due to his poverty and not to help the rich due to his status. The law is binding. And we shall further stress; it is possible that substantive law will benefit with the poor – but a ruling made in accordance with this law is not violation of this law but its implementation. The meaning is that the adjudicator or the judge must rule in accordance with the law even if had preferred a different outcome.

It is actually for the purpose of avoiding a serious outcome of implementation of the law that the Hebrew law espouses an approach that prefers compromise over the law. There is an aspiration in the Halacha to bring the parties to a compromise – "and any tribunal that reaches a compromise is always better" (Shulchan Aruch, Choshen Mishpat, Article L, section B). This is the policy that rabbinical courts practice in property issues when they wish to rule according to the principle of compromise and not in accordance with the law even at present (Rabbi Zalman Nehemiah Goldberg "On the merits of compromise" Law of the Land – Law, Judge and Discussion 78 (5762); Rabbi Haim David Halevy, Chief Rabbi of Tel Aviv - Yafo at the end of the 20th century, The Full Source of Life, Chapter 292, section G). In any event, the verse "neither shalt thou favor a poor man in his cause" is aimed at civil law, when there are two actual parties in the dispute. And indeed, the verse does not deny from the court "the authority…to take into consideration the poor state of the defendant as it imposes on it a financial penalty" for example in traffic cases (see: Michael Vigoda "Neither shalt thou favor a poor man in his cause" the weekly sermon in the spirit of the law 62 (5762)). And so, the government is also entitled to lay down such a rule in criminal law (ibid). This is certainly a legitimate consideration of the court and the legislator, in the type of the matters that are brought before the High Court of Justice. And the spectrum is wide. Let us take for example the issue of the approach to the court and the rate of the fees (see my judgment in MLA 703/98 (Be'er-Sheva) *Elimelech v. Karvani*, para. 4 (26.5.1998)). This is one example out of many for the consideration of the poor that is practiced not by virtue of mercy but by virtue of the law. This can be practiced in civil law, in criminal law, in administrative law and in constitutional law, and this is how this case should be regarded.

Of course, I do not say that the legislator or the court is obligated, in any administrative or constitutional case, to always side with the position of the poor. Social decisions of the legislator and of the court are not one-dimensional and we can take into consideration questions relating to the budget with relation to various groups, and not necessarily the poorest groups. However, we should not understand this as if the Torah orders the court not to take the poor into consideration – this is not a prohibition or even a preferred rule. And we shall also remind that "There is no greater mitzvah that should be practiced outside the court: to give to the poor" (Interpretation of the Book of Exodus 23, 3 by Rabbi Shimshon Rafael Hirsh).

We will go up another level. The justice is manifested "without taking into consideration the status of the parties" (ibid). For the purpose of protecting human dignity, we should not treat a person – whether he is rich or poor – as if he, his values and his wealth are one and the same. Indeed, Shulchan Aruch states in the laws of charity; "Whoever feels pity for the poor – God have mercy on him" (Shulchan Aruch, Yore Deah, Article 246, section C). We are dealing with financial data which are indeed important practically, but it does not determine the essence of man. We will conclude with the interesting Mishnah from the Peah Tractate that concerns the landlord – i.e. the owner of property – who moves from one place to the next. It is only in light of his travels that "he has to take Leket, Shikhhah, and Pe'ah and Maaser ["gleanings, forgotten produce, and the corners of the field"] for the poor" – parts of the field that are left for the poor. The Mishnah states that he may, under some kind of coercion, take from the field. There is still dispute on the question whether when the landlord returns to his home he has to pay, since in that stage he returned to a state in which he is no longer poor. The sages release him from the duty to pay for the reason that "he was poor at the time" (Mishnah, Pe'ah E, D). And the truth is revealed; every poor man is poor only at the time, even if the time is long and continuous. The same applies to the poor, the rich and to man.

The relief

10. I have presented my position on the subject – the highlights that were presented – the reasons explaining why the Deposit Scheme is unconstitutional, according to the views held by the President. However, I hold a different opinion regarding the issue of the relief. The President is of the opinion that in light of the illegal nature of the Deposit Scheme, it should be voided immediately. At the same time, I am of the opinion that it would be appropriate to order the suspension of the voidness for a short period.

