Supreme Court

HCJ 8665/14 *Desta v. The Knesset*

Abstract

In a judgment handed down today, 11.8.2015, an expanded bench of nine justices of the Supreme Court ruled on the question of the constitutionality of sec. 30A and Chapter D of the Prevention of Infiltration (Offences and Jurisdiction) Law, 1954 (hereinafter: the Law) – as amended in the Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel (Statutory Amendments and Temporary Orders) Law, 2014 – which state that infiltrators may be detained for a period of up to three months, and that an order may be issued to hold them in an accommodation facility for a period of up to twenty months.

After having heard the pleadings of the parties, the Court decided **unanimously** that, subject to the interpretation in this judgment, the provision of the Law according to which infiltrators may be held in detention for a period of up to three months (sec. 30A of the Law) **is constitutional**. With respect to the provisions of the Law that grant authority to order the infiltrator to remain in an accommodation facility (Chapter D of the Law), the Court decided by majority opinion that these provisions pass the test of constitutional review, except for secs. 32D(a) and 32U – which set the maximum period for holding a person in an accommodation

facility for infiltrators at twenty months – which are void, due to the fact that this period is not proportionate.

By virtue of the majority decision, the declaration of voidness of these sections was deferred for six months. During this period, the maximum period for holding a person in an accommodation facility specified in these sections is twelve months. Those who had been held in an accommodation facility prior to the date of this judgment for twelve months or more were to be released from it immediately, and no later than fifteen days from the date of this judgment. The Court emphasized that if, at the end of a period of six months, the Knesset had not enacted new provisions on this matter, the authority of the Commissioner for Border Control to issue orders regarding accommodation for infiltrators would lapse.

President M. Naor and Justices S. Joubran, E. Hayut, Y. Danziger and Z. Zylbertal issued the majority opinion. Justices U. Vogelman and Y. Amit concurred in the position of the majority Justices, but held in a minority opinion that sec. 32T too – which authorizes the Commissioner for Border Control to order the transfer of a person held in an accommodation facility to detention – is unconstitutional. Justice H. Melcer, too, concurred with the majority Justices, subject to a preliminary alternative geographic restriction (or *résidence assignation*) being considered, and except for the matter of the temporary provision.

Justice N. Hendel held, in a dissenting opinion, that the petition should be denied **in its entirety.**

It was therefore decided, by majority opinion, that the petition should be denied, except for the matter of the provisions of the Law under which an infiltrator may be held in an accommodation facility for a maximum period of twenty months: these provisions were held to be unconstitutional and were voided.

Summary of the Opinion of President M. Naor

President M. Naor, who wrote the majority opinion, held that the authority to detain infiltrators, while processing their identification information or exhausting avenues for their deportation from Israel, is constitutional. Similarly, President Naor held that, except for the maximum period of time for holding an infiltrator in an accommodation facility, Chapter D meets the criteria of the limitation clause – albeit sometimes with difficulty. To begin with, President Naor discussed the backdrop to the relevant legislation. She noted that in recent years, the State of Israel has been dealing with the phenomenon of infiltration into its territory – a phenomenon that manifests itself in the illegal entry of tens of thousands of people into the State, who did not cross through border stations. President Naor discussed the fact that in view of this phenomenon, the State of Israel is faced with complex challenges. Alongside the need to prevent illegal immigration, the State must also honor its obligation to protect the persecuted and to ensure that they will not be

placed in a situation of danger to their lives or their liberty if they are deported.

President Naor noted that there is a dispute between the parties with respect to the reasons that brought the infiltrators to Israel. Whereas the State alleges that the motives of the infiltrators are primarily economic, the petitioners allege that these individuals fled from their countries of origin because their lives or their liberty were in danger. President Naor said that whatever the case may be, at the present time the State of Israel is refraining from deporting from its territory nationals of Eritrea and North Sudan – these are the countries of origin of the majority of the infiltrators to Israel.

President Naor discussed the fact that even though the scale of infiltration is in decline, the need to deal with the challenges presented by the vast number of infiltrators who remain in Israel remains. Therefore, the State has implemented various solutions, including the enactment of laws designed to apply new legislative arrangements to the infiltrators. In the Prevention of Infiltration (Offences and Jurisdiction) (Amendment no. 3 and Temporary Order) Law, 2012, section 30A was added to the Law. The main provision of sec. 30A in its first version – which was enacted as a temporary order – allowed for the detention of infiltrators for a period of up to 3 years, subject to the grounds for release on bail specified in the Law. The Supreme Court, in HCJ 146/12 *Adam v. The Knesset* (16.9.2013) (hereinafter:

Adam case) found that Amendment no. 3 as then formulated was not constitutional due to its disproportionate infringement on the constitutional right to freedom.

