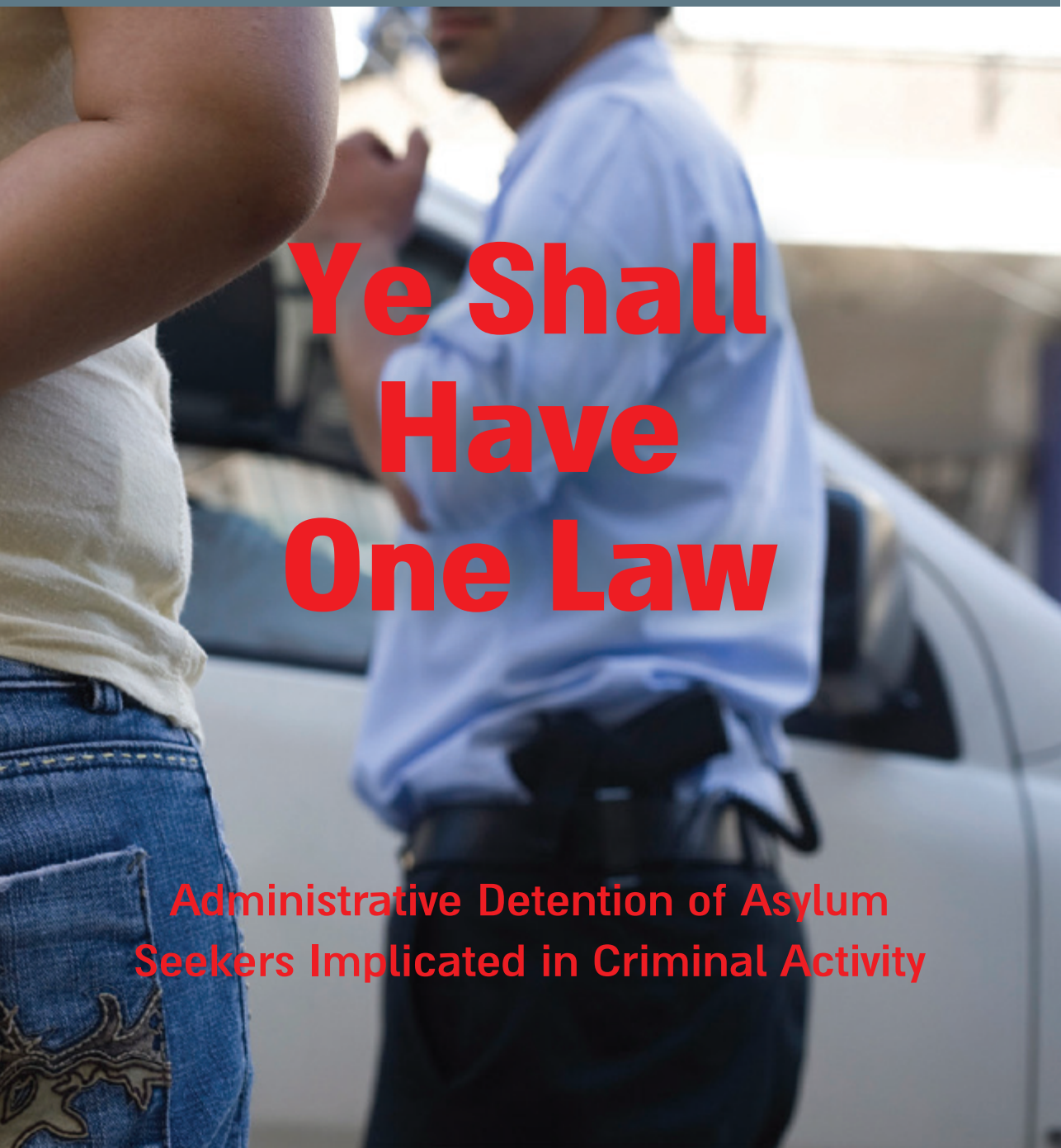
HOTLINE for REFUGEES and MIGRANTS



Ye Shall Have One Law

Administrative Detention of Asylum Seekers Implicated in Criminal Activity

September 2017

"Ye Shall Have One Law"

Administrative Detention of Asylum Seekers Implicated in Criminal Activity

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About the Hotline for Refugees and Migrants

The Hotline for Refugees and Migrants is a nonpartisan, nonprofit organization which aims to protect and promote the human rights of migrant workers and refugees and prevent human trafficking in Israel. We are committed to eradicating the exploitation of migrants, ensuring they receive respectful and fair treatment, and formulating government policy to this end. We seek to lend our voice to those who are not heard in the public sphere and build a just, equal, and democratic Israeli society. The organization acts by providing information, counsel, and legal representation to migrants, educating the Israeli public, and promoting legislation and public policy.

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Contents

Introduction

"You and the alien who resides with you shall have the same law and the same ordinance." Book of Numbers 15:16

For over a decade, Israel's legal system has been coping with the presence of individuals who live in Israel without the prospect of being deported or granted legal status. This state of affairs naturally raises practical and legal challenges pertaining to almost every sphere of these people's lives. The High Court of Justice stated several years ago that the "normative fog" characterizing the lives of these individuals creates "an incredibly heavy uncertainty," adding that clear rules and regulations regarding their rights and legal status in the country need to be instituted[1].

