Petition against Law to Prevent Infiltration – Excerpts

On the Incarceration of Sudanese Asylum-Seekers and their Children and the Denial of Residence Permits

1. According to the Respondent, the incarceration of Sudanese asylum-seekers and their children is based upon the Law to Prevent Infiltration, as amended January 2012 (Book of Laws 2332 dated 18 January 2012). Paragraph 30 of this law states that Respondent 2, the Minister of Defense, or a person authorized by this Minister, may issue an order for the deportation of an infiltrator. This deportation order will then serve as a warrant for holding the person in custody. In all but exceptional circumstances, the term of custody based on para. 30a of the Law to Prevent Infiltration shall be no less than three years; release from custody, even after three years, is at the discretion of the head of the border control. Even after three years, however, the border control head has no authority to release a person from custody if deportation is prevented or delayed due to the lack of cooperation by the detainee; or if the release would jeopardize the security of the state, public order, or public health; or if, according to an expert opinion, activity in the detainee's country of residence might endanger the security of the state or its citizens. Sudan, it should be noted, is hostile to Israel and has referred to it more than once as an enemy state. Thus, in the approach of the Respondent, Sudanese nationals and their children will be held in administrative detention for no less than three years and possibly an indefinite period of time. The Respondent believes, it should be noted, that "the threat of infiltrators here is no less serious than the Iranian threat".

2. **The Law to Prevent Infiltration, as amended in January 2012, is unconstitutional. It is inconsistent with the values of the State of Israel; it contravenes the law of nations (*jus gentium*); the purpose of the law is improper; and it disproportionately undermines basic rights. Soon after submission of this petition, the human rights organizations that are party to this petition will apply to the High Court of Justice to strike down the Law to Prevent Infiltration.**

3. The Petitioners reserve the right to raise arguments before this Honorable Court with regard to the unconstitutionality of this law, as required in the proceeding. At this stage, however, the Petitioners will argue that even if the Law to Prevent Infiltration is constitutional, the Respondent does not have the authority to apply it to the Sudanese nationals currently residing in Israel for purposes of incarcerating them.

4. First, the Respondent does not have the authority to order the incarceration of the Sudanese nationals under the Law to Prevent Infiltration. Second, even if the Respondent did have such authority, the use made of this authority is not lawful.

The Respondent does not have the authority to order the incarceration of the Sudanese nationals or their children under the Law to Prevent Infiltration.

5. As noted, para. 30 of the Law to Prevent Infiltration states that Respondent 2, the Minister of Defense, or a person authorized by this Minister, may order the deportation of an infiltrator, and a deportation order serves as a legal warrant for holding this person in custody. This authority was deliberately conferred upon the Minister of Defense, not the Minister of the Interior. During preparation of the amendment to the Law to Prevent Infiltration for the second and third reading in the Knesset's Internal Affairs and Environment Committee, the Knesset Legal Advisor recommended that the amendment be made to the Entry to Israel Law, whose implementation is the responsibility of the Minister of the interior. Ms. Avital Sternberg of the Justice Ministry clarified that the government opposes this, as evident in the Committee's deliberations on 10 August 2011:

> The question of whether to use [amend] the Entry to Israel Law or the Law to Prevent Infiltration was deliberated by the government. Ultimately it made a deliberate decision to use the Law to Prevent Infiltration in order to convey a message of severity to those who are not refugees. We wanted to make use of this law for which the Minister of Defense is responsible.
>
> See http://knesset.gov.il/protocols/data/rtf/pnim/2011-08-10.rtf

The legislators accepted the government's position, and the authority was bestowed upon Respondent 2 or someone authorized by this Minister. On 10 June 2012, Respondent 2 authorized several officials in the Population and Immigration Authority to issue deportation orders to "infiltrators" (Official Gazette 6432 dated 14 June 2012, page 4734). The most senior official in the Population and Immigration Authority to whom this power was delegated was the head of the Enforcement Unit. Although the Population and Immigration Authority is administratively part of the Ministry of the Interior, it is an independent statutory body established by government decision (Decision 3599 on 15 June 2008). Its officials have various realms of authority, some derived by law and others delegated to them by others. Respondent 1 does not hold all these powers, including the legal authority to prevent infiltration. This power is held by Respondent 2, who continues to be responsible for executing this function, even when it is delegated to others (see Daphne Barak-Erez, *Administrative Law*, A 188-189, 2010 (Hebrew), hereinafter "Barak-Erez"). The delegation of authority by the Minister of Defense to officials in the Population and Immigration Authority is not a "vertical delegation" (from one who holds the authority to subordinates), but rather a "horizontal delegation" (from one who holds the authority to administrative units that are not subordinate to him) (See Yitzhak Zamir, *Administrative Authority*, B, 2011, second edition, 871 (Hebrew)). "Horizontal delegation" does not mean circumventing the laws that regulate the transfer of powers from one minister to another, which would require Knesset approval according to para. 31(b) of the Basic Law: The

Government, or the indirect transfer of powers in the Law to Prevent Infiltration from the Minister of Defense to the Minister of the Interior (see HCJ 6741/99 *Yekutieli v. Minister of the Interior*, PD 55 (3) 673, 694 (2001); Barak-Erez, p. 175). The authority delegated by Respondent 2 to officials in the Population and Immigration Authority remains the responsibility of Respondent 2, and does not "float up" to the Respondent in whose ministry these officials work.

