HCJ 8665/14 Desta v. The Knesset

Translation of the summation of the decision produced by the High Court of Justice

In a decision delivered today, 11.8.2015, an expanded panel of nine Supreme Court judges ruled on the constitutionality of Article 30A and Chapter D of the Anti-Infiltration Law (Offences and Jurisdiction) - 1954 (hereinafter: the Law) – as amended by the Law on Prevention of Infiltration and Securing the Departure of Infiltrators from Israel (Legislative Amendments and Provisional Orders) – 2014 – that allow the holding of infiltrators in detention for a period of up to three months and ordering their residency in a residence centre for a period of up to twenty months.

After hearing the claims raised by the parties, it was held *unanimously* that, subject to the interpretation provided in this decision, the provision in the law allowing the holding of infiltrators in detention for a period of up to three months (Article 30A) – *is constitutional*. As for the provisions in the law authorizing issuance of residency orders against infiltrators, their constitutionality was upheld by the majority, except for articles 32D(a) and 32U, which set the maximum residency period at twenty months, that were invalidated. This, on the ground that the length of this period is disproportionate.

According to the majority opinion, the invalidation of these provisions has been suspended for six months. During this period, the maximum residency period shall be set at twelve months. Residents who, at the date of this decision, have been residing at the centre for twelve months or more shall be released immediately and no later than within fifteen days of the date of this decision. It was emphasized that if the Knesset fails to enact new relevant provisions within the six-month period, the authority of the Director of Borders Control to issue residence orders shall expire.

The majority opinion was given by President M. Naor and Judges S. Joubran, E. Hayut, Y. Danziger and Z. Zylbertal. Judges U. Vogelman and I. Amit concurred with the majority opinion, but dissented regarding Article 32T – authorizing the Director of Borders Control to order the transfer of a resident to detention – which they found as unconstitutional. Judge Meltzer also concurred with the majority opinion subject to that the alternative of geographic delimitation is considered and except for the provisional arrangement.

Judge N. Hendel dissented, holding that the petition should be rejected in its entirety.

It has been decided therefore by the majority that the petition is rejected except for the provisions in the Law stipulating that an infiltrator could be held in a residence centre for a period of up to twenty months. These were held to be unconstitutional and hence invalidated.

Summation of President Naor's Opinion

President Naor, who wrote the majority opinion, held that the authority to hold infiltrators in detention, subject to the existence of proceedings for identification or exhausting removal alternatives, is constitutional. Furthermore, President Naor held that, except for the maximum residency period for infiltrators in the residence centre, Chapter D meets, sometimes barely, the constitutional test of the limitation clause.

At the outset of the decision, President Naor addressed the background of the legislation in question. President Naor mentioned that in recent years the State of Israel is faced with the phenomenon of infiltration into its territory, which brings about the illegal entry of tens of thousands of people into the state not through a recognized border crossing. President Naor recognized that consequently Israel is faced with complicated challenges. Alongside the need to prevent illegal infiltration, the State has to uphold its obligation to defend those persecuted and to ensure that expulsion does not put their lives or freedom at risk.

President Naor pointed out the existing disagreement between the parties concerning the motives for the infiltration into Israel. While the State maintains that the motives of the infiltrators are predominantly economic, the petitioners believe that these are persons who fled their countries of origin because of risk to their lives or freedom. President Naor stated that either way, for the time being, the State of Israel refrains from expelling nationals of Eritrea and of north Sudan – the countries of origin of most infiltrators into Israel.

President Naor further indicated that although the scope of the infiltration phenomenon is on the decrease, the need to address the challenges emanating from the large number of infiltrators still in Israel, remains. Therefore, the State has implemented various solutions, including the enactment of legislation designed to apply new legal arrangements on infiltrators. As part of the Law on the Prevention of Infiltration (Offences and Jurisdiction) (Amendment No. 3 and a Provisional Order) – 2012, Article 30A was added to the Law. Its main provision, in the first version of Article 30A which was enacted as a provisional statute, allowed the holding of infiltrators in detention for a period of up to three years, subject to conditional release grounds set out in the Law. In HCJ 7146/12 *Adam v. The Knesset* (16.9.2013) (hereinafter: the *Adam* decision), the Supreme Court held that Amendment No. 3 as it stood then was unconstitutional owing to its disproportionate infringement of the constitutional right to liberty.

