# CASE LAW COVER PAGE TEMPLATE

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

| **Date of the decision:** | **11 Aug 2015** | **Case number:** | HCJ **8665/14** |
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**Parties to the case:**

Petitioners in HCJ 8665/14

1. Tashuma Noga Desta
2. Anwar Suliman Arbav Ismail
3. The Hotline for Refugees and Migrants
4. The Association for Civil Rights in Israel
5. ASSAF- Aid Organization for Refugees & Asylum Seekers in Israel
6. Kav LaOved – Worker's Hotline
7. Physicians for Human Rights in Israel

VS.

Respondents in HCJ 8665/14

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

Requesting to join in High Court of Justice 8665/14 as "Amici Curiae":

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

**Decision available on the internet? ☒Yes ☐No**

If yes, please provide the link: http://elyon1.court.gov.il/files/14/650/086/C15/14086650.C15.pdf

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

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

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

**Countr(y)(ies) of origin of the applicant(s): Eritrea and Sudan**

**Country of asylum (or for cases with statelessness aspects, country of habitual residence) of the applicant(s):** Israel

**Any third country of relevance to the case:[3]**

**Is the country of asylum or habitual residence party to:**

| The 1951 Convention relating to the Status of Refugees<br>☒**Yes** | Relevant articles of the Convention on which the decision is based:<br>Articles 1(2); 9; 33 |
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| ☐**No** | |
| **(Only for cases with statelessness aspects)** The 1954 Convention relating to the Status of Stateless Persons<br>☐**Yes**<br>☐**No** | Relevant articles of the Convention on which the decision is based: |
| **(Only for cases with statelessness aspects)** The 1961 Convention on the Reduction of Statelessness<br>☐**Yes**<br>☐**No** | Relevant articles of the Convention on which the decision is based: |
| **(For AU member states):** The 1969 OAU Convention governing the specific aspects of refugee problems in Africa<br>☐**Yes**<br>☐**No** | Relevant articles of the Convention on which the decision is based: |
| **For EU member states:** please indicate which EU instruments are referred to in the decision | Relevant articles of the EU instruments referred to in the decision: |

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

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

**Key facts (as reflected in the decision):**

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

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

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

Amendment 5 to the Anti-Infiltration Law was enacted approximately three months after the High Court of Justice struck down Amendment 4 in the Eitan case; Amendment 4 to the Anti-Infiltration Law was enacted less than three months after the High Court of Justice struck down Amendment No. 3 of the same law in the Adam case.

Amendment 3 defined persons who entered Israel through an unauthorized border point as "infiltrators".

Amendment 3 then allowed the detention of infiltrators for a period of three years, subject to several release grounds. The Amendment was held to be unconstitutional by the Supreme Court on the ground that a three-year detention period was a disproportionate violation of the right to liberty enshrined in the Israeli Basic Law: Human Dignity and Liberty.

Amendment 4 retained the definition of "infiltrators" and reduced the mandatory detention period to one-year for new infiltrators (Article 30A). It also established the legal basis for a residence facility to which infiltrators could be sent for an unspecified duration (Chapter D of the law) with no judicial review. The Amendment required thrice a day reporting within the facility and mandatory overnight stay and prohibited working outside the facility. The Amendment enabled the Ministry of Interior to transfer residents to detention for violating the reporting and other behavioral requirements of the facility. The Holot Residence Facility was established soon after passage of Amendment 4 and pursuant to criteria issued by the Population and Immigration Border Authority (PIBA), long-staying Eritrean and Sudanese men were ordered to reside in the center. In the Eitan case, the High Court of Justice ruled that placing "infiltrators" in detention when there is no deportation on the horizon for the duration of a period of one whole year – when it is not as a punishment for their actions, and without the ability to do anything to advance their release –establishes a severe infringement on their rights. With respect to the Residency Center, it was determined that it too was not constitutional.