This conclusion I reached should also be read with my position according to which the constitutional violation manifested in the Deposit Scheme is of quantitative

nature. It is not the mere deduction from the wages of the workers that is constitutionally wrong, but it is its rate. Therefore, from the time the order regarding the voidness is absolute, in the sense that it voids the entire Deposit Scheme, I am of the opinion that there is no room that it should be immediate, but it is necessary to allow the Knesset to have a short period of time to amend the Law before the amounts in the Deposit Scheme are returned fully to the workers. In general, I am of the opinion that it is possible to grant a relief of suspended voidness in the proper cases. Considerations in principle and acts that are relevant for the purpose of formulating the relief. This outcome can also advance the constitutional dialogue between the authorities, and facilitate in the recognition of the complexity in the voiding of the law by the court, and that this should be the last resort (see: Yigal Mersel, "Suspension of the declaration of voidness" Law and Government I 39, 84, 86-88 (5766)).

At the same time, I also took into consideration the disadvantages of suspended voidness, first and foremost the fact that it leaves intact – albeit for a limited period – a statute that causes disproportionate violation of human rights. I do not ignore from the practical difficulties in the legislation of a law or its amendment, especially at present. However, when dealing with practical considerations, we should also take into consideration the Coronavirus pandemic that spread in our country and whose serious health and financial consequences are clearly felt – and we may even assume that they are felt very strongly – by the population that is the subject matter of the Deposit Scheme. Therefore, I am of the opinion that it would be proper to set a short suspension period of four months only.

11. In conclusion: I concur with the conclusions of my colleague the President, namely that the Administrative Deduction Component should not be voided, and that the Employee's Component is unconstitutional, and that it is necessary to order its voidness. If my opinion is accepted, we would have suspended the order regarding voidness for a period of four months as of the date of giving this judgment.

Judge

Judge G. Kara:

I concur with the opinion of President E. Chayut, namely that the Employee's Component in the Deposit Scheme is unconstitutional in light of its disproportionate violation of the right to property of the worker, and therefore it should be voided, when the said voidness will enter into force forthwith.

Judge

Vice President H. Meltzer:

1. I side and concur with the comprehensive judgment given by my colleague the President, Judge E. Chayut, and the comprehensive and careful analysis in her opinion of the factual and legal circumstances that are relevant to this case, and the outcome that she proposed.

   Having read the opinions of my other colleagues – I also concur with the comments that were made by my colleague, Judge U. Vogelman.

2. In light of the importance of these issues – I allow myself to add a number of insights and highlights of my own.

3. It seems that there is no dispute between the Petitioners and the Respondents that the Deposit Scheme, that is formulated in section 4 of the Prevention of Infiltration and Ensuring the Departure of Infiltrators and Foreign Workers from Israel (Legislative Amendments and Temporary Provisions) 5775-2014 (hereinafter respectively: the "Amending Law" and the "Deposit Scheme") – in anything related to the deduction of the Employee's Component within the framework of the Deposit Scheme (hereinafter: the "Employee's Component in the Deposit Scheme") – **violates** the right to property of these workers, within its meaning in section 3 of Basic Law – Human Dignity and Liberty. We can learn this, *inter alia*, by way of per a fortiori (beyond the sources that were presented by my colleagues) – and the said in my opinion in HCJ 6784/06 ***Shlitner v. Director of Pension Payments***, P.D. 64(2) 581 (2011) in connection with pension rights; see also: HCJ 11437/05 ***Kav LaOved – Worker's Hotline v. The Ministry of Interior***, P.D. 64(3) 122, 165 (2011); my opinion in LCA 8138/07 ***Pe'er v. Pensions Officer Ministry of Defense***, (21.06.2011); HCJ 8347/09 ***Jane Doe v. IDF Pensions Officer*** (08.04.2015) in para. 36 of my opinion).

   This position of the parties – with respect to **the violation** of the Employee's Component in the Deposit Scheme is also acceptable by all judges in the panel, and even the dissenting opinion expressed by my colleague, Judge N. Solberg, sided with the conclusion that: "The infringement of the right to property of the infiltrators is disturbing."

   Moreover, this infringement also undermines human dignity since it brings most of the workers who are part of this category to earn less than the minimum wages, highly impedes their subsistence and frustrates the possibility for their rehabilitation to such

degree that they need assistance in order to survive. We can compare this to the law of charity in Hebrew law, where the giving is intended, *inter alia*, to cause that a person will not degrade himself and will be required to look for assistance. See: Moshe Hellinger, The possible contribution of Halachic Jewish tradition to the creation of social justice in the volume: Seekers of justice between society and economy in Jewish sources, edited by: Hanoch Dagan and Binyamin Porat, issued by the Israel Democracy Institute (2016; hereinafter: Dagan and Porat, Seekers of Justice), ibid, pp. 133-170 and in the opinion of my colleague, Judge N. Hendel in the case in question.

