

None official translation of the 6th amendment to the Anti Infiltration law

(legislated on February 8, 2016)

A. Proposed Name of the Law:

Bill for the Prevention of Infiltration (Legislative Amendments and Temporary Order), 2015

B. Purpose of the Proposed Law and the Need for It:

Background:

1. The State of Israel has land and sea borders hundreds of miles long with its neighbors. From the first wave of infiltration about 10 years ago until today more than 60,000 people have been caught who have infiltrated into Israel through the border stations. Indeed, most of the infiltrators entered Israel via the Egyptian border prior to the completion of the fence, but also after the completion of the border fence with Egypt the passage of additional infiltrators through the border cannot be completely prevented, as well as through other borders of the country, into the State of Israel.
2. The special legislative arrangement that applies exclusively to infiltrators according to the Law for the Prevention of Infiltration (Offences and Judgment), 1954 (hereinafter - the Law or the Prevention of Infiltration Law) is intended to address the problem of large-scale infiltration that Israel has been facing in recent years. The consequences of this phenomenon are seen, among other things, in the damage to the fabric of life in Israeli society, damage to the labor market, a reduction in resources in various systems such as the education, health care and welfare systems, that are reserved for Israeli citizens and residents living in it legally, and in the increasing crime in areas where illegal immigrants are concentrated.
3. Prior to passing the Prevention of Infiltration Law (Offences and Judgment) (Amendment No. 3 and Temporary Order), 2012 (hereinafter - Amendment No. 3), infiltrators were placed in custody in accordance with the Entry into Israel Law, 1952 (hereinafter - the Entry into Israel Law), but were released from there after a relatively short period of time, partly because the Entry into Israel Law does not allow, as a rule, holding a person in custody for more than 60 days, subject to the exceptions set out in it regarding the continued detention of an illegal resident.
4. Amendment No. 3 reflected the government's policy, according to which a unique and stricter legal arrangement must apply to infiltrators, contrary to the law applied to unlawful residents under the Entry into Israel Law. This is because, among other things, unlike an illegal resident who entered Israel through the border legally and formally using the passport of a foreign state, and was granted a visa for a specified period as a tourist or for work purposes and only later became an illegal resident, an infiltrator entered Israel knowingly not through the border checkpoint without identification documents in an informal and undocumented manner. This makes it difficult for the authorities of the State to ascertain his identity, the country of nationality or the country of residency and origin of the infiltrator, and also makes difficult the practical ability to remove him from Israel to any country, and in any event the question of expulsion from Israel creates further complexity and difficulty in light of the main countries of origin from which the majority of the infiltrators arrived to Israel. In addition, the entrance of an

undocumented infiltrator to Israel is illegal in the first place and therefore a more stringent law should apply to an infiltrator than to a foreign national who entered the country legally and became, after his visa and residency permit in Israel expired, an illegal resident under the Entry into Israel Law.

5. According to Amendment No. 3, it was possible to hold infiltrators in custody for up to three years, subject to the grounds for release prescribed by law including special humanitarian reasons and rate at which asylum claims of those who were placed in custody were examined.
6. On 16 September 2013, the Supreme Court ruled in HCJ 7146/12 *Adam v. Knesset* (published in Nevo, 16/09/2013) (hereafter – the *Adam* ruling), in an expanded panel of nine judges that Article 30A of the law is unconstitutional and ruled that all the provisions of Article 30A of the law are void because it encapsulates a disproportionate right to liberty and human dignity as set out in the Basic Law: Human Dignity and Liberty.
7. Following the judgment in the *Adam* ruling, the relevant government ministries began thorough staff work to find alternative and effective measures that would enable coping with the severe consequences arising from the phenomenon of infiltration and measures that would be less harmful to infiltrators and that would satisfy the principles set out in the judgment. As part of the government's policy and its underlying rationale and in order to prevent the incentive for continued infiltration into Israel and to prevent the settling of infiltrators in urban centers by preventing their ability to work inside Israel, the policymakers believed that several measures must be taken to deal with the phenomenon of infiltration.
8. Therefore, it was decided to adopt a comprehensive, integrated and coordinated system to deal with the phenomenon of infiltration, which included amending the law to provide the normative layer for the comprehensive action. In this context, several options were examined in order to deal effectively with the infiltration phenomenon and its consequences, while searching for an alternative that was more moderate than that established in Amendment No. 3.
9. At the same time, on 11.24.13 Government Decision No. 960 was accepted, ordering the implementation of the comprehensive, integrated and coordinated system to deal with the phenomenon of infiltration, at a cost of hundreds of millions of shekels, to ensure compliance with the provisions of all laws and the allocation of special funds to the Israel Police to improve security of the citizens of south Tel Aviv.
10. On 11.12.13 the Prevention of Infiltration Law (Offenses and Judgment) (Amendment No. 4 and Temporary Order) 2014 (hereinafter: Amendment No. 4) was approved by the Knesset. Amendment No. 4 anchors the rules and normative framework for the establishment of an open residency facility. Amendment No. 4 set out two arrangements - Chapter III dealing with the detention facility in a more proportional manner than that prescribed in Amendment No. 3, and Chapter IV dealing the open residence facility – that were part of the set of measures to deal with the phenomenon of infiltration.
11. A petition was filed against Amendment No. 4 to the Supreme Court - **HCJ 8245/13 *Gebrselassie v Israeli Knesset et al*** (hereinafter the ***Gebrselassie*** ruling). On 09/22/14 the Court's verdict in this appeal was rendered, where it was decided to nullify Article 30A of the Prevention of

Infiltration Law - dealing with the detention facility – as the provision is unconstitutional due to the serious and disproportionate violation of the constitutional right to freedom and dignity. It was also decided to cancel Chapter IV of the Prevention of Infiltration Law - under which the residence facility was established - because it infringes on the right to dignity and freedom. At the same time the Court held that the declaration of nullification of Section D as a whole shall be suspended for a period of 90 days, with the assumption that this will be a sufficient time period to formulate an appropriate legislative arrangement. However, the Court ordered that during the 90-day period an infiltrator is required to report in the residence facility twice per day, and the afternoon reporting requirement will be canceled as of 24.09.14. The Court further ordered that from 2.10.14 until the end of the 90- day period the Head of Border Control shall be authorized to order the transfer of an infiltrator to custody for a period not exceeding 30 days (instead of up to one year).

