HOTLINE for REFUGEES and MIGRANTS

The Detention Review Tribunals

December 2014

Written By: Adv. Nimrod Avigal

Cover photography: Shiraz Greenbaum /Activestills

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.

75 Nahalat Binyamin, Tel Aviv–Yafo, 65154 Israel
E-mail: info@hotline.org.il
Telephone: 03-5602530
Website: www.hotline.org.il

Published with the generous supported of the PRO ASYL Foundation:

PRO ASYL
DER EINZELFALL ZÄHLT.

Table of Contents

1. Introduction

The Detention Review Tribunals (hereinafter "Tribunal(s)") have been active in Israel for the past 12 years. They operate far from the public eye, within the wards of immigration detention facilities.[1] Throughout the years, the Tribunals have deliberated on the long-term detention of tens of thousands of people, and regularly ruled on the futures of thousands of people held in the detention facilities. Despite the scope and importance of their work, there is almost no reference to them in the legal scholarship, and to date no report or article has been written to comprehensively describe the Tribunals' jurisdiction and methods of operation.[2]

The current report appears at a crucial time. Since June 2012, when the 3rd amendment to the Anti-Infiltration Law was first applied, the Tribunal has had two roles. Firstly, as in the past, it has jurisdiction over individuals against whom a detention order has been issued under the Entry to Israel Law. Secondly, the Tribunal rules in the matters of individuals who did not enter Israel through a border crossing, and who have had a detention order issued against them under the Anti-Infiltration Law. Under the provisions of the Anti-Infiltration Law, by which the Tribunal has acted in its second role, the Tribunal's authority to order the release of people who entered Israel illegally (among them asylum-seekers) is much more limited than under the Entry to Israel Law. Under the Anti-Infiltration Law, the Tribunal has fulfilled that Law's purpose, which in the Minister of Interior's words is "to make the lives of [asylum-

[1] This report employs the terms "detainees", instead of "people held in custody", due to the nature of the detention facilities, which are built and act like a prison, are run by the Israeli Prison Service, and the nature of the decision to imprison them, which is similar to administrative detention and is imposed by an order of the Border Control Officer.

[2] In 2010, Dr. Yuval Livnat's article "The detention and release of the alien who refused to identify [himself]", *HaMishpat* 15 (1), September 2010, was published, in which he described the Tribunal's conduct in a case he was handling (as a lawyer). In his article, Dr. Livnat described the Tribunal as "a legal hybrid creation – between an administrative and judicial authority that acts in quite a wild manner while violating the basic human rights of the people whose matters it handles". This was the only academic article to describe the Tribunal.

seekers] in Israel miserable until I can deport them"[3]. As will be described in this report, there are many instances in which the Tribunal refrained from using its discretion to order release, even in cases where it was authorized by the Law to do so.

On September 16, 2013 the Supreme Court voided the 2012 amendment to the Anti-Infiltration Law, ruling that it was unconstitutional. To bypass the ruling, the government quickly pushed through a new amendment to the Anti-Infiltration Law, similar to the version that had been invalidated by the Court. Its provisions regarding the Tribunals are almost identical to the ones in the invalidated law. An important opportunity now presents itself to amend and improve the directives which regulate the judicial review of the detention of migrants, and to establish an effective and independent system in line with judicial precedents and the recommendations of this report.

The Hotline for Refugees and Migrants (previously Hotline for Migrant Workers, hereinafter: "HRM") operates before the Tribunal on a daily basis by submitting release requests according to the criteria set forth by law. Despite the Tribunal's definition as an instance of judicial review, its conduct is far from that of a judicial body.

The information presented in this report is based on hundreds of Tribunal hearings HRM attended; protocols of the Tribunals published by the Ministry of Justice; appeals and petitions submitted to Courts regarding the Tribunals; and interviews held with detainees and HRM staff members who have appeared before the Tribunals and worked with it.

[3] "And until I can deport them I'll lock them up to make their lives miserable", Interior Minister MK Eli Yishai. From Omri Ephraim "Yishai: Next phase – arresting Eritrean, Sudanese migrants", Ynet, 16.8.2012. Accessible at: http://www.ynetnews.com/articles/0,7340,L-4269540,00.html

2. Establishment of the Tribunals

In the late 1990s, hundreds of undocumented migrants were arrested and held in detention until deportation under the provisions of the Entry to Israel Law. Many of these deportations were postponed for various reasons, such as lack of documents or funding for their flight, or due to procedures initiated against the deportation (e.g. applying for asylum). Many were held in detention for weeks and even months and years. The deportation order had a standard clause setting bail at 30,000 NIS, but the detainees were not even aware that they were entitled to be released on bail – and it was normally brought to their attention only when someone applied to the Ministry of the Interior (MoI) or the Court regarding their detention on their behalf. Many of those lacking legal representation were held in detention for long periods of time without any judicial review of the length of their detention and without being offered an alternative to detention.

In 1998, a petition was filed on behalf of three asylum-seekers from Sierra Leone[4] who had been held in detention for three months. The petitioners requested the establishment of a system to judicially review detention orders under the Entry to Israel Law. At the time of the hearings, in 1999, Attorney Sara Ben Shaul-Weiss, an employee of the Ministry of the Interior, was appointed to the "Review Instance", and detainees were brought before her daily. Even though HRM's reports from that period show that the Ministry of the Interior interfered with the work of Adv. Ben Shaul-Weiss[5], her work in the prisons resulted in the release of individuals on severe humanitarian grounds, and she assisted migrant workers with visas, who found themselves in prison by mistake, to return to work.

A public outcry ensued after an undocumented migrant who had been imprisoned for ten months because his nationality was contested committed suicide in jail. HRM had applied to UNHCR on the detainee's behalf but his matter was unresolved at the time of his suicide.

---

[4] Petition to the High Court of Justice 4963/98 Sasai and others v. Minister of Interior TK-AL 2001 (4)

[5] HRM report: For ye were strangers - Modern Slavery and Human Trafficking in the State of Israel", 2002; HRM report: "Immigration Authority or The Deportation Unit?", May 2003.

"The death of Musa Togu in Nitzan Prison has created many questions and a lot of anger, because in fact there were recurring warnings that, due to different reasons, foreign workers were being held for long months in detention... that could in principle be endless, because no one said when it would end. Someone in that situation, endless detention, can reach a very difficult state. We are talking about very weak people… In every sense, because they are not citizens, because they sometimes do not know where they are coming from and where they are going, and also because they do not have a public base of support to fight for them, and no family and nothing. The conclusion should be that we have to set very clear rules here, and I call on the Ministry of Justice, the Ministry of the Interior and all the bodies that can initiate [change] in this case, to set very clear rules."

(MK Gozansky, during a discussion in the Committee on Foreign Workers on February 2, 2012 following the suicide of Musa Togu).

Following the appeal of asylum-seekers from Sierra Leone,[6] the Entry to Israel Law was amended in 2001. For the first time, the amendment defined "custody" to denote the detention of the undocumented in Israel, and it established the Detention Review Tribunal. The amendment included a provision that a custody order would only be issued after a person had been given the right to be heard, and that the Tribunal would hold judicial review after 14 days of arrest.[7]

The Tribunal replaced the Review Instance. Adv. Ben Shaul-Weiss continued in her position, under the aegis of the new Tribunal, and Advocate Sharon Bavly-Larry was appointed to work beside her. Many operational problems arose when the Tribunal began its work. Hearings were held only by those two judges and without any infrastructure: without a physical building to house the Tribunal, and without secretarial or translation services. Hearings took place using hand gestures, without the detainees being able to express

[6] Decision of the Supreme Court dated January 20, 2001 regarding expenses in the above case 4963/98. The petition was withdrawn in accordance with the petitioners' request, due to the States' commitment to amend the law.

[7] The Entry to Israel Law (9th amendment) 2001.

themselves, and in humiliating conditions such as inside a car in the parking lot beside the prison.[8]

In 2002, a petition against the ninth amendment to the Entry to Israel Law was brought before the High Court of Justice. The petitioners requested that the conditions of release be changed so that in every case where there can be a less harmful alternative to detention that would ensure deportation, such as setting a bail, the person would not be detained, and that judicial review would be held within shorter time periods than the ones set in the law.[9] Noting the Tribunal's flawed procedures and the fact that it operated under the authority of the Ministry of the Interior instead of the Ministry of Justice the petitioners requested that the Tribunal be abolished, and that jurisdiction for judicial review be transferred to the Magistrate's Court. Following the petition, the Tribunal began operating under the Ministry of Justice, resources for rooms and secretarial services were allocated, an order was given to hold a first review of detention as soon as possible and in any event within 4 days, translation services were provided and periodical review was set to be held every 30 days.[10] Following another petition,[11] these changes were codified into law in 2008.[12]

---

[8] The Annual Report of the State Comptroller 55B for 2004 and for the fiscal year of 2003, page 374.