These rules and regulations have yet to be written. Nevertheless, some islands of certainty should have emerged within this fog. For a moment it appeared that criminal law is one such island: When government officials called to toughen the punishment of foreigners in Israel, simply for being foreigners, the Supreme Court clearly proclaimed that this should not be allowed and that "the ethnic origin or group affiliation of a defendant are irrelevant to the circumstances of the criminal offense, and are not an element of the external circumstances" of the case, adding that increased penalties contradict the principle of equality and may lead to the stigmatization of an entire group[2].

However, two parallel trends developed in Israel. On the one hand, judges ruled that Israeli criminal law does not permit tougher punishment against foreign citizens merely for being foreign. The legal system – albeit always partially – guaranteed the principle of equality in criminal law to any person suspected of a crime, regardless of their legal status. On the other hand, authorities established a discriminatory administrative track to indefinitely detain foreigners without trial, at times even contravening court rulings. This report focuses on this administrative track and the way the courts and authorities dealt with cases that

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1 Administrative appeal 8908/11 Asfo vs. The Ministry of Interior (July 17, 2012).

2 Criminal appeal 1127/13 Gebrezgi vs. the State of Israel (January 15, 2014).

questioned its legality. This separate track created a dangerously discriminatory distinction between residents, citizens, foreigners who could be deported and foreigners who could not be deported from Israel. The members of the latter group are in Israel, either lawfully or unlawfully, with a temporary permit based on the power of the Minister of Interior to grant visas and permits under the 1952 Entry to Israel Law.

As opposed to tourists or migrants, these individuals cannot be removed from Israel due to persistent human rights violations in their countries of origin and their claims for asylum in Israel, a situation that is unlikely to change in the foreseeable future. As of the writing of this report, approximately 38,000 people, most of them from Eritrea and Sudan, are in this legal situation[3]. They will be referred to in this report as "asylum seekers".

This report is based on rulings of Detention Review Tribunal, Appeals Tribunal, Administrative Courts and the Supreme Court, alongside the experience gained at the Hotline for Refugees and Migrants (HRM) over the past five years in dealing with the fluctuating policy implemented by Israeli authorities on this matter.

First, this report will chronologically detail the use of administrative tools (i.e. outside the confines of Criminal Law), by Israeli authorities against asylum seekers considered "implicated in criminal activity." Secondly, this report will examine the (partial) regimentation of this practice in administrative rulings, i.e. regulations issued by government officials to create uniform guidelines when dealing with certain issues. Thirdly, the report will present the problems stemming from the use of administrative tools under the 1954 Anti-Infiltration Law and the 1952 Entry to Israel Law, to deal with questions that criminal law should address in its own manner. These problems relate to the issue of authority, i.e, whether under these circumstances the existing law allows for the detention of people in an administrative procedure, as well as the matter of forming and exercising administrative discretion, assuming the authority to detain exists in the first place. Finally, the report will present the current state of affairs and our recommendations on the matter.

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3 According to the report "Data on Foreigners" published by the Publication and Immigration Authority in April 2017, 39,274 "infiltrators" reside in Israel, out of them 28,110 are Eritrean citizens, 7,939 are Sudanese citizens, and 3,225 are citizens of other countries, most of them African countries. The report, in Hebrew, can be viewed here: www.gov.il/he/Departments/publications/reports/foreign_workers_report_q1_2017

Prior to the Written Procedures

Until September 2012, Israeli authorities did not issue any written procedure regarding asylum seekers considered to be "implicated in criminal activity." This absence of written regulations, however, did not prevent the Population and Immigration Authority from "punishing" asylum seekers when there was administrative indications of their involvement in crime. In our context, an administrative indication means that a clerk in the administrative authority believes that a person is involved in crime not because they were tried and convicted, but because there is administrative evidence against them. Administrative evidence is usually significantly less substantial than the minimum burden of proof required in criminal proceedings. Until June 2012, the "punishment" usually entailed a verbal refusal to renew the stay permit of the asylum seeker issued under the Entry to Israel Law. This practice left people without any identifying documents and without a valid stay permit, although authorities did not dispute that they could not be removed from Israel. Without a valid stay permit asylum seekers cannot work and support themselves, receive medical care, withdraw money or perform other transactions that require access to their bank account. They were also exposed to random arrests by the Police and Immigration Authority. The apparent justification for this unwritten policy was the broad authority of the Minister of Interior to decide whether, and under what conditions, to grant stay permits, even in cases when the person is cleared of any charges raised against them[4]. In general, the decision not to grant a stay permit to a foreigner against whom there is administrative evidence of involvement in criminal activity is within the purview of the administrative authority, and oftentimes it would be a reasonable decision. Difficulties arise when a stay permit is not granted to those who cannot be removed from Israel, as granting these permits in the first place was done to reflect the government's policy of non-removal. When the refusal to grant a stay permit does not lead to removal from the country or placement in custody, but leaves a person in a legal limbo, and when it is done according to an unwritten practice not codified by law, regulations or internal instructions, this is clearly an unacceptable and

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4 Administrative appeal 9993/03 Hamdan vs. the Government of Israel, Verdicts 59, 134 (4)

illegal practice. What is more, the Entry to Israel Law explicitly states that all those who are released from custody must be granted a stay permit until their removal[5]. Since this policy was not written down and the courts handled the appeals of HRM on an individual case-by-case basis, there was a significant difficulty to challenge this practice in courts[6].