12. Following the ruling of the Supreme Court in *Gebrselassie*, the Israeli government examined how it would be able to deal effectively with the infiltration phenomenon and its consequences, in an attempt to seek an alternative that is more proportional than that which nullified in the framework of Amendment No. 4. And this, while taking into account the purpose of the immigration policy of the State of Israel.
13. On 17.12.14 the Law for the Prevention of Infiltration and to Ensure the Departure of Infiltrators from Israel (Legislative Amendments and temporary orders), 2014 (hereinafter Amendment No. 5), was published in the Official Gazette, which set out several arrangements: Chapter III dealing with the detention facility in a more proportional manner than that prescribed by Amendment No. 4 and Chapter IV dealing with the open residence facility – that were part of the set of measures to deal with the phenomenon of infiltration.
14. Amendment No. 5 included significant changes compared to Amendment No. 4 regarding the maximum period of detention prescribed in Section C, and concerning the operation of the open residence facility as stipulated in Section D of the Law. Within the framework of these changes, a proper and appropriate response was given to the determinations of the Supreme Court in *Gebrselassie*, along with due consideration of the purpose of the law as a means of realizing the objectives of government and Knesset policy.
15. In addition to the arrangements set out in Sections C and Section D of the Prevention of Infiltration Law, Amendment No. 5 ordered amendments to the Foreign Workers Law, 1991 and the Employment of Workers by Manpower Contractors Law, 1996, in order to ensure the departure of foreign workers, including infiltrators, from Israel on time, and to increase enforcement regarding employment of foreign workers, including infiltrators.
16. An appeal was filed to the Supreme Court against the constitutionality of Amendment No. 5 - **HCI 8665/14 Teshome v Israeli Knesset et al (hereinafter the Teshome ruling)**. On 11/08/15 the judgment of the Supreme Court in this petition was given, which ruled unanimously that the provisions of the law ordering the holding in custody of infiltrators for up to 3 months is **constitutional**. As for the provisions of Section D granting the authority to order an infiltrator to stay in the residence facility Holot - the Court held that the provisions of Chapter D **pass constitutional scrutiny**, other than Articles 32D(a) and 32U – that state that the maximum period for holding an infiltrator in the residence facility is 20 months – that are to be null and void. The

court ruled that the declaration of nullification of articles 32D(a) and 32U are suspended for a period of 6 months – which will give the legislature more time than that which was given in the *Adam* and *Gebrselassie* rulings, and during this period the maximum period of stay at the residence facility will be **up to 12 months**.

C. Key Provisions of the Proposed Law:

17. According to the Supreme Court ruling that abolishes Articles 32D(a) and 32U of Amendment No. 5, in the absence of legislation that will fix the maximum period of stay at the residence facility - the authority of the Head of Border Control to issue a residency order for infiltrators will expire. Therefore, the present legislative amendment is required first and foremost to bring provisions that determine the maximum period of stay at the open residence facility. In addition, other amendments presented in this memorandum are required in view of the increased scope of the infiltration phenomenon that is gaining momentum in recent months.

18. The proposed bill contains two parts:

A. An amendment to the Prevention of Infiltration Law – the proposed amendments in Chapter D of the Law concerning the residence facility for infiltrators includes amendments to articles 32D, 32U, which determine the maximum period of stay at the residence facility for infiltrators. The proposed amendment provides that the period of stay at the residence facility for infiltrators will be a period of 12 months, while in some cases the Minister of Interior or any person authorized by him may extend this period for an additional period not exceeding six months for special reasons to be recorded. It is also proposed to hold that an infiltrator who enters Israel after the publication of the proposed law will reside in the residence facility for no more than 18 months.

One can see that when it comes to determining the maximum period of stay at the residence facility, the determination of the Supreme Court in *Teshome* has been implemented - so that when it comes to infiltrators who are in Israel before the publication of the law their period of residence will be for a maximum period of 12 months, whereas for new infiltrators who will enter Israel from the date of publication of the law, the maximum period of residence at the facility will be for 18 months.

Amendment 5 establishes limits on the issuance of a residency order for special groups. This amendment proposes to delete Article 32D(a)(4) - which states that the Head of Border Control will not issue a residency order to an infiltrator who is a parent of a dependent minor. Given the fact that the residency order will be given to an infiltrator after hearing arguments and examining all the circumstances of the case, the Head of Border Control is authorized to act on its discretion and according to its experience in any case, and therefore there is no need to exclude this population in primary legislation.

In addition, it is proposed to determine that a court, including the Appeal Tribunal, will not grant the request for temporary relief delaying the implementation of the Head of Border Control's decision to issue a residency order, prior to the reporting by the infiltrator at the residence facility.

The residence facility for infiltrators is an open residence facility. The decision to grant a residency order may be appealed to the Appeal Tribunal. Within the framework of the appeal one may file an application for temporary relief ordering the delay of reporting to the residence facility as long as the procedure is being conducted. Following the enactment of Amendment No. 5 hundreds of petitions and appeals were filed against the decision of the Head of Border Control to issue a residency order to an infiltrator, and in almost all of the legal proceedings orders were issued to delay the reporting at the open residence facility - which led to difficulties in the implementation of the law. In view of the fact that, unlike other procedures against which an appeal / administrative appeal against a decision of the authority on enforcement and custody matters- where there is a total denial of liberty by placement in custody. In cases of the provision of a residency order- it deals with the reporting in **an open residence facility** where the violation of liberty is reduced and it is not a situation that would cause irreversible or irreparable damage. It is important to emphasize that this provision does not prevent the authorized court or tribunal from ordering temporary relief at any stage, but rather limits its authority to cases where the order is given for special reasons to be recorded.

It is further proposed to increase the period of custody that can be imposed on the infiltrator for a breach of the provisions of article 32T(b)(4) concerning the non-reporting at the residence facility in accordance with the provisions of residency order or absconding from the residence facility.

