HCJ 7385/13 GABRISILASI ET AL. VS. THE KNESSET ET AL. VERDICT DATED SEPTEMBER 22, 2014.

UNOFFICIAL TRANSLATION OF THE SUMMARY OF THE VERDICT

MAJORITY OPINION: JUDGE FOGELMAN

1. Context:

The first part of the decision includes a short description of situation In Eritrea and Sudan and the Israeli policy regarding Eritreans and Sudanese: Israel does not return Eritreans based on the principle of non-refoulement which is a customary principle derived from 1951 Convention and CAT. Judge Fogelman does not express an opinion on Israel's ground for not returning Sudanese, which is not based on the principle of non-refoulement, but rather on practical difficulties of expulsion stemming from the absence of diplomatic relations between the two states.

Judge Fogelman notes that most asylum-seekers in Israel claim to be entitled to a refugee status. He stipulates that Israel is a party to the 1951 Convention that although not incorporated into Israeli law nonetheless has legal significance pursuant to the "compatibility presumption" between Israeli and international laws. Furthermore, Israel views itself as obligated by the Convention. That being said, according to Israeli State Comptroller, Israel did not begin to examine asylum claims by Eritreans and Sudanese until end of 2013. This is significant. In other countries, an asylum claim triggers with it a different set of rules than those applicable to other illegal immigrants. Notably, in Israeli law, such distinction barely exists between those who submitted asylum claims and those who have not (for example, they are equally eligible to be detained in Saharonim prison or sent to Holot residence Centre). Israel also differs from other countries in that less than 1% of asylum claims by Sudanese and Eritreans have been accepted compared to other countries where according to UNHCR Report recognition rates are 81.9% and 68.2% respectively.

Judge Fogelman also notes the current statistics of infiltrators in Israel and the current challenges associated with the phenomenon: he refers to both the sharp decline in the numbers of infiltrators entering and staying in Israel as well as the difficulties dealing with the large number of infiltrators currently in Israel. In this context he also refers to relocation agreements signed between Israel and third countries, but stresses that they enable the relocation of only a small number of people.

2. Decision on the constitutionality of Article 30A (mandatory 1-year detention)

Most of the discussion concentrates on two conditions for constitutionality: (a) whether the provision in Article 30A is for a legitimate purpose and (b) whether the violation of the rights is proportionate in relation to that purpose.

Legitimate purpose:

- Detention for the purpose of identification/ensuring availability of permissible deportation (for the purpose of possible deportation) is legitimate and in line with the Israeli and international norm that detention designed to enable deportation is legitimate as long as deportation is feasible.
- Detention for the purpose of deterrence of other infiltrators from entering Israel is legally problematic. Judge Fogelman states he is not convinced that by itself it could be considered legitimate in cases where the people detained cannot be returned. He states that there is no need to decide this point because the provision fails the other constitutional requirement: that of proportionality:

Proportionality: composed of three sub-tests:

- *First sub-test* – whether there is a rational link between the measure and the purpose:
    - Judge Fogelman finds that there is no rational link between the 1-year detention and the purpose of identification/ensuring availability of permissible deportation because the law does not include a provision excluding from detention persons who cannot be returned; nor is there a provision establishing a review mechanism on whether return is possible in a reasonable time; nor does the law distinguishes between persons who are identified and those who are not nor between those who can be returned in a reasonable time and those whose return is not feasible in the foreseeable future. Furthermore, most detainees are nationals of countries to which Israel does not return and return to third countries can be an option for just a few. This excludes the possibility of return within a reasonable period which is a requirement for permissible detention under international law.
    - On the other hand, Judge Fogelman is willing to consider that a rational link exists between the detention and the purpose of deterrence of the arrival of further infiltrators, even if fear of detention does not constitute the only preventive consideration on their part.

  The conclusion is that it can be assumed that the first sub-test is met.

- *Second sub-test* – whether an alternative, less harmful measure that could similarly achieve the purpose is available:
    - With respect to the purpose of identification/ensuring availability of permissible deportation - Detention is effective in ensuring that a person does not escape while his identity is being verified. Other alternatives to detention such as open centers or electronic monitoring are not similarly effective in ensuring the presence of the person for identification and preventing his escape in case he is to be returned. This is enough to meet the second sub-test.
    - With respect to the purpose of deterrence: other alternatives, such as the fence or the legal prohibition on taking out property from Israel, are also not as effective as detention in deterring people from arriving to Israel.

It is held that alternative measures suggested by the petitioners cannot equally achieve the purpose and therefore the second sub-test is met.