In June 2012, the Immigration Authority began implementing the Third Amendment to the Anti-Infiltration Law, which passed into law on January 9, 2012. The main premise of the law was incarceration without trial, for a period of three years, of all asylum seekers who entered Israel right before and after June 2012. In addition, the Immigration Authority utilized the law to arrest asylum seekers who entered Israel at earlier dates, as long as they were considered by authorities to be "implicated in criminal activity." Thus, detention under the Anti-Infiltration Law replaced the unwritten policy of refusing to renew stay permits.

The State argued that the law allows it to detain any asylum seeker for a period of three years. At the time, approximately 60,000 people had entered Israel illegally and stayed within its borders, but detention facilities could not hold such a large number of people. The State thus claimed, that due to shortage of beds in detention facilities, the Immigration Authority set priorities for the exercise of its administrative authority. The first priority for detention were those who entered Israel following the implementation of the law, and subsequently those who entered prior to this date will be detained as well, in cases when there is administrative evidence for "implication in criminal activity."

Therefore, the detention of those "implicated in criminal activity" under the Anti-Infiltration Law was carried out, first and foremost, without any administrative regulations to guide the manner of exercising the administrative discretion. Following several appeals that were quickly filed with administrative courts, Israeli authorities realized that they needed to formulate clear regulations on this matter. Thus, the "Procedure on Handling Infiltrators Involved in Criminal Proceedings" was born, to which we shall now turn our attention.

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5 Article 13 (F) (4) of the Entry to Israel Law.

6 The HRM eventually filed a substantive appeal against the refusal to grant stay permits. The court handed down a verdict, after an agreement was reached by the two sides, ordering the Immigration Authority to grant permits to all those released from custody. See verdict from December 3, 2012 and a decision from March 5, 2013 in the administrative petition 6848-08-12 Hotline for Migrant Workers vs. the Director of the Department of Enforcement and Foreigners - the Population and Immigration Authority (published in Nevo). However, in subsequent years after the ruling, the Immigration Authority increasingly did not comply with it.

Procedure on Handling Infiltrators Involved in Criminal Proceedings

On September 24, 2012, the Ministry of Interior published Procedure number 10.1.0010 under the name: "Procedure on Handling Infiltrators Involved in Criminal Proceedings". The Procedure was updated twice: on July 1, 2013 and on April 4, 2014. In its various iterations, the Procedure determined that those who entered Israel illegally could be deprived of their liberty if "implicated in criminal activity"[7].

As mentioned, the first version of the Procedure, from September 2012, relied on the provisions of the Anti-Infiltration Law and determined that Israeli Police and Israeli Prison Services will pass requests to the Immigration Authority to transfer a person to immigration detention due to their involvement in criminal activity. The Procedure encountered harsh criticism, among others by the United Nation's High Commissioner on Refugees (UNHCR), which stated in a letter sent on April 24, 2013 that the UNHCR sees this as a "draconian procedure."

The Implementation of the Procedure

The issuance of the Procedure led to a wave of arrests of asylum seekers who were suspected of "implication in criminal activity." The Police discovered that utilizing this Procedure allowed it to close cases without having to gather the necessary evidence that meets the legal burden of proof, thus conserving resources that would have to be utilized to gather such evidence that could withstand defense lawyers, courts and appeals.

Naturally, this report can not encompass all the cases when the Procedure was utilized, not even all the cases handled by HRM. Therefore, this report will present

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7 The Procedure on Handling Infiltrators Involved in Criminal Proceedings, April 4, 2013 (Hebrew) http://refugee-law.tau.ac.il/wp-content/uploads/2013/01/4--נוהל-הטיפול-במסתננים-המעורבים-בהליך-פלילי.pdf

The Procedure on Handling Infiltrators Involved in Criminal Proceedings, July 1, 2013 (Hebrew) http://www.justice.gov.il/Pubilcations/News/Documents/NohalMistanenim.pdf

Guidline for Coordinating the Handling Infiltrations Involved in Criminal Activity Between the Israeli Police and the Immigration and Population Authority (Hebrew) http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=55112f774

only a handful of cases in which the legal department of HRM represented asylum seekers detained under this Procedure. In most cases, HRM's legal department took on the case only after the Detention Review Tribunal[8] approved the arrest and detention of the asylum seeker, and efforts of the employees and volunteers at HRM's Crisis Intervention Center to bring about the release of these individuals by providing para-legal assistance had failed. In some cases, courts initiated contact with HRM and asked that we represent asylum seekers pro bono in appeals to the District Court on rulings of the Detention Review Tribunal to release asylum seekers. In these cases, judges for the first time encountered situations in which lawyers represented the State, whereas asylum seekers, who received a ruling granting them release, remained under detention and were ineligible for any type of legal representation[9].