In addition, it is proposed that to add to Article 32T(c) dealing with the authority of the Head of Border Control to order an infiltrator be held in custody if he did not report to renew the temporary license for visitors permit in his possession in excess of 30 days the option to order the holding in custody of an infiltrator who received a license and permit for visiting according to Section 2(a)(2) of the Law of Entry into Israel and who did not come to renew their license within 30 days of the date on which the license expires.

B. The second part deals with an indirect amendment to the Foreign Workers Law and an indirect amendment to the Employment of Workers by Manpower Contractors Law, 1996.

The proposed amendment to the Foreign Workers Law was intended to amend the definition of "infiltrator" as set forth in Amendment No. 5, for the purpose of applying the obligation to pay the deposit to employers of infiltrators and to expand this to apply to employers of all the infiltrators, and not just the employers of infiltrators who hold licenses under the Law of Entry into Israel.

The proposed amendment to the Employment of Workers by Manpower Contractors Law is intended to clarify that a manpower contractor who employs infiltrators must be registered by the Ministry of Economy under the said law, and to prevent attempts to reduce the cost of employing infiltrators by alleging that they may employ them through unauthorized manpower contractors.

The proposed legislative amendment is intended to complete the legislative arrangement established in Amendment No. 5 of the Law and establishes the maximum period of stay at the residence facility and makes a distinction between an infiltrator who resides in Israel prior to the

promulgation of the law and an infiltrator who infiltrates into Israel after the entry into force of this Law. Further to the previous arrangement and its purposes, the arrangement as a whole is intended to change the incentive structure of all of the infiltrators who are considering infiltrating to Israel and to reduce the incentive to do so.

In addition, the proposed amendment, in addition to the arrangement established in Amendment No. 5, is designed to prevent the continued settling and establishment of infiltrators residing in Israel and their continued employment here, by authorizing the Head of Border Control to issue a residency order for infiltrators in the residence facility for a period of 12 months. By doing so, the amendment seeks to deal with the economic, social and infrastructural consequences associated with the settling down of the population of infiltrators in Israel's cities. Moreover, the determination of a maximum residency period of 18 months for an infiltrator who arrives in Israel after the publication of the law, in addition to the period of custody pursuant to article 30A and that was approved by the Supreme Court *Teshome*, is intended primarily to provide a normative barrier, alongside the fence which was established along the land border with Egypt, which will reduce the motivation of potential infiltrators from coming to Israel. Alongside these proposed arrangements to amend the law, the government decided to take additional steps that do not require legislation for the realization of the set of objectives.

When we examine the purposes of the proposed amendment, we distinguish between two different groups to whom the amendment refers. The first group is the undefined public located outside the country that is considering whether to infiltrate, which is mainly dealt with in article 32U(a1). The second group consists of infiltrators who infiltrated into Israel illegally long ago and have settled here, which is mainly dealt with in Chapter IV as a whole and Article 32U(a).

Article 32D(a) And Article 32U – Determination of the maximum period of stay at the residence facility -

Section D as set out in Amendment No. 5 is designed to deal primarily with two major groups of infiltrators - from Eritrea and Sudan – for whom there are currently difficulties in deporting to their countries of origin. According to the provisions of Article 32D(a) residency orders may be issued to any infiltrator for whom there is a **difficulty of any kind** to deport to his country of origin.

The proposed legislative amendment in articles 32D(a) and 32U replace the end of Section 32D(a) and the provision set forth in Section 32U as provided in Amendment No. 5 that were canceled by the Supreme Court in *Teshome*. As discussed above, the Supreme Court in *Teshome* held that the provisions of Chapter IV which give authority to order an infiltrator to stay in the residence facility Holot – **withstand the constitutional review**, except for articles 32D(a) and 32U – that determine that the maximum period for holding an infiltrator in the residence facility is 20 months – that are to be repealed. The court ruled that the declaration of voidance of articles 32D(a) and 32U are suspended for a period of 6 months- that will give the legislature a longer period than that given in the *Adam* and *Gebreselassie* rulings, during this period the maximum period for holding in the residence facility will be up to 12 months.

The proposed legislative amendment states that in article 32U(a) the residency period at the facility will be for 12 months. Setting the period at a maximum of 12 months for infiltrators residing in Israel prior to the publication of the Law is consistent with the ruling of the Court in *Teshome*, and it is

evident that this is a significantly shorter period from the period stipulated in Amendment No. 5 and violates to a lesser degree the dignity and liberty of the infiltrator and meets the constitutional standards determined by the Court.

It is further proposed to set out at the end of Section 32U(a) that the Minister of Interior or any person authorized by him may extend this period for an additional period not exceeding 6 months for special reasons to be recorded. This is to give the Minister of Interior or a person authorized to do so the possibility of examining specific cases and for special reasons to be recorded gives the option to issue an additional residency order for an additional period of up to six months, to an infiltrator who completed or is about to complete the maximum period of residency at the residence facility.

Amendment 5 establishes limits on the issuance of residency orders for special groups. This amendment proposes to delete Article 32D(a)(4) - which states that the Head of Border Control will not issue a residency order to an infiltrator who is a parent of a dependent minor. Given the fact that the provisions of the stay will be given an infiltrator after hearing arguments and examination of all the circumstances of the case, the Head of Border Control is authorized to act according to its discretion and experience in any case, and therefore there is no need to exclude this population in primary legislation.

In addition, it is proposed to determine that a court, including the Appeal Tribunal, will not grant the request for temporary relief delaying the implementation of the Head of Border Control's decision to issue a residency order, prior to the reporting by the infiltrator at the residence facility.

The residence facility for infiltrators is an open residence facility. The decision to issue a residency order may be appealed to the Appeal Tribunal. Within the framework of the appeal one may file an application for temporary relief ordering the delay of reporting to the residence facility as long as the procedure is being conducted. Following the enactment of Amendment No. 5 hundreds of petitions and appeals were filed against the decision of the Head of Border Control to issue a residency order to an infiltrator, and in almost all of the legal proceedings orders were issued to delay the reporting at the open residence facility - which led to difficulties in the implementation of the law. In view of the fact that, unlike other procedures against which an appeal / administrative appeal against a decision of the authority on enforcement and custody matters- where there is a total denial of liberty by placement in custody. In cases of the provision of a residency order- it deals with the reporting in **an open residence facility** where the violation of liberty is reduced and it is not a situation that would cause irreversible or irreparable damage. It is important to emphasize that this provision does not prevent the authorized court or tribunal from ordering temporary relief at any stage, but rather limits its authority to cases where the order is given for special reasons to be recorded.