Following the *Adam* decision, the Knesset enacted the Law on Prevention of Infiltration (Offences and Jurisdiction) (Amendment No. 4 and a Provisional Order) – 2013. As part of the amendment – also enacted as a provisional statute – Article 30A was re-enacted, shortening the maximum detention period of an infiltrator to a year. Alongside Article 30A, the amendment added to the Law Chapter D which regulated the establishment of a residence centre for infiltrators and authorized the Director of Borders Control to transfer to it every infiltrator whose expulsion was found to be difficult. In HCJ 7385/13, 8425/13 *Eitan v. The Government of Israel* (22.9.2014) (hereinafter: the *Eitan* decision), the Supreme Court held, by a majority opinion, that both elements of Amendment No. 4 were unconstitutional and ordered their annulment. Three months following the *Eitan* decision, the Knesset passed the amendment to the law under consideration which was also enacted as a provisional statute.

In view of the above-mentioned, and of the determinations in previous proceedings, President Naor turned to examine the two main amendments to the Law – Article 30A and Chapter D in their current version.

- *Article 30A (Detention)*

In the current version of Article 30A, the maximum detention period was shortened once more and set at three months.

President Naor firstly opined that Article 30A to the Law infringes on the constitutional right of infiltrators to liberty. Per President Naor, the shortening of the detention period does not, in itself, nullify the infringement on the constitutional rights of the infiltrators. Consequently to such infringement President Naor turned to examine the conditions of the limitation clause. President Naor held that in view of the legislative history of the Law and in light of the substantial shortening of the detention period, which is consistent with that accepted worldwide, the primary objective informing Article 30A is the identification of the infiltrator and the exhaustion of expulsion options, whereas the deterrence objective is secondary at most. Therefore, President Naor held that the current detention period is proportionate and constitutional if correctly interpreted: if it is found that the continued detention of the infiltrator does not serve the purpose of identification and expulsion, there would no longer be a cause to detain him. This, even before the end of the three-month period.

Subject to this interpretation, it was held that Article 30A meets constitutional review and should not be invalidated.

- *Chapter D (Residence Facility)*

Chapter D was first added to the Law as part of Amendment No. 4 and provided the basis for the establishment of the Holot Residence Facility in the Negev. The annulment of Chapter D in the *Adam* decision was the first intervention by the Supreme Court in the provisions concerning the residence centre. In its previous version, Chpater D authorized the Director of Borders Control to order an infiltrator whose removal is found to be difficult to report to the residence centre. The Director was not obliged to limit the residency period. Therefore, an infiltrator summoned to the residence centre might have stayed therein until Amendment No. 4, enacted as a three-year provisional statute, expired. Theoretically, should the provisional statute be extended, the infiltrator might reside in the residence centre indefinitely. The previous version of Chapter D, furthermore, did not include release grounds from the residence centre or provisions obligating the Director of Borders Control to exempt special populations from residency. Residents were required to report to the centre thrice a day – morning, noon and evening. During the night he centre was closed. In addition, the Director of Borders Control was authorized to transfer to detention residents who violated different rules of the residence centre.

Following the ruling of the Court in the *Eitan* decision to annul Chapter D, it was re-enacted as part of the current amendment to the Law. As before, Chapter D in its current version regulated the operation of the residence centre and its rules. Most of the particular arrangements remained. However, Chapter D in its current version differs from its previous version in several aspects: the length of the residency period has been limited (up to twenty months); the reporting obligations during the day have been narrowed; the authority of the Director to transfer residents to detention has been limited; the Director has been authorized to to order the release of a resident under certain conditions; special groups were exempt from Chapter D such as minors, women and victims of certain offences.