- *Third sub-test* – whether appropriate balance exists between the expected public benefit from the measure under examination and the constitutional violation:
    - The benefit foreseen by the state was the reduction of the detrimental implications of infiltrations: reduction in available labors, deteriorating sense of security of residents living nearby infiltrators, changes in the social fabric of the areas in which infiltrators live, all of which requires resources from the state to handle the new population. Judge Fogelman emphasizes, however, that the expectations of the state notwithstanding, the Court needs to consider the *actual* benefit expected from the law and to what extent said benefit could be achieved by other measures. In this context there is relevance to previously mentioned factors: the fact that the rational link between the detention and purpose of identification (for the sake of return) is in doubt; the fact that while detention is the most effective measure to achieve the stated purposes, it is by no means the only available measure; and the fact that the numbers of new infiltrators has substantially declined; all this leads to the conclusion that the added benefit of detention as a measure is in fact limited.
    - Against that benefit, the severity of the constitutional violation should be considered. The different changes made to the previous provisions in Amendment do not suffice to reduce the severity of the violation in a manner that would meet the third sub-test. Detention must be necessary, absent alternative means and for a reasonable duration. The default in Article 30A – A 1-year detention of persons who cannot be returned - does not conform to these principles or to constitutional standards. Indeed, comparative review demonstrates that a 1-year detention of persons who cannot be returned is unacceptable (examples: France, Canada, Britain, German, Austria, Spain, South-Africa, New-Zealand, US, Italy, Greece. But see Australia, Malta, both criticized). This comparative overview is beyond necessary as the same conclusion is reached based on Israeli constitutional law: 1-year detention of individuals who cannot be returned in the foreseeable future, not as punishment for their actions and without being able to take action to advance their release – constitutes a severe violation of their rights (this is particularly true for those among them who are asylum-seekers). Detention takes a toll on the detainee: deprives his liberty and violates his dignity, privacy, autonomy. It freezes his ability to manage his life and exercise his autonomy.

    The result is that the deep, core violation of Article 30A of constitutional rights exists also in the current version of the law. It is much more severe than the benefit produced. It is therefore disproportionate and unconstitutional.

Remedy: Once the central provision in Article 30A is found to be unconstitutional, there is no choice but to declare the annulment of the article in its entirety and leave it to the Knesset, should it chooses, to set a new arrangement in its stead.

We propose the same outline as in the Adam case: reverting back to the constitutional order preceding Amendment 3: the Law on Entry. Detention orders should be reviewed pursuant to Article 13 thereof. There is no need to grant a 90-day stay of this order in view of the small number of detainees under the provisions.

3. Chapter D (Residence Center)

Summary of Conclusion: Judge Fogelman clarifies that the Holot residence center is more akin to a closed center. While the establishment of a residence center could in principle coincide with Israeli constitutional standards, the specific legislative outline for the center in Chapter D disproportionally violates the rights to liberty and dignity and must therefore be annulled.

Methodology of analysis: In its analysis, Judge Fogelman provided a description of both the normative framework of the center and the actual operation of the Holot center since its establishment.

- In the latter context he referred to the **Criteria** for stay in the center issued by the state (long-staying Eritreans and Sudanese) and commented that the rationales for these criteria were not made clear to the Court and that, absent good reasoning, they could amount to selective enforcement. However, he made no determination on this point as he did not find it relevant in the context of the present appeal.
- The analysis of the constitutionality of Chapter D is twofold. First, the constitutionality of individual provisions is examined. Second, the constitutionality of the Chapter as a whole is examined.

Purpose of the Residence Center:

- Prevention of infiltrators from settling in populated centers and integrating into the labor market: Despite Justice Arbel's determination in the Adam case that this purpose is legitimate, Fogelman refrains from making such determination in view of the failure of the Chapter to meet the proportionality tests.
- Providing for the needs of infiltrators: in itself a legitimate purpose, especially considering the unregulated status of infiltrators in Israel and the denial of adequate access to health and social services they face. Does the center in fact fulfill that purpose? Notably, the law does not provide for education and religious services, cultural and sport activities or legal counseling. This leaves the administrative authority with wide discretion as to how the center should be operated (its actual operation exceeds the scope of the constitutional issue at hand). Pursuant to this Court's jurisprudence, even absent express directions in legislation, it is clear that the right to dignity implies not only an obligation to provide detainees with basic physical needs, but also cultural and emotional needs. Since the parties did not focus their claim on this issue, it is left undecided.
- Encouraging "voluntary" departure (claimed by the petitioners to be the real purpose of Chapter D): a state cannot remove a person contrary to the principle of non-refoulement. On the other hand, a state must respect the constitutional right of a person to choose to depart to a state where his life and liberty might be at risk. When would such a decision be considered to be based on free will? Fogelman's position is

that a state is said to be deporting a person when it takes extreme and severe measures specifically designed to put pressure that would lead him to "voluntarily" leave the country. Free choice is only possible when a person is sovereign to take an informed and conscious decision out of a number of options that do not place him in an impossible life reality. This is a principle in the Israeli judicial system. According to the ILC, deportation could be attained via "constructive expulsion" through coercion or threat. The prohibition on constructive expulsion has been criticized and narrowly construed. One of the important aspects in identifying free choice is the legal status of the protected subjects in the host states. If the rights of infiltrators are not recognized, if they are subject to pressure and limitations and are held in closed camps, their decision to return cannot be said to be out of free will according to UNHCR Handbook. This position is accepted also in this Court's jurisprudence. Judge Fogelman concludes: the question of whether an individual's choice to leave a country is made by free will or whether it is the product of impermissible coercion is tied to background conditions in the host state. Unreasonable pressure and means of duress could transform the departure into impermissible forced expulsion. Fogelman decides not to make a determination as to the claim of the petitioners, despite commenting he cannot deny it out of hand.