It is further proposed to set out in Section 32U(a1) that an infiltrator who enters Israel after the publication of the proposed law will reside in the residence facility no longer than 18 months.

As explained above, when it comes to determining the maximum period of stay at the residence facility, the holding of the Supreme Court in **Teshome** was implemented- so that when it comes to infiltrators who are in Israel before the release of the Law the period of stay will be for a maximum

period of 12 months, whereas for new infiltrators from the date of the promulgation of the Law, the maximum period of stay at the facility will be for 18 months.

It is further proposed that the custody periods to be imposed on an infiltrator for a breach of the provisions of article 32T(b)(4) dealing with non-reporting to the residence facility in accordance with the residency order or absconding from the **residence facility**.

In addition, it is proposed that to Article 32T(c) dealing with the authority of the Head of Border Control to order the holding of an infiltrator in custody insofar he was not present to renew the temporary license for a visitors permit in his possession in excess of 30 days, will also be added the option of ordering the holding in custody of an infiltrator who has received a license and permit for visiting according to Section 2(a)(2) of the Law of Entry into Israel who did not come to renew his license within 30 days of the date on which the license expired.

Alongside these proposed arrangements to amend the law, the government continues to take additional steps that do not require legislation in order to realize the set of purposes, including: encouraging voluntary departure from the State of Israel, either to the countries of origin or to other countries, by awarding a grant of voluntary departure; Continued negotiations with other third countries to identify alternative exit and deportation to additional third countries; Completion of the fence; Reinforcement of examinations of the Asylum-Seekers Unit and various enforcement actions.

Indirect legislative amendments:

Indirect amendment to the Foreign Workers Law, in order to expand the definition of "infiltrator" regarding the applicability of the obligation to pay the deposit that applies to employers of infiltrators, such that it will apply to the employers, whether or not they employ infiltrators who are licensed under the Law of Entry into Israel.

Indirect amendment to the Employment of Workers by Manpower Contractors Law in order to clarify that a manpower contractor who employs infiltrators must be registered by the Ministry of Economy under the said law, and to prevent attempts to reduce the cost of employing infiltrators by alleging that they may be employed through unauthorized manpower contractors.

D. The Effect of the Bill on Existing Law:

Articles 32D, 32T and 32U shall be amended.

E. The Effect of the Bill on the State Budget:

None.

F. The Effect of the Law on Standards in Government Offices and the Administrative Aspect:

G. None

The following is the text of the bill

Bill for the Prevention of Infiltration (Amendment number...), 2015

1. Amendment to the Law for the Prevention of Infiltration – Temporary Order

The Prevention of Infiltration (Offences and Jurisdiction) Law, 1954 (hereinafter primary law) -

(1) In paragraph 32D of the Main Law:

(A) paragraph (a), the words "but not more than the 20 months period referred to in Section 32U", states, "but no more than the period referred to in Section 32U."

(B) subsection (b) (4), shall be deleted;

After subsection (g) the following shall be inserted:

"(h) A court, including the Appeal Tribunal, shall not grant the request for temporary relief delaying the implementation of the Head of Border Control's decision under Article 32D(a) prior to the infiltrator's attendance at the residency center, unless special reasons are recorded."

(2) In paragraph 32T of the Main Law:

In subsection (b)(4)(a):

(1) In subsection (a)(1), the words "30 days" shall be "60 days";

(2) In subsection (a)(2), the words "45 days" shall be "75 days";

(3) In subsection (a)(3), the words "60 days" shall be "90 days"

(A) In subsection (b)(4)(b):

(1) In subsection (b)(1), the words "60 days" shall be "90 days";

(2) In subsection (b)(2), the words "75 days" shall be "105 days";

(3) In subsection (b)(3), the words "90 days" shall be "120 days";

In subsection (b)(4)(c), the words "120 days" shall be replaced with "150 days";

In subsection (c) at the beginning, after the words "the Head of Border Control found that" the following words are added: "infiltrator received a license and permit for a visit under Article 2(a)(2) of the Entry into Israel Law or";

(3) In Section 32U of the Main Law:

(A) In subsection (a), the words "more than 20 months" shall be "more than 12 months, however, the Minister of Interior or any person authorized by him, may extend this period for an additional period not exceeding six months for special reasons that are recorded";

(B) After subsection (a):

"(A1) Notwithstanding the provisions of subsection (a), an infiltrader who entered Israel after the publication of this law will not reside in the residency center for more than 18 months"

2. Amendment to the Foreign Workers Law – Number 19

In the Foreign Workers Law, 1991, as worded in section 7 of the Prevention of Infiltration and to Ensure the Departure of Infiltrators and Foreign Workers in Israel (Legislative and Temporary Order), 2014 - Section 1(J)(2), from the definition of "infiltrator", the words "with a permit under section 2 (a) (2) or (5) of the Entry into Israel Law "- should be removed;

3. Amendment to the Employment of Workers by Manpower Contractors - No. 10

In the Employment of Workers by Manpower Contractors Law, 1996 –

In Section 10(a) - paragraph (1), at the end will come "provisions of this paragraph shall not apply to the provision of manpower services by employees who are infiltrators as defined in section 1(J)(2) of the Foreign Workers Law, 1991, and to the provision of such manpower services the provisions of Section 3 will be applied".

Explanatory Notes

The State of Israel has land and sea borders hundreds of miles long with its neighbors. From the first wave of infiltration about 10 years ago until today more than 60,000 people have been caught who have infiltrated into Israel through the border stations. Indeed, most of the infiltrators entered Israel via the Egyptian border prior to the completion of the fence, but also after the completion of the border fence with Egypt the passage of additional infiltrators through the border cannot be completely prevented, as well as through other borders of the country, into the State of Israel.

The special legislative arrangement that applies exclusively to infiltrators according to the Law for the Prevention of Infiltration (Offences and Judgment), 1954 (hereinafter - the Law or the Prevention of Infiltration Law) is intended to address the problem of large-scale infiltration that Israel has been facing in recent years. The consequences of this phenomenon are seen, among other things, in the damage to the fabric of life in Israeli society, damage to the labor market, a reduction in resources in various systems such as the education, health care and welfare systems, that are reserved for Israeli citizens and residents living in it legally, and in the increasing crime in areas where illegal immigrants are concentrated.