Thus Respondent 1 issued an order to arrest the Sudanese nationals currently in Israel without having the authority to so act.

Even if Respondent 1 had the authority, the decision is not lawful

6. However, even if Respondent 1 had the authority to so act (and we argue that he did not), this authority was not exercised lawfully. Although the amendment to the Law to Prevent Infiltration was published in January 2012, it was implemented as of June 2012 and applies to persons who entered Israel from that date onward. Thus, in general, those who entered Israel prior to implementation of the law were not arrested in accordance with that law[1] and even now the decision of the Respondent is to arrest and incarcerate, in accordance with that law, Sudanese, but not Eritrean, nationals. In other words, the Respondent took upon himself implementation of the law – both in terms of the date it takes effect and its content – as a discretionary decision. In which case, as with any discretionary authority, its implementation must have an appropriate purpose and be reasonable, proportionate, made in good faith and integrity, free of extraneous considerations, discrimination, or arbitrariness, and give weight to the fundamental rights of those who may be harmed by the exercise of this authority (see Ra'anan Har Zahav, *Israeli Administrative Law*, 106-109 and the sources cited there). The Respondent's decision does not meet any of these criteria for discretionary decisions.

The purpose is improper (and even if it is proper, it is disproportionate)

[1] Specifically, the provisions for administrative detention in the Prevention of Infiltration Law were used to incarcerate without limit those previously released from custody who were suspected of criminal offenses, but not indicted due to insufficient evidence or lack of public interest. Several asylum seekers, for example, are currently in administrative detention – they had residence permits for years in keeping with para. 2(a)(5) of the Entry to Israel Law, but were unable to find jobs and acquired forged B-1 work permits. Although a decision was made not to indict them, they are being kept in administrative detention for an undefined period in keeping with the Prevention of Infiltration Law on suspicion of having a forged document. On 24 September 2012, this extreme and unlawful practice was anchored as a procedure of the Population and Immigration Authority. This procedure abrogates the most basic rights, such as the right to defend oneself in a court of law against the intent to deprive one's freedom. It exemplifies the unbearable ease of incarceration, and above all the disdain with which the Respondents regard the liberty of "infiltrators".
The procedure: http://www.piba.gov.il/Regulations/10.1.0010.pdf

7. Making one's life unbearable is not an appropriate purpose – a point that is presumably not in debate. Such a purpose is racist, cruel, and unconscionable. Seeking to force refugees to return to their country where their lives and safety would be in jeopardy is an illegitimate purpose. And punishing Sudanese nationals by administrative detention of unlimited duration for previously entering the country illegally is also prohibited.

8. Even if clarification is offered that the purpose of the incarceration is to deter other "infiltrators" from coming to Israel in order to reduce their number, the authorities are still aware, as noted, that it is not necessary to incarcerate those who have been living in Israel for some time in order to achieve this goal.

9. Last month, the Office of the Prime Minister published data showing that the number of those entering Israel across the Israeli-Egyptian border declined sharply since June 2012, and asserted that this is the result of measures taken by the government in the preceding months.

   According to recent reports based on data from the Population and Immigration Authority, the number of entries declined even more in September 2012, when only 122 "infiltrators" entered Israel.

   See, for example, Omri Efraim, "A downward trend: 122 infiltrators In September compared with 199 in August" (YNet 29 September 2012) – http://www.piba.gov.il/Regulations/10.1.0010.pdf

10. If it is the view of the government that the measures taken (irrespective of the issue of their legality) were effective and achieved their goal, what deterrence will be gained by arresting thousands who now reside in Israel? If this were a worthy purpose (and it is not), the Respondent's decision would still not meet the criteria of reasonableness or proportionality in the narrow sense. It would thereby be struck down as disproportionate, as there is no correspondence between the drastic measure employed (incarcerating thousands of people in extreme conditions) and its purpose, while the speculative benefit is low relative to the terrible and certain harm (see HCJ 3648/97 *Stamka v. Minister of the Interior*, PD 53 (2) 728, 779 (1999)).

A discriminatory, arbitrary, and unfair decision

11. The arrest of Sudanese nationals only and not nationals of other countries currently in Israel is discriminatory. Their arrest is arbitrary, unfair, and does not serve the purpose of deportation from Israel.