The case of each of the teenagers, women and men who were represented by HRM is different. Some of them had arrived from Sudan after surviving torture by the regime due to their ethnicity or political activism. Others fled the Eritrean dictatorship. Each of them stayed in Israel for some time and started, with great effort, to rebuild their life. There is one common denominator in these cases: police closed their cases soon after opening them or after the court made it clear that it will refuse to extend their detention without an indictment. Following the closing of their cases, the Israeli Police and Immigration Authority decided to keep the individuals in detention "by other means" and transfer them to indefinite detention, due to "implication in criminal activity". Several times, courts ordered the release of asylum seekers, and in the hours following the hearing, as the asylum seeker tried to meet the conditions of release set for them, the Police would transfer them to the custody of the Immigration Authority. As a result, most of them spent various periods in detention, approved by the Detention Review Tribunal. These individuals were released only after HRM filed an appeal against the Detention Review Tribunal ruling to the Administrative Court.

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8 This is a legal instance authorized to approve of nullify a decision of the administrative authority to detain a person and hold him in immigration detention. The Detention Review Tribunal also deals with conditions of release from immigration detention.

9 See for example Administrative Petition 49420-02-16 the Population and Immigration Authority vs. Ereges Wldemrim (Decision from February 29, 2016).

The matter of **Jane Doe**[10] involves an Eritrean asylum seeker who filed a complaint for rape. After the police interrogators asked her whether she "climaxed" and "enjoyed the act," she asked to withdraw the complaint, and then was suspected of filing a false complaint. In the matter of **John Doe**[11], a Sudanese asylum seeker who was suspected of holding "military equipment" in an apartment he had rented. The Israeli property owner willingly went to the police station and declared that this equipment was stored in the apartment by him and had no connection to the asylum seeker. The property owner used the equipment for film productions (this particular equipment was used in the movie Beaufort). In the matter of **Hagos**[12], an asylum seeker from Eritrea who was suspected of trespassing after standing at the entrance to a yard in a village and asking the owner of the yard whether he has work for him. In the matter of **Adam**[13], an asylum seeker from Sudan who was suspected of stealing a cellphone from a migrant worker and strongly denied doing so (the cellphone was never located). In the matter of **Baqri**[14], an asylum seeker who was suspected of an assault based on a complaint filed by a fellow Sudanese citizen (who was questioned in Hebrew and claimed that a person named "Baqri" had attacked him). The plaintiff did not bother to take part in the confrontation interview organized by the police for him and the defendant and the police did not bother to track him down; thus the case was closed due to lack of evidence. The matter of **Iman**[15] involved a young asylum seeker whose employment agency withheld his pay, and when he demanded to receive his back pay, the agency filed a complaint against him claiming that he demanded it in a threatening manner while holding "a pen

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10 Administrative Petition 28773-01-13 (the name of the appellant is withheld by the HRM to protect her privacy).

11 Administrative Petition 25569-02-13 John Doe vs. the Minister of Interior (yet to be published).

12 Administrative Petition 45536-02-13 Tesfay Hagos vs. the Minister of Interior (published in Takdin, May 9, 2013.

13 Administrative Petition 58564-12-12 Hussein Adam (prisoner) vs. Ministry of Interior (verdict from January 27, 2013, published in Nevo).

14 Administrative Request to Appeal 4135/13 Baqri Hassan Tabur Dilaf vs. the Minister of Interior (verdict from January 7, 2014).

15 Administrative Petition 36428-04-13 Iman (prisoner) vs. Ministry of Interior (verdict from May 21, 2013, yet to be published).

or a pencil" in his hand. In the matter of **Babi**[16], an asylum seeker and theater actor from Darfur, who was arrested and placed in immigration detention for not having a receipt for a bicycle that was standing next to a barbershop where he was employed. He was also suspected of using a stolen cellphone, but managed to present a receipt proving he had purchased it.

In all the cases described above – and in many others – the asylum seekers were released only after HRM filed petitions or appeals on their behalf. In some cases, their release was only granted after a hearing at the Supreme Court. However, unlike in any other case concerning the deprivation of liberty in Israel, none of these individuals were entitled to legal representation. Thus, for every person that HRM represented pro bono and managed to release from custody, there were many others languishing in immigration detention facilities. This matter underscored the need for a clear, authoritative and broadly applicable legal decision regarding the legality of the Procedure.

The Legality of the Procedure

"Laws that are not equal for all revert to rights and privileges, something contradictory to the very nature of nation-states. The clearer the proof of their inability to treat stateless people as legal persons and the greater the extension of arbitrary rule by police decree, the more difficult it is for states to resist the temptation to deprive all citizens of legal status and rule them with an omnipotent police".