Prior to passing the Prevention of Infiltration Law (Offences and Judgment) (Amendment No. 3 and Temporary Order), 2012 (hereinafter - Amendment No. 3), infiltrators were placed in custody in accordance with the Entry into Israel Law, 1952 (hereinafter - the Entry into Israel Law), but were released from there after a relatively short period of time, partly because the Entry into Israel Law does not allow, as a rule, holding a person in custody for more than 60 days, subject to the exceptions set out in it regarding the continued detention of an illegal resident.

Amendment No. 3 reflected the government's policy, according to which a unique and stricter legal arrangement must apply to infiltrators, contrary to the law applied to unlawful residents under the Entry into Israel Law. This is because, among other things, unlike an illegal resident who entered Israel through the border legally and formally using the passport of a foreign state, and was granted a visa for a specified period as a tourist or for work purposes and only later became an illegal resident, an infiltrator entered Israel knowingly not through the border checkpoint without identification documents in an informal and undocumented manner. This makes it difficult for the authorities of the State to ascertain his identity, the country of nationality or the country of residency and origin of the infiltrator, and also makes difficult the practical ability to remove him from Israel to any country, and in any event the question of expulsion from Israel creates further complexity and difficulty in light of the main countries of origin from which the majority of the infiltrators arrived to Israel. In addition, the entrance of an undocumented infiltrator to Israel is illegal in the first place and therefore a more stringent law should apply to an infiltrator than to a foreign national who entered the country legally and became, after his visa and residency permit in Israel expired, an illegal resident under the Entry into Israel Law.

According to Amendment No. 3, it was possible to hold infiltrators in custody for up to three years, subject to the grounds for release prescribed by law including special humanitarian reasons and rate at which asylum claims of those who were placed in custody were examined.

On 16 September 2013, the Supreme Court ruled in HCJ 7146/12 *Adam v. Knesset* (published in Nevo, 16/09/2013) (hereafter – the *Adam* ruling), in an expanded panel of nine judges that Article

30A of the law is unconstitutional and ruled that all the provisions of Article 30A of the law are void because it encapsulates a disproportionate right to liberty and human dignity as set out in the Basic Law: Human Dignity and Liberty.

Following the judgment in the *Adam* ruling, the relevant government ministries began thorough staff work to find alternative and effective measures that would enable coping with the severe consequences arising from the phenomenon of infiltration and measures that would be less harmful to infiltrators and that would satisfy the principles set out in the judgment. As part of the government's policy and its underlying rationale and in order to prevent the incentive for continued infiltration into Israel and to prevent the settling of infiltrators in urban centers by preventing their ability to work inside Israel, the policymakers believed that several measures must be taken to deal with the phenomenon of infiltration.

Therefore, it was decided to adopt a comprehensive, integrated and coordinated system to deal with the phenomenon of infiltration, which included amending the law to provide the normative layer for the comprehensive action. In this context, several options were examined in order to deal effectively with the infiltration phenomenon and its consequences, while searching for an alternative that was more moderate than that established in Amendment No. 3.

At the same time, on 11.24.13 Government Decision No. 960 was accepted, ordering the implementation of the comprehensive, integrated and coordinated system to deal with the phenomenon of infiltration, at a cost of hundreds of millions of shekels, to ensure compliance with the provisions of all laws and the allocation of special funds to the Israel Police to improve security of the citizens of south Tel Aviv.

On 11.12.13 the Prevention of Infiltration Law (Offenses and Judgment) (Amendment No. 4 and Temporary Order) 2014 (hereinafter: Amendment No. 4) was approved by the Knesset. Amendment No. 4 anchors the rules and normative framework for the establishment of an open residency facility. Amendment No. 4 set out two arrangements - Chapter III dealing with the detention facility in a more proportional manner than that prescribed in Amendment No. 3, and Chapter IV dealing the open residence facility – that were part of the set of measures to deal with the phenomenon of infiltration.

A petition was filed against Amendment No. 4 to the Supreme Court - **HCI 8245/13 *Gebrselassie v Israeli Knesset et al* (hereinafter the *Gebrselassie* ruling)**. On 09/22/14 the Court's verdict in this appeal was rendered, where it was decided to nullify Article 30A of the Prevention of Infiltration Law - dealing with the detention facility – as the provision is unconstitutional due to the serious and disproportionate violation of the constitutional right to freedom and dignity. It was also decided to cancel Chapter IV of the Prevention of Infiltration Law - under which the residence facility was established - because it infringes on the right to dignity and freedom. At the same time the Court held that the declaration of nullification of Section D as a whole shall be suspended for a period of 90 days, with the assumption that this will be a sufficient time period to formulate an appropriate legislative arrangement. However, the Court ordered that during the 90-day period an infiltrator is required to report in the residence facility twice per day, and the afternoon reporting requirement will be canceled as of 24.09.14. The Court further ordered that from 2.10.14 until the end of the 90-day period the Head of Border Control shall be authorized to order the transfer of an infiltrator to custody for a period not exceeding 30 days (instead of up to one year).

Following the ruling of the Supreme Court in *Gebrselassie*, the Israeli government examined how it would be able to deal effectively with the infiltration phenomenon and its consequences, in an attempt to seek an alternative that is more proportional than that which nullified in the framework of Amendment No. 4. And this, while taking into account the purpose of the immigration policy of the State of Israel.

On 17.12.14 the Law for the Prevention of Infiltration and to Ensure the Departure of Infiltrators from Israel (Legislative Amendments and temporary orders), 2014 (hereinafter Amendment No. 5), was published in the Official Gazette, which set out several arrangements: Chapter III dealing with the detention facility in a more proportional manner than that prescribed by Amendment No. 4 and Chapter IV dealing with the open residence facility – that were part of the set of measures to deal with the phenomenon of infiltration.