President Naor opened the constitutional analysis of the current version of Chapter D with the following introduction: "in my opinion in the *Adam* decision I wrote: 'the State is faced with the reality of life – forced upon it – with which it needs to cope. Such coping presents difficulties alongside challenges. These challenges necessitate creative solutions. This could be the State's finest hour, that in the reality forced upon it, it succeeds in finding humane solutions that are consistent not only with international law but also with the Jewish perception'. I suggested, *inter alia*, turning the detention facility to an *open* residence facility, where residency is voluntary. I shall not lie: it is not the residence centre as was subsequently established in Holot that was in my vision when I wrote those things. As a citizen, I would be happy to see my own State showing more compassion even towards those suspected of infiltrating into Israel for no good purposes. However, as we do not examine the wisdom of the law, so we do not substitute ourselves for the legislature…I'll just say this: after examining the provisions of Chapter D my conclusion is that except for the maximum period for residency, Chapter D meets, barely sometimes, the tests of the limitation clause" (paragraph 57).

After these words, President Naor addressed the infringement of Chapter D on constitutional rights. President Naor stated that in its current version some changes were introduced compared to the previous version. However, although these changes lessened the infringement on the right to liberty, it nevertheless still exists. This conclusion is based on the fact that residency in the centre is still not by the free choice of the resident, and as such it restricts the freedom of movement of the residents and even rises to infringement on their right to liberty.

As a consequence of an infringement on a constitutional right, President Naor turned to examine the purpose of Chapter D. President Naor found that the main purpose of Chapter D is the prevention of settling in of infiltrators in city centers in Israel. President Naor stated that this objective was designed to alleviate the difficulties which resulted from the concentration of most infiltrators at the heart of central cities in Israel. Per President Naor, under existing circumstances, there is no wrong in measures dedicated to reducing these difficulties through dispersing the population of infiltrators. President Naor stipulated that in the exceptional circumstances existing in Israel, even international law recognizes the legitimacy of taking measures in order to address the difficulties resulting from the mass influx of asylum-seekers. With this in mind, President Naor then moved to examine the proportionality of the measures set out in Chapter D for the purpose of achieving the objective of prevention of settling in of infiltrators in city centers in Israel.

President Naor held that the authority of the Director of Borders Control to order infiltrators to reside in a residence centre for a period of up to twenty months meets the first two tests of proportionality – the rational link between the objective and means test and the least harmful measure test. However, President Naor stated that the provision does not meet the third proportionality test – the narrow proportionality test (balance between harm and benefit). President Naor indicated that the twenty-month period set out in the current Law indeed constitutes a lesser infringement on the rights of infiltrators compared to the longer period set out in the previous Law. However, this is not enough. Even when the legislator adopts a less harmful arrangement than a previous one, the Court is not exempt from examining such law that infringes upon constitutional rights. President Naor held that balancing of the sever infringement of the rights of infiltrators against the benefit resulting from the Law leads to a conclusion that a period of twenty months is an

overly long period for holding of infiltrators in liberty-limiting conditions of this kind. This conclusion is based on the fact that the infiltrators who are subject to the Law cannot be expelled from Israel and do not pose a concrete threat to the security of the State or the lives of its citizens. President Naor emphasized the objective of the Law – prevention of settling in of infiltrators in city centers – does not focus on a particular infiltrator or the threat he poses to society. Rather, the focus is on the need to alleviate the burden *generally* imposed on city centers and their residents. In order to achieve this objective there is no need to hold a particular infiltrator in the residence centre, it is sufficient to hold a group of different infiltrators in the residence centre. In light of this, President Naor was of the opinion that a substantially shorter residency period could still achieve the purpose of the Law.

President Naor also indicated that the maximum residency period is unparalleled in comparative law. In some states it is possible to subject an infiltrator to stay at a residence centre for a period of few months at most. Furthermore, in most states, the purpose of the residence centres is not dispersing populations, but rather providing social needs or identification and removal. Further, President Naor indicated that the current Law treats the infiltrator population as one, so the fate of infiltrators who applied for asylum; of infiltrators that cannot be returned because of a risk to their lives or freedom; and of infiltrators who cannot be expelled for other reasons – is but one – transfer to a residence centre.