Hannah Arendt, The Origins of Totalitarianism, p. 290 (Harvest, 1979)

The arguments against the Procedure focus on the illegality of bypassing the provisions of Criminal Law by utilizing legislation concerning immigration. One underpinning of this argument is that depriving a person of their liberty through administrative proceedings should be an exception and be grounded – if at all – in a specific appropriate law, which clearly determines the extent of the restrictions on the subjects' liberty. A second underpinning is that such an administrative track assails the principle of equality, as it creates a situation where if two people are suspected of the same crime, the asylum seeker will be

16 Administrative Petition 43567-07-13 Ibrahim Babiker (Babi) vs. the Minister of Interior (verdict from February 19, 2014, yet to be published).

jailed for an undetermined period, while the Israeli citizen will not be detained at all. Another argument is that Criminal Law, with all its inherent checks and balances, is a more reasonable and proportional tool. Criminal Law seeks to safeguard the public's interest while providing a sentencing range that is congruent with the severity of the crime and restrains the power of the executive branch vis-à-vis subjects.

Rulings of the Supreme Court on the Legality of the Procedure

Several proceedings concerning the constitutional and legal problems raised by the Procedure reached the Supreme Court, both in a direct challenge to the Procedure and in indirect challenges as part of proceedings aiming to release an asylum seeker. The Supreme Court did not rule on the substantive question and the arguments raised by HRM. In the matter of **Tesfahone**[17], in which the Association for Civil Rights in Israel and HRM asked to join as Amici Curiae, the majority of judges opined that the argument claiming "that the Procedure is unconstitutional as it creates a separate set of punishments for infiltrators, not according to the rules of Criminal Law… does raise substantial constitutional questions" (paragraph 3 to the ruling of Justice Danziger). However, the court did not rule on the matter assuming that "the substantive hearing in this court when it presides as the High Court of Justice regarding the legality of the Procedure is scheduled for the near future" (ruling of Justice Hendel). Therefore, the Supreme Court acknowledged the possible constitutional shortcomings of these detentions as late as February 2013.

Even six months later, in a hearing held on August 1, 2013 in the matter of **Baqri** before Justices Joubran, Vogelman and Barak-Erez, the Supreme Court decided not to rule on the constitutionality of the Procedure, similarly arguing:

"In the hearing held before us, **the substantive question regarding the legality of the Procedure for Handling Infiltrators Implicated in Criminal Proceedings is up for discussion in this court as part of other appeals. In one of them, two hearings were held and it awaits an update from the State and in other appeals scheduled for a hearing in the near future.** Therefore, at this stage, there is no sense in a parallel discussion in the

17 Administrative Appeal 8642/12 Tesfehone vs. the Ministry of Interior (February 4, 2013, published in Nevo).

proceedings before us, which are at an early stage of a request to appeal" [Emphasis added]

Following this, the Supreme Court handed down several addition decisions without a ruling on the substantive question[18]. Among those decisions, stands out one ruling that came close to providing an authoritative and substantive determination on the matter, when a panel of judges headed by the Deputy Chief Justice Rubinstein ruled that[19]:

"The legislator determined, in article 16(F)(A)(4) in the Law of Entry to Israel, that – in general – people illegally in Israel and facing deportation should be released from detention after 60 days have passed. However, the legislator assumed (in article 13(F)(B)) that there might be cases when – due to the consideration detailed in this article – there might be a need, or even a necessity, to prolong the aforementioned duration. This, of course, is congruent with logic and lived experience. As the possible consequence of this binary result is that due to the lack of ability to deport [a person] presently for one reason or another, authorities and the court will be unable to fulfill their role and obligation to protect public order and safety. This result is unreasonable. Authorities are indeed obligated to ensure human rights, and the court is their protector, and in particular the right to liberty. However, one must remember that alongside a person's right – every person's, including illegal residents – to liberty, there are also substantial public interests, such as public order and safety, which authorities and courts are also obligated to protect. It would not be appropriate if the State or the courts ignored the public's interest and let the illegal residents who pose a threat to public order – and of course, not all of them do – and who currently can not be removed from Israel, to walk around freely. The

18 For additional decisions of the Supreme Court not to deliberate on the substantive question raised by the Procedure, see paragraph 13 in the ruling of Justice Rubinstein in the Administrative Appeal 4496/13 Habtom vs. the Ministry of Interior (November 12, 2013 hitherto: matter of Habtom); Paragraph 11 in the ruling of Justice Rubinstein and the ruling of Justice Barak-Erez in Administrative Appeal 4326/13 Helhelo vs. the Ministry of Interior (verdict issued on November 3, 2013, published on the judiciary's website); High Court of Justice Ruling Babiker vs. the Minister of Interior (July 21, 2013).

19 See the verdict in the matter of Habtom.

State and the courts are responsible for upholding the public's safety just as they are responsible for upholding the rights of the individual. On the other hand, it would not be appropriate to hold an illegal resident, due to the danger he poses to the public, in custody – a euphemism for a type of administrative detention – without bringing him before a criminal trial, until the end of times. Although, as stated, we are not dealing with the substantive constitutional matter, the key idiom, in this particular context as well, is a proportional balance between all the considerations. As part of an effort to strike this balance, all circumstances should be considered, including the severity of the crimes attributed to the resident in custody and the existing evidence to prove them. In addition, the duration of the time the resident has been held in custody, the feasibility in practice of removing the resident from Israel, and of course, the possibility of releasing the resident to an alternative to detention. As we are dealing with matters of proportion and balances, it is impossible to determine ahead of time that due to the lack of a present possibility to deport a person, the decision to place him in custody is unreasonable, just as it is impossible to determine that it is necessarily reasonable".