4. Taking into consideration the said so far, it is necessary to see now whether the said **violations** are commensurate with the "limitation clause" that is set out in section 8 of Basic Law – Human Dignity and Liberty and that demands that the **violation** will satisfy four conditions:

   (a) That the violation will be regulated in the law, or that it will comply with the law by virtue of an express authorization granted by operation of the law.
   (b) That the law in which the violation is stated will be commensurate with the values of the State of Israel.
   (c) That the said law will be for a legitimate cause.
   (d) And that the violation of the constitutional right will be to the extent required.

   I will consider these conditions further below.

5. The two main purposes – that are relevant to the deduction of the Employee's Component in the Deposit Scheme in the Amending Law are supposed to advance the following:

   (a) The creation of a financial incentive that will encourage the Infiltrator Workers to leave Israel and prevent their integration in Israel.

   (b) Providing an initial financial support for those leaving Israel by the release of the deposit that accrued in their favor (under the conditions set out in the Amending Law).

   These goals are attainable and permissible under the circumstances of the case, and as such they are legitimate causes, within their meaning in section 8 of the Basic Law – Human Dignity and Liberty.

6. Taking into consideration the aforesaid – we should still ask whether the Amending Law is commensurate with the values of the State of Israel according to the meaning

set out in section 8 as said. I have presented a similar question in my opinion in HCJ 8665/15 *Desta v. The Knesset* (11.08.2015) (hereinafter: the "Desta Case") and now my colleague, Judge Y. Amit, discussed this issue here – from the aspect of the scheme in question – and reached the conclusion that the answer is questionable. I hold a different opinion here. I am of the opinion that it is indeed necessary to scrutinize any enactment that violates constitutional rights that are set out in Basic Law – Human Dignity and Liberty (or that stem from these rights) – in order to determine **whether they are commensurate with the values of the State of Israel**, however we should not say that the Amending Law, as such, deviates from this.

For the purpose of this matter I shall note that this issue, that concerns the values of the State of Israel – has three alternative meanings:

(a) The values of the State of Israel as a Jewish and democratic state (see: section 1A of Basic Law – Human Dignity and Liberty).

(b) The values of the State of Israel as a state that honors the humanitarian values, the sanctity of life and freedom (see: section 1 of Basic Law – Human Dignity and Liberty).

(c) The values of the State of Israel as a state acting in the spirit of the principles laid down in the Declaration of Independence (see: section 1 in Basic Law – Human Dignity and Liberty). For the purpose of this last source, paragraph 13 of the Declaration of Independence is relevant, stating the following:

> "THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; **it will be based on freedom, justice and peace as envisaged by the prophets of Israel**; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; **and it will be faithful to the principles of the Charter of the United Nations**."
> (Me emphases – the undersigned).

We should remind here that as a result of the lessons learned by the Holocaust – the State of Israel was one of the parties that initiated and that signed the 1951

Refugee Convention (that was ratified in the Knesset in 1954 and that was published in Treaty Series 65) and that rested on the principles laid down in the UN Charter. This also happened in 1967, with respect to the protocol that was attached to the said treaty (see: Treaty Series 1690) and the said two documents shall be referred hereinafter collectively: the "Refugee Treaty."

See: My opinion in APA 8101/15 *Zegata v. The Ministry of Interior* (28.08.2017) (hereinafter: the "Zegata Case") and see the list prepared by Shai "Tagner, Refugees, Infiltrators and Asylum Seekers in Israel" in the collection: The Declaration of Independence with Israeli Talmud edited by Israel Dov Elbaum (2019) (hereinafter: "Elbaum, Declaration of Independence") ibid, p. 244.

We can learn three principles from these sources:

(a) It is necessary to honor anyone asking for an asylum as a refugee, in the spirit of the 1951 Refugee Convention and the protocol of the convention. Beyond that – this conduct realizes the biblical edict: "Love ye therefore the stranger; for ye were strangers in the land of Egypt" (Deuteronomy 10, 19) that was manifested in **the vision of the prophets of Israel**. See, for example:

The words of the prophet Jeremiah:
"but if ye thoroughly amend your ways and your doings… if ye oppress not the stranger, the fatherless, and the widow…"
(Jeremiah G, E-F)

"…Execute ye justice and righteousness, and deliver the spoiled out of the hand of the oppressor; and do no wrong, do no violence, to the stranger, the fatherless, nor the widow…" (Jeremiah 22, 3);

The words of the prophet Zechariah:
"and oppress not the widow, nor the fatherless, the stranger, nor the poor…" (Zechariah 7, 10);

The words of the prophet Malachi:
"And I will come near to you to judgment; and I will be a swift witness…and against those that oppress the hireling in his wages, the widow, and the fatherless, and that turn aside the stranger from his right" (Malachi 3, 5);

The words of the prophet Ezekiel:

"The people of the land have used oppression, and exercised robbery, and have wronged the poor and needy, and have oppressed **the stranger** unlawfully" (Ezekiel 22, 29).
(All emphases mine – the undersigned).