In the wake of the judgment in the *Adam* case, the Knesset enacted the Prevention of Infiltration (Offences and Jurisdiction) (Amendment no. 4 and Temporary Order) Law, 2013. In this amendment – which too was enacted as a temporary order – sec. 30A was re-enacted, shortening the maximum period for detention of an infiltrator to one year. At the same time, the Amendment added Chapter D to the Law. This chapter regulated the establishment of an accommodation facility for infiltrators, and it authorized the Commissioner for Border Control to accommodate there any infiltrator who could not be deported from Israel without difficulty. In HCJ 7385/13, 8425/13 *Eitan – Israeli Immigration Policy v. Government of Israel* (22.9.2014) (hereinafter: *Eitan* case), the Supreme Court held, by majority opinion, that two components of Amendment no. 4 were unconstitutional, and ordered them to be struck down. Some three months after the judgment was handed down in the *Eitan* case, the amendment to the Law, challenged in the present petition before this Court, was enacted, also as a temporary order.

Against this backdrop, and bearing in mind what was decided in the previous proceedings, President Naor proceeded to address the two main amendments to the Law – sec. 30A and Chapter D of the Law, as presently formulated.

Section 30A of the Law (detention)

In sec. 30A of the Law in its present formulation, the maximum period of detention was again shortened, this time to three months.

President Naor began by addressing the fact that sec. 30A of the Law for the Prevention of Infiltration infringes the constitutional right of the infiltrators to liberty. According to President Naor, reducing the period of detention does not, in itself, eliminate the infringement of the constitutional rights of the infiltrators. Since section 30A infringed constitutional rights, President Naor proceeded to examine the limitation clause criteria. She ruled that in view of the legislative history of the Law, and in view of the significant reduction of the period of detention, which is consistent with the timeframes common in other states, the principal purpose that underlies sec. 30A of the Law must be said to be identification of the infiltrator and exhaustion of all possible channels for his deportation from Israel, whereas the purpose of deterrence is at most a secondary one. She therefore held that the period of detention now set was proportionate and constitutional, subject to the correct interpretation of the Law: where it found that the continued detention of the infiltrator no longer served the purposes of identify or deporting him, his continued detention would no longer be justified. This is the case even if three months have not yet elapsed from the time that he was detained.

Subject to this interpretation, it was ruled that sec. 30A passed constitutional review and should not be voided.

Chapter D of the Law (Detention Center for Infiltrators)

Chapter D was first added to the Law in Amendment no. 4. This chapter established the Holot accommodation facility in the Negev. The voiding of Chapter D in the *Eitan* case was the Supreme Court's first intervention with respect to the provisions of the Law regarding the accommodation facility. Chapter D, in its previous formulation, authorized the Commissioner for Border Control to order an infiltrator whom it was difficult to deport to appear at the accommodation facility. The Commissioner was not required to set a time limit on the period of accommodation at the facility. Accordingly, an infiltrator who was summoned to the accommodation facility was likely to remain there until the expiration of Amendment no. 4, which was enacted as a temporary order, valid for three years. Theoretically – had the temporary order been extended – an infiltrator may have remained in the accommodation facility for an unlimited period of time. The previous version of Chapter D set no grounds for release from the accommodation facility , nor did it include any provisions requiring the Commissioner for Border Control to exempt particular populations from being accommodated there. The infiltrators assigned to the accommodation facility were required to present themselves at the accommodation facility to register their presence

three times a day – morning, noon and evening. At night, the facility was closed. Similarly, the Commissioner was granted the authority to take into detention those infiltrators assigned to the accommodation facility who violated various rules of the accommodation facility.

After the Court struck down Chapter D in the *Eitan* case, that chapter was re-enacted in the present amendment to the Law. As with the previous Law, Chapter D in its present version regulates the mode of operation of the accommodation facility and its rules. Most of the detailed arrangements remained as they were. At the same time, Chapter D in its present version is different from its previous incarnation in several aspects: the duration of accommodation in the facility has been limited in time (up to twenty months); the requirement of being present in the center during the course of the day has been reduced; limitations have been placed on the authority of the Commissioner to order that an infiltrator assigned to the accommodation facility be taken into detention; the Commissioner has been authorized to order the release of individual infiltrators assigned to the accommodation facility when certain conditions are met; and certain groups, such as minors, women and victims of certain offences have been excluded from the application of Chapter D.