On 8 December 2014 – approximately three months after the ruling was rendered in the Eitan Case – Amendment 5 to the Anti-Infiltration Law was enacted as a temporary order. The fundamental amendments to the Law are as follows: first, the maximum period of detainment in detention for illegal entry into Israel was set at three months (Article 30A). Secondly, the amendment reestablished the "Residency Center" and arranged its activities (Chapter D of the law), restricting the maximum period of residency in the "Residency Center" to twenty months and determining that a special populace, for example, minors, elderly, victims of trafficking or parent with dependents would not be summoned to the Center. The amendment determined that the "infiltrators" must report for the purposes of attendance registration once a day in the evening hours and that they are not permitted to leave the boundaries of the Residency Center during the hours of the night.

Civil Society organizations petitioned the High Court of Justice claiming that Amendment 5 – like its predecessors – is unconstitutional and should be declared null and void.

**Key considerations of the court**

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**Section 30A: Three months' detention**

**The section of the petition challenging a maximum period of detention of three months (section30A(c) of the Law), subject to the grounds of release with a guarantee, including the "infiltrator's" age, physical condition or other humanitarian grounds (section 30A(b) of the Law), was dismissed.**

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

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

*The Purpose of Detention*

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

*"This is the rule that has been formulated in our case law, there is no denying that detention requires the existence of an effective deportation process. In order not to deprive any person's liberty for the sake of his deportation, a general statement of the State's intent to do so in not sufficient. There is a need for consistent action whose purpose is to formulate the appropriate speed of the channel of deportation" (para. 199).*

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

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

*"Consequently, the Military Commander is not permitted to adopt a measure of assigning a place of residence due to reasons of only general deterrence. Nevertheless, when due to the danger posed by the person, assigning a place of residence is justified, and the question is only whether to use this authority, then there is no flaw if the Military Commander will also consider considerations to deter the masses…."*

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

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

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

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

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

*"I think that the outline which we are presenting today is 3 months detention. Here, we will debate what this means. With all due respect, the Knesset can define what it considers to be an effective process for examining deportation. I do not know if in the Even Shushan Dictionary, Mr. Attorney General of the Knesset, if there is a precise definition for the effectiveness of the deportation process [...] We are very interested that the process be effective, we need time. It is very difficult when the legal advisors define for us formulas which are not scientific, what is the effective time for the deportation process. I thought that three months will not necessarily be enough time for us (Official Minutes of Meeting No. 428 of the Internal and Environmental Protection Committee of the 19th Knesset, p. 7 (December 2, 2014)).*

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

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

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

*"There is no dispute that holding an "infiltrator" in detention makes it easier to establish his identity in a controlled and organized process – a matter which has great importance due to the unique characteristics of the population of the "infiltrators" who entered into Israel by means other than the border stations and who do not possess official documentation. It is also apparent that the detention assists in executing the deportation process from Israel since it ensures that no person will "disappear" and it spares any difficulties for the possibilities of locating persons in the future (compare to section 13g(a)(2) of the Entry into Israel Law)" (ibid, para. 54)*

*Moreover, I believe that in the current version of the Law there is a foothold for such that detention is subject to this purpose. The starting point is found in the provisions of section 30(a) of the Law, which authorizes the Minister of Defense to instruct in writing the deportation of an "infiltrator" and prescribes that the deportation order shall serve as legal attestation for his*