Amendment No. 5 included significant changes compared to Amendment No. 4 regarding the maximum period of detention prescribed in Section C, and concerning the operation of the open residence facility as stipulated in Section D of the Law. Within the framework of these changes, a proper and appropriate response was given to the determinations of the Supreme Court in *Gebrselassie*, along with due consideration of the purpose of the law as a means of realizing the objectives of government and Knesset policy.

In addition to the arrangements set out in Sections C and Section D of the Prevention of Infiltration Law, Amendment No. 5 ordered amendments to the Foreign Workers Law, 1991 and the Employment of Workers by Manpower Contractors Law, 1996, in order to ensure the departure of foreign workers, including infiltrators, from Israel on time, and to increase enforcement regarding employment of foreign workers, including infiltrators.

An appeal was filed to the Supreme Court against the constitutionality of Amendment No. 5 - **HCJ 8665/14 Teshome v Israeli Knesset et al (hereinafter the Teshome ruling)**. On 11/08/15 the judgment of the Supreme Court in this petition was given, which ruled unanimously that the provisions of the law ordering the holding in custody of infiltrators for up to 3 months **is constitutional**. As for the provisions of Section D granting the authority to order an infiltrator to stay in the residence facility Holot - the Court held that the provisions of Chapter D **pass constitutional scrutiny**, other than Articles 32D(a) and 32U – that state that the maximum period for holding an infiltrator in the residence facility is 20 months – that are to be null and void. The court ruled that the declaration of nullification of articles 32D(a) and 32U are suspended for a period of 6 months – which will give the legislature more time than that which was given in the *Adam* and *Gebrselassie* rulings, and during this period the maximum period of stay at the residence facility will be **up to 12 months**.

Key Provisions of the Proposed Law:

1. According to the Supreme Court ruling that abolishes Articles 32D(a) and 32U of Amendment No. 5, in the absence of legislation that will fix the maximum period of stay at the residence facility - the authority of the Head of Border Control to issue a residency order for infiltrators will expire. Therefore, the present legislative amendment is required first and foremost to bring provisions that determine the maximum period of stay at the open residence facility. In addition, other amendments presented in this memorandum are

required in view of the increased scope of the infiltration phenomenon that is gaining momentum in recent months.

2. **The proposed bill contains two parts:**

A. **An amendment to the Prevention of Infiltration Law** – the proposed amendments in Chapter D of the Law concerning the residence facility for infiltrators includes amendments to articles 32D, 32U, which determine the maximum period of stay at the residence facility for infiltrators. The proposed amendment provides that the period of stay at the residence facility for infiltrators will be a period of 12 months, while in some cases the Minister of Interior or any person authorized by him may extend this period for an additional period not exceeding six months for special reasons to be recorded. It is also proposed to hold that an infiltrator who enters Israel after the publication of the proposed law will reside in the residence facility for no more than 18 months.

One can see that when it comes to determining the maximum period of stay at the residence facility, the determination of the Supreme Court in *Teshome* has been implemented - so that when it comes to infiltrators who are in Israel before the publication of the law their period of residence will be for a maximum period of 12 months, whereas for new infiltrators who will enter Israel from the date of publication of the law, the maximum period of residence at the facility will be for 18 months.

Amendment 5 establishes limits on the issuance of a residency order for special groups. This amendment proposes to delete Article 32D(a)(4) - which states that the Head of Border Control will not issue a residency order to an infiltrator who is a parent of a dependent minor. Given the fact that the residency order will be given to an infiltrator after hearing arguments and examining all the circumstances of the case, the Head of Border Control is authorized to act on its discretion and according to its experience in any case, and therefore there is no need to exclude this population in primary legislation.

In addition, it is proposed to determine that a court, including the Appeal Tribunal, will not grant the request for temporary relief delaying the implementation of the Head of Border Control's decision to issue a residency order, prior to the reporting by the infiltrator at the residence facility.

The residence facility for infiltrators is an open residence facility. The decision to issue a residency order may be appealed to the Appeal Tribunal. Within the framework of the appeal one may file an application for temporary relief ordering the delay of reporting to the residence facility as long as the procedure is being conducted. Following the enactment of Amendment No. 5 hundreds of petitions and appeals were filed against the decision of the Head of Border Control to issue a residency order to an infiltrator, and in almost all of the legal proceedings orders were issued to delay the reporting at the open residence facility - which led to difficulties in the implementation of the law. In view of the fact that, unlike other procedures against which an appeal / administrative appeal against a decision of the authority on enforcement and custody matters- where there is a total denial of liberty by placement in custody. In cases of the provision of a residency order- it deals with the reporting in **an open residence facility** where the violation of liberty is reduced and it is not

a situation that would cause irreversible or irreparable damage. It is important to emphasize that this provision does not prevent the authorized court or tribunal from ordering temporary relief at any stage, but rather limits its authority to cases where the order is given for special reasons to be recorded.

It is further proposed to increase the period of custody that can be imposed on the infiltrator for a breach of the provisions of article 32T(b)(4) concerning the non-reporting at the residence facility in accordance with the provisions of residency order or absconding from the residence facility.

In addition, it is proposed that to add to Article 32T(c) dealing with the authority of the Head of Border Control to order an infiltrator be held in custody if he did not report to renew the temporary license for visitors permit in his possession in excess of 30 days the option to order the holding in custody of an infiltrator who received a license and permit for visiting according to Section 2(a)(2) of the Law of Entry into Israel and who did not come to renew their license within 30 days of the date on which the license expires.

B. The second part deals with an indirect amendment to the Foreign Workers Law and an indirect amendment to the Employment of Workers by Manpower Contractors Law, 1996.

The proposed amendment to the Foreign Workers Law was intended to amend the definition of "infiltrator" as set forth in Amendment No. 5, for the purpose of applying the obligation to pay the deposit to employers of infiltrators and to expand this to apply to employers of all the infiltrators, and not just the employers of infiltrators who hold licenses under the Law of Entry into Israel.

The proposed amendment to the Employment of Workers by Manpower Contractors is intended to clarify that a manpower contractor who employs infiltrators must be registered by the Ministry of Economy under the said law, and to prevent attempts to reduce the cost of employing infiltrators by alleging that they may employ them through unauthorized manpower contractors.

