In the Supreme Court sitting as High Court of Justice

HCJ 8665/14

Before: President M. Naor
Justice S. Joubran
Justice E. Hayut
Justice H. Melcer
Justice Y. Danziger
Justice N. Hendel
Justice U. Vogelman
Justice I. Amit
Justice Z. Zylbertal

Petitioners: 1. Teshome Nega Desta
2. Anwar Suliman Arbab Ismail
3. Hotline for Refugees and Migrants
4. Association for Civil Rights in Israel
5. ASSAF – Aid Organization for Refugees and Asylum Seekers in Israel
6. Worker's Hotline
7. Physicians for Human Rights – Israel
8. African Refugee Development Center

v.

Respondents: 1. Knesset
2. Minister of the Interior
3. Minister of Defence
4. Minister of Public Security

5. Attorney General

Request to join as amici:	1. Eitan - Israeli Immigration Policy Center
	2. Kohelet Policy Forum
	3. Legal Forum for Israel
	4. Concord Research Center for Integration of International Law in Israel
	Objection to granting an order nisi
Date of Hearing:	14 Shevat 5775 (Feb. 3, 2015)

Attorneys for the Petitioners: Adv. Oded Feller; Adv. Anat Ben-Dor; Adv. Asaf Weitzen; Adv. Osnat Cohen Lifshitz; Adv. Aelad Cahana; Adv. Rachel Friedman; Adv. Yonatan Berman

Attorney for Respondent 1: Adv. Gur Bligh

Attorney for Respondents 2-5: Adv. Yochi Gnessin; Adv. Ran Rozenberg; Adv. Moriah Freeman; Adv. Noam Mola

Attorney for Amicus 1: Adv. Guy Tsabari

Attorney for Amicus 2: Adv. Ariel Erlich

Attorney for Amicus 3: Adv. Idan Abuhav

Attorney for Amicus 4: Adv. Avinoam Cohen

Judgment

President M. Naor:

The petition before the Court challenges the constitutionality of Chapter A of the Prevention of Infiltration and Ensuring Departure of Infiltrators from Israel (Legislative Amendments and

Temporary Provisions) Law, 5775-2014 (hereinafter: the Amendment). This chapter amends the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 (hereinafter: the Law), and establishes provisions for the detention of infiltrators for a period of up to three months, and to order that they be held in a residency center for up to twenty months. The Amendment, which passed second and third readings in the Knesset on Dec. 8, 2014, was enacted after this Court held in two previous judgments that certain provisions that had been added to the Law by previous amendments were unconstitutional (HCJ 7146/12 *Adam v. Knesset* (Sept. 16, 2013) (hereinafter: the *Adam* case); HCJ 7385/13 *Eitan - Israeli Immigration Policy Center v. Government* (Sept. 22, 2014) (hereinafter: the *Eitan* case)).

General Background

1. Over the last few years, tens of thousands of people, many of them nationals of African countries, entered Israel without passing through the border control stations. The Law defines these people as "infiltrators" because they did not enter Israel legally. This, as opposed to persons who entered Israel legally but who did not leave on the required date, thus continuing to remain in the country unlawfully.

2. The infiltration phenomenon presents Israel with complex challenges. While it must prevent illegal immigration, the state must also uphold its obligations to protect persecuted persons and ensure that they not face a situation that would threaten their lives or freedom if deported (HCJ 7302/07 *Foreign Workers Hotline v. Minister of Defence*, para. 13 (July 7, 2011) (hereinafter: the *Hotline* case)). In the *Adam* case and the *Eitan* case, we noted that these challenges are not unique to Israel, and that there has been a constant rise in the number of men and women wandering outside their countries for various reasons over the last decades.

3. According to the current data of the Population and Immigration Authority, as of June 30, 2015, a total of 64,309 infiltrators have entered Israel, of whom 45,091 are currently present in the country. Until 2012, infiltration followed an upward trend, which has since reversed. While 17,258 infiltrators entered the country in 2011, only 45 entered in 2013, and 21 in 2014. In the first half of 2015, 39 infiltrators entered the country. In the years 2013-2014, there was an increase in the number of infiltrators *leaving* Israel. Despite the said changes in the scope of the

infiltration phenomenon, the State of Israel must still contend with a large number of infiltrators living in its territory (and see: the *Eitan* case, para. 40 of the opinion of Justice U. Vogelman, further references in this judgment refer to the opinion of Justice Vogelman, unless otherwise noted). Most of the infiltrators currently present in Israel (some 92 percent) are nationals of Eritrea and the Republic of Sudan (hereinafter: North Sudan) (Population and Immigration Authority, Policy Planning Department, Data on Foreigners Policy in Israel – Publication no. 2/2015 (July 2015)).

4. In the previous proceedings, the Court noted that the parties disagree as to the reasons that brought the infiltrators to Israel. That disagreement has also arisen in these proceedings. The State is of the opinion that the overwhelming majority of infiltrators are economic migrants who left their countries in order to improve their situations. Therefore, in addition to the legislative arrangements that are the subject of these proceedings, the Amendment also comprises Chapter B (which is not challenged in this petition), which amends the Foreign Workers Law, 5751-1991, by reference, and imposes various restrictions upon the employment of infiltrators. As opposed to this, the Petitioners are of the opinion that we are concerned with people who fled their countries of origin due to threats to their lives or liberty. The Petitioners note that Eritrea and Sudan – the countries of origin of most of the infiltrators – are countries that have suffered internal instability, and in which there have been crises and wars over the last years (the *Adam* case, para. 6 of the opinion of Justice E. Arbel, further references in this judgment refer to the opinion of Justice Arbel unless otherwise noted; the *Eitan* case, para. 31). Against this background, the Petitioners argue that many of the infiltrators are entitled to refugee status. According to the Petitioners, that status is not limited to a prohibition upon deportation to the country of origin, but grants additional rights in various areas (Convention Relating to the Status of Refugees of 1951, 5 *Kitvei Amana* 3 (opened for signature in 1951), and the Protocol Relating to the Status of Refugees of 1967, 21 *Kitvei Amana* 23 (opened for signature in 1967) (hereinafter referred to jointly as the Refugee Conventions); the *Eitan* case, paras. 32-36).

5. As noted in the previous proceedings, "the true picture as to the identity of the infiltrators is certainly more complex than either side seeks to present. Alongside the economic motive that may be assumed to have driven many of the infiltrators to come to the State of Israel, we cannot casually deny the claims relating to fleeing the dangers that threatened them in their country"

(*ibid*., para. 31). This is also true in the matter before us. In any case, at present Israel does not deport nationals of Eritrea and North Sudan directly to their countries. According to the information presented to us, nationals of North Sudan are not repatriated due to practical problems deriving from the lack of diplomatic relations with that country (for a more detailed discussion of this issue, see *ibid*., paras. 31-32; the *Adam* case, para. 8). As opposed to this, due to the situation in Eritrea, the State has adopted a policy of "temporary non-deportation". This is in accordance with the customary international law principle that a person cannot be removed to a place that presents a danger to his life or liberty (the principle of *non-refoulement*; see, *inter alia*, para. 33 of the Refugee Convention). This Court addressed the non-deportation policy as implemented by Israel at some length in earlier judgments (the *Adam* case, paras. 8-9; AAA 8908/11 *Asafu v. Ministry of the Interior* (July 7, 2012) (hereinafter: the *Asafu* case)). At present, only "temporary non-deportation" is involved, without establishing any associated, specific arrangement treating of its practical implications and the nationality rights of those enjoying it (for a criticism of this normative situation, see *ibid*., the opinion of Justice E. Hayut).

6. To complete the picture, we would note that the said policy does not currently prevent nationals of Eritrea and Sudan from submitting individual requests for recognition as refugees, although the State formerly limited this (see: the *Eitan* case, para 34; the *Asafu* case, para. 18 of the opinion of Justice Vogelman). Until a few years ago, requests for asylum were handled by the U.N. High Commission for Refugees, initially in their entirety and later in cooperation with it (see: AAA 8675/11 *Tedesa v. Unit for Processing Asylum Seekers*, para. 9-11 (May 14, 2012); Sharon Harel, *The Israeli Asylum Mechanism: The Process for transferring the handling of Asylum Requests from the U.N. Commission for Refugees to the State of Israel*, in WHERE LEVINSKY MEETS ASMARA: SOCIAL AND LEGAL ASPECTS OF ISRAELI ASYLUM POLICY 43 (2015) (hereinafter: LEVINSKY MEETS ASMARA) (Hebrew)). Over the last few years, requests for asylum have been referred to the RSD (Refugee Status Determination) (hereinafter: RSD) department of the Population and Immigration Authority, which operates in accordance with the directives of the Ministry of the Interior (see: Ministry of the Interior, "Procedure for Handling Requests for Political Asylum in Israel" (Jan. 2, 2011)).

Previous Proceedings – the Adam and Eitan Cases

7. In view of the difficulty in repatriating most of the infiltrators, the State of Israel had to find alternative solutions. Initially, Israel adopted a policy under which infiltrators who were apprehended were returned to Egypt. However, the implementation of that policy was stopped due to the geopolitical situation in Egypt (the *Hotline* case, paras. 11-12; for other arrangements implemented in the past, see: Yonatan Berman, *Arrest of Refugees and Asylum Seekers in Israel*, in LEVINSKY MEETS ASMARA 147; HCJ 10463/08 *African Refugee Development Center v. Ministry of the Interior* (Aug. 17, 2009); HCJ 5616/09 *African Refugee Development Center v. Ministry of the Interior* (Aug. 26, 2009)). Another policy adopted by Israel was that of detaining infiltrators under the Entry into Israel Law, 5712-19952 (hereinafter: the Entry into Israel Law). However, the infiltrators were released from detention after a relatively brief period, *inter alia*, because the Entry into Israel Law does not generally permit detaining a person or more than sixty days.

8. In light of the increase in infiltrations, the state authorities implemented other means, among them the erection of a physical barrier along the land border with Egypt, and legislation intended to impose special legal arrangements upon infiltrators. These arrangements are more severe than those applying to persons unlawfully present in Israel under the Entry into Israel Law. This policy was first expressed in the Prevention of Infiltration (Offences and Jurisdiction) (Amendment no. 3 and Temporary Order) Law, 5772-2012 (hereinafter: Amendment 3), which added sec. 30A to the Law. The main provision of sec. 30A – enacted as a temporary order – permitted detaining an infiltrator in legal custody for a period of up to three years, subject to grounds for supervised release that were established in the Law. In the *Adam* case, this Court – in an expanded panel of nine justices – held that Amendment 3 was unconstitutional due to its disproportionate violation of the constitutional right to liberty. By majority opinion, we annulled all the arrangements established in sec. 30A of the Law. We further ruled that in light of the annulment of sec. 30A, all the detention and deportation orders under which the infiltrators were detained would be viewed as if they had been issued by virtue of the Entry into Israel Law, and that an immediate, individual review of the cases of all those detained must be undertaken, along with their release, as necessary.

9. Pursuant to the judgment in the *Adam* case, the Knesset enacted the Prevention of Infiltration (Offences and Jurisdiction) (Amendment no. 4 and Temporary Order) Law, 5774-

2013 (hereinafter: Amendment 4). That law – also enacted as a temporary order – reenacted sec. 30A, while shortening the maximum period of detention to one year. It also added Chapter D, which arranged for the establishment of a residency center for infiltrators (hereinafter: residency center), and authorized the Director of Border Control (hereinafter: the Director) to transfer any infiltrator to the center if there was any problem whatsoever in removing him from Israel. Chapter D also established various provisions in regard to the operation of the residency center. *Inter alia*, infiltrators residing in the residency center were required to report three times a day for registration of their presence in the center, and to remain in the center during the night. On Dec. 12, 2013, shortly after the enactment of Amendment 4, the Prevention of Infiltration (Offences and Jurisdiction) (Declaration of a Residency Center for Infiltrators) (Temporary Order), 5774-2013, was published in the Official Gazette. In that order, promulgated by virtue of sec. 32B of the Law, the Minister of Public Security declared the "Holot" installation in the Negev as a residency center for infiltrators under Chapter D of the law. On the following day, the Population and Immigration Authority began transferring infiltrators held in custody to the "Holot" installation.

10. In the *Eitan* case, a majority of this Court held that the aforementioned two pillars of Amendment 4 were unconstitutional and ordered their annulment. The Court held that a person could not be ordered to be held in custody if there was no expectation of his removal from Israel, and *a fortiori* not for a period of one year. Although the State argued that one of the purposes of sec. 30A of the Law was the identification of the infiltrator and exhausting the possibilities for his deportation, it was held that there was a gap between the declared purpose of the Law and its language. It was therefore held that placing infiltrators in detention for an entire year in the absence of any foreseeable expectation of their deportation – and this not a punishment for their conduct, and in view of their inability to do anything to bring about their release – creates a disproportionate violation of their rights. It was further held that the residency center was also unconstitutional. This was first and foremost because no limits were set for the maximum period of custody in the center, nor were any criteria for release established. But it was also due to the specific arrangements that were established, such the obligation to report for registration and the obligation to remain in the center at night. The Court held that Chapter D, as a whole, presented a gloomy picture of an installation that shared many of the characteristics of a detention center,

as opposed to an open or partly open residency facility. The Court therefore overturned both elements of the Law.

11. In place of the arrangement established under sec. 30A, which was annulled, the Court held that the arrangement established under the Entry into Israel Law would be followed. In addition, the declaration as to the annulment of Chapter D of the Law was held in abeyance for ninety days, with the exception of a limited number of provisions regarding which the declaration would enter into force earlier, in accordance with the conditions set forth in the judgment.

The Law challenged by the Petition

12. On Dec. 8, 2014 – about three months after the judgment in the *Eitan* case – the Knesset enacted the amendment that is the subject of these proceedings. It, too, was enacted as a temporary order. The main points of the amendment are as follows: First, sec. 30A of the Law was reenacted, while establishing a three-month maximum for detention. Second, Chapter D of the Law was reenacted to reestablish the residency center and regulate its operation. Like the earlier version of Chapter D, the new arrangement authorizes the Director to require that an infiltrator be present in the residency center. However, the maximum period for remaining in the residency center is limited to twenty months, and special populations – like minors and victims of certain crimes – will not be summoned to the center. As in the past, the infiltrators were required to report in the evening for registration, and were prohibited from leaving the center at night. However, the requirement that they report during the day was rescinded, and grounds for release from the residency center were established. Below, I will address all of the details of the arrangement established under Chapter D. I will already note that according to the explanatory notes, these arrangements were intended to change the scheme of incentives for infiltrators considering entering Israel other than through the border control stations; to permit the authorities to exhaust the identification procedures for infiltrators, as well as deportation procedures; to provide a response to the State of Israel's right to protect its borders and sovereignty; and to prevent infiltrators from continuing to establish themselves in Israeli urban centers (Explanatory Notes to the Prevention of Infiltration and Ensuring Departure of

Infiltrators from Israel (Legislative Amendments and Temporary Provisions) Bill, 5775-2014, Government Bills 904 (hereinafter: the Explanatory Notes)).

The petition before the Court was filed shortly after the enactment of the Amendment.

Developments following the filing of the Petition

13. On Dec. 30, 2014, President A. Grunis issued an order nisi instructing the Respondents to show cause why sec. 30A of Chapter D of the Law, as amended in the Amendment that is the subject of this petition, not be annulled. President Grunis further ordered that the case be heard before an expanded panel of nine justices.

14. Oral arguments were heard on Feb. 3, 2015. In light of questions and arguments raised in the course of the hearing, we ordered that the Respondents submit a supplementary affidavit. The Respondents were asked to present various data in their affidavit, *inter alia*, in regard to the breakdown of the population currently in the Holot residency center; in regard to asylum requests submitted to the RSD; and in regard to asylum seekers who voluntary left Israel in the course of their stay in the residency center or while in detention. I will refer to the supplementary data submitted on Feb. 16, 2015 in due course.

The Petitioners' Presentation and the Main Arguments of the Parties

15. Petitioner 1 is a 34 year old Eritrean citizen. He claims that he served for a number of years in the Eritrean army, and was thereafter imprisoned without trial for over a year. In 2008, Petitioner 1 left Eritrea and infiltrated into Israel. Between the years 2008 and 2013, Petitioner 1 lived in Beer Sheva, Eilat and Tel Aviv, and worked in hotels. In January 2014, the Director ordered him to the Holot residency center, where he remained until the filing of the petition. Petitioner 1 filed a request for asylum that has not yet been decided. Petitioner 2 is a 35 year old citizen of North Sudan, born in the Darfur region. He claims that in the course of his university studies he was politically active in the Sons of Darfur movement, and as a result, was twice imprisoned without trial, beaten and held under inhuman conditions. In 2004, following his release from prison, Petitioner 2 fled from North Sudan to Libya. In 2008, when the Libyan

authorities began to extradite members of the movement to North Africa, Petitioner 2 fled Libya, and on Nov. 17, 2008, infiltrated into Israel. Upon arrival, he was held in custody for five months. Following his release from custody, he lived in Jerusalem and in Tel Aviv, and worked in hotels. In February 2014, Petitioner 2 was ordered to the Holot installation, where he has been since March of that year. According to him, he was ordered to stay in Holot after he refused to leave Israel to a third country. Petitioner 2 also filed a request for asylum that has not yet been decided.

The other petitioners are human rights organizations: The Hotline for Refugees and Migrants; The Association for Civil Rights in Israel; ASSAF – Aid Organization for Refugees and Asylum Seekers in Israel; The Worker's Hotline; Physicians for Human Rights – Israel; and The African Refugee Development Center.

16. The petition challenges both elements of Chapter A of the Amendment. The first arrangement challenged is that of custody by virtue of sec. 30A of the Law. Although the period of custody has been shortened from one year to three months, the Petitioners are of the opinion that the section nevertheless remains unconstitutional. The Petitioners argue that, like Amendment 4, section 30A in its current form permits holding a person in custody even when there is no practical expectation of his removal form the country. Under these circumstances, they argue that this constitutes unlawful arrest.

The second arrangement challenged by the Petitioners is the residency center that, as noted, was established under Chapter D of the Law. According to the Petitioners, Chapter D suffers from a number of constitutional defects that justify the annulling of the entire chapter. Their main argument is that the period of custody in the residency center – although limited to twenty months – is still extremely long in relation to what is accepted in the world, and significantly violates the rights of the infiltrators. The Petitioners are of the opinion that the purposes of Chapter D are also improper. Their primary argument in this regard is that the true purpose of the provisions of Chapter D is to encourage the infiltrators to leave the state "by means of breaking their spirit, deterrence, and separation of populations". This, they argue, is not a proper purpose when deportation of the concerned group is prohibited. In any case, the Petitioners argue, the residency center does not achieve its purpose in view of the fact that after their release from the center, they will return to the urban centers and establish themselves there.

The Petitioners also make numerous arguments in regard to the individual arrangements in Chapter D, and particularly in regard to the arrangement that authorizes the Director to order that an infiltrator staying in the residency center be transferred to detention if he be found to have violated various rules of the residency center.

In light of the above, the Petitioners ask that this Court annul for a third time the provisions of the Law as amended in the Amendment that is the subject of the petition.

17. The Knesset and the State are of the opinion that the petition should be denied. According to them, the purposes of the Law are proper, and the arrangements therein are proportionate. According to the Knesset, there are substantive differences between the arrangement that was overturned in the *Eitan* case and the arrangement enacted to replace it, which is challenged in this petition. The changes introduced by the Knesset in the legislative arrangement – among them a reduction of the maximum period of detention to three months; shortening the maximum period for being held in a residency center to twenty months; limiting the duty of reporting in the residency center; shortening the periods for transfer of an infiltrator from a residency center to detention, and instituting automatic judicial review of such a decision by the detention tribunal – resolved, it is argued, the constitutional defects found in the previous arrangement. Given the margin of legislative appreciation granted to the legislature, the Knesset is of the opinion that, in this petition, an interpretive solution should be preferred to Supreme Court intervention in legislation. This is particularly so in view of the fact that we are concerned with a third constitutional review of the same law, and in view of the fact that the Law touches upon the designing of immigration policy, which is a subject at the core of the State's sovereign authority.

The State argues that although the provisions of Chapter D in regard to a residency center infringe the right to liberty, they do not deny it. It is argued that the changes introduced by the Knesset in this arrangement significantly limit the scope of the infringement, and they pass the criteria of the Limitation Clause. It is similarly argued that the provisions regarding placing a person in detention were enacted for a proper purpose and meet the criteria of proportionality.

Requests to join the Petition

18. Four associations and organizations asked to join the petition as amici curiae. The first, the Kohelet Policy Forum (hereinafter: the Forum), is a public association that acts "for the strengthening of Israeli democracy, the advancement of individual freedom and encouraging the implementation of free-market principles in Israel, and for the establishing of the permanent status of Israel as the nation state of the Jewish nation". According to the Forum, the purposes of the Law – which are the stemming of the infiltration phenomenon and the prevention of future infiltration, along with preventing the permanency of the presence of infiltrators unlawfully present in Israel and ensuring their exit – are proper. It is further argued that in accordance with the accepted Israeli normative structure, domestic law takes precedence over the provisions of international law. The Forum therefore argues that recourse should not be made to the provisions of international law in the framework of constitutional review of the Law.

19. The second association that requested to join the petition as an amicus is the Legal Forum for Israel, which acts "for good governance in general, and in the judiciary in particular, including in the area of the separation of powers and the balances among the three branches of government". In brief, the association argues that the petition should be denied first and foremost in light of the broad margin of discretion granted to the legislature as a substantive element of the principle of separation of powers. It is argued that in the instant case the margin of discretion is particularly broad, given that the primary issue – the period of time that an infiltrator may be held in custody and in a residency center – is "quantitative" in nature.

20. The third association, requesting to join the petition as a respondent or alternatively as an amicus is the Eitan - Israeli Immigration Policy Center, which acts "for the establishing of an orderly immigration policy for Israel". Eitan's main argument is that an examination of the constitutionality of the Law must also address the necessary balance between the rights of the infiltrators and the rights of the residents of the cities in general and those of south Tel Aviv in particular. In Eitan's view, we are concerned with a "vertical balance" in which the interests of Israel's citizens and residents must be shown preference. It is therefore argued that the Law's arrangements are not only proportionate but necessary, inasmuch as there will otherwise be disproportionate harm to the rights of the city residents.

21. The fourth organization requesting to join the petition is the Concord Research Center for Integration of International Law in Israel (hereinafter: the Concord Center). The Concord Center

emphasizes that international law grants states the right and authority to enforce their immigration laws by means of removing aliens unlawfully present in their territory. It further notes that there is nothing wrong in principle with adopting detention as a means for ensuring the enforcement of decisions in regard to deportation and removal. However, it explains that the use of this means is subject to such fundamental principles as necessity, proportionality and reasonableness. According to the Concord Center, the Law's provisions are not consistent with those principles. In its view, the Law lacks a clear connection between the authority to hold a person in custody or in a residency center and the practical possibility to deport a person defined as an infiltrator form Israel. It is argued that, in practice, the absence of such a connection allows for the arbitrary violation of the right to liberty, which is prohibited under international law.

Discussion and Decision

22. As noted, the question before the Court concerns the constitutionality of two arrangements in the Law. The starting point for the constitutional examination is that the Court must act with restraint in reviewing laws enacted by the Knesset, which express the will of the people (see, for example: HCJ 1213/10 *Nir v. Speaker of the Knesset*, para. 27 of the opinion of President D. Beinisch (Feb. 23, 2012) (hereinafter: the *Nir* case); HCJ 1548/07 *Israel Bar Association v. Minister of Public Security*, para. 17 (July 14, 2008)). This is particularly true in this case in which we are concerned with the constitutional review of a law that was overturned by the Court, and reenacted by the Knesset for a third time. In the *Eitan* case, Justice Vogelman noted that examining the constitutionality of a law under such circumstances requires particular care (*ibid*., para. 23). However, that does not mean that the Law is immune to judicial review. I made a similar point in the *Eitan* case:

> …there is a constitutional dialogue between the judiciary and the legislature: the Knesset enacts a law, which it believes meets the constitutional criteria; the Court examines the law under the lens of constitutional review. Occasionally, upon review, the Court arrives at the conclusion that the law, or some part thereof, is unconstitutional. That does not end the dialogue: if necessary, the Knesset legislates anew (see: AHARON BARAK, THE JUDGE IN A DEMOCRACY, 383-384 (2004) (Hebrew), [236-238 (2006) (English)]). However, after the Court has

> determined that a piece of legislation is unconstitutional, the legislature must not reenact it unchanged, or with changes that do not resolve the contradiction of the Basic Laws that the Court pointed out, as such legislation "constitutes a violation of the Basic Laws themselves" (*ibid*., 388) [*ibid*., para. 3 of my opinion].

We are, therefore, required to examine the constitutionality of the said Law yet again. As is well known, constitutional review is not performed in a vacuum. It is performed against the background of the reality with which it was intended to contend (see: the *Adam* case, para. 1 of the opinion of Justice U. Vogelman). As described above, the provisions of the Law that are being challenged in these proceedings comprise means that the State employed as part of an attempt to contend with the infiltration phenomenon. According to the data before us, the magnitude of this phenomenon is in a downward trend. However, inasmuch as the number of infiltrators living in Israel is still large, the need to contend with the challenges that derive therefrom still remains. It is against this background that I will begin my constitutional examination.

23. In principle, constitutional review is performed in stages. First, we must examine whether the law infringes a protected human right. If the answer is negative, then the constitutional examination comes to an end. If the answer is positive, then we must examine whether it is lawful in accordance with the criteria of the Limitation Clause (see, for example: HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance*, IsrSC 63(2) 545, 594 (2009) [http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance] (hereinafter: the *Prison Privatization* case)). These rules are based upon the constitutional view that constitutionally protected human rights are relative, and may be limited where justified.

24. The Limitation Clause establishes four cumulative conditions that a violating law must meet in order for the infringement to be lawful. First, constitutional rights cannot be infringed except by a law that befits the values of the State of Israel as a Jewish and democratic state. Additionally, the law must serve a proper purpose. In brief, a purpose is proper if it is intended to realize important public interests (see, for example: HCJ 6893/05 *Levi v. Government of Israel*, IsrSC 59(2) 876, 889 (2205); HCJ 6784/06 *Major Schlitner v. IDF Director of Pension Payment*, para. 78 of the opinion of Justice A. Procaccia (January 12, 2011); AHARON BARAK, INTERPRETATION IN LAW – CONSTITUTIONAL INTERPRETATION, 525 (1994)). Finally, the

infringement of the right must be proportionate. The proportionality of a statute is tested by means of three subtests. The first subtest is the rational connection test, whereby we must examine whether the statute realizes the purpose for which it was enacted. The means selected must lead to achieving the purpose of the statute in a likelihood that is not remote or merely theoretical (see the *Nir* case, para. 23 of President D. Beinisch's opinion; HCJ 7052/03 *Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of Interior*, IsrSC 61(2) 202, 323 (2006) [http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior] (hereinafter: the *Adalah* case); HCJ 6133/14 *Gurevitz v. Knesset*, para. 54 of the opinion of Deputy President E. Rubinstein (March 26, 2015) (hereinafter: the *Gurevitz* case); AHARON BARAK PROPORTIONALITY IN LAW –CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, 377, 382 (2010) (Hebrew) (hereinafter: BARAK – PROPORTIONALITY). The second subtest – the less restrictive means test – considers whether among the means that may achieve the purpose of the statute, the legislature has chosen the means that least infringe human rights. The legislature is not required to select alternative means that do not achieve the purpose to the same extent or to a similar extent as the means selected (the *Adam* case, para 24; HCJ 3752/10 *Rubinstein v. Knesset*, para. 74 of the opinion of Justice E. Arbel (September 17, 2014)). The third subtest is the proportionality *stricto sensu* test. In the framework of this test, we must examine whether there is a proper relationship between the benefit derived from realizing the purposes of the statute and the attendant infringement of constitutional rights. This is a value-based test that is based upon a balance between rights and interests. It calculates the social importance of the infringed right, the type of the infringement and its extent, against the benefit of the statute (see HCJ 6304/09 *Lahav - Israel Organization of the Self-Employed v. Attorney General*, para. 116 of the opinion of Justice A. Procaccia (September 2, 2010); HCJ 6055/95 *Tzemach v. Minister of Defence*, IsrSC 53(1) 241, 273 (1999) (hereinafter: the *Tzemach* case) [http://versa.cardozo.yu.edu/opinions/tzemach-v-minister-defense]).

If the Court concludes that the statute does not meet the conditions of the Limitation Clause, then it is unconstitutional. In such a case, the Court must determine how to remedy the unconstitutionality (see, for example: HCJ 2334/02 *Shtanger v. Speaker of the Knesset*, IsrSC 58(1) 786, 792, para. 5 of the opinion of President A. Barak (2003)); HCJ 2254/12 *Samuel v. Minister of Finance*, para. 8 of Justice N. Hendel's opinion (May 15, 2014)).

25. I will now turn from general principles to the constitutional review of the Law that is the subject of these proceedings. First I will examine sec. 30A of the Law, by virtue of which infiltrators may be held in detention for three months. I will then examine Chapter D of the Law, which rearranges the operation of the residency center for infiltrators.

Section 30A of the Law – General

26. The point of departure for the examination is sec. 30(a) of the Law, which authorizes the Minister of Defence to issue a deportation order to an infiltrator. The deportation order serves as legal grounds for holding the infiltrator in custody until his deportation, subject to various provisos (also see: the *Eitan* case, para. 4**2**). Section 30A of the Law, which was reviewed in the *Adam* case, allowed for the custody of an infiltrator against whom a deportation order was issued for a maximum period of three years. Section 30A, as worded in Amendment 4, and which was reviewed in the *Eitan* case, established a shorter, one-year maximum period for detention. The section currently under review again shortened the maximum period of custody, setting it at three months. Section 30A states:

> *Bringing before the Director of Border Control and his Authorities (Temporary order) 5774-2013)*
>
> 30(A)(a) An infiltrator located in detention will be brought before the Director of Border Control no later than five days from the beginning of his being taken in custody.
>
> (b) The Director of Border Control may release an infiltrator with a monetary guarantee, with a bank guarantee, or another suitable guarantee, or on conditions that he shall deem appropriate (in this law – guarantee), if he is convinced of one of the following:
>
> > (1) Due to the infiltrator's age or to his physical condition, including his mental health, his being held in custody is likely to harm his health as aforesaid, and there is no other way to prevent the aforesaid harm;

(2) There are other, special humanitarian grounds from those stated in paragraph (1) justifying the release of the infiltrator with a guarantee, including if as a result of his being held in custody, a minor will be left unsupervised;

(3) The infiltrator is a minor who is unaccompanied by his family members or a guardian;

(4) His release will assist in the infiltrator's deportation proceedings;

(5) If 60 days have passed from the date when the infiltrator filed a request for a visa and permit for residence in Israel under the Entry into Israel Law and processing of the request has not yet begun.

(c) The Director of Border Control is authorized to release an infiltrator with guarantee if three months have passed from the beginning of the infiltrator's being held in custody.

(d) Notwithstanding the provisions of subparagraph (b)(2) or (4) or (5), an infiltrator will not be released with guarantee if the Director of Border Control is convinced of the existence of one of the following:

(1) His deportation from Israel is prevented or delayed due to a lack of full cooperation on his part, including in regard to the matter of verifying his identity or arranging the proceedings for his deportation from Israel;

(2) His release would endanger national security, public order or public health. In this regard, the Director of Border Control may rely upon an opinion of the authorized security agencies that activity that may threaten the security of the State of Israel or its citizens is being carried out in the infiltrator's country of origin or the area of his residence, unless the Director of Border Control is convinced that due to his age or his state of health, holding him in custody is likely to harm his health and there is no other way to prevent this aforesaid harm.

(e) His release with guarantee from detention will be contingent on conditions which the Director of Border Control shall determine in order to ensure the appearance of the infiltrator for deportation from Israel on the determined date, or for other proceedings according to law. The Director of Border Control may, at any time, review the guarantee conditions if new facts be discovered or if the circumstances have changed since the decision to release upon guarantee was rendered.

(f) In regard to an infiltrator released from detention with a guarantee according to this section, the decision regarding his release with a guarantee will be deemed a legal credential for his stay in Israel for the period of his release under guarantee. The validity of this decision regarding release upon guarantee is contingent upon meeting the conditions for release as aforesaid.

(g) Where a guarantor requests to cancel the guarantee that he provided, the Director of Border Control may grant the request or reject it, provided that his decision will ensure the reporting of the infiltrator by supplying a different guarantee. If it is not possible to ensure the appearance of the infiltrator by supplying a different guarantee, the infiltrator will be returned to custody.

(h) If an infiltrator is deported from Israel at the time determined, he and his guarantors will be released from their guarantee and the monetary guarantee will be returned, as may be the case.

(i) If the Director of Border Control discovers that the infiltrator released upon guarantee violated or was about to violate one of the conditions of his release upon guarantee, he is may instruct by order that the infiltrator be returned to custody, and he may order the confiscation or realization of the guarantee.

(j) No order will be given to confiscate or realize a guarantee as aforesaid in subsection (i) until after the infiltrator or guarantor, as the case may be, has been given an opportunity to present his arguments, if it is reasonably possible to locate him.

(k) If the Director of Border Control ordered an infiltrator's release upon

guarantee in accordance with this section, and the conditions for granting an order for the infiltrator to stay under section 32D are met, the Director shall issue a residence order staying as stated in that section.

Like the arrangement under Amendment 4 that we reviewed, sec. 30A in its current form regulates the authorities of the Director in all that relates to holding in custody and release from custody. As in the past, the arrangement was enacted in the framework of a temporary order in force for three years, and its incidence is prospective (sec. 8(b) of the Amendment to the Law).

27. As noted, sec. 30A authorizes the Director to hold an infiltrator in custody for a maximum period of three months (sec. 30A(c) of the Law), subject to the grounds for release upon guarantee, among them the age of the infiltrator, his state of health or other humanitarian considerations (sec. 30A(b) of the Law). In addition, if the infiltrator filed an application for an Israeli residency permit and the processing of the request has not yet begun sixty days following its submission, this will constitute additional grounds for release on guarantee. Along with this, sec. 30A permits holding an infiltrator in custody for a longer period if he does not cooperate in his deportation or if his release poses a threat. All of the above applies unless the Director is convinced that due to the individual circumstances of the infiltrator, holding him in custody is likely to harm his health (sec. 30A(d) of the Law). An infiltrator held in custody must be brought before the Detention Review Tribunal (hereinafter: the Tribunal) no later than ten days from the beginning of his being held (sec. 30E(1) of the Law). If the Tribunal approves holding the infiltrator in custody, he will be brought for periodic review of his matter within a period that will not exceed thirty days (sec. 30D of the Law). The Tribunal's decision is subject to appeal before an administrative affairs court (sec. 30F of the Law).

28. These, in brief, are the provisions concerning holding an infiltrator in detention and release therefrom. The main difference between these provisions and those that we examined in the *Eitan* case is the maximum period of time that an infiltrator may be held in detention. While, as noted, Amendment 4 permitted holding an infiltrator for a year, the current arrangement restricts the period of detention to three months. Similarly, the period until the supervised release of an infiltrator whose request for a residency permit has not begun to be processed was reduced from three months to sixty days. In addition, grounds for supervised release based upon the infiltrator's state of mental health were added (sec. 30A(b)(1), and other grounds for supervised

release, which concerned the period of time until the rendering of a decision on the residency request, were cancelled.