President Naor began her constitutional analysis of the present version of Chapter D with the following introductory words:

> "In the *Adam* case I wrote: 'The State is faced with a reality – which has been forced upon it against its will – which it must confront. This confrontation involves difficulties, together with challenges. These challenges require creative solutions. This might be the finest hour of the State, which in the reality that has been forced upon it has succeeded in finding humane solutions, solutions that are in keeping not only with international law but also with the Jewish approach.' *Inter alia* I suggested that the detention center be turned into an **open** accommodation facility, remaining in which would be voluntary [...] I cannot deny, an accommodation facility such as the one eventually set up at Holot is not the one that I was thinking about when I wrote those words. As a citizen, I would be happy to see my State showing more compassion, even towards a person who is suspected of having infiltrated to Israel to buy grain. At the same time, just as we do not examine the wisdom of the law, so too do we not put ourselves in place of the legislator [...] I will begin by saying: after examining the provisions of Chapter D of the Law, my conclusion is that except for the maximum period of accommodation in the facility, Chapter D meets the criteria of the limitation clause – albeit sometimes with difficulty" (para. 57).

Subsequently, President Naor addressed the infringement of constitutional rights implicated by Chapter D. She commented that in the present version of Chapter D, there

were indeed some changes as compared to the previous version. However, even if these changes ameliorated the infringement of the right to liberty, the infringement still remained. This conclusion was supported by the fact that remaining in the facility is still not the result of free choice of the individuals accommodated there, and as such it infringes the freedom of movement of those remaining there, and even amounts to an infringement of their right to liberty.

In view of the existence of an infringement of constitutional rights, President Naor turned to an examination of the purpose of Chapter D of the Law. She found that the central purpose of Chapter D was to prevent the settlement of the infiltrators in Israeli city centers. President Naor determined that this purpose was intended to alleviate the problems that arose as a result of the concentration of most of the infiltrators in the urban centers of major Israeli cities. On her approach, in the existing circumstances, there is nothing wrong with taking steps designed to alleviate these problems by means of dispersal of the population of infiltrators. She pointed out that in exceptional circumstances such as those existing in Israel, international law too recognizes the legitimacy of taking steps for the purpose of addressing the difficulties arising from a mass influx of asylum seekers. Bearing these conclusions in mind, President Naor proceeded to an examination of the proportionality of the means adopted in Chapter D in order to realize the purpose of prevention of settlement in the city centers.

President Naor determined that the authority of the Commissioner for Border Patrol to order an infiltrator to remain in an accommodation facility for a period of up to twenty months passed the first two tests of proportionality – the test of the rational connection and that of the least intrusive means. At the same time, she decided that the provisions of this Law do not pass the third test of proportionality – the test of proportionality *stricto sensu*. According to President Naor, the period of twenty months that was prescribed in the present Law indeed constitutes a lesser violation of the rights of infiltrators as compared to the longer period specified in the previous Law. However, that is not the end of the analysis: even when the legislature adopts a less intrusive arrangement than what pertained formerly, the court is not exempt from examining the constitutionality of such a law that infringes constitutional rights. President Naor ruled that weighing the severe infringement of the rights of the infiltrators on the one hand against the benefit derived from the Law on the other leads to the conclusion that a period of twenty months is too long a time for holding the infiltrators under conditions of this sort that limit their freedom. This conclusion was based on the fact that the infiltrators subject to the Law can neither be deported from Israel, nor do they present a concrete threat to the security of the State or to the lives of its citizens. President Naor emphasized that the main purpose of the Law – the prevention of settlement of the infiltrators in city centers – does not focus on a particular infiltrator or on

a risk that he may individually present to society. Rather, it is concerned with alleviating the burden placed in a **general way** on city centers and the local residents. In order to realize this purpose, it is not necessary to accommodate a particular infiltrator in an accommodation facility; it is sufficient to accommodate a group of various infiltrators in the facility. Accordingly, President Naor held that the Law could specify a significantly shorter maximum period and still realize its purpose.

President Naor further pointed out that the maximum period for accommodation in an accommodation facility has no counterpart in comparative law. In certain states, it is possible to force an asylum seeker to remain in an accommodation facility, but this is for a period of several months at most. Beyond that in most states the purpose of accommodation facilities is not dispersal of the population, but rather the provision of social services or identification and deportation. Similarly, President Naor addressed the fact that the present Law refers to the population of infiltrators *en masse*, so that the fate of infiltrators who have submitted requests for asylum, and of infiltrators who cannot be deported due to the risk to their liberty or lives in their countries of origin, and of infiltrators who cannot be deported for other reasons – is the same: they are sent to the accommodation facility.