[9] Petition to the High Court of Justice 6535/02 HRM andtThe Association of Civil Rights in Israel vs. the Minister of Interior, TK-AL 2006(1), 118.

[10] The Attorney General's guidelines to the government date 5.1.2005 under the title "Periodical review on people held in custody", state that even though the law states that the Tribunal "may" conduct recurring examination within 30 days, this must be interpreted as "must".

[11] Petition to the High Court of Justice 1461/06 HRM and the Association of Civil Rights in Israel vs. the Minister of Interior Affairs (dated February 15, 2006) The petition was withdrawn upon the petitioners' request after the state made a commitment to amend the law.

[12] The Entry to Israel Law (the 17th amendment) 2008.

During those years, African asylum-seekers who entered Israel from Egpyt were the exception.Entry to Israel. In 2004-2005, those Africans who did enter would wait for the army after crossing the border, which would then take them asylum-seekerinto detention in accordance with the Entry to Israel Law. HRM and the lawyers of the Refugee Rights Program at the Tel Aviv University represented dozens of asylum-seekers before the Tribunal, leading to their release from detention. As a result of those victories, the Israeli government began looking for ways to keep asylum-seekers in detention.

In 2006, the first Sudanese survivors of the demonstrations and killings in the Mustafa Mahmoud Garden in Cairo entered Israel from Egypt. Deportation orders were issued against them under the Anti-Infiltration Law of 1954, a law originally intended to prevent citizens of Arab countries from entering Israel. HRM and the Refugee Rights Program filed a petition against the use of the Anti-Infiltration Law to the Supreme Court. The Court decided that whoever had been detained under that law must be brought in front of the Tribunal within 14 days, and following the first hearing, the Entry to Israel Law would be applied instead.[13] In 2006, Advocate Elad Azar, a judge on the Tribunal, was appointed Special Advisor to the Minister of Defense. He was instructed to meet detained asylum-seekers to recommend whether or not they should be released. But due to a disagreement between the Ministry of Justice and the Ministry of Defense about the funding of his trips, the Special Advisor did not go to Ktziot Prison, where 120 asylum-seekers from Sudan were detained. Asylum-seekers, their numbers growing, were left with no judicial review. Only four months later and after repeated requests made by HRM and the Refugee Rights Program, did the Special Advisor begin his work in Ktziot prison.

Between 2007 and 2012 the number of asylum-seekers entering Israel via its border with Egypt kept rising. In the first year of its operation, 96% of the 5,029 individuals who appeared before the Tribunal were migrant workers with an expired visa, and only 4% (around 200 people) had entered Israel outside of established border checkpoints.[14] By 2013, on the eve of the Supreme Court's ruling on the amended Anti-Infiltration Law, there were

[13] Administrative Petition (t"a) 162/06 the Ministry of Interior Affairs v. Tigian TK-MH 2006 (3), 1724.

[14] Detention Review Tribunal – analysis of the Tribunal's meetings protocols, Ronni Bar-Zuri, The Ministry of Industry and Commerce (2003).

approximately 2,000 detainees in Saharonim, Ktziot and Giv'on prisons who had entered Israel outside of an established border checkpoint. Out of the total, approximately 1,500 were Eritreans and the majority of the remainder Sudanese. In addition, Giv'on prison held a couple of hundred detained migrant workers.

Contrary to migrant workers, who in most cases can be deported to their home country easily and quickly,[15] the deportation of asylum-seekers is illegal under international law, and even though the State of Israel does not state this publically, it has so far refrained from forcibly deporting asylum-seekers to their home countries.

In addition, deporting asylum-seekers is also more difficult in the practical sense, because in many cases the home countries do not have diplomatic relations with Israel. Whereas migrant workers holding an expired visa are usually brought before the Tribunal only once, asylum-seekers imprisoned for months and years are brought before the Tribunal for periodical review increasing the workload of the Tribunals, but no additional positions for judges were created to accommodate for this drastic increase in the workload.

In January 2012, the Knesset passed the 3rd amendment to the Anti-Infiltration Law.[16] Its explicit goal was to deter foreigners from coming to Israel.[17] The Law was applied to all who entered Israel without a permit (unlike migrant workers and those who enter with a tourist's visa, to whom the law does not apply). By virtue of the law, some of the judges of the Tribunal were ordained to act as judges of the "Administrative Review Tribunal for the Detention of Infiltrators". Although they were the same judges, they performed two roles, in two different tribunals and with different powers. Under the Anti-Infiltration Law, the first judicial review

[15] The same report of the Ministry of Trade and Labor stated that the average duration of migrant workers' detention in 2002 was 18 days. Migrant workers who were caught in Israel after their visa has expired are normally directly put in a detention facility at Ben Gurion Airport for their deportation, and most are deported within 72 hours. The source of this information is the Population, Immigration and Border Authority's answer from 17.9.2013 following a request that HRM filed in accordance with the Freedom of Information Law regarding the Ben Gurion Airport facility.

[16] Anti-Infiltration Law (3rd amendment, temporary order) 2012.

[17] Knesset plenum protocol dated January 9, 2012.

was to be held no later than 14 days after initial detention (unlike the Entry to Israel Law, under which the first hearing is to be held within four days of detention); periodical review every 60 days (not 30); and legal possibility to release the asylum-seekers only after three years (not 60 days). Likewise, the Anti-Infiltration Law provided for very limited release grounds in exceptional humanitarian cases. The periodical review held by the Tribunal by the power of the Anti-Infiltration Law often seemed pointless, because the Tribunals had almost no authority to order a release, and indeed almost no one was released.

Along with other organizations and individual detained asylum-seekers, HRM filed a petition with the High Court of Justice, stating that the 3rd amendment to the Anti-Infiltration Law was unconstitutional.[18] In the ensuing year and a half thousands of people were detained for long periods of time under the law, and their detention authorized time and again by the Tribunals.

On September 16, 2013, an expanded panel of nine judges at the High Court of Justice held that the 3rd amendment to the Anti-Infiltration Law was unconstitutional. The decision, running 120 pages, determined that the law, which mandated a minimum three year detention period for people who cannot be deported, disproportionately violated the right to liberty. It was also ordered that the State immediately begin examining cases of the 2,000 people already detained under the invalidated law, considering their release under the Entry to Israel Law.

The nine judges harshly criticized the disproportional violation of human rights committed in the name of the law, of which the most basic was the right to liberty. They criticized the use of detention as a means to deter others from coming to Israel. The Court's decision presented the Tribunal in a bad light. For 15 months, the Tribunal had repeatedly reviewed the cases of those detained under the unconstitutional law, and adhered to its orders while giving its stamp of approval to the continuation of the detention. Most Tribunal judges did not even try to interpret the law's disproportionate provisions in a lenient manner.

[18] Petition to the High Court of Justice 7146/12 Adam v. the Knesset, verdict dated September 16 2013

The High Court of Justice postponed the application of a clause in the Entry to Israel Law, which warrants release from detention after 60 days, for 90 days Entry to Israel. However, it ordered that during this interim period the Ministry of the Interior and the Border Control Officer examine the cases of all the detainees. And yet, as the ruling was given, it was as if the Tribunal had gone on vacation. For two months after the ruling, the Tribunal gave thousands of similar decisions in cases brought before it, ruling that according to its interpretation, the High Court's decision meant that the Tribunal had no authority to examine individual requests for release until the Ministry of the Interior had exhausted the 90 days it was given for examining all the detainees' cases.

Absurdly, although the ruling repeatedly emphasized the violation of the right to liberty, the Court's decision was interpreted by the Tribunal in a way that prevented it from deciding to release anyone for three months. It is impossible to comprehend how a quasi-judicial instance refrains from deciding on the cases before it without understanding the pressures exerted on the Tribunal by the Ministry of the Interior not to release detainees (see chapter 6 below). Despite the number of appeals filed during this time with the Beer Sheva District Court, which time and again ordered the Tribunal to decide on cases, the Tribunal judges held steadfastly to their stance, and refrained from deciding. However, after the HRM filed an appeal on behalf of a torture victim, the Court clearly ruled that the Tribunal must decide on release requests based on humanitarian grounds[19]. Some of the Tribunal judges then began to examine release requests, and a few people were released.

[19] Administrative Petition (B"Sh) 21717-10-13, verdict dated September 29, 2013.

3. The Limits of Authority

The authority of the Detention Review Tribunal is limited to examining the legality of holding a person in custody .The Tribunal does not have the authority to rule on the issue of deportation or status in Israel. The Tribunal's task is defined in Article 13l of the Entry to Israel Law: "The Tribunal will hold judicial review over decisions about the detention of an undocumented person, including release on bail, and in the matter of extending the detention due to a delay in the execution of a deportation order."