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

40. *The cited provisions were also included in the arrangement which we examined in the Eitan Case. Nevertheless, in the Eitan Case we ruled that there is a gap between the provisions of the arrangement set forth in section 30A of the Law and the declared purpose for holding in detention – clarifying the "infiltrator's" identity and forming channels of his departure from Israel. Our ruling relied upon the absence of relevant arrangements in the Law, for example, an explicit provision which conditions the continuation of detaining the "infiltrator" on the existence of "a departure channel which is expected to materialize within a reasonable period of time" (Eitan Case, paras. 55, 199; also see: the Adam Case, para. 34 of Justice U. Vogelman's ruling). Even the legislative arrangement before us contains no explicit provision which conditions the detention of an "infiltrator" onthe feasibility for his deportation. Nevertheless, I believe that reducing the period in detention currently permits – unlike in the Eitan Case – an interpretation of the Law as the Knesset proposed. In the Eitan Case, even though Justice U. Vogelman assumed that it is possible to adopt an interpretive effort, he did not see " how, when we stand before a provision of the legislator which determines detention for a period of one year … we can avoid its repeal" (para 202); and he also ruled that "a section of a law that authorizes a person to instruct upon the detention for a long period of someone until their deportation (contrary to the limiting timeframes in the Law of Entry into Israel) must demonstrate the connection between the deportation process and the detention (para. 199, emphasis added – M.N.). Contrary to the arrangement which we examined in the Eitan Case, the new period of time for holding an individual in detention, as aforementioned, is closer to the period of time set forth in the Law of Entry into Israel. This is a relatively shorter period of time which befits the declared purpose of the Law. This period of time is also not unusual in comparison to arrangements in other countries, whose purpose is establishing the identity of the "infiltrator" and exhausting the channels of deportation. Most western countries permit detaining illegal*

*immigrants who are awaiting their deportation for the duration of a period of time which is restricted to several months. In the absence of extraordinary circumstances, an acceptable period of time ranges between one month to six months on average (for more details, see: Eitan Case, paras. 73 – 77; for an updated review of the average time illegal immigrants are detained in detention in Europe, see: the use of detention and alternatives to detention in the context of immigration policies, synthesis report for the emn focused study (2014). Thus, consequently, the maximum period of three months is acceptable in most countries, where the purpose of detention is similar to the declared purpose in our case (compare to: Eitan Case, para. 72).*

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

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

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

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

43. *This interpretative approach is not only unique to our system. In other countries, courts also adopted a strict interpretation for the authority to hold asylum-seekers and illegal immigrants in detention. The most salient example for this – which was mentioned both in the Adam Case and in the Eitan Case – is the United States' Supreme Court ruling in the Zadvydas Case. This case examined the constitutionality of an arrangement in the American Law which permitted holding*

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

44. *The interpretative conclusion which I reviewed above is also consistent with the provisions of international law. According to sections 9, 26 and 31 of the Refugee Convention, a country is permitted – subject to the requirements of urgency and proportionality – to impose restrictions upon the freedom of movement of the asylum-seekers (also see: the 1951 convention relating to the status of refugees and its 1967 protocol 1243, 1268 (Andreas Zimmerman, ed. 2011) (hereinafter: "commentary to the refugees convention"); R. v. Uxbridge Magistrates Court & Another Ex Parte Adimi [1999] ewjc 765, para. 26; Goodwin – Gill and McAdam, Refugees, at 522; The UN Refugee Agency [unhcr], Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/04, at 6, para. 18) (hereinafter: "UNHACR, Alternatives to Detention)). Even though these sections deal with restrictions on freedom of movement, according to the accepted interpretation they also apply to the detention of individuals who illegally entered a country with the intent of submitting requests for asylum (see, for example: james hathaway, the rights of refugees under international law, 414 – 418, (Cambridge University Press, 2005) (hereinafter: "Hathaway")).*

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

*The Proportionality Tests*

51. *In light of our ruling in the Eitan Case, I believe that the current Law does pass the third proportionality test. Shortening the maximum period of time for detention, which is subject to the purpose which I reviewed, significantly reduced the infringement on the rights of the "infiltrators". As aforementioned, a three month period is not an anomaly in comparison to other arrangements in the Israeli law as well as in comparison to similar arrangements in other western countries. It appears that there is no dispute that detention, if only for a short period of time, severely infringes the rights of the detainee.*

*Nevertheless, when it is a maximum period of several months – and considering that detaining the "infiltrator" is for a purpose recognized in our legal system, international law and comparative law as a proper purpose – this time and subject to this interpretation, I do not think that there is any place for our intervention.*