29. The Petitioners argue that even in its present form, sec. 30A does not meet the criteria of the Limitation Clause. They argue that this arrangement – like that examined in the *Eitan* case – permits holding an infiltrator in detention without regard for whether there is any effective possibility of his removal. According to the Petitioners, this can be understood from the Knesset's decision not to include an express provision in the Law that an infiltrator be released from detention if, at the conclusion of the identification process, there is no practical possibility of removing him from Israel within a reasonable period of time. They argue that this shows that the purpose of sec. 30A is not to determine the identity of the infiltrators and exhaust the existing avenues for their removal, but rather to deter potential infiltrators. The Petitioners are of the opinion that deterrence is not a proper purpose. They therefore argue that sec. 30A in its present form must also be annulled.

30. In its response, the State argues that sec. 30A was enacted for a proper purpose, and that it does not infringe rights beyond what is necessary. According to the State, the main purpose of the section is the exhausting of procedures for the identification of the infiltrator, and providing the necessary time for establishing avenues for his removal from Israel. In view of this purpose, the State is of the opinion that the three-month period established in the Law is proportionate.

31. In its response, the Knesset joined the position of the State that sec. 30 is constitutional. The Knesset notes that while the section is also premised upon the additional purpose of reducing incentives for potential infiltrators to reach Israel – regarding which the Court expressed doubt as to its constituting a proper purpose – inasmuch as the period of custody is consistent with achieving the purposes of identification and exhausting avenues for removal, it is of the opinion that the present arrangement's infringement of rights does not exceed what is necessary. Finally, the Knesset argues that even though the present arrangement does not expressly include grounds for release in circumstances in which the process of identifying a particular infiltrator and the examination of avenues for his deportation have been exhausted, it would be better to interpret the arrangement in a manner that is consistent with the Basic Laws than to annul it.

After considering the arguments of the parties, I have reached the conclusion that, subject to the interpretation that will be presented below as to the arrangement for custody, the petition should be denied in this regard.

Infringement of Constitutional Rights

32. That sec. 30A infringes the infiltrators' constitutional right to liberty is undisputed. Bearing in mind that in the previous proceedings the Court addressed the importance of the right to liberty at length (the *Adam* case, paras. 71-76; the *Eitan* case, para. 46), I will suffice with a summary. The right to personal liberty is established in sec. 5 of Basic Law: Human Dignity and Liberty, according to which: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise". The right to liberty is granted to every person present in Israel, even if he entered its territory illegally. This right "[…] is one of the foundations of the democratic regime" (the *Eitan* case, para. 46; and see, for example: the *Prison Privatization* case, at pp. 597-598). Holding an infiltrator in detention violates his right to physical liberty, which also has consequences for other rights. Along with the violation of the right to liberty, holding an infiltrator in detention also violates his right to dignity (the *Eitan* case, para. 47). Of course, shortening the period of detention does not, itself, eliminate the said violation of the constitutional rights of the infiltrators.

33. When constitutional rights are violated, we must ascertain whether the infringement is lawful. The first condition – that the infringement is effected by a law – is met. In the present proceedings – as in the previous proceedings – the parties did not expand upon the second condition, which concerns the Law's consistency with the values of the State of Israel. Therefore, I will proceed upon the assumption that this condition is met, and I will turn to the additional criteria of the Limitation Clause – whether the provisions of the infringing law were intended for a proper purpose, and whether the infringement is not greater than necessary.

The Purpose of Detention

34. In its response and in the course of the hearing, the State declared, as noted, that the primary purpose of sec. 30A is "to exhaust the procedures for identifying the infiltrator, and the allowing the necessary time for the State to arrange avenues for voluntary emigration or deportation from Israel" (para. 119). As held in the *Eitan* case, the purpose of removal, itself, is proper. "Who will be permitted to enter the territory of the state is a question of a purely sovereign character. The state enjoys a broad prerogative to decide who will enter its gates, for how long, and under what conditions, in a manner that will permit its proper conduct and the protection of the rights of its citizens and residents" (the *Eitan* case, para. 51). Holding an infiltrator in detention in order to determine his identity and for the purpose of exhausting avenues for his removal from Israel is consistent with the case law, according to which a person cannot be held in detention if it is not possible to deport him within a certain period of time. Indeed, "[…] the validity of an arrest by virtue of a deportation order does not persist in the absence of an effective removal proceeding" (the *Adam* case, para. 2 of my opinion; and see: HCJ 4702/94 *Al Tai v. Minister of the Interior*, IsrSC 49(3) 843, 851 (1995) (hereinafter: the *Al Tai* case)). This Court reiterated this rule in the *Eitan* case:

> This is the rule that has been established in our case law and there is no other: holding a person in detention requires that there be an effective removal process. In order to deny a person's liberty for the purpose of his removal, a general declaration that the state intends to do so is not sufficient. What is required is consistent activity whose purpose is to achieve an avenue for deportation in due course (para. 199).

It is therefore possible to hold infiltrators in detention if that is necessary in order to identify them and exhaust the avenues for their removal (and see: GUY GOODWIN-GILL AND JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 462 (3rd ed.) (Oxford University Press, 2009) (hereinafter: GOODWIN-GILL AND MCADAM, REFUGEE)).

35. *Another* underlying purpose of the detention arrangement concerns creating a "normative barrier…that will reduce the motivation of potential infiltrators to reach Israel" (Explanatory Notes, p. 424). The meaning of this purpose is general deterrence (the *Eitan* case, para. 52). I referred to the purpose of deterrence in the *Eitan* case, noting that "general deterrence, *in and of itself*, is not a legitimate purpose" (*ibid*., para. 2 of my opinion, emphasis original). Nevertheless,

there is nothing wrong with a purpose of deterrence when it is attendant to another legitimate purpose. As held in HCJ 7015/02 *Ajuri v. IDF Commander in the West Bank*, IsrSC 56(6) 352, 374 (20020 [http://versa.cardozo.yu.edu/opinions/ajuri-v-idf-commander-west-bank]:

> The military commander may not, therefore, adopt a measure of assigned residence merely as a deterrent to others. Notwithstanding, when assigning a place of residence is justified because a person is dangerous, and the question is merely whether to exercise this authority, there is no defect in the military commander's taking into account considerations of deterring others [para. 27].

While this was stated in a different context, it is nevertheless appropriate to the matter before us. It was similarly held in the *Eitan* case that "there is nothing wrong with the fact that detention of an infiltrator, intended to advance the process of his deportation, has an accompanying deterrent effect…however, that should not be understood as meaning that an infiltrator can be held in detention *for the purpose* of deterring others even after his identity has been established, and even after it is found that there is no effective possibility of removing him from the country" (para. 52; and compare the opinion of Justice I. Amit, *ibid*.).

36. Bearing in mind that sec. 30A is grounded upon two purposes, we must consider the relationship between them and focus upon the dominant of the two (the *Adalah* case, p. 319). Indeed, "[…] Knesset legislation may have more than one purpose. Our case law has previously held that that in a situation in which a law has several intertwined purposes, great weight will be given to its dominant purpose, and it will be the focus of the judicial review. Nevertheless, the other, secondary purposes of the law should not be ignored, and their consequences for human rights will also be examined" (HCJ 4769/95 *Menachem v. Minister of Transportation*, IsrSC 57(1) 235, 264 and the citations there (2002)).

37. What, then, is the dominant purpose of sec. 30A? An examination of the legislative history of this section shows that the primary purpose is the identification of the infiltrator and the exhausting of avenues for his removal from Israel, while deterrence is at most a secondary, attendant purpose. Thus, the purpose of identification and exhausting avenues of removal is granted a central place in the Explanatory Notes to sec. 30A:

> Establishing a three-month period of detention […] is necessary, *inter alia, in order to exhaust the procedures for identifying and deporting the infiltrator, among them identifying his place of origin, arranging travel documents for him, and exhausting avenues for his emigration or removal from Israel* (Explanatory Notes, p. 425; emphasis added – M.N.).

The importance of this purpose can also be seen in the statement by the Minister of the Interior in the course of the deliberations of the Internal Affairs and Environment Committee on the bill:

> I think that the framework that we are presenting today, of 3 months of detention, we will argue here about what that means. With all due respect, the Knesset can define what it sees as the efficacy of the procedure for examining the removal. I don't know that the Even-Shoshan Dictionary, Mr. Knesset Legal Advisor, precisely defines what is the efficacy of the examination of the removal […] we are very interested that the procedure be effective. We need time. It is very difficult when legal advisors define for us unscientific formulas for what constitutes the time for the effectiveness of a removal procedure. I thought that three months would not necessarily be enough for us (Protocol of Session No. 428 of the Internal Affairs and Environment Committee of the 19th Knesset, p. 7 (Dec. 2, 2014)).

The Knesset also argued in its response that in examining the constitutionality of sec. 30A of the Law, it is sufficient to focus upon the purpose of identification and removal (para. 88). According to its approach, the need for a process of identification of infiltrators and the exhausting of avenues for their removal from Israel is therefore at the base of sec. 30A of the Law in its current language. In the hearing before us, the State also emphasized that according to its approach, this is the primary purpose of this arrangement.

38. Locating the dominant purpose does not suffice with an examination of the legislative history of the law. The question whether a particular purpose is the dominant purpose of the law is also examined in light of the specific arrangements that it establishes (compare: the *Adalah* case, pp. 336-339). Can the primary purpose of sec. 30A be discerned from its arrangements? According to the Petitioners, the current Law – like the arrangement that we reviewed in the *Eitan* and *Adam* cases – does not make holding an infiltrator in custody contingent upon

identification or removal proceedings. They argue that in the absence of a clear connection in the Law between detention and the reasonable possibility of removal, "the real purpose of this section [sec. 30A – M.N.]" is the improper purpose of deterrence. As opposed to this, the Respondents *first* argued in the context of this petition that the present arrangement can be interpreted in a manner that establishes a clear relationship between holding in custody and the identification of the infiltrator and the existence of an effective removal process. After considering the parties' arguments, I am of the opinion that in view of the present legislative framework, we should accept the position of the Respondents.

39. There is no dispute that there is a facial connection between holding the infiltrator in detention and the purpose of his identification and the exhaustion of avenues for his removal from Israel. We addressed this in the *Eitan* case:

> No one disputes that holding an infiltrator in detention facilitates the possibility of his identification in an orderly, controlled procedure, which is a matter of great importance against the background of the special characteristics of the infiltrator population which did not enter by means of regular border crossings and official identity documents. It is also clear that detention aids in carrying out the procedures for deportation from Israel, in that it ensures that the person will not "disappear", and it saves the possible pursuant problems of locating him (and compare: sec. 13F(a)(2) of the Entry into Israel Law) [*ibid*., para. 54].

Moreover, I believe that there are grounds for stating that under the present Law, holding a person in detention is subject to this purpose. The starting point is in the provision of sec. 30(a) of the Law, which empowers the Minister of Defence to order in writing that an infiltrator be deported, and establishes that a deportation order will serve as legal grounds for holding him in detention until his deportation. Authority to hold an infiltrator in detention is therefore contingent upon the existence of a deportation order. Similar authority – permitting the holding of a person who is not lawfully present in the country in detention, subject to the issuance of a deportation order – can also be found in the Entry into Israel Law. The time periods for detention are similar in the two laws (three months in the present Law and sixty days in the Entry into Israel Law). I accept the view of the Respondents that the difference in the time periods stems from the complexity of the process of ascertaining the identity of infiltrators who, as opposed to others

unlawfully present in the country, did not enter through a border control station. Often, infiltrators carry no identification papers, and significant factual disputes arise as to their country of origin (see, for example: AAA 6694/13 *Gidai v. Ministry of the Interior – State of Israel* (Feb. 15, 2015); AP 37598-06-10 (Central District) *Gebremaiam v. Ministry of the Interior* (July 6, 2010)). In view of the arrest's contingency upon the issuance of a *deportation order*, the case law has construed the arrest authority in the Entry into Israel Law as auxiliary to the deportation authority, the purpose of which is to ensure that the detainee will leave Israel (see: HCJ 1468/90 *Ben Yisrael v. Minister of the Interior*, IsrSC 44(4) 149, 151-152 (1990) (hereinafter: the *Ben Yisrael* case); LAA 696/06 *Elkanov v. Detention Review Tribunal*, para. 16 (Dec. 18, 2006)). This is so even though this Law does not comprise an express provision connecting the person's arrest to the possibility of his deportation. In view of the similarity of the arrangement under review and that established under the Entry into Israel Law, I believe that we can apply that rule to this case by analogy. My conclusion is further supported by the provisions of secs. 30D and 30E of the present Law, which make holding an infiltrator in detention subject to periodic review within no more than thirty days. The requirement of periodic review of the detained person helps ensure that there are still grounds for holding him in detention, and supports the conclusion that the detention is intended to aid in the process of the infiltrator's deportation. Deterrence is but ancillary thereto (see and compare: the *Eitan* case, para. 199).

40. The said provisions were also included in the arrangement that was presented for our review in the *Eitan* case. Nonetheless, the *Eitan* case held that there was a gap between the arrangement under sec. 30A of the Law and the declared purpose of detention – identifying the infiltrator and arranging avenues for his exit from Israel. That finding was based upon the absence of relevant arrangements such as an express provision conditioning the continued detention of an infiltrator upon the existence of "a prospect of removal that is expected to be realized within a reasonable time" (the *Eitan* case, paras. 55, 199; and see the *Adam* case, para. 34 of the opinion of Justice U. Vogelman). The legislative arrangement now before us also lacks an express provision that makes detention of an infiltrator contingent upon the existence of a possibility of his removal. However, I believe that the shortening of the period of detention now – as opposed to in the *Eitan* case – makes it possible to construe the Law in the manner proposed by the Knesset. In the *Eitan* case, Justice U. Vogelman was willing to assume that an interpretive path could be adopted, but he did not see "how, in this matter, confronted by a legislative

provision establishing a one-year period for detention…it is possible to refrain from invalidating it" (para. 202). He further held that "a section of the law that authorizes a person to hold someone in detention for an *extended period* for the purpose of his deportation (*as opposed to the limited timeframe of the Entry into Israel Law*) must express the connection between the removal process and the detention" (para. 199, emphasis added – M.N.). As opposed to the arrangement under review in the *Eitan* case, the new timeframe for detention is similar to the timeframe under the Entry into Israel Law. The period is also not exceptional in comparison to those found in other countries for the purpose of identifying the infiltrator and exhausting avenues for deportation. Most western countries limit the period for detaining illegal aliens awaiting deportation to a period of a few months. In the absence of special circumstances, the accepted time periods average between one and six months (for details: see the *Eitan* case, paras. 73-77; for an up-to-date survey of the average period of detention for illegal aliens in Europe, see: THE USE OF DETENTION AND ALTERNATIVES TO DETENTION IN THE CONTEXT OF IMMIGRATION POLICIES, SYNTHESIS REPORT FOR THE EMN FOCUSED STUDY (2014)). A maximum period of three months does not, therefore, deviate from what is acceptable in most countries in which the purpose of detention is similar to the declared purpose in the matter before us (compare: the *Eitan* case, para. 72).

41. In view of all the above, my conclusion is that the provisions of the current Law – like the provisions of the Entry into Israel Law – can be understood as intended for the identification of the infiltrator and for exhausting avenues for his removal from Israel. Therefore, if it is found that the continued detention of an infiltrator cannot serve the purpose of identification and removal, then there will be no justification for his continued detention. That will be the case even if three months have not passed since the beginning of his detention, for otherwise it would be possible to hold a person under arrest arbitrarily. Such a result would not be consistent with the fundamental principles of our legal regime. We ruled similarly in regard to the Entry into Israel Law:

> From an examination of this section [sec. 13 of the Entry into Israel Law as then worded – M.N.] it is manifest that the purpose of the detention mentioned in subpara. (3) of the section [establishing that a person in regard to whom a deportation order has been issued may be detained until he leaves Israel or is

> deported – M.N.] is to ensure the exit of a person against whom a deportation order from Israel has been issued, or until his deportation therefrom…the sole source of authority for the detention of the Petitioner, according to the Respondents before us, is the provision of sec. 13(c) of the law. *Having found that the continued detention of the Petitioner cannot serve the purpose for which it was permitted under sec. 13(c), there is no further justification for holding him under detention*. (The *Ben Yisrael* case, at pp. 151-152, emphasis added – M.N.).

In that case, the Court held that it is possible to continue to detain an illegal alien as long as the detention is intended to serve the purpose for which it was originally instituted. That holding – based upon the purpose grounding the detention authority – was made despite the fact that the Entry into Israel Law does not comprise a relevant cause for release from detention (CA 9656/08 *State of Israel v. Saidi*, para. 26 (Dec. 15, 2011); and see: the *Al Tai* case, at p. 851; HCJ 199/53 *A. v. Minister of the Interior*, IsrSC 8 243, 247 (1954)). This is appropriate here, as well.

42. In addition, the choice of this interpretive possibility is consistent with one of the principles of our constitutional law according to which – to the extent *possible* – an interpretation that realizes the law is preferable to its voidance (see, for example: HCJ 5462/92 *Zandberg v. Broadcasting Authority*, IsrSC 50(2) 793, 808, 812 (1996) (hereinafter: the *Zandberg* case); HCJ 9098/01 *Ganis v. Ministry of Building and Housing*, IsrSC 49(4) 241, 257-258, 276 (2004) [http://versa.cardozo.yu.edu/opinions/ganis-v-ministry-building-and-housing]; CA 6659/06 *A. v. State of Israel*, para. 8 (June 11, 2008)). It is also consistent with the principle *cessante ratione legis cessat ipse lex* – the rationale of a legal rule no longer being applicable, that rule itself no longer applies (*Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (hereinafter: the *Zadvydas* case)).

43. This approach is not unique to our system. The courts of other countries have also adopted a narrow construction of the authority to detain asylum seekers and illegal aliens. The most salient example – noted in both the *Adam* and *Eitan* cases – is the United States Supreme Court's decision in the *Zadvydas* case. That case addressed the constitutionality of and American legal arrangement that permitted the detention of an illegal alien *beyond* the "regular" ninety-day period established by law in cases in which, for some reason, he was not deported. Inasmuch as the period of detention was not delimited, it appeared that detention could be indefinite. The Supreme Court (*per* Justice Breyer) interpreted the authority in accordance with its purpose –

ensuring deportation – and held that a person could be detained only for the period of time necessary for his deportation, and only if there is an effective means for his removal (*ibid*., p. 699-700). Therefore, as a rule, supervised release of the alien should be ordered at the end of that period (*ibid*., p. 701). A similar ruling was made by the Australian Supreme Court (*Plaintiff S4-2014 v. Minister for Immigration and Border Protection*, paras. 21-35 [2014] HCA 34).

44. The interpretive conclusion that I presented above is also consistent with the provisions of international law. Under secs. 9, 26 and 31 of the Refugee Convention, a state may – subject to demands of necessity and proportionality – impose restrictions upon the freedom of movement of asylum seekers (and see: THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL (Andreas Zimmerman, ed., 2011) 1243, 1268 (hereinafter: COMMENTARY TO THE REFUGEES CONVENTION); *R. v. Uxbridge Magistrates Court & Another Ex Parte Adimi* [1999] EWHC 765, para. 26; GOODWIN-GILL AND MCADAM, REFUGEES, at 522; The UN Refugee Agency [UNHCR], *Alternatives to Detention of Asylum Seekers and Refugees*, April 2006, POLAS/2006/03, at 6, para. 18 (hereinafter: UNCHR, *Alternatives to Detention*)). Although these sections treat of restrictions upon freedom of movement, according to the accepted interpretation they also apply to the *detention* of persons who unlawfully entered the state in order to file an asylum application (see, for example: JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 414-418 (Cambridge University Press, 2005) (hereinafter: HATHAWAY)).

45. The restriction of the movement of asylum seekers is permitted for achieving lawful purposes under international law (COMMENTARY TO THE REFUGEES CONVENTION, p. 1270). Among such lawful purposes, the directives of the UN Commission for Refugees mention, *inter alia*, preserving public order, including the sense of identifying an unlawfully present person; protecting public health; and protecting national security (The UN Refugee Agency [UNHCR], DETENTION GUIDELINES: GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION 15-19 (2012) available at http://www.unhcr.org/505b10ee9.html (hereinafter: the DIRECTIVES); and see: the *Adam* case, para. 92). The DIRECTIVES also note that a person may be held in detention in order to ensure his deportation when there is such a possibility, and that detention solely for general deterrence or as punishment is improper (*ibid*., p 19). In addition, the state is required to evaluate

the need for detention on the basis of the individual circumstances of the particular infiltrator, and must not use this means in a sweeping manner (*ibid.*, p. 15; and see: International Law Commission, Draft Articles on the Expulsion of Aliens, art. 19 (2004), http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_12_2014.pdf).

46. Lastly, the interpretive conclusion in this matter is reinforced in view of the position of the State. In the oral hearing before the Court, the State declared, *expressly for the first time*, that despite the absence of a provision conditioning the continued detention of an infiltrator upon identification and removal proceedings, it recognizes that the detention authority is *subject* to a reasonable expectation of removal (Protocol of the Hearing of Feb. 3, 2015, pp. 4-5). This being the case as long as the infiltrator whose matter is being addressed cooperates in the proceedings for his removal from Israel (in this regard, see: sec. 30A(d) above, which permits the continued detention of an infiltrator if he does not cooperate in the proceedings for his deportation from Israel). This declaration by the State is of no insignificant weight in the matter before us.

47. The Petitioners referred us to the position expressed by the Knesset legal adviser in response to the bill, that it would be appropriate to create a *written* connection between the detention period and its purpose (Opinion of the Legal Adviser to the Knesset; and see: Position of the legal adviser to the Internal Affairs and Environment Committee, as expressed in the committee's deliberations on the bill (Protocol of Session No. 429 of the Internal Affairs and Environment Committee of the 19th Knesset, at pp. 9-10 (Dec. 2, 2014)). The Petitioners complained that no express provision was ultimately included to establish that an infiltrator must be released if there was no reasonable expectation of his removal. I have considered this argument, but I see no reason to change my conclusion in the matter. Although including an express connection between detention and removal procedures would be desirable, my conclusion is, as aforesaid, that the present arrangement allows us to arrive at the same result through interpretation of the statute.

48. To summarize, I am of the opinion that viewing the matter in its entirety – the purpose of the Law, the shortening of the maximum period of detention, and the declarations of the Respondents – it is possible to interpret the Law in a manner that establishes the missing connection. I am aware that this interpretive result differs from our decisions in previous proceedings. However, adopting this interpretive approach – which is reasonable and possible in

the present case – was not possible in regard to the arrangement reviewed in the *Eitan* case (see, *ibid*., para. 200-201; and see: the *Zandberg* case, p. 813). This is so because the previous maximum detention period was not consistent with the declared purpose of the Law. Had this interpretation been applied in the *Eitan* case, it would have allowed a person to be held in detention for an unreasonably long period. As a result, Justice U. Vogelman noted in the *Eitan* case: "I agree with the view of my colleague [President A. Grunis – M.N.] according to which an interpretive effort must be made in order to refrain from voiding Knesset legislation. However, in this case in which we are confronted with a legislative provision that establishes a one-year period for detention (a period that is, in my view, disproportionate), I do not see how we can refrain from voiding it (*ibid*., para. 202; and see: para. 2 of my opinion in the *Eitan* case). As noted, the matter is different in the case before us. As explained in detail above, the maximum period established by the law now under review is a relatively shorter period that is consistent with and supports the purpose of the Law.

49. Against this background, and in reliance upon the interpretation outlined for the Law, I will now turn to an examination based upon the proportionality tests.

The Proportionality Tests

50. As I will explain, I am of the opinion that in view of the interpretation of the Law, sec. 30A passes the proportionality tests. In the *Eita*n case, we expressed doubt as to whether the legislative approach under review actually presented a rational connection between detention and realizing the legislative purpose. That was so in view of the absence of an express provision conditioning the continued detention of an infiltrator upon the reasonable expectation of his removal from Israel. This problem was resolved in this case. Given the relationship between detaining an infiltrator and the existence of an identification process and the exhausting of avenues for deportation, it is difficult to argue that the Law currently under review does not meet the rational connection test. The current Law also meets the second proportionality test – the less harmful means test. Although there are various possible alternatives to detention, foremost among them open or semi-open residency centers, those alternatives do not realize the purpose of the Law to a similar degree of effectiveness (the *Eitan* case, paras. 60-66). It therefore remains to

examine the Law under the proportionality *stricto sensu* test, which is the primary test in the matter before us.

51. As noted, the third proportionality test examines whether there is an appropriate relationship between the benefit that will accrue to the public from the legislation and the infringement of the constitutional right that will be caused by its implementation. In the *Eitan* case, we explained that even though the arrangement established under sec. 30A benefits the public, its benefit is limited. On that basis, we held that the Law as then worded infringed constitutional rights to a greater extent than was necessary. That conclusion was founded upon two primary pillars: First, the Law's "default position" was that persons unlawfully present could be detained for a maximum period of one year *when there was no possibility of their removal*. Second, the holding that even on the assumption that the detention of an infiltrator was subject to the conducting of effective removal proceedings, a detention period of up to one year was disproportionately long. We therefore found (para. 71):

> Such detention is permissible only in order to protect the state's sovereignty, for the purpose of the removal of those who are unlawfully present from the country. It cannot be implemented as a punitive act that is not part of a criminal process. In accordance with the demands of the Limitation Clause, it must be implemented only when necessary, when there is no alternative means, and for a proportionate period of time.

Against the background of our holding in the *Eitan* case, I am of the opinion that the current Law also meets the third proportionality test. Shortening the maximum detention period, subject to the purpose I addressed above, significantly reduces the infringement of the rights of the infiltrators. As aforesaid, a three-month period is not exceptional, both in comparison to other arrangements in Israeli law of similar purpose, as well as in comparison to similar arrangements in various other western states. It would appear that no one would argue that detention, even for a short period, does not seriously infringe the rights of the detainee. However, when we are concerned with a maximum period of a few months – and bearing in mind that detaining the infiltrator serves a purpose recognized as proper by our legal system, by international law, and in comparative law – there are now, subject to this interpretation, no grounds for our intervention.

52. We have twice held that the Law's provision in regard to the detention of infiltrators does not pass the tests for constitutionality. The language now before us – interpreted in a manner agreeable, in practice, to the Petitioners – meets the requirements of the Limitations Clause and should not be voided.

Chapter D of the Law – General

53. Chapter D was added to the Law in the framework of Amendment 4, and the "Holot" residency center was erected by virtue of this chapter. The voiding of Chapter 4 in the *Eitan* case marked this Court's first intervention in the provisions of the Law regarding a residency center. The particular arrangements and practical operation of the "Holot" residency center prior to its voidance were described in detail in the *Eitan* case. The prior language of Chapter D authorized the Director to order that an infiltrator concerning whom there was difficulty in regard to deportation present himself at the residency center. As opposed to the provisions of sec. 30A of the Law, which are of prospective force, the above authority could also be exercised in regard to infiltrators who were already in Israel. In addition, the Director was not required to set a time limit for remaining in the residency center. Thus, an infiltrator ordered to a residency could have remained there until Amendment 4 – which was enacted as a temporary order for three years – lapsed. In theory, if the temporary order were to be extended, an infiltrator could remain in the center indefinitely (see: the *Eitan* case, paras. 149, 151). The prior law also did not establish grounds for release from the residency center, or any provision requiring that the Director exempt any special populations from residing in the residency center. Those residing in the center were required to report for registration three times a day – in the morning, afternoon, and evening. The center was closed at night. The center was operated by specially trained personnel from the Prisons Service who were granted broad enforcement powers, such as the power to detain, search and seize. Along with those powers, the Director was granted authority to transfer residents who violated various of the center's rules to detention.

54. After we ordered the voiding of Chapter 4 in the *Eitan* case, it was reenacted in the framework of the Law now under review. Like the prior law, the current language of Chapter D authorizes the Minister of Public Security to designate by order that a particular place serve as a residency center for infiltrators (sec. 32B of the Law), and arranges the manner of operation of

the residency center and its rules. Most of the particular arrangements have remained unchanged. Thus, the Director may order residency in the residency center for any infiltrator regarding whom there is a problem "of any sort" in regard to deportation to his country of origin, including infiltrators already present in the state's territory and infiltrators in detention by virtue of sec. 30A of the Law (secs. 32D and 30D(d) of the Law). In accordance with these provisions, the Director of the Population and Immigration Authority issued a directive under which Sudanese nationals who had infiltrated into Israel prior to May 31, 2011, and Eritrean nationals who had infiltrated into Israel prior to May 31, 2009 were to be relocated to the residency center (Appendix R/6 of the State's response). In their request for an order nisi, filed on July 20, 2015, the Petitioners noted that updated criteria were published on July 14, 2015. According to those criteria, as of July 19, 2015, Sudanese nationals who had infiltrated Israel prior to Dec. 31, 2011, and Eritrean nationals who had infiltrated Israel prior to July 31, 2011 would be relocated to the residency center (http://www.piba.gov.il/ SpokesmanshipMessagess/ Documents/ holot_criteria_14072015.pdf). The residency center continues to be run by the Prisons Authority; the detention, search and seizure authority granted to the corrections officers remains the same; and the authority of the Director to order transfer to detention has not been entirely cancelled. As opposed to this, Chapter D in its current form differs from the prior format in several aspects: the period of residency in the center has been limited (up to twenty months); the requirement of presence in the center over the course of the day has been reduced; the Director's authority to order the transfer of a person from the residency center to detention has been restricted; the Director has been authorized to release a person from the residency center in various situations; and certain populations, such as children, women, and victims of certain offenses, were excepted from its application.

55. The maximum capacity of the Holot residency center is 3,360 people, as in the past. According to the supplementary affidavit, as of Feb. 9, 2015, there were 1,950 infiltrators in the center, of whom 76% were Sudanese nationals while the remaining 24% were Eritrean nationals. Also, as of that date, the maximum period during which infiltrators resided in Holot was twenty-four months. According to the affidavit, more than 60% of the residents of Holot infiltrated into Israel before 2008, and 1,521 filed applications for asylum with the RSD, of which about half were filed *after* the beginning of residency in the center. According to the Population and Immigration Authority, the asylum applications of the residents are given priority.

56. The nature of the living conditions in the residency center is disputed by the parties. According to the Petitioners, the conditions in the center are very basic, the structure of the living quarters does not allow privacy and the employment possibilities are few and poor. Additionally, the Petitioners complain of the medical and welfare services in the residency center, of the quality of the food supplied, and of the amount of pocket money allotted to the residents. As opposed to this, the State argues that there are recreational activities and educational frameworks, and that medical and welfare services are provided. The State further notes that each wing of the residency center – which houses 140 residents – has a recreation center that operates all day, and the residency center has two libraries, an athletics field, a laundry and a grocery in which the price of goods is controlled. In addition, the State noted that sec. 32G of the Law, and the Prevention of Infiltration (Offences and Jurisdiction) (Employment of Residents in Maintenance and Services) (Temporary Order) Regulations, 5775-2015, promulgated thereunder, arrange for the possibility of working in the area of the residency center for payment set in the regulations. There is an employment office in the residency center, and the residents are offered work, *inter alia*, in maintenance and cleaning of the center, in supply and in the laundry. However, the State claims that the rate of participation in the various activities offered to the residents and the rate of employment in the framework of the residency center are extremely low (see and compare: the *Eitan* case, paras. 91-96).

Against this background, I will proceed to examine the claims of the parties in regard to the constitutionality of Chapter D in its present form. But first a few words of introduction.

57. In my opinion in the *Eitan* case, I wrote: "The State faces a reality that it is compelled to confront. That confrontation poses problems and attendant challenges. These challenges require creative solutions. This can be the state's finest hour, in which, facing a compelled reality, it will succeed in finding humane solutions, solutions that are not only consistent with international law, but also with Jewish values". *Inter alia*, I suggested changing the residency facility into a voluntary, *open* residency center.

I will not deny that the residency center erected in Holot is not what I had in mind when I wrote that. As a citizen, I would be happy to see my state show more compassion, even to those suspected of infiltrating into Israel to find sustenance. However, just as we do not examine the wisdom of the law, we do not place ourselves in the place of the legislature. Our role is to

examine the constitutionality of the law. I will begin by stating that after examining the provisions of Chapter D, I have concluded that, with the exception of the maximum period of residence in the center, Chapter D meets – sometimes just barely – the criteria of the Limitation Clause.

The Infringement of Constitutional Rights

58. There is no disputing that the arrangements established in Chapter D of the Law infringe constitutional rights. However, the parties disagree as to the type of infringement, its intensity, and its scope. According to the Petitioners, the various arrangements on Chapter D – that set out the obligation to remain in a residency center and its scope – constitute a harsh, independent infringement of the constitutional right to liberty. Despite the changes made in the Law, they argue that staying in a residency center means staying there. In other words, it is a facility whose characteristics are more like those of a detention facility than an "open" or "semi-open" residency center. For its part, the State does not dispute that Chapter D, by its current language, continues to restrict the constitutional right to liberty. However, it argues that the changes made in the Law reduce "the restriction imposed upon the resident's ability to realize his liberty *substantially*, such that the obligation to stay there in a manner that infringes the right to liberty is only at night…". The State further argues that "Chapter D does indeed restrict the right to liberty and thus infringes it. However…the Petitioners' claim that staying in the residency constitutes a denial of the right to liberty should not be accepted" (para. 103 of the State's response).

59. Indeed, changes were introduced into the current language of Chapter D in comparison to its former language. However, while these changes reduce the infringement of the right to liberty, the infringement still exists. The obligation to remain in the residency center is still not given of the resident's free choice. As such, it infringes the residents' freedom of movement, as well as amounting to an infringement of their right to liberty. This infringement is reinforced in view of the requirement that the residents of the center report for registration in the evening, and remain there during the night, and in view of the prohibition upon their working outside of its confines. As was held in the *Eitan* case, every arrangement that forces a person to stay in a

particular place, and that requires him to stay there even for part of the day, naturally comprises an infringement of his right to liberty:

> Infringement of the right to liberty…is inherent to every facility in which one's presence is not voluntary. *Open residency centers that are not entered voluntarily as a matter of the resident's free choice, and that require the resident's presence even if only for part of the day – infringe the right to liberty by their very nature.* In the matter before us, the State does not dispute that the residency center restricts the right to liberty, but rather, as noted, it distinguishes between *denying* the right to liberty and *limiting* it. I find no virtue in this distinction in regard to the infringement of the right. As A. Barak noted, "Limiting a constitutional right means violating it. Basic Law: Human Dignity and Liberty employs the term 'violates' ('There shall be no violation of rights under this Basic Law…'). As opposed to this, the Canadian Charter and most other modern constitutions employ the term 'limits'. In my opinion, there is no distinction between the two (PROPORTIONALITY IN LAW, p. 135). And as Barak explains:
>
> "The limitation or violation occurs in every situation in which a governmental authority prohibits or prevents the holder of a right from realizing it to its fullest. In this regard, the question of whether the violation is great or small is of no importance, whether it is at the core of the right or its dim edges, whether it is intentional or not, whether it is by action or by omission (where there is a positive duty to protect the right), every violation, regardless of its scope, is unconstitutional unless it is proportionate (*ibid*., at pp. 135-136)" (*ibid*., para. 117, emphasis added – M.N.).

So it is in the matter before us, as well. As a rule, the difference between a violation of freedom of movement and a violation of the right to liberty is in the *extent* of the violation and its *force* (OPHELIA FIELD, U.N. HIGH COMMISSIONER FOR REFUGEES, DIV. OF INT'L PROTECTION SERVS., ALTERNATIVES TO DETENTION OF ASYLUM SEEKERS AND REFUGEES 2, 11-2 U.N. DOC POLAS/2006/03 (April 2006); *Guzzardi v. Italy*, 39 Eur. Ct. H.R. (ser. A) at 23–25 (¶¶92–95) (1981) (hereinafter: the *Guzzardi* case); and see: Department of Economics and Social Affairs, *Study of the right of everyone to be free from arbitrary arrest, detention and exile* (United

Nations publication, Sales No. 65.XIV. 2), ¶21)). The changes made in the Law – like the reduction of the requirement of presence, and the restriction upon the length of residency in the residency center – reduced the extent of the violation of constitutional rights. However, it cannot be said that the violation has been so reduced as to leave only the imposition of limits upon freedom of movement.