The Tribunal is defined in the Law's explanatory notes as "a judicial instance, quasi-supreme, that reviews the legality and reasonableness of the Administrative Authority's decisions. The Tribunal is not authorized to review the decision to deport, only the decision to keep in custody and all that it entails. The authority of judicial review of the decision to deport is therefore left in the hands of the Supreme Court". That is to say, whoever wishes to overturn the decision to deport an individual from Israel is required to file a petition to the Administrative Court (the successor in authority to the Supreme Court).Yet whoever wishes to reverse the decision to keep him in custody must turn to the Detention Review Tribunal. The decision of the Tribunal may be appealed at the Administrative Court. The Law also states that the Tribunal's decision can be appealed against via an administrative appeal against deportation. Case law has determined that when an appeal against deportation is filed, it should include the matter of release from custody, the issues of deportation and release from custody should not be adjudicated in two different procedures.

The restriction of the Tribunal's authority to decide only in the matter of detention, and not in the matter of deportation orders (as a result of which the person is being kept in custody), creates an absurd situation: The Tribunal does not have the power to determine that a detainee should not be held in custody because the decision to deport him is groundless. A detainee who wants to be released from detention on this ground would have to petition the District Court regarding his deportation order. This restriction creates a substantial disadvantage to the foreigners brought in front of the Tribunal, because they are unfamiliar with Israeli law and lack the knowledge and/or means to appeal to the Administrative Court.

The Authority of the Tribunal under the Entry to Israel Law

According to the Entry to Israel Law, the purpose of migration detention is not punitive but preventive. Its purpose is to ensure that the person leaves Israel in accordance with the deportation order.

However, the law's basic assumption is that all persons against whom an order of deportation has been issued must be detained, and the Tribunal's authority to release someone in custody under the Entry to Israel law is restricted to four grounds:[20] If the Tribunal is convinced that a migrant's illegal stay is due to a mistake and not purposeful; if the Tribunal is convinced that the migrant will leave Israel willingly on the deportation date, and there will be no problem to find the migrant if he fails to do so; if the Tribunal is convinced that due to his age or physical condition, continued detention may harm the migrant's health, or other humanitarian reasons that justify the migrant's release on bail; or if the migrant has been in custody for more than 60 days. Even in these cases, the law does not authorize the Tribunal to release a person who showing a lack of cooperation or whose release may risk the State's security, or the safety or health of the public. Furthermore, the Tribunal is authorized to set a future release date, if the State fails to deport the migrant until that date, for migrants cooperating with the efforts to deport them. As detailed in Chapter 9 below, the judges' decisions to release depend on how they interpret the four grounds of release. This interpretation has changed over the years and differs from judge to judge.

The Authority of the Tribunal under the Anti-Infiltration Law

During the 15-month period that the 3rd amendment of the Anti-Infiltration Law was applied (June 2012 to September 2013), the Tribunal's authority to release asylum-seekers was significantly curtailed. Unlike the Entry to Israel Law, the purpose of the detention in the

[20] The Entry to Israel Law, 5712-1952 Article 15-a; The default policy stands in contrast with the guidelines issued by the UN High Commissioner for Refugees, which stipulate that the detention of undocumented individuals should be employed only as a last resort, and that the authorities should convince the court that reviews the detention that it is a necessary, proportional and reasonable measure, and that less detrimental alternatives have been considered with respect to the individual, available at: http://www.refworld.org/docid/503489533b8.html

Anti-Infiltration Law was not only to ensure deportation but also to deter "potential infiltrators". The law's point of departure was that release was possible only in exceptional cases, which were: detention caused a health risk that could not be alleviated in any other way than release from detention; special humanitarian reasons; the confinement of an unaccompanied minor; if the asylum-seekers' release would facilitate his deportation; if the asylum request of the detainee had not been addressed within three months; if a decision had not been made on said application within nine months; or if the asylum-seeker had been held for three years. Even then, a person would not be released if he was not cooperating with his deportation or if his release risked the security of the State, or the public's health or safety. In other words – apart from very rare cases, a person would be held in detention for three years, even if there was no intention to deport him (for example, if it is impossible to deport the migrant to his home country, as will be explained below).

When the Anti-Infiltration Law came into force, only those apprehended at the border were detained under it. Afterwards, however, deportation orders under the Anti-Infiltration Law were also issued against asylum-seekers who had a permit to stay in Israel. These deportation orders were based upon the "Procedure for Infiltrators involved in Criminal Proceedings", as will be described below. Those who had entered Israel lawfully as migrant workers or tourists continued to fall under the provisions of the Entry to Israel Law.

In many cases, the Ministry of the Interior issued deportation orders under the Anti-Infiltration Law for people who were detained under the Entry to Israel Law and had already been granted a release order by the Tribunal. The re-issuing of deportation orders under the Anti-Infiltration Law was intended to ensure the continuation of detention. In this manner, thousands of asylum-seekers, some of whom had been tortured in the Sinai torture camps, were confined in hard conditions in detention facilities, together with their families, because the Tribunal was unable to find a ground for their release. The hearings at the Tribunal often seemed merely a rubber stamp for extending the asylum-seekers' detention.

In addition to the limitations to its authority set by the law, the Tribunal is powerless to confront the external bodies on which it relies: the Ministry of the Interior often exerts pressure on the Tribunal against releasing people, does not attend hearings and ignores the Tribunal's

decisions. Furthermore, the Tribunal sometimes instructs external bodies such as the police and various government offices to provide the Tribunal with assistance, but the law does not give the Tribunal the authority to hand orders to those bodies. As will be described below, this powerlessness is especially tragic when the Tribunal wishes to release children and victims of torture or trafficking, yet the shelters and institutions meant to accommodate them are full.

In one instance, hundreds of asylum-seekers were held in custody, despite the Tribunal's instruction to release them. The Ministry of the Interior demanded that medical examinations for several diseases were to be carried out as a condition for release. Due to a conflict between the Ministry of Health and the Israeli Prison Services over who was responsible for carrying out and funding the examinations, the asylum-seekers were left in detention for long months. Only following a petition to the Supreme Court were the required examinations carried out and the detainees released.[21] Unlike the Supreme Court, the Tribunal lacked the capacity to pressure the government ministries to conduct the examinations.[22]

Since the 3rd amendment to the Anti-Infiltration Law came into force in June 2012, HRM filed over one hundred requests to the Tribunal to release people who fell within the limited criteria set by the law. Out of these requests, as of August 2013 the Tribunal ordered the release of only 27 asylum-seekers, as shown in the following charts. Chapter 9 below describes the legal criteria and how the Tribunal interprets them.

Release requests filed

Tribunal	Raja Marzuq	Marat	Michael	Dvir Peleg	Other	Total

[21] High Court of Justice case 10077/08 Physicians for Human Rights vs. Minister of Health.

[22] As described in the Introduction Chapter, the third amendment of the Anti-Infiltration Law was invalidated by the Supreme Court on 16.9.2013, see verdict of the Supreme Court for petition to the Supreme Court of Justice 7146/12.

Judge		Dorfman	Zilbershmidt			
Requests filed	19	12	27	37	11	106
Total of released	12	5	3	2	1	21

Segmentation of release decisions

Tribunal Judge	Marzouk Raja	Marat Dorfman	Michael Zilbershmidt	Dvir Peleg	Other	Total
Mothers with children in prison	1	1	1	0		3
Victims of torture	1	1	1	0		3
Asylum request not examined within 3 months	2	0	0	0		2
No decision on asylum request within 9 months	8	3	0	4		17
Confined for 3 years	0	0	1	0		1

Other reasons	0	0	0	0	1	1

The table illustrates the stringent manner adopted by the Tribunal judges for interpreting the grounds for release set in the law, even in the few cases in which detainees met them and release was required (for the Tribunal's interpretation of the grounds for release see Chapter 9 below). The difference between the judges is also apparent. Thus, for instance, whereas Judge Dvir Peleg handled the largest number of release requests, only two of the detainees who were brought before him were released (5% of the requests filed). It must be mentioned that most of the detainees brought before the Tribunal are not represented by counsel, do not file requests to be released, and their matter is examined by the Judge himself.

4. Who Appears Before the Tribunal

The Tribunal has jurisdiction over cases of migrants in "custody" (detained under the Entry to Israel Law or the Anti-Infiltration Law). The migrants appear before the Tribunal after the Ministry of the Interior issues a deportation order against them and after they have had a hearing in front of the Border Control Officer, an MOI employee who issues the order for detention after an initial hearing. Thus, the Tribunal is not the first body that decides on detention. Instead, it examines detention orders, and whether there is a ground for release from detention. As will be described below, many of the Tribunal's decisions are not published, and therefore only a partial picture of its decisions can be obtained:

In 2009, 13,034 hearing protocols of 6,504 detainees were published. 45% of the detainees were from Eritrea, 10% from Sudan, 16% from countries in East Asia (India, China, Thailand and the Philippines), and the majority of the rest from other countries in Africa (Ethiopia, Ghana, Guinea, Ivory Coast and Nigeria).