**Chapter D: Holot (The Residency Facility)**

**In balancing the severity of the infringement of the rights of infiltrators against the benefit resulting from the Law, the court reached the conclusion that a period of twenty months is too long a period for holding infiltrators in liberty-limiting conditions of this kind and should be shortened to 12 months.**

**Summary**

*The Infringement on Constitutional Rights*

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

*The Purpose of Chapter 4*

61. *According to the Explanatory Notes of the Law and the Respondents Response it appears that the primary purpose of Chapter 4 of the Law is to cease the settling down of the population of the "infiltrators" in the urban cities and to prevent the possibility that they will work in Israel. Alongside this, the Law was designed to provide an appropriate response to the needs of the "infiltrators". An additional declared purpose is to create a normative barrier for potential "infiltrators".*

*Preventing "Settling Down"*

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

67. *In the Eitan Case, it was illustrated that many of the "infiltrators" reside in Tel Aviv – Jaffa (in particular the south neighborhoods) and the rest reside primarily in Eilat, Ashdod, Ashkelon, Beer Sheva, Petach Tikva, Rishon LeZion and Ramla (para. 29). The reality which*

*was created in these aforementioned cities raised – and is continuing to raise – considerable difficulties. In my opinion, there is nothing wrong with a law which seeks to reduce these difficulties by means of dispersing the population of the "infiltrators". In the Eitan Case, as aforementioned, I reviewed that there is nothing wrong with the State adopting measures which would lead to dispersing the "infiltrators" and alleviating the burden imposed on urban cities in Israel.*

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

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

70. *A similar approach is anchored in the European Council's Directive concerning the absorption of asylum-seekers (Council Directive 2003/9, 2003 O.J. (L31) 18 (EC)). In light of the fact that in general asylum-seekers are granted freedom of movement in the area of the host country, it was determined in section 7 of the Directive that countries are entitled to set geographical areas where asylum-seekers will reside, and at times even specific residential areas…Consequently, adopting measures in order to determine assigned areas for asylum-seekers is proper, provided that it is connected to public interests, the public order or the need to effectively and quickly handle requests for asylum. This Directive was also recently*

*updated in the framework of which similar provisions were applied to anyone who submitted a request for international protection of any nature whatsoever (Directive 2013/33, 2013, O.J. (L180) 96 (EU)).*

71. *The European policies anchored in the Directive and its updates were criticized, inter alia, in light of the broad discretion which was reserved for application by the countries (Commentary to the Refugee Convention, pp. 1161 – 1163) and since it permits imposing restrictions on the freedom of movement due to considerations of public order, even if they do not pass the necessity tests (UNHCR annotated comments to Directive 2013/13/EU of the European Parliament and Council of 26 June 2013, laying down standards for the reception of applicants for international protection (Recast) 14 (2015) (hereinafter: "UNHCR Comments to EU 2013 Directive"). Notwithstanding, in the updated commentary to the Refugee Convention it was noted that it is possible to justify the European policies if it will be applied in situations wherein there is a pressing need to do so, for example, circumstances where there is a "mass influx" of asylum-seekers (ibid, p. 1164; emphases added – M.N.)*

72. *Consequently, international law recognized that in extraordinary circumstances it is possible to adopt measures restricting freedom of movement and at times even the liberty of the asylum-seekers (compare to: Commentary to the Refugee Convention, p. 790; UNHCR comments to EU 2013 Directive, pp. 20 – 21). This is for the public's needs and alleviating the burden on urban cities, in extraordinary circumstances, for example, a "mass influx" of asylum-seekers (also see: commentary to the refugee convention, pp. 789 – 790; Hathaway, p. 420.; Goodwin-Gill and McAdam, p. 465; for the irregularity of these circumstances also compare to the European Directive in the matter of temporary protection at times of a mass influx: Council Directive 2001/55, 2001 O.J. (L212) 12 (EC); for the analysis of this Directive see the Asefo Case, para. 26).*