60. To summarize this aspect, the current language of Chapter D still significantly infringes the rights of the residents of the residency center – particularly their liberty. That being the case, we must examine whether that infringement can meet the criteria of constitutional review, to which I will now proceed.

The Purposes of Chapter D

61. From the explanatory notes of the Law and the responses of the Respondents we learn that the main purpose of Chapter D of the Law is to stop the permanent settling of the infiltrator population in the urban centers, and to prevent them from working in Israel. Alongside this, the Law is intended to provide an appropriate response to the needs of the infiltrators. Another declared purpose is the creation of a normative block to potential infiltrators.

62. The Petitioners' main argument is that the true primary purpose of the Chapter D of the Law is to "break the spirit" of the infiltrators and encourage them to leave Israel (and see: the Petitioners' pleadings, paras. 4-6). This purpose, they argue, found expression in the deliberations on the bill. They argue that, in any case, reality demonstrates that, in practice, sending infiltrators to the Holot residency center breaks their spirit and leads to their leaving Israel. The Petitioners are of the opinion that the desire to encourage departure from Israel is not a proper purpose, particularly when the efforts are directed at a group of people who cannot be deported. The desire to prevent the infiltrators from settling in the urban centers is also not a proper purpose in their view. The purpose is improper whether it is intended to prevent long-term residence in Israel, or whether it is intended to distance these people from society. Lastly, the Petitioners argue that deterrence is also not a proper purpose.

63. The Respondents – both the State and the Knesset – are of the opinion that these purposes are proper in that they are "intended…for the benefit of realizing clear societal interests

concerning the sovereignty of the State of Israel and its ability to confront the consequences attendant to tens of thousands of infiltrators settling in its cities…" (para. 178 of the State's response).

Preventing Settling

64. The purpose of preventing infiltrators from settling was addressed in the *Adam* case, as well as in the *Eitan* case. In the *Adam* case, Justice E. Arbel was of the opinion (in the course of addressing the arrangement for detention) that this is a proper purpose. In her view, the state has the "right to decide its immigration policy, which derives from the sovereign character of the state", from which "even its right to establish measures to confront illegal immigrants, assuming they have not been recognized as refugees" also derives. She was ready to "deem as an important societal objective, the state's desire to prevent negative consequences…to thwart the possibility of infiltrators to freely establish themselves in any place in the State of Israel, integrate into the labor market, and force the local public to contend with the entry of infiltrators to its midst, with all that it implies" (*ibid*., para. 84). As opposed to this, in the same case, Justice U. Vogelman was of the opinion that "the question of whether the law's purposes meet the proper-purpose test, as set out in the case law, raises difficulties", but he left the matter to be addressed in due course (*ibid*., para. 19; and see: the *Eitan* case, para 103). The remaining justices concurred in the opinions of both Justice E. Arbel and Justice U. Vogelman. Therefore, the *Adam* case did not decide this issue, with the majority preferring to leave the question of whether the purpose was proper for future deliberation in due course.

65. The question of whether preventing settling is a proper purpose was also left undecided in the *Eitan* case. Justice U. Vogelman again refrained from deciding the question of proper purpose "against the problem raised", in his words, "by a purpose concerning the separation of one population from another" (para. 103). Most of the justices – both those who concurred in Justice Vogelman's majority opinion, and those dissenting – did not address this purpose. Justice S. Joubran was of the opinion that this purpose "in and of itself, is not illegitimate", noting "that the state's desire to prevent the settling of infiltrators in the cities is one of the expressions of the immigration policy. This policy inherently involves restrictions of certain basic rights…but this restriction itself does not deny its being a proper purpose. Vital interest underlie this policy. The

purpose of these interests expresses protection of society from the negative consequences that may result from the infiltration phenomenon. I view this purpose to be proper […]" *(ibid*., paras. 7-8). I also noted there (para. 5 of my opinion) that creative solutions are needed to solve the problem of the distress of the residents of south Tel Aviv, such as the orderly delineation of the areas of residence of infiltrators.

66. Neither the *Adam* case nor the *Eitan* case unequivocally found that preventing settling in the urban centers is a proper purpose. It was expressly recognized as such by Justice (Emerita) E. Arbel and Justices N. Hendel and S. Joubran. I also expressed support for adopting means for realizing that purpose. I would propose to my colleagues that we now expressly hold that preventing settling in the urban centers is a proper purpose, for the reasons that I will now present.

67. The *Eitan* case noted that many of the infiltrators live in the city of Tel Aviv-Jaffa (particularly in its southern neighborhoods), and that the rest live primarily in Eilat, Ashdod, Ashkelon, Beer Sheba, Petach Tikva, Rishon Lezion, and Ramle (para. 29). The situation created in those aforementioned cities raised – and continues to raise – not inconsequential problems. In my opinion, there if no defect in a law that seeks to reduce those problems by dispersing the infiltrator population. In the *Eitan* case, I noted, as aforesaid, that it is not wrong for the state to adopt means that would lead to the dispersal of the infiltrators and to easing the burden on Israel's urban centers.

68. International law recognizes the challenges posed by the arrival of aliens in a state, and as noted, permits it to adopt various measures – among them measures that restrict their freedom of movement and liberty – in the framework of confronting those challenges (secs. 26 and 31 of the Refugee Convention; also see sec. 9 of the Convention, which establishes a derogation clause that permits states to adopt various measures against asylum seekers in exceptional situations, among them measures that may limit their freedom of movement (COMMENTARY TO THE REFUGEE CONVENTION, p. 789)). As described above, the restriction of liberty must serve a lawful purpose, and it must be employed only when necessary.

69. The purpose of preventing settling in the urban centers – which concerns easing the burden upon the urban center in which there is a significant concentration of aliens – is consistent with these criteria, and accords with the rules of international law. The interest in

preventing the concentration of asylum seekers in certain cities stood at the base of various measures that restrict the freedom of movement of asylum seekers in Norway (see: UNHCR, Alternatives to Detention, p. 165), Switzerland (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Switzerland*, at 52, AIDA Doc. (17.2.2015) (hereinafter: Switzerland)), Germany (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Germany*, at 62, AIDA Doc. (January 2015)), and Kenya (see: *Kitu Cha Sheria v. The Attorney General* [2013] eKLR (H.C.K.) (Kenya) (hereinafter: *Kitu Cha Sheria*); *Samow Mumin Mohamed v. Cabinet Secretary, Ministry of Interior Security and Co-ordination* [2014] eKLR (H.C.K.) (Kenya) (hereinafter: *Mohamed*); *Coalition for Reform and Democracy (CORD) v. Republic of Kenya* [2015] eKLR, paras. 401-403 (H.C.K.) (Kenya)). Even the U.N. Commission for Refugees – in its comments upon the bill for the Law that is the subject of these proceedings – recognized that dispersal of the asylum-seeking population among various cities is necessary in order to ease the burden upon the cities in which the infiltrators have concentrated (see: Appendix P/10 of the petition).

70. The European Union's directive regarding the reception of asylum seekers (Council Directive 2003/9, 2003 O.J. (L31) 18 (EC)) adopts a similar approach. Despite the fact that, as a rule, asylum seekers are granted freedom of movement within the state in which they are staying, art. 7 of the directive establishes that states may establish geographic areas in which asylum may reside, and at times, even specific places of residence:

> 1. Asylum seekers may move freely within the territory of the host Member State *or within an area assigned to them by that Member State*. *The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive*.
>
> 2. *Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application*.

> 3. *When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law*.
>
> 4. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national legislation.
>
> 5. Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 4 and/or the assigned area mentioned in paragraph 1. Decisions shall be taken individually, objectively and impartially and reasons shall be given if they are negative. The applicant shall not require permission to keep appointments with authorities and courts if his or her appearance is necessary.
>
> 6. Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible. (Emphasis added – M.N.)

Adopting means for deciding the place of residence of asylum seekers is therefore proper, as long as it is related to public interests, public order, or the need for the swift and efficient processing of applications for asylum. A revision to this directive was recently published, in the framework of which similar provisions were applied to anyone submitting an application for international protection of any kind (Directive 2013/33, 2013 O.J. (L180) 96 (EU)).

71. The European policy established under the directive and its revision has been the subject of criticism, *inter alia*, due to the broad discretion that it allows states in its implementation (COMMENTARY TO THE REFUGEES CONVENTION, pp. 1161-1163), and because it permits the imposition of restrictions upon freedom of movement for considerations of public order even if they do not meet a necessity test (UNCHR ANNOTATED COMMENTS TO DIRECTIVE 2013/33/EU OF THE EUROPEAN PARLIAMENT AND COUNCIL OF 26 JUNE 2013 LAYING DOWN STANDARDS FOR THE RECEPTION OF APPLICANTS FOR INTERNATIONAL PROTECTION (Recast) 14 (2015)

(hereinafter: UNCHR COMMENTS TO EU 2013 DIRECTIVE). However, the current commentary to the Refugee Convention noted that it is possible to justify the European policy if it is implemented in situations in which there is a pressing need to do so, such as circumstances of "mass influx":

> [Article 7] can, however, […] be regarded to be in accordance with Art. 26 of the 1951 Convention if it is restricted to *situations of a mass influx*, or to the procedural situation of investigating the identity of, and possible security threat poses by, an individual seeking recognition of refugee status. (*ibid*., p. 1164; emphasis added – M.N.)

In its response to the revision to the directive, the U.N. Commission for Refugees presented a similar stand (UNCHR COMMENTS TO EU 2013 DIRECTIVE, p. 14):

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

72. International law thus recognizes that measures that restrict the freedom of movement and at times, even the liberty of asylum seekers may be adopted in exceptional circumstances (compare: COMMENTARY TO THE REFUGEES CONVENTION, p. 790; UNCHR COMMENTS TO EU 2013 DIRECTIVE, pp. 20-21). This is permitted for public purposes, among them alleviating the burden on urban centers in exceptional circumstances such as "mass influx" of asylum seekers (and see: COMMENTARY TO THE REFUGEES CONVENTION, pp. 789-790; HATHAWAY, p. 420); GOODWIN-GILL AND MCADAM, p. 465; on the exceptionality of these circumstances, also compare the European directive in regard to temporary protection in the event of mass influx: Council Directive 2001/55, 2001 O.J. (L212) 12 (EC); for an analysis of the directive, see the *Asafu* case, para. 26).

73. If we view the Israeli legislation through the lens of international law, we can distinguish a situation in which the state is confronted with a situation that, on its face, justifies adopting liberty-limiting measures. As presented above, over the last decade the State of Israel has been contending with a large number of people who entered its territory illegally, and who, at the present time, it is unable to remove. A significant part of them are concentrated in specific

geographic areas, particularly south Tel Aviv. In my opinion, under these circumstances, there are no grounds for intervening in the State's position that there is a vital need to prevent the infiltrators from settling in the urban centers. One can even say that such a situation constitutes "mass influx" that requires the implementation of appropriate measures. "Mass influx" is not only measured quantitatively, but also relatively, *inter alia*, giving consideration to the state's resources, and specifically its asylum system and its capabilities (GOODWIN-GILL AND MCADAM, REFUGEE, p. 335).

74. The purpose of preventing settling in urban centers would also appear to be consistent with the state's right to design its immigration policy and choose to whom to grant status in Israel. This right derives from the principle of state sovereignty (the *Adam* case, para. 84). However, that right is not absolute, and it is subject to the state's obligation to aliens, among them refugees and asylum seekers. This view is also accepted in our constitutional system. As is well known, a person is not deprived of basic human rights even if he enters the country illegally. Therefore, not every legislative arrangement intended to serve the immigration policy will be consistent with constitutional criteria (see and compare: the *Al Tai* case, p. 848). Nevertheless, this does not mean that such an arrangement will necessarily be annulled due to its *purpose* (see and compare: the *Adalah* case, p. 412).

75. In conclusion, it is my view that under the present circumstances, preventing settling in the urban centers is a proper purpose.

Preventing the Infiltrators from Earning in Israel

76. The Respondents argued that erecting the residency center is also intended to serve the purpose of preventing the infiltrators from earning income in Israel. However, although the residents of the center are not permitted to work, it would seem that this purpose is, at most, attendant to the primary purpose of preventing the infiltrators from settling in the urban centers. This conclusion is reinforced by the fact that the provisions regarding work and earning by infiltrators are primarily found in Chapter B of the Amendment, which was not challenged in the petition before us. The Petitioners themselves did not specifically address this purpose and did not present concrete arguments as to the constitutionality of the provision prohibiting residents of

the residency center to work outside of the center. This being the case, I see no reason to decide the complex question (compare, *inter alia*, the response of the U.N. Commission for Refugees to the bill, Appendix P/10 of the petition) of whether this purpose is proper.

Preventing a Resurgence of Infiltration to Israel

77. According to the State, another purpose of the Law is the creation of a "normative block" to the arrival of potential infiltrators to Israel. The State is of the opinion that this purpose, in and of itself, is proper. I addressed the purpose of deterrence in the framework of my discussion of sec. 30A of the Law. I found, as I noted in the *Eitan* case, that "general deterrence, *in and of itself*, is not a legitimate purpose" (*ibid*., para. 2 of my opinion, emphasis original). However, as I noted, when there is a proper purpose for restricting or infringing individual rights, there is no flaw in the legislature's considering a subsidiary, *attendant* purpose of deterrence. This is the case before us. Having acknowledged that in principle the purpose of preventing settling in the urban areas is proper, nothing prevents its implementation having an attendant deterrent effect.

Responding to the Needs of the Infiltrators

78. According to the State, another purpose grounding the Law is providing a response to the needs of the infiltrators. This purpose was acknowledged to be proper in the *Eitan* case, which held: "A law whose purpose is the erecting of an open residency center intended to meet the needs of the infiltrators is a law intended for a proper purpose" (*ibid*., para. 104). I am in complete agreement with that conclusion, and I see no need to say more. There can be no doubt that such a social purpose is proper. Similarly, other countries have established residency centers intended to provide shelter and basic rights for asylum seekers who cannot provide for themselves (for a detailed discussion, see *ibid*., paras. 133-134). However, we should not ignore the fact that, in practice, the infiltrators do not consider the Holot residency center to be meeting their needs. I will address this below.

A "Hidden" Purpose – Encouraging Voluntary Emigration

79. The Petitioners' main argument is, as noted, that the true purpose of the residency center is to "break the spirit" of the infiltrators and encourage them to leave Israel "voluntarily", so to speak. This claim was also raised in the *Eitan* case, and Justice U. Vogelman left it to be decided in due course. The claim was denied before the Court in the responses of both the State and the Knesset. The matter also finds no mention in the Law or the explanatory notes. More importantly, in the oral arguments before the Court, the State's attorney Adv. Yochi Genessin expressly declared that no actions have or will be taken for the purpose of encouraging the infiltrators to leave Israel:

> President Naor: This is a motif that is nevertheless repeated in the petition. Are you willing to clearly state that no actions have or will be taken to break the spirit?
>
> Adv. Genessin: *Certainly, most certainly* (emphasis added – M.N.).

80. The Respondents pointed out that not every policy whose purpose is not "inclusion and absorption" is a policy intended to break the spirit of those people who have infiltrated into Israel. I accept that legal position. In this matter, it is not possible to determine that breaking the infiltrators spirit is one of the purposes of the Law. Infiltrators who cannot be deported have the right to remain in the territory of the state after completing their stay [in the residency center]. In its response and in the hearing before us, the State argued that the residency center provides a response to the needs of many of the infiltrators, above and beyond their basic needs, and that, *inter alia*, recreational activities, employment opportunities, professional training courses and more are offered. While the Petitioners presented a number of claims and criticisms in regard to the character of the residency center and the possibilities it afforded, they stressed that this subject is not the focus of their petition. Even assuming that there is room for improving the living conditions in the residency center – upon which I am not making a determination – it cannot be found, at *present*, that the current conditions actually cause infiltrators to leave Israel by breaking their spirit.

81. I have, therefore, not found that the current Law is intended to break the spirit of the infiltrators. If this were the purpose of the Law, it would present a great difficulty. On its face, such a purpose would be improper in view of the fact that it would appear to undermine the principle of *non-refoulement* that prohibits deporting a person to a state in which there is a threat

to his life of liberty. This is not to say that the state cannot remove infiltrators to a *safe* country. Removal of infiltrators to such a country is subject to various conditions intended to ensure that it is indeed a safe country, and that that country will not transfer the infiltrators to another country that is not safe (the *Al Tai* case, pp. 848-850; the *Adam* case; for foreign case law in this regard, see for example: *Plaintiff M70/2011 v. Minister for Immigration and Citizenship* [2011] H.C.A. 32; *EM (Eritrea) v. Secretary of State for the Home Department* [2012] EWCA Civ. 1336). Determining that the country is indeed safe is a complex question that does not arise in the matter before us.

82. Along with the possibility of transferring any person – even against his will – to a safe country, a person is, of course, entitled to choose to leave Israel *of his own free will*, and even go to a country that presents a danger (the *Eitan* case, para. 109; sec. 1(c)4 of the Refugee Convention, according to which the Convention will cease to apply to a person who "[…] has voluntarily re-established himself in the country which he left or outside which he remained […]"; and see art. 12 of the International Covenant on Civil and Political Rights; HATHAWAY, pp. 953-961). A person's free will is premised upon the principle of freedom of choice. This principle is expressed in sec. 1(c)(4) of the Refugee Convention in the "voluntariness" requirement (see: HATHAWAY, p. 960; UNCHR, HANDBOOK: VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION (1996)). A free, voluntary decision to leave the country is one made "without external inducement and certainly without coercion of any kind" (HATHAWAY, p. 960). Voluntary repatriation that does not meet these requirements may expose the infiltrators to persecution in their country and constitute "constructive removal" in violation of the *non-refoulement* principle (for a discussion of constructive removal in the Israeli context, see: Christian Mommers, *Between Voluntary Repatriation and Constructive Removal, or: The Activities of Israel to Promote the Return of South Sudanese Asylum Seekers*, in WHERE LEVINSKY MEETS ASMARA 386 (2015) (Hebrew); for a discussion in regard to other countries, see HATHAWAY, pp. 319, 959-961; and compare the *Mahmoud* case, para. 26).

83. The outcome of the above is that the state may not employ sanctions or any other means that might deny free will against groups of people subject to the *non-refoulement* principle in order to break their spirit. As quoted, the State's attorney, Adv. Genessin, declared that no actions intended to break the spirit of the infiltrators would be employed in the residency center.

The state is therefore obligated – as also arises from the declaration – to refrain from tying staying in the residency center to the issue of voluntarily leaving the country. Accordingly, no actions intended to bring about voluntarily departure from the country may be employed in the residency center, including actions intended to exert pressure upon the infiltrators in order to encourage or persuade them in any manner. In particular, no such actions may be taken in the course of contacts between the infiltrators and administrative entities in the residency center, for example, when they seek medical attention, welfare assistance, an exemption from reporting in the residency center, and so forth.

84. In summary, the result of this chapter is my conclusion that preventing infiltrators from settling in the urban centers, in the senses that I addressed, is a proper purpose. As noted, this conclusion is also consistent with the principles of international law. In view of this conclusion, I will now turn to an examination of the proportionality of the means adopted by the Law for realizing the said purpose.

Chapter D: Proportionality

85. As is well known, an infringement of a right must be to an extent no greater than is required. "Proper purposes do not sanctify all means" (HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset*, IsrSC 61(1) 619, 694 (2006); HCJ 5100/94 *Public Committee against Torture v. Government*, IsrSC 53(4) 817, 845 (1999) [http://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-israel]). In the *Eitan* case, the majority held that Chapter D comprised a number of individual arrangements – such as the scope of the requirement to remain in the residency center and the length of the stay – that suffered from constitutional defects that affected the entire chapter (see, for example, *ibid*., para. 4 of my opinion). Here, too, I will first examine the primary individual arrangements established by the Law. In doing so, the reciprocal relationships between these arrangements will also be examined.

86. I will state my conclusion in advance: I have not found any grounds for intervention in the Director's authority to order an infiltrator to the residency center. I also find no defect in the Law's provisions arranging the method of operating the residency center and the daily life of the

infiltrators staying there. The only arrangement that, in my view, is tainted by a constitutional defect is that establishing a twenty-month maximum period for holding a person in the residency center. In my opinion, this period of time violates the constitutional rights of the infiltrators to an extent that is greater than required.

The Director's Authority to order that an Infiltrator stay in the Residency Center and its Scope

87. Like Amendment 4, the Law now under review authorizes the Director to order that an infiltrator stay in the residency center. The current language of the Law limits this authority in two ways. First, it establishes that the Director can issue such an order for a period that shall not exceed twenty months. Second, it establishes that the Director is *not* permitted to issue such an order to vulnerable populations, such as minors, victims of human trafficking, or people with families (sec. 32D(b) of the Law). In addition, the Law establishes grounds for release, among them a change of circumstances or medical reasons (secs. 32D(g) and 32E(c) of the Law). The previous law did not expressly restrict the Director's authority in these ways. The question before us is whether – in light of the changes introduced in regard to the scope of the Director's authority – this authority passes the tests for constitutionality.

A. The Rational Connection Test

88. The first test is the rational connection test, which examines whether the chosen means are appropriate to achieving the law's purpose and rationally lead to its realization (see: the *Nir* case, para. 23; BARAK-PROPORTIONALITY, pp. 373-374). Do the arrangements under review meet this test? The Petitioners' main argument is that the period of up to twenty months does not realize the legislative purposes. As opposed to this, the State is of the opinion that while staying in the residency center may only prevent settling for a limited period, the purpose is effectively achieved during that period.

89. In the *Eitan* case we held that issuing an order to stay in the residency center that is not limited in time meets the rational connection test. We noted that the order permanently disengages the infiltrator from the area in which he established himself, and makes it difficult for

him to continue his employment (*ibid*., para. 158). The question that must be asked is whether an analogy should be drawn from that holding to the matter before us in which the period of the stay in the residency center is, as noted, limited to a defined period. In my opinion, the answer is yes. First, there can be no doubt that while staying in the residency center, the infiltrator is unable to establish himself in the urban centers, inasmuch as his habitual residence is in the residency center. Thus, during the period of the stay, the Law's purpose is fully realized. Moreover, disengaging the infiltrator – even for a defined period – can influence his ability to return and reestablish himself in the urban centers. Even disengagement for a limited period has not-inconsequential effect on way of life (see and compare the data submitted by the Petitioners themselves in this regard: paras. 138-140 of the petition, and the affidavits appended as Appendix 13). In addition, Eitan - Israeli Immigration Policy Center – which sought to join the petition – appended to is request a number of affidavits by residents of Tel Aviv's southern neighborhoods who state that the effect of the means adopted by the State can be seen on the ground. According to them, since the implementation of the new policy, the situation has significantly improved (p. 2 of the affidavit of Ms. Shefi Paz, a social activist who is a resident of the Shapira neighborhood, and see: the affidavit of Mr. Oved Hugi, Chair of the Tel-Haim Council; the affidavit of Mr. Haim Meir Goren, a resident of the Shapira neighborhood).

90. In any case, even if a limited stay does not fully achieve the Law's purpose, it is not necessary that the chosen means fully achieve the Law's purpose (see and compare: the *Nir* case, para. 24; BARAK-PROPORTIONALITY, pp. 376-382; the *Adalah* case, p. 323). We should bear in mind that underlying Chapter D was the desire to ease the burden borne by a number of Israeli cities that are a magnet for infiltrators. Under these circumstances – and upon the reasonable assumption that after infiltrators are released from the residency center, other infiltrators will enter to replace them – I am of the opinion that limiting the stay of a particular infiltrator to a particular period of time is consistent with the purpose of the Law.

91. Inasmuch as according to the Petitioners the maximum number of infiltrators that can be held in the residency center constitutes a marginal percentage of the total infiltrator population, the petition casts doubt whether the residency center will have a real influence over their settling as a *group*. However, this argument ignores the fact that the Law allows for increasing the capacity of the Holot residency center and for establishing additional residency centers.

Accordingly, the State declared that the existing center serves as a "pilot". Against this background, we can state that the provision under review meets the first proportionality test. This Court expressed a similar view in the prior proceedings (see: the *Eitan* case, para. 128; and see: the *Adam* case, para. 97). However, it is not impossible that with time or changes in circumstances, it will be possible to revisit this issue. "[…] the rational connection must continue throughout the entire life of the law. The question of constitutionality accompanies the law through its entire life. It is examined at all times in accordance with its results (BARAK-PROPORTIONALITY, p. 385; HCJ 7245/10 *Adalah – The Legal Center for Arab Minority Rights in Israel v. Ministry of Social Affairs*, para. 60 of the opinion of Justice E. Arbel (June 4, 2013) [http://versa.cardozo.yu.edu/opinions/adalah-%E2%80%93-legal-center-arab-minority-rights-israel-v-ministry-social-affairs]; HCJ 9333/03 *Kaniel v. Government*, IsrSC 60(1) 277, 293 (2005)). Therefore, for the present, the said means achieve the primary purpose of Chapter D.

92. To a certain extent, staying in the residency center also achieves the attendant purpose of deterring potential infiltrators. It may, of course, be assumed that infiltrators fleeing for their lives will not refrain from entering Israel, despite the possibility of being placed in the residency center. However, it is reasonable to assume that those infiltrators who have set themselves the objective of settling in the intended state and earn a living there will take the period of residence in the residency center into account among their considerations (see and compare: the *Eitan* case, para. 58; the *Adam* case, para. 98; and see: UNCHR, *Legal and Protection Policy Research Series, Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, p. 2, PPLA/2011/01.Rev. 1 (April 2011) (prepared by Alice Edwards)).

93. The purpose of providing a response to the needs of the infiltrators is a desirable purpose. But, as noted, I am not convinced that it is realized by the means chosen by the legislature. As is well known, staying in the residency center is imposed upon those residing there, without any certainty that they actually require assistance (see and compare: the *Eitan* case, paras. 105-106; *Kitu Cha Sheria*, para. 82). In any case, there is no need to expand upon this inasmuch as, as noted, the residency center realizes the main purpose for which is was erected.

B. *The Less Restrictive Means Test*

94. In my opinion, the means under review – requiring that an infiltrator stay in the residency center for up to twenty months – also meets the less restrictive means test. In the *Eitan* case the Court held that a residency order for an indeterminate time (or a period limited to three years) constitutes a less restrictive means inasmuch as no other means would realize the Law's purposes as effectively (*ibid*., para. 159). That conclusion also applies to this case, in which we are concerned with a residency order limited to twenty months. Other means proposed by the Petitioners – like a voluntary residence center – would not achieve the Law's purpose as effectively. It may be assumed that a person who has already established himself in a particular place in Israel will not voluntarily choose to leave it and move to the residency center (see and compare: *ibid*., paras. 129, 181). Indeed, the legislature is not required to adopt the means that is the very least restrictive when adopting that means would lessen the possibility of achieving the purpose (BARAK-PROPORTIONALITY, p. 500; the *Eitan* case, para. 130).

The Proportionality Stricto Sensu Test

95. The third proportionality test – proportionality *stricto sensu* – examines whether the legal provision strikes a proper balance between the social benefit produced by the law and the harm resulting from its infringement of constitutional rights (BARAK-PROPORTIONALITY, p. 413; the *Gurevitz* case, para. 58). In the *Eitan* case, the Court held that the absence of a limit upon the length of residence and the lack of grounds for release lead to the conclusion that Chapter D was entirely void (para. 195). As described above, these requirements received some response in the current Law. Does that alter the harm-benefit relationship?

96. As described above, the changes in the Law reduced the harm to constitutional rights. Clearly, the twenty-month period established under the current Law infringes the rights of the infiltrators to a lesser degree in comparison to the longer period established in the prior law. Similarly, keeping a person in the residency center for a limited period – as opposed to an indeterminate period (or a period that can be extended for an indeterminate time) – lessens the intensity of the infringement of his rights, inasmuch as it creates certainty as to the release date. In addition, the Law includes a number of provisions that limit the Director's authority to issue a residency order and set its length, and which outline an administrative apparatus through which he must make his decision. First, under the Law, the Director must make two separate decisions.

He must first decide whether a residency order should be issued in regard to a specific infiltrator. If he decides that an order should be issued, he must – at the second stage – decide upon the period of time that the infiltrator will reside in the center. Second, the twenty-month period is not a default position, but rather the upper limit of the Director's authority. This derives from the express language of the Law, which establishes that the residency period will be "[…] *no more* than the 20 months stated in sec. 32U (emphasis added – M.N.). We are therefore concerned with a system that requires an individual examination of each infiltrator. This system is appropriate and should be maintained. Third, the Director must grant the infiltrator a hearing in which he can present his arguments prior to the issuance of a residency order and before the setting of the period of residency (sec. 32D(d) of the Law; and see: AAA 2863/14 *Ali v. Ministry of the Interior – Population and Immigration Authority* (Aug. 10, 2014 and Oct. 2, 2014)). Lastly, the procedure for issuing the residency order and setting its time is individual. The Director must exercise his authority and his discretion in accordance with the personal circumstances of each infiltrator (compare: *Kitu Cha Sheria*, paras. 62 and 87; and see *Mohamed*, para. 24). In this framework, he must consider relevant information, bearing in mind the purpose of the Law and the scope of the expected harm to the infiltrator (see and compare: AAA 1758/10 *Israel Bar Assoc. v. Sagi*, para. 12 (Aug. 15, 2011); the *Al Tai* case, p. 848; ITZHAK ZAMIR, THE ADMINISTRATIVE AUTHORITY, vol. II, 119-130 (2nd ed., 2011)). Against this background, the statement made by the State's attorney in the hearing before us – according to which, at present, *all* infiltrators are issued a twenty-month residency order – *is not* consistent with the Law and is contrary to its purpose.

97. While it is hard to disagree – particularly in light of the above – that Chapter D's current infringement of the constitutional rights of the infiltrators to liberty is of lesser intensity than it was under its prior language, that is not the end of the road. Even when the legislature adopts a less harmful arrangement than the previous one – a situation referred to as a "benefitting statute" – the Court is not relieved of its duty to examine the constitutionality of such a law that infringes constitutional rights. As held in the *Tzemach* case:

> … the distinction between an amending statute which benefits and an amending statute which does not benefit is not easy to draw. Sometimes, an amending statute combines beneficial provisions with ones that infringe. A single provision

> may benefit in some ways and infringe in others, and the two kinds of results may be inseparable. The difficulties inherent in determining which provisions benefit and which do not may create a substantial and complex debate, undermining the stability and certainty of the law. That is another reason for saying that every amending statute passed after the Basic Law is subject to review under the Basic Law, whether or not the statute benefits [at p. 260; and see: the *Eitan* case].

Indeed, we are concerned with an arrangement that the legislature adopted after the Court annulled a previous arrangement for unconstitutionality. However, that does not exempt the Court from examining the new Law in accordance with the accepted constitutional criteria. That is what this Court did in the *Eitan* case in regard to sec. 30A of the Law, and that is what we must do now in regard to the provisions of Chapter D of the Law. I will begin by stating that despite the appropriate changes made in Chapter D – as a result of which most of the provisions now pass the constitutional tests – I am of the opinion that the maximum period established for staying in the center is unconstitutional. It does not appropriately balance the benefit of the Law and the serious harm to the rights of those staying in the residency center. As a result, it does not meet the third proportionality test. I will now explain in detail.

98. As noted, this Court held that even holding an infiltrator in the residency center for a limited period of time constitutes an infringement of his right to liberty. "An infringement of the right to liberty…is inherent to any facility in which a person's presence is not voluntary. Open residency centers that one does not enter voluntarily in accordance with the resident's free choice, and which requires the resident's presence even if only for part of the day, inherently infringe the right to liberty" (the *Eitan* case, para. 117). An infiltrator who is the subject of a residency order must abandon his lifestyle, his work, his place of residence, and his family and acquaintances. His day is organized in accordance with the rules of the residency center, and he is not free to live his life in an independent, autonomous manner. "[…] and all of this, not as punishment for his infiltration, or for the purpose of realizing his deportation, but for the purpose of 'preventing him from settling in the urban centers and integrating himself into the labor market" (*ibid*., para. 150). This infringement is intensified in regard to some of the infiltrators in view of the trials and travails they experienced in their countries of origin and on their way to Israel (the *Adam* case, para. 112). This Court added that the longer the period of time during

which a person is deprived of liberty, the greater the intensity of its infringement, "[…] such that a person is required to increasingly relinquish more of his desires and hopes. His personal identity and his unique voice are submerged in a regimented, grinding daily routine" (the *Eitan* case, para. 154).

99. Against this background, it was held that setting an upper limit for being held in a residency center is insufficient. That limit must also be proportionate (see: *ibid.*, para. 162). Liberty is the basic foundation of a person's life and existence. Denying it, even for a day, significantly infringes his rights (compare: *ibid.*, paras. 152-153). Weighing the serious infringement of the infiltrator's rights against the benefit deriving from the Law has led me to the conclusion that a period of twenty months is too long a period for holding infiltrators under liberty-limiting conditions of the type under examination. We should bear in mind that we are speaking of infiltrators who cannot be deported from Israel, and who do not present a concrete threat to the security of the state or the lives of its citizens. Their only sin is illegally crossing our borders, for which the state may not punish them (see and compare: sec. 31(1) of the Refugee Convention). While infiltration is an unwanted phenomenon, and solutions should be found for the residents of Israel's cities, these are not the only considerations. A solution that involves denying people's rights for such long periods of time is disproportionate.

100. At this point, on the basis of all the above, I will return to the main purpose of the Law – preventing settling in urban centers. This purpose does not focus upon an *individual* infiltrator or a threat that he poses to society. It concerns the need to ease the burden upon the urban centers and their residents, in *general*. I am of the opinion that realizing this purpose does not require holding any *particular* infiltrator in the residency center. It is sufficient that a group of *various* infiltrators be held in the residency center. Indeed, it is to be assumed that when one infiltrator is released from the residency center, another infiltrator will take his place. I am of the opinion that this turnover between the infiltrators staying in the residence center and others from outside realizes the purpose of the Law. It is sufficient that at any given time, part of the infiltrator population – according to the capacity of the Holot facility and other facilities that the state intends to erect – is removed from the urban centers. This "revolving door" approach infringes the constitutional rights of the infiltrators placed in the residency center to a lesser extent, while

achieving the legislative purpose. It is therefore possible to suffice with a significantly shorter period for staying in the residency center while still realizing the Law's purpose.

101. The lengthy period established by the Law has no parallel in comparative law. A comparative examination must, of course, be conducted cautiously in view of the cultural and social differences that may influence the comparison (see: the *Eitan* case, para. 72 and the references there). Nevertheless, "we should bear in mind that democratic states share common basic values. One can learn from another. Comparative law allows us to broaden our horizons and acquire interpretive inspiration […]" (*ibid*.). A comparative survey reveals that staying in residency centers of various types is voluntary in most countries. In certain countries, asylum seekers are required to stay in a residency center as an alternative to detention, but this is only for periods of a few months. It is also important to note that in some countries there is a trend toward shortening the periods for imposed residence in residency facilities of various kinds, and of reducing the restrictions upon freedom of movement. Thus, for example, while asylum seekers in Germany and Switzerland are required to stay in a reception center upon arrival in the country, the period of that stay is only three months (*Asylverfahrensgesets* [Asylum Procedure Act] Nov. 22, 2011, BGBI. I S 2258, Art. 47) (hereinafter: Germany, Asylum Procedure Act); Art. 16 al. 2 *Ordonnance 1 sur l'asile relative à la procedure*).