President Naor further stated that several particular arrangements in the current Law meet the tests of the limitation clause. Thus, unlike Amendment No. 4, the current Law set out release grounds from the residence centre, Also, while under the previous law residents were required to report thrice a day, now they must do so only once. President Naor held that these changes render the reporting requirement at the residence centre proportionate. President Naor also addressed the arrangement authorizing the Director of Borders Control to order the transfer of a resident to detention for violating the rules of the centre (Article 32T). President Naor stated that in the current law that authority is expressly subject to an automatic judicial review of the Tribunal for Detention Review of Infiltrators. President Naor held that that the automatic judicial review constitutes an inseparable element of the transfer process of a resident to detention and validates it. President Naor added the review procedure is accompanied by procedural guarantees such the right to legal representation, the right to bring evidence and to ask the Tribunal to order summons for witnesses.

President Naor conceded that some of the detention periods set out in the Law are long, yet since the they are maximum periods there is no need to fully “use” them. Beyond that, President Naor held that in view of the severity of the detention measure, the underlying offences should be interpreted narrowly. Additionally, there is a hierarchy of available enforcement measures in the Law, beginning with enforcement measures set out in Article 32S (warning, reprimand, revocation of pocket money etc.) and ending with transfer to detention. Therefore it was held that despite the maximum length of the detention periods, they do not disproportionately violate the rights of the infiltrators.

In light of the above-mentioned, President Naor was of the opinion that there is no basis for the annulment of these particular arrangements. President Naor however held that it cannot be overlooked that a central flaw in the Law, the length of the residence period, remained. As pointed

out by President Naor, although the lives of the infiltrators residing in the centre have improved and despite being provided with greater freedom of movement, a single provision still stands allowing prolonged period enforced residence, unparalleled in Western countries. Therefore, "despite the infiltrator is allegedly enjoying a greater measure of freedom of movement during this time, he is still required to move the center of his life to the residence centre. During a great part of the day he is not his own master. He must spend his nights and part of his days with others, his constitutional rights violated. During the hearing, the representative of the petitioner described to us the extent of the violation and the sense of humiliation experienced by a person forced to stay at the residence centre. I found the above true regarding the law struck down in the *Eitan* decision. They are equally true today regarding the Law under discussion. I shall not lie: In the present arrangement lies some benefit to the public interest…however the limitation on the liberty of infiltrators staying at the residence centre for such an extended period cannot be accepted, even if at its basis stands an appropriate objective.

President Naor concluded that as a whole – and subject to the interpretation outlined in her decision – her position is that the present Law is constitutional except for the maximum length of the residency period which is invalid. At the remedy level, President Naor suggested that the invalidation of Articles 32D(a) and 32U be postponed for a six-month period. This, in order to allow the legislator a sufficient time period to carry out the necessary amendment. During this period, the Director of Borders Control is authorized to issue residence orders as long as they do not exceed twelve months. Furthermore, it was held that infiltrators residing in the residence centre for over twelve months at the time of the decision shall be released immediately and no later than within fifteen days of the date of the decision. President Naor emphasized that should a new provision concerning the maximum length of residency periods not be enacted, the authority of the Director of Borders Control to issue residence orders to infiltrators would expire.

Judge Vogelman:

In his opinion, Judge Vogelman concurred with the determination of President M. Naor that there exists no cause for the declaration that Article 30A of the Law is void, subject to the interpretation according to which there is a structured link between detention and effective removal procedure. It was found that the current Amendment, which limits the maximum detention period to three months, significantly reduces the infringement resulting from detention on the right to liberty and the right to dignity. Therefore, it was determined that there is no legal obstacle to detain for this period of time, which is internationally accepted, those who emigrated in an unregulated manner to a state for the purpose of identification and removal.