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

74. *The purpose of preventing the settling down of concentrations of populations is also seemingly consistent with the State's right to shape its immigration policies and choose to whom it will grant a status in Israel. This right originates from the principles of a sovereign state (Adam Case, para. 84). Notwithstanding, this right is not absolute and is subject to the State's commitment with respect to foreigners including refugees and asylum-seekers. This*

*point of view is acceptable in our constitutional system. As known, basic human rights are not deprived from a person, even though he illegally entered the State. Thus, not every legal arrangement whose purpose is to promote immigration policies will be consistent with the constitutional criteria (see and compare to: Al – Tai Case, p. 848). Nonetheless, this does not mean that such an arrangement will necessarily be repealed due to its purpose (see and compare to the Adalah Case, p. 412).*

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

*Preventing the Resurfacing of the "Infiltrator Phenomenon"*

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

*A Response to the Needs of the "Infiltrators"*

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

*A "Latent" Purpose – Encouraging Voluntary Returns?*

81. *…I did not find the current Law was intended to break the spirit of the "infiltrators". If the Law would have been intended for this purpose, then there would have been great difficulties. On face value, such a purpose would be improper, considering such that it allegedly undermines the non–refoulement policy which prohibits deporting an individual to a country where he faces imminent danger to his liberty or life. It should be clarified that nothing contained herein can prevent the State from deporting "infiltrators" to a safe country. Sending an "infiltrator" to such a country is subject to different conditions whose purpose is to ensure that the country will surely not send an "infiltrator" to another country which is not safe (Al – Tai Case, pp. 850 – 848, Adam Case, for foreign case law see, for example: Plaintiff M70/2011 v. Minister for Immigration and Citizenship [2011], EM (Eritrea) v. Secretary of State for the Home Department [2012]; H.C.A. 32 49 EWCA Civ. 1336). The question of how it is determined that a given country is indeed a safe country is a complex question which does*

*not arise in our case.*

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

*84. My conclusion is that preventing the settling down in the urban cities, with respect to the issues which I reviewed is a proper purpose. This conclusion is consistent, as aforementioned, with the rules of international law.*

*Chapter 4: Proportionality*

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

*The Rational Relationship Test*

91. *Considering that the maximum number of "infiltrators" which can be held in the Residency Center, constitutes, according to the Petitioners' claim, a marginal percentage of the entire population of "infiltrators", a doubt has been cast in the Petition whether the Residency Center will have concrete impact on their settling down as a group. However, this claim ignores the fact that the Law permits increasing the capacity of the "Holot" Residency Center and establishing additional Residency Centers. Accordingly, the State declared that the Center is being used as a "pilot". In light of the aforementioned, it can be determined that the examined provision meets the first proportionality test. Nevertheless, it is not inconceivable that as time passes or if circumstances change, there will be a need to present this matter for re-examination.*

*The Least Restrictive Means Test*

*94. My opinion is that the measure in question– requiring an "infiltrator" to reside in the Residency Center for a period of up to twenty months – also meets the least restrictive means test. Other measures which the Petitioners pointed out – for example, a voluntary residency center – will not realize the purpose of the law to a similar degree of effectiveness. It should be assumed that a person who already settled in a certain place in Israel will not choose to leave and voluntarily move to and reside in a residency center. Indeed, the legislator is not required to adopt the least restrictive means, when adopting this measure reduces the possibility of realizing its purpose.*

*The Proportionality Test in the Strict Sense*

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

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

99. *Weighing the severe infringement on the rights of the "infiltrators" on the one hand and the benefit arising from this Law on the other, led me to the conclusion that a period of twenty months is an excessively lengthy amount of time for detaining "infiltrators" in conditions which limit liberty of the type being reviewed. It should be noted that these are "infiltrators" who cannot be deported from Israel and they face no concrete danger to the security of the state or the life of its citizens. Their only sin is illegally entering our borders, with respect to which the State, as a rule, is not permitted to punish them (see and compare to: section 31(a) of the Refugee Convention). Even though the "infiltrator phenomenon" is undesirable and it is possible to find solutions for the residents of cities in Israel, these are not the only considerations. A solution which entails depriving rights of individuals for such long periods of time is not proportionate.*