Reporting requirements in the center:

Residents are obligated to report to the center 3 times a day and to stay therein overnight.

- *Violation of rights*: The restriction of the freedom of movement is so severe that it amounts to a violation of the right to liberty (the test is a matter of degree per ECHR's jurisprudence). The noon reporting requirement further impedes the right to dignity, which infiltrators are entitled to by virtue of their humanity. The reporting requirement effectively limits the ability to stay outside the walls of the facility. This deprives the ability to develop personality, meet a partner, adopt hobbies, and meet friends. The current structure of Chapter D prevents infiltrators from fulfilling their autonomy in a manner that conforms with the obligation of the state, including the Knesset, to guarantee their dignity. This is intensified in the context of Holot. Its remote location raises the probability that the infiltrator will choose – to the extent this could be described as a choice – to remain inside for most hours of the day. "Lets not let the title – 'open Facility' – to fool us. The thrice-a-day reporting requirement, coupled with the vast distance from the area towns, negates almost any possibility for routine departures from the center. Is it, therefore, an 'open facility'?" This conclusion would apply also if the center was located in a city center since the reporting requirements transform the center into a facility more akin in essence to a closed facility.
- *Proportionality of the violation*: examination of proportionality is made vis-à-vis the purpose of preventing infiltrators from settling in populated centers and integrating into the labor market.
    - The first sub-test is met since there is a rational link between the reporting requirements, which make it difficult for residents to leave the facility, and the purpose of preventing infiltrators from settling in city centers and

integrating into the labor market. Notably, the small capacity of the center prevents it from having an effective impact on purpose of preventing the settling in city centers and integrating into the labor market (especially in view of the state's obligation not to enforce the prohibition of their employment) of the general infiltrators community. However, considering that Holot serves as a pilot program, Judge Fogelman is ready to assume that the test is met.

- The second sub-test, lack of alternative, similarly effective, means is also met. The reporting requirements ensure the center of life of infiltrators is in Holot. Other alternatives, such as bail, better enforcement of labor laws to prevent cheaper hiring costs of infiltrators, or raising the employment wages in the facility, are not similarly effective. That being said, Judge Fogelman notes that these alternatives should be considered.
- Third sub-test is not met. The benefit of the law is clear: it prevents the integration of infiltrators in city centers and labor market. However, there is no appropriate ratio in comparison to the injury to the infiltrators. The title of the facility is of less consequence that its essence in determining its nature. For most infiltrators it is a closed facility which prevents them from developing lives of meaning and substance. The severe implications of the reporting requirement are made clear by comparative review. Judge Fogelman provides an overview of different types of centers and reporting requirements in Britain, France, the Netherlands, Spain, Bulgaria, Hungary, Italy, Belgium, Poland and Sweden (open centers that constitute financial benefit), Austria (reporting does not exceed once a day requirement), Germany, Canada (community-based alternatives), Norway (once every three days), Denmark (up to once a day), Lithuania (up to once a day, coupled with overnight stay – has been criticized) and Malta (between once a day and three times a week). The obligation of residing in a closed facility for days, weeks, months is a severe violation of dignity and liberty which is not justified by the law's benefit.

Administration of the Facility by the Israeli Prisons Service and the Authority of Guards

Judge Fogelman opines that the administration of the facility by the IPS exacerbates the injury to the rights of the residents. An open residence facility should maintain the sense of liberty of its residents. The IPS, on the other hand, specializes in operating closed centers and dealing with specific criminal populations. For this reasons, operation of centers in other countries is usually not placed with prison services, but, *inter alia,* immigration officers, the Red-Cross, private contractors and NGOs. The law also provided Holot guards with extensive authorities such as search and seizure, preventing entrance of those who would not identify themselves and maintaining order. They therefore come across residents in many points during the day. The symbolism in their presence has actual effect on the way the residents perceive their stay.

The conclusion is not that this set-up constitutes an independent violation of rights. Rather, that it is exacerbates pre-existing violations of the rights to liberty and dignity and has an effect on the proportionality of the overall arrangement.

Absence of Limitation on Duration of Stay and of Release Grounds

The third issue requiring examination, which might be the first in importance, concerns the length of stay in the facility. Chapter D does not include provisions limiting the duration of stay or grounds for release therefrom.