Judge Vogelman proceeded to discuss the provisions of Chapter D of the law which governs the establishment of the residence center for infiltrators. It was noted that even after the changes made to it, the arrangement violates the right to liberty of the infiltrators since also a radical revocation of choices available to the individual - and not only the limitation of his physical liberty - amount to an infringement of liberty. It was further held that the arrangement infringes on the right to dignity. Judge Fogelman's conclusion was that although the amendments to the Law somewhat reduced the infringements of Chapter D, the infringement still very much exists.

Judge Fogelman continued to examine the objectives of Chapter. It was held that to the extent that the stated objective of the "prevention of settlement" is interpreted to mean "alleviation of burden" of cities where most infiltrators are *temporarily* concentrated, it is a legitimate objective. As for the purpose of “preventing the resumption of the infiltration phenomenon in Israel”, judge Fogelman stated that it is clear that it is essentially a deterrent purpose, and save in exceptional circumstances - that do not exist here - this objective is not legitimate. However, Judge Vogelman joined President Naor’s position that it is not impermissible for a deterrent effect to accompany the implementation of the objective of the prevention of settlement in city centers. As concerns the objective of “encouraging voluntary departure” Judge Fogelman indicated it is doubtful whether this “hidden” objective in indeed absent from the law. This is if taking into account the statements made by representatives of the authorities during the legislative procedures; that the State did not address the concrete allegations made by the petitioners according to which a heavy pressure to leave the country was exerted upon them; and given the identity of those sent to the “Holot” facility, majority being Sudanese and a minority Eritreans – contrary to their numbers in the population. It was held that these question marks are insufficient to determine the presence or absence of this claimed objective, but it was stated that they are sufficient in order to avoid a positive finding that the law was not intended to realize this objective.

In the context of examining the proportionality of the new arrangement set out in Chapter D, Judge Vogelman focused on two specific arrangements: one is the authorization to issue residence orders against an infiltrator for a maximum duration was set to twenty months; and second, the arrangement which allows the Director of Borders Control to order the transfer of an infiltrator to detention for disciplinary violations. As concerns the first arrangement, Judge Vogelman concurred with President Naor's position that the infringement of the legal provisions, allowing residence for a maximum duration of twenty months in the center, on constitutional rights is disproportionate to the benefit derived from them and hence should be voided, as well as to the suggested relief.

According to Judge Vogelman’s position, there is room to declare the nullification of the arrangement allowing the Director of Borders Control to transfer an infiltrator to detention for disciplinary violations. Per Judge Vogelman, the maximum detention periods which could reach 75, 90 and 120 days, coupled with the fact that detention conditions are similar to those of imprisonment - lead to the conclusion that it is penal punishment, as distinct from disciplinary punishment. This kind of punishment, it was held, should not to be placed in the hands of the Director of Borders Control, an administrative body, since this is jurisdiction given to the court alone. For these reasons, Judge Vogelman was of the opinion that there is no alternative but to declare the nullification of Article 32T of the Law and suggested that this nullification would take effect within six months of Court's decision. During this period, or until the adoption of an alternative legislation arrangement on the subject matter, the Article shall be read to mean that as concerns each ground numerated in it, the Director of Borders Control would be authorized to order the transfer of an infiltrator for detention to a period not exceeding 45 days.

Judge Vogelman concluded that Articles 30D(a) and Article 32U of the Law should be invalidated, as should Article 32T. It was noted that the Knesset could work towards adopting a different legislative arrangement that would meet constitutional standards, so that the prolonged detention periods set out in Article 32T of the Law be replaced with shorter periods; additionally, under the provision

which sets the maximum length of residency period, the Knesset could set a substantially shorter period that passes the constitutional test. It was also noted that the legislator could examine new options. In this context Judge Vogelman suggested to set different maximum residency periods to the "veteran" infiltrators group (those who are already present in the country) and to the "new" infiltrator group (those who enter the country later on): Due regard should be given to the fact that the infringement on the rights of the "senior" infiltrators is greater since those have already made their lives in the city centers, and disconnecting them from the life they already established for themselves "pulls them out" of work, residence, social environment etc. with one stroke; and to the fact that the benefit achieved with regard to the "new" infiltrators group in the context of prevention of settlement is greater since this group has yet to settle down.