102. After that period, remaining in the reception center is not required, but in Germany it constitutes a condition for obtaining social benefits (Germany, Asylum Procedure Act, Art. 47, Art. 60 para 2 Nr. 1, Art. 85 para 3 Act; *Oberverwaltungsgericht* [OVG] *Freie Hansestadt Bremen* [Higher Administrative Court of Bremen], 01.10.1993 - 1 B 120/93, beck-online). In the Netherlands, an asylum seeker is permitted to stay in an open residency center on the basis of economic need for as long as his request is being processed. An asylum seeker staying in such a center is free to leave the facility, but he must report to the authorities weekly (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, the Netherlands*, at 43-46, AIDA Doc. (16.1.2015)). There are open residency centers intended for social needs in Belgium and Finland, as well. Asylum seekers residing in them enjoy full freedom of movement (see: European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National*

Country Report, Belgium, at 68, AIDA Doc. (28.2.2015) ; MAAHANMUUTTOVIRASTO: The Finnish Immigration Service, http://www.migri.fi/asylum_in_finland/reception_activities/reception_centers). There is no requirement to remain in a reception center in Hungary, Poland or Ireland, but staying in a residency center is a condition for receiving social benefits (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Hungary*, at 14, AIDA Doc. (17.2.2015); European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Poland*, at 5, AIDA Doc. (January 2015); European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Ireland*, at 50-51, AIDA Doc. (1.2.2015)). There is also no requirement for remaining in residency centers while asylum requests are processed in France, but more than a five-day absence may lead to a denial of eligibility for pocket money (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, France*, at 57, AIDA Doc. (26.1.2015); L348-2 *Code de l'action sociale et des familles*).

103. In Italy, staying in the facilities – for a maximum period of twelve months – is viewed as a benefit (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Italy*, at 15, 53, AIDA Doc. (January 2015) (hereinafter: Italy)). Not reporting to the facility without permission will lead to the resident's loss of his place in the facility *(ibid*., p. 66). In Malta, as well, staying in the open facilities – limited up to the issuance of a decision on the person's asylum request, unless extended – is voluntary (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Malta*, at 40, AIDA Doc. (February 2015) (hereinafter: Malta)). Although residents there enjoy freedom of movement, they are required to confirm residence by signing in order to continue to remain in the facility and receive the attendant social benefits (*ibid*., p.44). Staying in the residency centers in Croatia is voluntary, and is intended to provide the social welfare needs of the asylum seekers. Asylum seekers enjoy freedom of movement, but they are required to return to the center every

day by 11:00 PM unless they have obtained permission for absence from the director of the center (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report,Croatia*, at 44, AIDA Doc. (5.3.2015) (hereinafter: Croatia)). And also compare the situation in Lithuania, where asylum seekers may be held in reception centers as long as the processing of their asylum request continues (EMN Focussed Study 2013, *The Organisation of Reception Facilities for Asylum Seekers in different Member States*, *National Contribution from Lithuania*; The UN Refugee Agency [UNHCR], *Integration of refugees in Lithuania: Participation and Empowerment* (Oct. – Nov. 2013)).

104. To complete the picture, we would note that even in countries in which it is possible, under certain circumstances, to hold asylum seekers in closed detention facilities, the period of restricting liberty does not generally exceed a few days, or at most, a period of a few months (see: the *Eitan* case, paras. 73-74; The Global Detention Project [GDP], *The detention of Asylum Seekers in the Mediterranean Region, Global Detention Project Backgrounder* (April 2015)). Some countries permit detaining asylum seekers in closed detention facilities or longer periods. In Malta, for example, most asylum seekers are placed in detention for a maximum period of twelve months (Malta, p. 47). Severe criticism has been expressed in this regard (see, for example: Daniela DeBono, *'Not Our Problem': Why the Detention of Irregular Migrants is Not Considered a Human Right Issue in Malta*, in ARE HUMAN RIGHTS FOR MIGRANTS? CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES, 146 (Marie-Benedicte Dembour & Tobias Kelly, eds., 2011). In Bulgaria, illegal migrants can be detained for a maximum of eighteen months. While, in general, Bulgarian law requires that asylum seekers not be held in detention, in practice, a person who does not manage to file an asylum request at the border will be arrested (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Bulgaria*, at 34-35, AIDA Doc. (31.1.2015); recently, a bill was introduced to permit a general detention regime in closed facilities for all asylum seekers (*ibid*., p. 48)). Similarly, Cyprus permits the detention of an asylum seeker for a maximum period of eighteen months, which can be extended in certain cases (European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Bulgaria*, at 64,

AIDA Doc. (February 2015)). However, there is a trend toward shortening the periods of detention even in some of these countries. Thus, while Greece permits detention for the relatively long period of eighteen months, the government recently announced that the period would be reduced to six months (for the Greek government's announcement of Feb. 17, 2015, see: http://www.mopocp.gov.gr/index.php?option=ozo_content&lang=&perform=view&id=5374&Itemid=607 (in Greek); Asylum Information Database [AIDA], *An end to indefinite immigration detention in Greece?*, http://www.asylumineurope.org/news/16-02-2015/end-indefinite-immigration-detention-greece#sthash.Zn3XJD6S.dpuf; for the criticism of detention in Greece by the U.N. Commission on Refugees, see The UN Refugee Agency [UNHCR], *Greece As A Country Of Asylum – UNHCR'S Recommendations* (April 2015)). Similarly, until recently, Italian law permitted a maximum detention period of eighteen months, but in November 2014 that period was shortened to four months (Italy, pp. 72-73). In Croatia, where aliens could be held for a period of up to eighteen months, it has been established that aliens who have submitted a request for asylum may be detained for a period of only three months, which can be extended for an additional three months under certain circumstances (Croatia, p. 53).

105. Moreover, the reception centers in various countries are generally intended for such purposes as initial identification of those entering the territory, assessing asylum requests or exhausting avenues for deportation (for a broad discussion of this subject, see: the *Eitan* case, para. 163; STEPS Consulting Social study for European Parliament, *The conditions in centers for third country national (detention camps, open centers as well as transit centers and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states*, IP/C/LIBE/IC/2006-181, 193). To the best of my knowledge, no western country maintains residency centers that are not voluntary for asylum seekers of other migrants with the purpose of population dispersal. That objective is generally achieved by other means (see, for example, what is done in Norway, Switzerland and Turkey: UNHCR, Alternatives to Detention, at p. 165; Switzerland, at p. 71; Asylum European Council on Refugees and Exiles [ECRE], Forum Réfugiés-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee, *Asylum Information Database: National Country Report, Turkey*, AIDA Doc. (18.5.2015); it should be noted that Turkey recently adopted regulations that arrange the status of aliens who enjoy temporary protection from deportation, see *ibid*., pp. 65-74). In addition, many countries distinguish among different groups of infiltrators that cannot be deported in regard to the

restrictions upon their liberty (see, for example: Eur. Comm'n, *Study on the Situation of Third-Country Nationals Pending Return/Removal in the EU Member States and the Schengen Associated Countries* 75, E.U. Doc. HOME/2010/RFXX/PR/1001 (Mar. 11, 2013)). As a rule, the distinctions are based upon the reasons for why a particular infiltrator cannot be deported from the country. As a result, there are differences in the scope and type of restrictions imposed upon the liberty of asylum seekers and those who are entitled to international protection as opposed to other aliens. The arrangement under our review does not comprise such distinctions, but rather relates inclusively to all infiltrators for whom there is a problem in regard to deportation. I would emphasize that this is not to say that infiltrators cannot be held in residency centers for the purpose of easing the burden upon the cities. As already stated, my opinion is that this may be done. However, the above does hold implications for the reasonable, proportionate period of time that they may be held.

106. Undeniably, the conditions for residence in the residency center have been improved, but not sufficiently. As was held in the *Eitan* case: "…a proportionate normative arrangement must preserve a proper relationship between the extent of the limitation of rights in the facility and the length of the maximum stay there, such that the more severe the limitation upon basic rights, the shorter the imposed stay in the facility" (*ibid*., para. 162). In the matter before us, the maximum period for holding a person in the residency center does not take into account the scope of the limitations imposed by the current language of the Law on the liberty of the infiltrators staying in the center. Those staying in the center are still subject to a strict disciplinary regime and to the authority of the employees of the Prisons Service (sec. 32C of the Law). In the *Eitan* case we held that while the administration of the center by employees of the Prisons Service does not constitute an independent infringement of the right to liberty and the right to dignity, it reinforces the infringement of the rights of the infiltrators (*ibid*., paras. 138-146). To that we must add the enforcement powers granted to the employees of the Prisons Service – among them the power to detain, search and seize. The administration of the residency center by employees of the Prisons Service who are granted police enforcement powers thus increases the infringement of the right to liberty of those staying there. It amplifies the imbalance between the severe infringement of the rights of the individual and the benefit provided by the Law. Along with that, the Law expressly forbids those staying in the center from working outside of its precincts. Although the residents are given the opportunity to work the center, in practice the Law is implemented in a

manner that significantly limits that possibility both in terms of the maximum scope of monthly employment hours and in terms of the salary paid for that work (see: Prevention of Infiltration (Offences and Jurisdiction) (Employment of Residents in Maintenance and Services) (Temporary Order) Regulations, 5775-2015; Prevention of Infiltration (Offences and Jurisdiction) (Provision of Pocket Money and Other Benefit and the Conditions for their Denial) (Temporary Order) Regulations, 5775-2015). In its response, the State itself notes that the employment opportunities are limited and that there are not enough jobs for all of the infiltrators staying in the center (paras. 77-78). As a result of the imposition of these restrictions, the infringement of the liberty of the residents is intensified. Although the residents are currently permitted to remain outside of the center all day, in the absence of employment or a reasonable ability to earn a living, their ability to shape their existence is severely impaired. This is all the more so in view of the location of the residency center, which remains far removed from any populated area (see the *Eitan* case, para. 126).

The net result of all of the above further supports the conclusion that the maximum period for holding infiltrators in the center is greater than necessary.

107. As noted, the State argues that part of the constitutional defects in the previous version of the Law in regard to the residency center has been remedied in the present version. Two subsidiary arguments can be derived from this: One is that the Court should not intervene in these arrangements, while the other is that the Court should examine the proportionality of the maximum period for holding a person in the residency center under the amended arrangements. I will now address these arguments.

The Constitutionality of Additional Individual Arrangements and their Consequences

108. The first arrangement that was amended concerns release from the residency center. Under the law that came under review in the *Eitan* case, the Director did not have the authority to release a person from the residency center. The Law now establishes grounds for release. Another arrangement concerns the requirement of reporting in to the residency center. While the previous law required that infiltrators staying in the center register three times a day, they are now required to do so only once. Due to the cancellation of the obligation to register in the

afternoon, a resident of the center can now move about relatively freely throughout the day (see and compare: the *Eitan* case, para. 127). The cancellation of the requirement of registering in the morning saves the resident valuable time and allows him to leave the residency center without unnecessary delays. In my opinion, these changes make the reporting requirement proportionate.

109. Another amended arrangement grants the Director authority – if one of the grounds specified in the Law is met – to order the transfer of an infiltrator to a detention facility. These grounds largely remain as they were in the previous law, primary among them the commission of disciplinary infractions – which concern the violation of the residency center's disciplinary rules – as detailed in the Law. The Director is authorized to decide the length of the detention period imposed upon the resident of the center, subject to maximum periods prescribed by the legislature. Like the previous law, the periods of detention are set in relation to the number of infractions, their severity and the length of their continuation. However, the *maximum* periods for detention were significantly shortened. Thus, the shortest period is now set at fifteen days (as opposed to thirty days under the previous law), and the longest period is set at 120 days (as opposed to a year under the previous law).

110. Unlike the previous law, the current version of the Law establishes an express mechanism for judicial review of the Director's decision. In accordance with this mechanism, the detention order must be approved by the Detention Review Tribunal as soon as possible, and no later than 96 hours from the beginning of the resident's detention (sec. 32T(g) of the Law). The Tribunal is required to examine whether there were grounds for transferring the resident to detention, and it may approve the order with or without *changes* or not approve it (sec. 32T(h) of the Law). This review is self-executing and automatic. It constitutes an inseparable part of the process of transferring a resident to detention, and validates it (see and compare: HCJ 2320/98 *Al-Amla v. Commander of IDF Forces in Judea and Samaria*, IsrSC 52(3) 346, 360-362; AAA 8788/03 *Federman v. Minister of Defence*, para. 12 (Nov. 5, 2003) (hereinafter: the *Federman* case); Yitzhak Hans Klinghoffer, *Preventive Detention for Reasons of Security: AAA 1/80 Ben-Yosef (Green) v. Minister of Defence*, 11 MISHPATIM 286, 291 (1981) (Hebrew) (hereinafter: Klinghoffer)). This interpretive conclusion is supported by the Law's provisions and their purpose, as well as by the position expressed by the Respondents, who made it clear in the hearing before us that, in their view, the judicial review exercised by the Tribunal is *de novo*

review (and see: paras. 61-63, 168, 229-247 of the State's response). Along with this, by virtue of sec. 4 of the Administrative Courts Law, 5752-1992 (hereinafter: the Administrative Courts Law), together with art. 22 of the Addendum to that law, the Tribunal's exercise of its review power it subject to the provisions of that law. The Administrative Courts Law establishes, *inter alia*, that the court is an independent body that, in matters of judging, is subject to no authority other than the law (sec. 3). That law also establishes provisions in regard to procedures and rules of evidence (secs. 20-21). The law further establishes that hearings before the court will be public, that the parties are entitled to legal representation, and that they may submit evidence and ask that the court subpoena witnesses and order the disclosure of documents (secs. 25, 27, 28).

111. The main hurdle that sec. 32T of the Law must clear is the third proportionality test – proportionality *stricto sensu*. I am of the opinion that the current version passes this test. As noted, the enforcement mechanism established under sec. 32T of the Law grants effective means for the administration of the residency center, without which its rules of conduct would be a sham (see and compare: the *Eitan* case, para. 180). As opposed to the benefit of the arrangement, it undeniably infringes the rights of the residents. However, in view of the procedural guarantees established in the current Law, we are concerned with a lesser infringement than in the previous law. After weighing the benefit deriving from the arrangement against the infringement of the rights of the residents, I am of the opinion that the infringement under the current version of the Law maintains a proper balance with the benefit. Although the Director's authority to order a transfer to detention remains, it has, in practice, been made conditional upon a decision composed of two elements: the Director, who is part of the executive authority, and the Tribunal that is of a judicial character (the *Federman* case, para. 12; Klinghoffer, p. 287). In this manner, "the deprival of personal liberty, which is a direct result of the issuing of the detention order, [loses] its pure administrative character and to some degree, the great principle of the rule of law that a person shall not be derived of his personal liberty unless a judge has so ruled is satisfied" (*ibid*., p. 286). In addition, the review process is accompanied by other procedural guarantees that, as noted, apply to the operation of the Tribunal by virtue of the Administrative Courts Law. These procedural guarantees bring the disciplinary regime under review as close as possible to a regular judicial process without detracting from its purpose (also see: Dalia Dorner, *Constitutional Aspects of Disciplinary Procedures*, 16 IDF LAW REVIEW 463, 468 (2002-2003)

(Hebrew) (hereinafter: Dorner); Assaf Porat, *On the Right to Legal Representation in Military Disciplinary Proceedings*, 17 MISHPAT V'ASAKIM 469 (2014) (Hebrew)).

112. The Petitioners are indeed correct in arguing that the detention periods established by the Law – among them periods of 85, 90 and even 120 days – are long. For the sake of comparison, under military disciplinary rules, a junior disciplinary officer is authorized to sentence a soldier to up to seven days imprisonment, and a senior disciplinary office is authorized to impose up to thirty-five days imprisonment (secs. 152(5) and 153(a)(6) of the Military Justice Law, 5716-1955). In the case of multiple offenses, it is possible to impose imprisonment for no more that seventy consecutive days (sec. 162A of the Military Justice Law; Dorner, p. 464; and see: Emanuel Gross, *The Constitutional Dimensions of Arrest Law in the Army*, 5 MISPAT UMIMSHAL 437, 449-453 (2000) (Hebrew)). However, although the detention periods in the current Law are, in my opinion, at the border of legality, they do not justify our intervention in the discretion of the legislature. We should bear in mind that we are concerned with *maximum* periods that need not necessarily be fully "exploited". The Director must exercise his discretion in an individual manner in regard to each infiltrator and each disciplinary violation. He is not empowered to put infiltrators in detention for the maximum periods automatically. Moreover, the maximum period of 120 days applies only to one disciplinary violation concerning absence from the residency center for over ninety days. The other periods are dependent upon the severity of the conduct, and there is a clear punishment scale in regard to repeated violations. In addition, in view of the severity of placing a person in detention, it is clear that the violations that permit the adoption of this measure must be narrowly construed. The state recognizes this, as well (see: paras. 244-245 of the State's response). Moreover, the Law provides another "scale" in regard to the *enforcement means* that should be adopted. The scale begins with other means of enforcement established under sec. 32S of the Law (warning, reprimand, denial of pocket money, etc.), and concludes with transfer to detention. As a result, the Director and the Tribunal are expected to consider imposing the lesser sanctions before arriving at a decision to transfer a resident to detention. This interpretive conclusion is also required in view of the purpose of the enforcement powers in the current Law. This purpose seeks to balance the need for maintaining the rules for staying in the center with the desire to protect the basic rights of its residents. Lastly, it should be noted that both the finding that a violation has occurred and the decision in regard to the appropriate sanction under the circumstances are subject to the judicial review of the Tribunal.

Therefore, although the maximum periods for detention are long, I believe that sec. 32T does not infringe the rights of the infiltrators to a greater extent than required.

113. There are, therefore, a number of individual arrangements that now meet the tests of the Limitation Clause. Thus, I find no grounds for annulling them. However, we cannot ignore the fact that a central defect remains in regard to the length of the stay in the residency center. Although the lives of the residents of the center have improved, and they have been given broader freedom of action, the provision permitting *compelled* residency in the center for a very long period continues to stand out. While the infiltrator would appear to enjoy a greater degree of freedom of movement during this period, he is still required to move his habitual residence to the residency center. For a significant part of the day, he is not his own master. He must spend his nights and part of his days with others, in violation of his constitutional rights. In the course of the hearing, the attorney for the Petitioners described the intensity of the violation and the sense of degradation a person incurs when forced to reside in a residency center against his will. I accept the accuracy of these observations in regard to the law that was annulled in the *Eitan* case, and they remain correct today in regard to the Law under review. I will not deny that the current arrangement benefits the public interest to a certain degree. Placing the infiltrators in a residency center may limit the negative phenomena associated with broad-scale unregulated immigration and ease the burden upon the residents of the major cities (see the *Eitan* case, paras. 131, 160 and 186). However, we cannot condone restricting the liberty of the infiltrators staying in the residency center for such a long period, even if it is based upon a proper purpose.

Conclusion

114. This petition is the third in a series of petitions in which this Court has addressed the constitutionality of liberty-limiting means adopted against infiltrators. As opposed to the previous judgments, I am not of the opinion that the issues involved in the Law before us should be left for examination in due course, even if deciding them is not entirely necessary in the present matter. In general – and subject to the interpretation presented in my opinion – I am of the opinion that the current Law passes the tests for constitutionality, with the exception of the maximum period for holding a person in the residency center. I will, therefore, recommend to my colleagues that we find that this upper limit is disproportionate and must be voided.

115. In the previous judgments we established a three-month transition period in the framework of the constitutional relief granted. Experience has shown that that period is insufficient. The legislative process was hasty, and the legislature was unable to conduct an in-depth examination before adopting the new Law. I would therefore propose to my colleagues that we now permit the legislature a longer period – of six months – before the annulment of the maximum period for holding a person in the residency center comes into force. During that period – or until the enactment of a new maximum period for staying in the residency center, whichever is sooner – secs. 32D(a) and 32U of the Law, which establish the authority for ordering that an infiltrator remain in the residency center, will remain in force. However, they will be understood as permitting the Director to order an infiltrator to the residency center for a period not to exceed twelve months. To remove all doubt, the Director is still required to exercise his authority in an individual manner, and decide whether it is proper to issue a residency order to an infiltrator, and if so, for what period. Those currently staying in the residency center upon the issuance of this judgment will be released at the end of twelve months in the center or at the end of the period set for them by the Director, according to the shorter of the two periods. Residents of the residency center who are currently residing in the center for twelve months or more on the day of this judgment – among them Petitioners 1 and 2 – will be released immediately, and no later than fifteen days from the date of this judgment. We would emphasize that in the absence of new legislation at the end of the six-month period, the authority to issue a residency order to infiltrators will lapse.

116. The petition is therefore partially granted in regard to the maximum period for holding a person in the residency center, in the sense that secs. 32D(a) and 32U of the Law are annulled. As for sec. 32A of the Law and the other individual arrangements established under Chapter D of the Law, subject to the interpretation of the Law that I explained above, the petition is denied. The Respondents will bear the costs of the Petitioners in the amount of NIS 30,000.

Justice U. Vogelman:

This Court twice nullified amendments to the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 (hereinafter: the Law or the Prevention of Infiltration Law). Now before the Court are additional amendments to the Law made under Chapter A of the Prevention

of Infiltration and Ensuring Departure of Infiltrators from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014. In her comprehensive opinion, my colleague President M. Naor presented an instructive constitutional examination in which – as this Court is required – she examined for a third time the detention arrangement for infiltrators who arrived in Israel through unregulated immigration, and again addressed the normative provisions establishing the residency center for infiltrators (hereinafter: the center or the facility) – the Holot center. To begin with the end: it is possible that this amendment is not a benefitting statute. In our case law, we have taken note of many other legislative possibilities. But, as usual, the question is not what the ideal legislative arrangement is. The question is whether the arrangement adopted meets the constitutional tests. As I will explain, my opinion, like that of the President, is that sec. 30A of the Law is constitutional, and that the provisions establishing the twenty-month maximum length for residing in the residency center should be nullified. In addition, I have found that the arrangement permitting the transfer of an infiltrator from the residency center to detention should be declared void, as I will explain.

Preface to the Constitutional Examination – The Factual Basis for the Decision

1. Like other countries, Israel is also required to contend with the global refugee and migrant crises that is the worst since the Second World War (U.N. HIGH COMMISSIONER FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2014 (2015) (http://www.unhcr.org/556725e69.html)). Israel is the only western country accessible by land from Africa (see the opinion of Justice I. Amit in HCJ 7385/13 *Eitan - Israeli Immigration Policy Center v. Government*, para. 15 (Sept. 22, 2014) (hereinafter: the *Eitan* case). The fence erected on the Israeli-Egyptian border does not absolutely stop unregulated immigration (as the continuing trickle of infiltration into Israel testifies). Before that, tens of thousands infiltrators crossed our borders, and the burden that presents is significant and sadly, would appear to be borne primarily by the weaker more vulnerable segments of the state's population. In an attempt to contend with this phenomenon, the Knesset made changes to various provisions in the Prevention of Infiltration Law. First it established that an infiltrator entering the borders of Israel, and against whom a deportation order was issued, could be held in detention for a period of up to three months. In the *Adam* case (HCJ 7146/12 *Adam v. Knesset* (Sept. 16, 2013) (hereinafter: the

Adam case) a unanimous Court of nine justices held that the maximum period of detention (established in sec. 30A of the Law at that time) was unconstitutional. A majority of eight justices – against the dissent of Justice N. Hendel who was of the opinion that only sec. 30A(c) should be annulled – ordered the nullification of sec. 30A of the Prevention of Infiltration Law. Following that decision, the Law was amended again (hereinafter: Amendment 4) – as a temporary order for three years – establishing that an infiltrator against whom a deportation order was issued could be held in detention for one year (sec. 30A of the law). Along with that, the Law established a "residency center" for infiltrators. Chapter D, which was added to the Law, established that infiltrators could be ordered to the residency center for an unlimited time (and at the very least, for the three-year term of the temporary order). In the *Eitan* case, the Court majority found that sec. 30A and Chapter D of the Law were unconstitutional and must be annulled. In the two previous cases, I noted that the background of the constitutional analysis must present a picture of the situation that can serve as a foundation for the examination and sharpen the legal questions that must be decided (the *Adam* case, para. 1; the *Eitan* case, para. 37). The time that has passed since our last judgment requires that we now do so again.

2. First, the makeup of the infiltrator population in Israel (on the problematic nature of the term "infiltrator", see the *Adam* case, para. 10 of my opinion; the *Eitan* case, para. 5). The data regarding the identities of the infiltrators were addressed at length in the previous decisions, and in the absence of any significant change in this regard since the decision in the *Eitan* case, there is no need to address this in detail. It is sufficient to state that the countries of origin of 92% of the infiltrators currently in Israel are Eritrea and the Republic of Sudan (hereinafter: Sudan). The situation in both countries is not easy, to put it mildly. According to the up-to-date reports that I cited in the *Eitan* case, the Eritrean government systematically violates human rights on a broad scale (see *ibid*., para. 31). In Sudan, a country with a history of military coups and internal struggles, most of the residents suffer from significant poverty (*ibid*.). The nationals of those two countries are not directly repatriated to their countries of origin. Eritrean nationals are not currently removed in accordance with a temporary non-removal policy and in accordance with the principle of *non-refoulement*. Sudanese nationals are not repatriated due to the absence of diplomatic relations with Sudan (the *Eitan* case, para. 32). I will not repeat what I stated in regard to the reasons that brought these infiltrators to our country, but I will merely note that among them – in my view – are some who sought to improve their economic situation, but there

are also those who sought to flee dangers that threatened them in their country. The state is not making haste to decide upon the applications for asylum that have been submitted (see the data in this regard in the *Eitan* case, para. 35), and it is therefore difficult to reach clear conclusions in this regard.

3. The matter is different in regard to the number of infiltrators in Israel, which has seen many changes over the last years. In her opinion, the President addressed the current data (para. 3 of her opinion). It was noted that – based upon a publication by the Population and Immigration Authority – there were 47,711 infiltrators in Israel as of March 31, 2015, as opposed to some 50,000 staying in Israel as of the date of our judgment in the *Eitan* case (at the end of September 2014). From the data provided by the President, read together with the data presented in the *Eitan* case, it is clear that the decreasing trend in the number of infiltrators in Israel, which began in 2012, is continuing. This is also clear from comparing the number leaving Israel against the number entering. As noted in the President's opinion, since the beginning of 2014 and until the end of the second quarter of 2015, a total of 104 infiltrators have entered Israel. As opposed to this, 6,414 infiltrators left the country in 2014, and 1,382 left in the second quarter of this year alone (see: Population and Immigration Authority, Policy Planning Department, Data on Foreigners in Israel (July 2015) (hereinafter: July Data of the Population and Immigration Authority)).

This, therefore, is the basis for the discussion, and against this background we will embark upon the constitutional examination. Inasmuch as the subject has been addressed twice by this Court, and in view of the President's broad discussion, I see no need to start the examination from the beginning, and in my following remarks I will seek to emphasize and elucidate several points.

Section 30A of the Law

4. Section 30A establishes the law in regard to an infiltrator to whom a deportation order has been issued. The section makes it possible to hold an infiltrator in detention for a maximum period of *three months*, as opposed to the three-year period that was the situation when the *Adam* case was adjudicated, and the one-year period we addressed in the *Eitan* case. Along with this,

several changes were made in the section that are not at the core of the matter. There would seem to be no disagreement that this section infringes the constitutional rights of liberty and dignity to which the infiltrators – and all persons – are entitled (see the President's opinion, para. 32; the *Eitan* case, paras. 46-47; the *Adam* case, paras. 71-72). In view of this infringement, we must address the criteria established under the Limitation Clause, and first examine whether the section is intended to serve a proper purpose.

"For a Proper Purpose"

5. In its response (p.35), the State argued that the primary purpose of the section is to exhaust the process of identifying the infiltrator and providing the necessary time for arranging avenues for voluntary emigration or deportation. The Knesset added that the legal arrangement has an additional purpose, as arises from the explanatory notes, of reducing the incentives for potential infiltrators to come to Israel (p. 20 of the Knesset's response; and see the explanatory notes to the Prevention of Infiltration and Ensuring Departure of Infiltrators from Israel (Legislative Amendments and Temporary Provisions) Bill, 5775-2014, Government Bills 904, p. 424). My colleague the President found that the dominant of the two purposes of sec. 30A of the Law is that argued by the State. I agree for the same reasons as those presented by the President (without, at this stage of the discussion, addressing the purpose argued by the Knesset, which is actually "deterrence", to put it euphemistically (see the *Eitan* case, para. 52)). As I pointed out in the *Eitan* case, the purpose of identification and exhausting avenues of departure and deportation is a proper purpose (*ibid*., para. 51). The state has the right to remove a person who entered its territory in an unregulated manner, subject to domestic Israeli law and international law, to which Israel is obligated. However, I emphasized there that the state is permitted to hold a person in detention for that purpose – identification and removal – alone: "Holding a person against whom a deportation order has been issued in detention is legitimate when it is intended to ensure the process of his removal from the country. It is permitted as long as its purpose is deportation, but forbidden when there is no effective removal process, or when the possibility of deportation from the country is not on the visible horizon" (*ibid*.,).

6. Unfortunately, despite the findings in the *Adam* and *Eitan* cases, the legislature did not include a direct connection between detention and the removal process in the amended version of

sec. 30A (on the need for this connection, also see the *Adam* case, para. 5 of my opinion). There can be no denying that had the legislature adopted a legislative arrangement that included such a connection, along with a periodic review of the situation of the detainee focused upon this question, and appropriate grounds for release when there is no expectation of removal (and see the *Eitan* case, para. 19) our task would be easier, and the arrangement would pass constitutional review in this regard without difficulty. I would think that after this had been stated twice by expanded panels of this Court, it would even have been appropriate to do so (see and compare: para. 48 of the opinion of the President). However, I agree that what the legislature left undone, we can add by way of judicial interpretation that will realize the language of the Law and its purpose. In this sense, I concur with the view of my colleague the President that we need not declare the section void, inasmuch as I am also of the opinion that in this matter it is possible to interpret the Law's provisions in a manner that is consistent with constitutional criteria.

7. In her opinion, my colleague the President explained in detail why this night is different from other nights, and why we can now refrain from declaring the nullification of sec. 30A of the Law. In brief, the President pointed out the similarity between this arrangement and the arrangement established under the Entry into Israel Law, which our case law has interpreted as requiring an expectation of deportation from Israel (*ibid*., paras. 39-40), and how this conclusion is consistent with international law (*ibid*., paras. 44-45). The President further emphasized that the State – for the first time in these proceedings -- agrees with this interpretation (para. 46 of her opinion; see and compare the *Eitan* case, para. 200). I would like to add to what the President explained that, in my opinion, the period of detention established under sec. 30A of the Law – three months – also supports this view. The maximum period of detention established by the legislature is not long. As noted, it is a period that is only one month longer than that established under the Entry into Israel Law (compare to sec. 13(f) of the Entry into Israel Law, 5712-1952 (hereinafter: the Entry into Israel Law)). This short extension of the period permitted under the Entry into Israel Law derives from the fact that infiltration into Israel is characterized by an absence of any orderly documentation and does not go through a border control point, which makes identification more difficult (see the *Eitan* case, para. 54). While we are concerned with a longer period of time than that permitted under the Entry into Israel Law, it is a relatively short period that can itself motivate the authorities to take effective steps to identify the infiltrator and examine the possibility of his deportation in accordance with provisions of the law, inasmuch as

at the end of this period it is more difficult to ensure that the infiltrator will not "disappear" (see and compare: the *Eitan* case, para. 54). Thus, while in the *Eitan* case it was possible to question whether the one-year period of detention was a possible normative expression of the claimed purpose – identification and exhaustion of avenues for deportation (this, even though no one denies the relative complexity of the identification process in the case of unregulated immigration) – in the matter before us it appropriate to take the opposite view. Just as under the previous version of the Law it was difficult to conclude that the purpose was identification and exhaustion of avenues for deportation, shortening the period of detention to three months can serve to demonstrate – even without express language to this effect – the inherent connection between the period of detention and an effective removal process. In this sense, the "quantity" – the maximum detention period – "speaks", and affects the interpretation of the "quality" (a connection to the existence of an effective removal process).

8. This change in the quantitative aspect also permits a validating interpretive approach in another sense. In the *Eitan* case, a careful, respectful approach required resolving the constitutional problem that arose specifically in regard to nullifying the section (as we were confronted head on with a legislative provision that established a one-year period of detention, which is itself disproportionate. Had we sought to establish an alternative period, we would have found ourselves involved in judicial lawmaking (also see: *ibid*., para 201)), whereas the detention period at present does not raise constitutional problems, as I shall explain. We are therefore left only with the need to ensure that the detainment of the infiltrator – like any case of detention – will not be arbitrary, but rather intended to serve the purpose grounding it. In the matter before us, that purpose is, as noted, ensuring an effective deportation process. While this purpose is not directly expressed by the language of the Law, this time the Law's provisions can be reconciled with the need to realize it by a judicial interpretative approach that is consistent with the State's position (although it would be possible to arrive at this interpretation even if the State did not agree with it), and refrain from declaring them void. The provisions of sec. 30A will, therefore, be understood such that an infiltrator who has been identified and who cannot be deported will be released immediately (subject to the grounds stated in sec. 30A(d) of the Law). Given the aforesaid, I conclude that sec. 30A of the Law meets the test of a proper purpose.

Proportionality

9. In this case, no dispute arose between the parties as to whether the Law's infringement of rights was intended for a purpose befitting the values of the State of Israel as a Jewish and democratic state (neither in regard to this section, not in regard to Chapter D, which will be addressed below). That being the case, we will now proceed with an examination of proportionality. I will state at the outset that in my opinion, this section also meets the requirements of the three subtests for proportionality. We begin with the question whether the section maintains a rational connection with the Law's purpose. Our basic assumption for the purpose of this examination is that – in view of the interpretive approach set forth above – we are now concerned with legislation that permits detaining only those regarding whom there is an ongoing identification and deportation process. In the *Eitan* case I noted that while no one disputes that holding an infiltrator in detention makes it easier to conduct an orderly, controlled identification process and remove the fear that he may flee and thus frustrate the process of identification and removal from the country, it is not clear that there is an effective avenue for removal in regard to most of the infiltrators held in detention under sec. 30A of the Law (*ibid*., paras. 54-55 and 62). That is so, given the fact that most of the infiltrators are, as noted, from Eritrea and Sudan, to which there is no present possibility of removal. Although as noted above, there has been no change in the identity of the infiltrators, the State now contends that it can deport the infiltrators to "safe third countries" rather than to their countries of origin (and according to its submission, some 1,093 infiltrators have been so removed from Israel). An examination of the arrangements that the state has arrived at with those other countries is beyond the present procedural scope, and I will not make any definitive findings in this regard (as well as in regard to the additional question raised by the State in this regard concerning what might be deemed a lack of cooperation). However, this is sufficient for the purpose of meeting the first subtest.