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

101. *The longer period of time prescribed in the Law is unparalleled in the comparative law. Although, as is known, a comparative analysis should be conducted cautiously, since cultural and social*

*differences may impact the nature of the comparison. From the comparative analysis, we see that in the majority of countries, residency in the different types of residency centers is voluntary, although it often serves as a condition to receive social benefits. In some countries, asylum-seekers are required to reside in the residency centers as an alternative to internment, however this is for a period of several months. Alongside this, it is important to note that in some countries there is a trend to shorten the period of mandatory residence in the different types of residency centers and reduce the limitations on the freedom of movement.*

*The Constitutionality of Additional Individual Arrangements and their Implications*

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

*111. The main hurdle which section 32T of the Law is required to pass is the third proportionality test, the proportionality test in the strict sense. I believe that the arrangement in the current version of the Law passes the test. The enforcement mechanism anchored in section 32T of the Law grants, as aforementioned, effective measures for the management of the Residency Center, without which the rules of conduct for residency would be a mockery. Against the benefit in the arrangement, there is no dispute that it causes an infringement on the rights of the residents. Nevertheless, in light of the procedural guarantees set forth in the current Law, this is a less severe infringement in comparison to the previous Law. After weighing the benefit arising from the arrangement on the one hand and the infringement on the rights of the residents on the other hand, I believe that the infringement in the current version of the Law maintains a proper relationship to the benefit arising therefrom. Even though the Head of Border Control's power to instruct upon the transfer to detention remained intact, it was subject, as aforementioned, to the Tribunal's approval. Therefore, the constitutionality of the detention order, is actually subject to a two–component decision, one being the Head of Border Control – appointed by the executive branch, and the Tribunal – of a judicial nature.*

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

*115. Therefore, in the current case, I will suggest to my colleagues to grant the legislator a longer period of time – six months – before the repeal of the maximum period of detention in the Residency Center will enter into effect. During the course of this time – or until the legislation of a new maximum period of detention in the Residency Center, whichever is earlier – sections 32D (a) and 32U of the Law, which anchor the power to instruct upon the detention of an "infiltrator" in the Residency Center will remain in effect; however, it should be read as such that the Head of Border Control shall be permitted to transfer an "infiltrator" to the Residency Center for a period which shall not exceed twelve months. For the*

*avoidance of doubt: the Head of Border Control is still required to exercise his discretion on an individual basis and determine whether there is room to grant a residency order to an "infiltrator", and if so, what the duration will be. The residents in the Residency Center on the date of this ruling shall be released at the end of twelve months of their detention or at the end of the time which was set for them by the Head of Border Control – whichever is earlier. Residents who on the date of this ruling have resided in the Residency Center for more than twelve months – including Petitioners 1 and 2 – shall be released immediately and no later than fifteen days from the date of our ruling.*

**Other comments or references**

- The decision in this case is linked to the decision in the Eitan case that annulled the previous amendment to the Anti-Infiltration Law (Amendment 4). A summary of the Eitan case is available at: http://www.refworld.org/docid/54e605334.html

- As a result of the judgment, 1,178 Eritreans and Sudanese held in Holot for more than 12 months were released within two weeks of the decision being rendered. All those released received a visa which restricts their right to work and in live in Tel Aviv and Eilat.

**EXPLANATORY NOTE**

1. Decisions submitted with this form may be court decisions, or decisions of other judicial, quasi-judicial and administrative bodies.

2. Where applicable, please follow the court's official case reference system.

3. For example in situations where the country of return would be different from the applicant's country of origin.

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