At the end of his opinion Judge Vogelman indicated that a different implementation of the Law could have affected the examination of its proportionality. If better conditions had been provided in the centre; if the "pocket money" had allowed the infiltrators greater autonomy; if the residence centre had not been so remote from other settlements - this would have had affected the margin of proportionality, and as a consequence - the question of constitutionality.

And so it was stated at the conclusion of the opinion: "Indeed, when we are about to repeat a constitutional review of the same provision, special care is required […] and more so when a third review is concerned. But we must not hesitate to declare as invalidated unconstitutional legislation. We are not allowed to hesitate in such a situation. This holds true, *mutatis mutandis*, when the issue before us concerns the core of human rights of a weakened population. This is the *raison de'tre* of constitutional review. Although it is always a last resort, unconstitutional legislation is void.

Judge Amit

Judge Amit reiterated that from the viewpoint of the purpose and proportionality of the Law, its two main elements must be addressed dichotomically: detention under Article 30A of Chapter C of the Law and the establishment of the residence centre and the regulation of its operation under Chapter D of the Law.

In the spirit of his opinion in the *Eitan* decision, Judge Amit is of the view that the State may adopt a rigid immigration policy, which is prospective, outward-looking, directed towards potential infiltrators. The deterrent purpose, designed to serve the attempt at preventing the phenomenon of infiltrators, has no constitutional flaw in itself, protecting as it is a long line of substantial interests of the state and of the society in Israel, including guaranteeing the sovereignty of the state, its character, national identity and social and cultural character, alongside other aspects such as overcrowding, welfare and economy, internal security and public order. Therefore, as in *Eitan* decision, Judge Amit believes that the current amendment, which reduced the period of detention to three months, passes the tests of the limitation clause.

In contrast, and inversely to the prospective rigidity, Judge Amit opined that it would have been appropriate for the State to demonstrate compassion and humanity, directed inward and retrospectively, namely, towards those who already entered the country's borders years ago.

According to Judge Amit, Chapter D of the Law should not be nullified at the objective stage, since the State statement - that the objective of preventing settlement needs to be interpreted to mean "alleviating the burden" of cities, especially south Tel Aviv – and which is, in itself, a legitimate objective – must be taken at face value. However, the tortuous path of "revolving doors", meaning, removal of infiltrators from city centers, transferring them to the outskirts of the desert for twenty months, then returning them to city centers, while at the same time, taking others out of city centers "to fill their places" in the residence centre raises the concern whether behind the declared objective of preventing settling in urban centers lies the objective of hazing and breaking the spirits of infiltrators as claimed by the petitioners.

With regard to the proportionality of the Law, and in view of the infringement on liberty, Judge Amit concurs with President Naor's ruling that the period of twenty months fails the third sub-test test of proportionality, insofar as it relates to infiltrators residing in the country. However, with respect to potential infiltrators, Judge Amit is of the opinion that the arrangements in Chapter D can be applied as written, with prospective application, even for a period of 20 months. In addition, Judge Amit joined Judge Fogelman's opinion as concerns the nullification of Article 30T of the Law.

Judge Joubran

Judge S. Joubran concurred with President Naor's opinion. According to him, Article 30A of the Law on Prevention of Infiltration (Offenses and Jurisdiction), 1954 (hereinafter: the Law) should remain in place subject to the interpretation outlined by the President. Judge Jubran stressed that the objective of prevention of the settlement of the infiltrators is appropriate, based on the right of the State to formulate an immigration policy which seeks to reduce unwanted demographic changes which are the inevitable product of illegal immigration and infiltration in particular.

As concerns the arrangement set out in Articles 32D(a) and Article 32U of the Law, Judge Joubran is of the opinion that it does not pass the proportionality test in the strict narrow sense in view of the length of the period an illegal resident can be held in the residence center.