10. This brings us to the second proportionality test – *the less harmful means test* – which was already addressed in the previous cases. In the *Eitan* case, I noted that even if there are alternatives to detention that other countries have seen fit to adopt, their actual effectiveness is not comparable to that of custodial detention. The legislature enjoys a broad margin of appreciation in this regard, and in the absence of an alternative that can achieve the Law's purpose to the same or a similar degree of effectiveness, the conclusion is that sec. 30A also meets this test (also see: the *Eitan* case, paras. 60-66)). The current detention arrangement also

meets the third proportionality test – *proportionality stricto sensu* – as opposed to what was held in regard to this section in its previous version in the *Adam* and *Eitan* cases. As may be recalled, those cases addressed a maximum detention period of three years and of one year respectively. As I noted in the *Eitan* case, the period of time during which liberty is denied affects the intensity of the infringement of the right. The longer the denial of liberty, the greater its infringement (*ibid*., para. 153). The mirror image of that is that reducing the period of detention lessens the infringement of the right. Indeed, detention for three months is no trivial matter. However, setting the ceiling for detention at three months (instead of a year) significantly reduces the infringement of the right to liberty and the right to dignity. As for the scope of the infringement of the right, weight should be given to the State's position that the grounds for release of an infiltrator for "other special humanitarian reasons" (sec. 30A(b)(2) of the Law) should be interpreted broadly as a dynamic valve-concept that will allow those responsible for implementing this general ground "to show the necessary sensitivity for limiting the infringement of the right to liberty" (and I would add, in regard to other rights, as may be the case) (see p. 43 of the State's response). In striking the balance between the infringement of a right and the benefit, I no longer find it necessary to state that it is constitutionally prohibited to hold a person who has immigrated to the country in an unregulated manner for this period of time for the purpose of identification and removal. This is accepted throughout the world (see: the *Eitan* case, paras. 73-77), and this may also be done under our domestic constitutional law and the basic principles upon which it is founded.

In summary, there are no grounds for declaring sec. 30A of the Law void given the agreed interpretation that we have pronounced here. I will now proceed to Chapter D of the Law.

Chapter D of the Law

11. In the framework of this petition, the Petitioners also challenged the provisions of Chapter D of the Law, which permits establishing a "residency center" for infiltrators. In the *Eitan* case we concluded that the arrangement established under Chapter D of the Law disproportionately infringed the right to liberty and the right to dignity and was, therefore, void (*ibid*., para. 98). Changes have since been made in this chapter. The President addressed these changes (paras. 53-54 of her opinion), which are primarily as follows: the length of the stay in

the center has been limited to a maximum of 20 months; the obligation to register has been set at once a day; the authority of the Director of Border Control to order the transfer of a resident from the residency center to detention has been limited; a resident may be released from the center on a number of grounds; and special groups, such as women and children, will not be sent to the residency center. Despite these changes, Chapter D of the Law continues to infringe protected constitutional rights. I will now address this.

The Infringement of Constitutional Rights

12. I addressed the issue of the infringement of rights in Chapter D at length in the *Eitan* case (*ibid*., paras. 117-127). The State recognizes the fact that Chapter D can indeed limit and infringe the right to liberty, but it reiterates its previous argument that infringing a right is not the same as denying it. The State is further of the opinion that the infringement of the right to liberty "is only at night (between 10 PM and 6 AM)" (p. 31 of its response), when the facility is closed and entry and exit are prohibited. I cannot accept this argument. First, although precisely defining the scope of the infringement of the right is of importance at the later stages of the constitutional examination, every infringement – whether minor or severe – is sufficient to require an examination under the Limitation Clause. At this point, the question of whether we are concerned with a "limitation" of the right or its "denial" is of no consequence, as "every limitation, regardless of its scope, is unconstitutional unless it is proportional" (AHARON BARAK, PROPORTIONALITY – CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, 136 (2010) (Hebrew); see: the *Eitan* case, para. 117; also see above, para. 59 of the opinion of the President).

13. Second, and most importantly, I am not of the opinion that the infringement of the right to liberty is "only at night". A person's liberty is not infringed by walls alone. Section 5 of Basic Law: Human Dignity and Liberty states: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise". How shall we interpret "or otherwise"? Does it apply only to a physical restriction upon liberty, or might it also extend to the individual's right to autonomy (also see: the *Eitan* case, para. 171)? The State proposes the most limited interpretation: in any other manner that restricts a person's physical liberty. In my opinion, that is not an appropriate interpretation. "Personal liberty is not confined to a person's physical liberty" (AHARON BARAK, HUMAN DIGNITY – THE CONSTITUTIONAL RIGHT AND THE

CONSTITUTIONAL RIGHT, vol. I, 344 (2014) (Hebrew) (hereinafter: BARAK, HUMAN DIGNITY)). Of course, not every infringement of free will and of the autonomy of will constitutes an infringement of the right to liberty (see: *ibid*.). But in my view, an *extreme denial* of an individual's choices constitutes an infringement of the right to liberty. An infiltrator residing – under coercion, let us not forget – in a residency center is not a free person even during those hours of the day when he is not enclosed within its walls. We must bear in mind that even though the requirement of reporting three times a day was rescinded in the new Law, and even though the center is sealed off only at night, it is questionable whether many of the residents have an effective possibility of leaving or travelling far from the facility. This is so in view of the "pocket money" given to the residents, which stands at NIS 14 per day (reg. 2 of the Prevention of Infiltration (Offences and Jurisdiction) (Provision of Pocket Money and Other Benefit and the Conditions for their Denial) (Temporary Order) Regulations, 5775-2014 (the regulations were not challenged in the petition); the prohibition upon persons staying in the residency center to work in Israel (sec. 32F of the Law); and the geographic location of the Holot facility. Under these circumstances, I am not convinced that a resident is able to routinely stray from the facility and provide for himself over the course of the day. This normative situation greatly limits the personal autonomy enjoyed by the infiltrators – who are subject to conduct and disciplinary rules that accompany them when they exit the gates of the residency center – and this restriction also affects their right to liberty. In this regard, the words of Justice E. Goldberg are apt:

> As Thomas Hobbes said: "A free man is he that… is not hindered to do what he has a will to" (HOBBES, LEVIATHAN, ch. 21). The scholar Isaiah Berlin discussed the positive meaning of this concept in his essay *Two Concepts of Liberty*:
>
> "The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside" (I. Berlin, *Two Concepts of Liberty*, 1958).
>
> Indeed, there is a strong connection between the right of liberty, and its derivative the autonomy of the will, and human dignity (FH 2401/95 *Nahmani v. Nahmani*,

IsrSC 50(4) 661, 723 (1996) [http://versa.cardozo.yu.edu/opinions/nahmani-v-nahmani-0]).

Our case law has also recognized an infringement of the right to liberty in other contexts that are not restricted only to "sealed gates" (see and compare: HCJ 4542/02 *Kav LaOved v. Government of Israel,* IsrSC 61(1) 346, 378 (2006) [http://versa.cardozo.yu.edu/opinions/kav-laoved-worker%E2%80%99s-hotline-v-government-israel] ("The restrictive employment arrangement violates the basic rights of the foreign workers. It violates the inherent right to liberty" (Justice E. E. Levy); "The arrangement has violated the autonomy of the workers as human beings, and it has *de facto* taken away their liberty" (Deputy President M. Cheshin, *ibid*., p. 403); LCA 10520/03 *Ben Gvir v. Dankner* (Nov. 12, 2006) ("The right to a good name also derives from a person's right to liberty, which is not exhausted in the protection of his body, but also of his spirit" (para. 12 of the opinion of Justice A. Procaccia); HCJ 2123/08 *A. v. B.*, IsrSC 62(4) 678, 696 (2008) ("The phenomenon of *get* refusal […] involves severe, painful harm to a woman who is left chained to a marriage in which she is no longer interested: her liberty is infringed, her dignity and emotions are infringed […]") (Justice E. Arbel); HCJ 3368/10 *Ministry of Palestinian Prisoners v. Minister of Defence*, para. 52 (April 6, 2014) [http://versa.cardozo.yu.edu/opinions/ministry-palestinian-prisoners-v-minister-defense] ("The denial of liberty is not expressed only in a person merely being subject to the custody of the State, but also is felt each and every day, during the period when a person is subject to the rules of conduct and discipline that are customary in the place of custody and which also limit his liberty" (Justice E. Arbel); HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance*, IsrSC 63(2) 545, 603-604 (2009) [http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance] ("But the actual violation of the right to personal liberty takes place on a daily basis as long as he remains an inmate of the prison […] and complies with the rules of conduct in the prison, which also restrict his personal liberty" (President D. Beinisch). See additional references in BARAK, HUMAN DIGNITY, 343-344, and compare to his approach according to which "the proper interpretation of the term 'otherwise' is in any other way that physically limits a person's liberty, or any other liberty of similar force" (*ibid*., p. 345).

14. If we find that the right to liberty of the center's residents is infringed even when they are not required to be there, in view of the requirement that they reside in the center to which they have moved their habitual residence, it is self-evident that staying in the residency center also infringes the right to dignity – their ability to choose how to conduct themselves and narrate their life story. I discussed this at length in the *Eitan* case (*ibid*., paras. 120-127).

15. What is the extent of the infringement of rights under Chapter D in its current formulation? Indeed, increasing the openness of the residency center (by means of registering once a day); granting the Director authority to exempt an infiltrator from registering for four days (instead of the prior two days); establishing a twenty-month maximum period of residence; excepting special populations; and certain changes in the Director's authority to order the transfer of a resident to detention have all somewhat reduced the infringement of rights. However, the Holot facility still remains isolated in the desert. We are still concerned with a facility in which a person torn from his life is forced to stay for a long period. His privacy is infringed – surrounded by jailers. The infringement of rights thus remains.

For a Proper Purpose

16. Having found an infringement of rights, we are obligated to examine whether the legislation meets the tests of the Limitation Clause. In her opinion, the President noted that the main purpose of Chapter D of the Law is "to stop the permanent settling of the infiltrator population in the urban centers, and prevent them from working in Israel", while providing an appropriate response to their needs (*ibid*., para. 61). The President further took note of the Petitioners' argument, also voiced in the *Eitan* case, that this chapter of the Law has a hidden purpose that is its true purpose: "breaking the spirit" of the infiltrators so that they will leave Israel. I addressed all of these purposes in the *Eitan* case (for a discussion of the purpose of preventing settling, see *ibid*., para. 103; on the purpose of responding to the needs of the infiltrators, see *ibid*., paras 104-106; on the claimed purpose of "encouraging voluntary emigration", see *ibid*., paras. 107-113). I will, therefore, only briefly address these matters.

Preventing Settling

17. We will begin with the purpose concerning the prevention of settling (or "stopping settling") that I left to be addressed in due course in the *Eitan* case (*ibid*., para. 103). I explained there that in any case, in my opinion, the provisions of Amendment 4 – the amendment under review in that case, and which introduced Chapter D – did not pass the constitutional tests, and therefore there was no need to address the question whether the purpose was proper (also see my position in the *Adam* case, para. 19 of my opinion). However, I was willing to assume, for the sake of argument, that it was a proper purpose. The President has now proposed that we expressly find that this purpose is proper (para. 66 of her opinion). I will therefore address this question.

18. "Preventing settling" – of whom? In the *Eitan* case, I addressed the problematic nature of separating one population from another (see: *ibid*,. para. 103 of my opinion). The reason for this is clear: the infiltrator population – as a matter of fact – has been with us for some time. Despite the fog surrounding the matter form a normative perspective (see: AAA 8908/11 *Asafu v. Ministry of the Interior*, the opinion of my colleague Justice E. Hayut (July 7, 2012); the *Eitan* case, para. 104) – which is no cause for celebration – there is no dispute that those infiltrators who are not in the Holot facility (which is the majority of the infiltrator population; see para. 55 of the President's opinion) are living substantial lives in Israel's cities. The State does not wish to reconcile with this situation. It is permitted to do so. In this regard, the State informed us that it has established and continues to work on establishing arrangements that will, in its view, facilitate the departure of infiltrators from Israel. These arrangements are not under review in the context of this petition, but in any case it is clear – and no contrary argument was made – that there is no concrete expectation for the mass removal of tens of thousands in the near future. That being the case, and inasmuch as we cannot order these people to return to their countries of origin, is it proper for us to seek to "prevent them from settling"?

19. At the end of the day, I have reached the conclusion that, in one sense, it can be assumed that while the matter is not problem free, we are concerned with a proper purpose. In this regard, I am referring to the interpretation of this purpose as "alleviating the burden" on the cities in which most of the infiltrators are concentrated – particularly south Tel Aviv. We need not waste words on the fact that the number of infiltrators who cannot be removed is large. In the years 2009-2011, thousands and more infiltrators entered Israel each year (see: the *Eitan* case, para.

38). Most of the infiltrators are concentrated in one geographical area. This concentration imposes a very heavy burden on the local population. The situation of infiltrators settling in the southern part of the city has changed the area's character, increased crowding, and contributed to the problems of daily life of the local residents. I addressed this at length in the *Eitan* case (*ibid*., para. 210). This burden – in terms of a small country with a small population, like Israel – is exceptional. Under the existing circumstances, we cannot deny that we are witnessing a "mass influx" of infiltrators. Given such a mass influx, I do not see reason to contradict the view that legislation seeking to prevent infiltrators from settling is, at present, intended for a proper purpose. This, as noted, is subject to our understanding of "prevention of settling" as intending to achieve a temporary division of the burden (with emphasis on the fact that we are concerned with a "temporary order"). Together with this, we should bear in mind that thousands of infiltrators left Israel since 2014, with only a few entering. The number of infiltrators is thus going down, and as I have already noted, "different factual data may […] lead to a different legal result (the *Eitan* case, para. 37). It is possible that in the future – perhaps the near future – the pressing social need for a strict normative arrangement for the infiltration phenomenon will assume a different character (see and compare: the *Eitan* case, para. 69), and if the downward trend of infiltration to Israel continues, and to the extent that the temporary order may be extended, the question of whether we are concerned with a "proper purpose" may arise for reconsideration.

20. In conclusion, at present I see no reason to reject the State's position in regard to this purpose. Along with this, like my colleague the President, I am also of the opinion that there is no present need to address the purpose of preventing the infiltrators from earning a livelihood in Israel, in view of the parts of the Law upon which the Petitioners focused their challenge (para. 76 of the opinion of the President).

Preventing the Resurgence of the Infiltration Phenomenon

21. Despite the title given to this purpose, we would make it clear that we are concerned with a deterrent purpose, with all the difficulties that were expressed in this regard in the *Adam* case and the *Eitan* case (*ibid*., para. 52 of my opinion), inasmuch as the State clearly informed us that this purpose means the reduction of the economic motivation of potential infiltrators – now in

Africa – to immigrate to Israel (para. 52 of the State's response). In the *Adam* and *Eitan* cases, I refrained from making any decisive statement in regard to the deterrent purpose (argued in regard to sec. 30A of the Law), inasmuch as in any case that section did not meet the proportionality tests (see: the *Adam* case, para. 19 of my opinion; the *Eitan* case, para. 52). I believe that we now must expressly decide the question whether this purpose meets the proper-purpose test. In my opinion, except in particularly exceptional cases – which are not present in the current circumstances – this purpose is improper. My colleague the President (para. 77 of her opinion) states that since we have already recognized that "having acknowledged that in principle the purpose of preventing settling in the urban areas is proper, nothing prevents its implementation having an attendant deterrent effect". I agree with that. As I pointed out in the *Eitan* case, I, too, am of the opinion that "there is nothing wrong with the detention of an infiltrator, intended to advance the process of his deportation, having an attendant deterrent effect" (*ibid*., para. 52), and that is true not only in regard to custody, but also in regard to the residency center. But the State's argument shows that it thinks that deterrence is not an attendant purpose appended to the other, proper, purpose but rather a separate and distinct purpose that it believes is also proper. It even refers to it as "the second purpose" (alongside "the first purpose" that concerns preventing the infiltrator population from striking roots, and "the third purpose", which concerns providing an appropriate response to the needs of that population). I cannot agree to this separate existence. In my view, this purpose cannot stand on its own – and standing on its own, it is improper. Justice E. Arbel addressed this at length in the *Adam* case, and I see no need to revisit it (*ibid*., paras. 85-93; but compare the position of Justice I. Amit in the *Eitan* case, according to which changing the incentives in regard to potential infiltrators is a proper social purpose that derives from the principle of state sovereignty, paras. 9-10 of his opinion).

22. Moreover, the State notes that changing the array of incentives for potential infiltrators is rooted in the integration of the provisions of sec. 30A (concerning detention) and the provisions of Chapter D (which addresses the establishing of a residency center). The relationship between the two is established by sec. 30A(k) of the Law, according to which an infiltrator will be ordered to the residency center upon release from custody. According to the State, these two change the array of incentives and encourage potential infiltrators to refrain from trying to reach Israel. I read and reread the State's argument, and it is not clear – even were I willing to accept that we were concerned with a proper purpose (which is not the case) – why "changing the array

of incentives for the potential infiltrator", or deterring him from coming to Israel, would not be achieved by making the provisions of the Law, in regard to Chapter D as well, of prospective effect. To the extent that the State seeks to deter someone from arriving in Israel, it should in any case suffice that the said normative arrangement apply only to that potential infiltrator who is currently somewhere else and considering whether to make his way to Israel. That is not what was done in the legislation we are examining.

23. As opposed to this, the Knesset's view is that the purpose of reducing the economic incentive is also relevant in regard to existing infiltrators wishing to remain in Israel (p. 13 of the Knesset's response). This framing of the matter raises questions in regard to the possibility of encouraging "voluntary emigration" by such means (see the *Eitan* case, paras. 107-113 of my opinion), and I will address this below. It remains to address two matters – the purpose of providing a response to the needs of infiltrators and the additionally claimed purpose of "encouraging voluntary emigration". I will briefly state, as I already stated in the *Eitan* case, that the purpose of "providing a response to the needs of the infiltrators" is proper (*ibid*., para. 104 of my opinion). I indeed continue to doubt whether the residency center actually realizes this purpose in practice, but I do not believe that the constitutional framework is the appropriate one for addressing the dispute as to the manner of operation of the Holot center, on which the parties to these proceedings continue to disagree.

I will now turn to the issue of the claimed purpose of "encouraging voluntary emigration".

Encouraging Voluntary Emigration

24. The starting point for examining this purpose is that a person cannot be compelled to go to a country that presents a danger to his life or liberty. But what of a person who does so of his own will? In the *Eitan* case I noted that leaving the country might be deemed prohibited deportation or "constructive removal" (and not leaving of "free will") not only in situations in which the state officially orders a person's deportation, but also when the state adopts particularly severe, harmful means intended to exert pressure that will lead to a person to leave the country "willingly". The decision to leave the country – which is a choice that should not be

influenced – must be free of unreasonable pressures (*ibid*., paras. 110-112). In the *Eitan* case I addressed the question whether the purpose of Chapter D of Amendment 4 was to deny such free will – a question which, in my view, was not easy to decide nor free of doubts. This is what I said then:

> It would appear that no one would disagree that the residency center established by virtue of Chapter D of the Law presents a serious hardship for the lives of the infiltrators, and such hardship may certainly serve as an incentive for a person to leave the country. However, certain hardships are the lot of every person who chooses to immigrate to another country in an unorderly manner. It is not possible – and even, in some senses, undesirable – to eliminate them entirely. There is a fine line between legitimate incentives (such as financial incentives) to leave the country and applying significant, unfair pressure that, in practice, deprives the illegal aliens of their ability to choose not to leave the country. Does Chapter D cross that line in view of its the inherent, indeterminate denial of liberty, and other matters that will be addressed below? While I do not believe that the Petitioners' arguments in this regard can be dismissed out of hand, I do not find it necessary to decide the matter inasmuch as I believe that in any case, Chapter D of the Law must be annulled because it does not meet the requirements of proportionality (*ibid*., para. 113).

25. As opposed to this, in the present case the President expressed her view that the current Law is not intended to break the spirit of the infiltrators (paras. 80-81 of her opinion). In this regard, the President relied, *inter alia*, on the fact that the claim that here is a "hidden" purpose of this type was denied in the hearing before us by the State's attorney as well as in the responses of the Knesset and the State to the petition (para. 79 of her opinion). She also noted that the residency center offers activities and employment (*ibid*., para. 80). I have considered this, but I do not believe that it is sufficient to remove the doubts that I expressed in the *Eitan* case. It should first be noted that in the course of the deliberations that preceded the enactment of Amendment 4, representatives of the governmental agencies expressed themselves in a manner that showed that the possibility of encouraging "voluntary emigration" loomed in the background of the legislation (see the *Eitan* case, para. 113). On the day our judgment in the *Eitan* case was

handed down, the then Minister of the Interior announced that "the second amendment of the law has made a significant contribution to the process of voluntary emigration" (his announcement was appended to the petition and marked P/20). This matter was not forgotten in the deliberations on the Law that is the subject of these proceedings. Thus, for example, in a meeting of the Knesset Internal Affairs and Environment Committee on Oct. 6, 2014, the committee chair noted: "[…] by means of the law we have succeeded in voluntarily returning […] many infiltrators", and the Minister of the Interior added: "I set a goal of removing infiltrators […] we had a tremendous upswing in the voluntary emigration of infiltrators […]" (Protocol of meeting 384 of the Internal Affairs and Environment Committee of the 19th Knesset, pp. 4 & 6 (Oct. 6, 2014)). On Nov. 11, 2013, the Director of the Enforcement and Aliens Department of the Population and Immigration Authority noted in a meeting of that committee that "Whomever it is decided to send to a residency center will be given a referral that very moment, the residency permit he now holds in his hand will be revoked and his employment will be massively enforced. The moment he enters the facility, we will continue all of the procedures for encouraging voluntary emigration" (Protocol of meeting 117 of the Internal Affairs and Environment Committee of the 19th Knesset, p. 14 (Nov. 11, 2013)). In a meeting of that committee on Dec. 8, 2014, Knesset member David Tzur noted: "Holot must not be closed. We have to create a situation that amplifies the incentive for infiltrators to leave here. That's what I say" (Protocol of meeting 435 of the Internal Affairs and Environment Committee of the 19th Knesset, p. 6 (Dec. 8, 2014)).

26. If that were not enough, despite the declaration by the State's attorney in the hearing before this Court that "Certainly, most certainly" no actions were or would be taken to "break spirits", and although my colleague the President emphasized in language that could not be clearer that "[…] no actions intended to bring about voluntarily leaving the country may be employed in the residency center, including actions intended to exert pressure upon the infiltrators in order to encourage or persuade them in any manner" (para. 83 of her opinion), the State did not reply to the concrete claims of the Petitioners in these proceedings – which were supported by affidavits – that they were indeed heavily pressured in the residency center to leave the country. Thus, for example, Petitioner 2 stated:

> Every meeting with prison guards and clerks, and even with the clinic staff, is always accompanied by one question: "Why don't you leave?" The fact that my asylum request has not been examined for over a year doesn't interest anyone. All the people in Holot care about is that I leave, and the pressure in this regard is really unbearable (para. 23 of the affidavit of Petitioner 2, appended to the Petition and marked P/3).

The Petitioners further claimed that when the center's residents meet with representatives of the Population and Immigration Authority to submit requests for "leave", they are pressured to "depart voluntarily" (p. 55 of the petition). They argued on and on, and even presented additional examples, but no real answer was forthcoming from the Respondents.

27. Lastly, the question of the identity of the people sent to the Holot facility and the criteria established by the administrative agency in this regard continues to accompany us since the *Eitan* case (see: *ibid*., paras. 90-91). I will also address this issue briefly further on. At this point I would only point out that the result of the implementation of these criteria is that 76% of the Holot residents are Sudanese and 24% are Eritrean. This is almost the reverse of their relative proportions. According to *the July data of the Population and Immigration Authority*, 19% of the infiltrators into Israel are Sudanese and 73% are Eritrean. According to the Petitioners – and I do not intend to rule on this argument in these proceedings – "in the Respondents estimation, there is a better chance of breaking the spirts of the Sudanese nationals and forcing them to "agree" to leave the country" (p. 48 of the petition). Indeed, certain aspects concerning the implementation of the Law are not, at least directly, of constitutional import. However, questions regarding the implementation of the Law may influence the decision of whether it meets the proportionality tests (HCJ 3809/08 *Association for Civil Rights in Israel v. Israel Police*, (para. 33 (May 28, 2012) [http://versa.cardozo.yu.edu/opinions/association-civil-rights-israel-v-israel-police] (hereinafter: the *Association for Civil Rights* case)), and in my opinion, these aspects may even aid in the examination of the purpose of the Law in seeking to understand the difference – if there be one – between the declared purpose of the Law and its true purpose.

28. On this occasion, as well, I do not wish to place exclamation points after these question marks and decide as to the existence or absence of this claimed purpose, and I do not take lightly the State's declarations before us in this regard. Nevertheless, it would appear to me that even if

we are unable to determine that the purpose of Chapter D of the Law is to "pressure" the infiltrators to agree to leave Israel, the above suffices for us to refrain from making a positive finding in the matter. In conclusion, we can, at present, suffice in finding that the main purpose of Chapter D of the Law is to prevent the infiltrator population from settling in the urban centers. In the present time and circumstances, we cannot say that this is not a proper purpose. We will, therefore, proceed to an examination of the proportionality of the Law's provisions.

Proportionality

29. The legislature introduced several changes into the arrangement currently before us, which were presented in detail by the President, but it remains fundamentally similar to its predecessor. Under these circumstances, I see no need for a comprehensive examination of the details of the various arrangements that I reviewed in at length in the *Eitan* case, so I will suffice with a summary. I will focus my examination on two specific arrangements that require special attention: the authority to issue a residence order to an infiltrator for a maximum period of twenty months, as prescribed by the legislature, and the arrangement permitting the detention of an infiltrator for various disciplinary offenses. As for the former I agree with the relief proposed by the President. As for the latter, I would propose that we declare it void and issue appropriate transitional instructions.

The Authority to Order Residency and the Length of Residency in the Center

30. If the Director of Border Control finds any problem in regard to deporting an infiltrator to his country of origin, "he may order that the infiltrator stay in a residency center until his deportation from Israel or his removal therefrom, or until another date as shall be decided" for a period of twenty months in total (sec. 32D and 32U of the Law). Residency orders will not be issued to such defined populations as minors and women, as will be explained below. This is the core of Chapter D of the Law, in that – subject to criteria established by the administrative agency – it authorizes holding an infiltrator in a residency center, and establishes the maximum period of such a stay. As my colleague the President noted, examining the proportionality of this

arrangement requires that we address its reciprocal relationship with other particular arrangements in the Law (para. 85 of her opinion), as I will now proceed to do.

The Rational Connection Test

31. The rational connection test requires that the chosen means be suitable for realizing the Law's purpose. I earlier noted several possible purposes, and I will focus my examination of proportionality upon the purpose of "preventing settling", which is the most important of the purposes of Chapter D of the Law. Is there a rational connection between the authority granted to the Director and this purpose? Answering this question became more complex after a twenty-month *limit* was established for residency in the center. I noted in the *Etan* case that the absence of a limit upon the period of residency ensures the realization of the Law's purpose in manner that meets the rational connection test (para. 158). I added there that any limitation of the residency period would mean that the infiltrator could return to the labor market after a certain period of time (inasmuch as the State undertook not to enforce the work prohibition in regard to those not being held in the residency center). Indeed, the very setting of a time limit for staying in the center creates a "revolving door" in and out of the center in a manner that does not make it possible to prevent setting down roots, but at most *delays* it until such time as the infiltrator returns to his place of residence and his work. Even were one to say that such settling is prevented, but only for a limited period (which is the State's contention – se p. 67 of its response; and also see its statement that the Law is not "an exclusive means solely responsible for achieving the proper purpose of preventing 48,000 infiltrators from settling in Israel", *ibid*.), we are concerned with a law that only partially achieves its purpose, inasmuch as an infiltrator – regarding whom there is no concrete expectation of removal – will return to the urban centers. We would add that, at present, the maximum occupancy of the Holot center is 3,360 residents (according to the State's submission at p. 66 of its response), which is but a small part of the infiltrator population. Thus, only a minority of the infiltrator population is "prevented" (or delayed) from settling. However, it should be noted that the Law does not set a limit upon the size of the residency center, nor upon the number of residency centers that may be established. In practice, the State's contention is that the Holot center serves as a sort of "pilot" (the *Eitan* case, para. 128).

32. Ultimately, I believe that the rational connection in this case is not entirely clear. Despite my doubts, I would not say that there is no such connection. As the President noted, the chosen means need not fully realize the Law's purpose (para. 90 of her opinion), and I am willing to assume that this arrangement meets the first proportionality test. In any case, this matter can be revisited in the future (see para. 91 of the President's opinion).

The Less Harmful Means Test

33. An infiltrator ordered to report to the residency center cannot "establish himself" in the urban centers. During the period of his required residency in the center, his life is primarily in the center. In this sense, the residency center realizes the Law's primary purpose – preventing the infiltrators from settling – with relatively high effectiveness. Indeed, one might think of other means that might serve to achieve this purpose, like geographic dispersion or various grants that might serve as an incentive – a "carrot" rather than a "stick" – for living and working in various places other than the urban centers. However, presence in the residency center is compelled. It is not subject to the infiltrator's free choice. A person who chooses not to report to the center is subject to the severe sanction of detention, which I will address in detail below. I therefore tend to the view that it is doubtful whether there is a less harmful means with the potential for achieving the Law's purpose to a similar degree of effectiveness (the *Eitan* case, para. 159).

Proportionality Stricto Sensu

34. Thus far, the arrangement has passed the proportionality tests. However, in my opinion, this arrangement fails the last and most important value-based test inasmuch as the provisions that permit holding a person in a residency center for a maximum period of twenty months do not maintain a direct relationship with the benefit they achieve. In assessing the balance between the benefit and harm of the infringement of constitutional rights, I will begin with an examination of the benefit. In the *Eitan* case I emphasized that "there is some truth to the opinion that Israeli society benefits from its members not being required as a matter of course to bear the burden of absorbing tens of thousands of infiltrators, and that the negative phenomena associated with mass, unregulated immigration – which cannot be ignored – are substantially reduced when

they are placed in a residency center" (*ibid*., para. 160). But the benefit provided by this arrangement does not outweigh its infringement of rights. I explained this in detail in the *Eitan* case, and I see no need to repeat what I stated there. I will therefore focus upon the changes introduced into Chapter D of the Law and their consequences. I will first point out that under Amendment 4, Chapter D did not except special, particularly vulnerable groups from its compass. That is not the case in the present version of Chapter D, in which sec. 32D(2) prohibits issuing a residency order to minors, women, persons over the age of sixty, the parent of a dependent minor, "a person whom the Director of Border Control is convinced might be harmed by residing in the residency center due to his age or state of health, including his mental health, and there is no other way to prevent such harm", and so forth. I pointed out in the *Eitan* case that "individual infiltrators not referred to the residency center due to their personal status, or who may later be released therefor, would not detract from achieving the purpose grounding the legislation, and would, at most, detract to an insignificant extent", and that the absence of exceptions "forcefully emphasizes the lack of proportion (in the narrow sense) of the comprehensive prohibition" (*ibid*., para. 187). The amendment of the Law has resolved this problem to a great extent.

35. Another change introduced by the legislature concerns the center's registration requirement. Amendment 4 required that during the daylight hours – when the center is "open" and the residents may leave and enter freely – they must report three times. As I pointed out in the *Eitan* case, the need to report for registration at noon severely detracts from the practical possibility of leaving the facility for any uninterrupted activity (*ibid*., para 118), as "a person needs an appropriate window of time in order to fill his life with real content. Short, fixed periods are insufficient for that" (*ibid*., para 127). The Law now provides that the residency center will be closed at night (between 10:00 PM and 6:00 AM), and that a resident must report for registration once a day, between 8:00 PM and 10:00 PM (sec. 32H of the Law). This change somewhat blunts the intensity of the infringement of the right to liberty and the right to dignity. It allows the infiltrator greater freedom of action, inasmuch as he may leave the residency early in the morning and return in the evening. However, as I noted earlier, we should not overestimate the importance of this change in terms of lessening the infringement of the right. "May" is not necessarily "can". The center of life of an infiltrator required to report to the residency center transfers to that center. He is not a free man, inasmuch as he conducts his daily life in the shadow

of the demand to return to the center at night, and his ability to realize his autonomy is dictated by the Law's provisions that forbid him to work, the small amount of "pocket money" that he receives, and the location of the Holot center. Clearly, while there have been changes, the arrangement continues to infringe his rights (see paras 12-15, above).

36. The arrangement that I addressed in the *Eitan* case in regard to the administration of the residency center by the Prisons Service has barely been changed. The operation of the facility is entrusted to the Prisons Service under sec. 32C of the Law, which requires that when the Minister of Public Security proclaims the establishment of a residency center, he must appoint a senior warden as its director, and the Commissioner will appoint corrections officers who will work for the center (after appropriate training). I noted in the *Eitan* case that placing the operation of the residency center in the hands of the Prisons Service – which is also granted the broad powers required for operating the center – amplifies the infringement of the infiltrators' rights (*ibid*., para, 138), as the entity operating and administering the open residency center is in daily contact with the residents of the center, has substantial control over the entire scope of their lives, and therefore has decisive influence over how the center is perceived by its residents – whether an open facility with a civilian character, or a prison or detention facility with a criminal character (*ibid*., para. 144). However, I stressed that "it is possible that another normative approach for arranging the facility's operation would pass the constitutional test even if the entity entrusted with its operation were the Prisons Service" (*ibid*., para. 146). The arrangement has essentially remained unchanged, and corrections officers continue to operate the residency center.

37. What is the upshot of all this? It would seem that although there has been some mitigation of the infringement of human rights that was found in the prior version of Chapter D following Amendment 4, in view of the provisions regulating the lives of the residents of the residency center – including those in regard to when one must report to the center and when one may leave, who operates it and the authority granted him – the infringement of rights remains, and it is severe. As I noted in the *Eitan* case, "a proportionate normative arrangement must maintain a proper relationship between the extent of the limitation of rights in the facility and the maximum length of the stay therein, such that the more severe the limitation of basic rights, the shorter the period of imposed residence in the facility" (*ibid*., para. 162). The reason for this is

that Chapter D is built as an equation. "One arrangement (like the rigid registration requirement) may be balanced by another arrangement (like fixing the period of residency for a shorter period)" (the *Eitan* case, para. 100). The twenty-month period established in the Law is a very long time (in fact, there is no parallel to such a period of residency in a residency center anywhere in the world, see: the comprehensive survey in the President's opinion, paras. 101-105; and see: the *Eitan* case, para. 163). The time dimension substantially affects the infringement of the dignity of the person deprived of liberty. Depriving liberty for a short period allows a person to return quickly to his normal life. That is not so in the case of a very long period (the *Eitan* case, para. 154). Because the infringement of rights of imposed residence in the facility and the maximum term of that residence are inextricably tied, and in view of the extent of infringement of rights inherent in Chapter D, I am of the opinion that the maximum period of residence established by the Law does not maintain that proper relationship, despite the benefit it provides. The result is that secs. 32D(a) and 32U of the Law are disproportionate and therefore unconstitutional. Subject to the aforesaid, I concur in the opinion of the President and the relief she proposes.

I will now proceed to an examination of an additional arrangement – that permitting the transfer of an infiltrator to detention.

Transferring an Infiltrator to Detention

38. The State seeks to compel reporting to the residency center. It seeks to operate it in accordance with defined rules of conduct. To that end, it must hold "coercive power" that will deter infiltrators from perpetrating infractions (the *Eitan* case, para. 183). The State chose the means of detention of an infiltrator who perpetrates various infractions. The length of detention depends upon the type of infraction and the number of orders issued in regard to infractions committed. In the *Eitan* case, the periods of detention ranged from thirty days of detention for a minor infraction to a year for the repeated perpetration of certain infractions (*ibid*., para. 166). As I noted in the *Eitan* case, transferring a person to detention from the residency center (and even persons not in the residency center) infringes his constitutional right to liberty. This is so because "transfer from the residency center to a detention facility involves the limitation of various aspects of the right to liberty that are not limited merely to an amplified infringement of physical

liberty […] [it] prevents the possibility granted to an infiltrator in the residency center to leave its confines at the permitted times; it limits the possibility of creating social relationships; it disrupts the routine that the infiltrator has adopted in the course of his stay in the center" (*ibid.*, para. 168).