- *Violation of rights*: Since Chapter D is a provisional provision in force for three year, length of stay could be up to three years. However, there is no guarantee that the provision will not be extended in time, and the Government has not ruled out that possibility. This leaves residents in uncertainty as to the length of their duration.
    - The violation of the right of infiltrators to liberty is thereby intensified. The longer the deprivation of liberty – the worse the violation is. An arrangement that limits liberty for at least 3 years constitutes severe violation of liberty which will deepen if the force of the provisional order is extended.
    - 3-year stay in the facility further violates the right to dignity. The longer deprivation of liberty is, the more a person is required to give up his wishes and desires. Three years us a period during which a person can get married, begin a family, advance at work and attain education. A life chapter lost. Furthermore, the uncertainty as to the duration of stay is a unique and independent violation of dignity as it compounds the agony associated with deprivation of liberty, and might give rise to depression and anxiety. This hold true especially with respect to asylum-seekers who are a vulnerable population that is susceptible to post-traumatic disorders linked to deprivation of liberty (reference to UNHCR's 2011 position and to the obligation in the EU Directive to provide protection for the mental health of those detained).
- Proportionality of the violation:
    - First sub-test: Judge Fogelman is ready to assume the test is met as there is a rational link between prolonged stay and the ability to prevent his integration in city centers, which is the intended purpose.
    - Second sub-section is also met as prolonged stay is more effective than a shorter stay or other incentives.
    - Third test – there is no appropriate ratio between the benefit (relieving residents from the burden of incorporation of tens of thousands of infiltrators, with all the negative phenomena associated with unregulated immigration) and the violation of the rights. A democratic society cannot deprive for such a period the freedom of persons who pose no harm and that are not carrying out a sentence for a wrong committed, even if there is some benefit in it. As compared to other states such as the Netherlands, Austria, Germany and Belgium, where stay is limited in months, the minimum 3-year period in Israel is *clearly* disproportionate.

In view of all the above, Judge Fogelman is of the view that there is no escape from concluding Chapter D is disproportionate. However, in view of the issue of remedy, further examination of concrete arrangements in the Chapter is undertaken.

Transfer of Infiltrators to Custody

The last arrangement which will be reviewed is the one authorizing the Head of Border Authority to order the transfer of residents or infiltrators to detention for violating various disciplinary violations. These violations include failure in reporting, behavioral misconduct, and working on the parts of residents. Non-resident infiltrators are subject to be transferred to detention upon failure to renew their visas. Periods of detention range between 30 days and a year (for repeating violations). Notably, there is no judicial review of the decision of the Head of Border Authority to transfer a person to detention. The Law provides the Custody Tribunal for Infiltrators with the authority order the release of an infiltrator but only for predetermined grounds (such as humanitarian or health grounds, or that three months passed since an asylum was submitted and no action was taken in its pursuit). The only avenue available for challenging the decision is filing an appeal in an Administrative Court.

- *Violation of rights*:
    - Transfer to detention is a violation of the right to liberty which independent that the violation caused by the residence in Holot.
    - Additional to the right to liberty, the arrangement strikes a heavy blow on the constitutional right to dignity by virtue of the injury to its subsidiary right to due process, one aspect thereof is the right to have legal procedure determined by an objective body enjoying personal and institutional independence. Other elements of the constitutional right to due process are procedural guarantees. The more severe the potential violation of the right and the higher the normative status of the right – the wider the obligation to ensure procedural guarantees. The normative status of the right to liberty and the degree of potential violation of the right requires strict observance of the existence of procedural guarantees as prerequisite of the constitutional right of due process. These guarantees do not exist in our case. First, the authority to limit and supervise liberty is at the hand of the executive, which is not independent or objective, instead of the judiciary. The option to appeal to the Administrative Courts is untenable for most infiltrators who lack knowledge of the system, the law or be able to afford legal representation. Other procedural guarantees are also not provided for such as access to the evidentiary materials and right to legal representation. Their absence intensifies the violation of the constitutional right of due process.
    - In obiter, Judge Fogelman raises - but make no determination – the issue of whether the right to due process mandates judicial review over the decision to issue residence orders for Holot. He does mention that "of course that a different legislative arrangement that replaces, if replaces, Chapter D in its current version – that will offer different balances in respect to an open residence center, and will reduce the violation of the right to liberty and other rights…- might not mandate such judicial review".
- *Proportionality*:
    - First sub-test: there exists a rational link between detention and the purpose of the law, as disciplinary measures ensure observance of the Facility's rules,

including reporting requirements. Violation of due process equally maintains the link as it eases the operation of the facility and saves costs.

- Second sub-test: the provision offers a cheap, quick and effective mechanism to impose sanctions for violating Facility's rules. Other means such as judicial review and provision of procedural guarantees would not be as effective as they require resources that are needed elsewhere and might impair the effectiveness of sanctions. The test is therefore met.
- Third sub-test: The benefit does not keep an appropriate ratio compared to the extent of the violation. The entire procedure for transferring infiltrators to detention is not subject to review of an independent, neutral, institutionally independent body. The only available option to challenge the procedure is via an administrative appeal which imposes substantial burden on the initiating infiltrator. The heavy price in no way observes a proper ratio to the benefit of deterring infiltrators from committing violations. It is a quintessential public interest that we observe that liberty may not be deprived prior to the exercise of minimal protection mechanisms.
- Judge Fogelman comments in obiter that whether the arrangement constitutes an independent violation of the right to liberty is unnecessary. He is, however, of the view that detention for prolonged periods of time crosses the line between a disciplinary sanction (deterrence) and punitive sanction (retributive). Since there is no dispute that punitive sanction cannot be imbued in the authority of the Head of Borders Authority, such sanction cannot stand. He does state that: "in outlining a new legislative arrangement…there needs to be examined – strictly, the period of detention. Overly prolonged detention period might be disproportionate (in itself) even if subject to judicial review".