Regarding the disagreement between the President and Judge Vogelman concerning the arrangement in Article 32T of the Law, Judge Joubran joined the President's position, whereby the arrangement is proportionate. Judge Joubran was of the opinion that the group of infiltrators cannot be reviewed in the same light as groups of soldiers, prison guards and police, as did Judge Vogelman. According to him, a differentiation should be made between the authority granted to an administrative body to impose disciplinary sanctions on a group of people under its mandate for an offense committed by them, and a group of people coming under his authority in their capacity as professionals in the civil service. Judge Joubran added that there is no fear that the Director of Borders Control would choose to "use" in full the maximum periods prescribed by law. In his view, there is no place to cast an *a priori* doubt in the ability of an administrative or judicial element to exercise discretion in accordance with the specific case brought before it. For all this, according to Judge Joubran there was no basis to invalidate the arrangement as set forth in Article 30T of the Law.

Judge Hendel

According to Judge Hendel, the petition should be rejected in its entirety. As the majority opinion, Judge Hendel held that there is no room to intervene in the amended period of detention, and that there is no constitutional flaw in Article 32T of the Law. In a dissenting opinion, Judge Hendel deemed that the provision according to which the maximum residency period is set at twenty months passes the constitutional test. This, for a number of reasons and at a number of levels.

First, examination of the maximum residency period along the rest of provisions of Chapter D of the Law, with the changes introduced by the Knesset following the *Eitan decision*, demonstrate that the residence centre resembles an open facility more than a closed facility. In the past, the freedom of movement was substantially limited, including by the obligation to report three times a day. At the moment, there is an actual freedom of movement. The infringement exists - but is limited and proportionate. The Law grants the Director the discretion to issue a residence order and decide on its length and it is his administrative obligation is to exercise it. A hearing must be conducted and an assessment of the circumstances of the individual infiltrator must be carried out. The length of twenty months is the maximum residency period. Limiting the reporting requirement to once per day means that the infiltrator is allowed to stay outside the facility during every hour of the day between six in the morning and ten at night. The sum of the provisions - with the legitimate objective of preventing the settlement at its backdrop - places the maximum residency period under a different constitutional light.

Second, the nature of the "numeric" constitutional amendment - from a period of twenty months to a period of twelve months (provisionally) - is difficult. Mainly, it is not possible to quantify the maximum period with a surgeons' scalpel. It is not simple to differentiate between one year and 14 or 16 months. In this light, it is difficult to justify the intervention for the sole reason that the maximum period is set at twenty months. It should be mentioned, that all judges agree with the objective of the facility - the prevention of settlement in cities as a first stage. Further, the overview of comparative law does not lead to the conclusion that the Article should be invalidated. First, in some countries mentioned the objective of the holding is different and therefore there is no sense in comparison. Furthermore, the balancing formula is not a mathematic calculation, and as long as the gaps are not substantial – uniformity is not required. In addition, the State of Israel faces particular difficulties that may, in themselves, justify a somehow longer period. Even if a trend exists in comparative law to minimize the holding period, it is a legislative trend and is not a product of judicial review. So was it in Germany with the recent legislative amendment. The jurisprudence of the European Court of Human Rights demonstrates that limitations for extended periods, even longer than twenty months, were recognized.

Third, the division of roles between the court and the Knesset, and the restraint required for a third intervention by the Court in the work of the legislator – also tips the scale towards rejecting the petition. In the *Eitan* decision the emphasis was placed on the entirety of provisions of the law, whereas in the current petition the spotlight is placed on a flaw which did not receive such a prominent position in the past – an exact quantification of the maximum residency period. The constitutional discourse between the Court and the legislator – a necessary and appropriate

discourse by itself- should not include an improvement in requirements and identification of additional difficulties, certainly not in the third incarnation, and especially those which it seems could have been pointed out during the previous round.