This is the place to state that a stranger in these sources is, as said in paragraph 11 in the opinion of my colleague, Judge Y. Amit, anyone who came from another country and who lives in Israel, and not a stranger who converted, within its meaning in the Halacha.

For the purpose of this matter see also – the articles of Ben Dror Yemini, "Zionism is Humanism," in the collection: Elbaum Declaration of Independence, ibid p. 245, and: Israel Dov Elbaum, "We have no freedom not to like the stranger," in the same collection, p. 248, and in the chapter on the thirteenth paragraph of the Declaration of Independence, ibid, p. 427-443. See also the article of Moshe Winfield, "Law and charity in Israel and among the nations," Dagan and Porat, Justice Seekers, ibid, p. 251.

(b) Hebrew law (according to the review conducted by my colleague the President and my colleagues: Judge Y. Amit and Judge N. Hendel) prohibited in principle, and in the spirit of the Bible, the forfeiture and the withholding of worker's wages. Nevertheless, and according to the statements made by my colleague, Judge N. Solberg, the city residents are entitled – by virtue of the Halacha: "To stipulate on the measurements and the rates and the wages paid to the workers and punish for them" (Bavli, Bava Batra, 8, 72).

(c) Rules (a) and (b) above – should not be interpreted as diminishing from the authority of any state (including the State of Israel) to lay down its immigration policy, and this is also stated in the Refugee Convention.

7. In light of the foregoing, we can learn that the Amending Law, as such, **satisfies** the requirement to be commensurate with the values of the State of Israel, since the two purposes stated in para. 5 above – are not in contravention of the right of the State of Israel to lay down its immigration policy and prevent the integration of strangers in the country, while assuring that those that leave the country will have basic financial means to support them.

The focus in the legal discussion further below should therefore be **on the proportionality** of the Employee's Component in the Deposit Scheme, and I shall now discuss this issue.

8. My colleague the President said that the Employee's Component in the Deposit Scheme – **fails to meet** the requirement of proportionality in its narrow sense (the addition of its benefit vis-à-vis the violation of the right to property).

I concur with this conclusion and the reasons that my colleague presented in support of the said. I would like to add a number of reasons and aspects for the purpose of this matter.

9. For the purpose of attaining the purposes of the Amending Law – the Respondents chose the Deposit Scheme, after other solutions, that included an excess element of deprivation of freedom, were rejected by this court (see: HCJ 7146/12 *Adam v. Israel Knesset*, P.D. 66(1) 717 (2013) (hereinafter: the "Adam Case"); HCJ 7385/13 *Eitan – Israeli Immigration Policy v. The Government of Israel* (22.09.2014) (hereinafter: the "Eitan Case"); the Desta Case).

Nevertheless, another solution that the Respondents attempted to pursue (deportation to a third country, in which the State had to give a grant to every worker) was approved in principle by this court (the Desta Case) however it was impossible to realize it as a result of the disagreement of the third countries to accept the infiltrators that were deported not out of their own free will.

10. Other solutions were also presented in the meantime, solutions that might have solved the problem or the major part of the problem:

Honorable President M. Naor and the undersigned referred to this issue in the Desta Case, regarding the possibility **to send** the foreign population in question too all parts of Israel by way of "geographic boundaries" thereby decreasing the pressure and the difficulties that we are aware of and that are caused to the local residents in the center of the largest cities in Israel.

The Minister of Interior at the time tried to pursue this option, but withdrew (see: HCJ 5616/09 *African Refugees Development Center v. The Ministry of Interior* (26.08.2009)). At the same time, a similar action was taken, for example, in Germany and in other European countries, and these solutions had partial success, and even passed the constitutional criterion both in Germany and in the European Court of Human Rights (see: my opinion in the Desta Case, ibid, para. 10, and in my opinion in the Zegata Case).