President Naor added that there are several detailed arrangements in the present Law that now meet the criteria

of the limitation clause. Thus, as opposed to Amendment no. 4, the present Law contains grounds for release from the accommodation facility. Similarly, whereas under the previous Law infiltrators in the accommodation facility were required to present themselves three times a day in order to register, now they are required to do so only once daily. President Naor ruled that these changes render the attendance requirement in the accommodation facility proportionate. She referred to the arrangement whereby the Commissioner for Border Control was empowered to order that an infiltrator assigned to an accommodation facility be taken into detention if he violated the rules of accommodation in the facility (sec. 32T of the Law). President Naor determined that the present Law stated clearly that this authority was subject to initial judicial review of the Tribunal for Review of Detention of Infiltrators. President Naor said that this judicial review was mandatory, and constituted an integral part of the process of transferring an infiltrator assigned to accommodation into detention, and validates it. President Naor added that the process before the Tribunal involves procedural guarantees, such as the right to representation by an attorney and permission to bring evidence and to ask the Tribunal to subpoena witnesses.

President Naor ruled that some of the periods of detention specified in the Law are lengthy, but since the Law specifies maximum periods, it is not necessary to "exploit" them fully. Moreover, she ruled that in view of the harshness of

the means of transfer into detention, the offences which allow for recourse to this means must be interpreted narrowly. In addition, the Law can be viewed as an additional "scale" for the purpose of the determining the means of enforcement that should be adopted. At the top of this scale are the other means of enforcement specified in sec. 32S of the Law (warning, reprimand, deprivation of pocket money and more), and at the bottom is the means of transfer into detention. Therefore, it was ruled that even though the maximum periods for holding a person in detention are lengthy, they do not infringe the rights of the infiltrators to an extent greater than is required.

In view of the above, President Naor held that ordering that these detailed arrangements be struck down was not warranted. At the same time, she held that one cannot ignore the fact that a major flaw in the Law regarding the duration of accommodation in the facility remained as it had been under the prior version. As President Naor noted, although the lives of the infiltrators in the facility have improved and although they are given wider freedom of action, a single, solitary provision remains valid. This provision, which has no equivalent in Western states, allows for a person to be forcibly held in an accommodation facility for an extensive period of time. Therefore –

> " ... even though the infiltrator apparently enjoys, in this period, a greater degree of freedom of movement, he is still obliged to transfer the center of his life to

> the accommodation facility. In the course of a significant part of the day he is not his own master. He must spend his nights and part of his days in the company of others, in violation of his constitutional rights. In the hearing before us counsel for the petitioners described the magnitude of the violation and the feeling of debasement caused to a person who is forced to remain, against his will, in an accommodation facility. I accepted these apt words regarding the law that was declared void in the *Eitan* case; they remain as true today, in relation to the Law before us. I will not deny that the present arrangement is of certain benefit to the public interest ... but one cannot accept the limitation of the liberty of those infiltrators who are held in the accommodation facility for such a long period, even if underlying this is a proper purpose."

President Naor concluded by saying that overall – and subject to the interpretation laid out in her opinion – her position is that the present Law passes constitutional muster, except in relation to the maximum limit for holding a person in an accommodation facility: this must be voided. At the level of relief, President Naor proposed to determine that the announcement of voidness of secs. 32D(a) and 32U (which specify the maximum duration of accommodation in an accommodation facility) be deferred for a period of six months. The purpose of this is to allow the legislator sufficient time to amend that which requires amendment. In the course of this period, the Commissioner for Border

Control will be authorized to order an infiltrator to remain in the accommodation facility, provided that he does not do so for a period that exceeds twelve months. Similarly, it was ruled that infiltrators who on the date of this judgment have been in an accommodation facility for twelve months or more will be released immediately and no later than fifteen days after the judgment is handed down. President Naor emphasized that if at the end of the six-month period of deferment, no new provision has been enacted regarding the maximum period of time for remaining in the facility, the authority of the Commissioner for Border Control to issue orders to accommodate infiltrators will lapse.

Summary of the Opinion of Justice U. Vogelman

Justice U. Vogelman concurred with the conclusion of President M. Naor that there were no grounds for declaring sec. 30A of the Law to be void, subject to the interpretation whereby there is an established connection between holding a person in detention and an effective process of deportation. It was found that the present amendment, which sets the limit for the period of detention at three months, significantly mitigates the infringements upon a person's right to liberty and dignity caused by holding him in detention. It was therefore ruled that for the purpose of identification and deportation, there is no constitutional hindrance to detaining irregular immigrants for this length of time which is accepted world-wide.

