Unofficial translation

At the Supreme Court Sitting as a High Court of Justice

HCJ 7146/12

MAA 1192/13

AAP 1247/13

Before:	President A. Grunis Deputy President M. Naor Justice E. Arbel Justice S. Joubran Justice E. Hayut Justice Y. Danziger Justice N. Hendel Justice U. Vogelman Justice Y. Amit
The Petitioners in HCJ 7146/12:	1. Naget Serg Adam 2. Zamzam Bosra Ahmad 3. Abraham Masgana 4. Gebremariam Mehri 5. Amsalat Negossa Tekela 6. ASSAF Aid Organization for Refugees and Asylum Seekers in Israel 7. Hotline for Migrant Workers 8. Association for Civil Rights in Israel 9. Kav LaOved 10. African Refugee Development Center
The Applicants in MAA 1192/13:	1. John Doe 2. Jane Doe
The Appellants in AAP 1247/13:	1. Ta'ami (Tabi) Tahanges 2. Jane Doe 3. John Doe
Applicant to join as amicus curiae in HCJ 7146/12:	UN High Commissioner for Refugees
Applicant to join as amicus curiae in HCJ 7146/12:	Kohelet Policy Forum

Versus

The Respondents in HCJ 7146/12:	1. The Knesset 2. The Minister of the Interior 3. The Minister of Defense 4. The Attorney General

The Respondents in MAA 1192/13:	1. The Ministry of the Interior 2. Jane Doe 3. John Doe 4. John Doe 5. John Doe 6. Jane Doe
The Respondents in AAP 1247/13:	The Ministry of the Interior
Applicant to join as amicus curiae in HCJ 7146/12:	Fence for Life Movement
Applicants to join as respondents in HCJ 7146/12:	Corinne Galili and 17 Others

HCJ 7146/12: Petition to grant an Order Nisi

MAA 1192/13: Application for permission to appeal the ruling of Beersheva District Court dated January 17, 2013 in Adm. App. 21001-10-12, Adm. App. 21060-10-12, Adm. App. 21097-10-12; Adm. App. 42469-10-12; and Adm. App. 42465-10-12 granted by President Y. Alon

AAP 1247/13: Appeal against the ruling of Beersheva District Court dated January 17, 2013 in Adm. Pet. 21001-10-12 and Adm. Pet. 21097019012 granted by President Y. Alon

Session Date:	24 Sivan 5773 (June 2, 2013)
For the Petitioners in HCH 7146/12:	Atty. Yonatan Berman; Atty. Anat Ben-Dor; Atty. Oded Feller; Atty. Asaf Weitzen
For the Applicants in MAA 1192/13:	Atty. Yonatan Berman; Atty. Omer Shatz; Atty. Yiftah Cohen
For the Appellants in AAP 1247/13 and Respondents 2-6 in MAA 1192/13:	Atty. Tomer Warsaw; Atty. Orit Ronen; Atty. Yael Rothschild
For the applicant to join as amicus curiae in HCJ 7146/12:	Ms. Walpurga Engelbrecht, Representative of the UN High Commissioner for Refugees in Tel Aviv
For the applicant to join as amicus curiae in HCJ 7146/12:	Atty. Ariel Erlich; Dr. Aviad Bakshi
For Respondent 1 in HCJ 7146/12:	Atty. Dr. Gur Blei
For Respondents 2-4 in HCJ 7146/12,	Atty. Yochi Gnessin; Atty. Michal Michlin-

Respondent 1 in MAA 1192/13 and the Respondent in AAP 1247/13:	Friedlander; Atty. Ran Rosenberg; Atty. Moriah Freeman
For the applicant to join as a respondent in HCJ 7146/12:	Atty. Amir Avni; Atty. Ofer Hanoch; Atty. Uri Harel
For the Concord Center:	Atty. Prof. Frances Raday

Ruling

Justice E. Arbel:

The central issue placed before us is the question of the constitutionality of the Prevention of Infiltration Law (Offenses and Jurisdiction) (Amendment No. 3 and Temporary Provision), 5772-2012 (hereinafter: **the Amendment**), enacted by way of the amendment of the Prevention of Infiltration Law, 5714-1954 (hereinafter: **the Law** or **the Prevention of Infiltration Law**). The Amendment enables infiltrators against whom a deportation order has been issued by the minister of justice to be held in custody for a period of three years.

1. We have before us three cases whose hearing has been consolidated. The first and central of these is a constitutional petition (HCJ 7146/12) directly attacking the constitutionality of the Amendment. Alongside this, an appeal (AAP 7146/12) and a motion for permission to appeal (MAA 1192/13) were filed, both of which attack a ruling granted by the Court of Administrative Affairs, and which also raises the question of the constitutionality of the Amendment. The matter before us focuses on the Amendment to the Prevention of Infiltration Law, implementation of which has already begun. I shall, of course, discuss the details of the Amendment to the Law below; however, I shall note at this early juncture that the essence of the Amendment relates to the possibility of holding infiltrators against whom the minister of defense has issued a deportation order in custody for a period of three years. An infiltrator is defined in the Amendment (article 1 of the Prevention of Infiltration Law) as a person who is not a resident and who entered Israel otherwise than through a border post established by the minister of the interior in accordance with the Entry to Israel Law, 5712-1952 (hereinafter: **the Entry to Israel Law**). However, the Amendment

specifies instances in which the infiltrator is to be released on various grounds prior to the expiry of the above-mentioned period. The Amendment also establishes a series of arrangements relating to these provisions, including conditions of holding in custody, the appointment of a tribunal for the review of custody of infiltrators and the authorities of the tribunal, judicial review, etc.

Background Review

2. Migration of humans for various reasons is a global phenomenon that has grown consistently over recent decades. The State of Israel has not been excluded from the global map of migration. Millions of men and women "wander from their countries seeking employment and personal and economic security" (see HCJ 4542/02 **Kav LaOved Association v. Government of Israel**, Piskei Din 61(1) 374, para. 23 of Justice Levy's ruling and the references therein (2006) (hereinafter: **Kav LaOved I**)). Accordingly, the State of Israel has in recent years addressed difficult issues and dilemmas concerning the state's migration policy and the manner in which it processes and treats legal and illegal migration. The various issues to be resolved differ from each other and raise distinct problems and diverse dilemmas. Thus substantive issues have been raised regarding application for family unification in Israel; the issue of foreign workers; asylum seekers and refugees. Most of the issues raise confrontations between national and public interests and the rights of the various migrants, including questions concerning the human rights, dignity and liberty of migrants and, conversely, questions of injury to citizens, the impact on the employment of local workers, and so forth. Balancing the interests and values placed on the scales is not easy and raises extremely difficult questions facing those engaged in this task. Any solution entails some injury to one of the interests or the conflicting rights.

3. This case relates to what the state terms "infiltrators," and we shall also use this term in accordance with the definition in the Law. Infiltrators, then are persons who entered Israel as stated unlawfully and otherwise than through a regulated border post (see also the definition of infiltrator in article 1 of the Prevention of Infiltration Law). Such persons are to be distinguished from persons who entered Israel lawfully

through a border post, whether as tourists or as foreign workers, but who remained in the country unlawfully while violating the terms of the visa they had been granted. Most of the infiltrators arrived via the State of Israel's border with Egypt, a border with a length of some 220 km, and which until recently was open, but is now blocked by a fence recently constructed along its length. The phenomenon of the infiltrators, which has expanded in the State of Israel, influences various areas of national life. There is a significant influence on internal security and public wellbeing. A profound change has been created in the fabric of life in the urban domain, alongside ramifications for the economy and industry.

4. According to figures of the Population and Immigration Authority, a cumulative total of some 54,500 infiltrators entered Israel through the end of 2011. The most updated figures, as of May 1, 2013, refer to 64,649 infiltrators who entered Israeli cumulatively, of whom 54,580 are present in Israel as of this date (see Israel Population and Immigration Authority – Annual Report, Freedom of Information Law, 2012, available at: http://www.piba.gov.il/PublicationAndTenderPages/FreedomOfInformation.aspx; Statistics on Foreigners in Israel, Population and Immigration Authority, May 2013, available at:
http://www.piba.gov.il/publicationandtender/foreignworkersstat/pages/default.aspx).

5. The breakdown of the statistics by years indicates a changing trend regarding the phenomenon of infiltration to Israel. In 2009 5,285 infiltrators entered Israel. In 2010 14,709 infiltrators entered via the border with Egypt. In 2011 17,258 infiltrators entered – an average of approximately 1,400 per month. However 2012 marked a turning point and the trend was reversed. In this year 10,412 infiltrators entered Israel, an average of approximately 870 a month. In 2013 the monthly number of infiltrators dropped dramatically. In January, 10 infiltrators were located on the border; in February, five; in March, three; and in April just 10 people were located on the border. The significance and reasons for this significant change in the trend are the subject of disagreement between the sides, as I shall discuss below.

6. The statistics further show that the vast majority of the infiltrators originate from Eritrea and Sudan. According to the latest statistics of the Population Authority,

66 percent of the infiltrators currently present in Israel come from Eritrea, 25 percent from Sudan, and the remainder from various countries. This statistic is extremely significant. Eritrea and Sudan are two countries in East Africa that have in recent years experienced serious crises, wars, and bitter internal conflicts.

By way of background to the subject, it is important to provide a little information regarding these two countries. Eritrea is a country whose independence was recognized in 1993 after a 30-year struggle with Ethiopia. Since the recognition of its independence no democratic elections have been held in Eritrea and the country's president, who also serves as prime minister and supreme commander of the army, has remained in office since that time. Eritrea's National Assembly consists of just one party (PDFJ). According to United Nations reports, Eritrea faces the consistent and extensive violation of human rights by the government. These violations include extrajudicial executions; a policy of shooting to kill at those attempting to leave the country's borders; the disappearance of citizens and failure to notify families of detentions; arbitrary imprisonment and arrests; the extensive use of physical and psychological torture during interrogations by the policy, the army and the security forces; inhuman conditions of imprisonment; military service for a long and indefinite period during which cruel punishments are used, also leading to suicides; failure to respect civil rights, such as the freedom of expression, assembly, association, freedom of religion and movement; discrimination against women and sexual violence; violation of the rights of children including drafting of children to the army; and so forth (see the report prepared for the UN Human Rights Council in May 2013: Sheila B. Keetharuth, "Report of the Special Rapporteur on the situation of human rights in Eritrea," available at: http://daccess-dds-ny.un. org/doc/UNDOC/GEN/G13/140/99/PDF/G1314099.pdf?OpenElement.

Sudan is a famine- and hunger-struck country that has for many years suffered from military coups and a fierce and protracted civil war. Following the war, millions of people were forced to leave their homes, suffered hunger and malnutrition, and received extremely defective education and health services. In addition to the civil law between the north and the south, an additional revolt erupted in the province of Darfur in the west of the country in 2003. In order to suppress the revolt, the

government armed militias that fought the rebels. This struggle, which evolved into an ethnic struggle, was marked by mass rape and slaughter; some consider it genocide. In 2011, South Sudan declared its independence from the Republic of Sudan. In mid-2011, further reports revealed bombings without distinction between civilians and combatants; attacks against civilians by all sides in the conflict, including the Sudanese army; and the absence of governmental protection of civilians. There are extensive reports of physical and sexual violence against women, although a certain improvement in the response to the issue by the government and police has also been noted. The recruitment and arming of children are also a common phenomenon in Sudan; an effort is currently underway to eradicate this phenomenon. Human rights violations in Sudan also include arbitrary imprisonment and detention, the torture of detainees and their incarceration in poor conditions (see the report prepared for the UN Human Rights Council in 2011 – "Report of the independent expert on the situation of human rights in the Sudan on the status of implementation of the recommendations compiled by the Group of Experts to the Government of the Sudan for the implementation of Human Rights Council resolution 4/8, pursuant to Council resolutions 6/34, 6/35, 7/16, 11/10 and 15/27," available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/GEN11/155/34/PDF/G1115534.pdf?OpenElement.

7. The State of Israel has signed and ratified the 1951 international Convention Relating to the Status of Refugees, CD 65 (hereinafter: **the Refugees Convention**) and has also joined the 1967 Protocol Relating to the Status of Refugees annexed to the Convention. The Convention defines a refugee as a person present outside his country of nationality due to –

> "… substantiated fear of persecution well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion […]and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" (article 1(2) of the Convention).

The Convention protects any person recognized as a refugee and prohibits the state from deporting such a person to countries in which his life or liable will be endangered for reasons of race, religion, nationality, membership of a particular social group or political opinion (article 33 of the Convention). The Refugees Convention

also grants recognized refugees extensive rights in various fields. It should be noted that in accordance with international law, and as a general rule, refugees and asylum seekers who have found refuge in a particular country will not proceed to another country (see HCJ 7302/07 **Hotline for Migrant Workers v. Minister of Defense**, para. 4 (July 7, 2011) (hereinafter: **HMW**)). However, we should note that the Convention has not been absorbed as a law in domestic Israeli law and constitutes only the undertaking of the State of Israel on the international conventional level. This means that the interpretative assumption established in case law, known as the assumption of consistency, applies to this law, stating that there is consistency between the laws of the state and the norms of international law binding on the State of Israel. That is to say, Israeli law is, as far as possible, to be interpreted in a manner consistent with international law (CA 9656/08 **State of Israel v. Saidi**, para. 27 (December 15, 2011) (hereinafter: **Saidi**)).

The procedure for recognizing a person as a refugee, known as RSD (Refugee Status Determination), was in the past undertaken in Israel by the United Nations High Commissioner for Refugees (UNHCR). In 2008 the processing of asylum applications was gradually transferred to the Ministry of the Interior (for details of these proceedings, see AAP 8675/11 **Tadasa v. Asylum Seekers Processing Unit**, paras. 9-11 (May 14, 2012) (hereinafter: **Tadasa**)). These proceedings are subject to the judicial review of the administrative courts and, within this framework, the courts have established various guidelines for the procedure. This Court has emphasized the rights at stake in examining an application for recognition as a refugee, including the right to life, the right to the person, and the right to liberty. The fact that these are the most basic core rights granted to a human requires strict attention to a proper and cautious process (**Tadasa**, para. 12).

8. In addition to the broad protection granted to a person recognized as a refugee, international law also recognizes an additional complementary protection from repatriation to a person's country of origin due to the general principle of non-refoulement. This means that the State of Israel will not deport a person to a place where his life or liberty are threatened (see AAP 8908/11 **Asfu v. Ministry of the Interior**, para. 19 (July 17, 2012) (hereinafter: **Asfu**); art. 33 of the Refugees

Convention). This principle is also derived from Israeli domestic law, which recognizes the value and sanctity of life (see art. 1 of the Basic Law: Human Dignity and Liberty; HCJ 4702/94 **Al Tai v. Minister of the Interior**, Piskei Din 49(3) 843, 848 (1995) (hereinafter: **Al Tai**)). Accordingly, it is possible that even in the case of a person who has not received individual recognition in accordance with the Convention, the state will not be permitted to repatriate him to his country of origin due to the principle of non-refoulement. As for deportation to a third country, it should be noted that it has been ruled that it is not possible to deport a person to a third country when there is concern that the destination country may deport the person to his country of origin where, as stated, he faces danger (Al Tai, 849). However, the burden of proof in this matter has been imposed on the foreign subject (MAA 7079/12 **State of Israel v. Gramay** (December 10, 2012)).

9. The State of Israel currently applies a policy of "temporary non-repatriation" of Eritreans to their country of origin in accordance with the principle of non-refoulement, and against the background of the recognition of Eritrea as a country in crisis. Prior to the amendment to the Prevention of Infiltration Law, the protection of non-repatriation was applied on the basis of collective affiliation without examining individual eligibility for asylum in accordance with the Refugees Convention. It must be emphasized and differentiated that this collective protection does not imply that every member of the group enjoys refugee status in the absence of evidence to the contrary, since this would require a positive determination on the part of the state – one that has not been made by the State of Israel (Asfu, paras. 17, 22). In most cases, persons enjoying temporary protection are not entitled to the full rights granted to a person recognized as a refugee. As its name implies, the purpose of the protection is temporary, and it is not intended to enable settlement in the absorbing country. However, a difficulty would seem to arise in maintaining a policy of temporary protection over time and, after some time, it is necessary to engage in an individual examination of the eligibility of the members of the group for refugee status (see Justice Vogelman's review in **Asfu**). The significance of Israel's policy toward citizens of Eritrea has never been fully clarified by the state. Accordingly, with the exception of the principle of non-refoulement pertaining due to this protection, no detailed arrangement has been enacted regarding the significance of this arrangement

and the rights granted on its basis. As Justice Hayut has already noted, this situation is "grossly undesirable. The normative fog creates uncertainty that is exceptionally irksome for the persons themselves… The courts are also obliged, due to this, to cope frequently with various and diverse questions and situations that are inevitably created by the reality of life regarding the rights of these persons (see Justice Hayut's remark in **Asfu**). In any case, for our purposes the important fact is that once Eritrean citizens have arrived in Israel they cannot, for the present, be repatriated to their country of origin. This situation obliges the State of Israel to cope with their remaining within its borders in the present stage.

10. Subjects of Sudan – the situation in their regard is different, though in a certain respect its ramifications are similar. In the past, subjects of Sudan arriving in Israel were also entitled to "temporary protection" and, accordingly, their deportation from Israel was postponed and they received permits for residency in Israel. As of today the State of Israel does not apply any protection to the subjects of north or South Sudan; from its perspective, ostensibly, it is possible to return the subjects of these countries to their country of origin. This is the declared policy of the State of Israel, and I do not take any position regarding this policy, since we are not required to do so in the framework of this petition. Regarding the Republic of Sudan (northern Sudan), repatriation of citizens is impossible due to practical difficulties accruing from the absence of diplomatic relations between Israel and this country. As for South Sudan, which was recognized as an independent country in 2011, the State of Israel has established diplomatic relations with the country and has begun to repatriate infiltrators to its territories. In a decision dated January 31, 2012, the minister of the interior informed subjects of South Sudan present in Israel that they must return to their homeland. This policy was approved by the Jerusalem Court for Administrative Affairs, principally in light of the willingness of the minister of the interior to engage in an individual examination regarding every subject of South Sudan who submits a request for asylum (AP (Jer.) 53765-03-12 **ASSAF Aid Organization for Refugees and Asylum Seekers in Israel v. Minister of the Interior** (June 7, 2012) (hereinafter: **ASSAF**).

11. Setting aside the low numbers of infiltrators entering Israel in 2013, it is evident that the State of Israel has faced, and is facing, a significant phenomenon of tens of thousands of infiltrators unlawfully penetrating its territory. As clarified, it is not possible at this stage in practical or normative terms to deport these persons from its territory. No-one disputes that the phenomenon of infiltration has significant and sometimes severe ramifications for Israeli society, although the interpretation of these ramifications and the ways they should be addressed for the heart of the dispute between the Parties.

The Ramifications of the Phenomenon of Infiltration

12. In its claims, which will be presented at length below, the state argues that the ramifications of the phenomenon of infiltration apply in two key aspects affecting the state and the public in Israel. Firstly, the state argues that the phenomenon of infiltration has ramifications in terms of internal security and public wellbeing. It argues, on the basis of statistics provided by the Israel Police, that between 2007 and 2012 a consistent increase was seen in the number of criminal files opened against infiltrators, although it should be taken into account that during this period there was also a consistent increase in the number of infiltrators present in Israel. In 2012, according to these statistics, 2,065 criminal files were opened against infiltrators. The most notable offenses are property offenses, public order (threats and assault of police officers), person (assault), morality (narcotics), and sex offenses. The state also notes that concentrations of infiltrators have been created; most of the infiltrators are concentrated in the neighborhoods of southern Tel Aviv, with additional concentrations in Eilat, Ashdod and Arad.

13. It should be taken into consideration that the statistics presented by the state are absolute numerical figures that do not provide a true an comparative picture of crime among the infiltrators. There is disagreement concerning the full and true picture. The Knesset Research and Information Center prepared a study on this subject (Dr. Gilad Natan, “Statistics on Crime by Infiltrators and Asylum Seekers and against Infiltrators and Asylum Seekers,” Knesset Research and Information Center, October 2010). According to this study, the level of crime among infiltrators is low

relative to that among the general population. In Tel Aviv, for example, which has the highest concentration of infiltrators, the crime statistics for 2010 indicate that one criminal file was opened against every 15.9 residents of the city; by contrast, one criminal file was opened against every 84.7 infiltrators and asylum seekers in Tel Aviv. Similar gaps may be found in the other concentrations of infiltrators in Eilat, Arad and Ashdod. A similar study undertaken in 2011 found an increase in the number of files opened against infiltrators, with a prominent increase in the area of crimes of violence. However, the statistics again showed that the proportion of files opened against infiltrators is limited relative to the proportion of files opened against the general population (Dr. Gilad Natan, "Crime by Infiltrators and Asylum Seekers and against Infiltrators and Asylum Seekers," Knesset Research and Information Center, May 2011). At the same time, the police evaluation study noted that most of the crime among infiltrators is within this sector and is unreported. In addition, a high level of alcohol consumption common among this population influences the probability of offenses, particularly in the field of violence. It was further noted that sex offenses committed by infiltrators are also mainly directed against women from within this community, as well as against women engaged in prostitution. It is worth noting that others dispute this picture and claim that a breakdown by offenses shows that the proportion of infiltrators is much higher than that of the general populations (see the study by the Eitan association: http://www.south-tlv.co.il/articles6521).

14. The factors quoted as the reasons for crime in this population are also diverse. It was claimed that there is a higher level of violence in the infiltrators' countries of origin; that the infiltrators have experienced trauma leading to a high level of crime; that the state hampers the ability of this population to work, thereby leading to despair, inactivity, and depression, from which point the road to crime is a short one (see, for example, the comments of the commander of the Tel Aviv Police regarding survival crime – discussion dated May 21, 2012 in the Committee to Examine the Problems of Foreign Workers); that the assistance provided to this population by the welfare services is minimal; and so forth.

In any case, despite the statistics indicating a lower crime level among the infiltrators, at least for most types of offenses, the difficult feeling of residents of

south Tel Aviv that the level of security in their living surroundings has declined significantly cannot be belittled. Neither can there be any dispute that the state bears a commitment to respond to this situation. It is possible that the atmosphere of fear created in the area has not been translated into the opening of criminal files, but it cannot be disputed that an atmosphere of tension, fear and frustration indeed exists among the population of the area and, as noted, requires attention and action. The reality on the ground whereby a high concentration of infiltrators has been created in south Tel Aviv, requiring the residents of the area to bear the burden of coping with this unique population, which no-one disputes is a poor and difficult one in inferior living conditions that demands immediate attention, has serious ramifications for the local residents. It is impossible to ignore the distress and exclamation of the residents of south Tel Aviv or the difficulties they have experienced following the demographic change in their area of residence.

15. The second aspect that is emphasized by the state concerning the ramifications of the phenomenon of infiltration on the State of Israel regards the impact on the economy and industry. The state argues that the entry of the infiltrators into Israel created a massive increase in the supply of non-local workers in an uncontrolled and undirected manner, in a quantity similar to that authorized by the State of Israel for the lawful and controlled entry of foreign workers. The state argues that the principal victims of this situation are Israeli workers with limited skills who work for low pay; the phenomenon of the infiltrators has led to the erosion of their pay and even to their displacement from the job market for work of the above-mentioned type. Other ramifications claimed by the state are budgetary in character. Thus the State of Israel has incurred medical expenses on account of this population which, in most cases, does not purchase medical insurance and from which it is not possible to collect moneys in a genuine and efficient manner. Additional expenses have been incurred due to services in the fields of welfare, education, special education, residential schools, family health clinics, and additional areas provided for the population of infiltrators and their children. Lastly, the state notes estimates suggesting the hundreds of millions of shekels a year are transferred from Israel to Africa from the infiltrators' salaries. A significant proportion of these sums, it is claimed, is transferred by illegal

means, thereby creating an unsupervised market for the illegal transfer of funds, with all the ancillary ramifications.

16. The ramifications of the employment of infiltrators may be deduced from comments regarding the ramifications of the market for foreign workers in general on the employment market in Israel and on state resources, as this Court has noted in the past:

> "The phenomenon of the employment of foreign workers has brought a particular complexity. On the one hand, it entails significant financial advantages for employers due to the low costs of employing a foreign worker, and in light of the special working skills characteristic of foreign workers in certain fields of employment. On the other hand, the employment of foreign workers on such a large scale has severely damaged the local job market. Israeli workers have found it difficult to compete for jobs with the foreign workers; this has led to rising unemployment and created a negative incentive for Israelis to enter the industries in which foreign workers are employed. rising unemployment has created a serious burden on the state treasury in the form of payments of benefits and the expansion of welfare systems, while circles of poverty and social gaps have widened. The benefit enjoyed by certain sectors of the economy from the employment of foreign workers have imposed heavy costs on the public as a whole; all these have been compounded by costs relating to law enforcement and the supervision of foreign persons, both those with and without permits. And beyond all the above – serious injury has been created to the basic rights of the foreign workers by some of the employers in the absence of clear norms regulating the status of foreign workers, and due to the inadequate enforcement of the existing norms. This injury has had an impact on the basic values of society and on its moral character" (HCJ 11437/05 **Kav LaOved v. Ministry of the Interior**, para. 19 of the ruling of Justice Procaccia (hereinafter: **Kav LaOved II**) (April 13, 2011)).

Regarding this aspect, it should be noted that statistics suggest a correlation between the entry of foreign workers, including infiltrators, into a branch of employment and a decrease in the employment of Israelis in that branch. However, other studies suggest that migrant workers integrate in jobs at the bottom of the labor ladder – ones that are not in demand, or for which demand is low, among local residents (see **Kav LaOved I**, 374; Efrat Shoham, "The Back Yard of the Incarceration System in Israel – Undocumented Foreign Workers" **Israeli Criminology** A 29, 33 (5771 (hereinafter: **Shoham**)). Moreover, as of the end of

2010, the statistics showed that infiltrators and asylum seekers constitute just 20 percent of the non-Israelis employed in Israel without permits. Other groups include illegal foreign workers and tourists who have remained in Israel without a valid visa. The statistics for 2013 also show that the latter group is the largest and most significant. The infiltrators clearly have a noticeable impact on the job market in Israel and on budgetary expenses in the State of Israel. However, the picture is more complex, and there would seem to be even larger groups than those of the infiltrators who have an impact on the illegal job market in Israel (see Dr. Gilad Natan "The Impact of Foreigners without a Work Permit on the Job Market in Israel" Knesset Research and Information Center, January 2011).

17. As for the normative situation regarding the employment of infiltrators, the ruling granted in HCJ 6312/10 **Kav LaOved v. Government** (January 16, 2011) should be recalled. As part of this ruling, the state announced that, for the present, it will not commence the enforcement of the prohibition against the employment of infiltrators entitled to collective protection against repatriation to their countries of nationality. The state declared that an update would be ranted 30 days prior to the commencement of enforcement actions. The state further clarified that enforcement actions would not be undertaken against employers of persons who have submitted a request for asylum prior to the completion of the procedure for processing their application. The ruling stated that, for the present, the policy adopted maintains a proper balance:

> "In the given state of affairs where, alongside sensitivity to the difficult background of many of the members of these groups, attention must also be given to the state's interest in preventing 'labor migration' which naturally deviates from those instances in which there is substantiated fear of persecution – it would seem that the state's position as detailed above, according to which work permits are not to be granted, alongside the statement that, at this stage, actions will not be undertaken against employers, maintains the proper balance with attention to the difficult and sensitive reality that has been created."

18. In conclusion, it may be stated that the picture is complex and includes shades of gray, contrary to the black and white colors with which the Parties attempt to paint it. The phenomenon of infiltration, on the scale this reached, has indeed created

significant ramifications for Israeli society and has influenced its budget and its employment market. However, it is impossible to ignore the data that alter the perspective and present a more balance, truthful and moderate picture concerning the difficulties and ramifications of the phenomenon of infiltration.

The Normative Situation prior to the Amendment

19. Prior to the enactment of the Amendment to the Prevention of Infiltration Law, the state employed primarily the provisions of the Entry to Israel Law for the purpose of the deportation and detention of infiltrators. Article 13 of the Law permits the removal from Israel of a person who is not an Israeli citizen or an immigrant in accordance with the Law of Return, 5710-1950, and who is present in Israel without a residency permit. Until 2001, the Law established that a person against whom a removal order (a deportation order, according to the terms used in the Law at the time) was issued could be arrested pending his departure from Israel or his deportation therefrom. As may be seen, the arrangement at the time did not include any restriction regarding the length of the period of placement in custody (or detention, to use the terms of the Law at the time). Since an arrangement of this type does not properly balance the right to liberty of the person unlawfully present in Israel and the need to protect the state's interests, the rulings of this Court completed the lacuna and established principles for the holding in custody of persons unlawfully present in Israel (Saidi, para. 24). It was ruled that the discretion enjoyed by the interior minister in accordance with the Entry to Israel Law is subject to judicial review. Initially, the reference was to broad discretion enjoyed by the minister of the interior, but not unlimited discretion. Later, the rule developed that the discretion of the minister of the interior is examined in accordance with the rules of administrative discretion applied in general by the Court (HCJ 3648/97 **Stamka v. Minister of the Interior**, Piskei Din 53(2) 728, 770 (1999) (hereinafter: **Stamka**)). It was further ruled that the authority of detention in accordance with the Law is an ancillary authority to the authority of deportation, and its purpose is to ensure the purpose of the deportation order. It was emphasized that the detention is not intended to serve any punitive purpose whatsoever, nor any coercive purpose. Neither van the purpose of the detention be the forcible deterring of persons unlawfully present in Israel. "Its

entire purpose is to ensure the presence of the person against whom a deportation order has been granted for the purpose of realizing the order, if the person has not left Israel voluntarily, and in order to prevent his fleeing due to impending deportation, if he has not voluntarily left Israel, and as this deportation is about to be executed" (HCJ 1468/90 **Ben Yisrael v. Minister of the Interior**, Piskei Din 44(4) 149, 152 (1990) (hereinafter: **Ben Yisrael**); see also Saidi, para. 26). However, the detention may realize the purpose of removing the deported person from Israeli society. On the basis of these foundations, it was ruled that the continued holding of a person in detention in circumstances in which no solution could be seen on the horizon ending the detention is unjust and without authority (Ben Yisrael, 152).

This Court has also established that the exercising of the authority of detention by the minister of the interior in accordance with the Entry to Israel Law must be proportionate. This means that it is not possible to hold a person in detention for a protracted period if it is not expected that the deportation will be effected within a reasonable time. The authorities must act to effect the deportation "sincerely, effectively and rapidly, within a reasonable period of time in the special circumstances of each individual case" (HCJ 199/53 **John Doe v. Minister of the Interior**, Piskei Din 8 243, 247 (1954)). It has also been ruled that examination should be given to alternatives to detention that will realize the purpose of custody – effectiveness in realizing the deportation – without placing the deported person in detention or custody. In Al Tai (851), President Barak summarized the matter as follows:

> "In exercising the authority of detention and holding, action should be proportionate (see HCJ 3477/95 **Ben Atiya v. Minister of Education, Culture and Sport** (unpublished)). A person against whom a deportation order has been issued is not to be detained for a period greater than that required to realize the underlying purpose of the detention. If the detention is not effected within a reasonable period of time (not measured in years or many months), continued detention may be justified solely by way of concern that the purpose of the deportation will not be realized – whether because the deportee will flee the threat of deportation, or because if released he will injure public security and wellbeing (and, accordingly, will be afraid to report for deportation), or for other reasons. For this purpose various alternatives should be examined, such as holding otherwise than in detention, or periodic reporting to the police, and other such means that will secure the purpose of holding (effectiveness at the time of

deportation) without the need for physical holding. It should be stressed that the case of a person against whom a deportation order has been issued is not identical to that of a person held in detention due to an investigation being conducted against him, or due to an indictment served against him. Accordingly, from the outset, his holding for the purpose of his detention need not be in conditions of "detention," and means of holding should be considered in his regard that are consonant with the purpose of his holding. In some instances, of course, there will be no alternative to actual detention, when the release of the deportee entails danger to public wellbeing or security. But detention is not the sole means. It is certainly not an ordinary means when a long time has passed and no target country has been found to which the person may be deported.

In all these instances, a balance must be found between the needs of public security and wellbeing, on the one hand, and the individual's liberty, on the other, and a means should be chosen whose injury to liberty is not greater than required."

20. In 2001, following the hearings in a petition submitted to the High Court of Justice by the Association for Civil Rights in Israel (HCJ 4963/98 **Sasai v. Minister of the Interior** (December 27, 2001)), and after the phenomenon of persons unlawfully presented in Israel expanded, the Knesset enacted the Entry to Israel Law (Amendment No. 9), 5761-2001 (hereinafter: **Amendment No. 9**). The amendment was intended to find a proportionate arrangement balancing the rights and interests of the persons unlawfully present in Israel, the State of Israel, and Israeli society:

"The intention of the amendment is to find an appropriate balance between the right of the State of Israel, as a sovereign state, to determine who will enter it and who will be present within its area, for how long and on what conditions, and the need to ensure the basic human rights of the alien and the obligation not to injure his liberty beyond the extent required, even if he is unlawfully present in Israel" (Proposed Law: Entry to Israel (Amendment No. 8), 5761-2000, PL 107, 109 (hereinafter: **Proposed Amendment No. 9**); see also Saidi, para. 25.)

In the proposed law the state noted the dramatic increase in the scope of the phenomenon of persons unlawfully present in Israel and the harsh ramifications of this phenomenon (see AAP 4614/05 **State of Israel v. Oren**, Piskei Din 61(1) 211, para. 14 (2006) (hereinafter: **Oren**). However, for the purpose of the amendment the state did not distinguish between infiltrators, foreigner workers unlawfully present in Israel, or tourists who remained in Israel after the expiry of their visa.