The proposed legislative amendment is intended to complete the legislative arrangement established in Amendment No. 5 of the Law and establishes the maximum period of stay at the residence facility and makes a distinction between an infiltrator who resides in Israel prior to the promulgation of the law and an infiltrator who infiltrates into Israel after the entry into force of this Law. Further to the previous arrangement and its purposes, the arrangement as a whole is intended to change the incentive structure of all of the infiltrators who are considering infiltrating to Israel and to reduce the incentive to do so.

In addition, the proposed amendment, in addition to the arrangement established in Amendment No. 5, is designed to prevent the continued settling and establishment of infiltrators residing in Israel and their continued employment here, by authorizing the Head of Border Control to issue a residency order for infiltrators in the residence facility for a period of 12 months. By doing so, the amendment seeks to deal with the economic, social and infrastructural consequences associated with the settling down of the population of infiltrators in Israel's cities. Moreover, the determination of a maximum residency period of 18 months for an infiltrator who arrives in Israel after the

publication of the law, in addition to the period of custody pursuant to article 30A and that was approved by the Supreme Court *Teshome*, is intended primarily to provide a normative barrier, alongside the fence which was established along the land border with Egypt, which will reduce the motivation of potential infiltrators from coming to Israel. Alongside these proposed arrangements to amend the law, the government decided to take additional steps that do not require legislation for the realization of the set of objectives.

When we examine the purposes of the proposed amendment, we distinguish between two different groups to whom the amendment refers. The first group is the undefined public located outside the country that is considering whether to infiltrate, which is mainly dealt with in Article 32U(a1). The second group consists of infiltrators who infiltrated into Israel illegally long ago and have settled here, which is mainly dealt with in Chapter IV as a whole and Article 32U(a).

Section 1 - Amendment to the Prevention of Infiltration Law - Articles 32D, 32T and 32U

Article 32D – Residence Facility

As set out in Amendment No. 5, the purpose of Article 32D is to lay the legal framework to deal with the majority of the infiltrators living in Israel today who are from Eritrea and Sudan. As mentioned above, for these population groups there is currently a difficulty to deport them to their countries of origin. Regarding Eritrean nationals, Israel has adopted a policy of temporary non-removal of Eritrean nationals to Eritrea. As for nationals of Sudan, Israel's avoidance in recent years of making returns directly to North Sudan is due mainly to the practical difficulty of making such returns, due to the lack of diplomatic relations between Israel and the Republic of Sudan, and in any case due to lack of communication with the authorities in this country.

Currently Article 32D establishes the procedure pursuant to which the infiltrator will be sent to the residence facility. In accordance with **subsection (a)** as it appears in Amendment No. 5, the Head of Border Control may order, if he finds that **there is a difficulty of any kind** in carrying out the deportation of an infiltrator, that the infiltrator reside in the residence facility until his deportation from Israel and not more than the end of the 20 months stipulated in Section 32U, whichever is earlier. Following the decision of the Supreme Court in *Teshome* it is proposed that in Article 32D(a) the words "but not more than the 20 months period referred to in Section 32U", be replaced with "but no more than the period referred to in Section 32U." The maximum permissible period of residence in the residence facility will be 12 months (and not 20 months as set out in Amendment No. 5).

Subsection (b) as set out in Amendment No. 5, sets out the instances in which the Head of Border Control will not issue a residence order for the residence facility:

- (1) a minor;
- (2) a woman
- (3) a person older than 60 years;
- (4) a parent of a dependent minor in Israel;

(5) a person for whom the Head of Border Control is persuaded that because of his age or state of health, including mental health, residency in the residence facility may cause harm to his health as mentioned, and there is no other way to prevent such damage;

(6) a person for whom the Israeli police notified under section (c) that there is prima facie evidence that an offense was committed against him under sections 375A or 377A (a) or (b) of the Penal Code, 1977;

This amendment proposes to delete Article 32D(a)(4) - which states that the Head of Border Control will not issue a residency order to an infiltrator who is a parent of a dependent minor.

Given the fact that the residency order will be issued to an infiltrator after hearing arguments and examining all the circumstances of the case, the Head of Border Control is authorized to act according to his discretion and experience in any case, and therefore there is no need to exclude this population in primary legislation.

The bill also proposes to add subsection (h) that will state that the court, including the Appeal Tribunal, will not grant the request for temporary relief delaying the implementation of the Head of Border Control's decision to issue a residency order, prior to the reporting by the infiltrator at the residence facility.

The residence facility for infiltrators is an open residence facility. The decision to grant a residency order may be appealed to the Appeal Tribunal. Within the framework of the appeal one may file an application for temporary relief ordering the delay of reporting to the residence facility as long as the procedure is being conducted. Following the enactment of Amendment No. 5 hundreds of petitions and appeals were filed against the decision of the Head of Border Control to issue a residency order to an infiltrator, and in almost all of the legal proceedings orders were issued to delay the reporting at the open residence facility - which led to difficulties in the implementation of the law. In view of the fact that, unlike other procedures against which an appeal / administrative appeal against a decision of the authority on enforcement and custody matters- where there is a total denial of liberty by placement in custody. In cases of the provision of a residency order- it deals with the reporting in **an open residence facility** where the violation of liberty is reduced and it is not a situation that would cause irreversible or irreparable damage. It is important to emphasize that this provision does not prevent the authorized court or tribunal from ordering temporary relief at any stage, but rather limits its authority to cases where the order is given for special reasons to be recorded.

Article 32T – Transfer to Custody

The proposed Article 32T grants the Head of Border Control the authority to order the transfer of a resident to a place of detention. **Subsection (a)** in Amendment No. 5 states the conditions with, if fulfilled, permit the Head of Border Control to order the transfer of a resident to custody. The issuance of a residency order to an infiltrator and the residency in the residence facility include general obligations and conditions that the resident must fulfill, including: reporting to the residence

facility according to the time set out in the residency order, complying with the terms of the residency order to register attendance, good behavior in accordance with the rules of conduct prescribed by the Director of the facility, and not committing criminal offenses, including damage to property and to the person . If these terms and conditions are violated, the Head of Border Control is authorized to consider transferring the resident to custody. The proposed authority is the main sanction that can be imposed on a resident who violates these terms and conditions as stated.

Subsection (b) as published in Amendment No. 5 sets out the period of detention that the Head of Border Control may order.