The violation of basic rights is not lawful

12. That the basic rights of those so arrested and incarcerated are violated should be self-evident. As noted, these individuals are in Israel legally. Many are refugees, and there are children among them. They were arrested upon their entry to Israel, and some were incarcerated for very long periods. They were released by the authorities, received residence permits in Israel, and are fulfilling the conditions of their release. Many have

lived in Israel for many years with these permits. The children are integrated into schools. Now, due to "political hysteria", the Respondent has given an order to abrogate their freedom for an indefinite period, concentrate them in one place, and imprison them in extreme conditions in detention centers in the desert. Cancellation of their residence permits, which had enabled them to support themselves, will lead to a severe humanitarian crisis. Their fundamental rights are being ignored and trampled.

DOCUMENT 2

Introduction

This petition is in the matter of the constitutionality of the provisions of the Law to Prevent Infiltration (Offenses and Jurisdiction) (Amendment 3 and Temporary Order) 2012 (hereinafter "the Law to Prevent Infiltration , Amendment 3" or "the law") and the unlimited administrative detention of the Petitioners by virtue of this law. It is doubtful that any other law on the books in Israel so severely violates the right to liberty through administrative detention.

The question posed by this petition is simple: What price is a democratic society willing to pay for the declared goal of "deterring infiltrators". The answer given by the Respondents to this question is also simple – "any price", which includes, in the words of the Minister of the Interior, actions to make their lives unbearable. Every price, including abrogation of the rule of law with respect to foreigners in the guise of applying the law, and unlimited administrative detention of men, women, and children, some of whom had been victims of harsh torture and who cannot be deported because of the danger in their countries of origin. The response given by the Petitioners is different: In a democratic society, the legislator is constrained by basic constitutional principles. The administrative incarceration of people living in Israel without a permit who cannot be deported because their lives would be in danger is an extreme departure from moral and constitutional norms. The mass imprisonment of asylum seekers while they await consideration of their applications for asylum is likewise an extreme departure from these norms.

Since June 2012, nearly 2,000 men, women, and children have been held in administrative detention under Amendment 3. This amendment was enacted with the declared goal of deterring asylum seekers and migrant workers from entering Israel without a permit, and to that end, it deviates significantly from the constitutional principles of Israeli law and the principles of international law. In accordance with these constitutional and international principles, administrative detention based upon a detention order is carried out for the purpose of enabling deportation, but in the absence of a deportation procedure, a person must not be held in administrative detention for an indefinite term. Amendment 3 states, however, that as a rule, in the absence of significant extenuating circumstances, a person who enters Israel without a permit shall remain in administrative detention for at least 3 years.

The population for whom the provisions of Amendment 3 are most relevant is comprised of nationals from Eritrea and Sudan, two countries about whom the Respondents have a policy of "non-return" or "temporary protection", in recognition of the danger to people deported to either country. Data provided by the Respondents themselves indicate that almost 90% of the "infiltrators" belong to these groups. **Israel recognizes that individuals from these two populations must not be deported at this time, whether or not they are defined as refugees by the Convention Relating to the Status of Refugees.** Despite the request by the Court that the Respondents regulate the rights of these groups, as these issues have festered over many years, the Respondents chose rather to enact laws that allow administrative detention of unlimited duration for those who cannot be deported.

The law makes virtually no distinctions about those kept in custody, thus **Petitioner 1, an Eritrean infant 15 months old**, is being kept in administrative detention indefinitely, as are many other children.

Among the many flaws in this law is the absence of effective legal means to attain release from detention. The grounds for release for those detained for fewer than three years are so narrow and exceptional that in practice no one is released. Note that with respect to all the Petitioners, the Tribunal for Oversight of the Custody of Infiltrators stated that even though deportation is not an option (whether they are recognized as refugees or not), there are no grounds for their release. Indeed, grounds for release do not exist in the Law to Prevent Infiltration, and therefore the only legal recourse for Petitioners who believe they should not be in a detention camp is to challenge the constitutionality of the legal provisions.

In addition to the provision in this law that establishes the term of administrative detention as three years even in the absence of a deportation process, Amendment 3 has additional "constitutional land-mines": Seekers of political asylum will as a rule be held in custody while their asylum applications are being examined; being a minor is not grounds for release unless the minor is unaccompanied by a legal guardian; medical reasons are not necessarily sufficient grounds for release; being a resident of certain countries or regions could lead to detention indefinitely; and the time frame for holding a hearing, a quasi-judicial preliminary review and repeated review, deviate significantly from the constitutional standards set by this Court.