21. In accordance with Amendment No. 9 it was established that the general rule is the removal from Israel of a person unlawfully present therein, as distinct from the past, when the minister of the interior was **entitled** to issue a deportation order (article 13(a) of the Entry to Israel Law. See also AAP 1644/05 **Farida v. Ministry of the Interior**, para. f(3) (June 29, 2005); MAA 1662/11 **Birhah v. Ministry of the Interior**, para. 27 (September 1, 2011)). Article 13a of the Entry to Israel Law further establishes that a person unlawfully present will be held in custody pending his removal from Israel unless he has been released on bail. The custody order will be issued by the border inspection supervisor after hearing the claims of the person unlawfully present. A person unlawfully present brought for custody is entitled to make his claims on the matter within 24 hours from the commencement of his holding in custody. The law further establishes grounds for the release from custody of an infiltrator and the exception to these grounds:

> 13f. Release on bail
>
> (A) The border inspection supervisor is entitled to release on bail a person unlawfully present in accordance with the provisions of this article; a person unlawfully present shall not be released unless one of the following applies in his regard:
>
> (1) The border inspection supervisor has been convinced that his unlawful presence originated in an error or mishap in good faith, and that he will leave Israel on the set date;
>
> (2) The border inspection supervisor has been convinced that he will leave Israel by himself on the date set, and that there will be no difficulty to locate him if he fails to leave by himself on the date set;
>
> (3) The border inspection supervisor has been convinced that, due to his age or state of health, his holding in custody is liable to damage his health, or that other special humanitarian grounds exist justifying his release on bail, including when, as the result of holding in custody, a minor will be left without supervision;
>
> (4) He has been in custody for more than 60 consecutive days;
>
> (B) Notwithstanding the provisions of sub-section (A), a person unlawfully present shall not be released on bail if one of the following applies:
>
> (1) His removal from Israel has been prevented or delayed due to a lack of full cooperation on his part, including regarding the clarification of his identity or the arrangement of proceedings for his removal from Israel;

(2) His release is liable to endanger state security, public wellbeing or public health;

Unless the content of the beginning of para. (3) of sub-section (a) applies in his regard and there is no other way to prevent the damage to his health.

22. It is worth emphasizing the provision in section 13f(a)(4) of the Entry to Israel Law, which establishes that the border inspection supervisor is entitled to release on bail a person unlawfully present if he has been in custody for more than sixty consecutive days, unless one of the exceptions established in the article applies in his regard. It has been ruled on this matter that the word "entitled" in the article grants the border inspection supervisor discretion regarding the release on bail of a person unlawfully present, even after sixty days in custody. However, it has been established that, as a general rule, in the presence of the alternative in article 13f(a)(4), and when the conditions established in section 13f(b) do not apply, the supervisor will order the release of the held person, unless there is "a public interest of tangible weight obliging the continued holding of the person present in custody for a period not exceeding that reasonable" (MAA 173/03 **State of Israel – Ministry of the Interior v. Salameh**, para. 9 (May 9, 205) (hereinafter: **Salameh**)). It has further been ruled that conditions should be set for the release on bail of a person held that will not thwart the actual possibility of the release from custody of the held person merely because of the fact that he is unable to meet the conditions imposed, particularly after the protracted stay of the person held in custody (MAA 7267/09 **Abdulai v. Ministry of the Interior**, para. 13 (December 21, 2009)). We would add that the Entry to Israel Law, in the framework of Amendment No. 9, establishes the procedures for the judicial review of the custody both by the Custody Review Tribunal, established in the framework of the amendment, and by the Administrative Affairs Court (for criticism of the Custody Review Tribunal, see Yuval Livnat "The Detention and Release of the Foreigner Who Refused to Identify Himself" **Hamishpat** 15(1) 227 (5770) (hereinafter: **Livnat**); Ofer Sitbon "Shaping Policy toward Migrant Workers" **Mishpat Umimshal** 10 273, 311 (5767)).

23. Even after Amendment No. 9, the exercising of the interior minister's authority was established as relatively broad, though subject to judicial review as any

administrative authority, against the background of the broad discretion enjoyed by a sovereign country in determining its immigration policy (MAA 696/06 **Alkanov v. Tribunal for Review of the Custody of Persons Unlawfully Present**, para. 16 (December 18, 2006) (hereinafter: **Alkanov**); Oren, 224). In realizing the authorities in accordance with this law, it has been determined, the authorities and the courts must realize the legislator's desire for the determined removal of persons unlawfully present regarding whom there are no grounds for their remaining in Israel, on the one hand, while strictly adhering to a proper procedure of examination of each individual case, hearing the person involved, and ensuring treatment of human dignity and protection of the constitutional rights of the foreign persons (see Farida, f(10)). It was further established that the purpose of the custody in accordance with Amendment No. 9 is neither coercion nor penalization. "It is intended entirely to realize the purpose of the policy of supervising those entering and present in Israel unlawfully, and to provide the authority with efficient means for realizing this policy, while maintaining constitutional principles and protecting human rights" (Alkanov, para. 16). These purposes have been recognized as proper purposes meeting the conditions of the limitation clause (ibid., para. 17).

24. It should be noted that, in practice, infiltrators who arrived from countries regarding which the State of Israel has applied a policy of non-refoulement were released from custody after a short time and granted temporary residency permits in accordance with article 2(a)(5) of the Entry to Israel Law (for example, see AAP 8642/12 **Tasfahuna v. Ministry of the Interior** (February 4, 2013) (hereinafter: **Tasfahuna**); see also Proposed Amendment No. 9). It should further be noted that in 2006 the state attempted to use the provisions of the Prevention of Infiltration Law in its format prior to the amendment. Petitions were submitted to this Court against this practice, arguing that the law permits detention for an unlimited period without judicial review. After a temporary decree was granted in the petitions, an agreed ruling was granted in accordance with the state's notification:

> "Following the apprehension by the security forces of Israel of an 'infiltrator' whom it has been decided to hold in Israel, the said persons will be transferred within 48 hours, and not later than 72 hours, to holding and custody at a border inspection facility. Not later than 14 days after his entry to the facility, the said person will be brought before a judge of the Custody Tribunal in accordance with the

> Entry to Israel Law, unless he has been released from custody prior thereto by the border inspection supervisor who has examined his matter in the first stage of his transfer from the security forces to the Entry to Israel Law track. The sole exception to the said proceedings is when, in accordance with the circumstances of the matter of a person who entered Israel, there is a foundation to apply proceedings to him in accordance with another law due to facts clarified in his regard" (HCJ 3208/06 **Anonymous v. Head of the Operations Division, IDF** (October 7, 2008)).

The Process of Enactment of the Amendment to the Prevention of Infiltration Law

25. In light of the burgeoning dimensions of the phenomenon of infiltration to Israel and its ramifications for the State of Israel and Israeli society, the government considered the need to provide additional tools and means for addressing the phenomenon. On December 11, 2011, a government resolution was adopted entitled "Establishment of a custody facility for infiltrators and blocking illegal infiltration to Israel." In schematic terms, the government resolution relates to three principal layers intended to address the phenomenon of infiltration.

26. **The first layer** is the establishment of an obstacle on the Israeli-Egyptian border to create a physical barrier blocking the arrival of infiltrators to the territory of the State of Israel. Significant resources and budgets were allocated for the purpose of establishing the obstacle; construction began and proceeded at an impressive pace. Indeed, according to the latest updated on behalf of the state, with the exception of a segment in the "Eilat surrounds" with a length of some 2 km, work has been completed to establish the obstacle along 245 km of the Israeli-Egyptian border. It should be noted that the media recently reported that the fence has also been of assistance in the struggle against the drug smuggling and trafficking of women effected across this border.

27. **The second layer** in the struggle against the phenomenon of infiltration in the government resolution was the activity and efforts made by the state in contacts with foreign countries for the purpose of the safe return of infiltrators present in Israel, or for their removal to other countries, including the encouragement of voluntary

departure. In a hearing before us, it was even declared that substantive contacts are being pursued with foreign countries for the removal of infiltrators thereto. I would note that for many years efforts have been made to pursue contacts with foreign countries for the purpose of the removal of the infiltrators thereto, to date without great success. Accordingly, I do not believe that at this stage, when no concrete solution has as yet been declared, these contacts impinge on our matter and they should be examined separately from this issue. I would only note that removal to a third country, as already noted above, is also subject to the rules of the domestic law of the State of Israel and should take into account international rules and standards on this issue (see para. 8 above; HMW, para. 13).

28. **The third layer** in the government resolution, and the central layer for our purpose, is the amendment of the Prevention of Infiltration Law and the establishment of the Saharonim custody facility. The explanatory notes to the proposed law presented the general goals of the amendment, and it is worth quoting the remarks verbatim:

> "In recent years the State of Israel has faced a substantial increase in the scope of infiltration through the border with Egypt, otherwise than through a border post. In 2010 alone, according to the statistics of the Population, Migration and Border Crossings Authority, some 14,000 infiltrators as stated were apprehended. The infiltrators to Israel come from various countries, including countries that are hostile to Israel.
>
> …
>
> The proposed law is essentially intended to enable the holding in custody of infiltrators for a period significantly longer than that established in the Entry to Israel Law, and to add to the Prevention of Infiltration Law the necessary mechanisms for maintaining review of the execution of a deportation order and the holding in custody of infiltrators pending their deportation. These amendments are proposed by way of a temporary provision for a period of three years, during which time the impact of the proposed arrangement on the phenomenon of infiltration to Israel will be examined.
>
> …
>
> It should be emphasized that although the proposal seek to apply some of the provisions of the Entry to Israel Law to infiltrators, in accordance with their proposed definition, mutatis mutandis and with the proposed changes thereto, and to grant authorities to the existing bodies in accordance with the Entry to Israel Law (the border inspection supervisor and the custody tribunal), the proposed

> arrangement is a special and stricter law to be applied to infiltrators, as distinct from the law applying to persons unlawfully present in accordance with the Entry to Israel Law. The reason for this is that, unlike a person unlawfully present who, in most cases, entered Israel with a valid visa, as a tourist or for the purpose of work, and who later became a person unlawfully present, an infiltrator knowingly entered Israel otherwise than through a border post, and his entry to the country was unlawful from the outset" (Proposed Law: Prevention of Infiltration (Offenses and Jurisdiction) (Amendment No. 3 and Temporary Provision), 5771-2011, Government PL 594).

The Amendment to the Law and Its Actual Implementation

29. In accordance with the amendment, and as already noted above, an infiltrator was defined as a person who is not a resident and who entered Israel otherwise than through a border post established by the minister of the interior in accordance with the Entry to Israel Law (article 1 of the Prevention of Infiltration Law). Article 30 of the Prevention of Infiltration Law enshrines the authority of the minister of defense to issue deportation orders against infiltrators. The deportation order will be nullified for a person who is granted a visa and a permit for residency in Israel in accordance with the Entry to Israel Law. It is also important to note that article 30(a) of the law establishes that "the order will serve as lawful documentation for holding the infiltrator in custody pending his deportation."

30. The central clause in the amendment, which is also the relevant clause for most of the conditional decrees granted in this petition, is article 30a, the central part of which I shall quote verbatim:

> 30a. Bringing before the border inspection supervisor and the authorities thereof
>
> (a) An infiltrator held in custody shall be brought before the border inspection supervisor not later than seven working days after the commencement of his holding in custody.
>
> (b) The border inspection supervisor is entitled, in exceptional cases, to release an infiltrator for a financial guarantee, a bank guarantee, or other appropriate guarantee, or on such conditions as he shall see fit (in this law – bail), if he has been convinced that one of the following applies:

(1) Due to the age or state of health of the infiltrator, his holding in custody is liable to damage his health, and there is no other way to prevent the said damage;

(2) Special humanitarian grounds other than that stated in para. (1) pertain justifying the release of the infiltrator on bail, including if, due to holding in custody, a minor will be left without supervision;

(3) The infiltrator is a minor who is not accompanied by a relative or guardian;

(4) The release of the infiltrator on bail can assist in the proceedings for his deportation.

(c) The border inspection supervisor is entitled to release an infiltrator on bail if he has been convinced that one of the following applies:

(1) Three months have passed since the date on which the infiltrator submitted an application to receive a visa and a permit for residency in Israel in accordance with the Entry to Israel Law and processing of the application has not yet commenced;

(2) Nine months have passed since the date on which the infiltrator submitted an application as stated in para. (1) and no decision has been granted in the application;

(3) Three years have passed from the date of commencement of the holding in custody of the infiltrator.

(d) Notwithstanding the provisions of sub-section (b)(2) or (4) or (c), an infiltrator shall not be released on bail if the border inspection supervisor has been convinced that one of the conditions detailed below applies:

(1) His removal from Israel has been prevented or delayed due to a lack of full cooperation on his part, including regarding the clarification of his identity or the arrangement of proceedings for his removal from Israel;

(2) His release is liable to endanger state security, public wellbeing or public health;

(3) An opinion was submitted to the border inspection supervisor by the authorized security bodies to the effect that activity liable to endanger the security of the State of Israel or its citizens is being undertaken in the infiltrator's country of residence or region of residence;

All the above unless the border inspection supervisor has been convinced that due to the age or state of health of the infiltrator, his holding in custody is liable to damage his health, and there is no other way to prevent the said damage.

(e) Release from custody on bail will be conditioned on such conditions as shall be determined by the border inspection supervisor in order to ensure the infiltrator's appearance for the purpose of his deportation from Israel on the date determined, or for the purpose of

> other proceedings by law; the border inspection supervisor is entitled at any time to review the conditions of bail if new facts have emerged, or if the circumstances have changed since the date of granting the decision for release on bail.
>
> …

31. The provision of article 30a establishes two groups of provisions constituting grounds for the release on bail of an infiltrator in accordance with the discretion of the border inspection supervisor, as well as a group of provisions constituting a barrier to release on bail even if a ground for release applies. The first group of provisions, enshrining four grounds for the release of the infiltrator, addresses the special circumstances of a specific infiltrator. The border inspection supervisor is granted the discretion to release an infiltrator on bail in exceptional instances when, due to his age or state of health, his holding in custody is liable to damage his health, and when there is no other way to prevent the damage; when special humanitarian grounds for this release apply, including consideration concerning the holding in custody of an unsupervised minor; in the case of a minor not accompanied by a relative or guardian; and when the infiltrator's release may assist in the proceedings for his deportation. The second group of provisions enshrines three grounds for the release of the infiltrator that depend on the passage of time. The first ground concerns an infiltrator who submitted an application to receive a visa and a permit for residency in Israel, when three months have passed since the date on which he submitted the application and its processing has not yet commenced. The second ground is an instance when nine months have passed since the date of submission of an application as stated and no decision has yet been granted in the application. The third ground for release is the passage of three years since the date of commencement of the infiltrator's holding in custody. It should be emphasized that, in accordance with the letter of the law, these grounds are also subject to the discretion of the border inspection supervisor.

32. As stated, alongside the grounds for release established in article 30a, three restrictions are established in the presence of any of which an infiltrator will not be released on bail even if a ground for his release applied. It should be emphasized that these restrictions do not apply to the grounds for release concerning the infiltrator's state of health, nor to an unaccompanied minor. The first restriction involves an

infiltrator whose deportation has been prevented or delayed due to the absence of full cooperation on his part. The second restriction concerns an infiltrator whose release is liable to endanger state security or public wellbeing or health. The third restriction involves an opinion submitted to the border inspection supervisor by the authorized security bodies to the effect that activity liable to endanger the security of the State of Israel or its citizens is being undertaken in the infiltrator's country of residence or region of residence.

33. The amendment to the Prevention of Infiltration Law imposes additional provisions concerning a hearing before the border inspection supervisor, as well as judicial and quasi-judicial review to be undertaken concerning the holding in custody of an infiltrator. Thus it is established that an infiltrator held in custody will be brought before the border inspection supervisor not later than seven working days after the commencement of his holding in custody (article 30a(a) of the law). The law further establishes that the infiltrator is to be brought before the Tribunal for the Review of Custody of Infiltrators established in accordance with article 30c of the law not later than 14 days after the date of commencement of his holding in custody (article 30e(a) of the law). The border inspection supervisor is permitted to extend this period on special grounds, to be recorded, by additional periods not cumulatively exceeding 72 hours (article 30e of the law, referring to article 13n(a1) of the Entry to Israel Law). The tribunal is permitted to approve his holding in custody, to order his release on bail, or to order a change in the conditions of bail (article 30d of the law). After the initial review, the infiltrator is to be brought for periodic review before the tribunal within periods of time not exceeding 60 days (article 30d(a)(1) of the law). An infiltrator is also permitted on his own initiative to submit an application to the tribunal to examine his case or to request a re-examination (article 30a, referring to article 13p(a) of the Entry to Israel Law). In addition to the review undertaken by the Custody Review Tribunal, the Prevention of Infiltration Law also establishes judicial review before the Administrative Affairs Court. In accordance with article 30f, the decision of the Tribunal for the Review of Custody of Infiltrators is subject to an appeal to the Administrative Affairs Court.

34. A further article it is important to mention in the framework of the amendment of the Prevention of Infiltration Law is article 30b, which establishes the conditions for holding in custody. It is established that an infiltrator will be held in appropriate conditions not liable to damage his health and dignity. It is further established that an infiltrator will be held separately from prisoners and criminal detainees.

35. The implementation of the temporary provision in the amendment to the Prevention of Infiltration Law began in June 2012. According to the latest statistics provided by the state, some 1,630 persons are being held in custody at Saharonim facility, including 1,416 men, 203 women, and 11 minors. In addition, 338 men are being held at Ketsiot facility. The total number of persons held is close to 2,000, of whom some 1,750 are being held under the Prevention of Infiltration Law. The state further noted that from the beginning of June 2012 through the date of the update, 238 infiltrators held in custody were released on bail: 88 on the instruction of the border inspection supervisor and the remainder in the judicial review proceedings of the Custody Review Tribunal and the courts. Of those released, 51 were minors. The state also notes that following the amendment of the law, persons held in custody submitted some 1,400 individual applications for asylum.

Having reviewed the background and understood the clauses and arrangements of the amendment to the Prevention of Infiltration Law, we may now proceed to a brief discussion of the Parties' arguments in the files heard before us.

The Parties' Principal Arguments

HCJ 7146/12

36. Petitioners 1-5 are citizens of Eritrea who, at the time of the submission of the petition, were held in custody in accordance with the amendment to the law. Petitioners 6-10 are various human rights organizations. In the petition the Court is asked to declare the amendment of the law fully void. Alternatively, order nisis were requested concerning eight specific articles enacted in the amendment of the law. Before proceeding to a brief review of the petitioners' arguments, I should note that

on March 12, 2013, this Court ordered the issuing an order nisi regarding the eight alternative petitions in the petition. However, in the review of the Parties' arguments we shall relate solely to their general arguments and, if necessary, we shall examine arguments regarding specific articles at a later juncture.

37. The Petitioners firstly seek to note that the vast majority of persons infiltrating Israel, almost 90 percent, are citizens of Sudan and Eritrea, and to recall that a policy of non-refoulement pertains regarding the citizens of these two countries. The Petitioners argue that the sole purpose of the amendment is one of deterring infiltrators in the future from entering Israel otherwise than through a border post and in accordance with the law. This purpose, it is argued, is contrary to the basic principle adopted in our law and in international law that an undocumented person is not to be held in administrative detention when no effective procedure for deportation is maintained. They argue that article 30a(c)(3) of the law establishes the detention of persons who cannot be deported for a period of at least 3 years, even if no effective deportation procedure is maintained in their regard. In light of the above-mentioned principles, it is argued, this article is contrary to the constitutional right to liberty which protects against the administrative detention of undocumented persons in accordance with a deportation order not intended for the purpose of removal.

38. Regarding the limitation clause, the Petitioners again argue that the amendment is not intended for a fit purpose. They claim that the law damages the core of the right to liberty in such a mortal degree that it can no longer be claimed that it maintains even minimum sensitivity to this basic right and, accordingly, it should be rejected at the stage of purpose. The Petitioners further argue that the desire for deterrence cannot constitute a fit purpose for administrative detention. The purpose of deterrence is equivalent to penalization and, in this manner, the law enables the rendering superfluous of criminal law and the protections derived therefrom, which cannot be maintained in an administrative proceeding such as the Prevention of Infiltration Law. Accordingly, even if deterrence is a goal that advances a desirable social interest, the legislation does not show the required sensitivity to human rights in order for it to pass the fit purpose test.

39. The Petitioners further argue that the amendment of the law does not meet the tests of proportionality in the limitation clause. In general terms, the Petitioners argue that the law adopts an extremely harsh means of depriving liberty and injures this right to an unprecedented degree. Accordingly, it will be necessary to be particularly strict with the authority in examining the ground of proportionality. Regarding the rational affinity test, the Petitioners argue that since this instance entails grave damage to the right to liberty, a close affinity will be required between the means and the purpose, and a particularly high level of probability will be required that the means will realize the purpose. In this case, it is argued, the rational affinity between incarceration and the provisions of the law deterring asylum seekers is purely speculative. The Petitioners emphasize that they believe that the decline in the number of persons entering Israel without a permit on the Israeli-Egyptian border is due to various factors, including the construction of the new border fence, the reinforcement of Egyptian security forces in Sinai, and the temporary blockage of the entry route to Europe due to the repatriation agreement between Libya and Italy. They argue that no affinity can be identified between the decline in the number of infiltrators and the Prevention of Infiltration Law.

As for the test of the least injurious means, the Petitioners argue that this, too, is not maintained given that the Respondents are taking additional measures to reduce the phenomenon of the entry of asylum seekers to Israel. Thus a new mechanism was established to examine asylum applications that is supposed to accelerate the proceeding in a manner preventing the protracted presence in Israel of a person whose asylum application was rejected and whom there is no impediment to remove from Israel. Accordingly, the Petitioners argue, it is possible manifest the purpose of deterrence in the framework of the activation of the regular criminal proceeding against persons entering Israel without a permit. The Petitioners agree that short-term administrative detention to realize the purpose of removal from Israel has been recognized in case law in Israel. However, in the case of incarceration whose purpose of deterrence and which is unlimited in time, it is no longer possible to employ the tool of administrative detention. As for the detention of persons in whose region of residence hostile activity is being undertaken, the Petitioners argue that the alternative lies in a detailed examination of individual danger.

The Petitioners further argue that the proportionality test in its narrow sense is not maintained in view of the nature of the injured right and the strength of the injury relative to the speculative probability of securing the purpose. The amendment, it is argued, violates one of the most basic rights – the right to liberty. The strength of the damage to the right is the greatest that can be imagined, while the probability of injury to the right is certain. Thus, it is argued, the law does not meet this secondary test.

40. In terms of constitutional relief, the Petitioners requested the nullification of the amendment in its entirety. Alternatively, they requested constitutional relief in the form of nullification by the "blue pencil" and "reading in" methods. In their petition, the Petitioners detail how they believe these reliefs should be granted with reference to each of the articles in the amendment they attack.

MAA 1192/13

41. Together with the constitutional petition, an appeal and an application for permission to appeal were also heard relating to the ruling of Beersheva Administrative Affairs Court (President Y. Alon) granted on January 17, 2013. The ruling was granted in five administrative appeals the hearing of which was consolidated. Appellant 1 in AAP 1247/13 and the Applicants in MAA 1192/13 are Eritrean subjects. Appellant 2 in AAP 1247/13 is a Sudanese subject. All the above infiltrated into Israel through the border with Egypt. Deportation orders were issued against them and they were placed in custody in accordance with the Prevention of Infiltration Law. In the petitions the Court was asked to nullify the deportation orders, release the women from custody, and order the granting of a visa in accordance with the Entry to Israel Law. The common argument in the petitions was that the existing humanitarian collective protection for subjects of Eritrea and Sudan automatically establishes the right of these subjects to receive visas for residency in Israel, as was the case prior to the amendment; hence the Prevention of Infiltration Law excludes these subjects from its application in accordance with article 30(a2).

42. The court rejected the proposed interpretation and established that the granting of residency visas prior to the amendment was due to a situation in which collective protection applies to the subjects of Eritrea and Sudan, alongside which were the provisions of the Entry to Israel Law stating that the purpose of custody was to ensure deportation. This combination led to the inevitable outcome that it was impossible to place these infiltrators in custody, and hence the granting of the residency visas. The amendment to the Prevention of Infiltration Law, it was established, changed this situation, since the purpose and goal of custody are henceforth in accordance with the provisions of the amendment. The court determined that the proposed interpretation denudes the law of the purpose behind its enactment. The court also rejected the argument concerning the retroactive application of the law in light of an explicit provision enabling this.

43. The court further rejected the arguments attacking the constitutionality of the law. It noted that the Appellants before it are ostensibly migrant workers, and not refugees as defined in the Convention relating to the Status of Refugees; neither have they submitted an application for recognition as a refugee. The court stressed that the fundamental right to liberty within the borders of the state applies to any person who entered Israel lawfully and is lawfully present within the borders of Israel; the exception thereto is a person defined as a refugee. Accordingly, it was determined, the basic assumption that the law injures the infiltrators' right to liberty is not free of doubts. Conversely, it was noted that there is no dispute that the purpose of holding the infiltrator in custody is ultimately his removal from Israel. Accordingly, there must be a correlation between the custody and the removal. The court established that the period of custody determined in the law by way of a temporary provision, during which time the state would continue to pursue its efforts to find countries to absorb subjects of Eritrea and Sudan who infiltrated its territory, or during which it would be possible to remove the collective protection and repatriate them, is proportionate and balanced.

44. Specifically, it was established regarding Appellants 1 and 2 that the exceptions in the law do not apply and, accordingly, there is no impediment to their continued holding in custody in accordance with the Prevention of Infiltration Law.

As for the Applicants, it was argued that the manner of their entry to Israel prevents their definition as infiltrators. The two formed part of a group that arrived close to the Israeli-Egyptian border and encountered humanitarian distress there as both countries refused to permit them to enter their territory. In the framework of the proceedings in a petition at the High Court of Justice, the state agreed to permit the two Applicants to enter Israel on humanitarian grounds. The court rejected this argument and determined that the Applicants did not enter Israel by means of a lawful visa and the humanitarian gesture merely equated their status with that of the other infiltrators. Neither did the court consider the suffering the Applicants underwent during their wandering from Eritrea to Israel as justifying the application of any of the exceptions established in law. Accordingly, the appeals of these Applicants were also rejected.

45. The appeal and the application for permission to appeal were submitted against the above-mentioned ruling and, as noted, their hearing has been consolidated with the constitutional petition. Firstly, Appellant 1 argues that she entered Israel prior to the commencement of the implementation of the law, and only due to some error was she not released from custody at that time. Accordingly, it is improper to apply the law to her retroactively, particularly since she is subject to collective protection. Appellant 2 argues that she is a Sudanese subject who entered Israel in July 2012. Appellant 3, also a Sudanese subject, has been present in Israel since 2008 and holds a residency permit under the protection granted to Sudanese citizens in Israel. The two were married through their families in 2011. Appellant 2 argues that due to the principle of family unification her status should be assimilated to that of her husband as the partner of an asylum seeker.

46. In general, the Appellants argue that the Prevention of Infiltration Law did not alter the status of collective protection. Accordingly, there is no room to change the practice introduced prior to the enactment of the law whereby residency visas are granted to persons eligible for collective protection in accordance with the Entry to Israel Law. They argue that this interpretation is consistent with the content of article 30(a2) of the law, which establishes the nullification of the deportation order for a person who has received a visa and permit for residency in Israel in accordance with the Entry to Israel Law. A different interpretation, it is argued, would lead to an

absurd situation, since it is impossible that the state will grant protection to these infiltrators while simultaneously negating it, since the protection includes the right to liberty in accordance with the rules of international law. Since the current situation is that it is not possible to repatriate subjects of Eritrea and Sudan, nor to remove them to a third country under the conditions required in international law, there is no fit reason, it is argued, to issue a deportation order against them. Alternatively, the Appellants argue that the law remains silent regarding persons who receive collective protection and, accordingly, does not apply to them, since injury to the right to liberty must be made explicitly in the law. Alternatively again, the Appellants argue that the issuing of a deportation order without the ability to actually remove the subject constitutes improper, unreasonable and disproportionate punishment. They argue that if their interpretation is not accepted, there is no alternative but to nullify the amendment of the law, insofar as it is contrary to the provisions of the Basic Law: Human Dignity and Liberty. A further possibility raised by the Appellants is to interpret the exception on humanitarian grounds as enshrined in the law as also included collective protection as a special humanitarian ground, alongside the protracted period for which the Appellants have already been in custody.

47. The Applicants in MAA 1192/13 also contest the ruling of the Administrative Affairs Court. They clarify that the proceeding in their matter was an administrative appeal of the decisions of the Custody Review Tribunal, which rejected their application for the nullification of deportation orders, their release from custody, and the granting of a visa to enter Israel. The Applicants raise four central arguments. Firstly, they argue that, given the special circumstances of their entry to Israel, with the permission of IDF forces, they are not infiltrators as this term is defined by law. Secondly, they argue that humanitarian reasons apply that justify their release given the suffering they experienced, particularly at the hands of the smugglers, before they entered Israel. The Applicants argue on this matter that the Custody Review Tribunal uses fixed formats in its minutes for all infiltrators, so that the protocol of the hearing does not reflect the comments made by the detainees. Thirdly, it was argued that given the temporary protection applying to the Applicants, and in the absence of any effective proceedings for their removal, they should be released from custody. In this matter the Applicants are of the opinion that the Custody Review Tribunal should

apply article 13l of the Entry to Israel Law, to which the Prevention of Infiltration Law refers in article 30e, according to which the tribunal is to give consideration to the protraction of holding in custody due to a delay in executing a removal order. Fourthly, the Applicants attack the constitutionality of the amendment to the Prevention of Infiltration Law in a similar manner to the arguments raised in the constitutional petition.

It should be noted that on March 12, 2013, it was decided that the motion for permission to appeal should be heard as if permission had been granted and a petition submitted in accordance therewith.

The Statement of Response on the State's Behalf and Complementary Arguments during the Hearing

48. In its response, the state discusses the development and scope of the phenomenon of infiltration to Israel. The state believes that the State of Israel, relative to the other countries of the world, faces a unique situation as the only Western country that has a relatively long land border with Africa, which border was until recently not effectively fenced, and due to the geopolitical situation and Israel's complex relations with its neighbors. The state forms the conclusion that the provisions of the Entry to Israel Law are not adequate for coping with the phenomenon, since the infiltrators realized that they would be released from custody after a short while and could remain in Israel and earn several times the usual rate in their countries, and send moneys to their countries of origin – moneys used, among other purposes, to finance the arrival of additional infiltrators in Israel.

The state also discusses the ramifications of the phenomenon of infiltration as it sees these. Thus, it claims, the phenomenon of infiltration has had an effect on internal security and public wellbeing, and has caused a profound change in the fabric of life in the urban domain. A further central ramification is on the economy and industry. The state argues that the phenomenon of infiltrators has created a massive increase in the supply of non-local workers in an uncontrolled manner, while Israeli workers with low skills earning low wages were the first to be injured by this. This

has led to a reduction in the level of the salary paid to them, and even to their displacement from the job market, requiring the support of the state's social security system. This phenomenon has also had additional budgetary ramifications. Thus, for example, the state claims that considerable expenses have been required for health and welfare services for this population, which does not purchase medical insurance. The same applies to the expenses of the education system on account of the addition of children to the education system, including special education, and to the network of residential schools in Israel. The state adds that it has been estimated that millions of shekels in wages are transferred every year from Israel to Africa; much of this sum is transferred by illegal means.

49. The state argues, in general, that the Court should act with restraint and moderation when examining the nullification of primary legislation, and that the present case is not one of the rare exceptions justifying the nullification of a law. The state emphasizes that this is a temporary provision and, accordingly, the scope of constitutional review thereon is relatively limited. As for the injured rights, the state argues that the amendment does not injure the infiltrators' constitutional right to freedom of movement since this right is not enjoyed by a person who enters Israel illegally. Indeed, article 6 of the Basic Law: Human Dignity and Liberty grants the right of entry to Israel only to an Israeli citizen. Regarding the right to liberty the state agrees that this right is indeed injured, but emphasizes that this is not an absolute right, and that the injury meets the conditions of the limitation clause.

50. Regarding the requirement of fit purposes, the state believes that this is indeed met. The state notes two central purposes underlying the amendment to the Prevention of Infiltration Law. The first purpose is to block the phenomenon of infiltration which, it is argued, is based mainly on economic migration. The law sought to establish a normative barrier to infiltrators wishing to cross into the territory of the State of Israel and to infiltrators who have already entered Israel. Preventing the arrival of new infiltrators in Israel is secured through the awareness of potential infiltrators of the legal means taken against those who infiltrate its territory. The state views this as an extremely important public and social purpose due to the gravity of the phenomenon and its serious ramifications, which pose a tangible threat to the

sovereignty and resilience of the State of Israel. The second purpose is to prevent infiltrators settling in the country, and thereby prevent the negative influences that accompany the protracted settlement of illegal infiltrators in some of Israel's cities. In the framework of this purpose, the amendment seeks to reduce the attractiveness of Israeli cities as a focus for illegal labor migration. The state further argues that the amendment seeks to prevent infiltrators from setting down roots in Israeli society or in the economy and thereby presenting their migration as an accomplished fact. This also reduces the ability of the infiltrators to work in Israel and to send funds that will finance the arrival of additional infiltrators in Israel. The state further believes that blocking the phenomenon of infiltration is a fit purpose consonant with the values of the state as a Jewish and democratic state.

51. The state also believes that the amendment meets the proportionality tests. It was argued that the rational affinity test is met, since the statistics show a sharp decline in the numbers of infiltrators during the months following the commencement of implementation of the temporary provision. The least injury test, it was argued, is also met. The state argues that in the context of determining the policy of the State of Israel in the field of migration, a field that constitutes a clear manifestation of the state's sovereignty, the legislator enjoys room for broad constitutional maneuver. The state emphasizes that it distinguishes between persons who have a substantive claim for political asylum and infiltrators for other purposes. The state further argues that while there may be means that are less injurious to the right to liberty, these do not realize the social purpose with the same level of effectiveness. It argues that in order to realize the purposes regarding blocking the phenomenon of infiltration, alongside the prevention of the settling of infiltrators in Israel's cities, it was not sufficient solely to establish a fence along the border, but it was also necessary to provide additional means, most importantly the amendment of the Prevention of Infiltration Law. The state further argues that attention should be given to the affinity between the right to freedom of movement and the right of liberty, against the background of an appreciation that the practical significance of refraining from restricting the individual liberty of an infiltrator is the granting of collective freedom of movement in Israel to tens of thousands of infiltrators.