In 2010, 15,506 hearing protocols of 12,681 detainees were published. 60% of the detainees were from Eritrea, 15% from Sudan, 7.5% from countries in East Asia, and the majority of the rest from other African countries.

In 2011, 10,210 hearing protocols of 8,893 detainees were published. 56% of the detainees were from Eritrea, 25% from Sudan, 7.5% from countries in East Asia, and the majority of the rest from other African countries.

We randomly sampled 146 hearings held between 2010 and 2012. Our analysis of those sampled hearings shows: 21% of the detainees were women, 76% were men, and 3% were minors. The duration of their detention until the hearing in question (not including the duration after the hearing): in 2010 an average of a few days, in 2011 – seven months, in 2012 – 3.5 months, in 2013 – nine months. Out of 98 detainees from African countries detained under the Entry to Israel Law (i.e. until June 2012), 55% were released (54 people), three of whom were represented by counsel. In contrast, out of 59 detainees from African countries

detained under the Anti-Infiltration Law, 8% were released (five people), two of whom were represented by counsel (one by HRM).[23]

[23] As will be described below in Chapter 6.2, HRM filed a request to the Ministry of Justice under the Freedom of Information Law in order to receive an extensive break down of the Tribunal's decisions and the detainees brought before it, yet the request was rejected based on the argument that protocols are published. The Tribunal's decisions are published partially on the Ministry of Justice's website. The website and the format in which the protocols are saved (PDF files) do not allow for an extensive break down, unless one is willing to read all individual decisions. Therefore, the examination of 146 protocols can only give a very partial image of the tens of thousands of hearings that were held by the Tribunal at that time. For the protocol index: http://index.justice.gov.il/Units/mishmoret/Pages/muhzakim.aspx.

5. Procedure of the Hearings

The Tribunals are located in three major detention facilities: 'Giv'on' (Ramle), 'Saharonim' (near the border with Egypt) and Matan (a facility for minors near Hadera). As of today, ten judges serve in the Tribunal and hold hearings in the following prisons as well: Ktziot, Ela, Eshel, Dekel, Nitzan (in cases when asylum-seekers are transferred from immigration detention to these prisons for criminals, mostly due to psychological distress, medical issues or for "disturbing the peace").

The Tribunals do not resemble judicial bodies. They are situated in trailers in the open courtyards of detention facilities; inside, two tables are placed adjacent to each other: the judge sits behind one, and the detainee sits behind the other on a plastic chair.

One of the most difficult sights is to watch the daily wait for the Tribunal. A group of detainees is brought to the Tribunal in the morning and locked in a cage outside of room where the Tribunal takes place. The cage, resembling a lion's cage in the zoo, is referred to by the prison guards as '*kluba*' (from the word 'cage' in Hebrew). The cage is exposed to freezing sandstorms in winter and severe heat in summer, has only one bench and a toilet booth. In wintertime, in order to stay warm, the detainees huddle on the bench while waiting for their hearings – sometimes up to three hours.[24] In Ktziot prison, detainees are brought to the hearing in handcuffs, even though they are neither criminal prisoners nor do they pose a danger to others.

Inside the trailer, the judges' workload is extreme. In addition to conducting the hearing, the judges have to transcribe it themselves. In a single day a judge holds between 20 to 100

[24] The description of the waiting cage appears in a report of the Public Defense, "Arrest and Detention Conditions in the Israeli Prison Service and Police's Detention Facilities in the years 2009-2010", August 2011, p. 71. The report describes the response of the Head of the Facility to the Defense's claims, according to which "there is no intention to change the waiting procedure any time soon". And indeed, no change has been made.

hearings.[25] According to the Tribunal procedures that were set by the Ministry of Justice in 2009, a judge should hold no more than 30 hearings a day, yet often the judges must exceed that limit. For example, in 2010, the protocols of 3,805 hearings held by Judge Marat were published, in 2011 – 3,508 hearings and in 2012 – 2,500. Under this workload, each hearing cannot last for more than a few minutes. In total, in 2010, 15,506 protocols of hearings for 12,681 detainees were published, in 2011- 10,278 protocols of hearings for 8,893 detainees, in 2012 – 11,072 protocols.[26]

Criticism of the Tribunal's work dates back to 2002 and appeared, among other places, in a petitioned filed by HRM and other human rights organizations and in reports written on behalf of the State. For example, a report by the Ministry of Industry, Trade and Labor states: "The Tribunal works under a considerable workload: It holds hearings for thousands of detainees annually, works with no secretarial services, without assistance in documenting protocols, without translators, with no waiting hall, office or established place to hold the hearings".[27] Despite the criticism, the working conditions of the Tribunal have not improved substantially.

[25] Ibid, ibid.

[26] The data described is based on the index of Tribunal decisions published on the Ministry of Justice's website (http://index.justice.gov.il/Units/mishmoret/Pages/muhzakim.aspx). As will be described later on, many protocols are not published or are uploaded to the website after a significant delay, and therefore are not included in this data.

[27] Detention Review Tribunal – analysis of the Tribunal's meetings protocols, Ronni Bar-Zuri, The Ministry of Industry and Commerce (2003). Hereinafter: the TMT Report (2003).

6. Judicial Independence of the Tribunal

Is the Tribunal subject to nothing but the law? Defects in the Tribunal's independence and fundamental flaws in its procedures were severely criticized in a May 5, 2011 lecture by Tribunal Judge Dan Liberty, representing his views and those of his fellow judges. The Association for Civil Rights in Israel received a copy of his lecture, and on June 20, 2011 it was appended to a letter to the Committee on Interior and Environmental Protection of the Knesset.

In his lecture, Judge Liberty stressed that Tribunal judges are "required to withstand heavy pressures on a regular basis, to which regular judges are not used." Judge Liberty presented the working environment and conditions of Tribunal judges: hearings in inadequate rooms, with no partition between the litigant and the judge; a lack of typing services, forcing the judge to conduct the hearing, listen to the litigant and their advocates while typing the things said; lack of ability to change the hearing dates, and the need to be personally in touch, face to face or via telephone, with the Ministry of Interior's staff. "In everyone's opinion this is an abnormal and unadvisable situation," said Judge Liberty and added, "Yet it is inevitable due to the work conditions and the resources the State allocates to the Tribunals."

Judge Liberty mentioned the contempt with which authorities regard the Tribunal. "This phenomenon manifests in the authorities' total disregard of the Tribunal's instructions, accompanied by harsh and unbridled statements in the media," he said. In his conclusion, he stressed the importance of ensuring the Tribunal's independence and ability to serve as a judicial review body:

"**The Tribunal in its current form is what is available but not what is desirable. As of today the Tribunal is strongly dependent on the executive branch (the Ministry of Justice) when it comes to appointments and salaries. A judge's tenure is limited in time (up to ten years) with no prospect of promotion. In the ideal situation, the Tribunal should enjoy complete judicial independence and operate in isolation from the executive branch. The fact that the Tribunal is part of the executive branch does not make its job easier and does not give adequate validity to its decisions. It is apparent that whenever there is a disagreement and the Tribunal gives a decision opposed by the executive, the executive at times ignores the Tribunal's decision. In**

this way we have been exposed over the years to deliberate failure to comply with the Tribunal's orders by the Ministry of the Interior, the Israeli Prison Service and sometimes the State's Attorney at the Ministry of Justice. […] I believe that in everyone's interest, the natural and desirable place of the Detention Review Tribunal is under the Judicial Authority [judicial branch]."

The Entry to Israel Law states that "in carrying out its roles, the Tribunal is subject to nothing but the law" (Article 13m). The impairment of the judicial independence of the Tribunal is apparent in its ties to the Ministry of the Interior, and in the failure to comply with its decisions, as described below.

6.1 Appearance of Inappropriate Ties Between the Tribunal and Ministry of the Interior

Ties between the Tribunal and the Ministry of the Interior violate, at least in appearance, the judicial independence of the Tribunal and the principle of separation of powers. Separation of powers mandates a separation between the judicial authority and the administrative one. And yet, the in the case of the Tribunal and theMoI, even the physical proximity between the two bodies is striking: The MoI office in each of the detention facilities is adjacent to the Tribunals. Thus, when a judge needs to hear the position of the MoI on a certain case, he can simply call an MoI representative who is located down the hall. However, since the MoI representatives are usually absent and do not attend hearings before the Tribunal, the Tribunal judge himself often presents the position of the Ministry of the Interior as well as his own.