It is proposed in this amendment, as proposed, that an additional 30 days of detention will be added to each of the periods of custody that can be imposed on an infiltrator for a breach of the provisions of section 32T(b)(4) dealing with non-reporting to the residence facility in accordance with the residency order or for absconding from the residence facility.

In practice, accumulated experience has shown that the periods prescribed with respect to these provisions in Amendment No. 5 were not effective and did not lead to deter infiltrators who returned and violated the provisions of the residency order that was issued to them and did not report on the fixed date, or those who left the facility and did not return.

Increasing the period of detention by 30 days for each violation will set a more stringent sanction but also proportionate to the circumstances of the case and to the violations of failure to report to the facility or absconding from it.

Paragraph (c), as formulated in Amendment No. 5 grants the Head of Border Control the authority to order the holding in custody of an infiltrator who obtained a temporary visitors permit in accordance with paragraph 2(a)(5) of the Entry into Israel Law, and the validity of his license expired and he did not come to renew it for a period of more than 30 days. Such a license is issued to an infiltrator for whom a deportation order was issued according to the Entry into Israel Law, but who cannot be removed at this time, and thus a temporary residence permit was issued. If such a license expires, and the infiltrator does not come to renew it, this will be cause for holding him in custody. **It is proposed** that to Article 32T(c) dealing with the authority of the Head of Border Control to order an infiltrator into custody for not renewing the temporary license for a visitors permit in his possession in excess of 30 days also be added the option to order the holding in custody of an infiltrator who received a license and permit for a visit under Article 2(a)(2) of the Entry into Israel Law and did not come to renew his license within 30 days of the date on which the license expired.

This addendum is required in view of the fact that there are infiltrators who are holding licenses for a visitors permit under Section 2(a)(2) and the arrangement established in Amendment No. 5 does not grant the Head of Border Control the tools to impose sanctions on those infiltrators who failed to take action to renew the residence permit in their possession.

It is also proposed in this context to establish the periods of detention that the Head of Border Control is authorized to order, taking into account the period in which the resident delayed in renewing his license. It is noted that at the end of the period of detention the infiltrator will be transferred as stated to the residence facility, in accordance with the residency order issued to him.

Article 32U – Maximum Residency Period in the Residence Facility

In the legislative amendment it is proposed to set out in Article 32U(a) the period of residency in the facility for 12 months. The determination of the period of 12 months for infiltrators residing in Israel prior to the publication of the Law is consistent with the ruling of the Court in *Teshome*, and it is evident that this is a significantly shorter period than the period stipulated in Amendment No. 5 and violates to a lesser degree the dignity and liberty of the infiltrator and meets the constitutional standards determined by the Court.

It is further proposed to set out at the end of Section 32U(a) that the Minister of Interior or any person authorized by him may extend this period for an additional period not exceeding 6 months for special reasons to be recorded. This is to give the Minister of Interior or a person authorized to do so the possibility of examining specific cases and for special reasons to be recorded gives the option to issue an additional residency order for an additional period of up to six months, to an infiltrator who completed or is about to complete the maximum period of residency at the residence facility.

It is further proposed to set out in **subsection (a1)** that an infiltrator who enters Israel after the publication of the proposed law will reside in the residence facility no longer than 18 months.

As explained above, when it comes to determining the maximum period of stay at the residence facility, the holding of the Supreme Court in *Teshome* was implemented- so that when it comes to infiltrators who are in Israel before the release of the Law the period of stay will be for a maximum period of 12 months, whereas for new infiltrators from the date of the promulgation of the Law, the maximum period of stay at the facility will be for 18 months.

In recent months we have witnessed a growth in the scope of the phenomenon of infiltration into Israel and therefore the proposed text, whereby the maximum period of residency will be for 18 months for an infiltrator who arrives in Israel after the publication of the law, in addition to the period of custody pursuant to section 30A, is intended primarily to provide a normative barrier, alongside the fence which was established along the land border with Egypt, which will reduce the motivation of potential infiltrators from coming to Israel. Alongside these proposed arrangements to amend the law, the government decided to take additional steps that do not require legislation for the realization of the set of objectives.

Article 2 - Indirect Amendment of the Foreign Workers Law

Article 7 of Amendment No. 5 defines an "infiltrator" for the purposes of the obligation to pay a deposit, as an infiltrator as defined in the Prevention of Infiltration Law (Offences and Judgment) 1954, who is also licensed under Section 2(a)(2) or (5) of the Entry into Israel Law. In order to apply the obligation to pay the deposit to employers of all the infiltrators, and not just the employers of infiltrators who have a license under the Entry into Israel Law, the amendment proposes to delete the last part of this definition of "infiltrator" set forth in Amendment No. 5.

Article 3 - Indirect Amendment to the Employment of Workers by Manpower Contractors Law

In order to clarify the licensing obligation of manpower contractors who employ infiltrators and to prevent attempts to reduce the cost of employing infiltrators by alleging that they may be employed

through unauthorized manpower contractors, **it is proposed in this amendment** to add Article 10(a)(1) of the Employment of Workers by Manpower Contractors Law, making it clear that a manpower contractor who employs infiltrators must obtain a license from the Ministry of Economy under the said law, and the authority of the Minister of Interior to grant a special permit to manpower contractors that provide manpower services by employees who are not Israeli citizens under Article 10(a) of the Manpower Contractors Law shall not apply with regard to foreign workers who are infiltrators, as defined in section 1(10)2 of the Foreign Workers Law according to the proposed wording in this amendment. Thus, manpower contractors who employ infiltrators as stated will employ them under the provisions of Section 3 of the Manpower Contractors Law, and this is because, according to the government policy regarding the employment of infiltrators in the country for whom it announced that it will not enforce against employment, they may also be employed in fields of employment which are not permitted for the employment of other foreign workers, and also by those who do not have permits under Section 1M of the Foreign Workers Law, so that they will be employed along with Israeli workers by manpower contractors or their service contractors who received a license by the Minister of Economy. It also clarifies that a manpower contractor who employs infiltrators must be registered by the Ministry of Economy under the said law, and to prevent attempts to reduce the cost of employing infiltrators by alleging that they may be employed through unauthorized manpower contractors.