52. Regarding the proportionality test in the narrow sense, the state argues that the injury to the constitutional right in the amendment to the law is moderated by various arrangements, including several statutory milestones for the exercise of proactive and close judicial review examining the procedure of the placement in custody of the infiltrator, in addition to granting the infiltrator the right to present his arguments to the Custody Review Court whenever he wishes, and the possibility to submit administrative appeals and administrative petitions; the grounds for release established in the amendment – both the general grounds, including a basket ground of special humanitarian reasons, and those relating to infiltrators who submitted an application to receive a visa and a permit for residency in Israel; the conditions of holding in custody of the infiltrators, which are explicitly enshrined in the law; and the enshrining of the amendment in the framework of a temporary provision. Conversely, the state emphasizes the side of public interests, insisting on the sovereignty of the state and its obligation to protect its borders, as well as the rights of the citizens and residents of the State of Israel as individuals.

53. The state believes that the temporary provision does not contradict Israel's undertakings in accordance with international law. It notes that attention should be given to the unique aspects and specific social circumstances regarding the relevant legal and factual material. This is the case, the state argues, regarding the phenomenon of infiltration to Israel as a local and unprecedented matter, both in its scope and in its broad ramifications. Hence the place of international law or comparative law should be restricted in examining these matters. The state further argues that the material relates to core issues of the principle of sovereignty regarding the absolute right of the state to determine who will enter its borders – a principle that is also clearly established by international law.

The state proceeds to discuss individually each of the orders nisi issued in the petition, and seeks to apply to the specific terms that were attacked an interpretation that these are not intended to intensify or raise the threshold required for the consolidation of grounds for release, nor to restrict these. As noted, at this stage I did not consider the detailing of the arguments on this aspect to be necessary.

54. Regarding AAP 1247/13 and MAA 1192/13, the state argues that there are no grounds for intervening in the ruling of Beersheva Administrative Affairs Court. The state supports all the determinations in the ruling, both regarding the constitutional arguments and regarding the individual arguments of the Applicants and the Appellants.

55. On the individual level, the state updates that (male) Petitioners 1-4 have already been released from custody. Regarding (female) Appellants 1-2, a mother and daughter, they were release on a special humanitarian ground relating to the fact that they were brought to Israel against their will. Appellant 3 was also released from custody after the Custody Review Tribunal established that special humanitarian grounds apply in his regard, against the background of the captivity and torture the Appellant experienced in Sinai prior to entering Israel, and the ramifications thereof on his current mental condition. Appellant 4 was also released on the ground that three months had passed since the submission of his application for asylum and processing of the application had not yet commenced. Appellant 5, however, had remained in custody since the day she infiltrated into Israel, viz. since June 11, 2012 – over one year. The state further updates that the Applicants in MAA 1192/13 and the Appellants in AAP 1247/13 are still held in custody, some of them for a period of over one year.

56. Following our hearing on June 2, 2013, the state submitted on our instructions a complementary response on its behalf relating to the contacts and agreements concerning the removal of citizens of northern Sudan and Eritrea to countries other than their country of nationality. In this response the state reiterated the distinction between infiltrators from Eritrea, regarding whom a policy of non-refoulement applies, and infiltrators from northern Sudan, regarding whom such a policy does not apply, although they are not removed to their country of origin due to the practical difficulty accruing from the absence of diplomatic relations between the two countries. The state attached to its response the affidavit of Mr. Haggai Hadas, the official responsible for the said contacts. Mr. Hadas declares that advanced contacts are underway with several African countries with the goal of these serving either as a

destination country for absorbing the infiltrators on the basis of granting entry and residency visas, or as transit countries to the infiltrators' country of origin.

The Statement of Response on Behalf of the Knesset

57. The Knesset did not see fit to add to the expansive constitutional argument presented in the state's response. However, the Knesset sought to present an argument regarding the assumption of consistency in Israeli law, according to which an Israeli act of legislation is to be interpreted in as consistent a manner as possible with the norms of international law to which Israel is committed. The Knesset argues that the acceptance of the Petitioners' argument that the assumption of consistency should be applied to the interpretation of the Basic Laws would effectively lead to the transformation of the norms of international law into binding law in the State of Israel, and would also require the legislation of the Knesset to meet these norms, which would be introduced through the Basic Laws by means of the assumption of consistency. The Knesset argues that this approach is extremely problematic, undermines the sovereignty of the Knesset as the legislative branch, and is also inconsistent with the ruling of the Supreme Court. The Knesset argues that there is no dispute regarding the importance of international law in interpreting regular legislation under the assumption of consistency, and neither is there any dispute that, in appropriate instances, international law may serve as a source of inspiration in constitutional interpretation. However, it believes, the Petitioners' approach that the assumption of consistency with its binding foundation should be applied with regard to the Basic Laws, thereby granting international law supra-constitutional status in Israeli law, is to be rejected.

The Responses of the Petitioners, the Applicants, and the Appellants to the Complementary Arguments

58. Regarding the state's complementary arguments following the hearing held, the Petitioners and the Applicants in MAA 1192/13 submitted a joint response. They argue that the agreement ostensibly being consolidated with a third country cannot resolve the non-constitutionality of the amendment, which will continue to apply to

tens of thousands of persons. They further argue that the complementary arguments suggest that there is no finalized agreement that is close to implementation. They note that efforts and contacts have been underway on this matter for many years without results. Lastly, they argue that an agreement of this type is subject to legal restrictions and to compliance with the international obligations of the State of Israel, and they note that most of the agreements for the transfer of migrants to third countries have been rejected by courts around the world.

59. The Appellants in AAP 1247/13 also submitted their response to the complementary arguments on behalf of the state. They argue that even if an agreement is reached with a third country, this is irrelevant to the continued holding in custody of the Appellants, since even in such a case the injury to them should be minimized and they should be released pending the actual implementation of the agreement. The Appellants also claim that no agreement can impinge on the constitutionality of the amendment. The Appellants object to the confidentiality of the said agreement and argue that they should be enabled to raise claims against it, if it is actualized, and that the State of Israel will be required to ensure that the deportation is effected to a country that will constitute a safe place for the deportees.

Amicus Curiae Applications

60. Several organizations submitted applications to join as amicus curiae, both alongside the Petitioners and alongside the Respondents. One of these is the Concord Research Center for Integration of International Law in Israel (hereinafter: **the Center**). The Center's application seeks to cast light on the position of international law on the issue before us. Briefly, the Center argues that the rules established in international law impose few restrictions on migration policy and the implementation thereof, in light of the principle of state sovereignty, albeit balanced with the need to ensure basic rights for any person present within the borders of the state. It is argued that the principles that have been consolidated are intended to ensure that the use of detention will be solely for the purpose for which it is intended – to preserve the state's right to determine and implement its sovereign migration policy through prevention of entry or removal. Accordingly, in order that detention will not be

considered arbitrary, it is not to be used for the sake of penalization; strict attention must be paid to need, proportionality and reasonability in the character and duration of the detention; strict attention must be paid to proper proceedings and to the individual examination of restrictions on liberty. Consideration must also be given to rights intended to protect particularly vulnerable groups of foreign persons, including children, asylum seekers and refugees. The Center argues that central provisions in the Prevention of Infiltration Law deviate even from the minimal and conservative standards established in international law.

61. An additional body that applied to join the petition as a respondent is the Fence for Life Movement (hereinafter: **the Movement**), which, according to its definition, acts to ensure the security of citizens of Israel. The Movement argues that the full or partial acceptance of the petition will place the citizens of Israel in mortal danger. It bases its argument on the demographic and security-oriented claim that the Jewish citizens of the State of Israel face grave physical danger from the destabilization of the Zionist-Jewish majority in the State of Israel. The phenomenon of the illegal immigrants, it is argued, has led the proportion of the Jewish population in Israel to fall to just 73 percent of the total population.

62. A group of Israeli citizens who live and work in south Tel Aviv also applied to join the petition as respondents, alongside the association Eitan – Israeli Migration Policy. The applicants are interested in presenting to the Court the factual picture regarding the impact of the entry to Israel of infiltrators from Africa on the fabric of life in south Tel Aviv and on the lives of the citizens who live and work there. The applicants report a deterioration in the sense of personal security of the residents of south Tel Aviv since the entry of the waves of infiltrators to these neighborhoods, as well as phenomena such as the snatching of cellular phones, violence, and sexual harassment. They report congestion, noise, and fear of walking on the streets.

63. The Kohelet Forum (hereinafter: **the Forum**) is also interested to join as an amicus curiae. The Forum is a public association established by intellectuals and academics. Its arguments seek to discuss the values placed on the scales – the benefit of the relevant law and injured individual right. Regarding the injured right, the

Forum rejects the Petitioners' arguments that the Basic Laws should be examined in accordance with the norms of international law, since this implies the subjugation of the legislation of the Knesset in its entirety to international law. The Forum further claims that the infiltrators do not have any constitutional right to liberty in its full sense, since they do not enjoy constitutional liberty to move in the state as they wish. On the benefit side, the Forum emphasizes the consideration of protecting Israel's identity as a Jewish nation-state and protecting the population structure in Israel.

64. A further application that was exceptionally submitted is on behalf of the United Nations High Commissioner for Refugees (UNHCR) (hereinafter: **the Commission**), which also requests to join as an amicus curiae. The Commission asks to address the proper interpretation, in its opinion, of the international law pertaining to the issue and, in particular, the interpretation of the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. The Commission details its position regarding the general impact of international law on the discussion of the constitutionality of the amendment to the Prevention of Infiltration Law, and is of the opinion that the automatic and protracted detention of refugees and asylum seekers classified as infiltrators merely because they entered Israel in an unregulated manner fails to meet international standards. The Commission emphasizes that a policy of custody intended primarily for deterrence is unlawful, since this is not a legitimate purpose in accordance with the rules of international law. It is required that the policy be based on an individual evaluation of the need for detention.

65. It should already be noted at this juncture that I do not believe that we need determine the amicus curiae applications before us. The material submitted by the various applicants has been brought to our attention, we have read their arguments, and we have even heard oral presentations from some of their representatives. On the basis of the arguments of all the Parties, the time has now come to grant our decision.

Discussion and Decision

66. Before turning to the examination of constitutionality required in the matter before us, I wish to begin by removing irrelevant disagreements from the path on

which we are now about to embark. The Parties disagree on numerous issues relating to the infiltrators, reflecting distinct and almost diametrically-opposed viewpoints. Some of these issues are important and weighty, but not all of them are necessary relevant to the core of the petition before us and, accordingly, we shall not discuss them in this framework. Thus, for example, the Parties disagree regarding terms and terminology – custody according to the state against administrative detention according to the Petitioners; infiltrators according to the state against asylum seekers in the Petitioners' view; and so forth. Terminology can indeed have an impact on substance. However, our interest is not on this matter in the present framework and stage, and the use of the various terms shall be according to the terms of the Prevention of Infiltration Law.

The Parties disagree regarding the circumstances that brought the infiltrators to Israel. While the Petitioners paint a picture of persons persecuted in their countries of origin, facing genuine and mortal danger, kidnapping and torture, the state paints a completely different picture of economic migrants interested in improving their standard of living and their economic condition by means of work in the State of Israel. We shall also be unable to determine this issue in this framework, and in my opinion it is largely irrelevant to the essence of the matter before us. I would only note that it is evident that a person recognized as entitled to the status of refugee in accordance with the Refugees Convention will be released from custody immediately and will enjoy all the protects afforded by the Convention. The question as to whether an infiltrator's application for recognition as a refugee was justly rejected is a mainly individual one and we should not discuss this issue here.

The Parties further disagree regarding the conditions of custody in which the infiltrators are held at the various facilities, and particularly at the Saharonim facility, where most of them are present. While the state believes that the conditions are good and satisfactory, the Petitioners indicate shameful conditions and harsh testimonies from the field. Despite its great importance and the need to consider this issue thoroughly, it is not relevant to the constitutional examination of the amendment at this stage. It hardly needs to be noted that the state must ensure fit conditions ensuring the infiltrators' health and dignity , and indeed the law requires them to do so, as

stated (article 30b of the Prevention of Infiltration Law). However, the interpretation and implementation of this term are a matter for a separate petition that will include data and details on this subject in order to examine the issue in depth, something we cannot do in the framework of the issues placed before us.

In concluding this point, I would further note that the Parties present polarized and extreme positions relative to each other. As I already noted above, I believe that the picture is not colored in black and white, but comprises numerous shades along the continuum between the two extreme positions as presented before us. It might be naïve to hope for cooperation between the two bodies that stand before us on either side of the divide, on the one side the Petitioners representing the human rights organizations and on the other the state authorities, but I believe that such cooperation is possible and might benefit all those concerned, including the infiltrators themselves and Israeli society as a whole. In my opinion, the entrenchment of each Party in its own position without an ability to see the difficulties and dilemmas noted by the opposite Party is deleterious and injures the good of the matter. In any case, we can only examine the legal issue brought before us, and we shall now turn to doing so.

Constitutional Examination

67. In general terms it is important to remember and recall the restraint and moderation this Court has adopted in exercising the constitutional review of primary legislation of the Knesset. This is required on the basis of the principle of the separation of powers and the different authorities granted thereto. The legislator's decision effectively expresses the will of the people that elected it and, accordingly, the Court will caution itself before intervening in an act of legislation, and will not place itself in the shoes of the legislator in selecting and shaping policy. However, this Court is not permitted to ignore an injury to basic rights that fails to meet the requirements of the limitation clause as these are explicitly established in the Basic Laws. The Court bears the task of ensuring that the work of legislation of the Knesset does not injure to a greater degree than necessary the human rights enshrined in the Basic Laws, and it is not entitled to withdraw from this task. Accordingly, it must perform this while sensitively and consciously balancing the principles of majority

rule and the separation of powers and the guarding of civil rights and the basic values on which the system of government is founded in the State of Israel (HCJ 2605/05 **Human Rights Division v. Minister of Finance**, para. 14 of President Beinisch's ruling (November 19, 2009) (hereinafter: **Human Rights Division**); CA 6659/06 **Doe v. State of Israel**, Piskei Din 62(4) 329, para. 29 (2008) (hereinafter: **Doe**)).

68. As is well known, the constitutional examination is divided into three stages. The first stage examines the question as to whether the relevant law injures a right or rights enshrined in the Basic Laws. A negative answer will lead to the end of the constitutional examination and the rejection of the petition. Conversely, a positive answer will led the judicial review to the second stage. The second stage examines the constitutionality of the injury through the requirements of the limitations clause as this appears in the Basic Law: Human Dignity and Liberty or Basic Law: Freedom of Vocation. An injury to a constitutional right meeting all the conditions of the limitations clause is a permitted injury that will lead to the law's being declared constitutional. Conversely, an injury not meeting one of the conditions of the limitations clause will oblige the Court to proceed to the third stage of the judicial review, the relief stage. In this stage, the court examines the outcomes of the unconstitutionality established in the previous stage and determines the relief to be granted following this determination (see, inter alia, HCJ 10662/04 **Hassan v. National Insurance Institute**, para. 24 of President Beinisch's ruling (February 28, 2012) (hereinafter; **Hassan**); HCJ 6304/09 **Lahav – Bureau of Organizations of the Self-Employed and Businesses in Israel v. Attorney General**, para. 75 (September 2, 2010) (hereinafter: **Lahav**); **Human Rights Division**, para. 16 of President Beinisch's ruling; HCJ 6427/02 **Movement for Quality Government in Israel v. Israel Knesset**, Piskei Din 61(1) 619, 669-70 (2006) (hereinafter: **Movement for Quality Government in Israel**); HCJ 5975/12 **Distributors of Cigarettes in Automated Machines Division v. Ministry of Health**, para. 8 (July 3, 2013) (hereinafter: **Distributors of Cigarettes Division**)).

69. This Court has recognized the importance of the said analysis in its sequence. This analysis enables an analytical and uniform examination of constitutional issues raised before the High Court of Justice. It establishes the confines and boundaries for

the Court's intervention in the authorities of the legislative branch. It is important in creating the distinction "between the scope of the right and the extent of its actual protection and realization" (**Movement for Quality Government**, 670; **Hassan**, para. 24 of President Beinisch's ruling). President Grunis recently noted the importance of the distinction between the first and second stages:

> "Each of the stages of the constitutional examination has an important goal in the overall constitutional analysis. **The first stage** in the constitutional examination ("the injury stage") is intended to determine the conceptual scope of the constitutional right. In this stage the boundaries of the constitution right are determined through the interpretation of the relevant right and its balancing against other rights. **The second stage** in the constitutional examination ("the limitations clause") is intended to determine the extent of protection of the right and the "limits of the arena" of the legislator and the restrictions imposed thereon in injuring constitutional rights (see HCJ 10662/04 **Hassan v. National Insurance Institute**, para. 24 of President. **D. Beinisch**'s ruling (February 28, 2012)). Clearly there is a mutual relationship between these two stages. The boundaries of the constitutional right are not determined solely by the delineation of the conceptual scope of the right, but also by an appraisal of the extent of the protection to be granted thereto. However, the distinction between the two stages should not be blurred. Each stage has its own balances and an independent purpose" (HCJ 2442/11 **Shtangar v. Knesset Speaker**, para. 24 (June 26, 2013) (hereinafter: **Shtangar**)).

First Stage – Injury to a Basic Right

70. In the first stage of the constitutional examination, we are required to examine whether the amendment to the Prevention of Infiltration Law injures a right or rights protected in the Basic Laws. The Petitioners' argument is that the amendment injures the right to liberty and freedom of movement enshrined in the Basic Law: Human Dignity and Liberty. We shall examine these two rights separately.

Injury to the Right to Liberty

71. Article 5 of the Basic Law: Human Dignity and Liberty establishes:

> There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.

Our task with regard to this right would seem to be simple. The provision of article 5 of the Basic Law: Human Dignity and Liberty is explicit and clear. It is evident that the right to liberty of a person held in custody liable to last three years is unequivocally injured. “The act of incarceration of a person and his placing in imprisonment injures his right to liberty and to freedom of movement” (**Human Rights Division**, para. 16 of President Beinisch’s ruling; **Alkanov**, para. 13). Indeed, the state does not dispute that the amendment to the Prevention of Infiltration Laws injures the right to liberty. I shall, however, devote a few words to this important and central right.

72. The right to liberty is one of the foundations of the democratic system and is based on the values of the state as a Jewish and democratic state (HCJ 3239/02 **Marab v. Commander of IDF Forces in the Judea and Samaria Area**, Piskei Din 57(2) 349, 364 (2003) (hereinafter: **Marab**)). It constitutes one of the most basic and fundamental rights in the system of human rights. Physical liberty, which is enshrined in article 5 of the Basic Law: Human Dignity and Liberty, is recognized as the hard core of human liberty (see Rinat Kitai Sangero **Detention: Deprivation of Liberty Prior to the Verdict** 17 and the references therein (5771) (hereinafter: **Kitai Sangero**)). The right to liberty has been enshrined in the ruling of this Court, which was attached titles and headings to it, including its constituting a “supra-principle” ((ACH 2316/95 **Ganimat v. State of Israel**, Piskei Din 49(4) 589, 633 (1995) (hereinafter: **Ganimat**)); “at the front row in the pantheon” (HCJ 5016/96 **Horev v. Minister of Transportation**, Piskei Din 51(4) 1, 147 (1997) (hereinafter: **Horev**)); “the foundation of foundations and the father of all the sundry liberties” (AH 1/87 **Dananshvily v. State of Israel**, Piskei Din 41(2) 281, 288 (1987)); “a constitutional right of the first order” (HCJ 6055/95 **Tzemach v. Minister of Defense**, Piskei Din 53(5) 241, 261 (1999) (hereinafter: **Tzemach**)). Depriving a person of his liberty causes serious, comprehensive and broad injury in a wide range of areas of life, and it is this fact that renders this right so central in any democratic regime. A person who has been deprived of his liberty cannot enjoy the diverse choices life offers to the free person, including the choice of a place of work, maintenance of a normal family and social life, consumption of culture and leisure, and so forth. The injury to an individual’s liberty is irreversible, and no financial compensation can make amends

therefore (see PCA 4423/12 **Jarais v. State of Israel**, para. 6 (July 8, 2012); CA 4620/03 **Abu Rashed v. State of Israel**, para. 5 (September 8, 2003)). The injury to a person's liberty automatically also entails injury to his dignity. "It is hard to dispute the fact that the very act of incarceration of a person behind bars and bolts and his subjugation to the rules of conduct practiced in prison injures his human dignity" (**Human Rights Division**, para. 36 of President Beinisch's ruling). That is to say, the right to liberty is also derived from the right concerning human dignity. "Human dignity is the value of the human, the sanctity of his life and his being a free person" (Aharon Barak **Interpretation in Law** 421 (Vol. 3, Constitutional Interpretation, 1994) (**Barak, Constitutional Interpretation**)). Depriving a person of his liberty, in my opinion, also amounts to his humiliation and degradation, the prevention of which forms the heart and core of the right to human dignity. It is important to emphasize that these rights to liberty and dignity extend to any person in Israel, even if he is not lawfully present therein. The rights are granted to a human as a human (**Kav LaOved II**, para. 36 of Justice Procaccia's ruling; Livnat, 254; AAP 1038/08 **State of Israel v. Geavitz**, comments of President Beinisch (August 11, 2009)).

Depriving a person of his liberty is tantamount to injury to an entire set of rights, including freedom of vocation, the right to privacy, the right to property, freedom of expression, and so forth, the ability to realize which is restricted in physical, psychological and value-based terms as the result of the deprivation of liberty (**Human rights Division**, para. 20 of President Beinisch's ruling; para. 24 of Justice Procaccia's ruling; **Shoham**, 40). It is no coincidence that objectionable regimes make extensive use of the deprivation of liberty of opponents of the regime. Justice Zamir has noted the broad and grave injury:

> "Personal liberty is a constitutional right of the first order and it is also, in practical terms, a condition for the realization of other rights. Injury to personal liberty, like a stone hitting water, creates a widening circle of injury to additional basic rights; not only to freedom of movement, but also to freedom of expression, personal modesty, the right to property, and additional rights. See ACP 4463/94 **Golan v. Israel Prison Service**, 153. As stated in article 1 of the Basic Law: Human Dignity and Liberty: "Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free." Only a free person can fully and properly realize his basic rights. And it is personal liberty, more than any other right, that renders the person

> free. Accordingly, depriving personal liberty constitutes particularly grave injury” (**Tzemach**, 261).

The importance and centrality of the right to liberty in a democratic regime is also due to the ramifications of the deprivation of liberty of the injured person and the damages he is liable to sustain as the result thereof. Depriving a person of his liberty is liable to cause both physical and psychological damages (see **Kitai Sangero**, 18 ff.) The deprivation of liberty is not reflected solely in the fact that a person is held in the state’s custody, but also acquires everyday meaning in a period when the person is subject to the rules of conduct and discipline current in the place of custody, which also restrict his liberty (see **Human Rights Division**, para. 25 of President Beinisch’s ruling). The importance of the right to liberty and the gravity attributed to the deprivation of liberty have led to the perception that the authority to exercise force and deprive a person of his liberty is one granted to the state alone, as part of the social contract underlying the state. Accordingly, this Court decided to nullify a legislative arrangement that transferred the authorities for the operation of prisons to private bodies, even if this were under the close supervision of the state (**Human Rights Division**). It has further been established that, due to the importance of the right to liberty, it is to be interpreted as applying “also to procedural protections and procedural arrangements relating directly to the right and its realization” (**Shtangar**, para. 28).

73. The right to liberty, like any other basic right, is not absolute. The basic justification for depriving a person of his liberty lies in the presence of an important public interest secured by denying this liberty (**Human Rights Division**, para. 21 of President Beinisch’s ruling; **Tzemach**, 262; **Doe**, para. 28). The balance between the right to liberty and the public interest is effected according to the constitutional tools established in legislation and in case law, the most important of which, of course, is the proportionality test.

Denying liberty is the severest means (with the exception of the death penalty, which is extremely rare in our legal system) exercised by criminal law (**Kitai Sangero**, 16). It is no coincidence that the provisions of Israeli law have established numerous constraints and restrictions on the denial of a person’s liberty, even in the

case of a person who has already been convicted in criminal law. Thus, for example, it is not generally possible to impose a penalty of actual imprisonment on a defendant who is not represented (article 15b of the Criminal Procedure Law [Combined Version], 5742-1982 (hereinafter: **CPL**)). The law further establishes an obligation to commission a review by a parole officer concerning a defendant on whom the court intends to impose a sentence of actual imprisonment (article 38 of the Penal Code, 5737-1977 (hereinafter: **the Penal Code**)). Strict provisions have further been established regarding the detention of a person who has the status solely of a suspect or defendant and who has not yet been convicted by law. One of the most important provisions for this purpose establishes the detention of a person is not to be ordered when it is possible to secure the purpose of the detention by means of release on bail and conditions for release that are less injurious to the defendant's liberty (article 21(b)(1) of the Criminal Procedure Law (Enforcement Authorities – Detentions), 5766-1996 (hereinafter: **the Detentions Law**)). The 1996 Detentions Law changed the normative situation and ordered that the gravity of the offense does not in itself constitute grounds for detention (see SCM 3513/95 **Shragai v. Military Prosecutor, Air Force Attorney's Office**, Piskei Din 51(2) 686 (1997)). It was further established that the fact that a given offense constitutes a "national scourge" cannot in itself constitute grounds for detention (**Ganimat**, 611). Although financial compensation cannot, as noted, make amends for the denial of liberty as stated, provisions have been established awarding compensation on account of groundless imprisonment or detention in order to mitigate the injury caused as the result of the imprisonment or detention (article 80(a) of the Penal Code).

74. The strict attention and great caution in criminal law before depriving a person of his liberty are even more evident in other fields of law. "It should be recalled that detention without determining criminal liability should take place only in exceptional and special instances" (**Marab**, 364). Thus our legal system recognizes administrative detention intended to thwart and prevent future danger of the security of the state or the public. Administrative detention naturally gravely injures the liberty of a person, without the basis of the pursuit of a criminal trial, and often on the basis of confidential material that cannot be revealed to the detainee or his counsel. To this end legal filters and tools have been established with the goal of creating a balance

between the interest of protecting state security and protecting the dignity and liberty of the individual (see ADA 8607/04 **Fahima v. State of Israel**, Piskei Din 59(3) 58, 262 (2004); ADA 4794/04 **Doe v. Minister of Defense** (June 12, 2005)). In this framework three judicial instances exist in which judicial review of the administrative detention is undertaken, including review of the confidential material and the scrupulous examination of the material, and the detainee is, of course, entitled to representation within these frameworks (see, for example, HCJ 3128/12 **Musulmani v. Military Commander of the Judea and Samaria Area** (May 7, 2012); HCJ 5784/03 **Salameh v. Commander of IDF Forces in the Judea and Samaria Area**, Piskei Din 57(6) 721 (2003)). It has also been established that the administrative authority must consider the activation of alternative means to administrative detention that are less injurious to the detainee (see ADA 8788/03 **Federman v. Minister of Defense**, Piskei Din 58(1) 176, 188-9 (2003)).

75. An additional sphere in which an individual may be deprived of his liberty is in the framework of civil imprisonment. Thus, for example, the head of the Executor's Office was entitled to order the imprisonment of a debtor who failed to pay a debt ruled against him by the set date, in accordance with the provisions of the Execution Law, 5727-1967. In recent years there has been extensive discussion concerning the imprisonment of debtors, leading to the enactment of Amendment No. 29, which included a temporary provision nullifying the authority to imprison a debtor who failed to pay his debt, with the exception of a person owing a debt of alimony (Execution Law (Amendment No. 29), 5769-2008). The Knesset recently extended this temporary provision, so that the present legal situation does not permit the imprisonment of a debtor (Execution Law (Amendment No. 29) (Amendment No. 3), 5773-2013).

Additional arrangements can be found in the civil sphere that permit the denial of an individual's liberty. These arrangements are invariably scrupulous and cautious, and include clear provisions restricting the possibility to deny an individual's liberty to clearly-defined situations vital for the interest underlying the arrangement. Thus, for example, the Treatment of Mentally Ill Persons Law, 5751-1991 enables an individual to be deprived of his liberty following an instruction by a district

psychiatrist to undertake a forcible examination of a person or forcible hospitalization. The law aimed to provide an enhanced response, relate to the previous arrangement, in terms of the patient's rights and liberty, and accordingly its framework included closer supervision and restrictions as well as less extreme alternatives (see PCA 8000/07 **Attorney General v. Doe** (May 2, 2012)). The same is true of the provisions relating to contempt of court or the coercion of an individual to grant a divorce, which permit the imprisonment of a person for the purpose of enforcement the order or the divorce only, thereby placing the prison keys in front of the prisoner himself, who may observe the order or divorce and thereby release himself (see, for example, CA 7149/09 **Reifman v. Erez** (October 13, 2009); SCM 4072/12 **Doe v. Great Rabbinical Court** (April 7, 2013) (hereinafter: **Doe SCM**)).

76. Thus in every legal sphere in which it is permitted to deprive a person of his liberty, the denial of this right is measured and cautious, with scrupulous attention to clear and strict rules that seek to balance the public interest embodied in the denial of the individual's liberty and the individual's supreme right to liberty. It should be recalled that injury to an individual's personal liberty may be in different degrees and manners of varying force. The force and character of the injury may naturally impinge on the constitutional examination undertaken in the framework of the limitations clause (**Human Rights Division**, para. 30 in President Beinisch's ruling). It is also important to note that the legal developments of recent years, as emerged in the above review, reflect the granting of greater weight to individual liberty, including a willingness to relinquish a certain degree of the benefit secured to the opposing public interest. In any case, it is clear that the injury to the right to liberty inherent in the placement of an individual in custody is serious and extreme. As is well known, "the level of protection of a basic right should be in direct proportion to the level of importance of the right and to the strength of the injury to the right" (**Tzemach**, 262). Accordingly, the severe injury to a right that is so basic and important may have ramifications in later stages of the constitutional examination.

Injury to Freedom of Movement

77. Alongside the injury to personal liberty, the Petitioners claimed injury to the infiltrators' freedom of movement. Conversely, the state argued that an infiltrator does not have a vested right to freedom of movement within the territory of the state, against the background of the state's right to determine which foreign persons will enter its territory as part of the principle of internal sovereignty.

78. Every person in Israel has a basic right to move freely in any place within the state as he wishes and whenever he wishes as part of the freedom of movement. "Freedom of movement is, therefore, the freedom we have gained to walk in the public domain, to ride a donkey, or to travel in a car in places intended therefore" (**Horev**, 147). The right of movement is derived from "a human's being a free person and from the character of the state as a democratic state, and from our forming part of the international community, within which framework freedom of movement has been recognized as a customary human right" (HCJ 3914/92 **Lev v. Tel Aviv – Jaffa Regional Rabbinical Court**, Piskei Din 48(2) 491, 506 (1994)). This is a right that is perceived as vital for a person's self-realization and as reflecting his personal autonomy (**Horev**, 59,95). Freedom of movement is a right that stands by itself, but it also derived from human dignity and the right to personal liberty. Accordingly, it is protected by the Basic Law: Human Dignity and Liberty (HCJ6385/05 **Vanunu v. Commander of the Home Front Command**, para. 20 (2006) (hereinafter: **Vanunu**); HCJ 1890/03 **Bethlehem Municipality v. State of Israel**, Piskei Din 59(4) 736, 754 (2005) (hereinafter: **Bethlehem Municipality**)), despite the fact that freedom of movement within the state is not explicitly mentioned in the Basic Laws (see Yaffa Zilberschats "Freedom of Movement within a State" **Mishpat Umimshal** 4 793, 803 (5758) (hereinafter: **Zilberschats**); see, however, Justice Tal's position in **Horev** at 181; HCJ 6824/07 **Mana'a v. Taxes Authority**, para. 40 (December 20, 2010)).

The status of the right to freedom of movement in the ranking of the individual's rights and liberties is high, and this Court has compared it to the right to freedom of expression (**Horev**, 147; **Vanunu**, para. 10; **Bethlehem Municipality**, 756). However, it is evident that this right, too, is not absolute, and that not every matter included in the framework of freedom of movement is entitled to similar protection (**Horev**, 147). Accordingly, in examining the injury to freedom of

movement attention must be given, among other factors, to the geographical scope of the restriction, its level of intensity, its temporal duration, and the individual's personal interest in realizing freedom of movement. Moreover, insofar as a restriction is on preventative rather than punitive grounds, a public purpose of special weight is required to justify the injury, as well as maximum caution and scrupulous attention in activating the restriction (**Vanunu**, paras. 15, 18; HCJ 2150/07 **Head of Beit Sira Village Council v. Minister of Defense**, para. 33 of Justice Vogelman's ruling (December 29, 2009); **Bethlehem Municipality**, 759-60).

79. The connection between freedom of movement and personal liberty is obvious. As Deputy President M. Heshin has noted, liberty of movement is the daughter of liberty (**Horev**, 147). Injury to personal liberty is, of course, graver than the injury to an individual's freedom of movement; the border between the two rights depends on the level and force of the restriction (**Zilberschats**, 817, 818 and the references to the rulings of the European Court of Human Rights: **Gizzardi v. Italy** 3 EHRR 333 (1980); **Cyprus v. Turkey** 15 EHRR 509 (1992). In our present case, the injury to the infiltrators' right to liberty effectively combines with the injury to their freedom of movement. Since they are placed in custody, the injury to freedom of movement attains the degree of injury to their personal and physical liberty. Naturally, if it is determined that the injury to the infiltrators' liberty meets the constitutional standards, the same will be determined regarding the injury to freedom of movement. In this situation, I do not believe that the dispute between the Petitioners and the state on the question as to whether or not the infiltrators enjoy a constitutional right of movement is to be determined, since it is possible to confine ourselves to an examination of the injury to their liberty, which undisputedly constitutes injury to a protected right. I would note that there is a basis for the state's argument that a person who enters Israel unlawfully does not enjoy freedom of movement, nor the freedom to determine his place of residence, which generally accompanies the right to movement within the state. Thus, in the 1966 International Convention on Civil and Political Rights, the right to movement is conditioned on lawful entry to the state:

> Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Conversely, persons present who have been recognized as refugees in accordance with the Refugees Convention are entitled to freedom of movement "subject to any regulations applicable to aliens generally in the same circumstances" (article 26 of the Refugees Convention. Regarding stateless persons and foreign workers, see Zilberschats, 815-6).

80. Since it is my conclusion that the amendment to the Prevention of Infiltration Law injures the right to liberty, we should continue to the second stage of the constitutional review, which relates to an examination of the presence of the conditions in the limitations clause.