Another way to find a solution for this problem – was pursued by the Government at the time the Government signed, on April 2, 2018, a document of understandings with the United Nations High Commissioner for Refugees (UNHCR) in which the status of half of the population subject matter of this proceeding was supposed to be settled in different countries outside Israel, while the other part of the population was supposed to gain a certain status that would allow them to stay in our country. The problem is that these understandings were canceled a few hours after they were signed – in circumstances that were not explained to us sufficiently and that are not within the boundary of the Petition.

Hence, as part of the range of the alternatives we discussed (and that are still relevant) – we are left at this stage with the Deposit Scheme, and therefore we will now examine the Employee's Component in it.

11. The Respondents argue that the Deposit Scheme advances the purposes that were recognized by the majority of the members of the panel as legitimate, and that the other alternatives are not expected to give to the State similar advantages. Furthermore, according to their line of reasoning, the additional benefit in the Deposit Scheme outweighs the infringement of the constitutional rights associated with it.

Assuming that we can come to terms with the two first prepositions – the Employee's Component in the Deposit Scheme **fails** to satisfy the third sub-criterion in the criteria of proportionality.

And I will clarify.

12. It is known that it is possible to steer a policy voluntarily, *inter alia*, by way of a "reward" or a "punishment" or any combination of the two.

In behavioral economics it is usually customary that a "punishment" is more effective than an "award" especially when dealing with decisions in circumstances of risk and uncertainty (see: D. Kahneman and A. Tversky "Prospect Theory: An Analysis of Decisions Under Risk" Econometrica 47, 263-292 at p. 279 (1979); Daniel Kahneman, "Think fast, think slow" (2011) ibid, pp. 301-311).

This is the method that the legislator pursued in anything related to the Employee's Component in the Deposit Scheme and that results in a temporary withholding of **20%** of the worker's wages – until the worker leaves the country. The problem is that pursuing this method usually causes the relevant player who was affected by the "punishment" to act in an unethical manner, and sometimes even in an illegal manner,

and this is especially dangerous in the present age in which the members of this population find themselves unemployed and impoverished.

See: Mary C. Keren and Dolly Chugh "Bounded Ethicality, The Perils of Loss Framing," 20 Psychological Science (2009), 378. Cf. Yuval Feldman, Amos Schurr and Doron Teichman, "Reference Points and Contract Interpretation: An Empirical Examination," Electronic copy available at: http://ssrn.com/abstract=1989556.

Furthermore, sometimes the "reward" method is preferable to the "punishment" method (in particular in circumstances of low certainty and low amounts). See: Fieke Hanrinck, Eric Van Dijk, Ilja Van Beest and Paul Mersmann "When Gains Loom Larger Than Losses, Reversed Loss Aversion for Small Amounts of Money," 18 Psychological Science (2007), 1099.

13. I shall note here that at the time the Government – within the framework of the deportation scheme to "third countries" – was willing to propose that the departed infiltrators would receive a grant from the State in the amount of $3,500 each (see Zegata Case, para. 4 in the judgment of Honorable President M. Naor).

This is the "carrot" method, however we could also think about a mixed method, that might meet the criteria of proportionality, if it strikes a reasonable balance between the "stick" and the "carrot" and when the "punishment" (the temporary withholding of the amount of the "punishment") **is eventually returned upon the fulfillment of the resolutory condition, together with the "reward."**

It is interesting to note that the Torah already acknowledged the "reward" system and espoused it. The Torah says that a released slave should not be sent away empty-handed, and the following is said in Deuteronomy 15, 13-15:

> "And when thou lettest him go free from thee, thou shalt not let him go empty. Thou shalt furnish him liberally out of thy flock, and out of thy threshing-floor, and out of thy winepress; of that wherewith the LORD thy God hath blessed thee thou shalt give unto him. And thou shalt remember that thou wast a bondman in the land of Egypt, and the LORD thy God redeemed thee; therefore, I command thee this thing to-day."

Chazal referred to this issue awn they said the following:

> "Rabbi Ishmael says the following: come and see mercy in those who said that the world was real. A Hebrew slave works with you every six. The place said if he leaves empty-handed from your abode he will look for another abode and will be sold for the second time, and you should give him so he is blessed, as we say, you shall give to him" (Midrash Tanaim for Deuteronomy 15, 14).