Justice Vogelman then proceeded to discuss the provisions of Chapter D of the Law, which regulate the establishment of the accommodation facility for infiltrators. He noted that a person's liberty encompasses more than just his or hers physical freedom. It also encompasses his or hers freedom of autonomous choice. He ruled that even with the changes made to Chapter D – that somewhat mitigated the infringement upon the infiltrators' right to liberty and dignity – the arrangement still violates their liberty by limiting their range of options to the point of practically negating their autonomy as individuals. It was further ruled that the arrangement infringes upon the right to dignity.

Justice Vogelman proceeded to examine the purpose of Chapter D of the Law. He found that insofar as the declared purpose of “prevention of settlement" is interpreted as a purpose concerned with temporarily “reducing the burden” on the cities in which the majority of the infiltrators are concentrated, then this is a proper purpose. As for the purpose of “prevention of renewal of the phenomenon of infiltration to Israel”, Justice Vogelman noted that it was clear that this purpose was fundamentally one of deterrence, and absent particularly exceptional circumstances to the contrary – which do not exist in this case – this purpose is not proper. Nonetheless, Justice Vogelman concurred with President Naor that the implementation of the purpose of prevention of settlement in city centers could be accompanied by a deterring effect. With respect to the alleged purpose of “encouragement of voluntary departure”,

Justice Vogelman noted that there was doubt as to whether this “concealed” purpose was indeed absent from the Law, considering the remarks made by authorities' representatives during the legislative processes; considering that the State did not address the concrete arguments raised by the petitioners according to which heavy pressure was applied to them to leave the country; and given the identity of those who were sent to the Holot facility – most of them Sudanese and a minority Eritrean – whose numbers were in inverse proportion to their numbers in the population. These question marks could not determine the existence or absence of this alleged purpose, but it was commented that they were enough to prevent an affirmative finding that the Law was not intended to fulfill this purpose.

In examining the proportionality of the new arrangement specified in Chapter D, Justice Vogelman concentrated on two particular provisions: the first, the authority to issue an order to report to an accommodation facility with respect to an infiltrator, the maximum duration of which was set at 20 months; and the second, the arrangement allowing the Commissioner for Border Control to order that an infiltrator be transferred into detention for a breach of discipline. Regarding the first provision, Justice Vogelman concurred with President Naor that the infringement upon constitutional rights caused by the provisions of the Law which allow a person to be held in an accommodation facility for a maximum period of 20 months was not in direct proportion to the benefit derived from it, and therefore those

provisions are void; he also concurred with the remedy that she proposed.

With regard to the second provision, in Justice Vogelman's opinion, the arrangement that allows the Commissioner for Border Control to transfer an infiltrator into detention for breach of discipline should be declared void. According to Justice Vogelman, the maximum periods, as set in the Law, for which the Commissioner can transfer an infiltrator into detention, which can reach 75, 90 or 120 days, together with the fact that the conditions in detention are similar to those of prison, lead to the conclusion that the arrangement is a criminal punishment, as distinct from a disciplinary punishment. Punishment of the former sort, so it was decided, is a sanction that cannot be ordered by the Commissioner, who is an administrative officer, since it is an authority granted to the judiciary alone. For these reasons Justice Vogelman held that there is no alternative but to declare sec. 32T void, and proposed that the declaration of voidness enter into effect within 6 months from the date of the judgment; during this period, or until an alternative arrangement is enacted, the section will be read in such a way that in relation to each of the grounds specified therein, the Commissioner for Border Control will be authorized to issue an order for the transfer of an infiltrator into detention for a period not exceeding 45 days.

In the final analysis, Justice Vogelman's conclusion was that secs. 30D(a) and 32U of the Law are void, and sec. 32T is

void as well. It was commented that the Knesset can legislate a different legal arrangement that will conform to the constitutional criteria, so that instead of the long periods of detention prescribed in sec. 32T of the Law, shorter periods could be set; and instead of the provision specifying the maximum amount of time to be spent at an accommodation facility, the Knesset could set a different period, one which is significantly shorter, that would withstand constitutional scrutiny. It was further mentioned that the legislature can explore new possibilities. In this context, Justice Vogelman suggested the possibility of setting differing maximum periods for accommodation in an accommodation facility in relation to the "veteran" infiltrators (those who are already in the state at the moment) and groups of "new" infiltrators (those who will enter the state in the future), thus taking into consideration the fact that the infringement upon the rights of the "veteran" infiltrators is greater, since they have already tied their lives to city centers, and to transfer them into an accommodation facility means to sever them from their newly built life in one fell swoop: from work, from housing, from a social milieu and more. For this reason, with regard to the purpose concerned with prevention of settlement in city centers, the benefit that is obtained from the transfer of "new" infiltrators is greater, as they have not yet settled in, and the infringement upon their rights is less severe.