Second Stage – Examination of the Presence of the Conditions in the Limitations Clause

81. In the second stage of the constitutional examination, as noted, the presence of the conditions in the limitations clause established in article of the Basic Law: Human Dignity and Liberty is to be examined. It is worth quoting from President Beinisch's remarks regarding the essence of the limitations clause:

> "The limitations clause manifests the balance established in Israeli constitutional law between individual rights and general needs and the rights of other individuals. It reflects our constitutional perception that human rights are relative and may be restricted. Thus the limitations clause fills a double role – it establishes that the human rights determined in the Basic Laws will be injured solely in the presence of certain conditions, but at the same time it defines which are the conditions in which the injury to human rights will be permitted" (**Human Rights Division**, para. 44 of President Beinisch's ruling).

The limitations clauses contains four conditions: Firstly, the injury must be made in law or in accordance with a law under an explicit empowerment therein; secondly, the injurious law is consonant with the values of the State of Israel; thirdly, the injurious law is intended for a fit purpose; and fourthly, the injury is not in a degree exceeding that necessary.

82. The Parties do not disagree regarding the presence of the first condition of the limitations clause, that the injury was made in law. The Parties did not expand

regarding the presence of the second condition, in accordance with which the injury must be consonant with the values of the State of Israel. Accordingly, I shall also adopt the assumption that this condition is met in our case. Accordingly, we must proceed to an examination of the third condition in the limitations clause, according to which the injurious law must be intended for a fit purpose. I shall already note at this juncture that I shall also be ready to assume regarding this condition that it is met in our case, notwithstanding difficulties that cannot be ignored, since it seems to me that the constitutional examination regarding the amendment should be concentrated on the question of proportionality. Accordingly, I shall relate briefly to this matter below.

Fit Purpose

83. The purpose of a law will be considered fit if it is intended to advance human rights or to realize an important public or social goal consonant with the values of the State of Israel and sensitive to the place of human rights within the overall social structure (**Movement for Quality Government**, para. 52 of President Barak's ruling). The test will consider the nature of the injured right and the strength of the injury. "The more significant the injury to the right, the more important and vital the social objectives that will be required for its justification" (**Hassan**, para. 55 of President Beinisch's ruling; **Human Rights Division**, para. 45 of President Beinisch's ruling; **Lahav**, para. 107). Accordingly, it must be noted that not every important social or public goal will substantiate fit purpose; this also depends on the opposing injury.

84. The state notes two central purposes addressed by the legislator in enacting the amendment to the Prevention of Infiltration Law. One purpose, which I do not feel raises any difficulty, is to prevent the infiltrators from settling in Israel and to enable the state to address the broad ramifications of the phenomenon of infiltration. The state notes that the law seeks to prevent infiltrators who have already penetrated the borders of the State of Israel from setting down roots and settling therein, thereby positioning their illegal immigration as an accomplished fact. The law further prevents the integration of infiltrators in the Israeli job market, the ramifications of which were detailed above. The removal of the infiltrators from the cities of Israel

also prevents the remaining negative ramifications presented by the state and detailed above. It seems to me that this purpose is a fit one. As is well known, the State of Israel has the right to establish policy for immigration into the state deriving from the sovereign character of the state. Accordingly, it has also been ruled that the interior minister enjoys very broad discretion regarding the granting of entry permits and licenses for residency in Israel, although this discretion is also subject to judicial review (**Kav LaOved II**, para. 24 of Justice Procaccia's ruling; **Asfu**, para. 13; **Farida**, para. f(8)). The state's right to determine steps for coping with illegal immigrants also derives from this same point, assuming that the latter have not been recognized as refugees. As has been detailed, illegal immigration is liable to cause negative ramifications for the fabric of life in Israeli society and, among other influences, to injure the place of citizens and residents of Israel in the job market and the influence their wages, reduce the resources reserved for the various systems, such as the welfare and education systems that attend to citizens and residents unlawfully present in Israel, lead to an increase in crime in areas in which illegal immigrants are concentrated, and so forth. Accordingly, the state's desire to prevent these negative ramifications and to thwart the open possibility for the infiltrators to settle anywhere in Israel, to integrate in its job market, and to oblige the local society to cope with the entry of infiltrators with all this entails may be considered an important social goal (see **Kav LaOved II**, para. 58 of Justice Procaccia's ruling; **Oren**, 232). Naturally, however, the means used to realize this goal must meet the proportionality test, which I shall address below.

85. In my opinion, the second purpose underlying the amendment raises considerable difficulties. The goal is formulated by the state as blocking the phenomenon of infiltration. The state views the amendment to the Prevention of Infiltration Law as a normative barrier intended to complement the physical barrier in the form of the construction of a border fence with Egypt, together blocking the entry of infiltrators to the State of Israel. This sterile presentation of the matter is misleading. There can indeed be no dispute that the purpose of blocking the phenomenon of infiltration is an important and fit one, given the difficulties this phenomenon arouses. However, the significance of this purpose in the context of the amendment of the law is deterrence. That is, the act of placing the infiltrators in

detention deters potential infiltrators from coming to Israel since they realize that they, too, will be placed in custody. In the colorful language of Deputy President M. Heshin, "we must not be misled by the polite language; we have all realized that the silk glove contains a fist" (**Stamka**, 769).

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

87. ACH 7048/97 **Does v. Minister of Defense**, Piskei Din 54(1) 721 (2000) (hereinafter: **Does**) discussed the question as to whether a person who does not present any danger to state security may be held in administrative detention when the purpose of the detention is for the said person to serve as a "bargaining chip" in negotiations for the release of prisoners and missing persons of the IDF. The issue was difficult and painful. The petitioners were Hizbullah combatants who had already served their sentence. They were due to serve as a "bargaining chip" in the negotiations for the release of Ron Arad. Nevertheless, this Court ruled in a majority opinion that their detention was unlawful. President Barak noted that any administrative detention constitutes a grave injury to the detainee's liberty and dignity, but this injury is tolerated in light of the important underlying security goal. However, he determined that "the injury to liberty and dignity in the administrative detention of a person who does not present any danger of state security is extremely severe, to the point that the person interpreting this law is not entitled to assume that it was intended to secure such grave injury" (**Does**, 741). The Court clarified that the grave injury is due to the fact that the detainee is perceived as a means rather than as a

goal, something that injures the individual autonomy of will and his status as a person responsible for his own actions:

> "Indeed, the transition from the administrative detention of a person presenting a danger to state security to the administrative detention of a person not presenting a danger to state security is not a 'quantitative' one. It is a 'qualitative' one. The state, by means of the executive branch, detains a person who has not committed any offense and who do not present danger, and whose only 'sin' is that he is serving as a 'bargaining chip.' The injury to liberty and dignity is so substantive and profound that it cannot be tolerated in a country that values liberty and dignity, even if grounds of state security lead to the adoption of this step" (**Does**, 741-2).

The Court recognized that the holding of the petitioners could constitute an efficient means for promoting state security, but established that "not every efficient means is also lawful" (**Does**, 743).

88. The Court reiterated this approach when it examined the constitutionality of the Imprisonment of Unlawful Combatants Law, 5762-2002 (**Doe**). This law enables the imprisonment of foreign persons affiliated to a terror organization or who participate in hostile actions against state security, and it is intended to prevent these persons from returning to the circle of combat against Israel. The Court, which interpreted the law in accordance with the assumption of constitutionality and the assumption of consistency with international law, rejected the argument that the law does not include any requirement for individual danger. It was established that proof of individual danger for the purpose of a person's detention in accordance with the law under examination is required in light of the protection of the constitutional right to individual dignity and liberty:

> "Administrative detention is not intended as punishment for acts that have already been committed nor to deter others from committing acts, but rather its purpose is to prevent the concrete danger posed by the detainee's actions to state security. It is this danger that justifies the use of the exceptional means of administrative detention, which injures human liberty" (**Doe**, para. 18).

89. A further case examined an "order for the delineation of place of residence" issued by the military commander of IDF forces in the Judea and Samaria Area (HCJ 7015.02 **Ajuri v. Commander of IDF Forces in the West Bank**, Piskei Din 56(6)

353 (2002) (hereinafter: **Ajuri**). According to this order, the military commander is entitled to instruct a person to reside within the confines of a particular place in Judea and Samaria or in the Gaza Strip. The goal of the order was security oriented and intended mainly for the relatives of persons committing attacks and terrorists. This Court, in a panel of nine justices, established, in the absence of any dispute between the Parties, that an essential condition for delineating a person's place of residence is that the said person himself presents a danger. It was further established that a person's place of residence cannot be delineated if that person does not present a danger merely because the delineation of his place of residence will deter others. Moreover, it was established that the place of residence of a person who committed actions damaging security cannot be delineated when, in the circumstances of the matter, he no longer presents any danger, even if the delineation will help deter other terrorists from committing acts of terror (**Ajuri**, 370). President Barak noted that this conclusion is required and emerges from our Jewish and democratic values:

> "From our Jewish heritage we have learned that 'parents are not to be put to death for their children, nor children put to death for their parents; each will die for their own sin' (Deuteronomy 24:16). 'Each person bears his own iniquity and each person will due for his own sin' (Justice M. Heshin in HCJ 2006/97 **Abu Fara Janimat v. OC Central Command**, Piskei Din 51(2) 651, 654; 'A person will be arrested for his own sin and not for the sins of others' (Justice Y. Turkel in SCM 4920/02 **Federman v. State of Israel** (unpublished)). Our character as a democratic country that values freedom and liberty requires the conclusion that a person's place of residence is delineated only if that person himself, through his actions, presents a danger to state security" (**Ajuri**, 372).

90. The comparison and ramification for our purposes is obvious. The placement in custody of infiltrators is not within the framework of criminal law. This custody is not tantamount to punishment for the act of infiltration. Custody is determined by the administrative authority. The fact that the goal of custody is to deter others creates difficulties, insofar as the infiltrator constitutes a means for securing the state's goals. The key to his jail rests with others and not with himself (see ADA 10/94 **Does v. Minister of Defense**¸ Piskei Din 53(1) 97, 107 (1997); cf. SCM **Doe**, para 26(c)). The difficulty is amplified in light of the fact that the custody causes injury to one of the most important and substantive rights enjoyed by a human – the right to liberty – and that the injury to this right is effectively to the maximum degree: the complete denial

of a person's liberty for an extremely significant period of three years, and even this without his being promised that after this period he will be released from custody. The injury to liberty, as noted, also entails substantive and profound injury to dignity. Accordingly, it is doubtful whether this purpose may be considered a fit one.

91. The examination of international law reinforces the above-mentioned doubt, even on the assumption that we are facing illegal immigrants rather than asylum seekers, who enjoy broader protections. The State of Israel signed and ratified the International Convention on Civil and Political Rights, CD 1040. Article 9(10 of the Convention establishes that –

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

The Office of the High Commissioner for Human Rights (OHCHR) has interpreted this article in a broad manner. In accordance with this interpretation, the article applies to all types of denial of liberty, including denial of liberty in the framework of the migration policy of the state (General Comment No. 08: right to liberty and security of persons (Art. 9), June 30, 1982, para. 1 http://www.unhchr.ch/tbs/doc.nsf/0/f4253f9572cd4700c12563ed00483bec?Opendocument). In one of the cases discussed by the UN Human Rights Council (HRC), it was established that the holding in custody of an illegal migrant may be considered arbitrary in accordance with article 9(1) of the Convention if the custody is not necessary in the circumstances of the case. The detention cannot continue beyond that period in which the state can provide a lawful justification. By way of examples of such justification, with regard to an illegal immigrant, the Committee presents the need to undertake an investigation and additional particular justifications relating specifically to the said detainee, such as concern that he may flee or disappear, or lack of cooperation on the detainee's part. In the absence of these justifications, the detention is liable to be considered arbitrary, even in the case of a person who entered the state illegally. In this case, Australia attempted to argue that the detention of an illegal immigrant for a period of four years was lawful after he entered Australia illegally, and that his release was liable to lead him to escape or flee. The Human

Rights Committee rejected Australia's arguments and established that it had failed to substantiate any ground relating specifically to the detainee's circumstances and, accordingly, his holding in custody was arbitrary in accordance with article 9(1) of the Convention (**A. v. Australia**, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRCV), April 3, 1997, [http://www.refworld.org.docid/3ae6b71a0.html]). International law also includes a position relating directly to infiltrators to whom the principle of non-refoulement applies. In this case, it is stated that since the obstacle to the infiltrator's deportation does not depend on the infiltrator himself, he is to be released from detention, since otherwise the detention will be considered arbitrary in accordance with the said Convention (Report of the Working Group on Arbitrary Detention, para. 63, UN doc. A/HRC/13/30 (January 18, 2010), accessible at: http://www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx). In general terms, it has been established that the administrative detention of a person unlawfully present in the state without pursuit of an effective process of deportation constitutes arbitrary detention (Barban v. Australia, UN Doc. CCPR/C/78/D/1014/2001, September 18, 2003, para. 7.2). The implication of this is that international law identifies the need to justify detention on grounds relating to the specific infiltrator, and does not permit the holding in custody of an infiltrator on general grounds that do not relate to the circumstances of the case. It should further be noted that the European Court of Justice (ECJ has also established that holding in custody in the absence of deportation proceedings is contrary to the goals and purposes of the European Union Return Director (see Case C-61/11 PPU, El Dridi, April 28, 2011, OJ C 186, June 25, 2011; Case C-357/09 PPU, Kadzoev, Judgment of the Court (Grand Chamber) of November 30, 2009; see also the report submitted to the UN Human Rights Council: Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, para. 54, accessible at: http://www.ochr.org/Documents/Issues/SRMigrants/A.HRC.23.46.doc). It may be assumed that these comments will apply all the more clearly regarding a ground for detention dependent on deterring others.

92. In addition, it is impossible to ignore the fact that many of the infiltrators are asylum seekers. The state reports that some 1,400 asylum requests have been

submitted by persons held in custody in accordance with the Prevention of Infiltration Law. As of the date of the hearing in the petition, only a handful of asylum applications had been discussed and determined. Accordingly, the picture shows that most of the infiltrators currently in custody are asylum seekers, regardless of the question as to whether their applications will ultimately be accepted or not. In any case, most of them are covered by the principle of non-refoulement, which does not permit their deportation to their country of origin at this stage. As noted, international law regarding asylum seekers is stricter with regard to the countries in whose territory they are present. In 2010, the UN High Commissioner for Refugees (UNHCR) published updated guidelines regarding asylum seekers, including provisions for the detention of asylum seekers (Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, http://www.refworld.org/docid/503489533b8.html; hereinafter: **Detention Guidelines**). I would briefly note that these guidelines also instruct that the detention cannot be arbitrary, and indeed they explicitly emphasize that the detention must be based on an evaluation of the individual's particular circumstances. The guidelines require the present of specific justification for the detention of the asylum seeker in the circumstances of the case, even when the entry to the state was illegal. The three justifications approved in the guidelines are protection of public order, public health, and national security. It should be noted that the ground relating to the protection of public order includes concern that an asylum seeker may escape or fail to cooperate with the authorities; completely unsubstantiated and spurious claims of asylum accompanying accelerated proceedings; preliminary and minimal detention for the purpose of verifying identity and security examinations; detention for the purpose of securing information to be used in examining the application, in the absence of the possibility to obtain the information without detention. The conclusion, accordingly, is that it is highly doubtful whether international law permits the detention of asylum seekers for the purpose of deterring additional asylum seekers from arriving in the state.

93. Despite the above-mentioned doubts, it is possible that, in an extreme situation in which the purpose becomes extremely vital for the survival of the state and for its maintain its most basic interests, it may be possible to justify this purpose,

notwithstanding the grave and forceful injury to the infiltrator's liberty (see and cf. **Doe**, para. 30). It should also be emphasized that when the principle goal is not to deter others, but relates directly to the infiltrator himself, the said difficulties do not arise. Thus, for example, the detention of an infiltrator detained for the purpose of advancing the proceedings for his deportation within the foreseeable future will be lawful even it is accompanied by a deterrent effect (see **Al Tai**, 851). In any case, as noted, for the purpose of examining the matter before us I am willing to adopt the assumption that the law passes the fit purpose test and to examine it in accordance with the requirement of proportionality.

94. The next stage in examining the conditions of the limitations clause is the proportionality test. Since, as noted, no order nisi was issued regarding the amendment in its entirety, we must examine specifically those articles in the amendment on whose account an order nisi was issued in the petition. I have chosen to begin with Order Nisi No. 4 and, in its framework, to focus on the provision regarding the ground for release after three years in custody, since this is the most central and injurious clause in the framework of the amendment of the law. Moreover, the determination regarding its constitutional validity may also have ramifications for the examination of the constitutionality of other clauses.

Order Nisi No. 4 – Article 30A(C)(3) of the Prevention of Infiltration Law – Examination of Proportionality

95. For convenience's sake we shall present the test clause once again verbatim:

> 30a. Bringing before the border inspection supervisor and the authorities thereof
>
> (a) …
>
> (b) …
>
> (c) The border inspection supervisor is entitled to release an infiltrator on bail if he has been convinced that one of the following applies:
>
> (1) …
>
> (2) …
>
> (3) Three years have passed from the date of commencement of the holding in custody of the infiltrator.

The proportionality test in the limitations clause is divided into three secondary tests. The first test is the rational affinity test, which examines the affinity between the chosen legislative means and the purpose the law is intended to secure. The second test is the test of least injurious means, which demands that the legislation should cause the slightest injury to the constitutional right possible in order to secure the purpose of the law. The third test is the proportionality test in the narrow sense, meaning that a reasonable relationship is required between the injury to the constitutional right and the public-social benefit accruing from the injury. It is important to emphasize that the legislator is granted "constitutional room for maneuver" in selecting the legislative means for the purpose of realizing the desirable purpose:

> "The boundaries of the legislative room for maneuver are determined by the Court in each individual case in accordance with its circumstances, with attention to the nature of the injured right and the strength of the injury thereto versus the quality and nature of the competing rights or interests. This Court will not substitute the legislator's considerations with its own and will refrain from intervening, provided the means selected by the legislator falls within the scope of proportionality. The Court will intervene only when the selected means deviates significantly from the confines of the legislative room for maneuver and is clearly disproportionate (see CA 6821/93 **United Mizrachi Bank Ltd. v. Migdal Cooperative Village**, Piskei Din 49(4) 221 (1995), 438; HCJ 450/97 **Tnufah Manpower Services and Holdings Ltd. v. Minister of Labor and Welfare**, Piskei Din 52(2) 433 (1998); AA 4436/02 **Tishim Kadurim v. Haifa Municipality**, Piskei Din 58(3) 782 (2004), 815; **Gaza Coast Regional Council**, 550-1)" (**Doe**, para. 31; see also **Hassan**, para. 58 of President Beinisch's ruling).

96. As noted, the first secondary test examines the presence of a rational affinity between the injurious legislative means and the purpose this means sought to achieve. The absence of such an affinity will lead to the conclusion that the law is disproportionate. The means selected by the legislator in article 30a(c)(3) of the law is permitting the placement in custody of an infiltrator for a period of three years, subject to the grounds for release established in the law. The state seeks to argue that three years are not a mandatory compulsory period for the placement in custody of the infiltrator, but rather the upper threshold for placement in custody. I do not believe that this is the correct perspective concerning the amendment to the law. In general,

the amendment permits the holding in custody of an infiltrator for a period of three years (assuming that the article is not to be interpreted as granting the border inspection supervisor discretion to leave an infiltrator in custody despite the passage of three years, on the basis of the use of the term “permitted” in the article). Alongside this general rule, grounds were established permitting release for various reasons “in exceptional cases,” as stated in article 30a(b) of the law. Conversely, grounds exist in whose presence the infiltrator will not be released even if certain grounds for release are met. Even assuming that the grounds for release will be interpreted in a broad and generous manner, the picture is that in the “regular” instance an infiltrator will spend three years in custody in accordance with the law. The evidence of this are the date forwarded by the state itself, according to which just 136 persons held under the Prevention of Infiltration Law have been released since the commencement of implementation of the amendment. In accordance with the above, therefore, the proportionality of the provision is to be examined. In any case, the injury to human rights is examined according to the individual person, and not to the group or according to any quantitative index of injured persons. “The liberty of a single person is also worthy of protection as if he were an entire world” (**Tzemach**, 276).

97. It would seem undisputable that in theoretical terms there is a rational affinity between placement in custody of infiltrators and preventing their settling in Israel and preventing many of the alleged negative ramifications accruing from their integration in the cities of Israel, such as injury to Israeli employees, prevention of crime, and the like. However, attention should be paid to the actual implementation of the amendment. According to the state’s statistics, some 55,000 infiltrators are currently present in Israel. Of these, some 1,750 infiltrators are being held under the Prevention of Infiltration Law, i.e. a small percentage of the total number of infiltrators, and in all probability this currently represents the maximum capacity of the facility (see the website of the Israel Prison Service: http://www.ips.gov.il/NR/exeres/B39647B9-41FF-464B-AD47-FED65CA926CD,frameless.htm?NRMODE=Published). The significance of these statistics is clear. The placement in custody of 1,750 persons has a minimal impact on the total influences of the phenomenon of infiltration relative to the tens of thousands of infiltrators who are not held in custody, and accordingly it is

highly doubtful whether, in practice, the said purpose is secured from the placement in custody of those infiltrators the place currently contains.

98. As for the purpose of deterrence and blocking the phenomenon of infiltration – the picture regarding the rational affinity between this purpose and the placement in custody of infiltrators is unclear. The state argues that since the phenomenon involves migration for work purposes, if the potential infiltrators knew that, on arrival in Israel, they would be placed in custody for a protracted period, and that they would be unable to work and send money home, they would refrain from arriving in the State of Israel. Conversely, the Petitioners claim that the affinity is purely speculative. Since the phenomenon involves refugees fleeing from the horrors taking place in their country, they have no other alternatives and, insofar as they are able, they will continue to arrive in Israel and will prefer custody therein to the danger to their lives in their countries of origin. Indeed, as I detailed above, no-one disputes that a difficult situation pertains in Eritrea and Sudan that injures the human rights of the citizens and residents of the country. The fact, to date, only a few applications for recognition as refugees submitted by the infiltrators have been examined heightens the uncertainty regarding the infiltrators' motives in leaving their countries and entering Israel. Accordingly, we cannot determine the question as to whether, in the current normative situation, infiltrators will continue to prefer to penetrate the borders of the State of Israel and risk their placement in custody for a protracted period without the possibility to work.

99. Both sides attempt to prove their arguments by means of the numerical statistics. In my opinion, these statistics also do not lead to a clear conclusion regarding the presence of a rational affinity between the purpose and means of the law. The principal difficulty is due to the fact that the commencement of placement of the infiltrators in custody in accordance with the amendment to the law came parallel to the processes for the completion of the border fence between Israel and Egypt. The simultaneous nature of these processes creates uncertainty regarding the contribution each factor makes to the drastic decline in the number of infiltrators arriving in Israel. From the data presented by the state, during the period October through December an average of some 2,500 persons infiltrated Israel each month. During the period

January through March 2012, some 1,840 persons a month infiltrated Israel. The downward trend continued in the period April through June 2012, when some 1,340 persons a month infiltrated Israel. In July 2012 a drastic fall was seen and the number of infiltrators was 288. In August 2012 138 persons infiltrated Israel. The downward trend continued, so that in March 2013 just three persons infiltrated Israel. Alongside these figures it should be clarified that the implementation of the amendment to the Prevention of Infiltration Law began in June 2012. As for the pace of construction of the fence: by April 2012 the construction of 59 percent of the fence was completed. By May 2012 the construction of 67 percent of the fence was completed, and by June 2012 – 75 percent of the fence was completed. In July 2012 the construction of 82 percent of the fence was completed, and in August – 84 percent. By the end of 2012, 94 percent of the fence had been constructed.

It can indeed be argued, as the state attempts to, that in June 2012, after just one month's implementation of the amendment, a significant reduction was seen in the number of infiltrators entering Israel. This trend continued consistently over the subsequent months. Conversely, it may be doubted whether such a substantial reduction can be explained on the basis of just one month when the placement in custody of infiltrators was effected. Moreover, the figures show a downward trend that began before the commencement of implementation of the amendment. It should further be noticed that during the quarter April through June 2012, approximately one-fourth of the fence had been completed, and it is possible that this factor was the reason for the substantial decrease in the number of infiltrators entering Israel in July 2012. If the state had waited a few more months after beginning to implement the amendment to the law, it might have been possible for a clearer conclusion on this question. In the current state of affairs, it seems to me that the rational affinity is not unequivocal and, accordingly, the benefit secured by the amendment is "speculative and unproven" (**Stamka**, 783; **Kav LaOved I**, 396).

100. The relevance of the said doubt will be a function of the question as to who bears the burden of proving the conditions of the limitations clause. On this question, a judicial disagreement has developed. All agree that the burden of conviction in the first stage, examining the injury to the constitutional right, rests with the party

claiming the injury. The disagreement relates to the burden of conviction in the second stage, when the examination is required of the conditions of the limitations clause. In **Movement for Quality Government**, President Barak clarified his position that this burden rests with the party claiming the constitutionality of the injury, viz. the public authority. However, other positions were mentioned, including a position that in the second stage, too, this burden rests with the party claiming the injury; a position that the burden of conviction in the second stage rests with the public authority, but the burden on the question of proportionality rests with the party claiming that the injury is disproportionate; and a position according to which the decision regarding the burden of conviction depends on the relative weight given to considerations of the rule of law, the assumption of constitutionality of the law, the importance of the injured right, the strength of the injury to the right, and other public interests (**Movement for Quality Government**, 671-2).

101. Although I am inclined to join President Barak's position, I do not believe that we are required at this point to determine this question, and we may assume that the first secondary test has indeed been met. It should be recalled that it is not required that the means chosen by the legislator realize the goal in an absolute and certain manner. A fair measure of probability that the selected means will contribute reasonably to securing the purpose can be accepted (**Movement for Quality Government**, 706). The test is largely based on the factual infrastructure that was before the legislator and on life experience and common sense, and it acknowledges the presence of some uncertainty as to the extent to which the purpose is realized (**Hassan**, paras. 59, 61 of President Beinisch's ruling). In my opinion we may begin from a reasonable assumption that the enactment of a normative arrangement enabling the holding in custody of infiltrators arriving in the State of Israel for a period of three years will, at least, deter some infiltrators from arriving in Israel, and will at least partly secure the purpose of blocking the phenomenon of infiltration to Israel. In this state of affairs, it remains only to determine that the first secondary test has been met. However, the doubts raised will have ramifications for the second secondary test, as I shall show below.

The Test of the Least Injurious Means

102. The image of ladder clarifies in the best manner the essence of this test: “The legislative means is likened to a ladder up which the legislator climbs in order to secure the legislative purpose. The legislator must stop on that rung of the ladder by whose means the legislative purpose is secured, and which causes the least injury to the human right” (HCJ 1715/97 **Bureau of Investment Directors in Israel v. Minister of Finance**, Piskei Din 51(4) 367, 385 (1997)). However, the legislator enjoys legislative room for maneuver and is not obliged to choose the means that causes the very least injury (**Human Rights Division**, para. 12). In my opinion, the clause regarding the placing in custody of infiltrators for a period of three years does not meet this secondary test. I shall clarify my position.

103. Insofar as this matter involves a deterrent purpose relating to blocking the phenomenon of infiltration, there is a fair probability that it would have been possible to manage with a less injurious means in the form of the border fence between Israel and Egypt. As I showed above, we cannot determine which is the dominant factor in the dramatic reduction in the number of infiltrators entering Israel. However, I believe that it may be assumed with a fair level of probability that the fence itself could have significantly reduced the phenomenon of infiltration to Israel. It was not without good reason that the government decided to invest enormous resources in the construction of the fence. Recently there have been reports that the border fence has helped reduce additional negative phenomena that occurred while the border was open, such as trafficking in drugs and women. Indeed, the state may be right to argue that it is not possible to create a physical barrier that will absolutely prevent the smuggling of people and merchandise into Israel. However, it may be assumed that the border fence may help significantly to reduce the phenomenon of infiltration, whether because of the physical barrier or because of the need to invest greater resources in order to enter Israel unlawfully, in such manner that the investment will not be worthwhile for the infiltrator or for his smugglers. In any case, in a state of affairs in which the injury to the right to liberty is so severe, the secondary test demands that the state exhaust and examine a reasonable and less injurious possibility, even if there is no certainty as to its ability to secure the goal to a similar extent, before the state climbs another rung on the ladder of injurious means, particularly when all that is required of it is to wait

several months in order to examine the impact of the fence on the phenomenon of infiltration separately from the implementation of the amendment to the law. To this it should be added that there are additional means that state can employ in order to enhance the efficiency of the physical barrier, such as electronic means and so forth. These means require considerable financial resources but, as we know, “the protection of human rights costs money, and a society that respects human rights must be willing to bear the financial burden” (**Barak, Constitutional Interpretation**, 528).

104. As for the additional purpose of preventing the infiltrators from settling in Israel and preventing the negative ramifications of the phenomenon of infiltration on Israeli society: As I noted, I do not believe that, in the current situation, there is a rational affinity between the placement in custody for three years of the infiltrators and securing this purpose. Superfluous to need, it may be noted that even if the rational affinity test were met, it is doubtful whether the test of the least injurious means would be met. It is indeed possible that the selected means is the cheapest for the state, or the simplest to implement, but, as is well known, this is not the standard for the test of the least injurious means (see **Kav LaOved I**, 396). Just as in the framework of the other arrangements for depriving a person of his liberty, the state is obliged to give careful consideration to alternative options to detention whose injury is less grave, so the same applies in the criminal sphere and in the administrative sphere (see, for example, **Federman**, 188; Art. 21(b)(1) of the Detentions Law).

It seems to me that it is possible to develop diverse alternative means that could be adopted and would secure the desired purpose in a less injurious manner. Thus, for example, it is possible to create obligations of reporting and sundry guarantees (cf. **Kav LaOved II**, para. 63 of Justice Procaccia’s ruling); restrictions on the place of residence of infiltrators in a manner enabling the state to control and supervise the places in which they settle and to disperse them to different population points (a procedure in this spirit existed in the past and was nullified by the interior minister before its legality was discussed by this Court. See HCJ 5616/09 **African Refugee Development Center v. Ministry of the Interior** (August 26, 2009)); it could be considered obliging infiltrators to spend their nights in a residential facility prepared for them and meeting their needs while avoiding other difficulties. It should

be noted that alongside the legislative proceedings for the amendment to the Prevention of Infiltration Law, the legal consultation services of the Knesset Internal Affairs and Environment Committee also prepared an alternative draft proposal (Proposed Law: Struggle against the Phenomenon of Infiltration on the Southern Border (Temporary Provision), 5772-2011). According to this proposal, an open residential facility would be established for infiltrators to be managed and operated by the Ministry of the Interior. The facility would provide the residents with suitable conditions, including accommodation, food, medical services, clothing and other basic needs. In general terms, the proposed law establishes that an infiltrator who has not received a permit for residency in Israel but who cannot be deported will be transferred to the open facility. A further raised in the Knesset was to replace some of the foreign workers with infiltrators, thereby solving many problems in both these sectors while also helping Israeli employers in need of working hands (see the protocols of the Knesset Committee to Examine the Problems of Foreign Workers, June 11, 2012 – http://www.knesset.gov.il/protocols/data/rtf/zarim/2012-06-11.rtf). It was also proposed that the struggle against smugglers who help the infiltrators to penetrate the state's borders be intensified, and that the local authorities be indemnified for their expenses for processing infiltrators (ibid.) Police inspection could be intensified in areas with high concentrations of infiltrators in order to enhance the sense of security of the local residents. The labor laws could be enforced strictly in order to prevent the preference for the cheap labor offered by infiltrators; and so forth. Such means can be applied alongside means of supervision and punishment for those who fail to meet their conditions, and this naturally alongside the actions the State of Israel is continuing to take to deport the infiltrators outside the borders of the State of Israel.

105. The State of Israel is not the only country coping with phenomena of illegal migration and with a flow of asylum seekers and refugees knocking at the country's gates. Israel's unique geopolitical reality may present it with a more complex situation, but the basic need to cope is shared by the State of Israel and many countries of the world:

> "Many countries in the Western world have been required in recent decades to establish various arrangements regarding the proper ways to process asylum seekers who knock at their gates, with attention to

> their obligations in accordance with refugee law. These arrangements are based on an intricate and complex system of balances – protecting the state's sovereignty in determining who will enter it, on the one hand, and the obligation to protect the human rights of this population, which is in many cases fleeing famine, war or persecution, and seeks to create an alternative for itself for a better life, on the other" (**HMW**, para. 13; see also **Farida**, para. f(1)).

Thus we may learn from the experience of other countries of the world as they cope with analogous phenomena to the phenomenon of infiltration.

A Brief Look Overseas

106. I should first note that international law, as mentioned, requires that the detention of a migrant, and certainly of an asylum seeker, must not be arbitrary. The guidelines of the UN High Commissioner for Refugees established that one of the criteria for determining arbitrary detention is the absence of an examination of less injurious alternatives (**Detention Guidelines**, para. 18; see also, for example, the decision of the UN Committee for Civil and Political Rights: **Shams et al. v. Australia**, UN Doc. CCPR/C/90/D/1255/2004, September 11, 2007, para. 7.2; **D&E v. Australia**, UN Doc. CCPR/C/87/D/1050/2002, August 9, 2006, para. 7.2). The guidelines detailed and classify a series of alternatives to detention in accordance with their level of injury to personal liberty. Thus the guidelines mention (from lenient to severe) the means of the depositing of papers, the depositing of a financial guarantee, various obligations to report to the authorities, conditions for release into the community, residence in a defined area, electronic monitoring, and house arrest (**Detention Guidelines**, paras. 35-42). The guidelines further mention the possibilities of open or semi-open residential centers requiring registration of entry and departure and similar restrictions, as well as the requirement for a guarantor to undertake to ensure the reporting of the asylum seeker for proceedings in his case (**Detention Guidelines**, Annex A).