To give an example: During the appeal proceedings of an individual who had been detained for more than a year and a half due to his contested nationality an improper method of transferring information from the Ministry of the Interior to the judge by way of short written notes was exposed:

The Tribunal has not seen such evidence… Most certainly the appellant and his attorney have had no opportunity to examine such evidence… and refute it. Everything reached the Tribunal in notes sent to the judges, inappropriately, by staff of the Ministry of the Interior or by people at the UN. The judge receives a note bearing his private name… and shortly after that… the judge

quotes the note, word by word (Administrative Petition (center) 25582-05-10 Peter Buma v. The Ministry of Interior Affairs, TK-MH 2010(2), 14951).

6.2 Non-Compliance with Tribunal Decisions

As Judge Liberty warned, the fact that judges are appointed for five-year terms subjects them to the persistent risk of losing their position should they give decisions that the Ministry of the Interior is not comfortable with. In practice, when a Tribunal hands downs a decision contrary to the position of the MoI, the decision may be totally ignored. The most common manifestation of this disregard happens each time the MoI ignors the Tribunal's instruction to present a response to its inquiries.

In the matter of an asylum-seeker from Sudan the Tribunal asked the Ministry of the Interior to clarify the procedures of his deportation or, alternatively, their stance on the option of his release. A response failed to arrive. The Tribunal expressed its objection: "In the last decision in the matter of the detainee before me, the Tribunal instructed the Ministry of the Interior to respond no later than 30 days after the hearing. It is sufficient to mention that even this decision of the Tribunal was not complied with, and in any case no specific response was given by the Ministry of the Interior. **This habit of the Ministry of the Interior has recently become routine. This Tribunal has stated more than once in its decisions that this conduct of the Ministry of the Interior is highly improper and reprehensible. This conduct diminishes the presumption of propriety.** The Tribunal is aware that its decisions are regularly transferred by both the secretary of the Tribunal to the headquarters of the Ministry of the Interior and directly to the representatives of the Ministry of the Interior in the Saharonim Detention Facility. The Tribunal is also aware that all its decisions that require a response are routinely passed by the representatives of the Ministry of the Interior in the detention facility to the Legal Office and the directors at theBorder Control Officer's office. Yet, despite the harsh criticism made by the Tribunal in its decisions, nothing has changed. This is especially reprehensible when dealing with the denial of liberty, justified as it may be. In no case can an administrative authority overlook and ignore the Tribunal's decisions. Should the authority need more time to examine the matter and formulate its position based on the relevant factors, it should properly request an extension from the Tribunal in an appropriate and substantiated manner. Should it wish to

disagree with the Tribunal's decision, it can exercise this right by filing an administrative appeal. A situation when an administrative authority takes the law into its own hands, and this should be emphasized again and again, in a daily, routine and systematic manner, must not be permitted in a society that regards the rule of law as one of its cornerstones. Unfortunately, this conduct of the Ministry of the Interior is inconsistent with the fundamental principle of democracy and the rule of law in a civilized state. It would be fitting if the Ministry of Interior examined itself thoroughly and reformed its ways, and the sooner the better."[28]

Yet, it seems that the Tribunal fears ordering the release of detainees without first hearing the position of the Ministry of the Interior. Therefore, the Tribunal frequently and repeatedly postpones the date set for the MoI to respond before it rules on release.

In the matter of a person who was held in Giv'on for a year because the MoI refused to recognize him as an Eritrean, the Tribunal cautioned that despite its instructions in previous hearings, a decision regarding the person's citizenship had not yet been given by the MoI. The Tribunal continued to approve the detention order over a period of eight months until it finally gave the Ministry of the Interior a final opportunity to respond within two weeks, otherwise, the man was to be released. The MoI did not send a response, yet, instead of releasing the detainee, the Tribunal gave the MoI additional two months to formulate its opinion, until it finally decided to release the detainee. A month later, the Tribunal learned that despite its decision, the MoI did not accept the bail set for the detainee's release, and continued to hold him in prison. Only then, three months after the release decision had been given, did the Tribunal decide to release him without bail.[29]

Following repeated complaints from the HRM and a threat to file a tort suit for false imprisonment, the practice of continued detention for those whom the Tribunal has instructed to release has decreased significantly. Yet, as will be shown below, the Ministry of the Interior has since found a different method to circumvent an order to release a detainee via the Anti-

[28]The Tribunal's decision from 23.3.2009 in the case of a detainee whose prison number is 85612.

[29]The Tribunal's decision from 6.5.2010 and 25.1.2010 regarding the matter of the detainee whose prison number was 88383.

Infiltration Law. Many detainees, whom the Tribunal has instructed to release but whose release had been delayed, and detainees whom the Tribunal had released and were detained in the street, have found themselves confined again by the power of a new decree the Ministry of the Interior had issued under the Anti-Infiltration Law. This decree allowed the State to imprison the asylum-seekers for at least three years.

Since the Tribunal is the only authority that has contact with the detainees on a regular basis and examines their cases, many detainees complain to it about the detention conditions and their health. Consequently, the Tribunal finds itself issuing various decisions on matters that are not under its purview, which is confined to examining the extension of detention. In these matters the Tribunal encounters failure to comply from the relevant authorities, such as the Police and the Israeli Prison Service. Tribunal records reveal the frustration of judges faced with this disregard, and in many of the protocols the instructions to the authorities are accentuated in enlarged fonts, exclamation marks and frames.[30]

For example, the Israeli Prison Services (IPS) ignored a decision issued by Judge Dorfman in January 2011, in which an urgent medical examination for a detainee with breathing problems was ordered. Only after another decision on the matter some months later was the examination conducted. The response of the Ombudsman to a complaint filed on this subject by the Refugee Rights Program of the Tel Aviv University was that the Tribunal's decision had not been passed to the IPS due to "an administrative mishap."[31]

The MoI's disregard for the Tribunal's decisions is most common when they relate to detainees who wait for a ruling on their asylum request or to be identified as citizens of a country eligible for group protection. These individuals may wait for decisions for years. In the absence of a ruling regarding the detainee's country of origin, the Tribunal finds it difficult to decide on his release.

[30] As mentioned at the decision of judge Krispin at the Tribunal in Ktsiot dated September 4th 2012, regarding the matter of the detainee whose prison number was 1427213.

[31] The Ombudsman's response to Dr. Livnat from 5.5.2013.

"Over those two years of custody, the matter of the appellant was brought in front of the Tribunal time after time, 14 times in total. And during those two whole years of custody, the Tribunal instructed the Ministry of the Interior time after time to clarify the appellant's identity and citizenship. Yet during those two whole years the Ministry of the Interior failed to do anything, did not check the question of the appellant's identity and citizenship, and in doing so breached the Tribunal's instructions".[32]

One of the reasons for the Tribunal's weakness is that unlike a regular court it lacks the authority to compel enforcement of its rulings by imposing a fine or an arrest, an authority courts enjoy by the virtue of the ordinance against contempt of court.[33] Therefore, the Tribunal can give instructions to different authorities, yet it in practice lacks the power to compel compliance. The Tribunal has the authority to coerce only the appearance of a witness before it or the filing of evidence by imposing a fine or ordering an arrest, yet it refrains from using this authority, and seemingly has never exercised it, despite the frequent disregard for its decisions.[34]

"It is unimaginable that the Immigration Authority or any other body of the Immigration Authority will refuse to cooperate with the Tribunal, and will not provide it with interrogation reports for whatever reason. Until today, the Tribunal has refrained from exercising its authority according to Article 13 s (c) of the Entry to Israel Law by summoning the head of the "Tamir" unit by articles 9-11 of the Investigative Commissions Law of 1968, yet if the interrogation report of the detainee is not provided within seven days of this decision, the Tribunal will use its authority in this case and in future instances without advance warning, as was given today"[35]

---

[32] Administrative petition 22897-05-10 Suliman (detainee) v. the Ministry of Interior Affairs TK-MH 2010 (2), 16635.

[33] Contempt of Court Ordinance, 1962.

[34] In the past, this authority was due to article 13s(c) of the Entry to Israel Law, which granted the Tribunal authorities of inquiry commissions. The article was cancelled, and article 13t was amended.

[35] See the decision of Magistrate Maymon at a meeting of the Tribunal in Saharonim dated September 10, 2009

Another indication of the Tribunal's lack of independence is the fact that the Attorney General treats it as an administrative body – he has outlined the work procedures of the Tribunal and interpreted the Tribunal's authority regarding periodical hearings according to the Entry to Israel Law.[36] Obviously, the Attorney General does not set the work procedures of courts, nor instruct them how to interpret the law.