Chapter D as a whole and the Proportionality Requirement

This residence facility is unlike others in the world. The limitations it imposed on the freedom of the infiltrator are wider, and its violation of the dignity of infiltrators is more accute. The benefit inherent in Chapter D does not justify the violation of the human rights brought on by this Chapter. This is particularly true with respect to children that the current structure of Chapter D allows to hold at the facility (following enactment of regulations). This fact raises considerable difficulty. Children are particularly susceptible to deprivation of liberty. They experience it more acutely. Furthermore, the dignity of the child deserves special protection.

Another population deserving special attention include those whose particular circumstances makes stay in a residence center more difficult. Currently, the law does not include a mechanism that enable the weakest – the sick, trafficking, torture and rape victims – to be excluded from the facility.

The accumulation of unconstitutional aspects of Chapter D renders it entire arrangement disproportionate.

Remedy

Chapter D in its entirety is unconstitutional and has to be annulled. An order is given to suspend this ruling for a period of 90 days to allow the formulation of an appropriate legislative arrangement that would meet the limitations of the Basic Law: Human Dignity and Liberty.

The suspension does not apply to the following provisions:

Article 32(H)(a) is to be interpreted as mandating only twice reporting requirement, i.e., cancellation of the noon reporting requirement, effective 24 September.

Article 32(T)(a) is to be interpreted, as of October 2, as allowing the transfer to Saharonim for maximum of 30 days (for failing to report to Holot, for violating reporting and behavioral requirements within Holot, and for working outside Holot). Persons already in detention pursuant to Article 32(T)(a) should be released upon serving 30 days or earlier if decided by the Head of PIBA.

4. Counter-Appeal by Residence of South Tel-Aviv

With the decision on annulment of Amendment 4, there is no need to address the appeal brought by residents of South Tel-Aviv, which is based on the manner Amendment 4 was applied

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CONCURRING OPINIONS:

JUDGE DANZINGER:

Joins Judge Fogelman's opinion.

Emphasizes that the Court does not belittle the complex nature of the infiltration phenomenon which has difficult implications especially on the residents of South Tel Aviv. At the same time, the Legislature is obliged to adopt a constitutional solution by which the harm will be as little as possible both on the infiltrators and on the residents of South Tel Aviv.

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JUDGE NAOR

Agrees with Justice Fogelman's opinion that Article 30(A) and chapter D of the Anti-Infiltration Law must be canceled.

1. Article 30

Agrees with Justice Fogelman that examining section 30(A) doesn't end with the question whether the length of time in detention is constitutional but also with whether a person can be detained in detention where there are no effective deportation proceedings pending against him.

Even though the period of detention under 30(A) is substantially shorter than it was in the third amendment, it still is equally invalid as there is a gap between the declared purpose of holding a person in detention – identifying the infiltrator and developing horizons for exit from Israel. The current law allows holding a person in detention for one year even if he cannot be deported. Holding a person in detention for whatever length of time cannot be without a legitimate purpose. General deterrence is not a legitimate purpose even if its application is forward-looking. Holding in detention can be a short-term solution for the purposes of identifying an infiltrator, for verifying his status or where relevant for effective deportation proceedings. Therefore, detention for one year does not pass the proportionality test and is therefore not constitutional and therefore section 30(A) should be nullified

2. Chapter D

Agree with Justice Fogelman that Chapter D should be nullified in its entirety. The many constitutional violations, including the reporting requirement, the unlimited period of time a person may be held in Holot and the lack of grounds for release all go to the core of the arrangement. It is therefore it is unconstitutional and should be nullified.

3. The Counter-Appeal

The response by the Knesset and the State didn't sufficiently address these hardships. Amendment 4 would not have helped the residents of South Tel Aviv as the capacity of Holot is only 3,000 infiltrators. The State is obliged to protect the security and the rights of residents of South Tel Aviv and this requires the State to implement creative solutions, including allowing the Head of Borders Control to limit the geographical area of residency for infiltrators to allow for a dispersal of infiltrators all over the country, a practice which exists in many countries around the world, or opening a residency center where residency is voluntary, or placing limitations of the ability to receive a work permit such as qualifications for a specific field.

The state must find a solution but whatever it is, it must bring into effect the perception that all persons, even refugees, asylum-seekers and migrants are entitled to have their human rights protected. I hope that any additional legislative procedures will allow for a new way of

creative thinking regarding the handling of infiltrators which will allow for all the relevant actors, including residents of South Tel Aviv, to state their positions.

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JUDGE ARBEL

Joins Justice Fogelman's decision in its entirety.

1. 1951 Refugee Convention

The Refugee Convention raises difficulties not because of what is contained therein, but rather what it does not. The Convention does not distribute the burden of coping with the refugee phenomena amongst the nations of the world such that the burden can fall unequally on certain countries due to their geographical proximity, economic attractiveness and regulatory obstacles, etc. I therefore believe that the solution of deporting to a third country, so long as it meets the conditions under international law, is a proper solution which should be advance. Although the media portrays otherwise, the burden on Israel to handle asylum seekers isn't higher than other western nations and especially not higher than developing nations who surprisingly carry the majority of the burden. This burden should be accepted with an understanding of the historical background of the Jewish people, the values of the State of Israel and its obligations to human rights even when the person isn't Israeli.