Despite the reserved language of the ruling in the matter of Habtom, the State interpreted it as a green light to detain asylum seekers under the Procedure. However, in later proceedings in the Supreme Court, judges insisted that the substantive questions pertaining to the administrative detention of asylum seekers are yet to be resolved, while ignoring their statement in the matter of Habtom[20].

The End of the Procedure

On September 16, 2013, while some of the proceedings concerning the Procedure were still ongoing, the Supreme Court ruled on Adam vs. the Knesset[21]. This ruling annulled the Third Amendment to the Anti-Infiltration Law, while stressing the rule that a person must not be placed in immigration detention when there is no concrete removal proceeding (paragraph 2 in the Deputy

20 See the references in footnote 17.

21 High Court of Justice ruling 7146/12 Adam vs. the Knesset (September 16, 2013, published on the judiciary's website).

Chief Justice Naor at the time, paragraphs 5, 19, 32–35 in Justice Vogelman's ruling; and paragraph 2 in the ruling of Justice Hayut). Justice Arbel expounded in paragraphs 71–76 in her ruling about the importance of the right to liberty in Israel law stressing, "it is no coincidence that provisions of Israeli law set many restrictions and limitations on the deprivation of a person's liberty, even when applied to a person already convicted in Criminal Court... The considerable care and caution in Criminal Law before depriving a person of his liberty manifest all the more so in other legal fields. 'One must remember that detention without determination of criminal responsibility needs to occur only in extraordinary and unique cases'" (paragraph 75 in Arbel's ruling on the matter of Adam).

Due to the outcome of the substantive appeal against the Anti-Infiltration Law, it was only natural that merely a week later, on September 23, 2012, the Attorney General announced that he had decided to "suspend for now the implementation of the Procedure until the matter is examined in full." Unfortunately, the suspension of the Procedure did not help those already detained under it when it was suspended, and it did not bring back the years lost to those detained and released before its suspension.

The Rebirth of the Procedure as a "Guidline"

On January 29, 2014, the suspension period of the Procedure was over, and the "Guidline for Handling Infiltrations Involved in Criminal Proceedings" was born. This Guidline is the administrative guideline in force as of the writing of this report.

The implementation of the Guidline against those who entered Israel illegally and were "implicated in criminal proceedings" allows the authorities to revoke stay permits and issue removal and detention orders under the Entry to Israel Law. While the removal order is fictitious (due to the inability to deport asylum seekers), the detention order is wholly tangible. It should be pointed out that while the Guidline was based, supposedly, on provisions found in the Entry to Israel Law, its directives apply only to those who entered illegally, i.e., only to those defined as "infiltrators."

The Guidline relies on article 13(F)(B)(3) of the Entry to Israel Law. This is a creative utilization of a small sub-article that is an exception to an exception. Let us explain. The general rule set forth in the Entry to Israel Law is that a person who has no stay permit in Israel will be removed. In general, until they are removed, they will remain in custody. At the same time, several exemptions from detention were provided: for example when there are humanitarian grounds for release, when a person cooperates with their removal, or if a person remains in custody for more than 60 days. Two exceptions were then made to these exemptions: one when a person is not removed due to their refusal to cooperate with the process of identifying and removing them, and the second exception, the one relevant to our discussion, is when a person poses a threat to public order, health or safety. The entire Guidline is based on this exception, arguing that those implicated in criminal activities endanger public order and safety.

Based on this exception, paragraph A(2) of the Guidline determines that a person can be placed in immigration detention after having been arrested by the Israeli Police, if the following conditions are met:

A. The police intend to complete the investigation in order to file charges, or

the police intend to close the cases only due to lack of evidence, but there is enough clear, unequivocal and convincing administrative evidence pointing to the perpetration of the crime. Despite this, in exceptional cases when no investigation was initiated but there were efforts to exhaust it, it is possible to consider [the police] turning over intelligence information [to the Ministry of Interior].

B. The criminal act may pose a threat to the safety of the State or public order, in accordance with the standards elaborated in Annex A below, or in exceptional circumstances, when the repetition of the crime, the severity of the act and the severity of circumstances indicate the presence of a threat to public order and safety, and with the authorization of officials in the Police's Division of Interrogations and Intelligence.

These are the crimes detailed in Annex A to the Guidline:

1. Security offenses
2. Robbery
3. Violent crimes
4. Carrying a knife without a good reason
5. Sexual offences
6. Breaking and entering offences
7. Aggravated forgery (forgery of ID cards and drivers' licenses)
8. Driving under the influence or driving without a license
9. Drug offences with the exception of drug possession for personal use

In addition, a person can be transferred to immigration detention after "being tried for a criminal offense, being convicted and nearing the term of their incarceration," according to Article 2(A), which tasked the Israeli Prison Services with its implementation.