The result of the Tribunal's weakness vis-à-vis the Ministry of the Interior is manifested first and foremost in its consistent reticence to order release from detention. The frustration experienced by the HRM when it files repeated release requests on behalf of the same detainee is exemplified in the following case:

S.T., a citizen of Senegal, arrived in Israel in 2009. After his asylum request in Israel was denied and he had been held in custody for over two years, he gave up and expressed his wish to return to his country, despite his fears. Yet due to the lack of diplomatic relations with Senegal, the MoI did not suceed in deporting him. Only in October 2011, after he had been in prison for two-and-a-half years, the Tribunal decided that he should be released because he was not the one responsible for the delay in his removal. After his release, a romantic relationship developed between S.T. and an Israeli citizen. But a year and a half after his release, S.T. was randomly arrested on the street. A report of the Oz unit (immigration police) describes the reason of his arrest as simple: "We noticed an African subject, dreadlocks, dark pants and a green shirt". S.T. was offered to leave to Nigeria, a country he had no relation with. After his refusal, S.T. was returned to detention, this time, under the Anti-Infiltration Law. HRM applied to the Tribunal with a request for release on the grounds of his previous release and because his spouse requested to regularize his status due to the relationship between the two. Judge Zilbershmidt rejected the request and determined that the veracity of the relationship could be determined without S.T.'s presence.The MoI, however, refused to accept the request to regularize his status due to a relationship with an Israeli citizen without his presence. The Tribunal recommended

[36] Attorney General Instruction # 1.2400 "Periodical review on keeping in detention". As we will show, an appeal has recently been filed to the Attorney General on behalf of the Tribunal judges soliciting an opinion regarding their authority to decide that there is initial evidence indicating a detainee is a victim of human trafficking or slavery.

that the MoI review the spouse's request, but the recommendation was ignored. Several months passed, and despite recurrent requests by the HRM, the Judge refused to release him. In a hearing held in March 2013, HRM claimed that S.T. had been held in custody for over three years in total, and therefore his release was possible even according to the Anti-Infiltration Law. Judge Zilbershmidt stated that he would consider the request in a positive light, if a detention alternative was proposed. After S.T.'s partner suggested that S.T. live with her, the Judge requested the opinion of the Ministry of the Interior and only in the end of April 2013 ordered his release. HRM filed 11 motions for S.T during his three years in custody.

On July 8, 2013, HRM filed a request to the Ministry of Justice under the Freedom of Information Law, in which it asked for the number of release decisions given by each Tribunal judge. The reply stated that the requested information had not been collected by the Ministry of Justice, but rather by the Ministry of the Interior or the IPS.[37] This means that the body responsible for the Tribunals does not consider itself responsible for providing information about it, and refers those who seek information to the bodies whose decisions the Tribunal is supposed to review.

[37] The reply of Mr. Elimelech from the Ministry of Justice to HRM from 23.7.2013.

7. Distinguishing the Tribunal from a Court of Law

As will be shown below, the Tribunal's conduct does not conform to that of regular courts and exhibits basic procedural and substantive deficiencies.

7.1 The Proceedings are not Adversarial

Contrary to what is customary in the Israeli legal system, the proceedings in the Tribunal are not conducted by two opposing sides between whom the Judge decides. On one hand, there is no MoI representative is present in most hearings ; on the other hand, the judge sits in front of a detainee who does not speak Hebrew, does not assert his claims and is not familiar with the relevant legislation.[38] Thus, in practice, it is the Judge who puts forward the arguments of the Ministry of the Interior and questions the detainee.

The vast majority of detainees are not represented by counsel. According to the Entry to Israel Law even non-lawyers can represent detainees in the Tribunal, as long as they do not ask for compensation. This enables Hotline and other volunteers to appear before the Tribunal. Most of the few migrants who are represented in the proceedings, are represented by HRM. The fact that most detainees lack funds, are unaware of their rights and unfamiliar with the proceedings in the Tribunal, as well as the aid organizations aiming to protect them prevents them from turning to a lawyer and paying for their representation.[39]

In some instances, the Tribunal referred detainees to the HRM to seek help but because they lacked the necessary funds to buy a telephone card and because they are forbidden to keep

---

[38] The hardships of undocumented individuals in Israel and their weaknesses in front of the authorities was described in the administrative petition *The Association for Civil Rights in Israel v. Minister of the Interior, 530/07* 5.12.07. "It is often a weak person without means and lacking full knowledge, and sometimes foreign in the country, without a knowledge of the language or even basic information".

[39] Even someone who manages to obtain a release decision by hiring a lawyer to represent him in front of the Tribunal will not receive a reimbursement for his/her expenses. This is due to article 13z(a) of the Entry to Israel Law which excludes decisions on reimbursements and lawyer's fees from the Tribunal's authority.

cellular phones in prison, the detainees could not actually contact the HRM. In contrast, someone charged with a criminal offence can ask the Court to appoint a lawyer on his behalf if he lacks financial means and in some cases the Court is obliged to appoint a lawyer even if the accused does not request one. A detainee in immigration detention, on the other hand, is not entitled to an attorney unless he/she is an unaccompanied minor or a victim of human trafficking.

Without representation, many of the individuals brought in front of the Tribunal are completely unaware of the nature of the proceedings, the powers of the Tribunal, or the relevant grounds for release.

In January 2013, this author witnessed a number of hearings in the Tribunal at Ktziot. Four citizens of Guinea were brought in turn before the judge. After a year in prison they begged to return to their families. However, due to the lack of diplomatic relations, the State of Israel faced difficulties in deporting them without valid travelling papers. Due to their extended detention and in the absence of a future deportation date, the judge asked if there was a detention alternative (meaning a place in Israel where they could reside until their deportation, instead of remaining in prison). Not one of them understood the essence of the question. "Why would I have somewhere to live in Israel?" asked one of them via the translator, "I only want to return to Guinea". The Judge sighed and turned to the author: "Do you see?" he said, "This is the problem. They don't understand".

The lack of the representation is highly problematic, as can be seen in the case of A, an Eritrean citizen released by thea Tribunal but detained again after he was suspected of a crime. He was represented by the Public Defender and released from custody due to a lack of evidence. But instead of being released he was then placed in detention under the provisions of the procedure named "infiltrators involved in criminal proceedings". According to that procedure, asylum-seekers suspected of crimes but not charged with any crime and asylum-seekers who were tried and served out their sentence would not be released, but instead detained indefinitely in Saharonim prison. Thus, A. no longer had legal representation in front of the Tribunal. Exceptionally, the Tribunal decided that the use of the "criminal

procedure" was not appropriate in this case and ordered the release of the asylum-seeker. The State filed an appeal against this decision to the District Court, and so A. found himself in a detention cell at the District Court, unrepresented, confronted with an attorney employed by the State. Unable to hold a hearing in this situation, the Court turned to HRM requesting representation for the asylum-seeker. So only after the HRM complied with the Court's unusual request did A. gain legal counsel.

In 2002, a representative of HRM or a lawyer was present in 29% of the Tribunal (a HRM representative was present in 56% of hearings in the matters of detainees from Africa).[40] In the random sample of 184 hearings from 2010-2012, only 26% of the detainees were represented (approximately half by HRM), and in only two cases was an attorney present at the hearings. An MoI representative appeared only for one hearing. This difference in attorneys' presence in the hearings is attributable to the significant increase in the number of foreign detainees, to the differences between migrant workers who often have more money and accessibility to a lawyer than asylum-seekers who were arrested upon entering Israel, and also to the application of the Anti-Infiltration Law, which offered little opportunity for release. Even when detainees did manage to obtain legal counsel, his representative often did not receive invitations to hearings or rulings regarding the client's case. These deficiencies have been repeatedly criticized by courts during appeal proceedings againstTribunal decisions.[41]

In the absence of an MoI representative the Tribunal often voices the position of the Ministry of the Interior itself and even pressures the detainees who appear in front of it to return to their countries, explaining that as long as they do not do so, they will remain imprisoned for a long period of time.

[40] The TMT report (2003). At the time, the report pointed out the lack of legal representation in front of the Tribunal, stressing that the presence of representation had usually led to more positive rulings for the detainees.

[41] Example: Administrative petition (HI) 40411-04-10 Merlita Kee v. The State of Israel, TK-MH, 18072; Administrative petition (HI) 448/07 Unidentified Person v. the Tribunal (TK-NH 2007(3), 2283); Administrative petition (HI) 14556-12-08 Unidentified Person v. the Ministry of Interior, TK-MH 2009(1), 149.