39. In the *Eitan* case, I was of the view that sec. 32T – in its former version – also infringed the right of the infiltrators to due process, in addition to the infringement of their liberty. This section granted the Director authority to order the transfer of an infiltrator to detention without that decision being subject to automatic judicial review by any judicial or quasi-judicial body, other than for the grounds for release under sec 30A(b) of the Law, and did not comprise the appropriate "procedural guarantees" that are a precondition of the constitutional right to due process (the *Eitan* case, paras. 167, 179). The infringement of the right to due process was found to be disproportionate in the *Eitan* case. That conclusion obviated the need to examine whether the section passed the other constitutional criteria of the Limitation Clause due to its infringement of the constitutional right to liberty (*ibid*., paras. 183-184). I also noted that the issue of the independent infringement of the right to liberty was worthy of a separate examination in view of the periods of detention, inasmuch as placing a person in detention for extended periods "crosses the border between a 'disciplinary' sanction that is primarily deterrent and a 'penal' sanction that is of a retributive nature". I took particular note of the fact that an overly long period of detention "may also be disproportionate (in and of itself) in view of its severe infringement of the right to liberty, even if the Director's decision were subject to automatic judicial review" (*ibid*., para. 184).

40. The current Law also authorizes the administrative agency – more precisely: the Director of Border Control – to impose punishment in the form of deprivation or restriction of a person's liberty as part of the disciplinary arrangement. Before making such a decision, the Director is required to permit the infiltrator to "present his arguments to him" (sec. 32T(e) of the Law). To what extent is the Director able to make an informed decision in the matter before him? Needless to say, in making such a decision the Director is subject to the rules of administrative law, and he must observe them with utmost strictness. *Inter alia*, the infiltrator must be informed of the nature of the charge or claim against him, he must be given a fair opportunity to respond to the information provided in his matter, and appropriate arrangements must be made in view of the

fact that some of the infiltrators do not know the language (see and compare, e.g: AAA 7201/11 *Rahmani Ltd. v. Airports Authority*, paras. 43-45 (Jan. 7, 2014) (hereinafter: the *Rahmani* case); AAA 1038/08 *State of Israel v. Gaevitz* (Aug. 11, 2009); LCrimA 2060/97 *Valinchik v. Tel Aviv District Psychiatrist*, IsrSC 52(1) 697 (1998); *HCJ 656/80 Abu Rumi v. Minister of Health*, IsrSC 35(3) 185 (1981); DAPHNE BARAK-EREZ, ADMINISTRATIVE LAW, vol. I, 498-529 (2010)). The Director's decision must also be grounded upon an appropriate factual foundation directly corresponding to the infringement of basic rights inherent in a decision to place a person in detention (see and compare: HCJ 394/99 *Maximov v. Ministry of the Interior*, IsrSC 58(1) 919, 928-931 (2003); HCJ 3615/98 *Nimoshin v. Ministry of the Interior*, IsrSC 54(5) 780, 787 (2000); and see: HCJ 7015/12 *Ajuri v. IDF Commander in the West Bank*, IsrSC 56(6) 352, 372 (2002) [http://versa.cardozo.yu.edu/opinions/ajuri-v-idf-commander-west-bank]). However, the Law does not grant the Director such powers as the power to summon or subpoena witnesses. Such powers could serve to increase the probability that the proceedings will achieve a correct result and increase the chances that they will be fair from the perspective of the person charged, such that it will be easier for him to accept the result (see and compare: the *Eitan* case, para. 174). This is problematic in view of the degree of the infringement of rights.

41. However, as opposed to the situation in *Eitan* case, under the current legislation the Director's discretion is subject to the review of the Detention Review Tribunal (hereinafter: the Tribunal). The Director's decision is examined *de novo* by the Tribunal, which can approve or *reject* the Director's order (sec. 32T(h) of the Law). The Tribunal is not restricted to the grounds for termination of detention under secs. 30A(b)(1)-(3) of the Law, and it is also required to examine the lawfulness and reasonableness of the Director's decision. To that end, the Director's decision must be properly reasoned so that the considerations leading to the decision can be examined, and so that the decision can be subjected to judicial review (see and compare: the *Rahmani* case, para. 9 of the opinion of Justice Joubran). In my opinion, the Tribunal must address the Director's findings in their entirety, in a manner similar to the "double instance" model. In other words, it must permit the resident of the center to present his arguments and submit supporting evidence (see and compare: CHEMI BEN-NOON, THE CIVIL APPEAL, 13 (3rd ed., 2012)). To that end, the Tribunal, as opposed to the Director, holds broad powers by virtue of the fact that it exercises its review in accordance with the Administrative Courts Law, 5752-1992 (see the opinion of the President, para. 110). It should be stressed that the current procedure

establishes self-initiated review by the Tribunal, with no need for the infiltrator to "start" the procedure himself. This represents an improvement over the situation prior to the *Eitan* case. However, as can be understood from the language of the section, the Tribunal is required to examine the Director's discretion only *after* he has decided upon a transfer to detention. Although the infiltrator must be brought before the Tribunal "as soon as possible", his first appearance before it may take place only 96 *hours* after his confinement in detention (sec. 32T(g) of the Law). This is no insignificant amount of time (see: HCJ 6055/95 *Tzemach v. Minister of Defense*, IsrSC 53(5) 241 (1999) [http://versa.cardozo.yu.edu/opinions/tzemach-v-minister-defense] (hereinafter: the *Tzemach* case); sec. 237A of the Military Justice Law, 5715-1955 (hereinafter: the Military Justice Law); sec. 29(a) of the Criminal Procedure (Enforcement Powers – Arrests) Law, 5756-1996; but see: sec. 13N(a) of the Entry into Israel Law, which establishes that "a person held in detention will be brought before the Detention Review Tribunal as soon as possible, and no later than 96 hours from the beginning of his custody").

42. In any case, and even assuming the sufficiency of the judicial review established by the Law, granting such authority to an administrative agency is exceptional. In the *Eitan* case I noted that "the authority to limit and supervise liberty is at the core of the role of the judiciary" (*ibid*., para. 179). It is the judiciary that administers the criminal law. In order to ensure the constitutional protection of the right to liberty, criminal law establishes strict rules of procedure and evidence that govern the judicial supervision of interrogation and the manner in which a person's guilt will subsequently be decided (Ron Shapira, *An Administrative Procedure establishing the Boundaries and Scope of Criminal Punishment*, 12 HAMISHPAT – ADI AZAR VOLUME, 485, 488 (2007) (hereinafter: Shapira)). Nevertheless, Israeli law provides several examples in which an administrative agency is granted authority to restrict a person's liberty. *First*, in hierarchic organizations that by nature require the observance of strict disciplinary rules, the legislature granted authority to an administrative organ to deprive a person's liberty as punishment for breaches of disciplinary rules. Such rules – found in the armed forces, the Prisons Service and the police – permit judicial officers or disciplinary tribunals to impose penalties of confinement or detention a person who has committed disciplinary offenses under the relevant rules (see: secs. 152-153 of the Military Justice Law; secs. 110(30) and 100(44) of the Prisons Ordinance [New Version], 5732-1971 (hereinafter: the Prisons Ordinance); secs. 37 and 51 of the Police Law, 5766-2006 (hereinafter: the Police Law)). *Second*, in situations concerning the

enforcement of discipline in prisons and detention centers, the authority administering the prison or detention facility is authorized to order that a prisoner or arrestee be held in solitary confinement or – in the case of prisoners – to order a reduction of days of administrative or early release (see: sec. 58 of the Prisons Ordinance; sec. 10(b) of the Arrests Law).

43. As we see, the legislature recognizes that in certain hierarchic systems the administrative agency is authorized to impose punishment that includes the denial of liberty for disciplinary purposes (see: Shimon Shetreet, *Administrative Fines: Criminal Punishment by the Administration*, 2 MISHPATIM 577, 579-581 (1970)). Nevertheless, these arrangements should not be understood as indicating that the task of *criminal* punishment can be taken out of the hands the judiciary. We must, therefore, carefully consider the delicate distinction between disciplinary punishment and criminal punishment: in appropriate circumstances, disciplinary punishment can be entrusted to an administrative agency (but see: Shapira on the importance of judicial review over the decisions of the administrative body, in the case addressed there, the Prisons Service, *ibid*., pp. 488-493). However, if the Director of Border Control be granted authority to impose criminal punishment upon an infiltrator, that will not stand. It would constitute an overly severe infringement of rights – the right to liberty and to due process, which are interrelated. Seemingly disciplinary deprivation of liberty that crosses the Rubicon to the "criminal" coast requires a criminal process in a court of law that will ensure due process. Criminal punishment is permitted to the court and only the court, not retroactively and after the fact, not as "judicial review", and not even by rehearing. What is required is a criminal process in a court, in accordance with all its rules and regulations.

44. The question of the location of the border between punishment that serves essentially retributive objectives (criminal punishment) and punishment intended for deterrent, disciplinary purposes is difficult to resolve. It would seem that here, too, "there is great confusion and uncertainty", and "it may be that the said theoretical issue has not yet been adequately developed" (CrimA 758/80 *Yesh Li Ltd. v. State of Israel*, IsrSC 35(4) 625, 629 (1981) (hereinafter: the *Yesh Li* case) (on the question of whether a particular fine constitutes criminal punishment); and see: LCA 4096/04 *Boteach v. State of Israel*, IsrSC 59(1) 913, 917-920 (2004) (hereinafter: the *Boteach* case)). This matter requires an interpretive solution. "Through interpretation we must locate the 'genetic code' of the principle under examination – in other

words, its substance and character, and whether it is indeed 'criminal' or not" (HCJ 2651/09 *Association for Civil Rights in Israel v. Minister of the Interior*, para. 6 of the opinion of Justice M. Naor (June 15, 2011) (hereinafter: the *Passport Regulations* case); and see: the *Yesh Li* case, p. 629; LA 277/82 *Nirosta Ltd. v. State of Israel*, IsrSC 37(1) 826, 830 (1983); CrimA 474/65 *Miromit Metal Works v. Attorney General*, IsrSC 20(1) 374, 376-377 (1966)). This classification depends upon the circumstances of the matter and the language of the authorizing legislation (and see the example in the *Passport Regulations* case, para. 10).

45. This is the crux of the matter: the Director of Border Control is authorized to issue orders to transfer a person to detention for periods that may reach 75, 90, or 120 days. In other words, for various disciplinary violations – like absence from the residency center or not reporting on time to renew a temporary visitor's permit under sec. 2(a)(5) of the Entry into Israel Law – the Director of Border Control may "sentence" an infiltrator to prison-like punishment for a period of three or even four months. Is this "criminal" as opposed to "disciplinary" punishment? We will begin with the interpretation of the provision. In my opinion, we can be aided in this by examining the character of the disciplinary "offense" and whether or not it is part of the criminal corpus (the existence of a parallel criminal norm may support the view that we are not concerned with a disciplinary means, but rather an attempt to create a "by-pass" of the criminal process, and see the decision of the European Court of Human Rights in *Campbell v. United Kingdom*, 7 E.H.R.R. 165 ¶ 68 (1984) (hereinafter: the *Campbell* case)); the severity of the offense (the greater the severity with which the offense attributed to the person is viewed, the greater the tendency to view its punishment as criminal); the maximum term of deprivation of liberty (a longer period brings the punishment closer to criminal punishment, while a shorter period is more indicative of disciplinary punishment); and the manner for implementing the punishment (the greater the punishment infringes liberty, the more the scales tip towards a criminal classification) (see and compare the case law of the European Court of Human Rights that addressed the question of when a person subjected to a disciplinary penalty is entitled to the defenses under Art. 6 of the European Convention on Human Rights that establish procedural safeguards for a criminal defendant: *Engel v. The Netherlands*, 1 E.H.R.R. 647 ¶ 82 (1976); the *Campbell* case, paras. 69-73; *Ezeh v. United Kingdom*, 39 E.H.R.R. 1 ¶ 82-86 (2003). In the latter case, the European Court noted that the criteria are not cumulative conditions, and that

there may be instances in which the presence of one of them may suffice to show that the penalty under examination belongs to the criminal "sphere", *ibid*., para. 86).

46. We will now apply these tests to the arrangement under review. First, in regard to the existence of a parallel criminal norm, we find that an examination of sec. 32T of the Law shows that there is no parallel criminal offense for some of the violations enumerated there, whereas in regard to so some of them – "Causing substantial damage to property" (sec. 32T(a)(3) of the Law) and "Inflicting bodily injury" (sec. 32T(a)(4) of the Law – one can think of criminal offenses that might be applied when needed. This test does not, therefore, tilt the scale to one side or the other. This is also true in regard to the severity of the offenses, some of which relate to obeying the conduct rules of the residency center (like the registration requirement), while others, as noted, relate to more severe harm to property or person. Thus, neither of these two subtests yields an unequivocal result. However, the two other subtests do, in my opinion, point to the view that we are concerned with essentially criminal punishment. In regard to the manner of implementing the punishment, we are concerned with transferring a person to detention in conditions similar to imprisonment. This is, of course, a very severe sanction in terms of its infringement of liberty (and see: the *Eitan* case, para. 47). The length of the deprivation of liberty also supports this conclusion. Some of the periods of detention established in this section are unquestionably long, reaching 120 days – or four months – of deprivation of liberty. My colleague the President emphasized that these are "maximum" periods that need not be fully "exploited" (para. 112 of her opinion). In my opinion, that does not put the matter to rest. In the *Eitan* case, in response to the opinion of President A. Grunis, I addressed the question of the weight that should be given to the fact that the law authorized the Director of Border Control to order that an infiltrator remain in the residency center "until the date that shall be established". I pointed out that in accordance with my approach, the discretion granted to the Director did not change the fundamental principle, inasmuch as while the Director was authorized to set a date, the beginning of the section concurrently granted him the authority not to set any date. The Director may indeed properly exercise his discretion and refrain from placing an infiltrator in detention for the long periods stated by the Law. But we cannot hang our hopes solely on the grace of the administrative authority's discretion and on its choice to set punishment at the lower end of the scale permitted by the Law. We must look the Law in the eye. The legislature entrusted the administrative agency with the possibility of imposing prison-like punishment for

months. The authority was thus granted, and it – rather than the individual discretion – is now under our review.

47. Lastly, I would propose that we examine the balances achieved by the legislature in similar situations, as "in our legal tradition, we accept that a statement in one text may be interpreted by examining the meaning of a similar statement in another text" (AHARON BARAK, INTERPRETATION IN LAW, vol. 3, Constitutional Interpretation, 243 (1995) (hereinafter: BARAK, INTERPRETATION)). Parallel disciplinary arrangements in Israeli law limit the deprivation of liberty to much shorter periods than those established under sec. 32T of the Law. In the armed forces, as my colleague the President noted, a senior judicial officer can sentence a soldier to detention for a maximum of 35 days. If an *additional punishment* is imposed before the soldier has served the entire sentence, the soldier will serve both sentences, but with the proviso that the maximum period of consecutive detention not exceed 70 days (see sec. 153(a)(6) and sec. 162A of the Military Justice Law; para. 112 of the President's opinion). In the case of a corrections officer, a disciplinary tribunal can impose a maximum of 45 days detention for a conviction for a disciplinary offense. If the corrections officer is sentenced to an *additional* term of detention before serving the prior sentence, he will serve the longer of the two, but the panel may order that the sentences be served consecutively as long as the total period of consecutive detention not exceed 70 days (sec. 110(44)(5) and sec. 110(61) of the Prisons Ordinance). A disciplinary tribunal can sentence a police officer convicted of a disciplinary offense to a maximum of 45 days detention (sec. 51(a)(5) of the Police Law). Here too, if the police officer is sentence to an *additional* term of detention while still serving another sentence, he will serve the longer of the two, but the panel may order that the terms be served consecutively as long as the total period of consecutive detention not exceed 70 days (sec. 66 of the Police Law). It would not be superfluous to note that the authority to impose such maximum sentences upon police and corrections officers is granted to a three-judge panel, and two of the judges must be jurists (see sec. 110(37) of the Prisons Ordinance and sec. 44 of the Police Law). It thus appears that where Israeli law sets time limits upon the authority it grants to an administrative entity to deprive a person of his liberty for *disciplinary* purposes, the accepted time limit is 45 days for a single disciplinary offense, and no more than 70 consecutive days for several offenses.

48. Note well that sec. 32T of the Law establishes a "scale of severity" for punishment that is contingent upon the question of how many times an order for detention has been issued "for the same cause". Thus, for example, if such a detention order has been issued twice for an offense under sec. 32T(a)(5) of the Law (working in contravention of sec. 32F of the Law), such that the infiltrator has twice been placed in detention for the offenses he was "found" to have committed, he can be sentenced to detention for a period of 60 days for the third offense (sec. 32T(b)(3)(c) of the Law). But this is not like the provisions in regard to an "additional" detention sentence I referred to above. Those provisions treat of a situation in which the person was sentenced to an additional term while serving the first. In such cases, the relevant legislation establishes that even in the case of *consecutive* terms, the total cannot exceed 70 days. None of the disciplinary arrangements that I addressed permit a similar term of punishment for one disciplinary offense (even if preceded by additional offenses for which the term of punishment has been served). As opposed to this, in the matter before us the Director is authorized to order detention for such a period – and even longer – for one infraction (even if it is the third infraction). From a comparative perspective, as my colleague Justice H. Melcer notes in his opinion, a breach of the restrictions applying to "persons who infiltrated into Germany who are asylum seekers" leads to the *criminal track* (see para 10 of his opinion). That is not the case here.

49. It would appear from the above that the provisions established under sec. 32T of the Law cross the boundary between disciplinary and criminal punishment. That being the case, such authority cannot be entrusted to the Director or to any other administrative entity. Of course, the legislature enjoys broad discretion in regard to the length of administrative punishment. It need not precisely adopt the periods established in other arrangements that apply to soldiers, police or corrections officers. However, the periods established in the Prevention of Infiltration Law are very far from those – too far. They do not meet the test of proportionality *stricto sensu*, which as the President noted, is the primary test in this matter (para. 111 of her opinion). Operating a facility in which residence is imposed requires rules. Those rules require enforcement or they will be futile. But not anything goes. We should emphasize that when appropriate, the state can, of course, institute criminal proceedings "that by nature allow for the imposition of severe punishment" (the *Eitan* case, para. 184). But such authority cannot be granted to an administrative body, even if its decisions are subject to self-initiating judicial review. As I noted in the *Eita*n case, "such a sanction cannot stand, regardless of whether or not it is followed by

judicial review" (*ibid*., para. 184). My conclusion is, therefore, that such authority is not proportionate relative to its inherent harm.

The Relief

50. I have reached the conclusion that sec. 32T of the Law is unconstitutional. This constitutional defect cannot be remedied by interpretation, and there is no recourse but to declare the section void. In the *Eitan* case, I proposed to my colleagues that we read the section such that the Director would be authorized to order the detention of an infiltrator for no more than thirty days for each of the causes set out in the section, and that those in detention on the date of the judgment be released thirty days after the beginning of their detention, or on the date set by the Director, whichever be shorter (*ibid*., para. 191). This time – in view of the automatic judicial review of the Director's decisions that was added to the Law – I would propose that the declaration of voidance be held in abeyance for six months. During that period, or until an alternative arrangement be adopted, sec. 32T will remain in force but will be read such that no detention order will be issued for a period exceeding forty-five days for any of the causes under the section (in accordance with the rule for disciplinary punishment for one infraction). Those held in custody on the day of this judgment by virtue of an order issued by the Director will be released forty-five days from the beginning of their detention or at the conclusion of the term set by the Director, whichever is shorter.

Approaching the End – Comments on the Future

51. The result I have ultimately reached at the conclusion of the legal examination is as follows: Sections 30D(a) and 32U of the Law are void. Section 32T is void. What shall the Knesset do now? The dialogue will continue. The same legislation cannot be restored as if nothing has happened (see the opinion of then Deputy President M. Naor in the *Eitan* case, para. 3). The Knesset can enact a legislative arrangement that will meet constitutional criteria. The long detention periods established under sec. 32T of the Law can be replaced with shorter periods. The Knesset can replace the section that I propose be declared void – setting the maximum period of residency in the residency center – with one that establishes a different,

significantly shorter period that would pass constitutional review. The legislature can also consider other, new possibilities. In this regard, I would like to add a further comment.

52. As earlier noted, the Prevention of Infiltration Law permits the Director to issue a residency order to any infiltrator regarding whom there is a problem "of any sort" in regard to his deportation (sec. 32D of the Law). The administrative agency set criteria for itself in this regard. Under those criteria, which were published on the website of the Population and Immigration Authority and dated July 14, 2015, the infiltrators who can be issued a residency order are "Sudanese nationals who infiltrated into Israel before Dec. 31, 2011" and "Eritrean nationals who infiltrated into Israel before July 31, 2011, including those who received a B/1 residency permit until now". In other words, the administrative agency chose to apply the arrangement established by the Prevention of Infiltration Law to "old" infiltrators – those who arrived in Israel nearly four years ago. I do not intend to decide the various question these criteria raise. As I have already noted, inasmuch as these criteria involve an infringement of the right to liberty and the right to dignity, the question arises as to whether they should have been established in primary legislation (the *Eitan* case, para. 91). I would now like to emphasize only that in my opinion the scope of the infringement of rights, as well as the effectiveness of the residency center, differs in regard to two populations -- the *first*, "old" infiltrators, and the *second*, "new" infiltrators. The infringement of the rights caused by Chapter D of the Law is far greater for the first group. Most of the "*old*" infiltrators – the ones being sent to Holot under the criteria established in this regard – have established themselves in the urban centers. Severing them from the lives they have already built, "yanks" them from their jobs, housing, social environment and so on in one fell swoop. This is a more severe infringement of their right to dignity and liberty, and the benefit achieved in terms of preventing them from settling is limited. That is certainly the case in regard to the purpose of "responding to the needs". As opposed to this, in regard to the second group – the group of "*new*" infiltrators – it would appear that the infringement posed by Chapter D is less severe. In their regard one might even say that we are not concerned with retroactively "changing the rules of the game" (as Justice I. Amit noted in para. 1 of his opinion in the *Eitan* case). Even after we found that the deterrent purpose is improper, we can say that the infringement of the rights is inestimably less in regard to a person who knows that he is going with opened eyes to a state where these normative arrangements are in place, as opposed to a person who is torn from his daily life and then returned to it after no insignificant time. Thus, the

harm to these "new infiltrators" in the residency center is at a lower level than the harm incurred by the "old" infiltrators". As opposed to this, the benefit achieved in relation to the purpose of preventing settling is greater, as they have not managed to situate themselves. The upshot of the above is that nothing prevents establishing different "ceilings" for the two groups. Such an approach would also allow the state to respond to a situation in which the trend of compelled immigration to Israel changes (for example, as a result of the closure of immigration routes to Europe), in accordance with its position – with which one must agree – that a fence alone is insufficient to stop the infiltration phenomenon (see p. 58 of the response; I also noted that a fence alone is inadequate in the *Adam* case, para. 25 of my opinion; and in the *Eitan* case, para. 64). Of course in any case, as the President pointed out, residency orders must be issued on an individual basis, and it would be unacceptable to issue residency orders in accordance with a "uniform outline", i.e., for a fixed period in regard to each population group (para. 96 of the President's opinion).

53. Lastly, we should stop to consider a question that arose in the *Eitan* case, and that arises again here in regard to the relationship between the constitutional examination and the administrative examination. The questions that arise in regard to who will be sent to the residency center, what conditions will be provided for the resident of the center, and where the center will be located are primarily administrative, and are addressed in regulations and decisions made by virtue of the Law. The State and the Petitioners disagreed on these matters, and I am of the opinion – as was my opinion in the *Eitan* case – that this proceeding is not the appropriate forum for their examination. However, before concluding I would note that a different implementation of the Law could also have affected the examination of its proportionality. If those held in the residency center enjoyed better conditions, if the "pocket money" would afford them greater autonomy, if the residency center were not so far removed from populated areas, it would have influenced the margin of proportionality, and thus the question of constitutionality.

Conclusion

54. It is well known that "constitutional democracy is a delicate balance between majority rule and fundamental values that control that majority" (BARAK, PROPORTIONALITY, p. 113). This balance was upset in the matter before us. If my opinion were heard, we would declare the

annulment of secs. 32D(a) and 32U of the Law, and the annulment of sec. 32T of the Law. Indeed, special care is required when we are confronted with a second constitutional review of the same legislative provision (see the *Eitan* case, para. 23), and all the more so in the case of a third review. But we must not hesitate to declare the nullity of an unconstitutionality law. We nay not hesitate is such cases. This is true *a fortiori* when the matter before us concerns the core human rights of a vulnerable population. This is the raison d'être of constitutional review. Although this is always the last resort, there is but one result for unconstitutional legislation – annulment.

Justice I. Amit:

1. The productive dialogue between the legislature and the judiciary continues as we now enter the third round in regard to the constitutionality of the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 (hereinafter: the Law), which is unprecedented in our constitutional law.

Once again we are concerned with two primary pillars of that Law: detention under sec. 30A of Chapter C of the Law, and the erection of a residency center and the modes of its operation under Chapter D of the Law.

2. As in the *Eitan* case (HCJ 7385/13 *Eitan - Israeli Immigration Policy Center v. Government* (Sept. 22, 2014) (hereinafter: the *Eitan* case)), I remain of the view that insofar as the Law's purpose and proportionality, we must view its two main pillars as a dichotomy. In my opinion, the state is permitted to adopt a strict external policy in regard to immigration, with a view to the future and in addressing potential infiltrators. In contrast to that strictness, the state should show compassion and humanity internally in regard to the past, i.e., in regard to those who have already entered the country years ago, before the legislature changed the "rules of the game".

I will say a few words about the current version of Law against the background of this dichotomy.

3. *Section 30A of the Law*: In the *Eitan* case, I pointed out that the section is directed to the future, outside the fence and over the border, and to a non-particular population of potential infiltrators. I was of the minority opinion that there was no flaw in establishing a one-year period of detention, and I noted that putting a stop to the infiltration phenomenon was a proper purpose:

> …intended to protect a broad range of substantive interests of the state and of Israeli society – preservation of the state's sovereignty, character, national identity, and socio-cultural atmosphere, along with such other aspects as population density, welfare and economy, internal security and public order. Just as the state was entitled to erect a physical border barrier against those seeking entry, so it is entitled to erect a normative barrier as a complementary means of defense.

In view of these interests, I am of the opinion that there is nothing wrong with reducing the incentives for potential infiltrators to come to Israel, and for the reasons I gave in the *Eitan* case, I do not believe that the deterrent purpose changes a potential infiltrator from an end to a means.

That is what I thought in the *Eitan* case, and all the more so following the current amendment that reduces the detention period and sets it at three months. I can thus easily concur with the President's conclusion that the amendment to sec. 30A of the Law passes the tests of the Limitation Clause.

4. *Chapter D of the Law*: I will repeat what I said in the *Eitan* case. Chapter D of the Law "turns its glance inward, and imposes severe restrictions upon a particular population composed of people who have been in the country for a number of years…the residency centers created by the Israeli legislature entirely deviate from the character and purpose of the residency centers in various European countries". Indeed, as time passes, the clearer it becomes that this was not what we envisioned, as the President stated in her opinion (para. 57).

5. Look how many purposes the parties have piled upon the narrow shoulders of Chapter D of the Law: stopping the infiltration phenomenon and preventing future infiltration in terms of a normative block to potential infiltrators; preventing settling in the urban centers; providing an appropriate response to the needs of the infiltrators; ensuring the departure of infiltrators;

preventing infiltrators from earning and reducing the economic incentive for staying in Israel; breaking the spirit of infiltrators and encouraging them to leave Israel.

As the President noted (para. 105 of her opinion), it would appear that no western country maintains residency centers that are not voluntary, for such long periods of time, and whose purpose is population distribution. The Israeli model is unique, and in practice, it is not intended for population dispersion, as argued, but rather to *concentrate* the population in one facility that is remote from any settled area.

The current Law adopts a system of "centrifugal circulation" by means of removing the infiltrators from the urban centers, spinning them out to the edge of the desert for twenty months, and then back to the urban centers, while removing others from the urban centers "to take their place" in the residency center. This twisted path of constant turnover of infiltrators – described by Justice Vogelman as "a revolving door" – raises the suspicion that behind the declared purpose of preventing the infiltrators from settling in the urban centers hides a purpose of subjecting the infiltrators to a "run around" intended to break their spirit, as claimed by the Petitioners. I therefore join Justice Vogelman in regard to the questions he raised as to the gap between the declared purpose and the hidden purpose of the Law in his discussion of the purpose of encouraging voluntary emigration.

At the end of the day, I took the State at its word, and I can but join in the position of my colleague Justice Vogelman that the purpose of preventing settling should be interpreted as "alleviating the burden" on the cities, particularly south Tel Aviv. This is a proper purpose, and there are, therefore, no grounds for annulling Chapter D on the basis of its purpose. I would note that the term "settling" normally refers to a person's dwelling. In this regard, to the extent that the Law is intended to reduce the scope of infiltrators *living* in the cities, as opposed to working and staying there, it is a proper purpose that could also be achieved by erecting residency centers outside or on the outskirts of the cities, and not necessarily in a place as remote as Holot. It would therefore be more correct to examine the constitutionality of the Law in terms of proportionality rather than purpose, as the President did in her opinion. In this regard, I would say that the question of the *location* of the residency center is critical, inasmuch as the Law's proportionality is not examined in a vacuum, but rather in the context of a particular reality. The

current residency center is remote and isolated from any population center, and the daily pocket money given to its residents is insufficient for even one trip to the closest city.

True to my approach that preventing a renewal of the infiltration phenomenon is a proper purpose, I believe that it is also proper in the framework of Chapter D as a purpose in and of itself and not merely as an attendant purpose. I am therefore of the opinion that there is no reason not to apply the provisions of Chapter D, as written, prospectively to potential infiltrators in the future, even for a period of twenty months. In other words, an infiltrator who entered Israel after the enactment of the Law is subject to the provisions of sec. 30A(k) of the Law, and the provisions of Chapter D, including the twenty-month period as stated in secs. 32D and 32U. That is not the case in regard to infiltrators already living in the country, regarding whom the twenty-month period fails the third subtest of proportionality, and I concur with the opinion of President M. Naor on this point.

The claimed purpose of "providing a response to the needs of the infiltrators" is unquestionably a proper purpose. However, the "translation" of this purpose against the background of Chapter D of the Law as currently implemented leaves this purpose devoid of any content, and it therefore fails the very first test of proportionality.

6. In the *Eitan* case, we addressed several parameters that, taken together, presented a less-than-heartwarming picture of the character of a residency center, and we annulled various specific arrangements related to Chapter D of the Law. We will now continue down that path, without entirely uprooting Chapter D.

The bottom line is that in view of Chapter D's severe, inherent infringement if liberty, I concur with the opinion of the President according to which a period of twenty months in regard to "old" infiltrators is disproportionate. I also concur with the relief that she proposes.

In addition, in order to blunt the infringement of liberty to the extent possible, I concur with the view of my colleague Justice U. Vogelman in regard to the annulment of sec. 32T of the Law. There may be reason to revisit this matter, should severe disciplinary problems arise in the residency center in the future.

Justice S. Joubran:

1. The law under review – the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 (hereinafter: the Law) – comes before this Court for the third time. My colleagues have addressed the constitutional issues raised by this case in great depth, and it would appear that deciding this petition boils down to three central questions: *first*, whether or not the arrangement currently established under sec. 30A of the Law, concerning the possibility of holding an infiltrator against whom a deportation order has been issued in detention for a period of three months, is proportionate; *second*, whether or not the arrangement currently established under secs. 32D and 32U of the Law, concerning the length of an infiltrator's stay in a residency center, is proportionate; and *third*, whether or not the arrangement currently established under sec. 32T of the Law, concerning the authority of the Director of Border Control (hereinafter: the Director) to transfer an infiltrator from a residency center to detention for disciplinary infractions, is proportionate.

2. My colleagues President M. Naor and Justice U. Vogelman agree that the answer to the first question is that the arrangement is proportionate and therefore constitutional, while the answer to the second question is that the arrangement is not proportionate and therefore unconstitutional. However, they disagree as to the answer to the third question.

3. Like my colleagues, I am also of the opinion that sec. 30A of the Law should remain in force, subject to the interpretation set out in the opinion of my colleague the President (the first question above), whereas the maximum period established under secs. 32D and 32U of the Law for remaining in a residency center must be annulled (the second question above). I see no need to set out my reasons in detail, in view of the comprehensive opinions of my colleagues. In short, I would note that I, too, am of the opinion that the current version of sec. 30A of the Law meets the criteria of the Limitation Clause, primarily in view of the shortening of the maximum period for holding a person in custody. To clarify this point, as I explained in HCJ 7385/13 *Eitan - Israeli Immigration Policy Center v. Government* (Sept. 22, 2014) (hereinafter: the *Eitan* case)), and as my colleague the President explained in her opinion, the purpose of preventing infiltrators from settling is a proper purpose. This conclusion is based upon the state's right to establish an immigration policy, *inter alia*, to limit undesirable demographic changes that are an unavoidable

consequence of illegal immigration, and of infiltration in particular. I addressed this in para. 7 of my opinion in the *Eitan* case:

> In Israel, these changes have resulted in undesirable consequences such as a rise in crime, a burden upon the state budget and the health and welfare systems in certain areas, problems in enforcing civil obligations such as tax payment, and more (see: paras. 6-11 of the State's response of March 11, 2014).

As I believed in the past, and as I continue to believe, although the immigration policy, by its very nature, restricts certain basic rights, that is insufficient to deny that its purpose is proper. The comparison to principles of international presented by my colleague the President in paras. 68-73 of her opinion reinforces that view. In accordance with those principles, means that restrict freedom of movement, and at times, the infiltrators' right to liberty, may be adopted in exceptional circumstances. Therefore, in my view, the purpose is proper, and sec. 30A of the Law meets the other criteria of the Limitation Clause, as my colleagues explained in detail.

4. Notwithstanding the finding that the Law's primary purpose is proper, I, too, am of the opinion that secs. 32D(a) and 32U do not meet the test of proportionality *stricto sensu*, in view of the twenty-month period in which an illegal alien may be held in a residency center. As my colleagues explained, the time period influences the extent of the infringement of the rights of the infiltrators in a manner that does not maintain a proper relationship between the cost and the benefit. Therefore, I, too, see the maximum period for holding a person in a residency center as disproportionate, and it must be annulled.

5. However, in regard to the disagreement between my colleagues in regard to the third question – whether or not the arrangement granting authority to the Director to transfer an infiltrator from a residency center to detention for disciplinary offences is proportionate – my view is as that of President M. Naor. I, too, believe that there is significance to the marked shortening of the maximum periods for detention, the fact that transferring an infiltrator is subject to the causes set out in the Law, and the fact that the Director's decision is subject to an automatic judicial review process within 96 hours of the beginning of detention. I find that in terms of proportionality *stricto sensu*, the arrangement established under sec. 32T of the Law is proportionate in maintaining the proper relationship between its cost and benefit, and therefore, as my colleague the President demonstrated, it is constitutional.