2. Article 30A

Legitimate Purpose:

- For amendment 3, the State claimed that one of the purposes of 30(A) was to prevent the setting down of roots in Israel and the State's coping with the wide phenomena of infiltration. At the time, I held that this purpose pose no difficulty. This purpose is not claimed by the State with regard to 30(A) of amendment 4.
- The other purpose for 30(A), both for amendment 3 and 4, was deterrence of further infiltration, i.e., to serve as a "normative block". As a stand-alone purpose it is problematic since a person is treated not as end but as a means. Use of detention of infiltrators for the purpose of deterring potential infiltrators, not because they present a specific threat and constitutes an infringement of the right to human dignity as a person should not be seen as a means to achieve a purpose vis-à-vis others. If we wanted to punish infiltrators for illegal entry then we should do it through criminal law. This sanction could be legitimate if proportionate and in accordance with international criminal law. Judge Arbel refers to UNHCR's Detention Guidelines which specifically prohibit detaining a person for the purpose of deterring future asylum-seekers from coming. She disagrees with the distinction made by Judge Amit between

the rights of prospective infiltrators and those who are already in the country since the prospective infiltrator that enters Israel tomorrow would equally be entitled to the right of liberty and dignity.

- Agree with Justice Fogelman that the purpose of identification/ensuring availability of permissible deportation is a legitimate purpose.

Proportionality:

One-year detention does not meet the proportionality requirements as one year in detention is too long for the purpose of identifying an infiltrator. For infiltrators who cannot be deported, there is no justification for holding them in detention beyond the necessary time for identifying them. While there is the option of going to a third country, this is a voluntary option such that holding a person in detention for one year for the purpose of convincing him to agree to go to a third country is liable to result in his agreement to not be voluntary. Furthermore, there is uncertainty whether the reduction in influx of infiltrators arriving to Israel is the result of Article 30A. A lot of weight should be placed on this uncertainty when doing a cost-benefit analysis between the violation and the benefit. Judge Arbel notes that proportionality analysis could change should Israel be flooded with infiltrators and should its vital interests be threatened as the State of Israel cannot harm itself on the behalf of people from other nations.

3. Chapter D:

One of the solutions offered in the Adam decision was establishing an open residency facility, but Holot is both compulsory and requires residents to report three times a day and is for an unlimited period of time. The location of Holot also cannot be ignored, nor can the fact that IPS manages the center and that the center's staff have a vast degree of authority to carry out searches, to use force, etc. Holot is not an open residency facility but rather a detention facility as it significantly curbs the liberty of a person placed inside for an unlimited period of time. Even if the infringement on liberty in Holot is less than the infringement on liberty under amendment 3, it is not a significant reduction of the infringement in order to be proportional. This should all be viewed in light of the low numbers of infiltrators coming to Israel in the past year and a half and the capacity of Holot as compared to the overall population of infiltrators. It is not sufficient to cancel the afternoon reporting requirement in order to make the arrangement proportional and this is primarily due to the unlimited period of time for residency in Holot and the lack of judicial review. I assume that the benefit would outweigh the cost if the residency center were limited in time and if the resident was granted something to aspire to where he could eventually regain full liberty like all residents of Israel.

4. South Tel-Aviv

Judge Arbel states she does not ignore the residents of South Tel Aviv who bear most of the burden which is laid on the State of Israel. The State should find solutions which will distribute the burden without disproportionally harming the rights of the infiltrators. Regardless, Holot was not the solution to the problem here as its capacity is very small compared to the number of infiltrators overall.

Amendment 4 was aimed at solving a real problem. But it is not right or appropriate to solve the complex problem of the infiltrators by the most harsh and harmful means such as deprivation of liberty of a person.

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JUDGE JUBRAN

Joins Justice Fogelman's decision

1. Article 30A

The benefit from the one year detention does not outweigh the harm caused and thus section 30A should be nullified. The State argues that the one year detention is a normative obstacle for preventing future infiltration, but there is no proof that this is the case. It is difficult to estimate the benefit of the one year detention but the harm to the basic rights is clear.

2. Section D

Chapter D does not meet the conditions of the limiting clause and therefore should be nullified in its entirety.

Purpose

Judge Jubran, however, does not find fault in the purpose of Chapter D, preventing the setting down of roots of infiltrators and integrating into the work force, and views it as a legitimate immigration policy.

Proportionality

Chapter D should be nullified due to its lack of proportionality. The purpose may still be legitimate even if it infringes on human rights, but the infringement must be proportional to the purpose. According to Judge Jubran, the second sub-test is not met as there are alternative means which infringe significantly less on the basic rights of the infiltrators, but still sufficiently achieved the purpose of preventing the setting down of roots.

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JUDGE HAYOT

1. Article 30(A)

Agree with Judge Fogelman that 30A does not pass the constitutional test because infiltrators cannot be held in detention where there are no effective deportation proceedings pending.