Dr. Binyamin Porat explains the reason for this mitzvah as follows:

> "This mitzvah is highly important in the service of the released slave. It provides him financial security in the short-term, so that he could find the time to worry about his future in the long-term…it is reasonable to assume that if the slave was released without observing the mitzvah of giving, he will be willing to waste his first free days in finding some food and finding a place to live in meagerly, and in a short time he might find himself returning to his master's house and requesting his protection again. Therefore, the mitzvah of giving allows him to use the freedom that was granted to him to rehabilitate himself" (Dr. Binyamin Porat, The social legislation of the Torah: Basic principles, in Dagan and Porat, Seekers of Justice, p. 274, ibid, pp. 298-299).

We should add here that at the time there were slaves who asked not to be released because they found their condition satisfying (Deuteronomy 15, 16), and the following is said about this condition in Bavli, Kidushin 20, 71:

> "You should know that he finds it good to stay with you. He will eat and drink with you and will sleep with you and you sleep on a bed and he sleeps in hay and it was already said that anyone who buys a Hebrew slave shall be deemed as buying a master to himself" (my emphasis – the undersigned).

Nevertheless, and for the avoidance of doubt, I see fit to clarify that the slave who is released in accordance with Hebrew law was presented here **only** to demonstrate the "reward method" that is part of the orders laid down in the Torah, and Chazal advanced this method and explained it and **to deduce**, a fortiori, about the proper

treatment of members of the population before us. We should not extrapolate from here of course in any manner about the status of the workers subject matter of the hearing herein, who are free people.

14. In the case in question the legislator purported to apply the mixed method of "punishment" (the Employee's Component) and "reward" (the Employer's Component) in the Deposit Scheme however a number of failures fell here:

(a) The "punishment" outweighs the "reward" (which is the "Employer's Component" in the Deposit Scheme, that was changed from the grant that the State was willing to give to a departing infiltrator in a deportation scheme to third countries).

(b) The "punishment" is not reasonable, since it causes most of the workers to earn less than the minimum wages promised to them, contrary to the provisions of the Minimum Wage Law 5747-1987.

(c) The Government did not compel the employers to deposit the "Employer's Component." Therefore, only a small percentage of the employers transferred their part to accounts that were opened in Respondent 5 for the purpose of this matter. Consequently, the worker, even if he left the country, might find himself in a hopeless situation (without the "reward" component, and while the Government will not make good his part, and while the Government will not undertake to collect afterwards the amount that was taken from the employee from the employers).

(d) The Government included in the Deposit Scheme and in the forfeiture of the Employee's Component in this framework also the asylum seekers, even though their applications have not been considered for years (as required in the Refugee Convention, the rules of international law and our comments in previous judgments), which justifies their inclusion in the Exemption Regulations (and we also made the same proposal in one of the hearings that were held for the purpose of this matter).

Hence, the infringement of the constitutional rights of the workers (the right to property and the right to live in dignity), together with the said failures – outweigh in this case the additional benefit that the Respondents argue in connection with the Deposit Scheme, and even in this regard the deduction of the Employee's Component in the Employee's Component fails to meet the sub-criterion of "proportionality in its narrow sense."

15. Furthermore, I will present another argument. As already stated by my colleague the President – the argued benefit at this stage in the Deposit Scheme is not even certain, since after the Deposit Scheme entered into force there was actually a decrease in the number of the workers who left abroad.
We should therefore say that **the certain** violation of the constitutional rights (the right to property and the right to live in dignity) is better than **the probable** and uncertain benefits that lie in the Deposit Scheme, as argued by the Respondents.

16. In light of the foregoing, the voidness of the Employee's Component in the Employee's Component is necessary, as the proper constitutional relief. This conclusion gains further importance in these days, in which the financial crisis that befell us as a result of the outbreak of the **Coronavirus pandemic**, caused the workers in question (and many others) to be on the brink of poverty. Therefore, the required remedy is the remedy that was proposed by my colleague the President, and there is no room to suspend it beyond the period of the 30 days that was allocated (and I will add that it is possible to recruit these workers, the ones subject matter of this discussion, and who found themselves fired from their work – to work in other works that have a demand and no supply at present).

17. In conclusion, I will repeat part of the statements I made in the Zegata Case (where I also presented suggestions that regretfully were not accepted and that could have made the lives of the neighborhood residents easier):

> "We are required to apply the relevant legal rules with compassion and sensitivity towards all parties involved. This is required given the fact that we are a Jewish and democratic state."

Vice President

Decided as per the judgment of President E. Chayut and against the dissenting opinion of Judge N. Solberg, and regarding the relief, against the dissenting opinion of Judge N. Hendel.

Given today, 29 Nissan, 5780 (April 23, 2020).

President	Vice President	Judge

Judge	Judge	Judge

Judge

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