107. A detailed document of the UN High Commissioner for Refugees reviews in detail the issue of alternatives to detention. Among other aspects, the means actually adopted by various countries as an alternative to the detention of asylum seekers are

examined (UN High Commissioner for Refugees [UNHCR], **Legal and Protection Policy Research Series: Alternatives to Detention of Asylum Seekers and Refugees**, UN Doc. POLAS/2006/03 (April 2006) (prepared by Ophelia Field)). The document mentions alternatives in the form of guarantees, deposits and sundry securities required of asylum seekers. Reporting requirements imposed on asylum seekers are also mentioned. In England, by way of example, an obligation is imposed on any asylum seeker who is receiving support from the state, but living independently, to report to reporting centers. In France, Luxembourg and South Africa, asylum seekers are required to report in person once a month, approximately, in order to renew the documents they have received. In many cases this means is adopted alongside additional demands. An additional means adopted by various countries is to direct the places of residence of asylum seekers. This means includes open or semi-open residential centers, the restriction of areas of residence, the dispersion of the places of residence of the asylum seekers, and so forth. Thus, for example, in Germany there are centralized residential centers for asylum seekers, and the residents' movements are also restricted solely to the vicinity of the residential center. A person violating the restrictions is liable to detention. Switzerland also disperses asylum seekers among open residential centers in various cantons, though it does not impose any restrictions on freedom of movement. Various residential centers are also operated in Bulgaria, Hungary, Poland, Denmark, Sweden, Greece, and Italy. In many countries, the obligation on asylum seekers to live in the residential centers depends on the support they receive from the state. A further means employed by many countries is the identification and documentation of asylum seekers, among other means through electronic and biometrical means permitting easier and more certain identification. In several countries inspection is imposed on asylum seekers by electronic means, through electronic bracelets, sometimes accompanied by house arrest.

Interim Summary

108. Throughout the course of the examination of the provision of article 30a(c)(3) of the Prevention of Infiltration Law, doubts have arisen regarding the presence of the tests of the limitations clause in its regard. Firstly, doubt arose as to whether the

purpose of the law, and particularly the purpose of deterrence, is a fit purpose as required in the limitations clause. Subsequently, in the examination of the proportionality of the provision, it emerged that the purpose of preventing settlement does not maintain a rational affinity with the current implementation of the provision in the law given the small number of persons subject to custody compared to the number of infiltrators not in custody; and that it is unclear whether a rational affinity applies between the provision and the blocking of the phenomenon of infiltration, given the uncertainty regarding the motives that lead the infiltrators to flee and to enter Israel. The analysis of the test of the least injurious means yielded reasonable probability that the purposes could be secured by other means less injurious to the constitutional right, whether by means of the border fence with Egypt and its elaboration or by other restrictive means to be imposed on infiltrators present in Israel by way of an alternative to custody. Having established that the test has not been met, we may already at this juncture declare the provision in article 30a(c)(3) of the law unconstitutional. However, and superfluous to need, I have found it important to address the third secondary proportionality test, since in my opinion should any doubts remain, this test clearly resolves these.

The Narrow Proportionality Test

109. The narrow proportionality test requires the presence of a reasonable relationship between the injury to the protected constitutional right and the social advantage accruing from this injury. This is a value-based test that compares the public benefit accruing from the injurious means and the damage caused to the constitutional right by this same means. The significance of this test is that the end does not justify all means. Even when it has been established that the selected means secures the goal, and that there is no other less injurious means that will secure the goal to the same extent, it is still possible that the Court will be obliged to establish that the selection of this means is unconstitutional, since the injury to the right and the strength of this injury exceed the benefit accruing to society as the result of the injury. As President Barak notes:

> "The third secondary test has a different character. It does not focus solely on the means for securing the goal. It focuses on the injury to the human right caused by the realization of the proper goal. It

> recognizes that not all means – with a rational affinity and of least injurious character – justify the realization of the goal. This secondary test essentially bears the constitutional perception that the end does not justify the means. It is a manifestation of the idea that there is a value-based barrier that a democracy cannot cross, even if the purpose it is wished to realize is a proper one" (HCJ 8276/05 **Adalah – Legal Center for the Rights of the Arab Minority in Israel v. Minister of Defense**, Piskei Din 62(1) 1, para. 30 (2006)).

110. The imprisonment of infiltrators and the denial of their liberty for a protracted period constitutes fatal and disproportionate injury to their rights, their person, and their soul. The injury to the right to liberty of infiltrators who may be held in custody for up to three years is an extremely serious one with a high and considerable degree of strength. At the beginning of my remarks I noted the important and basic character of the right to physical liberty in a democratic state, as well as the serious injury caused by depriving an individual and his family of this liberty. I noted that the injury is extensive and serious. The denial of liberty may have an impact on the individual's physical and psychological health. In addition, it influences all aspects of his life. It influences the family life he is able to maintain, social life and leisure, and his ability to work and engage in a vocation of his choice. The denial of an individual's liberty also influences his right to property, his right to privacy, and his right to make different and diverse choices at each moment of his life. These ramifications are also accompanied by serious injury to the infiltrator's human dignity. The individual who has been deprived of his liberty has also sustained injury to his human dignity. The extensive injury to his autonomy and the involuntary transfer of most of the decisions regarding his daily routine to the authorities of the state and the prison cause one of the gravest possible injuries to human dignity. This is accompanied by the injuries to human dignity accruing from the absence of privacy, the inability to maintain a family and social life, and so forth. The denial of liberty humiliates the individual and damages his good name. The injury to human dignity is amplified in the Prevention of Infiltration Law since the incarceration is not related to the qualities or specific conduct of each individual infiltrator. As will be recalled, the law does not aim to punish the infiltrator for his act of infiltration; the criminal tools exist for this purpose. Placement in custody is intended primarily to deter others from infiltrating to Israel and to prevent negative ramifications with which the individual himself may have no connection. The keys to the prison are not in the infiltrator's hands. He cannot cease

hostile conduct toward the State of Israel, pay his debt, obey an instruction of the court, or grant a divorce to his wife in order to be released from the custody in which he is held.

111. The strength of the injury to the right also lies at the highest level in the ranking of injuries. The denial of liberty is coercive and absolute, in a manner similar to that of a criminal prisoner serving his sentence. The infiltrator is held under the rules and procedures of the facility and is not entitled to leave the confines of the facility at all. As we saw in the hearing before us, when infiltrators leave the custody facility, for example for the purpose of a legal hearing, they are accompanied by wardens and sit in the prisoners' booth in the Court, similar to criminal prisoners. This amplifies the strength of the humiliation, pain, and injury to their dignity. The period of custody of three years, assuming that no grounds are present for earlier release, is an extremely protracted and significant period. This situation must change, and the sooner the better.

112. To this we should add the identity of the persons before us. Even if there is disagreement regarding the motives for infiltration, there is no dispute that the majority of the infiltrators come from countries in which the living conditions are extremely harsh; their residents often face mortal danger; and the human rights situation is very poor. Some of them have undergone extremely difficult experiences, such as kidnapping, torture, rape, and so forth before arriving in Israel (see, for example, MAA 1689/13 **Waldo v. Minister of Interior** (April 18, 2013)). Even if the infiltrators' goal is to improve their standard of living and that of their families, it is impossible not to feel empathy for these goals. Naturally, this does not mean that the State of Israel is obliged to allow them to enter its territory and to grant their wish; and clearly the interests of Israeli society are the first and supreme priority. However, the treatment and processing of the infiltrators should be undertaken against the background of an understanding of their condition and difficulties. Moreover, no-one disputes that most of the infiltrators are covered by the international principle of non-refoulement, as we noted above. That is to say, the point of departure of the countries of the world, including Israel, is that these infiltrators have come from countries to which they cannot be returned due to the dangers they face there. This fact, too, must

be taken into account in the context of the strength of the injury caused to these persons as the result of the denial of their liberty for three years. It is impossible not to recall the reproachful remarks of Deputy President M. Heshin in the affair of the "shackling" arrangement for foreign workers, which may be applied all the more forcefully to the matter before us:

> "A review of the shackling arrangement the state has created and imposed on foreign workers – unfortunates who have separated themselves from their families for months or even years – raises surprise blended with anger as to how persons of authority in our country can see fit to act in this manner toward women and men whose sole desire is merely to put bread on their family's table. We will not deny that the persons of authority faced weight counter-considerations – considerations of good order and the need to prevent the abuse of the permit to reside in the country – however, how can they have overlooked the fact that the arrangement they are establishing cuts deeply into the dignity of the foreign workers as human beings? After all, any person – even if he is a stranger among us – is entitled to his human dignity. Money can be divided. The core of dignity cannot be divided. The same applies to the dignity and liberty of the workers." (**Kav LaOved I**, para. 4 of Deputy President M. Heshin's ruling).

113. Everyone accepts that the rights granted by the state to a foreigner, and certainly to a foreigner who entered the state illegally, are not equal to those granted to citizens of the state; neither, of course, are the obligations of the state toward such a person identical. Thus it is possible that the extent of protection of his right to liberty will be less than the extent of the protection afforded to a legal citizen of the state (see and cf. **Tzemach**, 272). However, this does not mean that an infiltrator is denuded of all his rights at the moment of entering the state, even if he does so illegally. To paraphrase Justice Levy's remarks, the infiltrator "does not enter the gates of the state and shed his humanity and his fundamental rights" (**Kav LaOved I**, 397). The scope of the constitutional right to liberty and human dignity applies to any Israeli citizen, as well as to the stranger, infiltrator, or refugee who has entered Israel, whatever the circumstances. A person's liberty is a right that accompanies him wherever he goes, whether in his own country or in another country; whether he is present in a place where he has been permitted to be present or has entered a place he has been forbidden to enter. Indeed, in certain instances it will be possible to deprive him of this liberty, but such deprivation will also require a cautious and controlled

examination of the proportionality tests. A person's liberty and dignity constitute infrastructural norms for life together in the state for citizens and residents, and they also extend to foreigners living among them.

Accordingly, the serious and powerful injury to the infiltrators' most basic constitutional rights cannot be disputed.

114. Conversely, we must examine the social benefit accruing to the state and to Israeli society as the result of the provision of article 30a(c)(3) of the law. Indeed, Israeli society has paid a price due to the need to cope with the extensive phenomenon of infiltration. This coping is complex and requires consideration for the needs of the Israeli economy and for economic, social, and other interests related to the good of society in Israel (see **Kav LaOved II**, para. 34 of Justice Procaccia's ruling). The price of this coping pertains both on the economic level, relating to the state's resources, and on the level of the employment and personal security of residents living in the vicinity of the infiltrators. However, insofar as the state's resources are concerned, in light of the serious injury to the right to liberty, which is situated in the upper section of the pyramid of rights, the state must be willing to bear the economic burden involved. In general terms, it should be noted that no figures were brought before us on this matter (see **Human Rights Division**, para. 55 of President Beinisch's ruling). "Society is gauged, among other factors, by the relative weight it grants to personal liberty. The weight should be manifested not only in fine statements, and not only in the law books, but also in the budget" (**Tzemach**, 281)

Regarding the ramifications on the local population, it should be recalled that this population is continuing even now to cope with these difficulties, since the large majority of the infiltrators are not in custody, but are present among or alongside the local population. With attention to this fact; and with attention to the presence of numerous alternative means the state could adopt in order to cope with these ramifications; and with attention to the border fence with Egypt, whose construction has recently been almost totally completed, and the ability to improve its efficiency; it cannot be said that the benefit from custody exceeds the serious injury to the infiltrators' constitutional rights. It is not easy to cope with the phenomenon of

infiltration. The difficulties faced by the local residents in the areas where the infiltrators are concentrated, who are required to absorb the results and ramifications of the phenomenon of infiltration, demand the attention and consideration of the authorities. However, the ostensibly simple solution of placing the infiltrators in custody is one that is disproportionate and inconsistent with the social, legal and moral values of the State of Israel. This is a solution that makes "a moral stain on the network of human values espoused by Israeli society" (**Kav LaOved II**, para. 64 of Justice Procaccia's ruling). The Jewish people, which throughout history has known extensive suffering and toil, and which has sometimes been forced to wander from place to place, must stand up to the difficult, bold and moral challenge posed by the numerous foreigners who have now wandered to the State of Israel seeking relief from their distresses, for so long as they cannot return to their countries, pending the finding of another suitable place that can absorb them. This does not mean that it is not possible at this stage to impose on them various restrictions, rules and procedures binding them during their stay in the host country, including even their placement in custody for a proportionate period of time (see **Tasfahuna**, para. 5 of Justice Danziger's ruling). However, these restrictions cannot, at least at the present time, amount to the complete denial of their liberty for such a significant period.

I should add that it is not possible to accept the position that the grounds for release established in the amendment to the law assist in a sufficient degree to cure the unconstitutionality of the amendment. Firstly, a situation has been created whereby the rule is injury to constitutional rights, while the exception is the honoring of these rights.

> "A legal system that grants constitutional protection to human rights cannot countenance the normative point of departure that assumes the negation of basic rights as a guiding rule. It cannot accept that in a system that has established human dignity as a protected constitutional right, the individual will be permitted to maintain his basic rights in 'exceptional' cases only" (**Kav LaOved I**, 391; see also **Kav LaOved II**, para. 65 of Justice Procaccia's ruling).

Secondly, as we have shown, the figures in the field also show that the grounds for release relate only to a small minority of the infiltrators held in custody. The fact that the amendment was enacted by way of a temporary provisions can also

not be of help in this instance, in light of the strength and duration of the injury (see HCJ 466/07 **Gilon v. Attorney General**, paras. 24-5 of my ruling (January 1, 2012); HCJ 1548/07 **Israel Bar v. Minister of Internal Security** (July 14, 2008)).

115. It is indeed possible that the worst will come to pass, that infiltrators will continue to flood to the State of Israel in their masses despite the sophisticated physical barriers, the ramifications for local society will only worsen despite the honest and vigorous efforts of the state and its authorities to prevent this by various and diverse means, and the State of Israel will face a threat and concern of severe injury to its vital interests. Indeed, in such a state of affairs, it will be possible to state that the benefit is equal to the injury, and that Israeli society cannot endanger itself for the sake of the residents of other countries. In my opinion, however, we are very far removed from such a bleak picture. Israeli society is continuing to function and to cope with the difficulties it encounters in diverse fields and matters while maintaining basic human rights. The state is indeed obliged to continue to act to cope with the ramifications of the phenomenon of infiltration and to improve, as far as possible, the quality of life of the local residents in whose vicinity the infiltrators are concentrated. However, this is not a situation in which we must raise our hands and turn to the most extreme course of action. It should be recalled that alongside the pessimistic scenario an optimist scenario might transpire, whereby the diplomatic, political and security situation in Eritrea may improve and permit the return of the infiltrators, most of whom come from this country, to their country of origin. As is well known, the temporary protection granted to these subjects under the principle of non-refoulement is as its name states temporary, and it is possible that it will removed at some point in accordance with the situation pertaining therein. This was the case, for example, regarding subjects of the Ivory Coast (see AA (Jer.) 58162-01-12 **Bakayouko v. Ministry of Interior** (June 24, 2012); AAP **Does (Ivory Coast) v. Ministry of Interior** (July 7, 2013)), and this appears to be happening at present regarding subjects of South Sudan (see **ASSAF**).

The conclusion is that the provision of article 30a(c)(3) of the Prevention of Infiltration Law also fails to meet the narrow proportionality test and is to be declared unconstitutional.

The Relief

116. What is the relief to be granted in light of the said determination regarding the unconstitutionality of the provision in the law? The Parties engaged in broad and detailed discussion of the doctrine of "reading in" and its confines. I do not believe we should refer to this in the present case. The nullification of the provision in article 30a(c)(3) will create a vacuum that cannot be filled by the Court, and this matter lies within the sphere of the Knesset (see **Human Rights Division**, para. 65 of Justice Beinisch's ruling). The Court cannot place itself in the legislator's shoes and establish another arrangement in place of that which has been nullified, and this instance certainly does not warrant this. Any determination will lead to diverse consequences which the Court does not have the tools to examine. Moreover, the significance of the nullification of the said article is broad. The arrangement enacted in the amendment to the Prevention of Infiltration Law largely depends on the determination that it is possible to hold an infiltrator in custody for up to three years. Other periods established in the law depend on this period. Thus, for example, it would be absurd to establish that it is not possible to hold an infiltrator in custody for three years, but that there are grounds for his release after the passage of nine months from the date on which the infiltrator submitted an application for recognition as a refugee. The periods of judicial review were also established with reference to the length of the period for which an infiltrator may be held in custody. Regarding other provisions, these are in any case already present in the existing arrangement in the Entry to Israel Law. Accordingly, the significance is that it is not possible to separate the parts of the amendment to the Prevention of Infiltration Law when its central provision has been nullified. This implies that it will not be possible to implement the arrangements of the amendment generally following the nullification of article 30a(c)(3) of the law, and that it is to be established that the arrangement in its generality is void and a new legal arrangement must be established in its stead. This conclusion obviously obviates the need to examine the constitutionality of the remaining provisions of the amendment attacked by the Petitioners.

117. The work of establishing a new arrangement in place of the nullified arrangement, therefore, is to be left to the legislator, if it so wishes. However, it is not possible to leave a vacuum, and neither is it possible to suspend the nullification of the provision due to the severe injury caused to those held in custody. The conclusion, therefore, is that after the nullification of the provision takes effect, leading to the prevention of the implementation of the entire amendment, this arrangement will be replaced by another legislative arrangement that was in existence prior to the amendment of the Prevention of Infiltration Law, viz. the existing arrangement in accordance with Entry to Israel Law. The advantages are that this Court is not creating an alternative arrangement but rather applying an arrangement established by the legislator prior to the existing arrangement. Moreover, the state and its authorities have extensive experience in implementing the arrangement in accordance with the Entry to Israel Law, so that, in my estimation, no great difficulty is liable to arise in the transition between the arrangements. It should be recalled that, in any case, many of the grounds for release and the grounds for non-release established in the Entry to Israel Law tessellate with those in the Prevention of Infiltration Law. However, it is evident that the legislator will be entitled to establish another legal arrangement for coping with the phenomenon of infiltration in place of the nullified arrangement, which shall, of course, need to meet the constitutional requirements presented in the Basic Laws.

118. As noted, in light of the severe injury to the right to liberty, I do not believe that the declaration of the nullification of the amend should be suspended. Instead, it may be determined – within the confines of our declaration on the nullification of the amendment – that the deportation (and custody) orders issued under the Prevention of Infiltration Law shall be considered to have been granted under articles 13(b) and 13a(c) of the Entry to Israel Law. The authorities will thus be required to examine individually the cases of the persons held in custody in accordance with the grounds for release, the restrictions thereon, and the dates established in the Entry to Israel Law. Our assumption is that this will undertaken with due speed. In order to enable the state to prepare to examine the individual cases of the persons held in custody, whose number is not insignificant, I shall suggest to my colleagues that it be determined that the grounds for release established in article 13f(a)(4) of the Entry to

Israel Law will not apply for a period of 90 days from the date of granting of this ruing. I shall further suggest to my friends that it be determined that the rule established in article 13n of the Entry to Israel Law shall not apply for a period of 60 days regarding a person whose case has already been heard before the Tribunal for the Review of Custody of Infiltrators in accordance with amendment.

In order to clarify the operative outcome derived from the proposed relief, and in order to prevent the unnecessary filing of legal proceedings by persons held in custody **prior to the exhaustion of the administrative proceeding**, I shall briefly note the manner of operation derived from this proposed course. On the granting of the ruling, the competent authorities will begin to examine the individual cases of each of the persons held in custody in accordance with the provisions of the Entry to Israel Law as these have been interpreted in our well-established case law. Insofar as it is possible to release a certain person so held on bail in accordance with the grounds established in the Entry to Israel Law, the border inspection supervisor is, of course, permitted to do so without it being required to bring that person before the Custody Review Tribunal. In order to enable the authorities to maintain an orderly administrative proceeding, they should be allocated a total period of time not exceeding **ninety days** to exhaust the administrative proceeding in the cases of all the persons held, within which confine the applicability of the grounds for release on bail established in article 13f(a) of the Entry to Israel Law will be examined, as will the restriction thereto, with regard to each of the persons held in custody. This period of organization is essential, despite the ongoing injury during its course to the constitutional rights of the persons held. Naturally, however, the proceeding for individual examination and release on bail must be commenced **immediately**. Insofar as the border inspection supervisor establishes that a given held person may be released on bail in accordance with the grounds for release established in the Entry to Israel Law and the restrictions thereto – he is to be released immediately. In order to delineate this period, I have as noted suggested that the ground for release established in article 13f(a)(4) of the Entry to Israel Law not apply for a period of ninety days from the date of granting this ruling. We shall recall that, in general, after the passage of sixty days from the date of placement in custody (and, in our instance, within ninety days from the date of granting the ruling, at the latest), and if the restrictions

established in article 13f(b) of the Entry to Israel Law are not met, the border inspection supervisor will order the release of the held person on bail (see **Salameh**). Our assumption is that this period of organization is sufficient to enable the state to complete the examination of the cases of all the persons held in custody and that no extensions will be requested. We shall recall that the relevant information regarding each of the held persons is in the possession of the authorities at the current point in time, since these are cases that have more than once been brought before the competent authorities and the Tribunal for the Review of Custody of Infiltrators in accordance with the provisions of the amendment. Accordingly, this process does not require the authorities to cope "de novo" with a large group of held persons with whom it is not familiar.

Before Closing

119. I have felt it proper to refer to the Book of Books and to the tradition of the Fathers that continues to guide us to this day. In the Book of Deuteronomy, chapter 23, verses 15-16, it is stated:

> If a slave has escaped from his master and taken refuge with you, you are not to hand him back to his master. Allow him to stay with you, in whichever place suits him best among your settlements; do not mistreat him.

The Biblical commentators noted that the text refers to a non-Jewish slave who flees from another country and escapes from his master to the Land of Israel. It is worth quoting the comments of Rabbi Shimshon Ben Raphael Hirsch (a nineteenth-century commentator, thinker and leader) regarding these verses, which extend the obligation on the Jewish authorities to grant refuge and attention to such a slave, to ensure his release, and to award him the full rights of a Jewish citizen:

> "The Jewish authorities must award this slave refuge and attention, and according to Maimonides (*Laws of Slaves* 88 H10), as also adopted by the *Yoreh De'ah* (167, 85), they must cause the freeing of the slave, and, to this end, they must present the master with the choice: He shall write a letter of release to the slave and take therefrom a letter of debt for his damages, or if the master did not wish to release him, the court nullifies his enslavement and he shall go. Once the slave has been freed he becomes a righteous resident with the full rights of a Jewish citizen, and he falls under the special

> protection of public law and general sympathy. On the basis of this commandment the ruling was stated that a person who leaves the Land of Israel is not entitled to take his slaves abroad with him against their wishes. And "he who sells his slave abroad, he [the slave] shall go free" (*Gittin* 43b).

Hirsch subsequently explains the reason for the commandment in our matter, which was intended to nurture "an international human spirit" which, alongside nurturing the moral foundation of the Jewish people, Hirsch considers "prominent features of the Jewish national character:"

> "Under the rule of the Torah in the Land of Israel they acted in a humane manner even toward the Canaanite slave, and we understand the greatness of the contrast between this approach and the perception of slavery that was prevalent everywhere except in the Land of Israel, and even the Canaanite slave of a Jew outside the Land was abandoned to this treatment. It seems to us that the commandments stated in verses 11-15 are intended to nurture the moral foundation, while the commandments stated in verses 16-17 are intended to nurture an international human spirit; and it has already been noted in the previous commandments that both these must be prominent features of the Jewish national character."

120. In conclusion, I assume that the outcome of this ruling will not be easy for the Israeli public and will be particularly difficult for the residents of south Tel Aviv, whose distress as manifested in their outpouring seems to stem from the heart and arouses empathy and understanding regarding the need to assist them in their situation. As I noted, I would like to believe that the state will manage to find the way to cope with the situation created by the means at its disposal and to alleviate their distress. A constant strand in this opinion is an attempt to clarify and convince that it is not proper to select a solution that ostensibly seems simple – protracted incarceration – given that this is the most injurious means toward any person, and certainly extremely injurious toward infiltrators incarcerated in custody for a protracted period. I shall reiterate that one of the basic rights of the human, situated at the upper end of the pyramid of rights, is the right to liberty. Since earliest times, humans have always fought for freedom. Injury to the right to liberty is one of the gravest imaginable. The denial of the infiltrators' liberty by means of their incarceration for a protracted period is a mortal and disproportionate injury to their rights, their person, and their soul. We must not solve one injustice by creating

another. We cannot deny basic fundamental rights while also grossly injuring human dignity and liberty in the framework of a solution to a problem that requires an appropriate systemic and political solution. I have already noted in the past, in a different context, that “the needs of one population, however important they may be, cannot be satisfied by injuring the needs and rights of another population group” (AHCJ 10007/09 **Glotten v. National Labor Court**, para. 29 of my ruling (March 18, 2013)). We must not forget our basic values as drawn from the Declaration of Independence and our moral obligation toward any person as these are engraved on the founding molds of our state as a Jewish and democratic state.

Since its establishment, the State of Israel has faced difficult and complex dilemmas in various fields. The most notable is the need to cope with a complex security reality obliging the state to balance the security interest and the right of residents to life and bodily integrity with the opposing basic human rights. The State of Israel has on more than one occasion made extremely difficult decisions on issues that entailed the taking of greater risks than those raised in this petition. The comments made may illuminate the issue we grapple with today in this petition, and should be a source in parallel and similar cases today and in the future:

> “As judges we know that we must properly balance human rights and security. ‘In this balance, human rights cannot receive full protection, as if there were no terror, and state security cannot receive full protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. This is a heavy price and one worth paying. It reinforces the state’s strength. It gives meaning to its struggle” (Ajuri, 383)” (President Barak in HCJ 7052.03 Adalah – Legal Center for the Rights of the Arab Minority in Israel v. Minister of Interior, Piskei Din 61(2) 202, 363 (2006)).

Similarly, there is no way to avoid the complex need to cope with the issue of the infiltrators. On this issue, we must recall that we are not facing terrorists who come to attack the residents of the State of Israel, but an unfortunate population that comes to us from a region that has suffered at the hands of fate and of man, a population that in Israel, too, lives a life of distress and poverty. We must emphasize that we do not ignore the public interest and the alleged change regarding the personal security of some of the residents, nor the ramifications for the economy and industry. However, we are convinced that the state and society cannot protect its citizens and its

underlying value-based interests while at the same time grossly injuring the liberty and dignity of the strangers in its midst. It is important to recognize that other alternatives exist. It may be assumed that the course to these will be harder, more complex, and require greater patience. But as President Barak has noted, I am confident and certain that –

> "The State of Israel will not be silent or rest until it finds the way to resolve this painful issue. As a state and as a society, our consolation should be that the path to a solution will be consistent with our basic values" (**Does**, 744).

121. Even if these comments will not satisfy many, it is important to look with open eyes at the factual picture derived from this ruling. As noted, some 55,000 infiltrators are currently present in the State of Israel. Of these, some 1,750 persons are being held in custody under the Prevention of Infiltration Law. In other words, the need for Israeli society to cope with the infiltrators who live in its midst is an accomplished fact that has not lessened or changed significantly since the commencement of the placement of infiltrators in custody. In all probability it will also not change following the implementation of this ruling. Conversely, the lives of 1,750 persons may change from incarceration without a solution to liberty and hope for the future.

122. If my opinion is accepted, the petition will be accepted in the sense that the provision of article 30a(c)(3) of the Prevention of Infiltration Law will be nullified, the significance being that it will not be possible to implement the arrangements of article 30a of the Prevention of Infiltration Law (Offenses and Jurisdiction) Amendment No. 3 and Temporary Provision), 5772-2012, and these will be nullified. Accordingly, article 30a of the Prevention of Infiltration Law is void. Pending the determination of another legal arrangement by the Knesset, the arrangement in the said amendment will be replaced by the existing arrangement in accordance with Entry to Israel Law. The grounds for released established in article 13f(a)(4) of the Entry to Israel Law will not apply for a period of 90 days from the date of granting of this ruling for the purpose of the authorities' organization for the individual examination of the infiltrators held in custody in accordance with the arrangements of

the Entry to Israel Law. The cases of the Appellants and the Applicants will be heard in the framework of the cases of the remaining infiltrators.

Justice

Justice U. Vogelman:

I join in the conclusion of my colleague Justice **E. Arbel** in her comprehensive opinion, to the effect that the arrangement established in the Prevention of Infiltration Law (Offenses and Jurisdiction) Amendment No. 3 and Temporary Provision), 5772-2012 (hereinafter: **the Amendment**), enabling the holding in custody of "infiltrators" for a period of three years, is unconstitutional and is to be nullified. The fabric presented by my colleague is broad and the issues raised therein are complex and multifaceted. Due to the importance of the subject placed before us, I shall discuss the principle matters that led me to join this conclusion.

The Background to the Constitutional Examination

1. Before proceeding to an examination of the provisions of the Amendment according to the familiar and well-known tests for constitutional review, it is important to discuss the background to the enactment of the law and the instances to which it is intended to apply. Constitutional review cannot be undertaken in a vacuum, and presenting as clear a picture as possible is essential in order to hone the legal questions requiring determination (cf.: HCJ 4542/02 **Kav LaOved v. Government of Israel**, Piskei Din 61(1) 346, 377 (2006) (hereinafter: **the Shackling Arrangement**). As we shall see below, the Petitioners and the Respondents present diametrically opposite pictures, and we shall attempt to distill from these distinct pictures a picture of the situation that may serve as an infrastructure for the discussion.

2. The background to the enactment of the Amendment, as may also be deduced from the explanatory comments, is the phenomenon of unregulated immigration with which the State of Israel has been coping in recent years, much of which was effected

by means of the uncontrolled crossing of the Israeli-Egyptian border. The state authorities identified this phenomenon as a general phenomenon of mass migration from the various African countries for the purpose of work and in order to improve the quality of life. On December 11, 2011, Government Resolution No. 3936 was adopted, entitled "Establishment of a custody facility for infiltrators and blocking illegal infiltration to Israel" (hereinafter: **the Government Resolution**). The Government Resolution enumerated several means for coping with the phenomenon. One means is the establishment of a fence on the Israeli-Egyptian border (section 1 of the Government Resolution). A second means is negotiations with various countries to absorb migrants who cannot be removed to their country of origin (section 6 of the Government Resolution). The legislative amendment that is the subject of our discussion is an additional means adopted in order to block this phenomenon and cope with its ramifications (section 2 of the Government Resolution), accompanied by the decision to establish a residential facility for infiltrators who cannot for the present be removed to their country of origin (section 4 of the Government Resolution).

3. There is no dispute that the phenomenon of unregulated immigration from Africa, on its scale in recent years, is a phenomenon that has broad ramifications. This phenomenon presents the authorities and Israeli society as a whole with considerable challenges and requires coping on various levels on the part of the authorities of state. In its arguments, the state addresses some of the negative ramifications of this phenomenon: In the aspects of **economy and industry**, the state argues that the uncontrolled entry of unskilled workers into the job market has injured the employment possibilities of Israeli workers with limited skills and who earn low wages and, as a result – injured the wellbeing of the members of the weaker strata of Israeli society. It was further argued that the protracted presence in Israel of these immigrants has direct budgetary ramifications derives from the health, education and welfare needs of this population. On the level of **internal security and public wellbeing**, it was argued that there is an upward trend of crime among the immigrant population, with a direct impact on the fabric of life in the areas in which they reside (south Tel Aviv, Eilat, Arad, and other cities).

4. As a point of departure for the discussion, the normative situation prior to the Amendment regarding the response to unlawful entry to Israel should be presented. The Entry of Israel Law, 5712-1952 (hereinafter: **the Entry to Israel Law**) – in its current form, following a comprehensive amendment undertaken therein in 2001 (Entry to Israel Law (Amendment No. 9), 5761-2001) – makes several tools available to the interior minister for coping with the phenomenon of unlawful presence in Israel. The arrangement established in the Entry to Israel Law is the central legal means by which the authorities coped with the phenomenon of unregulated immigration on the Israeli-Egyptian border prior to the enactment of the Amendment (in a particular stage, a short-lived attempt was made to exercise authorities in accordance with the Prevention of Infiltration Law in its original version, see: HCJ 3208/06 **Does v. Head of the Operations Division in the IDF** (October 7, 2008)). The broad authority granted to the interior minister in the Entry to Israel Law to remove a person unlawfully present in Israel to his country of origin, and to hold him in custody for the purpose of executing the removal, was intended to provide a response for coping with the phenomenon of unlawful immigration and its economic incentives, and to protect the state's sovereignty in deciding who is to come within its gates (see the explanatory notes to Amendment No. 9, PL 108). It was established that a foreign citizen unlawfully present in Israel will be removed to his country of origin, and that his liberty may be restricted for a certain time for the purpose of ensuring this removal. Article 13(a) of the law enshrines the rule that "a person who is not an Israeli citizen or an *Oleh* […] and who is present in Israel without a residency permit (in this law: a person unlawfully present) will be removed from Israel as soon as possible, unless he leaves of his own will prior thereto." The law further establishes, in article 13a(b), that "a person unlawfully present will be held in custody pending his departure from Israel or pending his removal therefrom, unless he was released on a financial guarantee, a bank guarantee or other suitable guarantee…" Thus the general rule established by the law is that the person unlawfully present is to be held in custody, while the exception permits the competent body, the border inspection supervisor, to order the release of a person unlawfully present on bail. This is possible if one of the grounds established in article 13f is met: If the supervisor has been convinced that it will be possible to remove the person unlawfully present from Israel without his holding in custody, since he will depart by himself on the date established

therefore, and that there will be no difficulty locating him to this end (articles 13f(a)(1) and 13(a)(2)); if the age or state of health of the person held justify his release from custody, or other humanitarian reasons pertain justifying this (article 13f(a)(3)); or if the person unlawfully present has been held in custody for over 60 consecutive days (article 13f(a)(4)). The law further establishes that release on bail will not be effected when the removal from Israel is impossible due to lack of full cooperation on his part, including regarding the clarification of his identity or the arrangement of proceedings for his removal from Israel, or when his release is liable to endanger state security, public wellbeing or public health (article 13f(b)).

5. In the Court's rulings regarding the Entry top Israel Law, a constant thread is a basic principle: the holding in custody of a person unlawfully present in Israel under this law is accompanied by a decision for his removal; and in the absence of an effective proceeding for removal executed within a reasonable period of time – the said person cannot continue to be held in custody, barring exceptional cases (see: CA 9656/08 **State of Israel v. Saidi**, paras. 25-6 (December 15, 2011) (hereinafter: **Saidi**)).