6. As opposed to that, my colleague Justice U. Vogelman is of the view that the arrangement is unconstitutional, primarily due to the fact that the arrangement's provisions cross the line between disciplinary and criminal punishment. My colleague Justice Vogelman notes, in para. 42 of his opinion, that granting such authority to an administrative agency is exceptional, and further suggests comparing the administrative organ in the matter before us (the Director) to hierarchic organizations in which an administrative organ is granted the authority to deny a person's liberty as a punishment for violating disciplinary rules (para. 47 of his opinion). Thus, Justice Vogelman points to the disciplinary arrangements under Israeli law that apply to the armed forces, the Prisons Service, and the police, and finds that those arrangements deny liberty for shorter periods than those established under sec. 32T of the Law.

7. As for myself, I do not believe that an analogy should be drawn between the infiltrator population and soldiers, corrections officers and police. Indeed, from the perspective of the holder of authority, we are concerned with an administrative organ in both cases. However, from the perspective of those punished, we are concerned with groups that are essentially different. The infiltrators constitute a group that is, *a priori*, in violation of the law by reason of illegally entering or living in the country. As opposed to this, the group comprising soldiers, corrections officer, and police is one of professionals in the service of the state. When an infiltrator commits a disciplinary offense, that offense is additional to the offense that he has already committed (without entering into the question of why he may have entered the country illegally). As opposed to that, when a soldier, corrections officer or police officer commits a disciplinary offense, he does so in the course of the performance of his duty. The right to liberty is important in both situations, and the need to refrain from infringing it should not be taken lightly. But I believe that we should draw a distinction between a group of people that is subject to the authority due to a violation of the law, and one subject to the authority in the framework of the performance of its duty in the state's service. I am, therefore, willing to accept an arrangement that grants an administrative organ the authority to deny liberty for a longer period when we are concerned with the former group.

8. I would add that unlike Justice Vogelman, who believes that "we cannot hang our hopes solely on the grace of the administrative authority's discretion and on its choice to set punishment at the lower end of the scale permitted by the Law" (para. 46 of his opinion), I agree

with my colleague the President (para. 112 of her opinion) that we need not fear that the Director will choose to "exploit" the maximum periods established by the Law to their full extent.

As a rule, I do not think that we should cast *a priori* doubt upon the ability of an administrative or judicial organ to exercise appropriate discretion in a particular case before it. The Law establishes that the Director may order the detention of an infiltrator who committed one of the acts listed in sec. 32T(a) of the Law for a period not exceeding the periods set out in sec. 32T(b) of the Law. In this regard there would seem to be no difference between the maximum periods of detention established under sec. 32T(b) of the Law and, for example, the maximum penalties established in the criminal law. Just as criminal offenders are sometimes sentenced to only a few months of imprisonment, and sometimes to the maximum years of imprisonment established by law (or nearly so), so it is with regard to the transfer of infiltrators from a residency center to detention – sometimes they will be sent for the shorter periods established in the Law, and sometimes for the maximum.

It should further be emphasized that if a suspicion of defective exercise of the Director's discretion arise, his decision is subject to automatic judicial review of the Detention Review Tribunal for Infiltrators (sec. 30T(g) of the Law; and see: para. 110 of the opinion of my colleague the President). I have therefore reached the conclusion that the arrangement established under sec. 32T of the Law is proportionate.

9. In light of all the above, I concur in the opinion of my colleague President M. Naor.

Justice N. Hendel:

1. This is the third incarnation of petitions challenging the constitutionality of amendments to the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 (hereinafter: the Law). In practice, we are concerned with a single cluster and a dynamic of amendments to amendments against a background of significant changes in the infiltration phenomenon over the last few years. On three occasions, including this one, the Court has granted the petitions. It was held that the Law, as amended, was tainted by unconstitutionality. In brief, HCJ 7146/12 *Adam v. Knesset* (Sept, 16, 2013) held that an infiltrator could not be held in custody for three years; HCJ 7385/13 *Eitan - Israeli Immigration Policy Center v. Government* (Sept. 22, 2014) held that

twelve-months custody was unconstitutional, as was the residency center in Holot in the format then established by the Law. The current case does not intervene in the amended period of custody, but found flaw in in the twenty-month maximum for being held in the residency center. The state was therefore granted an extension to amend the Law, and it was held that in the interim it would only be permissible to hold infiltrators in a residency center for no more than twelve months.

2. There have been developments in the field over the course of the relevant period. In 2009, 5,235 infiltrators entered Israel; in 2010 – 14,702; and in 2011 – 17,312. The Israeli government, which is responsible for immigration policy and the borders, contended with the phenomenon. Over the last three years, the upward trend was halted. In 2012, 10,441 infiltrators entered Israel. In 2013 – 45 infiltrators; in 2014 – 21 infiltrators; and in the first quarter of 2015 – only 4 infiltrators. It would seem that two primary elements contributed to the decrease: a physical barrier in the form of a border fence on the Israel-Egypt border, and a normative barrier – the provisions of the Infiltrators Law. The contribution of each element is the subject of debate, but in my view, there is no denying that the combination left its mark.

Other changes concern the number of infiltrators who left the country. 6,414 infiltrators departed Israel in 2014, and 747 departed in the first quarter of 2015. As of the end of this year, there are 45,711 infiltrators living in Israel, as opposed to some 50,000 who were living in Israel when the *Eitan* case was decided at the end of September 2014. In this regard we should take note of the principle of *non-refoulement*, which establishes that a person cannot be removed to a place in which he would be in danger. This principle is especially relevant to Eritrean nationals. There are also various problems in regard to citizens of North Sudan, due to a lack of diplomatic relations. Therefore, the infiltrators left to a "third state". The current picture is that while there is a reduction in the number of infiltrators entering Israel, that is not so in in the case of the number of infiltrators already in Israel.

3. I have carefully read the opinion of President M. Naor. Her conclusion is that the period that a person may be held in a residency center – twenty months – is too long and must be annulled. The opinion is clearly set out and comprehensive. It emphasizes that the Court is again of the opinion – for the third time – that there is an unconstitutional, disproportionate infringement of human rights, and the Court must intervene. I do not disagree with this principle,

as such. However, I have a different perspective of the case before us. Just as it is the Court's duty to intervene when such a defect is found, it is a judge's duty to present his position and reasoning when he concludes that the Court should not intervene.

In my view, the result that the law be changed three times – even if possible – is far from desirable. As a matter of constructive criticism, and so that this situation not repeat itself, all of the parties – the Knesset in legislating and the Court in constitutional review – must consider whether it was possible to prevent this situation.

Before addressing the core of the decision and its reasoning, I will note that in the *Adam* case I – like my colleagues – was of the opinion that holding a person in custody for a period of three years, whatever the intention, requires the conclusion that the provision be annulled, inasmuch as it constituted punishment. In my dissenting opinion in the *Eitan* case, I – and my colleague President (Emeritus) A. Grunis – took the view that a twelve-month period of custody fell within the margin of constitutionality, and a residency center for a period of three years (under the Temporary Order) meets the constitutional test of sec. 8 of Basic Law: Human Dignity and Liberty. Against this background, it should come as no surprise that in the present case, as well, I am of the opinion that the petition should be denied. However, in view of the result reached by the majority in this case, I believe that I should present additional, new reasons that justify not annulling the amendment to the Law, in addition to what I and President (Emeritus) Grunis wrote in the *Eitan* case, to which I will add several matters required in this petition.

I find it appropriate to emphasize three levels. The first concerns the relationship between this Court and the legislature. The second concerns the justification for the type of intervention proposed. The third focuses upon examining the issue of annulment on the merits. Each level provides a different perspective grounding the result that we should not intervene constitutionally.

A. *The Constitutional Discourse between the Court and the Legislature*

4. An important principle is that the Court must not order the revocation of a law for constitutional reasons unless there is no recourse. This power of the Court has been described as

a "non-conventional weapon". Its use must be measured and careful. Each branch has its function. So it is in regard to the first amendment to the Law, *a fortiori* in regard to the second, and all the more so in regard to the third.

It can be said that the residency center was "born" as a result of our comments in the *Adam* case. In the *Eitan* case, in the framework of the constitutional review pertaining to a residency center, this Court emphasized the restrictive conditions of staying in a residency center, primarily the requirement to register three times a day – morning, noon, and evening; the absence of grounds for release from the center; and the fact that the period of residency in the center had not, in practice, been limited. My opinion was that the arrangement could be understood as limited to three years. However, the majority opinion emphasized that the individual infiltrator was left uncertain as to the end of his stay at the residency center. According to this approach, it was not possible to rule out the possibility of an extension of the Temporary Order even beyond three years.

My colleague Justice Vogelman, who wrote the opinion of the court in the *Eitan* case, noted:

> The constitutional examination does not end with the question whether each particular provision – standing on its own – satisfies the constitutional criteria… "An individual arrangement may be proportionate, while *cumulatively* they may not be proportionate" ((HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance*, IsrSC 51 (4) 367, 401 (1997) (emphasis added – U.V.)). Such an accumulation may affect several provisions of Chapter D of the Law which, standing alone, would have passed constitutional review inasmuch as they do not independently infringe protected constitutional rights. This is the case inasmuch as the relationship between the various provisions also exerts influence upon the provisions that pass constitutional review (para. 100).
>
> Staying in the residency center for three years not only infringes the liberty of the "infiltrators" but also their right to dignity. The time dimension substantially affects the infringement of the dignity of a person whose liberty is deprived. Deprivation of liberty for a short period of time allows a person to return to his life quickly. The longer the deprivation of liberty, the more a person must

> relinquish his desires and hopes. His personal identity and unique voice are drowned in a regulated, wearying daily routine. A person who leaves a residency center *after three whole years* is no longer who he was (para. 154).
>
> As we have already explained, given that the Temporary Order may possibly be extended, an "infiltrator" sent to a residency center is in a state of inherent uncertainty in regard to his release. This uncertainty is not part of the infringement on dignity inherent to any stay in a liberty-depriving facility. It is a unique, independent infringement of the right to liberty that derives from the manner in which the uncertainty reinforces the suffering already associated with the deprivation of liberty. Indeed, psychological research has shown that uncertainty is a significant stress factor in a person's life, and is often linked to anxiety and depression (para. 155).
>
> Thus, a normative arrangement that deprives a person's liberty for a period of three years (at least), without definitively fixing the length of this period in advance, constitutes an arrangement that inflicts a very powerful infringement of the right to liberty and the right to dignity (para. 157).
>
> How should the period of residency be determined? In my opinion, a proportionate normative arrangement must preserve the proper relationship between the degree of the restriction of rights in the facility and the maximum period of residency therein, such that the greater the restriction of basic rights, the shorter the imposed residency in the facility (para. 162).

This is how the length of the period was emphasized against the background of the requirement of reporting for registration three times a day.

The above was brought to show one thing: to my understanding, the above does not lead to the conclusion that a period shorter than three years, such as twenty months, taken together with grounds for release and an easing of the registration requirement to once a day does not meet the proportionality test. The *Eitan* case noted the infringement of freedom of movement that results from being required to live in the residency center. But the emphasis was on the aggregate: the combined effect of the long period – at least three years, the uncertainty as to its

end, the lack of grounds for release, the requirement to register three times a day, and all in an isolated place. Thus the current petition has focused the spotlight on a defect in the Law that did not previously enjoy such principal status – setting the maximum period at twenty months rather than some shorter period (e.g. twelve months; see below).

There is indeed a kind of constitutional discourse between the Court and the Knesset. But it is not a discourse between partners to an endeavor. Each body has a different purpose and authority. In my view, were there a constitutional problem even with a maximum period that was only half of the three-year period, we should have said so in our prior judgment. It is not proper that the discourse include upgrading demands and introducing new problems in the second and third round that could have been pointed out in the previous round.

Indeed, an amendment, even the third one, is not immune to constitutional review. The *Eitan* judgment noted problems, but the Court did not establish a maximum period for a stay in the residency center, even in general terms. That is deficient. If that was the intention or the position, it should have been stated then. We are also not concerned with a situation in which the Knesset ignored the judgment's comments. For example, while the minority in the *Eitan* case (President Grunis and I) supported rescinding one of the three registration requirements, the Knesset chose to rescind two out of three, and left only the requirement to report at night. Similarly, the shortening of the maximum period was not a symbolic reduction like thirty months instead of three years. We are concerned with a significant reduction – twenty months at most. Even the other opinions of the majority in the *Eitan* case did not recommend an alternative number.

My questions can be answered in saying that it is not the role of this Court to draft the particulars of the Law. But an absence of direction, at least along general lines, may give the impression that this is not the main problem, and I believe the discourse between the Court and the Knesset suffers. That is also said in view of the many iterations of the amendment to the Infiltration Law. In my opinion, the constitutional correction in its current form could have been avoided.

B. *The Limitations of a "Numerical" Constitutional Correction*

Another aspect that I see as problematic concerns the manner of the correction. The majority view is that the twenty-month stay in a residency center must be annulled. In its place, the majority temporarily establishes a period of twelve months. The majority, *per* President Naor (para. 69) and Justice Vogelman (para. 19), concurrently recognizes the purpose of preventing settling in the urban centers. This purpose translates into alleviating the burden upon the cities in which there are large concentrations of infiltrators. It would seem that this purpose cannot be achieved in a period of only one year.

The comparative law survey shows that detention for a period of six months – if not more – is acceptable and passes the constitutional hurdle in the relevant countries (see para. 4 of my opinion and paras. 72-78 of the opinion of Justice Vogelman in the *Eitan* case). If that is true for custody – and given the difference in the magnitude of the infringement of rights presented by custody as opposed to a residency center, and the different purposes of these provisions – a significant distinction would seem to be required in regard to the maximum periods. For example, it would not be reasonable for the maximum period of custody to be half a year, while the maximum stay in a residency center is, for example, ten months.

Of course, the maximum period cannot be quantified with surgical precision. It would appear to be difficult to distinguish between a year and fourteen months of even sixteen months. From this perspective, it is hard to justify intervention merely because a twenty-month period was established. Even were we to accept the assumption that the period is long, which is not my view as I explained in the *Eitan* case, the numerical review does not justify a finding that the period deviates from the constitutional margin. Incidentally, this is why courts, both in Israel and abroad, tend not to intervene from a constitutional perspective in maximum sentencing in criminal contexts (see: CLIFF ROBERTSON, CONSTITUTIONAL LAW AND CRIMINAL JUSTICE, chap. 8 (2009)). We do not have the tools necessary for precise measurement. There may be exceptions in which numerical constitutional review would be possible, for example, in regard to not bringing an arrestee before a judge, and in comparing juveniles to adults. But when we are concerned with holding a person in a residency center that, as noted, permits the residents freedom of movement over the course of the day, I am hard pressed to understand the result of annulling the maximum twenty-month period.

Moreover, a residency order does not establish an automatic twenty-month period, but rather that an infiltrator may be held in a residency center "no longer than the 20 month period established under sec. 32U" (sec. 32D(a)). Section 32U further establishes: "An infiltrator shall not remain in a residency center by virtue of a residency order for more than 20 months". We thus see that the Law establishes twenty months as a *maximum period*. Therefore, if one is of the opinion that this period is too long from a constitutional perspective, he could, by way of interpretation, find that the maximum period should be exhausted only in exceptional cases. In other words, in many cases it would be possible to shorten the actual period by means of interpretation, without any need for declaring the section void. As is well known, this Court's rule for constitutional review is that interpretation is preferable to annulment (HCJ 5239/11 *Avneri v. Knesset*, para. 56 of the opinion of Justice H. Melcer (April 15, 2015) [http://versa.cardozo.yu.edu/opinions/avneri-v-knesset]).

6. Comparative law is another consideration deemed relevant by my colleagues the President and Justice Vogelman. According to the survey presented by the President, a twenty-month period is long when compared to other legal systems. In my opinion, the matter should be viewed differently.

First, some of the countries surveyed permit living in a defined area for a very short period measured in days, weeks or a few months. If that is the case, then clearly the primary purpose of residency centers in those countries is not the prevention of settling, but rather, for example, initial investigation (see para. 105 of the President's opinion). Similarly, in some countries, staying in a defined area is, in practice, a benefit granted to asylum seekers at their request (*ibid*., paras. 102-103). This, too, serves a purpose of a different kind. At the same time, my colleagues believe that preventing settling is a proper purpose. I accepted this view in the *Eitan* case, and this was also the view of my colleagues Justice S. Joubran (*ibid*., para. 7) and Justice Arbel (para. 84 of her opinion in the *Adam* case). If that is the case, then a comparison with other countries in which staying in a residency center serves a different purpose is of no significance. Choosing a legitimate purpose is within the bounds of the state's authority.

Second, if the maximum period of a legislative enactment is somewhat higher than its parallels in other countries, that alone is insufficient to show unconstitutionality. Comparative law is not meant to make all countries toe the same line in every field. The balancing of the

constitutional infringement and the proper purpose does not demand uniformity. The balancing formula is not a mathematical calculation. Recognizing the constitutional margin is a central part of judicial review. Of course, if the difference is significant, the matter is different. But as noted, this is not the case here. Moreover, as I will explain, the State of Israel faces special difficulties that may themselves justify a somewhat longer period.

Third, even if there is a trend toward limiting the period of stays in residency centers in comparative law, a distinction should be drawn between a legislative trend and judicial review. The situation in Germany in particular, against the background of the European Union in general, serves to bring this matter into sharp focus. The starting point is the European Union's 2003 Directive, and its updated version from 2013 (Directive of the European Union 2003/9/EC; Directive 2013/33/EU). Article 7 concerns "Residence and freedom of movement". Article 7(1), which was preserved in 2013, states: "Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive". A state may restrict freedom of residence, and not just freedom of movement: "Member States may decide on the residence of the applicant for reasons of public interest" (Art. 7(2)). For our purposes, it is important to note that neither the new nor the old Directive mention any time limitation for these provisions. It is also worth noting that the UN High Commissioner on Refugees expressed concern in regard to the exemptions and wide measure of interpretation that this article permits the member states of the EU. However, there is no criticism of the policy of restricting freedom of movement itself, or of the absence of a time limit (UNHCR annotated comments on COUNCIL DIRECTIVE 2003/9/EC, Article 7).

We will now turn to German law. Indeed, the current law sets a maximum of three months for the restriction of residence (*Residenzpflicht*) for an asylum seeker. However, this was only adopted in December 2014, and entered into force in January 2015. Prior to the amendment, asylum seekers in Germany were subject to restriction of their place of residence, and were required to apply to the authorities before leaving the area (secs. 55-58 of the Asylum Procedure Act). As for the length of time during which the residence restriction applied in practice, the following data can be of assistance: in the first half of 2014, the review of an asylum request

took an average of eleven months, but there were significant differences based upon country of origin. Thus, for example, reviewing the requests of asylum seekers from Afghanistan took an average of twenty-two months (Asylum Information Database - http://www.asylumineurope.org/reports/country/germany/asylum-procedure/ procedures/ regular-procedure).

It should be noted that the change in the German legal situation was instigated by the legislature and not by the court. Prior to the last few months, there was no time limit on the restriction of the freedom of movement of asylum seekers. Of course, even in the fields of constitutional law and comparative law, facts carry significant weight. To illustrate the point, let us assume that the twenty-month period were to remain in force in Israel, and fifty people a year would enter Israel on an annual average (similar to the recent data). It is quite possible that under such circumstances the state would find it appropriate to limit or even revoke staying in a residency center. Just as constitutional courts need not reach the same conclusions at the same time in regard to a complex issue, the same is true for different legislatures.

Another aspect of the matter is that the restriction of freedom of movement in German law was subjected to the review of the European Court for Human Rights (ECHR) in the matter of *Omwenyeke v. Germany*, App. No. 44294/04 (2007). The petitioner filed a request for asylum in Germany. In October 1998, he was required to live in the city of Wolfsburg. In April 2000, the petitioner left the city without permission, and did so again in May 2001. Due to these violations, he was fined. It should be noted that the restriction of movement was revoked in July 2001, after the petitioner married a German resident. Thus, the petitioner was subjected to the restriction for a *period of some thirty-three months*.

The petitioner demanded that the European Court revoke the fine on the basis of the claim that his liberty of movement was infringed (pursuant to art. 2 of the Fourth Protocol to the European Convention on Human Rights). The court denied the petition. The court explained that the said article granted liberty of movement to a person "lawfully within the territory of a State". However, having violated the restriction of movement, he was not lawfully in Germany: "it is for the domestic law and organs to lay down the conditions which must be fulfilled for a person's presence in the territory to be considered 'lawful'". In accordance with this rationale, the petitioner's departure from the city deprived him of the right to claim that he was lawfully in

Germany, and consequently of his ability to argue that his freedom of movement was infringed. The petitioner's claim that restricting his freedom of movement disproportionately infringed his right to privacy, freedom of expression, assembly and association was dismissed *in limine*. While it is true that the court denied the petition on narrow grounds, a critique of the case noted that in view of the decision, the result would have been the same even if the restriction of residence had been challenged on other grounds: "The ECtHR's reasoning – that obedience to residence restrictions imposed by national law is a necessary precondition to lawful presence under the ECHR – leaves little reason to believe that the same court would hear the merits of any case challenging the Residenzpflicht's basic rules" (Paul McDonough, *Revisiting Germany's Residenzpflicht in Light of Modern E.U. Asylum Law*, 30 MICH. J. INT'L L. 515, 531 (2009).

It would appear from the above that in the circumstances of this case, comparing the amendment to the Israeli Law to the current German law does not necessarily reflect the whole picture in regard to constitutional review by the courts. Even were one to propose that the Law is undesirable – on which I am expressing no opinion – there is a gap between taking a stand on the desirable law and legally justifying the annulment of the existing law on the basis of the provisions of Basic Law: Human Dignity and Liberty.

To this I would add that the situation of the State of Israel is exceptional in comparison to that of other states, as I noted in the *Eitan* case:

> Israel is the only western country that can be reached by land from Africa. Likewise, there are no other "alluring" destination countries in proximity to Israel to which infiltrators can proceed. At the same time, Israel – as noted by my colleague Justice I. Amit (para.15) – is "surrounded by a ring of hostility" that does not permit it to reach arrangements and agreements with neighboring countries. It should be noted that many of the infiltrators originate from Northern Sudan, a country hostile to Israel. Thus, Israel is distinct from all the other western countries that are also contending with the infiltration phenomenon. This combination of factors places the government, and the legislature, at an extremely difficult starting point. Clearly the situation of the State of Israel is not similar to that of European countries, where one country may share a common border with a number of countries with which it is organized under one political umbrella, and

> that are prepared to cooperate in a regional solution of the issue of absorbing infiltrators. There are countries that are at the forefront, and their constitutional balances may be more delicate (*ibid*., para. 9).

To the above factors we should add the fact that Israel's population is relatively smaller than that of Germany, for example. An addition of two-thousand people to a village or neighborhood numbering twenty-thousand people is far more significant than such an addition to much larger cities. It would therefore appear that there is an array of factual circumstances that permit, at least to some extent, striking a different balance in regard to the period of time for staying in a residency center in comparisons to other countries. Therefore, a comparative survey does not lead to the conclusion that we should order the annulment of the maximum residency period.

Up to this point, I have placed my emphasis on two perspectives that I believe militate against the conclusion that the amendment should be voided. The first is the division of labor between the Court and the legislature under the circumstances of this case, and the restraint required when the Court considers intervening for a third time in the work of the legislature. The second concerns the character of the amendment. It would appear that a twenty-month period is legitimate. That is what arises from an examination of the purpose, from comparative law in accordance with the factual circumstances, and in view of the transitional provisions established by the majority – twelve months. We should now address the third point, which is that the amendment should not be annulled on the merits.

C. *Examining the Twenty-Month Residence Period on the Merits*

7. The title of Chapter D of the Law is: "Residency Center for Infiltrators – Temporary Order". It comprises twenty-two sections, and is constructed level upon level.

The current version incorporates many changes in comparison to the former version of the Law. In my opinion, it is impossible to examine the twenty-month maximum period divorced from the other sections and from the changes introduced by the Knesset. These are the main points: a residency order may not be issued to certain groups – primarily minors, persons over the age of sixty, a parent with a dependent child in Israel, or a person whose health might suffer as a result of staying in the center (sec. 32D(b)). The Law also establishes grounds for release

from the center, for example, a change in circumstances or medical reasons (secs. 32D(g) and 32E(c)). A residency order can be issued only after the infiltrator has been granted an opportunity to present his arguments to the Director of Border Control (sec. 32D(d)). A person living in the center is entitled to health and welfare services, as well as to pocket money (secs. 32E(a) and 32K). A resident of the center may be employed – with his consent – in maintenance and services in the center (sec. 32G(a)). A resident of the center must report for registration between the hours of 8 PM and 10 PM, and must be present in the center during the hours when it is closed – 10 PM to 6 AM. A temporary exemption from reporting can be obtained for a 36 hour period (sec. 32H).

Therefore, truth be told, the picture is very different from the prior legal situation that was examined in the *Eitan* case. There is real freedom of movement. The Law grants the Director discretion in regard to issuing a residency order and as to its length. As noted, the upper limit is twenty-months. A hearing must be granted, and the particulars of the individual infiltrator must be examined. Having been granted discretion, the Director must exercise it. Limiting the registration requirement to once a day means that an infiltrator can remain outside of the facility all day. Special bus lines have been provided for the center's residents, and it is even possible to pursue leisure and cultural activities in the center. Thus, the sum total places the maximum period in a different light.

In the background of all this stands the purpose of preventing settling, in order to ease the burden of the residents of the cities. Experience shows, as is but natural, that most of the infiltrators choose to live in certain areas of a few specific cities, and not in other places. The purpose of preventing settling and integrating into the labor market accords with the state's right to establish an immigration policy. It is a clearly sovereign role of the state. A heavy burden should not suddenly be thrust upon a few neighborhoods as the result of a large concentration of infiltrators. This is a legitimate public interest that the Knesset and the government may address. And I would again emphasize that we are concerned with a fixed, limited period that occurs at the first stage of an infiltrator's arrival in Israel. Incidentally, the President also referred positively to another purpose noted by the State – providing for the needs of the infiltrators (para. 78). It is true that deciding that an infiltrator *must* stay in the center deprives him of the right to choose. It is possible that if he were asked, he would choose to do without it. But the state is

entitled – particularly at the initial stage – to make certain that the infiltrator's basic needs are provided, a sort of "5 Ws" – such as food, medical care, a place to sleep, pocket money, cultural and leisure activities, and vocational training courses. This, along with freedom of movement during the day.

The President agreed that the Law meets all the constitutional tests except for the third and last subtest of proportionality – proportionality *stricto sensu*. I therefore see no need to address all of the tests of the Limitation Clause. As for the last test, which balances benefit against harm, care is called for. This test should not be turned into the kind of judicial discretion that is characteristic of legal decisions in the civil and criminal fields. As noted, the constitutional review focused upon the gap between the period established in the Law and the possibility of establishing a shorter period. To my mind, I find no basis for such a distinction or gap, and certainly not to the extent that would justify annulling the section. There is a restriction of freedom of movement, but it is limited. In practice, the infiltrator must sleep in a particular area that the Law itself does not define geographically. The restriction does not apply during daylight hours. It is even possible to obtain a four-day exemption from registration. In view of the proper purpose, I have doubts as whether this should be seen as an unconstitutional infringement of human dignity and liberty. In my opinion, Chapter D in its present form, including the twenty-month period, passes the constitutional test.

The matter can be portrayed as follows: The question is whether the residency center is open or closed. In the framework of the previous law, which was up for review in the *Eitan* case, the residency center could be viewed as a closed facility. That was the case in view of the overall circumstances, including a requirement to report three times a day, the geographical location and the lack of a definite path to release. That is why I expressed the opinion in the *Eitan* case that part of the registration requirement should be annulled in order to allow actual freedom of movement. However, in the current case, in which freedom of movement outside of the facility is possible all day long, together the other new conditions, it would appear that the residency center easily crosses the line and can now be defined as an open facility. This holds many consequences for the amendment's constitutionality. Viewed in total, I do not think that establishing a twenty-month period negatively influences the result.

8. The considerations of the relationship between the Court and the Knesset, the twenty-month maximum period as opposed to a period that is not significantly different, and the examination of the amendment on the merits are interrelated. I will make three comments in this regard.

First, one cannot ignore the fact that the Knesset indeed "internalized" the need for the amendment as expressed in the majority opinion in the *Eitan* case. In the matter of detention, although it was possible to set a maximum period in excess of three months, and certainly up to six months, the Knesset sufficed with the shorter period. As for the residency center, the registration requirement was limited to once a day. Presence in the facility is only required between 10 PM and 6 AM. Broad exemptions were established for various populations, as well as grounds for individual release. The maximum period was reduced to twenty months, as opposed to the previous period of at least thirty-six months. When the Knesset acts seriously and with discretion, the Court should not intervene unless there is no recourse. Of course, the Knesset must respect the Court's instructions, and even the amended law is not immune to review. However, the Court should accord great weight to Knesset legislation carried out as a result of internalizing the constitutional review. It is not proper to "recalculate the route" and refocus the constitutional flaw. Of course, it is the Court's job to correct clear, profound, fundamental constitutional infringements. But not every possible difference of opinion as to the preferred law fits this category. In this sense, the Court should view "from above".

The second comment concerns the practical aspect. According to the State's supplementary affidavit, there were 1,950 infiltrators in the Holot residency center as of February 2015, and the maximum period stood at fourteen months (also see para. 55 of the President's opinion). Thus, from a practical perspective, the infiltrators will be released close to the date of this judgment under the existing law. It would seem that, for the time being, it would be better not to change the situation dramatically. The experience accrued from the release of the first residents may help the Director acquire a complete picture and ensure optimally efficient release. This is another reason, which does not stand alone, for why I believe that it would not be proper, at present, to amend the Law as proposed.

The third comment concerns Justice Vogelman's position that sec. 32T should also be annulled. That is the section that permits transferring an infiltrator from the residency center to

detention for a disciplinary infraction. Examining the section reveals that different periods – ranging from 15 to 120 days – for various disciplinary infractions. The maximum period is relevant when an infiltrator is absent for more than 90 days from his assigned reporting date. There is a distinction between a first and second violation. It is further emphasized that a detention order may not be issued prior to a hearing, and that once the order is issued, the resident must be brought before the Detention Review Tribunal within four days at most. In the *Eitan* case, my colleague addressed the problem of granting "transfer authority" to the Director, primarily in view of the one-year maximum period that was established there, and due to the absence of procedural safeguards – first and foremost, the absence of automatic judicial review. As noted, these defects have essentially been remedied. The current procedures include a hearing and automatic judicial review, and the maximum period is 120 days. There would seem to be a clear interest in enforcing discipline in the residency center. The periods of detention are short, graduated, and adapted to the nature of the infraction. I find no constitutional defect in this section. I agree with the reasoning set out in the opinion of my colleague Justice Joubran in this regard, which reinforces my conclusion.

In conclusion, in my opinion there are no grounds for annulling the Law from a legal perspective, from a principled perspective, in terms of the relationship between the Court and the Knesset, nor even for practical reasons.

The Opposing Humanitarian Interest

9. In reaching my conclusion, I am not ignoring the complex, difficult situation of the infiltrators. The vast majority of them suffered a bitter fate in their countries of origin, which – in general – lack the living conditions that are taken for granted in our society and other progressive societies. The infiltrators are a group, but their suffering and harsh conditions are not merely the lot of the group, but of each and every individual. We must protect the rights of disadvantaged groups, and of their *individual members*.

But that is but one side of the coin. The petition presented the basis for the suffering and the impositions in the lives of another disadvantaged group – the residents of the neighborhoods in which large concentrations of infiltrators developed, such as south Tel Aviv. The clear

impression is that they are not crying in vain. The call for this Court to strike a balance does not derive from a rejection of the other, but rather from the seriously deteriorating living conditions of the residents. As I noted in the *Adam* case, "the primary, even if not the only victims of the sudden, massive illegal immigration are the members of the weakest socio-economic strata…public welfare in the broadest sense, and the sense of public safety have all suffered serious harm" (para. 2). Here too, the group is a collection of individuals. Many of them do not enjoy the freedom to change their place of residence at the drop of a hat, if at all. The material shows that the suffering of this group is real and harsh.

Of course, it is no easy matter to compare suffering to suffering, group to group, and individual to individual. Moral questions loom in the background. However, it is the job of the Court to decide disputes. The importance of the factual examination in every proceeding shows that a judgments must not be theoretical or divorced from life. On the contrary, we rule in the field of reality. What weight should we therefore give to the conflict that has arisen, and to the two sides of the coin?

The matter depends upon the nature of the injury. As I have said in the past, the time has come for a constitutional system based upon Basic law: Human Dignity and Liberty, enacted more than twenty years ago, to rank rights (see, e.g., para. 4 of my opinion in HCJ 466/07 *Gal-On v. Attorney General* (Jan. 11, 2012) [http://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary, (para.3)]). In this manner, the system will develop and the proportionality test *stricto sensu* will accrue more objective content. The consequence of our matter is this: where, as in the case before us, we are concerned with a serious infringement of human dignity, such as detention, there is no room for considering the consequences of release of an infiltrator for the residents. Thus, for example, in the *Adam* case we explained that the three-year period was, in practice, a punitive measure that inflicted severe constitutional harm to the infiltrator, and that it could not be vindicated by the suffering of another group. In the *Eitan* case, I expressed the opinion that a one-year period met the constitutional test. However, I agree that if another judge is of the opinion that the period of detention is too long, the consideration of the residents' suffering is not decisive.

In the matter before us, the decision rules are different. First, the intensity of the infringement caused by being held in a residency center is certainly less than that resulting from

being held in detention. We are concerned with a restriction of freedom of movement of a different sort. Moreover, even according to the majority, the disagreement concerns the length of the period. Alongside this, the current constitutional review is premised upon the purpose of preventing settling. It is agreed that this is a proper purpose. Its concern is alleviating the burden upon the residents. It is also agreed that the reality that has been created in the relevant cities raises not inconsiderable problems (para. 67 of the President's opinion). That being the case, it is clear that weight should be attributed to the harm caused to the residents as a result of the annulment of various arrangements in regard to the residency center. While this consideration is less relevant in regard to detention, it is very relevant in regard to the residency center. This point requires striking a balance between two disadvantaged communities.

It should be clear that it is not my intention to equate the two harmed groups and decide which suffers more. At first glance, the answer is clear. But there is an additional consideration: citizens of the state as opposed to infiltrators who came here illegally and not through the border crossings, regardless of what the circumstances may be. Let us not forget that in view of problematic situations in various countries, every state must establish an immigration policy. That is legitimate. As I noted in the *Adam* case, Jewish law and history are particularly sensitive to the two competing sides: on one hand, the command to love the stranger and care for him, and sensitivity to the refugee against the background of our people's wanderings throughout history; on the other hand, the principle that "the poor of your city take precedence" [TB BAVA METZIA 71a – ed.]. Poverty is not only measured in monetary terms (see para. 2 of my opinion, *ibid*.).

Indeed, there are situations in which an infiltrator must not be deported. But we are not speaking of deportation, but rather of delineating the conditions for the first period of staying in the country. The humanitarian interests of the residents must be part of the equation. Together with the other reasons detailed above, it argues for denying the petition.

10. In conclusion, in my opinion, the petition should be denied in its entirety.

Justice E. Hayut:

1. For a third time, this Court is called upon to annul provisions of the very same law – the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 (hereinafter: the Law),

which is no common occurrence. However, and despite the complexity involved, it would appear that the dialogue between the Knesset and this Court as a result of the two prior petitions (HCJ 7146/12 *Adam v. Kn*esset (Sept. 16, 2013); HCJ 7385/13 *Eitan - Israeli Immigration Policy Center v. Government* (Sept. 22, 2014) (hereinafter: the *Eitan* case)) made a not insignificant contribution to reducing the infringement of human rights under that Law. This was made possible because following what was stated in these two previous petitions, the Knesset was willing, time and again, to make an effort to amend the Law and find appropriate constitutional solutions.