2. Chapter D

Join the comments made by Judge Naor in sections 4-6 of her opinion, and Chapter D should be nullified in its entirety as there are many constitutional violations, including the reporting requirement, the unlimited period of time a person may be held in Holot, the lack of grounds for release and therefore it is unconstitutional and should be nullified.

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PARTIALLY DISSENTING OPINION: JUDGE AMIT

1. Chapter D

One can understand the State's fear that granting access to work-welfare-health-housing will create an incentive for more infiltrators to come. This fear however can be dealt with by several measures, through the physical fence and section 30A of the law.

The Half a billion NIS invested by the State on tracing, deporting, isolating and placing a few thousands out of the tens of thousands infiltrators could have been better on investing in the welfare of residents of South Tel Aviv and finding solutions for infiltrators who already came to Israel. The fact that most chose to settle in the South Tel-Aviv is not by chance but rather a result of lack of policy. But it is not for the Court to review the wisdom of the law but rather its constitutionality.

The practical implication of Chapter is essentially the detention-like of people for a period which is "limited" to three years but this is also uncertain. It must be remembered that we are dealing with people that have been in Israel for years and have established a social-economic network, albeit meager and weak. As uncomfortable as this may be – we must lift the veil over the "block" of infiltrators and look straight at each and every one of them. This is the essence of humanity, realizing everyone has a name, face and own way to exercise one's dignity.

The fact that Holot is run by IPS does not make it, in my opinion, like a prison. The fact that the Head of Border Control is authorized to instruct transfer to detention, while strict and not proportional, could be remedied without rejecting chapter D in its entirety. But the thrice daily reporting requirement and the unlimited period of time in Holot are the elements bringing

Holot too close to a prison facility and why Chapter D should be nullified in its entirety. One has to wonder whether placing several thousand infiltrators in Holot will solve the problems in South Tel Aviv where there are tens of thousands of infiltrators.

2. Article 30(A)

Disagrees with the annulment of section 30A:

Purpose:

Unlike the previous provision in Amendment 3, the current 30A is forward-looking, addressing not infiltrators that are currently in Israel but the unspecified group of infiltrators beyond the borders of Israel. As such it is a normative barrier which complements the physical fence. The State's responsibility towards people who are already within its borders is not the same as the State's responsibility towards people outside its borders, and therefore the State is allowed to have a normative barrier in section 30A to complement to physical barrier – the fence.

Unlike a residence centre, it should be presumed that Article 30A could constitute an effective means to prevent infiltration, which in itself is a legitimate purpose, intended to protect to sovereignty of the State, is character and national identity, as well as economy, internal security, public order and welfare. The purpose of deterrence is not always illegitimate, especially when it applies not to innocent people, but to those committing an act that is illegal, such as infiltration, and when the detention has other purposes such as identification and formation of deportation alternatives.

Proportionality

There exists a correlation between the benefit and the violation. The benefit of 30A – the strong public interest for preserving the sovereignty of the State – outweighs the harm caused to the infiltrator held for one year and the infringement to his right to liberty.

30A provides authority to the Head of Border Control to release the infiltrator for various grounds (if health is endangered, special humanitarian grounds, etc), provides for judicial review once a month, and provides for the release of the infiltrator if he submitted an asylum claim and if within 3 months his claim didn't begin to be handled and if within 6 months no final decision was reached.

Coupled with its perspective application to an unspecified public outside Israel, the fact that forming an immigration policy is the prerogative of the Executive and Legislative Branches, the fact the former law has once been annulled, and that this is a provisional provision, there is no reason to nullify 30A of the Law

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MINORITY OPINIONS:

JUDGE GRUNIS

Dissents from the majority opinion regarding the annulment of Article 30A; Agrees that the provisions concerning the thrice daily reporting requirement in Holot disproportionately violates the constitutional right to liberty and therefore the noon reporting requirement should be canceled. Does not agree that Chapter D should be struck down in its entirety.

Emphasizes the wide margin of appreciation the Legislature is vested with. The courts should not lightly overturn a law, but exercise caution in deciding on the constitutionality of a law passed by Knesset and should not replace its discretion for that of the law-maker.

1. Article 30A

Stipulates the right to liberty is violated but points out that the current provision is less harmful than the provision that was annulled in the Adam case in that it is perspective; sets a maximum one-year detention period instead of a minimum three-year period; and includes stricter procedural guarantees.

Purpose

Agrees with the majority opinion that the purpose of identification/ensuring availability of permissible deportation is legitimate. Judge Grunis does not determine whether deterrence is a legitimate purpose but refers to his opinion in the Adam case, where he noted that in some circumstances it could indeed be considered legitimate.

Proportionality

Believes the when determining whether the third sub-test is met, i.e., that there is appropriate ratio between the benefit and the violation of rights, the wide margin of appreciation of the legislator to determine what is a proportionate means, should be given weight, especially in a case where the issue at stake is quantities, as in this case (the appropriate duration of detention). According to judge Grunis, the one-year detention period is within this margin of appreciation considering the improvements made to the previous version of the law and the traditional sovereignty of the State to determine immigration policy. Notably, the majority opinion reviewed comparative arrangements where six-month detention periods are permissible. The difference between one-year and six-month detention periods is not substantial enough to constitute a deviation from the margin of appreciation of the Knesset that would justify judicial intervention.