6. The amendment before us was enacted in order to cope with the unlawful entry of numerous migrants whom Israel **is not removing** at this stage to their countries of origin. If the matter involved persons unlawfully present who could be removed immediately to their countries of origin, and held in custody pending such removal, I believe the arrangement established in the Entry to Israel Law, or a similar arrangement, would be sufficient. Thus the matter involves an amendment intended to apply, and at the current point in time actually applied, mainly with regard to a group that is not removed from Israel. This group currently comprises the citizens of two countries in north-east Africa: **Eritrea and the Republic of Sudan** (also known as north Sudan), whose citizens are not removed at the current time by the State of Israel (in the past, this group also included citizens of the Ivory Coast and South Sudan). In practice, the citizens of these two countries constitute some 90 percent of the persons held in custody under the Amendment, The larger group of the two are citizens of Eritrea (approximately two-thirds of the number of persons held under the amendment).

7. Who are these Eritreans and Sudanese who until recently entered Israel unlawfully through its southern border in large numbers? A review of the statements of claim of the Petitioners, on the one hand, and the state, on the other, paints two diametrically opposed pictures of the reality.

For its part, the State argues that they are migrants against an economic background, "illegal work infiltrators" seeking employment possibilities in the only Western country that has a land border with the continent of Africa. This description places the discussion in the sphere of policy on economic migration for work purposes – a policy sphere that is clearly subject to the broad discretion of the state (HCJ 11437/05 **Kav LaOved v. Ministry of Interior**, paras. 18-26 (April 13, 2011); **Shackling Arrangement**, 392). The state clarifies that "it is actually the infiltrators who wish to reach Israel for economic reasons, like any work migrant, although they could have remained in Egypt or in other countries through which they passed on their way to Israel, but nevertheless chose to come here for reasons of work migration or for other similar reasons, constitute the central group the amendment seeks to address" (section 37 of the statement of response). The state emphasizes that the arrangement established in the Amendment is not intended to apply to persons eligible for political asylum in accordance with the Refugees Convention and, accordingly, grounds for release relating to this group are established in its framework – article 30a(c)(1) of the Amendment.

Conversely, the Petitioners argue that the population for whom the Amendment is intended and to whom it is actually applied is, as a generalization, the population of asylum seekers who fled Eritrea and Sudan against the background of persecutions and dangers they faced there. Regarding the citizens of Eritrea, the Petitioners refer to the opinion of the UN High Commissioner for Refugees and to the rulings of various legal systems around the world reflecting the human rights situation in that country and, in particular, the disproportionate punishments facing those who attempt to flee the country in order to avoid the compulsory draft imposed therein. The Petitioners note that in many countries of the world the percentages of recognition of Eritrean citizens as refugees (or as migrants entitled to other forms of

complementary international protection) are extremely high. As for citizens of Sudan, it is argued that many of them are residents of the province of Darfur who were persecuted by the central government and its agents (the Janjaweed gangs), and that in accordance with the position of the UN High Commissioner for Refugees, Sudanese citizens in Israel also require international protection. The Petitioners' description shifts the center of gravity to discourse on rights and obligations – the obligations of the state toward individuals entitled to international protection (against the background of the rules of international law and the basic principles of Israeli law) and the rights of these individuals.

8. Naturally, the true picture is more complex. The economic motive is certainly a significant factor in the decision by thousands of African citizens to set out on a long and complex journey – in many cases fraught with difficulties and suffering – toward the State of Israel, where their potential earnings are substantially greater than in other countries in the region. Equally, the figures presented regarding the countries of origin from which they come, as well as the de facto policy implemented in their regard by the State of Israel and other countries, do not permit the cursory dismissal of their claims to international protection, as the state attempts to do in its arguments before us.

Regarding the citizens of Ethiopia, the state declares that it "has adopted a policy of the temporary non-removal of Eritreans to Eritrea, **in accordance with the principle of non-refoulement**" (section 58 of the statement of response [emphasis in the original – E.V.]; see also: HCJ 7302/07 **Hotline for Migrant Workers v. Minister of Defense**, para. 8 (July 7, 2011) (hereinafter: **Hotline for Migrant Workers**); AAP 8908/11 **Asfu v. Ministry of Interior** (July 17, 2012) (hereinafter: **Asfu**)). We should recall that in **Asfu** the state argued that the policy of temporary non-removal regarding the citizens of Eritrea is a humanitarian step and the product of a sovereign decision by the State of Israel, based on the exercising of political discretion, and does not accrue from a commitment in law (**ibid.**, para. 9). By contrast, the principle of non-refoulement to which the state refers in the statement of response is enshrined in article 33 of the 1951 International Convention relating to the Status of Refugees (CD 65) (hereinafter: **the Refugees Convention**) and in article 3

of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CD 1039), though it is not limited to the confines of these conventions. This is a principle of international customary law that is also manifested in domestic Israeli law, according to which the State of Israel does not remove a person to a place where he faces danger to his life or liberty (see HCJ 4702/94 **Al-Tai v. Minister of Interior**, Piskei Din 49(3) 843 (1995) (hereinafter: **Al-Tai**)). As of the date of granting of the ruling in **Asfu** (July 17, 2012), the state had not undertaken any individual examination of the asylum requests from each of the citizens of Eritrea who entered Israel unlawfully, and had confined itself to a policy of "temporary non-removal," to use its definition (**ibid.**, para 9). At a later stage, alongside the implementation of the provisions of the Amendment, the authorities began to examine the individual asylum requests submitted by Eritrean citizens in Israel. Thus, for example, a notification was attached to the Petitioners' response dated June 16, 2013 regarding the rejection of the individual asylum application of Mr. Ramadan, an Eritrean citizen, after it was determined that he had not proved eligibility for refugee status in accordance with the provisions of the Refugees Convention. At the current point in time, too, there is no dispute that the number of individual applications in which a decision has been granted is tiny compared to the number of Eritreans present in Israel. In any case, it is important to emphasize that even regarding Eritreans whose individual application for asylum was **rejected**, the state has not taken steps for their removal. Thus, for example, in the rejection notification attached to the Petitioners' response, Mr. Ramadan was informed that in light of the policy of "temporary non-refoulement," to use the language employed in the letter, granted to Eritreans in Israel against the background of the present situation in Eritrea, he will not be removed to his country as long as this policy remains in force (cf. **Asfu**, para. 19 of my ruling, as well as the comment of Justice **H. Meltzer** in the same case).

As for citizens of north Sudan, the state declares that its refraining from returning these citizens to their country of origin is not derived from the principle of non-refoulement, but is due to the practical difficulty in executing this action. This is due to the absence of diplomatic relations between the countries and the absence of a direct track for executing removal to this country. The state emphasizes that its

position is that there is no normative impediment to the removal of citizens of north Sudan to their country.

9. For the purpose of the determination in our case, we need to establish firm rules on the question of the commitments of the State of Israel toward the citizens of Eritrea and north Sudan, nor regarding their normative origin. The reason for this is that, at the current point in time, the state is not removing the citizens of these two countries to their countries of origin, even if their individual application for asylum is rejected. **This is the point of departure for our discussion, and our determination is based on this factual infrastructure**.

An Aside: "Infiltrators" – a Matter of Semantics?

10. The legislator chose to establish the arrangement that is the subject of our discussion in the framework of an amendment to the Prevention of Infiltration Law, 5714-1954 (hereinafter: **the Prevention of Infiltration Law**) and to refer to the individual to whom the exercising of the authority is directed by use of the term "infiltrator." Ostensibly this is a technical legal term, defined in the law following its amendment in a broad and neutral manner as "a person who is not a resident […] who entered Israel otherwise than through a border post[…]" However, the new arrangement cannot be divorced from the original meaning of the term in its normative environs. The term "infiltrator" is laden with historical import.

11. In the original version of the Prevention of Infiltration Law, prior to the Amendment, the term "infiltrator" was defined as "a citizen or subject of Lebanon, Egypt, Syria, Saudi Arabia, Transjordan, Iraq or Yemen," a resident or visitor in these countries, or a Land of Israel citizen/resident who left his ordinary place of residence in a territory that became part of Israel for a place outside Israel (see article 1 of this law in its format period to the Amendment of the law in January 2012). We should recall that the Prevention of Infiltration Law was enacted in 1954 against the background of an increase in the relative proportion of violent infiltration (i.e. infiltration for the purpose of committing hostile actions and crimes) and organized infiltration, particularly across the Egyptian border, where the first signs of what

would become the "Fedayeen" began to appear – organized and trained terror groups, with the assistance of the Egyptian intelligence (Oren Bracha, "Misfortunate or Dangerous: The Infiltrators, the Law and the Supreme Court 1948-1954" **Iyunei Mishpat** 21(2) 333, 351-2 (1998) (hereinafter: **Bracha**)). The law established infiltration as a serious crime, imposing heavy penalties on infiltrators and those who assist them. In this spirit, the rulings of the said period described the infiltrators as follows:

> "In a period of danger to the state, when it is surrounded on all sides by hostile peoples who, in the past, have fought against it with furious cruelty, and who still pester it at every turn and threaten to swallow if alive – in such tempestuous times people leave it and move over to the enemy camp, and later they turn, and claiming to be faithful citizens they dare to claim equal rights with all its other citizens" (HCJ 125/51 **Hassin v. Minister of Interior**, Piskei Din 5 1386, 1392 (1951)).

12. As Bracha describes in his article, "the average infiltrator" was perceived as a person who crossed the borders of the state, alone or in a gang, in order to commit sundry hostile acts such as theft, robbery, murder, sabotage and even espionage (**ibid.**, 328). The word "infiltrator" therefore embodies an internal narrative and story which it relates. It emphasizes certain aspects relating to a person who entered Israel unlawfully, and blurs others (cf.: Yofi Tirosh, "The Story of a Rape, Nothing More – On the Politics of Textual Representation" **Mishpatim** 31 579 (2000); and see also: Shulamit Almog "'The appellant's eyes darkened' – Between Narrative and Normative" **Mechkarei Mishpat** 15 295 (2000)).

13. In the framework of the proceeding for the enactment of the Amendment in the Knesset Internal Affairs and Environment Committee, the attorney general suggested that the committee consider enacting the proposed arrangement by way of an amendment to the Entry to Israel Law, but the representative of the Ministry of Justice in the hearings clarified that the government had consciously chosen to use the Prevention of Infiltration Law as the "platform" for the said arrangement in order to convey "a message of gravity" and in order to ensure that overall responsibility for the handling of the matter would rest with the minister of defense. The legislator's rhetorical choices are not subject to our review. In any case, it is important that the rhetorical choice should not blur the essence. We must recall at every stage of the

discussion the complex profile of the new "infiltrators," a substantial portion of whom define themselves as asylum seekers.

Subject to this comment I shall also, like my colleague, employ the term "infiltrators" as established in the law, and continue the examination of the constitutional questions raised by the Amendment.

The Stages of the Constitutional Examination

14. With attention to the complex picture as presented, we shall now turn to the constitutional examination in accordance with the familiar stages delineated in the rulings of this Court (see, for example: HCJ 10662/94 **Hassan v. National Insurance Institute**, para. 24 of the ruling of President **D. Beinisch** and the references therein (February 28, 2012) (hereinafter: **Hassan**); HCJ 1661/05 **Gaza Coast Regional Council v. Prime Minister**, Piskei Din 59(2) 481, 544-5 (2005) (hereinafter: **Gaza Coast**).

Injury to the Constitutional Right

15. The first stage in the constitutional examination is the examination of the presence of injury to a right enshrined in the Basic Laws. If the answer is negative, there is no cause to continue with the stages of the constitutional examination (**Hassan**, para. 24 of the ruling of President **D. Beinisch**). There is and can be no dispute that the arrangement established in the Amendment injures the liberty of those held in custody under its terms. The right to individual liberty is a constitutional right enshrined in article 5 of the Basic Law: Human Dignity and Liberty, where it is established: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise." The holding of a person in custody for any period, let alone for a period of three years, constitutes serious injury to his right to personal liberty (cf.: CA 6659/06 **Does v. State of Israel**, paras. 27-8 (June 11, 2008)).

Is the Injury to the Constitutional Right Lawful?

16. Like all the human rights enumerated in the Basic Law: Human Dignity and Liberty, the right to personal liberty is also a relative right that may be injured subject to the conditions of the limitations clause, as established in article 8 of the Basic Law. This injury must be "in a law consistent with the values of the State of Israel, intended for a fit purpose, and in a degree not exceeding that required […]" (cf.: **Hassan**, para. 52 of the ruling of President **D. Beinisch**). The limitations clause thus enumerates four conditions whose presence is required in order for the norm injuring a human right protected in the Basic Law to be found constitutional: (a) The injury to the constitutional right is made in a law or under an explicit authority in law; (b) The injuries law is consistent with the values of the State of Israel; (c) The injury to the constitutional right is for a fit purpose; (d) The injury to the constitutional right is in a degree not exceeding that required. As I see it, the central issues requiring discussion in our case are the Amendment's compliance with the requirement of fit purpose and the proportionality tests as delineated in the rulings of this Court.

"For a Fit Purpose"

17. The limitations clause establishes that, as a condition for injury to a constitutional right enshrined in the Basic Laws, it is required that the injurious law be "for a fit purpose." A purpose is if it serves public and social interests that are important to the state and to society, with the goal of maintaining an infrastructure for common life and a social framework that seeks to defend and advance human rights (HCJ 4769/95 **Menachem v. Minister of Transportation**, Piskei Din 57(1) 235, 264 (2002) (hereinafter: **Menachem**); **Gaza Coast**, 547-8). The Amendment before us has several declared purposes as noted by the state in its statement of response. One purpose is "to block the phenomenon of infiltration," that is – to reduce the scope of unlawful entry to the State of Israel by deterring potential "infiltrators" and removing the economic incentives for their entry. The second purpose is to "prevent the settlement of the infiltrators and to enable the state to address the broad ramifications of the phenomenon of infiltration on Israeli society and economy." This purpose is directed at those who are already present within the borders of Israel.

18. Naturally the manner in which the purposes are presented may have ramifications for the determination as to whether or not the purpose is fit. It seems to me that the purpose of any norm may be presented at a level of abstraction that will ostensibly allow it to be determined that this is a fit purpose (through the use of terms such as "public security," "public order," "governmental stability," and so forth). However, it is important not to be captivated by any particular phraseology; the substance of the matter is to be examined. As noted, a purpose is fit if it is "intended to realize social goals consistent with the values of the state in general, and which show sensitivity for the place of human rights in the overall social system" (HCJ 6427/02 **Movement for Quality Government v. Knesset**, Piskei Din 61(1) 619, 697 (2006); HCJ 1030/99 **Oron v. Speaker of the Knesset**, Piskei Din 56(3) 640, 662 (2002)). As an aside, I would note that there is a doctrinal disagreement regarding the required approach to the characteristics of the least injurious means and the extent of the injury to the constitutional right in the framework of the fit purpose test (see, for example: Aharon Barak **Proportionality in Law – The Injury to the Constitutional Right and Its Restrictions** 297-300 (2010) (hereinafter: **Barak-Proportionality**); and conversely: Barak Medina and Ilan Saban "Human Rights and Risk Taking: On Democracy, 'Ethnic Profiling,' and the Limitations Clause Tests" **Mishpatim** 39 47, 93 (2009) (hereinafter: **Medina & Saban**)).

19. Like my colleague, I, too, believe that the question of the compliance of the purposes of the law with the first purpose test, as this has been delineated in case law, arouses difficulties. However, I am not required to reach a firm determination on this question, since even if I assume that the amendment is for a fit purpose – and this assumption is not without difficulties – it in any case fails to pass the proportionality tests.

"In a Degree not Greater than that Required"

20. The limitations clause establishes that the injury to the right should be "in a degree not greater than that required." This is the requirement of proportionality, instructing us to examine the relationship between the fit purpose of the law, which has been found consistent with the values of the State of Israel, and the means the

legislator selected in order to realize that purpose. The proportionality of the injury to the constitutional right is determined according to three secondary tests recognized in the rulings of this Court: (a) **The rational affinity test** – does the means selected by the legislator indeed contribute to realizing the purpose of the legislative provision whose constitutionality is at stake; (b) **the test of the least injurious means** – of the possible means for securing the legislative purpose, was the means selected whose injury to the constitutional right is the least; (c) **the proportionality test "in the narrow sense"** – is there a proper relationship between the benefit accruing from the act of legislation and the damage caused as a result of its injury to the constitutional right (**Hassan**, para. 58 of the ruling of President **D. Beinisch**).

(A) The Rational Affinity Test

21. The first secondary test of the proportionality tests is the **rational affinity test** (or the "appropriateness" test), which requires that the means adopted in the law be appropriate for the realization of its affinity (**Barak-Proportionality**, 373). Within the confines of this test, it is not required that the selected means realize the goal in full, or that it is the most efficient means for its realization, but rather it is sufficient that it promote this goal (**ibid.**, 376-8). On the factual level, complete certainty that the legislative means will realize the proper goal is not required, but a slight and theoretical contribution is not to be accepted (**ibid.**, 382).

22. Is there a rational affinity between the holding in custody for a protracted period of immigrants who entered Israel illegally and the purpose of blocking the phenomenon of unregulated entry into the territory of the State of Israel? It could be argued that the answer to this question is largely a derivative of the disagreement I mentioned at the beginning of my remarks regarding the identity and motives of the infiltrators to Israel. Insofar as they are immigrants whose migration is basically driven by the economic motive (as the state argues), the answer would appear to be clear. The economic incentive for entering Israel unlawfully diminishes enormously when immediately on entering Israel the immigrants' liberty is restricted by means of their placement in custody. As a consequence of placement in custody, the ability to work to make a livelihood, to improve the quality of life, and to send money to their

families left behind is automatically negated. However, insofar as these are people facing a genuine danger in their country of origin (as the Petitioners hold), the picture is different. My colleague noted the argument that it is doubtful whether a person who is facing danger in his country of origin due to persecution, or for any other reason, will be deterred by the knowledge that he will be placed in custody after entering Israel (this separately from the question as to whether deterring a person in such a situation is proper on the normative level). At the same time, I am willing to assume that the injury to the economic incentive, like the injury to the basic rights accompanying placement in custody, is a component that cannot be ignored in the fabric of considerations of a person considering whether to depart on a difficult and complex journey to the State of Israel, specifically, with the inherent risks and costs. This applies even in the case of a person facing danger in his country of origin.

23. Our attention thus far has been on the theoretical level, examining the fabric of considerations and incentives of the "reasonable infiltrator." At the current point in time, over one year since the actual implementation of the amendment, it is ostensibly also possible to examine whether the amendment has secured the said purpose in practical terms. There is no dispute that the number of persons entering Israel unlawfully across the Israeli-Egyptian border has plummeted alongside the taking effect and application of the Amendment. The state argues that this fact indicates the benefit of the Amendment as a normative barrier reducing the economic fabric of incentives to enter Israel in an unregulated manner via the Egyptian border. However, this alleged causative affinity is not without its doubts. Alongside the enactment of the Amendment, two significant developments occurred: Firstly, **the completion of the fence** along the border between Israel and Egypt with a length of some 240 km, constituting a significant physical barrier to uncontrolled entry into Israeli territory; the second, **the geopolitical developments in Egypt** generally, and in the Sinai peninsula in particular, which influenced the migration routes to Israel. For the purpose of the discussion I am willing to assume (without determining the matter) that the Amendment passes the rational affinity test regarding the purpose of blocking unregulated entry to Israel via the Egyptian border, despite the doubts as also noted by my colleague, and I agree with her that these doubts will accompany us in all the stages of the constitutional review.

(B) The Test of the Least Injurious Means

24. The second secondary test is **the test of the least injurious means**. This test examines whether, of the possible means for realizing the legislative purpose, the means was selected that causes the least injury to the constitutional right. This secondary test if founded on the approach that a law should not be enacted that injures the constitutional right beyond the degree required in order to secure the fit purpose (**Menachem**, 279). However, this test does not examine solely the presence of a less injurious means, but it is also obliged to examine whether that same means – which is less injurious to the human right – realizes the legislative purpose to the same extent, or to a similar extent, as the means ultimately selected by the legislator (see: HCJ 2605/05 **Academic Center for Law and Business, Human Rights Division v. Minister of Finance**, para. 49 of the ruling of President **D. Beinisch** (November 19, 2009) (hereinafter: **Privatization of Prisons**); HCJ 1789/13 **Lotan v. Minister of Agriculture and Rural Development**, para. 19 (June 20, 2013); HCJ 10202/06 **Dahariya Municipality v. Military Commander in the West Bank**, para. 17 (November 12, 2012) (hereinafter: **Dahariya**); **Barak-Proportionality**, 395-6).

25. My colleague is of the opinion that the Amendment does not pass this test since it is not possible to negate the argument that the fence established on the Israeli-Egyptian border is an alternative means that secures the purpose of blockage to a similar extent while causing less injury to personal liberty. However, I find it questionable whether, on the basis of equivocal numerical data, to determine that the fence is an effective means **to the same extent** or **to a similar extent** as its combination with a "normative barrier," to use the state's term, in the form of the provisions of the Amendment. It could be argued that without the addition of the said obstacle, human resourcefulness would find a way to overcome the physical obstacle. Given the distress, which is not in dispute, a ladder will be found for any fence, and no physical barrier is hermetic. Accordingly, I am willing to assume that the fence combined with the Amendment is more efficient in terms of blocking infiltration than the fence alone. However, given the presence of the fence – which is the principal obstacle – the benefit embodied in the Amendment in itself is clearly reduced and

weight should certainly be given to this in the framework of the relative implementation of the proportionality test in the narrow sense, as I shall discuss below (cf.: HCJ 7052/03 **Adalah v. Minister of Interior**, Piskei Din 61(2) 202, 344-5 (2006) (hereinafter: **Adalah**); **Dahariya**, para. 17; **Barak-Proportionality**, 398).

(C) The Proportionality Test "in the Narrow Sense"

26. The third test is the **proportionality test "in the narrow sense,"** in which we will examine the presence of a proper relationship between the benefit accruing from the securing of the fit purpose and the damage liable to be caused to the constitutional right (**Barak-Proportionality**, 419). This is the central test of the three secondary tests. It is a value-based test that balances the conflicting values and interests in accordance with their weight. In the aspect of the strength of the injury to the right, the more basic the injured constitutional right, and the more serve the injury thereto, the greater the required derived benefit. In the aspect of the public interest, attention is to be paid to the importance of the interest and to the degree of benefit caused by means of the injury to the human rights. The more important the public interest, the more severe the injury to human rights it may justify (**Adalah**, 331-2). This is a test that focuses on balance – between benefit and damage, between interest and values, between the general good and the rights of the injured individual – all against the background of the totality of values of our legal system (**ibid.**, 332-3). The Court's task of determination in implementing the proportionality test in its narrow sense is not simple. As Justice **Y. Zamir** wrote in **Tzemach**:

> "Proportionality is not measurable. […] There is no instrument or formula that can gauge the strength or weight of the injury accruing from the denial of personal liberty by means of detention for one hour or one day. Neither is there any instrument or formula that can gauge the profit or benefit accruing from the restriction of the injury to personal liberty by shortening the detention by one hour or one day. […] Indeed, human rights and public interests are not like potatoes that can be weighed on the scales against each other, visibly showing which one tips the scales. However, since it is impossible to weigh, we must estimate. In each and every case, we must make an effort to estimate correctly the relative weight to human rights on the one hand, and public interests on the other. […]
>
> […] Even when the estimate remains controversial, a decision is required. The decision must be made by the Court. This is the Court's

> function and authority. This is also the Court's skill. The Court is accustomed, in various contexts, to estimating the relative weight of competing rights and interests on the basis of the infrastructure of facts and considerations placed before it, and thereby reaching the proper balance. This is the case in general, and this is also the case regarding proportionality. There is no other way than the estimate, on the basis of facts and considerations, in order to determine whether a given injury to a given right exceeds the required degree" (HCJ 6055/95 **Tzemach v. Minister of Defense**, Piskei Din 53(5) 241, 273-4 (1999)).

27. As noted at the beginning of the remarks, the proportionality test in the narrow sense is customarily applied in "absolute values," that is by way of a direct comparison between the benefit inherent in the law as against the damage caused to the constitutional right. However, a "relative" examination may also be undertaken of proportionality in the narrow sense. A "relative" examination will consider the means adopted in the law as opposed to another possible means whose benefit is somewhat slighter. The adopted means will be disproportionate "in the narrow sense" if a **modest** reduction in the benefit secured therefrom will ensure a **significant** reduction in the degree of the injury to the constitutional right (HCJ 10202/06 **Beit Suriq Village Council v. Government of Israel**, Piskei Din 58(5) 807, 840 (2005); **Dahariya**, para. 21; **Privatization of Prisons**, para. 24 of the ruling of (then) Justice **M. Naor**). Accordingly, the injurious means selected in the law is to be examined by comparison to possible alternative means causing lesser injury to the human rights, even if these means will not realize the purpose of the law to the same degree. This relative implementation of the proportionality test in the narrow sense interacts with the second secondary proportionality test and with the alternatives selected in the framework thereof. Even an alternative that was found to be unsuitable in the second test, since it fails to realize the purpose of the law to a similar degree to the alternative selected by the legislator, may still secure the main aspects of social benefit while significantly lessening the injury to the constitutional right (for a different approach, see: **Medina & Saban**, 102-7). That is to say, the question of the presence of a proper relationship will be examined by means of a comparison between the marginal benefit and the additional injury (**Barak-Proportionality**, 434-7). To this end, the means adopted in the law may be compared to a preceding arrangement intended to secure a similar purpose. Thus, for example, in examining the constitutionality of the

Nationality and Entry to Israel Law (Temporary Provision), 5763-2003, the Court examined whether the marginal benefit obtained through the new arrangement, as compared to the preceding one, was in proper proportion to the accompanying additional injury to the constitutional right (**Adalah**, 345-6). This yardstick will assist us in the framework of the concrete balance, to which we now turn.

The Benefit Derived from the Amendment

28. One side of the scales carries the marginal benefit yielded by the Amendment. One purpose we have addressed is that of blocking the phenomenon of infiltration, i.e.: preventing the uncontrolled entry of foreign persons to the territory of Israel over the Egyptian border. The state's interest in preventing uncontrolled entry to its territory and in establishing immigration policy is an important and significant one. This is not merely the state's prerogative, but also its obligation toward its citizens and residents. As President **D. Beinisch** notes, this is indeed "a particularly weighty task" imposed on the authorities of state (**Hotline for Migrant Workers**, para. 13). Any state, including the State of Israel, is entitled to determine its immigration policy by itself. Determining and maintaining immigration policy may serve various purposes – national, security, economic, and social. Insofar as "labor migration" is concerned, the state's ability to determine and enforce policy is critical in order to avoid the negative ramifications that will accrue to the local economy and to the employment of local citizens (see para. 114 of the ruling of my colleague **E. Arbel**).

29. As far as the purpose of blocking the phenomenon of unlawful entry to Israel across the Egyptian border is concerned, a question arises regarding the additional benefit secured by means of the arrangement established in the Amendment, relative to the preceding normative situation. As I have noted, the enactment and actual implementation of the Amendment coincided with the completion of the fence along the Israeli-Egyptian border, as well as with the occurrence of geopolitical changes in Egypt in general, and in the Sinai peninsula in particular, that may be credited with an impact on the migration routes to Israel. In this state of affairs, it is difficult to calculate the "additional benefit" yielded by the arrangement enacted in the Amendment **in itself**. In determining benefit, consideration should be given – in

addition to the importance of the purpose – to the degree of probability that the selected means will realize this purpose (**Barak-Proportionality**, 439-40; HCJ **Stamka v. Minister of Interior**, Piskei Din 53(2) 728, 782 (1999)). Accordingly, it is impossible to ignore the uncertainty regarding the marginal benefit of the Amendment in the sphere of blocking the phenomenon of uncontrolled entry from Egypt to Israel. Even if this fact were not sufficient in itself to lead to the disqualification of the arrangement in the framework of the first two secondary tests, it can impinge on the balance examined in the framework of the proportionality test in its narrow sense, which, as noted, is the balance between benefit and damage. I should emphasize that I do not seek to establish my determination regarding the constitutionality of the Amendment solely on the factual doubt that arises regarding its marginal benefit, and I am willing to assume that the Amendment brings a certain marginal benefit in the sphere of blocking the phenomenon of uncontrolled entry to Israel. However, it is impossible to ignore the fact that the Amendment is akin to an additional layer to the fence, which is the principal barrier, and weight must certainly be given to this in the framework of the constitutional balance.

30. Alongside the benefit in the sphere of blocking the phenomenon of infiltration, the additional benefits of the Amendment must also be placed on the scales. These relate to the process of coping with the ramifications of the phenomenon. As my colleague has noted, the phenomenon of uncontrolled immigration from the African countries on the scale seen in recent years has had extensive ramifications for certain areas of Israel in diverse spheres. The presence in Israel of tens of thousands of impoverished immigrants with temporary and unregulated status, who – since the authorities have not arranged other frameworks for their housing – are concentrated in certain neighborhoods that were not prosperous from the outset, has presented the authorities and the local residents with numerous challenges. The public interest in coping with this phenomenon is an important one. For the residents of south Tel Aviv, it is a vital interest. The outpouring of the residents of Tel Aviv about the developments in the neighborhood has been heard loudly and clearly in the framework of these proceedings. This is an outpouring that comes from the heart and enters the heart. It must absolutely not be belittled, and the authorities bear an obligation to act to assist them. In this context, the placement in custody of the

infiltrators constitutes an attempt to cope with the difficulties that accompany their unregulated presence in specific areas of the cities of Israel in general, and in the neighborhoods of south Tel Aviv in particular. However, this is not sufficient. The question before us is whether this benefit is proportional relative to the injury to personal liberty. As I shall explain below, I believe that the answer to this is an emphatic no.

The Damage – Injury to the Constitutional Right and the Scope Thereof

31. The injury to the constitutional right must be weighed on the other side of the scales. As my colleague noted at length, the injury to personal liberty is severe, not to say mortal. In a democratic society this cannot be countenanced. We are speaking here of the deprival of liberty for a protracted period without trial. "Detention by an administrative authority […] is the gravest form of injury to personal liberty" (**Tzemach**, 262). The arrangement established in the Amendment establishes a clear and unequivocal rule: an "infiltrator" against whom a deportation order has been issued under article 30 of the Prevention of Infiltration Law will be held in custody until his deportation. The law does not establish a time limit on the duration of the infiltrator's holding in custody, and establishes that except in special circumstances (such as state of health and other humanitarian reasons), the competent body will be permitted to release an infiltrator only after **three years** have passed since the date of commencement of his holding in custody (article 30a(c)(3)). As my colleague has shown, this means deviates from the basic principles of Israeli law regarding the denial of liberty without trial (paras. 87-90 of my colleague's ruling). I shall add that the fact that the central purpose of placement in custody is to deter others arouses particular difficulty concerning the use of this means (**ibid.**, paras. 85-6). Even if I assume that this difficulty does not disqualify the arrangement at an earlier stage of the constitutional review, it clearly impinges on the strength of its injury to the constitutional right and, as a derivative thereof – on the question of its compliance with the proportionality test.

32. To this I should add that the established rule also deviates from the accepted principles in Israel and around the world regarding the denial of liberty of persons

unlawfully present in the framework of **migration laws**. This applies in two central aspects: firstly, the Amendment establishes a rule concerning the holding in custody of persons unlawfully present for a protracted period in the absence of any effective proceeding for removal. Secondly, the Amendment enables the holding in custody of asylum seekers for a significant period.

(A) The Holding in Custody of Persons Unlawfully Present for a Protracted Period in the Absence of an Effective Proceeding for Removal

33. In the early days of the state, it was already ruled that the validity of detention under a deportation order (in accordance with the Entry to Israel Law as then formulated) is not maintained if no effective proceeding for removal is implemented (HCJ 199/53 **Doe v. Minister of Interior**, Piskei Din 8 242, 247-8 (1953)). In **Saidi**, my colleague Justice **E. Hayut** noted the principles delineated in the rulings of this Court for the exercising of the authority of detention against persons unlawfully present (under the Entry to Israel Law prior to Amendment No. 9):

> "Detention prior to deportation is intended to ensure the effectiveness of the deportation order and is not designed to serve any punitive or deterrent purpose […] In exercising the authority of detention, as in exercising any governmental authority, the status must act in a proportionate manner, in the sense that if the deportation is not effected within a reasonable time, continued detention may be justified only if there is concern that the purpose of detention will not be realized, for example if the deportee flees, or if there is concern that, once released, he will injure public security and well-being. […] The holding of a person intended for deportation need not be in conditions of detention and consideration should be given to forms of holding consistent with the purpose of his holding" (**ibid.**, para. 24; see also: HCJ 1468/90 **Ben Yisrael v. Minister of Interior**, Piskei Din 44(4) 149, 151-2 (1990)).

34. I noted at the beginning of my remarks that the Amendment before us is effectively intended to apply to "infiltrators" who cannot be removed from Israel at the current point in time. I have reached this conclusion on the basis of the background to the enactment of the Amendment, its comparison to the previous normative arrangement, and the manner of its actual implementation. Indeed, the phrasing of the law may show that the placement in custody is ancillary to the goal of

deportation/removal. Article 30(a) of the law establishes that "the [deportation] order will serve as legal authorization to hold the infiltrator in detention **pending his deportation**" [emphasis added – U. V.]. The Arrangement itself completely ignores the question of the presence of an effective removal proceeding. The rule is clear and simple. An "ordinary" infiltrator may only be released after three years have passed since the date of his placement in custody.

35. This difficulty is heightened against the background of an examination of analogous arrangements around the world. The use of detention in the framework of migration laws is considered a permitted means in the countries of the world, and they have enacted legislation empowering the authorities to detain persons unlawfully present. However, this authority is ancillary to and derived from removal. Thus, for example, in the US and Britain the migration laws permitting the detention of persons unlawfully present pending their removal (without specification of a maximum period) have been interpreted as restricting the detention to that period reasonably required for the purpose of removal (**Zadvydas v. Davis** 533 U.S. 678 (2001); **Tan Te Lam v. Superintendent of Tai A. Chau Detention Centre** [1996] UKPC 5). This principle also applies in the European Union countries. Article 15(4) of directive 2008/115/EC on Common Standards and Procedures for Returning Illegal Immigrants (hereinafter: **the Directive**) establishes that "when it appears that a reasonable prospect of removal no longer exists for legal or other considerations […] detention ceases to be justified and the person concerned shall be released immediately." Moreover, even when an effective removal proceeding is maintained, the directive dramatically limits the instances in which the authority of detention is to be exercised, establishing that less coercive measures are to be preferred (article 15(1)). A maximum period of six months is further established for detention (article 15(4)), which may be extended for an additional period of up to one year in cases in which the removal is delayed due to a lack of cooperation on the part of the detainee or a delay in obtaining necessary documents from his country of origin (article 15(6).