This created a situation in which a person can be held for an indefinite period even if there is not enough evidence to put them on criminal trial (let alone convict them), without the right to legal representation from the State and without proactive judicial oversight of the judicial branch. This allowed holding in custody those suspected of driving without a license, those who committed even minor violent offences, and those who possessed marijuana for non-personal use, or anyone whose case has "other exceptional circumstances". In addition, the Guidline allows transferring to immigration detention those who completed serving out the sentence they were handed down by the relevant

court. The exception to the release set in article 13(F)(B)(2) in the Entry to Israel Law applies to this detention, and hence there is no authority to order their release from custody and no obligation to do so. This turns the incarceration to an open-ended detention in immigration facilities.

Several proceedings concerning the legality of the Guidline reached the Supreme Court, but similarity to the rulings regarding the Procedure that preceded it, the substantive questions have not been settled[22].

There should have been legal consequences to the duration of time that has passed without a ruling being made on the matter. This is what the court found in the matter of al-Amalah, when it decided to adjudicate the matter although it remained theoretical[23]. Similarly, in the case of **Tzemach**[24], when the court decided to hear a theoretical matter when circumstances indicated that otherwise, the matter could not be deliberated on efficiently. The lack of a

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22 See paragraph 27 and the final section of paragraph 28 in the ruling the Request for Administrative Appeal 298/14 the State of Israel vs. Muhammad Ismail (March 17, 2014); High Court of Justice ruling 8662/15 the Hotline for Refugees and Migrants vs. the Attorney General (January 5, 2016); Request for Administrative Appeal 4334/16 Weldemrim vs. the State of Israel (October 6, 2016).

23 See in the ruling of Justice Zamir: "Due to the position presented by the respondent, there is a concerning possibility that over the past years, people have been deprived of liberty through unlawful administrative detention. More importantly, there is a concerning possibility that in the years to come, people will be deprived of liberty in this unlawful manner. In such a situation, the respondent should desire an authoritative answer from the court, so as not to become entangled in unlawful detention. Or would it have been better if the respondent waits, even for many years as in the case before us, until another appellant comes before the court and raises the same question? And when such an appellant comes before the court, and would possibly be released during deliberations, as happened in the case before us, should the answer be delayed for a later date, maybe years ahead? It is perplexing that the respondent, in this situation, is asking to delete the petition, since it has become theoretical, and keep the current rule, which determines its authority, open for challenges. In any case, the court believes that given the circumstances of the case, although the claimant has been released from custody, and in this regard the petition has become theoretical, the question raised by the petition remains relevant, and due to its importance, the court should provide a response regarding the crux of the matter." High Court of Justice ruling 2320/98 Abdul Fatah Mahmoud al-Amalah vs. the IDF Commander in the Region of Judea and Samaria (July 19, 1998, published on the judiciary>s website).

24 High Court of Justice ruling 6055/95 Tzemach vs. the Minister of Defense, Verdicts 53 (5), 241.

ruling on the matter and the protraction of the "normative fog" covering those who remain in Israel under a non-removal policy should have given additional impetus to decisively rule on the matter of the legality of the Guidline.

The Ruling on the Request for Administrative Appeal 7696/16 and the Current Legal Framework

On January 4, 2017, the Supreme Court handed down a verdict in the Request for Administrative Appeal 7696/16 Tumuzgi Arya vs. the State of Israel. The case involved a citizen of Eritrea who was convicted for sexual offences and sentenced to time in prison. After he completed his sentence, he was transferred to immigration detention under the Guidline. At some point, the Detention Review Tribunal ordered his release, but the District Court ruled in favor of the State's appeal of this decision. The request for administrative appeal filed to the Supreme Court by Adv. Michal Pomerantz who represented the appellant on behalf of the Legal Aid Department at the Ministry of Justice[25] dealt extensively with the legality of the Guidline. HRM filed an amicus curiae request, while stressing the importance of ruling on the legality of the Guidline and its implementation[26].

In her ruling, Justice Barak-Erez (who was joined by Justice Danziger and Justice Zilbertal), stated that "the question of interpreting Article 13(F)(B)(2) of the Entry to Israel Law has been raised in this court several time, but it was not deliberated and ruled on in a direct and authoritative matter", adding that the matter was not even subject to "extensive deliberations"[27]. At the same time, Barak-Erez ruled that in this case too, the substantive questions raised regarding the legality of Guidline require "additional review"[28], while exempting convicted sex offenders from its application[29].

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25 As a rule, the Legal Aid at the Ministry of Justice does not represent asylum seekers in proceedings aiming to secure their release from immigration detention. One of the rare exceptions to this rule is when the State appeals against decision to release a detainee, and the court feels uneasiness dealing with a detainee who is not represented by a lawyer, facing off with the State>s lawyers. This at times leads to their representation by the Legal Aid.