In the margins of his opinion, Justice Vogelman related to the fact that a different application of the Law might also

have affected the review of its proportionality: Had the conditions in the accommodation facility been better; had the "pocket money" allowed the infiltrators a greater degree of autonomy; had the accommodation facility not been located at such a distance from settled areas – these could have affected the margin of proportionality, and consequently, the constitutionality of the provisions.

In conclusion, Justice Vogelman wrote:

> "Indeed, when we are faced with a repeat constitutional examination of the same provision, special caution is required [...] and when we are dealing with a third examination – much more so. But we must not hesitate to declare legislation that is not constitutional void. We are not at liberty to hesitate in such matters. *A fortiori* this is true when the matter before us concerns the core of human rights of a disadvantaged population. This is the *raison d'être* of constitutional review. Even though this is always the last resort, legislation which is not constitutional has but one fate: it will be declared void."

Summary of the Opinion of Y. Amit

Justice Amit once again emphasized that with respect to the purpose of the Law and its proportionality, the two main components of the Law – holding in detention under sec. 30A of Chapter C and the establishment of an

accommodation facility and regulation of its activity under Chapter D – must be considered in a dichotomous fashion.

In the spirit of what he wrote in the *Eitan* case, Justice Amit holds that the State is authorized to adopt an immigration policy that is rigid externally, with respect to the future, and which contemplates future potential infiltrators. The deterrent purpose, which is designed to decrease the phenomenon of infiltration, is not constitutionally flawed *per se*, in that it is intended to protect a slew of substantive interests of the State and of Israeli society, including preservation of the sovereignty of the State, its character, its national identity and its socio-cultural traits, alongside other aspects such as population density, welfare and economic prosperity, internal security and public order. As such, and *a fortiori* in relation to his opinion in the *Eitan* case, Justice Amit holds that the present amendment, which reduced the period of detention to three months, does satisfy the criteria of the limitation clause.

As opposed to this, and in inverse proportion to that forward-looking rigidity, Justice Amit believes that the State ought to have shown compassion and humaneness retrospectively within its borders, i.e., to those who already entered the country years ago. Justice Amit's approach is that Chapter D of the Law should not be declared void due to its purpose, for credit should be given to the statement and the presumption of the State that the purpose of preventing settlement should be understood as "lessening the burden"

on the cities, and in particular, south Tel Aviv; this, in itself, is a proper purpose. However, the tortuous road of "revolving doors", i.e., taking the infiltrators out of the centers of cities, transferring them to the edges of the desert for twenty months, from there back to the city centers, and parallel to this, taking others out of the city centers "to fill their place" in the accommodation facility, gives rise to the suspicion that possibly, behind the declared purpose of prevention of settlement in the city centers hides the purpose of "unsettling" the infiltrators and breaking their spirit, as alleged by the petitioners.

In light of the proportionality of the Law, and in view of the infringement of the right to liberty, Justice Amit concurred in the opinion of President Naor that a period of 20 months fails the third sub-test of proportionality, insofar as it relates to infiltrators who are already in our country. At the same time, with respect to potential future infiltrators, in the view of Justice Amit the provisions of Chapter D of the Law can be applied as written, with prospective application, even for a period of up to 20 months. In addition, Justice Amit concurred in the opinion of Justice Vogelman with respect to sec. 32C of the Law being void.

Summary of the Opinion of Justice S. Joubran

Justice Joubran concurred in the judgment of President Naor. According to Justice Joubran, sec. 30A of the Prevention of Infiltration (Offences and Jurisdictions) Law, 1954

(hereinafter: the Law) should remain in force, subject to the interpretation outlined by the President. Justice Joubran emphasized that the purpose of prevention of settlement of the infiltrators is proper, based on the fact that it is the right of the State to formulate immigration policy that seeks to reduce unwanted demographic changes that are the unavoidable result of illegal immigration and of infiltration in particular.

Regarding the arrangement established in secs. 32D(a) and 32U of the Law, Justice Joubran held that it does not pass the test of proportionality *stricto sensu* in view of the length of the period in which an illegal migrant can be held in an accommodation facility.