36. In the state's claims, the argument was raised that it is engaged in contacts with various countries in order to permit the removal from Israel of Eritreans and Sudanese not entitled to political asylum. How does this argument influence the

constitutional review? Insofar as this involved the practical possibility of the pursuit of removal proceedings at a close date, consistent with the undertakings of the State of Israel in the international sphere and with the provisions of domestic law, it might be possible to view this as a change in the factual infrastructure we have discussed. In the matter before us, this is not the case. As I see it, such a general argument cannot change the determination, even if we assume to the state's credit that it is substantive. As established in our rulings, the law permits holding in custody for a brief period for the purpose of realizing removal proceedings, but "the timetable cannot extend over many months" (**Al-Tai**, 852). It should be emphasized that, in any case, if a situation were involved in which the removal could be seen on the horizon, the arrangement established in the Entry to Israel Law would be sufficient. In this sense, the said fact cannot impinge on the constitutionality of the mechanism established in the Amendment, which is in practice intended to cope with persons who cannot be removed in the foreseeable future.

(B) The Holding in Custody of Asylum Seekers

37. To this we must add an additional difficulty aroused by the arrangement established in the Amendment regarding the holding in custody of asylum seekers. Aware of the difficulty involved in holding asylum seekers in detention during the examination of their application and their legal status, the Amendment indeed establishes additional grounds for release regarding an asylum seeker held in custody. The border inspection supervisor is entitled to release a person if "three months have passed since the date on which the infiltrator submitted an application to receive a visa and a permit for residency in Israel in accordance with the Entry to Israel Law and processing of the application has not yet commenced," and if "nine months have passed since the date on which the infiltrator submitted an application as stated […] and no decision has been granted in the application" (articles 30a(c)(1)-(2) of the law). The time limits established in the law are intended to incentivize the authorities to grant a decision with due speed in individual applications for asylum, and this is to be welcomed. However, this implies that the default is that asylum seekers will be held in custody throughout the process of examining their application. As my friend notes in her ruling, it is doubtful whether such an arrangement is consistent with the

usual standards in international law and in the countries of the enlightened world (see: UN High Commissioner for Refugees **Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention** (2012)).

Interim Summary

38. The injury to the right to personal liberty caused by the means adopted in the arrangement is acute and severe. This involves the denial of liberty by an administrative authority for a period of three years, while release from custody constitutes a narrow and limited exception. The means adopted is not consistent with the basic principles of our system concerning the denial of liberty by an administrative authority. In particular, it deviates substantially from the balance practiced in Israel and in the enlightened world regarding the denial of liberty in the context of migration and refugee laws. Conversely, doubt emerges regarding the presence of the marginal benefit accruing from the Amendment in terms of blocking the phenomenon of infiltration against the background of the presence of the fence; or, at the very least – doubt regarding the strength of this marginal benefit. As for the additional purposes of the Amendment relating to "coping with the ramifications of the phenomenon of infiltration" – regarding there, in my opinion, alternatives exist that maintain a more proper proportion between the benefit and the injury to the right, as will be detailed below.

The Presence of Proportionate Alternatives

39. As my colleague Justice **E. Arbel** notes, an arsenal of means exists that can help secure the purposes mentioned by the state and which are significantly less injurious to personal liberty. The determination that this is a disproportionate means is reinforced against the background of the presence of alternative means that were not adopted and which could secure – albeit not fully – some of the purposes of the Amendment, while causing significantly less injury to the right to personal liberty. As noted, the relative implementation of the proportionality test in its narrow sense requires a comparison to a practical and tangible alternative that can promote the

goals of the law while lessening the injury to the constitutional right. Extending our perspective to the countries of the world, and to the existing arrangements in Israel in other contexts, one might consider additional, less injurious means that could have been adopted in order to cope with the ramifications of the presence of foreign citizens who entered unlawfully and who cannot be removed from Israel at the current time. Some of these means may also reduce the economic incentives that sometimes form the background to unregulated immigration. I should clarify that the list of means that will be reviewed below is not devoid of difficulties. Certain means entail considerable costs and changes in budgetary priorities. But we should not forget that holding in custody also entails substantial financial costs. Other means may help confront one problem while creating or exacerbating another. However, it is important to present all these in the context of our decision, in order to illustrate that additional means exist that have not been adopted, and which should be considered and even tried before taking an injurious means such as that adopted in our case.

40. My colleague reviews some of the possible means in paras. 104-7 of her ruling. Consideration could be given to imposing geographical restrictions on the infiltrators' place of residence in order that not only certain local authorities and their residents would be required to cope with the challenges presented by this phenomenon (see: **Guidelines of the UN High Commissioner regarding Detention and Alternatives Thereto**, appendix A(iii)). Infiltrators can be required to live in open or semi-open residential centers, including proportionate restrictions on freedom of movement (ibid., appendix A(iv)). Consideration can be given to their integration in the job market in a manner consistent with the needs of the economy. A struggle can be waged against the phenomenon of smuggling through domestic law and inter-state cooperation (insofar as possible). The involvement of the welfare authorities among the infiltrator population can be intensified, as can law enforcement efforts in order to improve the sense of personal security of local residents. Efforts in the international arena to enable the absorption in additional countries can be intensified, while adhering to the international standards to which the State of Israel is committed.

41. The manner in which the matter is presented by the state suggests that only two alternatives exist: The implementation of the arrangement established in the

Amendment and the placement in custody of the infiltrators for a protracted period until their removal is possible – if at all; and the second, the continued presence of numerous infiltrators in south Tel Aviv and additional areas of Israel without regulation, supervision or attention. As I see it, this binary presentation creates difficulties, when presented by the state. We have noted the significant challenges posed for the authorities by the phenomenon that is the subject of this hearing, and these are not to be belittled. However, it is impossible not to ask whether the negative ramifications of this phenomenon – as noted at length by the state and the residents of Tel Aviv – have not been amplified due to the fact that the authorities have refrained from adopting other alternatives for regulating the infiltrators' presence and their treatment. Can the state rely on the negative ramifications of the phenomenon of infiltration in recent years by way of justification for the adoption of injurious means when no attempt has been made to cope with these ramifications by alternative and less injurious means? My assumption is that the question mark I raise, together with the outcome of this proceeding, will lead to reconsideration by the competent authorities.

The Relief

42. Having found that the arrangement established in the Amendment fails to meet the constitutional review, the question of relief arises. As is well known, "it is preferable to limit the scope of a law by means of interpretation rather than be required to reach that same limitation by way of the declaration of part of that law as nullified since it contradicts the provision of a Basic Law […] The reasonable interpretation of a law is preferable to a determination regarding its constitutionality" (HCJ 4562/92 **Zandberg v. Israel Broadcasting Authority**, Piskei Din 50(2) 793, 812 (1996)). In my view, it is not possible to offer an interpretation that maintains the law, against the background of the categorical rule established in the Amendment regarding holding in custody for a period of three years even in the absence of an effective procedure for removal. Any attempt to offer a different interpretation will be artificial and, in any case, will render the established arrangement redundant.

43. In the circumstances of the matter, I do not believe that there is any alternative but to declare the nullification of the possibility of activating the custody arrangements established in article 30a of the law. Although no order nisi was granted in the petition before us relating to the provisions of the Amendment in its entirety, the combination of the provisions of the Amendment regarding which an order nisi was given effectively covers the greater portion of the custody arrangement, leaving the remnant of the Amendment as a collection of provisions that has no independent meaning. I should emphasize that in my view the nullification of article 30a(c)(3) of the law alone will not secure the desired result, since this article effectively constitutes grounds permitting the **release** of an infiltrator at the end of three years from the date of his placement in custody. Like my colleague, I do not believe that it is proper to use the "reading in" technique in order to amend the constitutional difficulties raised by the arrangement. This is not our function. This task is given to the legislator. In these circumstances, I have not found it necessary to address the remaining arguments regarding the ancillary arrangements established in the Amendment since in any case, given the nullification of the arrangement in its entirely, it will not be possible to activate these.

44. I agree with my colleague Justice **E. Arbel** that the desirable outcome to be derived from our declaration of the nullification of the Amendment is the application of the arrangement established in the Entry to Israel Law. In light of the mortal injury to the right to human liberty, we have decided that it is not appropriate to suspend the declaration of the nullification of the Amendment. The authorities must examine the cases of the persons held in custody with proper speed, and anyone who may be released is to be released **immediately**. Given the large number of persons held in custody, we have seen fit to establish a period of ninety days for the exhaustion of the administrative proceeding for examining the grounds for release as established in the Entry to Israel Law and the restrictions thereto regarding each of the persons held in custody. However, I should emphasize that this is an upper threshold for the examination of the cases of **all the persons held** and, as noted, any person whose examination has been completed, and regarding whom there is no impediment to release, will be released without delay.

Closing Remarks

45. The challenge the State of Israel has been required and is still required to face, against the background of the unregulated immigration through its borders of tens of thousands of persons from Africa, is a complex one. Our ruling presents the broad fabric relating to the social, economic, and other difficulties this entails. No-one will dispute that the state cannot rest on its laurels and that is must address this complex phenomenon. This is not merely a permissive authority delivered to the state; this is an obligation imposed on it toward its citizens and residents. There are no magic solutions. The focus of our discussion was the constitutionality of the means selected for this purpose. In a democratic society – not all means are proper. The same applies regarding the arrangement whose constitutionality was raised here for our examination. However difficult the task the State of Israel must unwilling face, we must recall these those who have already come within its gates are present here with us. They are entitled to the right to liberty and the right to dignity granted in the Basic Law to all humans per se. Injury to these rights will be possible only for a fit purpose and to a degree not exceeding that necessary. The means selected by the state does not meet this standard and does not pass the constitutional review. The arrangement established in the Amendment, the nullification of which we declare here, mortally and disproportionately injures the right to personal liberty, which is a basic right of any human per se, and does so while deviating from the accepted principles in Israel and the countries of the enlightened world. Accordingly, the custody arrangement established in the Amendment is to be nullified.

Justice

Deputy President M. Naor:

1. I have reviewed the comprehensive opinions of my colleagues Justice **Arbel** and Justice **Vogelman**, and my opinion is as theirs.

2. At the time of enactment of the amendment to the law that is the subject of the petition, on January 9, 2012, the principle was already well-established in our rulings that a person may not be held in detention if it is not possible to deport him within a

certain period of time. The matter was mentioned in my colleagues' rulings, but I wish to emphasize it: As early as the 50s, it was established that the validity of a detention under a deportation order does not continue to apply if no effective removal proceeding is maintained. In HCJ 199/53 **Doe v. Minister of Interior**, Piskei Din 8 243, 247-8 (1953), a person's deportation order was used as a camouflage for his holding in detention for an unlimited period. This was done for a different goal not secured in the usual lawful manner – his interrogation on suspicion of espionage. In that case, Justice **Berenson** established:

> []A deportation and detention order … that ostensibly appears proper in legal terms on the date of its issue becomes improper and loses its validity if, in truth, the detainee is held in detention not for the purpose of deportation but for another purpose, or as and when it is proved that the authorities responsible for executing the deportation are not honestly, efficiently and rapidly taking the necessary steps and means for the execution of the deportation, within a reasonable period of time in the special circumstances of each case, for if we do not so assert, the liberty of persons in Israel is liable to face tangible danger, since, under the camouflage of a deportation order, which is in itself lawful and valid, the authorities will then be able to hold a person endlessly in ostensibly temporary detention pending his deportation, without taking any substantive action in order to execute the deportation or, at least, to attempt to execute it (ibid., 247-8).

Similarly, in HCJ 1468/90 **Ben Yisrael v. Minister of Interior**, Piskei Din 44(4) 149 (1990), it was ruled that the goal of the detention enshrined in article 13(c) of the Entry to Israel Law is to ensure the departure from Israel of a person against whom a deportation order has been issued, pending his deportation. This case involved a person who was unlawfully present in Israel and did not hold citizenship of any country. The United States was willing to absorb the petitioner only if he agreed to his deportation thereto, and the petitioner was not willing to grant this agreement. The petition was accepted. The ruling established:

> The authority of detention in these circumstances is an ancillary authority that seeks to ensure the purpose of the deportation order, viz. the detainee's departure or deportation from Israel. Then detention is not intended to serve a punitive goal… Neither is it intended to serve a coercive goal. Its entire goal is to ensure the presence of a person against whom a deportation order has been issued within reach in order to realize the order, if he does not leave the state voluntarily, and in order to prevent his fleeing the threat of deportation when this deportation is due to be effected.

> […]
>
> Once it has been found that the continued detention of the petitioner does not serve the goal for which his detention was permitted in accordance with article 13(c), there is no longer any justification to continue to hold him in detention… [when] there does not appear to be any possibility of his deportation from Israel on the horizon (ibid., 151-2, emphases mine – M.N.)

HCJ 4702/94 **Al Tai v. Minister of Interior**, Piskei Din 49(3) 843 (1995) addressed the cases of citizens of Iraq who entered Israel unlawfully through Jordan. Deportation orders were issued against the petitioners and they were held in detention for between one and three years. Although it was determined that the respondents had the authority to deport the petitioners from Israel, the state was criticized: Among other aspects, it was established that it should already have completed the examinations regarding the destinations for deportation and the security risk presented by the petitioners. It was clarified that the authority to order the detention and holding of a person against whom a deportation order has been issued – like any governmental authority – is not absolute and must be exercised in order to realize the purpose of the Entry to Israel Law. This purpose is to maintain an ancillary authority to the authority of deportation, **and its purpose is to ensure the effectiveness of the deportation order**. As **President Barak** noted:

> "In exercising the authority of detention and holding, conduct should be proportional (see HCJ 3477/95 Ben-Ataya v. Minister of Education, Culture and Sport [6]). A person against whom a deportation order has been issued is not to be detained for a period longer than that required to realize the underlying purpose of the detention. If the detention is not effected within a reasonable period of time (not measured in years or many months), continued detention may be justified solely by way of concern that the purpose of the deportation will not be realized – whether because the deportee will flee the threat of deportation, or because if released he will injure public security and wellbeing (and, accordingly, will be afraid to report for deportation), or for other reasons" (ibid., 851).

Accordingly, it was determined in the said case that insofar as the deportation is not effected, the respondents must take a decision with due speed concerning the petitioners' continued detention.

Justice **Hayut** reiterated these matters in CA 9656/08 **State of Israel v. Saidi** (December 15, 2011):

> The principles in light of which the authorities of state are to exercise the authority of detention under the Entry to Israel Law and under the Prevention of Infiltration Order were therefore determined in the relevant period for our purpose – prior to Amendment No. 9 to the Entry to Israel Law and the amendments to the Prevention of Infiltration Order – in the rulings of the High Court of Justice. The essence of these principles is that **detention prior to deportation is intended to ensure the effectiveness of the deportation order and is not intended to serve any punitive or deterrent goal, and that in exercising the authority of detention, as in exercising any governmental authority, the state must act proportionately, in the sense that if the deportation is not effected within a reasonable period, continued detention is possible only if there is concern that the purpose of the deportation will not be realized, for example because the deportee will flee, or because when there is concern that when released he will injure public security and well-being**. It was further established that the holding of a person intended for deportation need not be in conditions of detention, and consideration should be given to forms of holding that meet the goal of the holding. Thus, despite the defective arrangement that was established in the Entry to Israel Law prior to Amendment No. 9, the High Court of Justice did not meet the "eternal" detention without limitation of time of persons unlawfully present in Israel (see **Ben Yisrael**, 152), and it established even then that in this context "…it is necessary to balance the needs of public security and wellbeing, on the one hand, and the individual's liberty, on the other, and to select a means whose injury to liberty is in a degree not exceeding that required" (ruling in the First Petition, 851) (para. 26 of Justice Hayut's ruling).

3. In light of the rulings of this Court, the peremptory order is natural. In constitutional terms, as my colleagues have noted, it may be stated that the means adopted – the means of protracted detention – is disproportionate. This means is not consistent with the basic values of our legal system, nor, as my colleagues have shown, with accepted practice around the world. Accordingly, there is an affinity between the strength of the constitutional injury, for our purposes the injury to the right to liberty, and the selection of the proportionate means for coping with this injury. There is no doubt that this is a complex and complicated matter. As my colleagues have shown, it is multifaceted. However, and by way of negation – it cannot be addressed by means of protracted detention.

4. There is no doubt that the state has the right to hold the keys to the door and to determine who will enter its gates (see HCJ 7052/03 **Adalah v. Minister of Interior** (May 14, 2006), in para. 100 of President **Barak**'s ruling; para. 54 of the ruling of Deputy President **Heshin**; para. 3 of the ruling of Justice **Beinisch**; and para. 8 of my ruling). Due to its geopolitical situation, the State of Israel has found itself coping with a very large number of infiltrators, above the relative weight of the state among the freedom-loving countries. The infiltrators are temporary guests, even if for an extended period. The infiltrators are not persons eligible to return to Israel. The state may seek **legal** ways to remove them; ways consistent with the rulings of this Court and accepted practice in international law. As my colleagues have noted, there are many possible ways for coping (see paras. 104-7 of the opinion of my colleague Justice **Arbel**; paras. 40-1 of the opinion of my colleague Justice **Vogelman**). The state may consider converting the existing structure into an open camp residence in which is voluntary; consideration can be given to imposing restrictions on the ability to receive work permits, such as training for different functions, thereby recruiting the infiltrators to meet the needs of the economy; and these comments do not constitute an exhaustive list.

5. The state faces a reality – imposed on it against its wishes – and it must cope with this reality. This coping presents difficulties accompanied by challenges. These challenges require creative solutions. This could be the state's finest hour, whereby in a reality imposed on it, it will manage to find humane solutions consistent not only with international law but also with the Jewish approach. At the same time, it could also be the finest hour of the human rights organizations and of those who admire human rights. My colleague Justice **Arbel** mentioned (in para. 66 of her opinion) possible cooperation between the authorities of state and the human rights organizations. I beg to join these remarks. The human rights organizations could show that in addition to their (justified) action to disqualify a legal provision, they are also capable of constructive activity: recruiting volunteers, guiding and training the infiltrators, and assisting them during their stay here.

Deputy President

<u>Justice Y. Amit</u>:

I concur.

My colleagues Justice **E. Arbel** and Justice **U. Vogelman** have woven an extensive fabric, and accordingly I shall confine myself to some brief comments.

1. After the dust settles and the amendment to the law is removed of its garnishing, one central provision stands alone, as if in its shame. The practical consequence of this provision is that a person may be held in detention for three years without it having been established that he sinned, without his being subjected to criminal prosecution, and without it being possible to remove him to another country. This outcome, which forms the heart of our discussion, constitutes a powerful and disproportionate injury to the right to liberty. This is particularly true when one considers that the factual infrastructure on which the legal provision is based is akin to an equation with two unknowns – is there a causal relationship between the **normative barrier** established in the law and the dramatic decline in the number of infiltrators, or should this rather be attributed to the **physical barrier** in the form of the fence? And are we addressing **migration** or **refugeehood** – labor migrants seeking to improve their economic condition or refugees fleeing for their lives, or persons somewhere on the continuum between these two poles?

This impinges on the second and third secondary tests in the framework of the component of proportionality. Such powerful injury to such an important constitutional, right as liberty demands that the benefit to the opposing public interests be tangible. This brings me to my next comment.

2. The constitutional review and the task of balancing is not undertaken in a vacuum, in some type of legal laboratory in which the concentration of solutions of rights and liberties are weighed, balanced and calculated against the weight and volume of sundry vital interests. During the course of the hearing before us, I asked the Petitioners' representatives whether, from their perspective, there is any importance to the numerical figures, or whether the criticism of the amendment to the

law should be made on the purely normative level. Having not received any reply, I shall state the obvious, that even the right to liberty, like any other basic right, is not absolute. My colleague Justice **Arbel** discussed this in para. 115 of her ruling regarding a situation in which "the worst will come to pass, that infiltrators will continue to flood to the State of Israel in their masses…"

As emerges from the figures before us, as of today, the number of infiltrators who have penetrated Israel in recent years totals some 65,000, close to one percent of the population in Israel (taking into account an unknown number of undocumented persons present in the country). In an ideal world, the enlightened countries would apply the principle of burden sharing and "distribute" among themselves quotas for the absorption of refugees and asylum seekers, with attention to the size and area of the country, the number of its citizens and its economic capabilities. Unfortunately we do not live in an ideal world, but it could be argued that one percent of the population is a number that an enlightened and economically strong country such as the State of Israel can and should bear (although even now Israel is already one of the most overcrowded countries, if not the most overcrowded in the West). I would go still further regarding those asylum seekers who have already reached us, after crossing countries and thousands of kilometers of deserts by uncharted routes, crossing hundreds of kilometers through the Sinai desert, where some of them fell victim to scoundrels who tortured and abused them, raped their women and daughters, and even killed some of their number in bizarre manners, while no-one in the international community speaks out. Having reached our borders, bruised in spirit and body, we should have admitted them and told them "Let a little water be brought, and wash your feet, and rest yourselves under the tree" (**Genesis** 18:4), bound their wounds of body and soul, treated them generously and compassionately regarding work, welfare, health and education. This is how the State of Israel acted in the past toward refugees from Vietnam. Bosnia, and Kosovo.

Such is the situation today, when we are speaking of one percent of the population of Israel, by way of an accomplished fact. But what of the future? What if it were a matter of three percent? Five percent of the population? What is the numerical "red line" that a country can bear without concern of tangible injury to its

sovereignty, its character, its national identity, its cultural and social profile, the structure of its population and its diverse features, and without fear for its resilience and fear of reaching breaking point in terms of congestion, welfare, and the economy, internal security and public order? Naturally, the State of Israel, like any other enlightened country, cannot absorb all the unfortunates, the oppressed and the persecuted throughout the world and in Africa. All this without even taking into account Israel's unique situation as a small country surrounded by a ring of hostility in the region, a country all of whose borders touch on Third World countries in terms of GNP and the average per capita wage; the only democracy that is accessible by land from Africa; and the fact that some of the infiltrators come from hostile countries such as north Sudan. In balancing basic rights with other basic rights, or with vital state interests, therefore, we must be cognizant of the figures, estimates, and forecasts. There are situations in which "quantity means quality" (to quote (then) Justice Barak in the draft of yeshiva students petition – HCJ 910/86 **Rassler v. Minister of Defense**, Piskei Din 42(2) 441, 505, at sign f (1988)). As noted, this is not currently the situation, but given different situations and figures, the outcome in the legal sphere might also change.

3. The State of Israel and Jewish organizations played an active part in drafting the international Convention relating to the Status of Refugees, against the background of the world war and the events of the Holocaust. The State of Israel was one of the first countries to sign and ratify the convention, and with good cause. The story of the MS St. Louis is still scorched in our consciousness like an open wound as a historical lesson and as a byword for refugees seeking asylum who are not wanted anywhere (the ship left German in May 1939 after Kristallnacht with some one thousand Jewish passengers on board; Cuba and the United States refused to allow the ship to enter. The vessel eventually returned to Europe where several countries agreed to absorb the passengers, many of whom – with the exception of those absorbed in Britain – died during the Second World War. The story of the travails of the ship is described in the well-known film "The Voyage of the Damned.")

As noted, for the purpose of the outcome we reached we did not need to examine the question of the status of the infiltrators – whether they are refugees from

bloodshed and war or infiltrators seeking quality of life. As my colleague Justice Vogelman noted (para. 8 of his ruling), the true picture is probably more complex and combines economic incentives and motives, by way of an "added attraction" provided by Israel, which draws infiltrators who are willing to this end to jeopardize their lives by a long journey fraught with dangers. It would seem that the question of status will yet be discussed at a later point, in the framework of the individual decisions to be taken regarding the infiltrators.

Justice

Justice S. Joubran:

1. I have reviewed the thorough and comprehensive opinions of my colleague Justice **E. Arbel** and my colleague Justice **U. Vogelman**. The Prevention of Infiltration Law (Offenses and Jurisdiction) (Amendment No. 3 and Temporary Provision), 5772-2012 permits the holding in custody of infiltrators for three years pending their removal. In practice their removal is not possible, and they are doomed to remain in custody. Release from custody is confined to restricted exceptions. As my colleague stressed, this situation injures the infiltrators' right to liberty – an injury that at the present time cannot be countenanced. Accordingly, the amendment is to be nullified. I would make one comment regarding the manner of examination of the **purpose** of the amendment. As will be clarified below, I believe that during the stage of examining the constitutionality of the purpose, we should, as far as possible, refrain from examining the constitutionality of the means for its realization.

2. The amendment of the law has two purposes. The first is to prevent the settlement of the infiltrators and to address the ramifications of the phenomenon of infiltration. The second, and the relevant one for our purpose, is to block the phenomenon of infiltration. The Respondents emphasized that the essence of this purpose is a "normative obstacle" to existing and potential infiltrators. They argue that this purpose is secured by the mere awareness among potential infiltrators of the legal tools by means of which the state is coping with the phenomenon of "labor immigration" into its territory.

3. My colleague interpreted this purpose as **the deterrence of potential infiltrators** (para. 85 of her opinion). As she sees it, this purpose raises difficulties. In accordance with the norm in case law, my colleague noted that the purpose of the law is fit if it is intended to advance human rights or to secure an important public or social goal that shows sensitivity to the place of human rights within the overall social structure. My colleague further noted that consideration is to be given to the essence of the injured right and the strength of the injury. My colleague believes that the placement of a person in detention is tantamount to his use as a "means" to secure the state's goals. As she see it, this use is improper, and it is doubtful whether this purpose may regarded as fit.

4. Indeed, as my colleague stressed, the placement in detention of an infiltrator in order to deter potential infiltrators causes him, at this time, disproportionate injury, and accordingly is unconstitutional. However, I believe that the examination of the relationship between the injurious means and the purpose should as far as possible be left for the secondary tests of proportionality (cf.: HCJ 7052/03 **Adalah Legal Center for the Rights of the Arab Minority v. Minister of Interior**, Piskei Din 61(2) 202, 320-1 (2006) and the authorities therein; and cf.: Barak **Proportionality in Law – The Injury to the Constitutional Right and Its Restrictions** 297-300, 324, 328, 345 (2010).

5. The role of the fit purpose test is to answer the question as to whether the purpose of the legislation grants sufficient justification for the injury to a constitutional right (HCJ 6427/02 **Movement for Quality Government in Israel v. Knesset**, para. 50 of the ruling of President **A. Barak** (May 11, 2006)). This test considers whether the examined purpose is included in those purposes which in society's view justify injury to constitutional rights. In the case law, the use has become established of two questions for examining the fit nature of a purpose. One question relates to the **characteristics** of the purpose justifying injury to a constitutional right, or in other words – **the type of goals** justifying injury to a constitutional right. The second question relates to the **extent of the need** to realize the purpose (HCJ 52/06 **Al-Aqsa Company for Development of the Assets of the**

Muslim Trust in the Land of Israel Ltd. v. Simon Wiesenthal Center, para. 222 of the ruling of Justice **A. Procaccia** (October 29, 2008)); **Movement for Quality Government**, para. 53; **Adalah**, 319 and the authorities therein; **Proportionality in Law**, 301).

6. These two questions address two aspects – the **content** of the purpose and the **need** therefore. They do not address the extent of the injuriousness of the selected means. It is true that the more important the injured right and the graver the injury, the stronger a public interest will be required to be in order to justify the injury (Justice **Y. Zamir** in HCJ 6055/95 **Tzemach v. Minister of Defense**, Piskei Din 53(5) 273 (1999)). However, this does not mean that injury of a high strength will necessarily negate the constitutionality of the purpose. Attention to the strength of the injury is manifested (as noted, in the second question) in the examination of the extent of the **need** for the purpose. Indeed, in circumstances in which the realization of the purpose injured constitutional rights situated at a high point on the scale of rights, case law has required strict standards regarding the necessity of the injury, such as urgent social need or substantive social interest (see: HCJ 6893,05 **Levy v. Government of Israel**, Piskei Din 59(2) 876, 890 (2005); **Movement for Quality Government**, para. 53 and the authorities therein; **Adalah**, 321).

7. And now to the main point: An examination of the fit purpose without divorcing it from the injurious means for its realization raises difficulties: Firstly, such an examination is liable to stain any purpose with non-constitutionality without its being examined in substance. Secondly, such an examination creates unnecessary duplication. The examination of the relationship between the benefit accruing from the realization of the purpose and the damage caused to the constitutional right is effected in the framework of the third proportionality test (in the narrow sense), where a “direct” comparison is undertaken between damage and benefit. This direct comparison facilitates the task of examining the proportionality of the injury.

8. Conversely, an attempt to estimate the strength of the injury in the stage of the examination of the purpose is liable to impede this delicate task. In the stage of examination of fit purpose, we have not yet found that a rational affinity exists

between the selected means and the purpose. In the absence of such an affinity, our attempt to estimate precisely the strength of the injury will in any case be rendered redundant. In the stage of examining fit purpose, we have not yet attended to the question of the presence of alternative means for securing the purpose in a less injurious manner. Knowledge as to the presence or absence of such means may assist us in estimating the strength of the injury.

9. In addition to the difficulty created due to the absence of these indications, the fit purpose test itself is also laden and complex. An examination of fit purpose requires the "weighting" of several factors – the capacity of the injurious law to advance human rights or secure an important public or social goal; the presence of sensitivity to the place of human rights in the overall social system; and this while attempting to take into consideration both the essence of the injured right and the strength of the injury. It seems that a precise estimate of the strength of the injury in this framework renders our task unnecessarily complex, while the proportionality tests simplify the execution of this task. This is the case whether we compare "relative" values – as Justice **U. Vogelman** holds – or "absolute" values (para. 27 of his opinion). In other words, the examination of a purpose together with the means for its realization unnecessarily brings forward the discussion of the strength of the injury to the stage of examining fit purpose and hampers this stage. Accordingly, I believe, the second purpose (blocking the phenomenon of infiltration) should be examined without granting full weight to the strength of the injury caused by detention to the right to liberty in this stage.

10. Since the amendment does not pass the proportionality tests, I need not determine, in the circumstances of the case, the question as to whether the second purpose – blocking infiltration – is a proper one. I shall confine myself to some brief remarks. The Respondents believe that the awareness of potential infiltrators of the legal tools adopted by the State of Israel in coping with the phenomenon of labor migration influence their decision whether to migrate into its territory. It is reasonable to assume that a normative situation pertaining in a given country may form part of the totality of considerations that may influence the decision by labor migrants to "infiltrate" that country. There does not seem to be any principled impediment to the

use of measures constituting a “normative barrier” to these labor migrants. The desire to shape legislation that does not encourage labor migration is not illegitimate. It does not deviate from the state’s prerogative to determine who will come within its gates, and is consistent with its sovereignty (cf.: my position in **Adalah**, 485; see also the clarification by the Human Rights Committee: Human Rights Committee, General Comment No. 15: **The Position of Aliens under the Covenant**, U.N. doc. HRI/GEN/1/Rev.1 at 18 (April 11, 1986; see also: Liav Orgad & Theodore Ruthizer “Race, Religion and Nationality in Immigration Selection: 120 Years after the Chinese Exclusion Case” 26 **Constitutional Commentary** 237, 242-3 (2010)). Naturally, this is subject to the tests of the limitations clause and to the commitment of the State of Israel under international law. This question becomes more complex with regard to a person entitled to the status of refugee. As noted, in the current circumstances I am not required to examine this question and will confine myself to these remarks.

Justice

Justice Y. Danziger:

I concur with the comprehensive opinions of my colleagues Justice **E. Arbel** and Justice **U. Vogelman** regarding the unconstitutionality of the arrangement established in the Prevention of Infiltration Law (Offenses and Jurisdiction) (Amendment No. 3 and Temporary Provision), 5772-2012 (hereinafter: **the Amendment to the Prevention of Infiltration Law**). I beg to add a few brief remarks of my own.

Both Justice **Arbel** and Justice **Vogelman** noted the differences in the manner in which the Petitioners and the Respondents presented the target population addressed by the Amendment to the Prevention of Infiltration Law. While the Respondents regarded this population as migrant workers who came to Israel for economic reasons, the Petitioners described them as persons seeking political asylum who may be “refugees” as defined in the Convention relating to the Status of Refugees.

Like my colleague Justice **Vogelman**, I, too, believe that the actual picture is probably more complex. It may indeed be assumed that the choice of thousands of subjects of Sudan and Eritrea to come to the State of Israel through a tortuous journey also includes an economic foundation. However, it is impossible to ignore the fact that much of the ambiguity regarding the classification of these "infiltrators" – whether they be unlawful migrant workers or refugees entitled to political asylum – is related to the manner in which the state has processed this population. Over many years, the state has, on the one hand, refrained from examining individual requests for asylum submitted by subjects of Sudan and Eritrea, while at the same time refraining from deporting them to their countries, whether because of the policy of non-refoulement or because of other constraints (as detailed in para. 8 of the opinion of Justice **Vogelman**. See also **Asfu**, mentioned by him, and the comments of Justice **E. Hayut** on this matter).

In these circumstances, in my view, the Respondents should have been more cautious in addressing the complexity of these "infiltrators" and should not have confined themselves to labeling them as persons who are no more than illegal work migrants. This is not merely a rhetorical matter. The more the assumption that the target population of the Amendment to the Law comprises primarily work migrants is undermined, and the more the assumption that they are asylum seekers and possible "refugees" is strengthened, then, for example, the less the potency of the Respondents' argument that the purpose of the law is "to present them with strict immigration laws negating the economic incentive underlying their illegal immigration" (p. 24 of the state's response). Like my colleagues, however, even if I were ready to assume that the Amendment to the Law passes the fit purpose test, despite the problems this entails, it in any case fails to pass the proportionality tests for the reasons detailed in a comprehensive and exhaustive manner in my colleagues' opinions.

Lastly, I would like to address the arguments of the residents of the south Tel Aviv neighborhoods, who spoke passionately of the difficulties and fear that accompany their lives. The distress facing the residents of the neighborhoods is serious, painful and intolerable. Their outpouring echoes in our hearts and their pain is

our pain. However, the solution to the distress of the residents of the neighborhood cannot and should not lie in legislation permitting the holding in custody of thousands of persons – men, women, and children – in incarceration facilities for an unlimited time, without their having been accused of anything and with no foreseeable possibility of their deportation. Moreover, it is doubtful whether the Amendment to the Law as currently implemented – holding in custody of some 2,000 infiltrators out of some 55,000 in total – brings real relief for this distress.