7.2 Translation Deficiencies

Until recent years, the Tribunals functioned without any translation service, and hearings were conducted using basic English supplemented by hand gestures. Today a few translators do work for the Tribunals, yet they lack specialized training, and thus do not always know relevant terms. Additionally, there are no suitable translators for all the languages spoken by the detainees, and Tribunals often ask for the informal assistance of another detainee or a prison guard for translation.[42] In extreme cases, the translator was the representative of the Ministry of the Interior, who represented the party requesting the extension of the custody[43]. The detainee attends the hearing when only the questions he is asked are translated, he does not understand what is said in the hearing and what decision was made about his case, and at the end of the hearing he is given a protocol in Hebrew or English. A report of the Public Defense describes: "Many times [the detainees] do not understand the procedure regarding their case, and what is being said to them. When [Public Defense] official visitors entered one of the cells, each of the detainees handed them the protocol of the last hearing that was held in their case, and asked what was written in it, what their fate would be, and begged for assistance, since no one was helping them".

> Because there was no translator to his language, Mandingo, a Guinean citizen, was detained in Giv'on prison for five months without any hearings held on his matter, despite the Tribunal's duty to conduct a periodical review every month. The appeals of HRM to the Tribunal in his case were dealt with ineptly by the Tribunal. Judge Liberty's decision from March 2012 speaks for itself: "The matter of the detainee is well known to the undersigned, and his file is placed regularly on the Tribunal's desk. The detainee has been appointed a specific translator for the hearing… There is a structural problem in instructing to release the detainee with whom it is difficult to communicate effectively, and should there be a need, to clarify the terms of release. Therefore, I hereby approve the custody order [continued detention].

[42] Administrative petition 8675/11 Tedesa v. the Unit Responsible for Asylum-Seekers TK-AL 2012(2), 2866.

[43] Yuval Albashan, Accessibility of the disadvantaged to the law, Aley Mishpat, vol. 3 (2004).

7.3 Hidden from the Public Eye

The Tribunals operate far from the public eye. The principle of open justice, one of the core principles of the legal system in Israel, about which it has been said: "**Doing justice cannot be done in the shadows; in the same way as a "hidden law" is not a law, a "hidden trial" is not a trial. Justice must not only be made but also be publicly seen."**[44] is thus being violated**.** According to the principle of publicity of court proceedings, court hearings must be open to the public, and decisions shall be published. The procedure in the Tribunals differs: the Tribunals are situated inside the detention facilities, which are closed to the public, and entering them is only permissible to someone who represents a person in front of the Tribunal and has a Power of Attorney for the detainee.[45] According to Amendment 24 of the Entry to Israel Law the Tribunal operates under Article 25 of the Law of Administrative Tribunals since August 2013. Article 25 states that "a Tribunal will rule in the public", unless it orders the hearing to be held behind closed doors. In response to an appeal filed by HRM, the Ministry of Justice stated that the hearings are public, yet entering them is possible only by coordination with the IPS.[46] Thus, despite the change in legislation, nothing has changed. Even someone who receives the said entry permit, a procedure that sometimes takes longer than a week, and manages to go to the detention facilities (Saharonim and Ktziot are far from any nearby town, located near the border with Egypt) would find that the caravans in which the hearings are held do not have enough room for all the attendees.

---

[44] Mahagna vs. the District Court in Haifa, petition to the High Court of Justice 4841/04, article 5 of Judge Tirkel dated June 24, 2004 (not published).

[45] See the State's response dated 21.2.2013 to the High Court petition 6180/12, Hotline for Migrant Workers vs. the Israeli Prison Services, in which the Hotline petitioned against prohibiting its volunteers from entering detention facilities. Following the petition, the procedures were updated to allow people holding a power of attorney document to enter.

[46] The reply of Adv. Rakover from the Ministry of Justice from 18.8.2013 to the letter from Adv. Avigael from HRM from 29.7.2013.

In addition, a large number of the protocols and decisions are not published on the Tribunal's website, and those that do appear are sometimes posted after considerable delay.[47] In addition, decisions of the Tribunal are published without the name of the detainee.[48] This is done probably to protect the privacy of detainees, some of whom are asylum-seekers and afraid of retribution in their home countries, but the result is that the protocols are anonymous, with people identified only by their prison number.

Due to the lack of typing services, the judge types the protocol himself, under the heavy load and pressure of the hearings. The protocols are short and each seems a replication of the last. Someone reading protocols may be surprised to find that time after time all the detainee says is "I arrived in Israel in order to live and work here", or "I have nothing new to say since the last hearing". These supposed statements probably reflect everything the judge asked the detainees, and their yes/no answer. Other protocols reveal embarrassing mistakes, such as an Eritrean citizen, who according to the protocol said "I am willing to return to Sudan"[49] or a Guinean citizen whose protocol states that his hearing was conducted in Tigrinya[50]. Since the basic assumption is that the person will remain detained, the decisions approving an extension of detention are mostly short and laconic, and the exceptional decisions instructing to release people explain the grounds for release.

The case of Mr. Cadjie, a Georgian citizen held in Giv'on prison, provides a fine example of the practice of copy-pasting protocol. When his attorney, Adv. Elam, requested to receive his file from the Tribunal, he found a protocol that included things his client supposedly said, yet he inquired and found out that the hearing had never taken place. In response to an article published in the *Haaretz* newspaper, the spokesperson of the Ministry of Justice said that the draft of the protocol, including the statement of the detainee and the decision, was ready ahead

[47] In a response to HRM's argument regarding the publishing of protocols, the office in charge of Detention Review Tribunals stated on 4.3.12 that the Tribunal's decisions are published up to five months after the hearing. HRM complained again about the many protocols that are not published even after more than five months have passed, and that some Tribunal judges rarely publish their protocols.

[48] Due to this reason, the references to protocols that are mentioned in this report, which are found on the Tribunal's website, are noted without the name of the detainee.

[49] Judge Dvir Peleg's protocol from 3.1.13 regarding the detainee whose prison number was 1443227.

[50] Judge Marzouk's protocol from 1.1.13 regarding the detainee whose prison number was 137649.

of the Tribunal's hearing.[51] The method of duplicating protocols was criticized in appeals against the Tribunal's decision:

"The protocols are in fact written in such a way that it is impossible to know if a hearing is indeed held or a decision is made, since the title of the protocol from the hearing is in fact a duplicate of a previous hearing, with details from the specific hearing added at the end of the document. When the protocols are edited this way, it is unclear whether a hearing was held at all, and I doubt that such a hearing indeed took place. Apparently, the Tribunal takes a document it has in its computers and adds a new decision to the protocol that lists decisions from previous dates."[52]

And in a different case: "There is not even one word that the foreign worker uttered at the Tribunal's hearing. It is impossible to deduce from the hearing if there was even any conversation with the worker, and if so, in which language and whether a translator was present… The hearing is a preposterous undertaking that does not meet the minimal standards of principles of natural justice. This is because the version of the appellants was not heard and the documentation is a "serial product" of the hearing document that borders on abuse of the power of the job."[53]

[51] "The Tribunal's decision regarding the detainee appeared in his personal file – before the hearing had taken place", Dana Weiler-Folk, "Haaretz", 8.2.11.

[52] Administrative petition 17361-12-08 (HI) Unidentified Person v. the Ministry of Interior Affairs (verdict dated January 1, 2009).

[53] See also Administrative Petition (TA) 2031/04 Sharin v. The State of Israel, TK-MH 2004(3), 7129.

7.4 Lack of evidence

According to the law, the Tribunal is not bound by the rules of evidence. In appeal instances the Court decided that the Tribunal was allowed to rely on "any evidence a reasonable person would rely on."[54] For the detainee, who is normally unrepresented, lacks the means to assert his claims in an affidavit and has no way of obtaining evidence outside of prison in Israel or in the country of origin, this flexibility has many advantages when the judges recognize its importance.

In an article published in the daily *Haaretz*, Tribunal Judge Azar is described as someone who "consistently mistrusts the documents and certificates shown by African detainees. In one of the decisions, in a hearing in a detention facility for migrant workers in Hadera, he stated: 'It is impossible to rely on birth or identity certificates that Africans present, because it has already been proved that one should not rely on them as actual evidence. I do not think there is a need to prove for every case in which the Tribunal is presented with a birth certificate that it is fake, when a-priori there is considerable doubt over the authenticity of these documents.'"[55]

It seems appropriate to demand a higher standard of evidence from the other side, the Ministry of the Interior, which has access to information sources and to a lawyer. Yet, in many cases the Tribunal is willing to accept the claims of the MoI when they are unsubstantiated, or even proved to be mistaken, whereas it rejects similar claims made by the detainees. In cases involving asylum-seekers, for example, the Tribunal tends to be satisfied with a general statement by the MoI that the asylum request has been examined, without asking the Ministry to elaborate on what happened during the interview, what information had been examined, etc.