With regard to the disagreement between the President and Justice Vogelman concerning the arrangement specified in sec. 32T of the Law, Justice Joubran concurred in the position of the President that the arrangement is proportionate. Justice Joubran is of the opinion that there no analogy should be drawn between a group of infiltrators and a group of soldiers, prison wardens and police officers, as Justice Vogelman sought to do. In his opinion, a distinction must be drawn between the competence of an administrative entity to administer disciplinary penalties with respect to individuals over whom it has authority due to offences those individuals have committed on the one hand, and its competence to punish those subject to its authority for misdeeds committed in their capacity as officials or agents

in the public service on the other. Here Justice Joubran added that there is no cause for concern that the Commissioner for Border Control will choose to "exploit" in full the maximum periods prescribed in the Law. His position is that doubt should not be cast, *a priori*, on the ability of an administrative or judicial entity to exercise its discretion with due regard to the particular case brought before it. In view of all this, in the opinion of Justice Joubran, there was no justification for declaring the arrangement prescribed in sec.32T of the Law void.

Summary of the Opinion of Justice N. Hendel

In the opinion of Justice Hendel, the petition should be denied in its entirety. As in the majority opinion, Justice Hendel holds that the Court should not intervene with respect to the amended period of detention, and that there is no constitutional flaw in sec. 32T of the Law. In a dissenting opinion, Justice Hendel holds that the provision setting a 20-month maximum period of accommodation in the accommodation facility also passes constitutional review. This is for several reasons and on several levels.

First, examination of the maximum period together with the other provisions of Chapter D of the Law, with the changes that the Knesset made following the decision of the High Court of Justice in the *Eitan* case, shows that the accommodation facility is more like an open facility than a closed one. In the past, freedom of movement was limited in

practice, *inter alia*, by the requirement to register three times daily. Now, there is real freedom of movement. An infringement exists, but it is limited and proportionate. The Law grants the Commissioner discretion with respect to issuing an order for accommodation and its duration, and it is his administrative duty to use this discretion. There must be a hearing, and the details concerning the individual infiltrator must be examined. The period of 20 months is an upper ceiling. Scaling back the requirement to register to once each day means that the infiltrator is allowed to remain outside of the facility at all hours of the day – from six in the morning until ten at night. The whole body of the provisions, when set against a backdrop of the proper purpose of preventing settlement, places the maximum period in a different constitutional light.

Secondly, the nature of the "numerical" constitutional amendment – from a period of 20 months to a period of 12 months (temporarily) – is problematic, mainly because the maximum period cannot be quantified with a surgeon's scalpel. It is not simple to differentiate between a year and 14 or 16 months. From this perspective, it is difficult to justify intervention only because a maximum period of 20 months was prescribed. It will be recalled that all the Justices agree with the purpose of the facility – the prevention of settlement in the cities at the initial stage. Neither does a review of comparative law lead to the conclusion that the section should be declared void. First, in some states that were mentioned, the purpose motivating the

holding infiltrators differs, and therefore the comparison is meaningless. Similarly, the balancing formula is not a mathematical calculation, and as long as the gaps are not significant, uniformity is not required. In addition, the State of Israel faces particular difficulties that in themselves are likely to justify a period that is somewhat longer. Even if the tendency in comparative law is to reduce the period of accommodation, this is a statutory tendency and not the result of judicial review. This was the situation in Germany, in the case of an amendment that was passed only recently. The decisions of the European Court of Human Rights show that restrictions for long periods, even longer than 20 months, were upheld.

Thirdly, the distribution of functions between the Court and the Knesset, and the restraint required of the Court in relation to intervention for the third time in the work of the legislature, also tip the scales in the direction of denial of the petition. In the *Eitan* case, emphasis was placed on the whole body of provisions of the Law, whereas in the present petition, the spotlight was shone on a flaw that in the past had not merited such prominence – the accurate quantification of the maximum period of accommodation. The constitutional discourse between the Court and the legislature – a discourse that ought to take place and that is desirable in itself – need not include upgraded demands and the identification of additional difficulties, certainly not in the third round, and particularly those which apparently could have been raised in earlier proceedings.