26 Amicus curiae brief from November 3, 2016: http://hotline.org.il/wp-content/uploads/2017/07/DOC190717-19072017210955.pdf

27 Paragraph 31 of the ruling.

28 See for example paragraph 34 of the ruling.

29 See paragraph 40 of the ruling.

In other words, the Guidline can be implemented to indefinitely detain those who drove without a license or sold marijuana and completed his sentence, but not those who carried out serious sex crimes. The court justifies this matter, which appears counter-intuitive, but the existence of the Law to Protect the Public from Sex Offences of 2006, which aims to provide preventative protections against those convicted of sex crimes, and considering that this is a specific and more proportional framework, its use should be preferred over immigration detention. On the other hand, it can of course be argued that Criminal Law, with its inherent checks and balances, is the specific framework instituted to address all the aspects concerning involvement of individuals in criminal acts, and therefore those who drove without a license should not be placed in immigration detention.

This question, while it requires "additional review" by the court, is ruled on daily in prisons and immigration detention facilities, where people continue to be held while the Supreme Court keeps the matter suspended in the air.

It is still difficult to appraise how the State implements the Supreme Court ruling. Data provided by the Immigration Authority in response to a Freedom of Information request filed by HRM through the Clinic for Refugee Rights at the Tel Aviv University showed that between January 2016 and March 2017, 311 detention orders were handed down to those "implicated in criminal acts" (the Authority could not provide the data on how many people are held in immigration detention under the Guidline, and stated that the matter is still under examination)[30]. Based on the work of HRM in detention facilities, we estimate that while the practice of such detentions has been significantly curtailed, it still exists.

30 A Freedom of Information request from November 24, 2016 and the response to it from March 6, 2017: http://hotline.org.il/wp-content/uploads/2017/07/בקשת-חופש-מידע-נוהל-פלילי.pdf
http://hotline.org.il/wp-content/uploads/2017/07/חופש-מידע-נוהל-פלילי-תשובה-חלקית.pdf

Summary

The state of affairs described in this report is complex. On the one hand, the legal and public work of HRM on this matter, along with the work of the Public Defender, the Association for Civil Rights in Israel, legal clinics and private lawyers, has led to a significant reduction in the utilization of this practice, and is likely applied today in a few dozen cases. This is an accomplishment deserving of recognition, especially at a time when it appears harder and harder to defend human rights in Israel and in particular the rights of foreigners.

At the same time, without dismissing the success of curtailing the policy of administrative detention, it is important to highlight that despite the inherent problems in utilizing administrative tools to deprive persons of liberty for prolonged periods, this policy remains in place, and for years, courts have avoided deliberating and ruling on the substantive questions raised in proceedings before the courts. Some of the proceedings that reached the Supreme Court led to the significant reduction in the utilization of the administrative route and in guiding the application of the authority's discretion in a clearer manner. However, the substantive issue of whether asylum seekers can be jailed indefinitely for "implication in criminal acts" continues to require "additional review" as of the writing of this report. Thus, asylum seekers have continued to be detained under a practice whose legality and constitutionality remain uncertain. This is while the unconstitutionality of this practice is clear and should have been made clear by the courts.

Even more than the disturbing questions raised by the aforementioned administrative practice, the fact that the Supreme Court has refused to rule on this substantive question for over four years should alarm people who care about the Rule of Law and basic rights. It is possible to rule that a certain practice is legal and valid. It is possible – and in this context we believe appropriate and imperative – to rule that it is not legal and invalid. But administrative instructions, which have far-reaching constitutional consequences on the lives of a downtrodden social group, ineligible for legal representation, must not remain in force for such a long time without the courts' input. When people are languishing in facilities run by the Israeli Prison Service, the time of "additional

review" should also be allotted sparingly. This is despite – and maybe because of – the political and public challenges inherent in making a decision on this sensitive issue.

Hannah Arendt wrote in "The Origins of Totalitarianism" that even the condition of criminal suspects was better than that of stateless persons, because the former enjoyed an orderly legal proceeding and the possibility to present their narrative and receive a similar or identical treatment as that of other citizens. This is while the latter are exposed to arbitrary arrest due to their lack of legal status. Indeed, the handling of asylum seekers "implicated in criminal activity" in the State of Israel shows us that asylum seekers are at times denied the right to a fair legal proceeding.

Israel tramples on the rights of asylum seekers at almost every turn – starting with the laughable recognition rates of refugees, through the lack of access to medical and welfare services and ending with the detention of asylum seekers in the "Holot" facility. It is possible that in this context, the detention without trial of asylum seekers "implicated in criminal activity" is not the most extreme example of evil. Nevertheless, the willingness of the State to create a route bypassing criminal law and the resounding silence of the Supreme Court regarding the substantive aspects raised by this practice should concern all those who hold dear the rule of law.

Recommendations

1. Criminal law should be applied to all those suspected of committing a crime, regardless of their status in Israel. The State must immediately cease using administrative practices that harm criminal proceedings, and it must allow every person to have their day in court.
2. As long as authorities continue utilizing the Guidline, they must closely supervise its implementation: the number of cases when it is applied, the types of cases, etc. Authorities must collect the relevant data and present it to the public in a transparent manner.
3. If a person is held for over six months under this Guidline, they should be eligible for legal representation provided by the state.
4. Previous stretches of detention under the Guidline or Procedure should be taken into account when determining the length of detention in Holot, to ensure that the cumulative period in detention does not exceed 12 months.
5. Those who have been held in detention under the Guidline or Procedure for over 12 months should not be transferred to detention in Holot.

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