Indeed, no-one disputes the need to take operative steps to address the ramifications of the phenomenon of infiltration, and the sooner the better. Let us not delude ourselves. This is no simple task. Other countries of the world are also coping with a similar problem, and not always with resounding success. But to resort to a means that entails extreme injury to the basic right to liberty of thousands of persons, and whose benefit is doubtful, while at the same time no effort has been made to exhaust less injurious means, is not the solution. On this note I join the comments of my colleague Deputy President **M. Naor** in hoping and aspiring that the state will manage to overcome the challenges it faces by adopting humane solutions consistent with constitutional norms and the rules of international law.

Justice

Justice E. Hayut:

I concur with the comprehensive rulings of my colleagues Justice E. Arbel and Justice U. Vogelman, and with their position that the Prevention of Infiltration Law (Offenses and Jurisdiction) (Amendment No. 3 and Temporary Provision), 5772-2013 (hereinafter: **the Amendment to the Law**) is unconstitutional and is to be nullified. The pertinent considerations and facts for this matter were detailed at length in my colleagues' rulings and there is no need to repeat them. However, I beg to add a few remarks of my own on this sensitive and charged issue.

1. In the preface to their work on a course for immigration policy in Israel, the scholars Shlomo Avineri, Liav Orgad and Amnon Rubinstein remarked that "the State of Israel remains the only Western democracy in the world without an immigration

policy." They noted that this is an improper and undesirable state of affairs that leads to injury to vital interests of the state and to "harassment of foreign persons that shames us as a people and as a state" (Shlomo Avineri, Liav Orgad & Amnon Rubinstein **Coping with Global Migration: A Course for Israeli Migration Policy** 9 (Ruth Gabison, ed., 2009)). The phenomenon of the illegal migrants who have flooded the country in recent years, whose number – according to the figures presented before us – amounts to almost one percent of the total population, illustrates the gravity of Israel's need for migration policy and for a definition of goals, objectives and rules providing the authorities with tools for coping with this situation. The sad reality that has been created illustrates the negative outcomes of the absence of migration policy due to processes which, as described in the work of Avineri, Orgad & Rubinstein, are characterized by "ad hoc decisions, some of which are taken arbitrarily by appointed officials without any guiding hand" (**ibid.**). Thus, for example, there is no clear arrangement in law or even in a procedure on the acute question regarding the right to tens of thousands of infiltrators to work in Israel. The solution the state has found on this matter – as detailed in its response to a petition submitted in this regard – is not to grant these persons work visas, but at the same time not to take enforcement actions regarding the prohibition against the employment of infiltrators (HCJ 6312/10 **Kav LaOved v. Government** (January 16, 2011)); for a critique of this policy, see Yuval Livnat "Refugees, Employers and 'Practical Solutions' in the High Court of Justice: Following HCJ 6312/10 Kav LaOved v. the Government" **Mishpatim Al Atar** C 23 (2011)). Such ad hoc solutions are no substitute for orderly policy, and as I have already noted in one of the cases:

> This is a highly undesirable situation. The normative fog creates uncertainty that is extremely burdensome for the persons themselves, who sometimes remain in Israel for unlimited periods of time on the basis of the said policy. The courts are also obliged, due to this reality, to cope repeatedly with various and diverse questions and situations naturally created by the reality of life regarding the rights of these persons, as the present case shows.
>
> Given the dimensions of the phenomenon, it would be better if the matter received some regulation, if only by means of procedures and instructions, including, among other aspects, attention to the basic rights of these people during their stay in Israel.

> And the sooner the better.
>
> (AAP 8098/11 **Asfu v. Ministry of Interior** (July 17, 2012) (hereinafter: **Asfu**).

2. Now the need for an appropriate and comprehensive normative arrangement has been met by the legislator in a localized move that is problematic and far-reaching, by means of the addition of Amendment No. 3 to the Prevention of Infiltration Law. This amendment is defective in two respects. Firstly, it does not include any response to the complex problems created following the arrival in Israel of tens of thousands of infiltrators and their concentration in large groups in the various cities and locales. In this context, the incarceration of infiltrators who have just arrived, and whose numbers are relatively small, lack any effectiveness. Secondly, and as my colleagues have noted at length, the provisions of the Amendment to the Law and the course for detention it includes significantly increase and amplify the injury to the constitutional right to liberty of persons unlawfully present, and injury of this strength exceeds that required to complete the process for their deportation. In the past, in CA 9656/08 **State of Israel v. Saidi**, para. 26 (December 15, 2011), I noted with regard to detention in accordance with the Entry to Israel Law, 5712-1952 the nature of detention prior to deportation as intended to ensure the effectiveness of the deportation order, and not as detention intended to serve a punitive or deterrent goal, as well as the restrictions accruing therefrom regarding the duration of detention.

3. Lastly, it is worth emphasizing that the conclusion regarding the unconstitutionality of the Amendment to the Law does not mean that the legal situation pertaining prior to its enactment was satisfactory. The opposite is the case. As I noted at the beginning of my remarks, the question of the status of the infiltrators cries out for comprehensive legislative regulation and for long-term reflection capable of meeting, at least partially, the diverse challenges this issue places before Israeli society (regarding possible alternative policy less injurious to constitutional rights, see paras. 104-7 of Justice Arbel's opinion and paras. 39-41 of Justice Vogelman's opinion). In this context, it is not impertinent to reiterate, as noted in **Asfu**, that as the "temporary" policy of non-return adopted by the state toward some of these

infiltrators becomes over the years less and less temporary, the need arises to fill it with normative content.

Justice

Justice N. Hendel:

1. I have read the thorough and comprehensive opinion of my colleague Justice **E. Arbel**, and the complementary and important opinion of my colleague Justice **U. Vogelman**, on whose salient points they have been joined by the remaining members of the panel. I accept that there is a constitutional flaw in a provision establishing an upper threshold of three years for holding in custody, in part since this is a temporary provision, and in the meantime the circumstances have changed. However, my opinion differs regarding the operative outcome, viz. the determination of relief. I believe that the nullification of article 30a(c) of the Infiltration Law alone, relating to release on the grounds of the passage of certain date. should be ordered. I further believe that the nullification should be suspended for 90 days. I shall turn now to discussing the reasons that led me to this outcome.

2. Before discussing the constitutional difficulty aroused by the amendment to the law, I would like to clarify my position regarding the purpose of the law.

According to the state's approach, the amendment to the law is based primarily on two purposes: **Firstly** – to prevent the infiltrators settling in Israel, and **secondly** – to block the phenomenon of infiltration. There is, I believe, no disagreement among the members of the panel that the first purpose is fit in the sense of the limitations clause. This is stated in detail in the opinion of my colleague Justice Arbel, and I shall not expand on this aspect. However, according to the method adopted by my colleague Justice Arbel, the second purpose arouses "considerable difficulties:" It exploits the infiltrators who are already present in Israel in order to deter potential infiltrators. Despite this, my opinion is that this purpose is also fit.

On the more abstract level, the purpose of the law is to shape immigration policy. This policy is under the authority of the sovereign. The latter is entitled to establish, and would even seem to bear an obligation to establish, policy toward persons who wish to enter the gates of its land. The shaping of policy lies at the heart of the prerogative of the elected government and the Israel Knesset. This issue has also been at the heart of public debate for a protracted period. Taking all these into account, the Court should exercise great caution when considering the constitutionality of the law. It is, moreover, my opinion that the determination that the purpose of the amendment to the law, or even of one of its purposes, is not fit has considerable significance: on the public level, the value-based level, and the legal value.

Deterring potential infiltrators is not a self-standing purpose. It constitutes a type of interim purpose on the course to realizing the central purpose of the law. Let us ask ourselves: Why is it necessary to deter potential infiltrators? Why are means to be adopted reducing the scope of infiltration? The answer is that infiltration has considerable ramifications on the fabric of life in Israel, on the job market, and on the channeling of welfare and education budgets. This is true in Israel and in any country. The function of the law we address here is to attempt to navigate these ramifications. In any case, it is a legitimate purpose to reduce the negative ramifications of these phenomena, as established in the past in case law (see para. 84 of the opinion of my colleague Justice Arbel).

In my view, these comments are also pertinent with regard to the principle of deterrence: The deterrence in this instance is intended to prevent in advance the negative ramifications of infiltration on society in Israel. If we accept that preventing the infiltrators from settling in Israel is a fit purpose then, in my opinion, there is no alternative but to conclude that deterring potential infiltrators is also a fit purpose. This is subject to reservations as shall be presented below, principally the duration of the period in which an infiltrator may be held in custody.

It is not possible to ignore the reality created by the amendment to the law. In recent years, tens of thousands of migrants have exploited openings along the border

in order to infiltrate Israeli territory illegally. The flow of infiltrators threatened to become a flood. The phenomenon of infiltration brought without serious results in diverse fields: A deterioration in internal security and in the sense of personal security in various areas; injury to the salary levels and employment of numerous workers; an increase in budgetary expenditure on account of medical, welfare, and education services; and the development of unsupervised markets. This Court dwells among its people; it would seem that the principal, if not the only, victims of massive and sudden illegal immigration are the members of the weaker socioeconomic strata. Freedom of vocation, the ability to make a decent wage, public wellbeing in its broad sense, and the sense of public wellbeing – all these sustained serious injury. This situation was not the outcome of deliberate policy, but the result of the flow of life, and perhaps even of the absence of policy (see para. 1 of the opinion of my colleague Justice **E. Hayut**).

This was reality until recently. This is also the foundation on which the public demand arose to change Israel's immigration policy. Hence the amendment to the law, which sought to address this difficult reality. In these circumstances, is the amendment for a fit purpose? In my view the answer is positive.

To complete the picture, the other side of the coin should also be presented. The State of Israel has signed the 1951 international Convention relating to the Status of Refugees. The year and name of this convention highlight the special sensitivity of the State of Israel to this subject, in part due to the unique recent and distant history of the state and the people. We may also draw on the requirements of Hebrew law for the treatment of an individual by another. Two great rules stand alongside each other: Firstly – the obligation to act mercifully and to take humanitarian action toward any person. Maimonides summarizes the matter as follows (*Laws of Kings*, Chapter 10, Halacha 12): "Even regarding idol worshippers the Sages ordered that we visit their sick and bury their dead with the dead of Israel, and sustain their poor with all the poor of Israel, for reasons of the ways of peace, as it is stated: 'God is good to all and His mercy extends to all His creations," and it is stated: "Its ways are pleasant ways and all its paths are peace" (based on the Talmud in *Gittin* 61a). The second rule is – the recognition that the poor of one's own city take precedence. Here, too, we can be

assisted by the words of Maimonides (*Laws on Gifts for the Poor*, Chapter 7, Halacha 13): “A poor person who is a relative takes precedence over anyone else. The poor of one’s household take precedence over the poor of one’s city. The poor of one’s city take precedence over the poor of another city, as it is said (Deut. 15:11): ‘Open your hand to the poor and needy kinsman in your land’” (based on the Talmud in *Bava Metzia* 71a). These rules, it would seem, also apply to the public. The balance between them is extremely delicate and is influenced by changing reality. It is granted to the legislator and to the elected government, against the background of their general obligation to formulate immigration policy (see also para. 10 of the opinion of my colleague Justice **S. Joubran**).

3. And what if, nevertheless, it were to be asked: Is the above-mentioned consideration of deterrence compatible with the rulings of this Court and with the principles of administrative law? My answer is that a distinction must be made between punitive deterrence and limited administrative deterrence within the confines of shaping immigration policy. In my view, limited administrative deterrence may be legitimate, but punitive deterrence against the infiltrator – in the framework of an administrative proceeding – is not legitimate. I shall clarify by presenting two distinct examples.

The first example comes from the laws of penalization. The theory of punishment is based on the principles of retribution, deterrence, and rehabilitation. That is to say, general deterrence is a legitimate purpose in the framework of the criminal proceeding. It was also recently enshrined in the Penal Law in the framework of Amendment No. 113. The legislator established the ranking of the various purposes, and explicitly recognized the legitimacy of the consideration regarding “public deterrence” (see articles 40b and 40f of the Penal Law, 5737-1977). Public deterrence by means of punishing the individual is not an issue free of difficulties, but it is accepted.

The other example, which may clarify the point from a different angle, is administrative detention for security reasons. It has been ruled that administrative detention “is conditioned on the presence of grounds for detention accruing from the

individual danger posed by the detainee" (HCJ 3239/02 **Marab v. Commander of IDF Forces in the Judea and Samaria Area**, Piskei Din 57(2) 349, 367 (2003)). This suggests that temporary needs may justify administrative detention for security needs while lowering the threshold of proof and relaxing the laws of evidence. However, ostensibly an examination of individual danger is still required as raised by the material. This examination is similar to the proceeding for detention in a criminal court, in the sense that it takes place between the investigative bodies, the defense, and a judicial body. However, as noted, judicial arrangements and the rules of evidence are distinct. Although administrative evidence may be accepted, the character of the proceeding is legal.

Conversely, the holding in custody of infiltrators has the character of an administrative proceeding. The first stages of holding are under the inspection of an administrative body, while the judicial review proceeds along a course including the Custody Review Tribunal and appellant review by the court of administrative affairs. In this context, a distinction is to be made between the legitimacy of holding an infiltrator in custody and the determination of the period for which he is to be held.

The contribution made by the fence, for example, also lies in the fact that over time fewer people will attempt to infiltrate into the state. However, once an infiltrator has entered the state and been apprehended, the authorities are entitled to hold him in custody. His automatic release in any situation not only fails to deter the next attempted infiltration, but actually encourages it. This is a legitimate consideration. The tool of holding in custody is also recognized in other legal systems, as will be clarified. The justifications for this are that the infiltrator entered Israel without permission, in clear violation of the law, and the state is entitled to undertake an examination, for example: whether he is a refugee or a work migrant, and to find a solution therefore. The situation is complex since, on occasions, there are intermediate groups, for example work migrants whose countries are covered by the principle of non-refoulement (on this matter, see para. 8 of the opinion of my colleague Justice Vogelman).

It thus emerges that an infiltrator may be held in lawful custody. This outcome is possible, and in accordance with the amendment to the law it is indeed required. Article 30 a empowers the border inspection supervisor to release an infiltrator on bail and to consider sundry personal circumstances, such as state of health, humanitarian considerations, and status as a minor. However, even in a case in which an infiltrator is held in custody, the extension of the period should not defined by considerations of penalization or deterrence (cf. the opinion of my colleague Justice Hayut in **Saidi**, para. 26). The goal, as noted, is to complete the inspection and to order release or deportation to another country.

4. At this point, the dimension of the duration of holding arises. This is the core of the matter in the current petition: Does the determination that the upper threshold for holding stands at three years, and not at less than this, pass the constitutionality test.

Precisely because of the character of the holding – holding in custody without a criminal proceeding – the Court must, in the framework of the constitutional review, examine the matter through the lens of strict scrutiny, a doctrine familiar from American case law. In our case, this has double significance.

Firstly, there is greater justification for examining the maximum period of holding in the framework of the proportionality test, not only as of the date of enactment of the law but also at the present time. The data presented to us by the state reveal the following picture: The commencement of implementation of the amendment to the law was in July 2012. Since then, there has been a dramatic fall in the number of infiltrators. Thus in the first quarter of 2012, for example, an average of 1,840 persons a month infiltrated Israel. In the second quarter of 2012 – alongside the adoption of the amendment to the law – an average of some 1,340 persons a month infiltrated Israel. In the third quarter of 2012, by contrast, the average monthly number of infiltrators plummeted to 200. The dramatic reduction in the number of infiltrators continued and indeed intensified in 2013: in March 2013, for example, just three infiltrators penetrated Israel.

This decline shouts out by itself. Such figures are significant (see para. 2 of the opinion of my colleague Justice **Y. Amit**). In shaping immigration policy, is it conceivable that the developments in the field would not be significant? Is no legislative or constitutional importance to be attached to the distinction between a situation in which 10 infiltrators a month enter as opposed to a situation in which 10,000 infiltrators a month enter? It derives from this that legislative rules may change, although this also has its limited on the constitutional level. However, for the present, it seems to me that it is possible to agree that a period of three years is not justified. Even counsel for the state, Attorney Gnessin, replied during the hearing that had the situation at the time of the legislation been as it is today, the upper threshold might have been lowered significantly (see p. 27 of the protocol). This has ramifications regarding the constitutional review.

The second meaning of strict scrutiny for our purposes is that no weight should be attached to the state's argument regarding the need to establish protracted custody in order that it may in the meantime be possible to reach an arrangement with a third country. According to this line, protracted holding in custody is intended to promote a humanitarian solution. Even if this is true, the outcome of holding an infiltrator in custody for a period of up to three years renders this matter punitive. Such a protracted period diverts the perspective to the situation of the infiltrator held in custody. In objective terms, there is no alternative but to define this period as punitive. I should add that even if, as the state argues, the length of the period may deter potential infiltrators, such deterrence is improper. Our matter is not the act of holding, but its period. In such protracted holding, concern at the entry of the punitive dimension into the holding is elevated.

3. I shall clarify my position: I am willing to accept that the inclusion of the principal of deterrence in the amendment to the law raises certain difficulties. However, in my view, this cannot in any case render the purposes of the law – preventing settlement and blocking infiltration – improper.

In this context, the question presented for discussion should be recalled: The question is not regarding the **inherent constitutionality** of placing infiltrators in

custody. After all, even if the amendment to the law is nullified in its entirety, as my colleague suggests, the original arrangement in the Entry to Israel Law will return to center stage – an arrangement that also establishes rules for holding in custody. The result is clear: the question before us is not whether the placement of infiltrators in custody is constitutional. After all, even if it is established that the Amendment to the Prevention of Infiltration Law is not constitutional, it will still be possible to hold infiltrators in custody under the Entry to Israel Law. Thus this is not the question, and the discussion should not focus on this point. Neither is the question whether it will be constitutional to establish **mandatory administrative detention** of infiltrators for a period of three years, since the law does not establish such an obligation, but merely an upper threshold. Neither should it be ignored that the threshold of three years does not stand alone, and that – as emerges from the law – it is only expected to be manifested in exceptional situations.

The question before us, therefore, is whether raising the upper threshold for holding in custody, and setting this at three years instead of 60 days, is a constitutional move. According to my approach, the proper framework for examining this question is not in the stage of the examination of purpose, but in the other stages of the constitutional analysis – and, particularly, in the question of proportionality with its three secondary tests. In my view, as explained, subjecting the threshold of three years to the review of the third secondary test of proportionality – the proportionality test in the narrow sense – arouses substantive difficulty. In other words, even if benefit is embodied in the determination of a period of three years, this does not exceed the damage caused to the individual infiltrator and the defect created due to the imposition of such a protracted period.

6. My conclusion is that the central clause we address – the raising of the upper threshold for holding in custody – is to be nullified. The period of three years does not withstand the constitutional review.

Within the framework of this petition, I do not believe that a determination is required on the question as to whether the dramatic fall in the number of infiltrators is due to the enactment of the amendment to the law or to other factors – the

acceleration of the construction of the fence on the Egyptian border, the political changes in the Sinai peninsula, and so forth. This is not the heart of the matter. The emphasis is that the current situation in the field is dramatically different to that which led to the adoption of the amendment to the law, and that a period of three years is extremely long.

To this we must add the fact that the clause we address is defined as a temporary provision whose validity applies through January 18, 2015. The significance is that this is a legal item which, by definition, addressed to a certain situation created on the ground and provided a response of a temporary nature. An examination of the matter through the lens of strict scrutiny shows that this particular reality, as emerges from the date presented to us, no longer exists.

Since there has been a change in the reality for which the temporary provision was intended, the question arises as to why a more moderate upper threshold should not be established. That is to say, instead of establishing the possibility to hold a person in custody for up to three years, it would be determined that he could be held in custody for a shorter period. As noted, the state itself agreed that a situation where over 2,000 infiltrators a month are penetrating the State of Israel (as was the case in the past) cannot be compared to a situation where only a handful of infiltrators are involved (as is the situation today). In the new circumstances that have been created, I believe that a more proportionate means may be sufficient: the establishment of an upper threshold for custody that does not reach or approach a level of three years. It should be clarified that even after establishing a proportionate threshold, I would not reject the determination of another period – which is also subject to constitutional review – as an when the reality changes.

As for the additional sub-clauses in the framework of article 30a(c), although an upper threshold should be established for the examination of an application and receipt of a reply (as the legislator did), these are derived from the maximum period for which an infiltrator may be held. Accordingly, it will be right to also nullify these, viz. the entire article 30a(c).

7. What, then, is the appropriate period of time to serve as an "upper threshold" for holding in custody? From a constitutional standpoint, there is no unequivocal numerical answer to this question. The question is essentially handed to the legislator. It is the legislator who, within the room for constitutional maneuver granted to it, will select the appropriate upper threshold. Without establishing a firm position – I believe that the experience accumulated by various countries that have also been obliged to cope at one stage of another with the phenomenon of extensive infiltration is beneficial. Naturally, to paraphrase Tolstoy, every country that copes with the phenomenon of illegal infiltration does so in its own way. An automatic analogy is not to be deduced. The establishment of a particular period by a certain country cannot negate, restrict or dictate the constitutionality of Israel's immigration policy. However, the comparative examination can provide perspective and enrich the discussion.

In Australia the immigration law establishes that any person unlawfully present in the country, including asylum seekers, children, and even refugees, in certain situations – will be sent immediately to custody (mandatory detention). There is no statutory limitation on holding in custody and no possibility of turning to the court to request relief. Indeed, from the updated figures of the Australian Human Rights Committee (an independent statutory body), it emerges that 15 percent of those held in custody are children. The figures further show than some 85 percent of those held in custody have been held for three months or less, while a further 13 percent have been held for a period of between three months and one year (http://www.humanrights.gov.au/immigration-detention-statistics).

In Italy, the issue of the holding in custody of illegal immigrants was established in the 1998 Migration Law. The law has been updated from time to time and now orders that the initial period of holding in custody of a person illegally present in the country (CIE) is 30 days, and that this may be extended from time to time up to a period of 18 months (Italy Detention Profile, **Global Detention Project** (November 2012)).

In Malta, too, a statutory limit of 18 months applies for the custody of illegal immigrants (Cetta Mainwaring, "Constructing a Crisis: the Role of Immigration Detention in Malta" **18 Popul. Space & Place** 687 (2012)). However, unofficial reports suggest that in practice the period is longer (Malta Detention Profile, **Global Detention Project** (Dec. 2009)).

In the United States, the authority to hold a person unlawfully present in the country in custody – after a deportation order has been issued against him – is enshrined in federal law (8 U.S.C. § 1231(a) (2000)). It is established there that a deportation order will be executed within 90 days; however, if the order was not executed by that date, it will be possible to extend the custody. The Supreme Court has ruled that a personal unlawfully present may be held in custody for a reasonable period as required for the purpose of his deportation outside the borders of the United States. It has also been determined that an assumption applies whereby a period of six months is reasonable; after this period, the person held is to be released on bail, if there is "no significant likelihood of removal in the reasonably foreseeable future" (**Zadvydas v. Davis** 533 U.S. 678 (2001); **Clark v. Martinez** 543 U.S. 371 (2005)). It should be noted that the Supreme Court has not established a final upper threshold for holding in custody, and has refrained from stating that an inadmissible alien is entitled to protection against custody for a period above six months in the presence of the said condition of likely removal. Moreover, the Supreme Court has refrained from stating that if the legislator were to establish a threshold for holding in custody exceeding six months this would not pass the constitutional review test (Jose Javier Rodriguez, "Limited Statutory Construction Required by Constitutional Avoidance Offers Fragile Protection for Inadmissible Immigrants from Indefinite Detention" **40 Harv. Civ. Rights – Civ. Liberties Law Rev.** 505 (2005)).

In practice, a study from 2009 found that in the United States detainees spent an average of 26 days in custody. In greater detail: some 80 percent of detainees were held for less than 90 days, a further 12 percent were held for less than half a year, six percent were held for between half a year and one year, and some two percent were held for more than a year (Donald Kerwin & Serena Yi-Ying Lin, "Immigrant Detention: Can ICE Meets Its Legal Imperatives and Case Management

Responsibilities?" 16 **Migration Policy Inst.** (2009)). Another study from 2010 found that over 50 percent of detainees were held in custody for over 31 days (**Jailed without Justice: Immigration Detention in the USA** Amnesty International (2010)).

As noted, the comparative perspective does not necessarily limit the legislator's discretion (see also paras. 106-7 of the opinion of my colleague Justice Arbel, and para. 35 of the opinion of my colleague Justice Vogelman). Each country has its own unique circumstances and characteristics – such is the general rule, and all the more so regarding the State of Israel. The selection before the legislator is not binary. It should again be recalled that the often-changing relationship between the scope of the phenomenon of infiltration (the problem) and the upper threshold selected for holding in custody (the solution) must be taken into account. It is possible that it may be deduced from the various opinions in this ruling that there is a need to shape a multidimensional solution to the issue of the infiltrators. Over-emphasizing the component of holding in custody is insufficient and unconstitutional. Establishing a broad policy, and continuing to establish such policy, is an actual need.

8. As for the relief, it seems to me that the principal criticism is leveled at the three year threshold. Alongside this provision, the legislator established in the temporary provision legal arrangements for bringing the infiltrator before the border inspection supervisor and defined his authorities. Grounds for release were also established that do not depend on the passage of time. These include a positive dimension and proper balances. This does not mean that it is not possible to criticize various clauses in the provisions of the law. In the framework of this petition, however, my opinion is that the emphasis should be on the salient matter; in any case, according to my approach, it will be possible to examine other aspects of the matter, if necessary, in other petitions. In addition to the legislative effort in 2012, as I noted at the beginning of my remarks, the legislative task regarding the processing of infiltrators is a sensitive one. In my opinion, this Court should exercise caution in performing the task of review, and certainly the task of nullification and its scope.

In light of all the above, and although it is possible to understand the logic behind my colleagues' position that article 30a should be nullified in its entirety, I

believe that the more proper outcome is to focus the relief on the prominent constitutional flaw – the upper limit for holding in custody. Two reasons have led me to this conclusion regarding the nullification of article 30a(c) alone, rather than the nullification of the entire article 30a. The first is that this renders the period of 90 days proposed by my colleagues, and which is also acceptable to me, more practical. In this period, according to my approach, the Amendment to the Infiltration Law will remain in force, with the exception that the legislator will be required to establish a different upper threshold for holding in custody and for the dates derived therefrom in article 30a(c). In my view, three months are a sufficient period to make this limited change. Conversely, the need to examine additional changes in the temporary provision – without there being any independent constitutional reason therefore – may create unnecessary pressure that may not bring any benefit. The second reason relates to the fact that the matter involves a temporary provision enacted in 2012, and which is due to terminate at the beginning of 2015. The proposed limited nullification will enable the continued presence of at least the large part of the operative components of the temporary provision. The advantage this offers is that the period remaining until the expiry of the temporary provision – some 15 months – will give the legislator time to think, to observe the implementation of the temporary provision on the ground, and, accordingly, to determine a proper alternative – perhaps one that will not be in the framework of a temporary provision, or at least will be for a longer period.

9. To conclude, it is my opinion that the nullification of article 30a(c) of the Infiltration Law should be instructed, as detailed above.

Justice

Justice A. Grunis:

1. I attach my opinion to that of my colleague Justice **E. Arbel** and my colleague Justice **U. Vogelman**, to the effect that the Prevention of Infiltration Law (Offenses and Jurisdiction) (Amendment No. 3 and Temporary Provision), 5772-2012, SB 119 (hereinafter – **the Amendment**) contradicts the Basic Law: Human Dignity and Liberty and, accordingly, is to be nullified. The opinions of my colleagues have

extended a broad, comprehensive and thorough canvas. I shall add some brief remarks against this background.

2. In light of the large number of infiltrators who entered Israel across the Egyptian border until 2011, the other branches – the executive and the legislature – clearly bore an obligation to take steps to prevent the massive entry of infiltrators to Israel. Thus, in 2011 an average of some 1,400 persons entered Israel each month (see para. 5 of the ruling of Justice **E. Arbel**). Two steps were taken: the first, the construction of a fence along the border with Egypt; and the second, the adoption of the law. During the course of 2012 a change occurred. The number of infiltrators began to fall. In 2013 the numbers dropped dramatically, to the point that in each of the first months of 2013 fewer than 10 people infiltrated to Israel. In light of the latest figures the question naturally arose as to what had caused this extreme change, the fence or the law (or perhaps additional reasons). If it was indeed the fence that caused the change, what need is there for a law that undoubtedly causes serious injury to the basic right to liberty? Is it the physical barrier that has caused the change, the change in the legal situation, or perhaps both these factors together? It seems to me that we must admit that we do not have a clear answer to the question as whether the fence, the law, or perhaps a combination of the two has caused the change.

3. My colleague Justice **E. Arbel** is of the opinion that, in this case, the law failed in constitutional terms since it does not pass the second secondary test in the proportionality test, viz. the test of the means that is less injurious than the means selected by the legislator. My colleague enumerates various less injurious means which, according to her approach, could have been employed. Thus she mentions electronic means enhancing the efficiency of the fence, alongside a reporting obligation and a requirement for various guarantees, the restriction of the place of residence, presence at night in an open facility, and so forth (paras. 103-4 of her opinion; **M. Naor**, para. 4). I am not able to agree that it is to be determined that the law is nullified since it fails to meet the second secondary test. Firstly, it is worth noting that the less injurious means enumerated by my colleagues (or by some thereof) do not have a uniform character. A distinction should be made between means of a physical character, such as the fence itself, or electronic instruments

enhancing its efficiency, and legal means (I deliberately refrain from using the term normative means, due to the double meaning of the term "normative.") It is an interesting question whether the framework of the second secondary test of proportionality, which examines means that are less injurious to the constitutional right, relates to means selected by the legislator by way of changing the law, or also to physical means that originate in the decision of the executive rather than the legislator. Secondly, and this is the salient point, the legal means mentioned by my colleagues, such as a reporting obligation, restriction of place of residence, accommodation in an open facility, and so forth, in my estimation lack tangible validity in the circumstances of the matter. It is highly doubtful whether such means will significantly promote the purpose of preventing the infiltrators settling in Israel or substantial reduce the social and economic problems with which the citizens and residents of the state must cope due to the presence in Israel of tens of thousands of infiltrators.

4. According to my approach, the defect in the law is due to the fact that it fails to meet the third secondary test of proportionality, viz. what is known as the narrow proportionality test. According to this test, a reasonable relationship is required between the constitutional injury and the advantages secured by the injury. In this case, the injury is clear: holding in custody for a period of three years. The nature of the injury, given the specific facts, amplifies its gravity. I refer to the fact that, at present, some 1,750 persons are being held in custody (out of some 55,000 infiltrators). Most of those held are citizens of Eritrea and Sudan. For various reasons presented by my colleagues, it is not for the present possible to deport them from Israel. Neither is there any reasonable forecast as to when it will be possible to cause their removal from Israel. I am willing to accept that the holding in custody of infiltrators offers several advantages. Thus, when the time comes, and when it is possible to deport them from Israel, the authorities will be able to do so with great ease; for as long as they are in custody, they are not competing in the job market with Israeli workers; they cannot commit offenses that injure the citizens and residents of Israel, and so forth. I am even willing to go further and to assume that the deterrence of potential infiltrators is also an important goal in certain circumstances; and additional advantages may be noted. In any case, even with consideration to the

advantages of holding in custody, it is my opinion, as noted, that the law does not pass the third secondary test. I shall reiterate that, given the existing facts, holding in custody for three years as the law permits is constitutionally improper. Moreover, not only does the law permit holding in custody for three years, but there is an actual intention to hold infiltrators for the duration of the said period. Some of those in custody have already been held for over a year.

5. As noted, the situation today is that fewer than 10 infiltrators cross the Egyptian-Israeli border every month. This compared to some 1,400 persons a month in 2011. We should recall that we do not know whether it is the establishment of the fence that led to the substantial reduction in the number of infiltrators or the enactment of the law, a combination of the two, or perhaps other reasons. The question might be asked as to what will happen if the situation changes, returns to its previous reality, and the number of infiltrators rises dramatically, whether on the Egyptian border or on another of Israel's borders. If, heaven forbid, a substantive change occurs and the phenomenon of the entry of infiltrators in large numbers returns, it will be necessary to reconsider the issue. In other words, a chance in circumstances will justify reconsideration (see also the opinion of my colleague Justice **Y. Amit**, para. 2, and the opinion of Justice **E. Arbel**, para. 93; in addition, see HCJ 910/86 **Rassler v. Minister of Defense**, Piskei Din 42(2) 441, 505 (Justice **A. Barak**) (1988), as well as HCJ 3267/97 **Rubinstein v. Minister of Defense**, Piskei Din 52(5) 481, 529-30 (President **A. Barak**) (1998)). I shall phrase the matter more resolutely: It is my position that our ruling establishing the nullification of article 30a of the law is correct as of its time, and in light of the existing circumstances. A substantive change for the worse in the circumstances will justify the judicial re-examination of the matter, if the Knesset again enacts a similar law. Even in the existing circumstances today there is, according to my approach, no impediment to the enactment of a new law permitting holding in custody for a significantly shorter period than three years.

The President

With the agreement of all nine justices on the panel, it is established that the period of custody of three years, as stated in the Prevention of Infiltration Law, is unconstitutional since it is contrary to the Basic Law: Human Dignity and Liberty.

By a majority of opinion of eight justices, it has been decided to nullify article 30a of the Prevention of Infiltration Law, as stated in the opinion of Justice **E. Arbel**, against the opinion of Justice **N. Hendel**, who is of the opinion that only article 30a(c) of the law should be nullified. It has also been decided that the deportation and custody orders issued under the Prevention of Infiltration Law will be considered to have been granted under articles 13(b) and 13a(c) of the Entry to Israel Law. The grounds for release established in article 13f(a)(4) of the Entry to Israel Law will not apply for a period of 90 days from the date of granting of this ruling – all as detailed in the opinion of Justice **E. Arbel**.

An order exists prohibiting the publication of the name, photograph, or any other identifying detail of any of the litigants in the proceedings before us who is a citizen of north Sudan.

Granted today, 12 Tishrei 5774 (September 16, 2013).

The President	The Deputy President	Justice
Justice	Justice	Justice
Justice	Justice	Justice

Copy subject to editorial and stylistic changes. 12071460_B24.doc HG+AK
Information Center, tel. 077-2703333; website: www.court.gov.il