This is not a matter of ignoring the complex and difficult situation of the infiltrators, and their bitter fate in their countries of origin. At the same time, it must be recalled that there is another group that is harmed by the phenomenon – the residents of the neighborhoods in which concentrations of infiltrators have grown. It is not easy to juxtapose suffering against suffering, group against group, individual against individual. The role of the Court is to resolve disputes, in the arena of reality. On the question at issue, the ramifications for the residents of shortening the period ought to be taken into consideration. We must be sensitive to the two extremes: on the one hand, the precept concerning love of the stranger, and concern for and sensitivity to the refugee against the background of the upheavals that our people have experienced throughout history. On the other hand, there is the maxim whereby "the poor of your city take precedence." The human interest of the residents on the other side must become part of the equation. This, together with the other reasons elucidated above, militates towards the denial of the petition,.

Summary of the Opinion of Justice E. Hayut

Justice E. Hayut concurred in the opinion of the President. In her opinion, Justice Hayut underscores that in the present case, the Court is required for the third time to strike down provisions in the very same Law, something that is not very common; at the same time, and despite the complexity involved, she believes that the dialogue that took place

between the Knesset and the Court following the two previous petitions made a not-insignificant contribution to lessening the infringement of human rights implicated in that Law. This was made possible, according to her, because in the wake of what was said in the judgments in these two petitions, the Knesset was prepared, time after time, to invest effort in amending the Law and in finding suitable constitutional solutions.

With respect to the arrangement concerning the maximum period of accommodation in the accommodation facility, Justice Hayut concurs, as stated, in the conclusion of the President, and she holds that the disproportionate harm to those held in the accommodation facility is exacerbated in view of the extremely slow pace at which the State addresses requests for asylum that are submitted to the Refugee Status Determination Unit and in view of the negligible percentage of applications that have been approved by the State to date (approx. 0.9%). According to Justice Hayut, the conduct of the State in this context with respect to Sudanese and Eritrean nationals traps these nationals in an ongoing, impossible situation of normative opacity with respect to their status, with all the harsh ramifications this has for their rights.

Summary of the Opinion of Justice Z. Zylbertal

Justice Zylbertal concurs with President Naor. Although the location of the accommodation facility was not prescribed in

primary legislation, but rather, in an administrative decision, the location is relevant in the context of the constitutional examination of the provisions of the Law: the Law was enacted against the backdrop of the existence of the Holot accommodation facility, and this fact was part of the reality into which the Law "was born". Similarly, the case law has recognized the connection between the constitutional examination of a law and the mode of its concrete implementation by the executive authority. Accordingly, the concrete application of the provisions of Chapter D of the Law, against the background of the location of the accommodation facility, highlights their unconstitutionality.

Summary of the Opinion of Justice Y. Danziger

Justice Danziger concurred in the opinion of the President and the conclusion at which she arrived with regards to all the issues that arose in the petition.

Summary of the Opinion of Justice H. Melcer

Justice Melcer concurred, in part, with the majority opinion, which was written by President Naor. Justice Melcer agreed with the President that sec. 30A of the Prevention of Infiltration (Offences and Jurisdiction Law), 1954 (hereinafter: the Law), which regulates the possibility of detaining new infiltrators for a period of up to three months, passes the test of constitutionality, and he also supported

the approach of the President and the other Justices who supported her opinion regarding the validity of sec. 32T of the Law.

Justice Melcer also held, like the majority, that Chap. D of the Law and the accommodation arrangement that it prescribes, in its present format, is not constitutional with respect to the length of time that an infiltrator can be held in the accommodation facility. At the same time, Justice Melcer presented an alternative plan, which must be considered, for solving the constitutional difficultly that stems from the said arrangement. This plan, which is drawn from comparative European law, was designed to preserve the appropriate "margin of legislation" and the parameters of judicial review, and together with this, to lead to a greater degree of proportionality in dealing with infiltrators, while carefully guarding the interests of the State and the residents of the neighborhoods in which the infiltrators have settled.

According to Justice Melcer, only to the extent that a preliminary alternative geographical restriction (or *résidence assignation*) would be added to the Law, limiting the areas in which the asylum seekers are permitted to remain, will it be possible to accept a period of accommodation in the accommodation facility specified in Chap. D of the Law at present, and this Law would only be implemented if the infiltrator failed to comply with the geographic restriction or *residence assignation* – and this,

too, is subject to the authorized bodies' exercise of the power to issue an order of accommodation in a reasonable and not unduly burdensome manner.

Justice Melcer also criticized the failure of the representatives of the State to address applications that were submitted by some of the infiltrators for recognition as refugees.

Finally, Justice Melcer expressed his agreement with the order to defer the declaration of voidness; however, he did not think this justified the exclusion from the transitional order of all the individuals held in the accommodation facility, as is the case in the specification proposed by the President; rather, only those of them who had applied for refugee status before an order of accommodation was issued with respect to them, and whose applications had not been processed.