This is not to ignore the difficult and complex situation of the infiltrators and their misfortune in their countries of origin. However, it should be kept in mind that there is another group which is negatively affected by the phenomenon, which is the residents of the neighborhoods where concentrations of infiltrators have developed. It is not simple to compare one suffering to the other, one group in front of another, one individual against another. The role of the court is to decide on disputes in the field of reality. With regard to the question at hand, there is room to consider the implications of shortening the period on the residents.. We must be sensitive to both ends: on one side, the commandment about loving the stranger, caring for him and being sensitive to the refugee in light of turbulence experienced by our people throughout history. On the other side, the rule according to which "the poor of your city take precedence". The human interest of the residents before us must be part of the formula. It operates towards the rejection of the petition, together with the reasons above.

Judge Hayut

Judge A. Hayut concurs with the President's opinion. In her opinion, she recognizes that in this case the court is requested to nullify for the third time the same law, which is uncommon. Nevertheless, and in spite of the complexity attached to that, she feels that the dialog between the Knesset and the court following the two previous petitions contributed substantially to minimizing the infringement on human rights pursuant to that Law. This was made possible, per Judge Hayut, as a result of the Knesset willingness to invest efforts time and again in amending the Law and in finding more appropriate constitutional solutions following the court's decisions in the previous petitions.

As concerns the arrangement concerning the maximum length of the residency period, Judge Hayut concurs with the President and deems that the disproportionate infringement on the rights of the residents the centre is clearer in the face of the slow pace in which the State handles asylum requests submitted to the RSD Unit and in light of the almost zero percent of applications recognized by the state until now (around 0.9%). According to Judge Hayut, in that regard, the manner with which the State is handling nationals of Sudan and Eritrea, traps them in a continuous and impossible situation of normative fog concerning their status along with the harsh implications this has on their rights.

Judge Zylbertal

Concurs with President Naor. Although the location of the residence centre was not stipulated in primary legislation, but determined in an administrative decision, this factor concerning the location, is relevant in the context of the constitutional review of the provisions of the Law: the law was legislated on the ground that the residence centre existed in “Holot” and this was part of the reality to which the law “was born”. Furthermore, jurisprudence has recognized the connection between the review of the constitutionality of a law and the way it is concretely implemented by the

authorities. Therefore, the concrete implementation of the provisions of Chapter D of the Law and the location of the residence centre in the background, highlight their unconstitutionality.

Judge Denziger:

Concurs with the President's opinion and its outcome with regard to all the issues raised in the petition.

Judge Meltzer:

Judge H. Melzer partly concurs with the majority opinion given by President M. Naor. Judge H. Melzer agreed with the opinion of the President that Article 30A of the Law, which regulates the possibility of detaining new infiltrators for up to three months, passes the constitutionality test and further supported the position of the President and concurring judges as concerns the validity of Article 32T of the Law.

Judge Meltzer was also of the view, as the majority opinion, that Chapter D of the Law and the current version of the arrangement it sets out is unconstitutional as concerns the length of time for which infiltrators can be held in the residence facility. Nonetheless, Judge Melzer presented an alternative outline to be considered in resolving the constitutional difficulty stemming from the aforementioned arrangement. This outline, which is derived from European comparative law, is designed to preserve the appropriate “margin of legislation” and the boundaries of judicial review, and with that to bring about greater proportionality in the treatment of infiltrators, while safeguarding the interests of the State and of the residents of the neighborhoods where the infiltrators settled.

According to Judge Melzer, only if a preliminary alternative of geographic delimitation, which would limit the areas where asylum-seekers would be allowed to reside, is added to the *Law*, it would be possible to accept the residency period currently set out in Chapter D. The residency period should be applied only if the infiltrators violate the geographic limitation, and even then, the authority to issue residence orders must be exercised with restraint.

Judge Melzer also criticized the lack of treatment by the State representatives of asylum applications submitted by some of the infiltrators.

Finally, Judge Melzer expressed his agreement with the arrangement postponing the annulment declaration. He was however of the opinion that there is no reason for excluding from the provisional arrangement all the residents of the residence centre according to the President's outline, but only to those among them who applied for asylum before they were summoned and their requests have not been handled yet.