2. Chapter D

The thrice daily reporting requirement makes leaves from the residence facility impractical, bringing residence close to an absolute deprivation of liberty. The fundamental injury to the right to liberty negates appropriate ratio to the benefit (the purpose of preventing infiltrators from settling in centers and integrating into labor market). It therefore fails the third sub-test and should be annulled.

Disagrees with the Majority opinion that Chapter D should be nullified in its entirety due to the *cumulative* effect of three constitutional problems (namely the lack of judicial review over decisions to transfer from the facility to detention, the fact that the facility is run by IPS and because of the lack of maximum time period for residing in the facility).

Does not believe that the unspecified limits for the duration of residence is unconstitutional since once the noon reporting requirement is cancelled the overall violation of the right to liberty is reduced. Further, the lack of individual release conditions in the law does not necessary mean that the period of residence cannot be defined. Head of Borders Control has the power to specify in the residence summons the period of residency. Even if this is not done ahead of time, the individual can request such specification subsequently and refusal is subject to judicial review. Moreover, the relevant provisions are provisional, in force for three years. This in itself justifies judicial restraint *for the time being*. Judge Grunis clarifies that under the current circumstances, three years are the maximum acceptable detention period.

Lastly, Judge Grunis believes the law in fact allows for judicial review over the transfer from facility to detention: section 32d(a) authorizes the Detention Review Tribunal to review decisions of the Head of Border Control to transfer a resident of the facility to detention (section 32T), as it enables the Tribunal "to authorize the holding of an infiltrator in detention", which would include an examination of whether the Head of Border Control erred in deciding to transfer a resident to detention. Those transferred from the facility to detention will therefore be automatically brought before the Tribunal within 7 days and thereafter reviewed every 30 days. Further, decisions of the Tribunal may be appealed to the Administrative Court.

Remedy

Judge Grunis emphasizes that the approach by which accumulation of constitutional difficulties is a ground justifying the annulment f Chapter D as a whole. He is not convinced that this is indeed appropriate, and in any event, not when only one provision should be struck down. Suggests suspending the annulment order for 150 days during which an alternative arrangement should be formulated. Throughout this period, residents should not be required to report to the facility at noon.

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JUDGE HENDEL

Concurs with Judge Grunis opinion

1. Section 30(A)

It is possible to hold infiltrators in administrative detention but not for a long period of time; therefore the disagreement is over the length of time in detention and not the detention itself. What is the maximum period of detention which is acceptable? Disagrees that the period of six months is the maximum period for detention accepted worldwide. Amendment 4 set a mandatory release from detention after one year and therefore passes judicial review. A one-year detention period is not "outside of the range" of acceptable periods of detention and is not much longer than that which is acceptable is many countries. It therefore well within the constitutional margin of appreciation.

2. Chapter D - Holot

It is not sufficient that Holot will be a type of "light detention facility" but rather that this is a very different module of custody. I join President Grunis is his instruction to cancel the thrice daily reporting requirement. What distinguishes a detention facility from an open center is significant freedom of movement, even if limited.

However, Judge Hendel takes issue with other reservations expressed in the majority opinion: infiltrators failed to respect Israel's sovereignty and chose to steal the border and violate the law. They are not entirely innocent. Further, it is not correct to view them as presumptive refugees, as experience shows that refugees turn to the competent authorities with asylum claims. Further, it must not be assumed, as did the majority opinion, that the provisional measure will be extended as did the majority; lastly, in comparative view, it cannot be said that the legislature's decision to place the responsibility of Holot in the hands of IPS deviates from what is acceptable in Western nations.

Comparative review is helpful but must nevertheless not be blind to the specific context of Israel, which is the only Western country by which it is possible to arrive to by way of land from Africa. This should be taken into account when suggesting that detention for even a period of several months is unjustified. The maximal threshold of a one-year detention period was chosen is a balanced and proportionate response

Similarly to the accumulation of constitutional difficulty employed by the majority, one should also take into account of the accumulation of facts. The success of the combined measures taken by Israel in reducing the rates of new arrivals must also be taken into account. If the numbers of infiltrators changes dramatically, then the constitutional balancing point will also change. The situation is so dynamic that there is no way to know what the situation will be when the temporary order comes to an end. I believe that caution requires us not to intervene in this legislation at this sensitive stage where the change is so dynamic and drastic.

Judge Hendel further criticizes the majority opinion for not providing the legislator with clearer guidelines with regard to future legislation. Regarding detention, the court should have directed the legislature more clearly as to what is acceptable – is detention to be rejected no matter what? Is the debate regarding the length of detention? Regarding Holot, if the

length of time in Holot is limited and the number of reporting requirements is reduced, will this be sufficient according to the majority opinion?

3. Conclusion:

In contribution to the discourse between the Court and the legislator, the majority's position is as follows: the threshold should further be reduced and extension of detention must be subject to the existence of potential release or potential deportation, even if not crystalized. As for the residence centre, some of the conditions might be changed in accordance with the majority's review, but otherwise can be operated.

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