2. The amended provisions in Chapter A of the Prevention of Infiltration and Ensuring Departure of Infiltrators from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014 (hereinafter: the Amendment under review) now establishes, *inter alia*, that the period during which infiltrators may be held in custody will not exceed three months, in which regard I concur with the position of my colleague the President that these provisions pass the tests for constitutionality, and that the third petition before the Court should be denied to the extent that it concerns them. As opposed to that, further dialogue with the Knesset is required so that it will reconsider the arrangement concerning the maximum period for holding a person in the residency center. As my colleague the President pointed out, coercively holding a person in a residency center for a maximum period of twenty months has no parallel elsewhere in the world (paras. 101-105 of her opinion), and it is unconstitutional. This is the case, given the infringement of the constitutional rights of those held in the center for such a lengthy period, which is not directly proportional to the benefit derived from achieving the purposes for which the amendment to the Law was enacted (in regard to the purposes of the amendment, I concur with what is stated in the opinion of my colleague Justice Vogelman in paras. 16-28, and I see no need to add to what is stated there).

3. The disproportionate harm to those held in the residency center is brought into sharper view in light of the very slow pace at which the State processes asylum requests submitted to the RSD, and in view of the negligible percentage of requests approved by the State to date.

In the *Eitan* case, my colleague Justice Vogelman pointed out:

> A comparative view shows that the world-wide percentage of approval for asylum requests submitted by Eritrean and Sudanese nationals – the countries of origin of

> majority of the infiltrators in Israel – are significantly greater than the percentage in Israel. In 2012 (the last year with updated figures), the worldwide percentage for the recognition of Eritreans as refugees was 81.9%, and 68.2% for Sudanese (see the current Statistical Yearbook of the United Nations High Commissioner for Refugees, pp. 102, 104). According to the figures provided by the State, which are current as of March 3, 2014, it appears that less than 1% of asylum requests submitted in Israel by Eritrean nationals were approved, and not even one requests from Sudanese nationals was approved […] (para. 35).

From the supplementary affidavit submitted by Respondents 2-5 on Feb. 16, 2015 it appears that there has been no change in the rate of processing asylum requests since the judgment in the *Eitan* case, and the affidavit shows that the number of approved requests remains negligible. Thus, from July 2009 until Feb. 5, 2015, a total of nine asylum requests submitted by Sudanese and Eritrean nationals were approved, and 1,037 requests were denied. This data puts the rate of approval for asylum requests submitted in that period by Sudanese and Eritrean nationals in Israel at about 0.9%. When this figure is compared to the percentage of asylum requests of these nationals worldwide, the comparison itself raises questions as to the manner in which the state examines and decides upon such requests, as what comes out is a product of what goes in (compare: HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister*, paras. 18-20 of the opinion of President Barak (Feb. 17, 2006) [http://versa.cardozo.yu.edu/opinions/supreme-monitoring-committee-arab-affairs-israel-and-others-v-prime-minister-israel]; AAA 343/09 *Jerusalem Open House for Gay Pride v. Jerusalem Municipality*, paras. 45-47 (Sept. 14, 2010) [http://versa.cardozo.yu.edu/opinions/jerusalem-open-house-gay-pride-v-jerusalem-municipality]). This is further reinforced by the data provided in the supplementary affidavit in regard to the rate of the state's processing of asylum requests. The supplementary affidavit states that "[…] *the order of priorities in processing asylum requests of infiltrators originating from Eritrea and Sudan will be such that priority will be given to examining requests of those staying in the residency center*". However, an examination of the data provided in the affidavit shows that, in practice, the rate of processing those requests is far from satisfactory. Thus, as of the day of the submission of the affidavit, of 3,165 asylum requests submitted from July 2009 to Feb. 5, 2015 by infiltrators originating from Sudan, 2,184 requests (some 70%) remained pending, and of 2,408 requests submitted by infiltrators originating in

Eritrea, 1,335 (some 55%) remained pending. An important figure worth mentioning in this regard is that 1,521 of the 1,940 infiltrators held in the residency center as of Feb. 9, 2015 have submitted asylum requests, and most (862 infiltrators) did so while being held in the residency center.

4. In light of this conduct by the state in regard to Sudanese and Eritrean nationals, it would appear that they are trapped in an continuing, impossible state of normative fog in regard to their status, along with all its severe ramifications for their rights (see and compare: my opinion in AAA 8908/11 *Asafu v. Minister of the Interior* (July 17, 2012)). This is so because, on the one hand, they are not repatriated directly to their countries as a result of practical problems (North Sudan) or the situation in that country and the *non-refoulement* principle (Eritrea), but on the other hand, the state does not decide upon their asylum requests within a reasonable period of time, and when it does consider them, it only approves a negligible number, which itself raises questions in view of the approval rates in regard to asylum requests of comparable nationals in other parts of the world.

5. Lastly, in regard to the disagreement between my colleagues the President and Justice Vogelman in the matter of the Director's authority under sec. 32T to order the transfer of an infiltrator to detention, I am of the opinion that although the arrangement is not problem free, we should not adopt the drastic step of nullifying the legal provision. This is so for the reasons presented by the President, and in this regard I also concur with the opinion of my colleague Justice Joubran that we should not assume that the Director will "exploit" the maximum periods established in the Law to their fullest extent (para. 8 of the opinion of Justice Joubran).

Justice Z. Zylbertal:

I concur in the opinion and conclusion of my colleague President M. Naor in regard to all the issues raised in this petition.

Because I was bothered by the question of the relationship between constitutional and administrative review of the core issue in regard to the provisions of Chapter D of the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 (hereinafter: the Law) as amended in the Prevention of Infiltration and Ensuring Departure of Infiltrators from Israel (Legislative

Amendments and Temporary Provisions) Law, 5775-2014 (hereinafter: the Amended Law), I have chosen to add a few parenthetical comments.

My colleague the President found that the maximum period of time established by the Amended Law for holding infiltrators in the residency center (twenty months) exceeds what is necessary and is disproportionate. This is so, *inter alia*, in view of the primary purpose undergirding the possibility of ordering that an infiltrator stay in the residency center – preventing infiltrators from settling in the urban centers. The President found this purpose to be proper, and I agree. As my colleague explained, in view, *inter alia*, of the limited number of places in the residency center, advancing the said purpose does not focus upon removing a specific infiltrator to the center, but rather to alleviating the burden upon the residents of the urban centers by means of directing part of the infiltrators to the residency center at any given time (and for our purpose, it makes no difference which infiltrator the Director orders to the center). In this situation, and in order to advance the said purpose of moving the place of residence (as opposed, for example, to the purpose of preventing the possibility of working in Israel, regarding which my colleague the President refrained from deciding whether it is a proper purpose, and which, in my view, is doubtfully proper), a maximum period of twenty months residence in the center is disproportionate.

However, we should also turn our attention to another factor noted by my colleague the President – as well as by my colleagues Justices U. Vogelman and I. Amit – in reaching the said conclusion in regard to the lack of proportionality of the maximum residence period established by the Law. I am referring to the *location* of the Holot residency center.

The Law does not establish the location of the residency center. Section 32B of the Law instructs that the Minister of Public Security may declare in an order that a particular place will serve as a residency center for infiltrators. The location, which was chosen prior to the amendment of the Law under review, is in the Holot facility located some seventy kilometers southwest of Beer Sheba, near the Israel-Egypt border. We are thus concerned with a location that is very significantly removed from populated areas in which the infiltrators might find work or conduct proper, reasonable, routine life. As Justice U. Vogelman noted in the *Eitan* case (HCJ 7385/13 *Eitan - Israeli Immigration Policy Center v. Government* (Sept. 22, 2014)), at para 126

of his opinion: "Holot ["sands" – ed.] is just what it is named – surrounded by sand and more sand. It is far from any populated area".

Choosing the location of the residency center is not part of the primary legislation under constitutional review, but rather was accomplished by means of an administrative decision made by the authorized agency. It may be assumed, as would appear from the opinions of my colleagues the President, and Justices Vogelman and Amit, that had a different location been chosen, one not "at the edge of the desert" but at the "outskirts of the cities", which would make it possible to leave the center in the morning and return in the evening, while making it possible for the center resident to find work and lead a life of basic liberty such that we would indeed be concerned with a truly "open" center, then *it is possible* that the conclusion as to the disproportionality of the maximum period for staying in the center may have been different.

Thus, the conclusion as to the proportionality of the established maximum period is coupled with the manner in which the Law was implemented by virtue of an administrative decision. Justice Vogelman addressed this incidentally to his opinion in finding that this constitutional petition is not the proper forum for examining questions that are administrative in principle. However, Justice Vogelman saw fit to add that "a different implementation of the Law could also have affected the examination of its proportionality". Justice Amit added that "…the Law's proportionality is not examined in a vacuum, but rather in the context of a particular reality".

Thus, from the perspective of the length of the period of residency in the center, the Law before us may not necessarily be unconstitutional by reason of its provisions, but perhaps only due to the manner of the *implementation* of its provisions. In this regard, for example, the situation in the matter before us differs from the issue addressed by this Court in the petition challenging the possibility of privatizing a prison (HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance*, (Nov. 19, 2009) [http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance]). In the *Prison Privatization* case, Justice E.E. Levy, dissenting, noted that according to the approach of the majority "the violation of rights resulting from the privatization is so serious that nothing can mitigate it. By way of analogy, even if the private prison were to promise a seven-day feast for everyone in it, this would not mitigate the degradation and loss of liberty that is the lot of

those imprisoned in it, because they are at the mercy of a private concessionaire" (para. 9 of the opinion of Justice E.E. Levy). That is not the case in the matter before us, having found that the very possibility of ordering that an infiltrator stay in a residency center is not, itself, unconstitutional.

The above would seem to lead to the possible conclusion that there is no need to annul the provision concerning the maximum length for staying in the residency center, and that our focus should be upon the reasonableness and legality of the administrative decision as to its location.

However, I am of the opinion that the circumstances taken in their totality can only lead to the conclusion reached by my colleague the President.

First, the amendment was enacted in view of the residency center already existing in Holot, and with this reality and no other in the legislature's mind. Indeed, the concrete implementation of a Law as carried out in practice can constitute part of the reality in which the Law was "born", and in appropriate circumstances may be incorporated into the examination of the law's proportionality, as if it were part of the law itself. As noted, that can be the case where the "primary arrangement" is not found to be manifestly unconstitutional, but rather the lack of proportionality lay in the secondary arrangement of one of the aspects of the "primary arrangements".

Second, the case law of this Court has long recognized the relationship between examining the constitutionality of a law and the concrete manner of its implementation by the executive, for example in regard to the question of when a constitutional challenge is "ripe" (see: HCJ 2311/11 *Sabah v. Knesset* (Sept. 17, 2014)). Just as a *lack* of factual data concerning the concrete implementation of a law may sometimes prevent the possibility of its constitutional review, so the *existence* of such data may influence the results of its constitutional review, for were it not so, then there would be no logic in waiting for their accrual as a condition for "ripeness". Justice E. Hayut addressed this in the above case, stating: "…there may be cases in which the law appears constitutional on its face, and only the manner of its implementation reveals its unconstitutionality."

In my opinion, the concrete implementation of the provisions of Chapter D of the Law in regard to the maximum period for staying in the center, *when it is established that the residency center will be in Holot*, highlights their unconstitutionality, which might have been much more "mitigated", or even non-existent, had the implementation been different and more humane, and had appropriate weight been given to the basic rights of the infiltrator population that is subject to the policy of non-removal (at least temporarily) from Israel. While the state is entitled to decide where the infiltrators may live in order to ease the distress of the residents of the cities, it may not do so by trampling their dignity. "The stranger who sojourns with you shall be to you as the native among you, and you shall love him as yourself; for you were strangers in the land of Egypt" (Lev. 19:34).

Justice Y. Danziger:

Yet again, for a third time, we are addressing a petition challenging the provisions of the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954.

Inasmuch as we have already addressed this law and the issues a hand at length in the framework of the two prior petitions, I believe that it would be best that I suffice in concurring in one of the two primary opinions written by my colleagues President M. Naor and Justice U. Vogelman.

I concur in the opinion of the President and with her conclusion in regard to all the issues raised by the petition before the Court.

Justice H. Melcer:

1. I agree with the main points of the learned, comprehensive opinion of my colleague President M. Naor, and concur without reservation with that part in which she addresses sec. 30A of the Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954 (hereinafter: the Law or the Prevention of Infiltration Law) that was introduced into the Law by the Prevention of Infiltration and Ensuring Departure of Infiltrators from Israel (Legislative Amendments and Temporary Provisions) Law, 5775-2014 (hereinafter: the 2014 Amendment).

I therefore concur with the President's reasoning and her conclusion that the provisions of the said section, including the maximum three-month custody period for an infiltrator (who entered the country after the publication of the 2014 Amendment) as defined by the Law, passes the constitutionality test. At this point it should be noted that in my opinion, the executive and the legislature properly and respectfully internalized this Court's comments, and took into account what was decided in HCJ 7385/13 *Eitan - Israeli Immigration Policy Center v. Government* (Sept. 22, 2014) (hereinafter: the *Eitan* case).

2. The matter of Chapter D of the Law – which was also enacted in the framework of the 2014 Amendment – is much more complex, and consequently my proposed solution will be so, as well. This solution rests upon certain elements deriving from the reasons presented here in the various opinions of my colleagues. It was fashioned with due respect for the basic rights of the citizens of Israel and the residents of the neighborhoods in which the infiltrators have settled, while providing the required protection of the rights of the infiltrators as human beings, along with consideration of the interests of the state, as such, and the desired dialogue that should be maintained between the Knesset and the Court.

I will therefore proceed by presenting first things first, and last things last.

3. This is the third time that this Court is required to address the constitutionality of the statutory amendments to the Prevention of Infiltration Law to contend with the problem of infiltration from Africa, as described in the opinion of the President. In both prior cases (HCJ 7146/12 *Adam v. Knesset* (Sept. 16, 2013) (hereinafter: the *Adam* case), and the *Eitan* case), the Court annulled certain provisions of the Law, and pursuant to the *Eitan* case, the Knesset enacted the 2014 Amendment, which the Petitioners challenge on constitutional grounds.

Admittedly, the provisions of the 2014 Amendment, enacted as a temporary order for three years, are an improvement over the previous amendments of the Law. However, the case law provides that even when a legislative change comprises only ameliorating provisions, it is proper to reexamine the balances struck by the law when it is brought before the Court for judicial review (see and compare: HCJ 6055/95 *Tzemach v. Minister of Defense*, IsrSC 53(5) 241 (1999) [http://versa.cardozo.yu.edu/opinions/tzemach-v-minister-defense]; my opinion in HCJ 6784/06 *Major Schlitner v. Director of IDF Pension Payment*, Jan. 12, 2011)). This rule also applies to *temporary orders* (see: HCJ 466/07 *Gal-On v. Attorney General* (Jan. 11, 2012)

(hereinafter: the *Second Family Unification* case) [http://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary]). In the *Second Family Unification* case, the High Court of Justice *reexamined* the constitutionality of the Nationality and Entry into Israel (Temporary Order) Law, 5763-2003, in view of changes that had been introduced. The Court majority approved the constitutionality of that temporary order.

4. Even elsewhere in the world, the constitutionality of a law may occasionally be *reexamined* upon a claim that the legislature did not properly respect fundamental constitutional rights as interpreted by the court, or ignored other relevant constitutional provisions (see, for example: in the United States: *Shaw v. Reno* 509 U.S 630 (1993); *Shaw v. Hunt* 517 U.S 899 (1996); in Germany: the Constitutional Court's decision of July 2008, 2 BvC 1/07 2008, and its decision of July 2012, 2 BvE 9/11 2012; in France: the Constitutional Court's HADOPI 1 decision of June 10, 2009, and its HADOPI 2 decision of Sept. 22, 2009. For a description of the proceedings and issues addressed there, see my opinion in CA 9183/09 *The Football Association Premier League Limited v. A.*, para. 6 (May 13, 2012)).

5. The comparative law to which I refer demonstrates that the *second time* the legislature – and thereafter the court – address a law whose constitutionality will be scrutinized, both of the relevant branches display a maximum of care and consideration due to the need for *mutual respect*. That is all the more so when we are concerned with a *third* instance of judicial review of legislation, which is very unusual, although possible and justified in circumstances in which the parliament, in enacting a law, substantially deviates from fundamental constitutional rights as interpreted by the court (see, for example: in Germany: the proceedings of the Constitutional Court in regard to the Inheritance and Gift Tax Law (a) judgment of June 22, 1995 in BVerfG, 1995 2 BvR 552/91; (b) judgment of Nov. 7, 2006 in BVerfG, 2006 1 BvL 10/02; (c) judgment of Dec. 17, 2014 in BVerfG, 2014 1 BvL 21/12; in Italy: the proceedings in the Constitutional Court in regard to the Parliamentary and Ministerial Immunity Law (against the background of the prosecution of Prime Minister Silvio Berlusconi): (a) judgment of Jan. 2004 (Law 140/2003); (b) judgment of Oct. 2009 (Law 124/2008); (c) judgment of Jan. 13, 2011 (Law 51/2010)).

6. Beyond the description of comparative law on these issues, presented in paras. 4-5 above, there is an additional question in this regard as to whether a reviewing court annulling a law should instruct the legislature as to how to act in the future so as to enact a law that will be

immune, so to speak, to constitutional scrutiny, or whether the court should suffice with a constitutional examination of the law brought before it after the legislature has had its say.

There is much theoretical discussion of the dialogue between the judiciary and the legislature that develops in such situations (for the theoretical literature on the subject, see the article by Liav Orgad and Shay Lavie, *Judicial Directive: Empirical and Normative Assessment*, 34 TEL AVIV U. LAW REVIEW 437, 440 (2011) (Hebrew) (hereinafter: Orgad & Lavie, *Judicial Directive*), and see: Ittai Bar Siman-Tov, *The Puzzling Resistance To Judicial Review Of The Legislative Process*, 91 B.U. L. REV. 1915, 1954-1958 (2011); AHARON BARAK, THE JUDGE IN A DEMOCRACY 382-389 (2004) (Hebrew) (English: Princeton, 2008) ; GIDEON SAPIR, THE CONSTITUTIONAL REVOLUTION IN ISRAEL: PAST, PRESENT & FUTURE 219-222 (2010) (Hebrew)).

The answers to this question can be classified into three categories, although the dividing line between them is sometimes blurred (the analysis, references and presentation below are based upon the article Orgad & Lavie, *Judicial Directive*):

(a) One model is that of "judicial advice". Judicial advice is an approach that allows the judge to recommend necessary legislative changes to the legislature. It does not express a *demand*, but rather a legal *preference*, while leaving discretion to the legislature (compare: Nitya Duclos & Kent Roach, *Constitutional Remedies as "Constitutional Hints"*: *A Comment on R. V. Schachter*, 36 MCGILL L.J. 1 (1991)).

(b) A second model is that of the "constitutional roadmap". The constitutional roadmap is a technique that allows the judge to recommend to the legislature, expressly or impliedly, how to overcome the defects in the current law. In the constitutional context, it constitutes a sort of recommended path to correcting the constitutional defect found by the court (see: Erik Luna, *Constitutional Road Maps*, 90 CRIM. L. & CRIMINOLOGY 1125 (2000)).

(c) A third model is the "fire alarm". The fire alarm is a technique that allows the judge to warn the legislature of defects in the current law. In the constitutional context, this concerns cases in which the court just barely accepts the constitutionality of the law, but explains that although the law is "still constitutional", it may become unconstitutional in the future (see: Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1719 (1998)).

7. In Israel, in HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance*, IsrSC 51 (4) 367, 412-413 (1997) (hereinafter: the *Investment Managers* case), President A. Barak employed the "constitutional roadmap" approach, informing the Knesset of the alternatives that it might adopt in order to create an arrangement that would pass constitutional review in place of the provision that the Court had declared void in that case, emphasizing: "Choosing the proper balance point is given to the legislature" (*ibid*.).

A tendency toward approach (a) appeared in later decisions (for example, by some of the justices in the *Eitan* case), or toward approach (c) (for example, in the *Admissions Committees* case: HCJ 2311/11 *Sabah v. Knesset* (Sept. 17, 2014), or the judgment in the matter of raising the electoral threshold: HCJ 3166/14 *Gutman v. Attorney General* (March 12, 2015)). However, there has been no decisive verdict on this issue to date, and I do not propose that we adopt one here. However, I do think it appropriate to emphasize that it would be proper, in my opinion, to tell the legislators not only what is not constitutional, but also to provide them with general guidelines as to what can be expected to meet constitutional requirements, as President Barak did in the *Investment Managers* case. Beyond that, I believe that the said dialogue must continue openly, comprehensively and with mutual respect.

This is the place to note that in the meantime a tendency has developed, at least in Europe, towards a *fourth* approach that takes the view that a court that declares a law unconstitutional must not suggest to the (national) legislature how to fix the law (see: the majority opinion in *Hirst v. United Kingdom (No. 2)* 42 EHRR 41 (2006), decided by the European Court of Human Rights, and which was influenced, *inter alia*, by the need to grant relative freedom to the EU member states. As opposed to this, see the leading article supporting substantive dialogue: Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, *Charter Dialogue Revisited – Or "Much Ado About Metaphors"*, 45 OSGOODE HALL L.J. 1 (2007)).

8. Now, having presented the current comparative law on the subject and the theoretical streams that indicate the possible approaches for treating it, I will presently return to the subject matter before us. However, before proceeding to the specifics, I would make two, further prefatory comments:

(a) Our consideration of Chapter D of the Law is a *second* instance of judicial review (and not the third) of the arrangement, inasmuch as the institution of a residency center for infiltrators was not part of the law examined in the *Adam* case.

(b) On its face, it would seem that the move from a "judicial advice" approach to one telling the legislature precisely how it should fix the Law (limiting a stay in the residency center to no more than one year) is too extreme, and almost entirely removes the "legislative margin of appreciation". For this reason, I concur with part of the criticism expressed in the opinion of my colleague Justice N. Hendel. But while according to his basic approach, this should lead to the denial of the entire petition, I am of the opinion that there is room for an *intermediate solution*. This solution will preserve both the proper "margin of appreciation" and the boundaries of judicial review, and will even lead to greater proportionality in the treatment of infiltrators and their rights, while preserving the interests of the state and of the residents of the neighborhoods in which the infiltrators have settled, as I will explain in detail below.

9. My colleague the President concludes that under the present circumstances, preventing settling in the urban centers is a proper purpose. I am also of the opinion that it can serve to lessen the hardships of the residents of the communities in which the infiltrators have chosen to live.

What then is the primary proportionate means (the least infringing of the rights of the infiltrators) for achieving the prevention of settling in the urban centers?

In Europe (as well as in Israel in 2009), the solution adopted was that of "population dispersal" by way of "designating" areas for the residence of infiltrators (whose number in Israel is now some 45,000 men, women and children, which can be viewed as "mass influx" in Israeli terms). Indeed, at the time, the Minister of the Interior made a decision that asylum seekers would not be permitted to stay and work in the geographical region between Hadera and Gedera. Various human rights organizations (some of which are petitioners in this petition) immediately petitioned to challenge that decision (which, perhaps should have been established in an express statue, as was done in Germany, for example) – see: HCJ 5616/09 *African Refugee Development Center v. Ministry of the Interior* (Aug. 26, 2009). In response to that petition, the respondents informed the Court that the minister had decided to retract the said decision and the petitioners

withdrew their petition, with all the parties reserving their rights and arguments should the restriction be reinstituted.

Retrospectively, it may be unfortunate that the idea of "population dispersal" (not necessarily restricting residence and work in the Hadera-Gedera area, but rather by proportional distribution throughout the country) was not tried and was not judicially scrutinized, as there can be no doubt that the solution would be preferable from the perspective of the Petitioners to that of a remote residency center surrounded only by sand and desert. It would therefore appear that the rights organizations should draw conclusions from their haste to petition at the time, as "if you have seized too much, you have seized nothing" [TB ROSH HASHANA 4B; YOMA 80a – ed.].

10. In addition, the German Asylum Procedure Act (AsylVfG), which permitted "attaching" infiltrators into Germany to specific geographical areas, was subjected to constitutional review and withstood the challenge. Moreover, the said law also established, *inter alia*, two provisions stating that a person who violated the law's provisions would be arrested and criminally prosecuted, and that the examination of his asylum request would cease. This provisions were also approved by the German constitutional court (see: the German judgment of April 10, 1997, BVerfG 2 BvL 45/92). A petition to the European Court of Human Rights was also denied (see: *Omwenyeke v. Germany*, App. No. 44294/04 (2007)). For details in regard to the said judgment of the European Court of Human Rights, see the opinion of my colleague Justice Hendel.

We should note that Germany recently limited even the provisions permitting "geographical restriction" of infiltrators, as well as the term of their incidence.

11. To return to Israel, now that we have approved the purpose of preventing settling in the urban centers, and in view of the fact that a very significant number of infiltrators still lives in Israel, it would seem to me that the legislature should reconsider the possibility of implementing the decision in regard to dispersal of the infiltrator population, inasmuch as it is a much more moderate solution than transferring infiltrators to residency centers, and it would achieve the same purpose, perhaps even more efficiently (if this is actually the true purpose, and not the coerced departure of the infiltrators from Israel). Moreover, a person who violates the geographical restriction can be subjected to an "additional level of restriction" (in accordance with the "ladder model" of proportionality), i.e., placement in a residency center (Germany and the European Union have even recognized the constitutionality of transfer to the criminal path in

such situations). In such a case, it would seem that even a maximum period of twenty months would not lead to nullification.

Such an approach, which was already recommended by the President in the *Eitan* case (after noting in the *Adam* case that finding humane solutions for the infiltrators already living among us could be the state's finest hour), has now become a *legal imperative* in the framework of the *proportionality requirement* in order to realize the purpose that we have recognized. It even has some grounding in the provisions of sec. 32T(d) of the Law.

It might even be argued that not adopting this path might lead to viewing the Law as incompatible with the values of the State of Israel as a Jewish and democratic state, particularly in view of the European standard and the German practice.

It is not yet too late to attempt to implement this model.

12. Support for my approach, which seeks to achieve the permitted purpose without undesirable side effects, can be derived – indirectly – from the Israeli authorities' action (actually *inaction*) in regard to requests to recognize infiltrators as refugees, to the extent that such have been submitted prior to the issuance of a residence order. Petitioners 1 and 2 are sad, living examples of this, particularly in view of the fact that the brother of Petitioner 1, who also fled Eritrea and whose circumstances would appear similar to those of Petitioner 1, was granted such recognition by Switzerland some time ago.

In her opinion, my colleague Justice E. Hayut presented edifying data in this regard, deriving from the supplementary affidavit submitted by the State on Feb. 16, 2015, which reveal shocking incompetence, if not deliberate negligence, in the treatment of such requests (even those submitted to the competent authorities *before* the applicants were called to the residency center).

Moreover, of the requests that were nevertheless examined, only an insignificant number (some 0.9% of those submitted by Sudanese and Eritrean nationals) were granted, which is negligible in comparison to the rate of approval for asylum requests of similar nationals in other western countries.

I will now address the consequences of the above for the matter before us.

13. My colleague Justice E. Hayut directs us to HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* (Feb. 17, 2006) [http://versa.cardozo.yu.edu/opinions/supreme-monitoring-committee-arab-affairs-israel-and-others-v-prime-minister-israel], and to AAA 343/09 *Jerusalem Open House for Gay Pride v. Jerusalem Municipality* (Sept. 14, 2010) [http://versa.cardozo.yu.edu/opinions/jerusalem-open-house-gay-pride-v-jerusalem-municipality] (hereinafter: the *Open House* case). Those petitions were primarily based upon the principles of administrative law, and the "foot dragging" of the authorities in those cases ultimately led to the granting of the petitions.

Moreover, such inaction also bears constitutional significance (see the comments of my colleague Justice E. Hayut on this subject in the *Open House* case), as I shall now explain:

First, it would appear that the inaction primarily harms minorities or disadvantaged communities.

Second, in our context, inaction may testify that the declared proper purpose (preventing settling in the urban centers), *which we accepted*, is not the main purpose, and that it is accompanied by other, hidden purposes of no less importance, in regard to which the state is – *prima facie* – acting contrary to the obligations of its agencies in the framework of Basic Law: Human Dignity and Liberty (sec. 11), and in apparent contravention of the international obligations that the state undertook in ratifying the Convention Relating to the Status of Refugees (1951), of which Israel and various Jewish organizations were among the initiators and drafters (see: Tally Kritzman-Amir's Preface to WHERE LEVINSKY MEETS ASMARA: SOCIAL AND LEGAL ASPECTS OF ISRAELI ASYLUM POLICY, 12-14 (2015)).

The obligations that are seemingly contravened here are the obligation to examine asylum applications *as soon as possible*, and not to take any steps that might frustrate the possibility of their approval, see and compare: Directive 2013/32/EU of the European Parliament and of the Council, Article 31; and see: JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW, pp. 180-181 (2014).

At this point we should take not of sec. 32D(1) of the Law, which establishes as follows:

> Notwithstanding the provisions of section 2(a)(5) of the Entry into Israel Law, an infiltrator who is subject to a residency order will not be granted a visa and permit for residency in Israel under the Entry into Israel Law.

The provisions of this section would seem to show that in the case of a person issued a residency order, the possibility that his request for recognition as a refugee will be approved is, in practice, frustrated if it was submitted *prior* to the issuance of the residency order.

This would constitute the state's renunciation of its above obligations, and in such circumstances the state might be deemed as *estopped* by virtue of the good-faith principle from raising arguments to ground the residency order, or even to justify the relevant legislation. This principle is established in sec. 43(a) of the Contracts (General Part) Law, 5733-1973, and it applies by virtue of sec. 61(b) of that law "to legal acts other than contracts and to obligations that do not arise out of a contract" (see and compare: AAA 1659/09 *Ministry of Construction and Housing v. Malka*, para. 18 (Nov. 17, 2013) and the references cited there).

It would therefore appear that the geographical restriction solution for infiltrators (and here it would be proper to consider proportional allocation among *all* the various parts of the country, as noted) would provide a balanced response to the problem, and in my opinion, it should therefore be considered. The reasoning in regard to the purposes of the 2014 Amendment concerning the residency center are appropriate here as well, and in this regard I concur with the comprehensive opinion of my colleague Justice U. Vogelman and his comments on enforcement, which – in the absence of clear, controlled criteria – appears selective in terms of who is issued a residency order.

14. The consequence of all the above is that *without* reconsidering the alternative of geographical restriction – which is less harmful and should therefore be established by *law* prior to implementing the alternative of placement in a residency center – the period of a stay in the residency center cannot reach twenty months. Moreover, without such an alternative, it is possible that in the future, depending on the manner of implementation, it may be argued that the law is not what it purports to be (compare HCJ 121/68 *Electra (Israel) Ltd. v. Minister of Industry and Trade*, IsrSC 22(2) 552 (1968) in regard to subsidiary legislation). Therefore, only if the geographical restriction alternative is approved will it be possible to accept the current restriction of the residency arrangement (residency in the center for up to twenty months),

subject to the additional assumption that even then the said authority will be exercised with restraint, and that it will generally not be implemented to its fullest extent (compare: HCJ 2442/11 *Shtanger v. Speaker of the Knesset* (June 26, 2013) [http://versa.cardozo.yu.edu/opinions/shtanger-v-speaker-knesset] (hereinafter: the *Shtanger* case)).

The solution that I am proposing thus involves returning the Law to the Knesset so that it can adopt one of the two paths outlined above, or a hierarchic combination of them, or some other proportionate solution that it may deem suitable in light of our comments. In this manner, the "margin of legislative appreciation" (also called the "margin of proportionality") will also be appropriately maintained, see: the *Shtanger* case, and the majority opinion in the *Boycott* case (HCJ 5239/11 *Avneri v. Knesset* (April 15, 2015) [http://versa.cardozo.yu.edu/opinions/avneri-v-knesset]).

15. Before concluding, I would add that I also agree with the approach of the President and the other concurring justices in regard to the validity of sec. 32T of the Law, which in my opinion, should also be exercised with restraint and in proportion (again compare: the *Shtanger* case).

In addition to the reasons presented by the President, I also agree with the my colleague Justice S. Joubran's distinction in regard to the punishment of soldiers, corrections officer and police as opposed to infiltrators (and those authorized to order it). Grounds for this distinction can also be found in sec. 9 of Basic Law: Human Dignity and Liberty. On the interpretation of this section, see: Hanan Melcer, *The IDF as the Army of a Jewish and Democratic State*, RUBINSTEIN VOLUME 347, 370-389 (2012).

16. Having arrived at this point, a question remains as to my view of the transitional provision required as a result of this decision. I agree with holding the declaration of voidance in abeyance, as proposed by the President in para. 115 of her opinion. However, I do not think that the exception to the said suspension should apply to all of those currently in the residency center, as proposed by the President, but only to those among them who submitted requests for recognition as refugees *prior* to their being issued residency orders and who have not yet received a decision (Petitioners 1 and 2 among them).

This approach is justified both by theoretical and practical reasons (the latter were explained in the opinion of my colleague Justice Hendel). This result is required, *inter alia*, by the obligation of mutual respect mentioned earlier, so that the Knesset (which will have to address the entire matter for a third time), the government and the public will be able to prepare properly for the new situation (see: Yigal Mersel, *Suspension of a Declaration of Invalidity*, 9 MISHPAT U'MIMSHAL 39 (2006)). This is also the accepted approach in Canada under similar circumstances (see and compare: KENT ROACH, CONSTITUTIONAL REMEDIES IN CANADA 14-82 to 14-92.2). In such matters, it is preferable to grant some period of time for arriving at a more comprehensive solution over the medium term (along with the necessary implementation required immediately) rather than achieving a limited immediate result.

17. In summation, I would say that the intermediate solution that I have proposed for consideration strikes a reasonable balance among the needs of all in these difficult circumstances, in the sense of achieving the lesser evil where a greater good cannot be attained.

Moreover, as the descendants of ancient ancestors who were foreign workers in a country that was not their own, and of more recent forebears who pounded on the gates of various countries in their flight from the Nazis, and were turned away, we must apply the relevant legal principles with compassion and sensitivity toward all involved. This is demanded by our being a Jewish and democratic state.

The result is therefore as follows:

1. Decided by majority in accordance with the opinion of President M. Naor, Justices S. Joubran, E. Hayut, Y. Danziger and Z. Zylbertal concurring, that subject to the proposed interpretation, the provisions of the Law pass constitutional scrutiny, with the exception of the provisions of secs. 32D(a) and 32U, which establish the maximum period for being held in the residency center, and are void. In accordance with the majority decision, the declaration of the invalidity of these sections will be held in abeyance for a period of six months. During that period, the maximum period for holding a person in the residency center under those sections will be twelve months. Those who have been held in the residency center for twelve months or

more on the date of this decision will be released immediately, and no later than fifty days from the date of this decision, as stated in para. 115 of the opinion of President M. Naor.

(a) Justices U. Vogelman and I. Amit concurred with the majority, but were of the opinion that sec. 32T should also be declared void.

(b) Justice H. Melcer joined the opinion of the majority subject to the proviso that the alternative of geographical restriction be considered, and with the exception of the transitional provision, as stated in paras. 11, 14 and 16 (respectively) of his opinion.

(c) Justice N. Hendel, dissenting, was of the opinion that the petition should be denied in its entirety.

2. The Respondents shall bear the costs of the Petitioners in the total amount of NIS 30,000.

Given this 26th day of Av 5775 (Aug. 11, 2015).