The Purpose of Amendment 3

1. The provisions of Amendment 3 have one basic purpose – to deter future "infiltrators".
2. This becomes clear from the explanatory notes to the Prevention of Infiltration Bill (Offenses and Jurisdiction) (Amendment 3 and Temporary Order) 2011:

> Under the Entry to Israel Law 1952, infiltrators are placed in custody, but released after a relatively short period. That law does not allow for keeping someone in custody for more than 60 days, providing incentive for continued and even intensified infiltration (ibid, p. 594).

> The expectation is that the detention period will halt the massive infiltration or at least minimize it (ibid., p. 597).
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> The purpose of the Entry to Israel Law and its tools for addressing illegal stays in Israel are inappropriate for the purpose and tools needed by the state to prevent and halt the unprecedented scope of infiltration to Israel across its borders – a phenomenon that must be prevented – and the incentives for this infiltration must be eliminated in order to preserve the sovereignty of the state (ibid., p. 600).

3. Deterrence as the purpose of Amendment 3 was also articulated by Ahaz Ben-Ari, Legal Counsel to the Ministry of Defense, who presented this bill to the Internal Affairs and Environment Committee on 25 July 2011:

> "But we believe and assess that if a drastic tool is put in place – I will not say no – so that people understand that the way to Tel Aviv is blocked, and that they can't come from Africa via Egypt, via the Sinai, spend 2-3 weeks in Saharonim detention facility, and then enter the job market in Israel – if they understand this, perhaps it will stop. We are only trying to stop it, we are not trying to punish or anything else (p. 4 of the protocol).

4. Similarly, Avital Sternberg, representative of the Justice Ministry, clarified in a Committee meeting on 10 August 2011:

> In the framework of the proposed bill, we are changing one of the purposes of the custody. This is stated explicitly in the explanatory notes. The expectation is that the detention period will bring infiltration to a halt, or will reduce the number of infiltrators (p. 27 of the protocol).

5. Another purpose of unlimited administrative detention emerges from the words of the Minister of the Interior: to make the lives of the asylum seekers unbearable. This appears in his explanation of the rationale for the incarceration:

> I demanded a budget increase from the Finance Ministry for enlarging the detention facilities so that, until I deport them, I can incarcerate them to make their lives unbearable (Minister of the Interior, YNet, 16 August 2012).
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> Attached is a copy of the article dated 16 August 2012 and marked Ayin/50.
>
> http://www.ynet.co.il/articles/0,7340,L-4269522,00.html

In Summary

The provisions of Amendment 3 do not meet the minimal standards of constitutionality and should therefore be struck down. The provisions of this law render meaningless the right to liberty, negating it in absolute terms; minimally, liberty is undermined by these provisions so that they fail to meet the conditions of the limitation clause. Through this law, asylum

seekers and others who cannot be deported for practical or legal reasons are turned into tools to deter others. To that end, people defined by this law as "infiltrators" are stripped of all legal protections that are familiar from constitutional, administrative, or criminal law. The provisions of this law create legal and physical domains in which the customary principles of the rule of law are suspended.

Amendment 3 creates an entity that is unknown to Israeli, international, or comparative law – administrative detention by virtue of a deportation order whose purpose is not deportation but deterrence. The mantra repeated over and over by representatives of the Respondents is that Israel is in a unique position in comparison with other countries, and therefore it must deviate from the usual standards. The mantra is that Israel is the only western country that shares a border with Africa.

We must certainly not make light of the difficulties with which Israel has had to grapple in light of its geographic location. Nevertheless, its exceptional situation relative to western countries is greatly exaggerated. The United States grapples with undocumented immigrants along thousands of kilometers of border with Mexico, across which arrive immigrants and refugees from Latin America and other regions of the world. After the lifting of travel restrictions upon signature of the Schengen Agreement, European countries are likewise grappling with millions of economic immigrants and refugees – those from Gulf countries, the Middle East, and the Far East, who cross the long land border of the eastern countries in the European Union, and those from Africa, who enter through the sea borders of Greece, Italy, and Spain. Countries like Australia grapple with the many economic immigrants and refugees who arrive by way of the sea.

Israel is not unique in terms of coping with those who enter its territory without a permit. Nevertheless, despite increasingly harsh measures throughout the world, western countries maintain minimal standards when arresting someone who entered their territory without a permit. And when they deviate from these standards, courts do not hesitate to invalidate excessively harmful practices, particularly detention. Despite the enormous difficulties facing many countries in the west, these countries do not adopt a policy of endless years of administrative detention for purposes of deterrence. As we have seen, western countries and the courts remain staunch in the principle that administrative detention by virtue of a deportation order should be exclusively aimed at realizing the deportation, and that if no deportation process exists, there can be no administrative detention. In order to achieve deterrence and halt the phenomenon, they adopt other measures.

In light of all that has been written above, this Honorable Court is requested to issue an order in accordance with the request described at the beginning of this petition.

4 October 2012