In 2011, Tribunal Judge Azar found out that the Ministry of the Interior had issued travel documents for three foreigners to Ethiopia, although they were not Ethiopians. Their

[54] Administrative Petition (TA) 248/06 Odway v. the Ministry of Interior Affairs, TK-MH 2006(4), 4283.

[55] "The detainee understands that taking one's clothes off in the courtyard is forbidden" Nurit Wurgraft, "Ha'aretz February 18, 2007.

deportation was prevented at the last minute thanks to the judge's alertness. An article published in *Haaretz* on this case exposed that the Ministry of the Interior presents false evidence to the Tribunal, based on the trust it enjoys.[56]

7.5 Contrasts between Tribunal and Court Judges

The Tribunal judges are not like other judges in Israel.[57] They are not appointed by the Judicial Appointing Committee and their appointment lasts for only five years at a time, unlike regular judges who stay in office until their resignation. Their salary is different from that of judges;[58] they are not bound to the Law of the Ombudsman of the Israeli Judiciary. Even though they are subject to disciplinary jurisdiction of the Civil Service Commission, detainees appearing before the Tribunal cannot file complaints against the conduct of the judges. In the past few years there have been proposals to amend the Law of the Ombudsman of the Israeli Judiciary, so that it would apply on Tribunal judges as well,[59] but there no amendment has been passed to date. On the other hand, Tribunal judges are immune from negligence suits regarding their decisions, as they are considered a judicial body for this purpose.[60]

In 2009, HRM filed a complaint regarding Judge Yossi Maimon to the Civil Service Commission. The complained addressed an incident in *Ktziot* Prison in which the judge, without authority, shouted an order from his room to the meeting area where detainees were held. As a consequence, a detainee was prevented from meeting with HRM attorneys

[56] "In the light of protocols that have reached *Haaretz* it seems that the [Ethiopian] Consulate approves requests to determine that a person is a citizen of Ethiopia almost automatically, and allows his deportation from Israel", Talila Nesher, Haaretz, 24.10.2011.

[57] This matter has also been described in a report by the Association for Civil Rights in Israel: "Human Rights in Israel – Current Situation 2011".

[58] Yuval Livnat, The arresting and the releasing of the stranger who refused to identify himself, Hamishpat 15 (1), September 2010.

[59] Proposed amendment to the Law of the Ombudsman, 2009.

[60] Administrative Claim (TA) 57757-08 Kaita v. the State of Israel, TK-ShL 2011(3), 64211

and pressured to sign a request for a travel document that would enable his deportation from Israel. The Judge remained adamant. In 2010, HRM , the Association for Civil Rights in Israel and the Refugee Rights Program filed a complaint against the same judge to the Ministry of Justice, relying on an investigative report published in *Haaretz*. According to this report, the judge had brokered the employment of asylum-seekers to his brother after ordering their release. The report also described violation of the detainees' rights, a delay of release decisions and inappropriate behavior. The organizations therefore requested that the judge be suspended from his position, and that his appointment not be renewed after his tenure ended. A few months later, the Ministry of Justice laconically replied, without explaining its decision, that the judge had been reprimanded, and that it had decided not to extend his tenure.

Perhaps the most important aspect is the detainees' experience when they are brought before the Tribunal. Without representation or understating of Israeli Law, most do not even know what the purpose of the Tribunal is, and do not understand that it is authorized only to release from custody and that the judge is not empowered to cancel the deportation order. They are brought in front of a judge time after time without any explanation as to the purpose of the proceedings, and almost all hearings end with the same decision: "I approve the custody order".

> **"The only thing the judge in prison said to me is that I have to return to Chad if I don't want to die in prison. He said the same thing to me every time. I do not think he deserves to be called a "judge". A judge is supposed to give a decision based on the specific circumstances of the person in front of him. This judge had a predetermined opinion. He kept on repeating that I must return or I would die in prison."** (H. was in Saharonim Prison for two years).

> **"I do not understand this judge. He has seen me for a whole year and every time he asks me exactly the same two questions: How do I feel and if I am willing to return. I answered him: Do you think if I wanted to return I would not have done so a year ago?"** (M. has been in Saharonim Prison for a year, and his matter was periodically reviewed by Judge Peleg).

The detainee's statement:
My health is good. I do not wish to return to Sudan.

(Random hearing protocol of Judge Dvir Peleg).

In the only academic article published on the Detention Review Tribunal to date, Dr. Livnat describes the distress of individuals whose matters are discussed by the Tribunals: "They are all foreigners. In the vast majority of the cases they lack Israeli family members or acquaintances. They do not speak Hebrew (…) and are not familiar with the Israeli Law – not even in general. Some have come from dictatorships, in which the idea of protected human rights is barely even known."[61]

As shown below, the Tribunal's limitations as a judicial instance is also rooted in its circumscribed powers, which have implications on the authorities' attitude towards its decisions as non-binding recommendations.

[61] See footnote 58

8. Appealing Tribunal Decisions in Court

> "The right to appeal, similar to the right of access to courts, carries substantial weight, and as the writer H. Ben Nun wrote: "The right to appeal is rooted, among other things, in the view that a human decision might be wrong, and as such a judicial decision may be wrong as well. The appeal is a type of security net and control system that reduces – though does not prevent - injury to parties. It is indisputable that the right to appeal of the first instance is crucial, as opposed to the right to successive appeals. . For the first it is a substantive right. It may even be one worthy of a constitutional status."[62]

A person's right to appeal a judicial decision is crucial for maintaining proper jurisdiction and the extent of the Tribunal's discretion, and for ensuring the protection of that person's rights in cases when the original instance wronged him. Yet in practice, only few of those brought before the Tribunal exercise their right to appeal its decisions. During the 12 years in which the Tribunal has been active, during which it issued tens of thousands of decisions, only 250 appeals have been filed.[63] This means that the majority of the detainees have not seen a judge or the insides of a court (rather than an administrative judge at the tribunal). In contrast, people who are placed under administrative detention due to a decision of the Minister of Defense or the IDF Chief of Staff because they may endanger the State's security are automatically brought in front of a District Court judge near their place of detention, and undergo periodical review.

As mentioned, most of those who appear before the Tribunal are unrepresented and unfamiliar with the legal system in Israel. Even the sentence written in Hebrew in every decision of the Tribunal stating that there is a right to appeal the decision, is incomprehensible to most. They lack the financial resources to appeal, and as long as they are in detention they lack access to the courts.

---

[62] Administrative appeal 10044/09 Adv. Boteach v. Adv. Webe.1470 ,(2)2010

[63] This has been found by a search of administrative appeals in which the Tribunal is mentioned, conducted on the "Nevo" website. Yet, as formerly described, many times release is requested in an administrative petition against deportation, and not in an appeal against the Tribunal's decision.

Another reason for the low number of appeals against the Tribunal's decisions is the fear that once detainees have appealed, authorities will rush to deport them from Israel.[64] As mentioned above, the Tribunal's decisions relate only to the question of detention, and not to deportation. Some of the detainees may wish to appeal against their deportation and within that request to be released from custody. Yet others are willing to accept the decision to deport them from Israel, but wish only to be released until their deportation takes place: to take care of their matters in Israel (e.g. sue employers, properly say goodbye to their dear ones in Israel), to try to regularize their status in Israel when they are out of prison or simply to be out of prison, when the date of their deportation is far or unknown. These people would want to appeal only the Tribunal's decision to keep them in detention, yet if the appeal encourages the authorities to speed up their deportation, the appeal becomes irrelevant. In such cases, an appellate court determined that the appeal was theoretical and there was no ground to hear the matter.[65] Moreover, it is impossible to conduct an appeal in the absence of the appellant himself.

It seems that the detainee's right to appeal the Tribunal's decision is especially important due to the pressures placed on the Tribunal, its weakness vis-à-vis other State organs and its reluctance to order releases. And indeed, in some appellate decisions the authority of the Tribunal was expanded, and one could hope that the Tribunal would become stronger due to them. In *Ministry of Interior v. Tigio* the District Court stated that the Tribunal must examine the option of release based on grounds beside those in the Entry to Israel Law, by applying the basic legal principles, among them human dignity and liberty:

> Article 13l of the Entry to Israel Law authorizes the Tribunal to hold judicial review over decisions regarding the detention of undocumented migrants in custody and to examine the option of releasing such a detainee on bail when the detention is due to a delay in the execution of the removal order. This broad definition of the authority to review entrusted in an institution that is clearly an administrative instance **cannot be reduced to a mere**

[64] This conduct is described in administrative petition (TA) 141/03 Malwin v. the Ministry of Interior Affairs, TK-MH 2003(2), 31442.

[65] BRM 9595/02 Zahang Hong v. the Ministry of Interior Affairs, TK-AL 2002(3), 11.

> **technical examination** of the compatibility between the judgment of the Border Control Officer and the provisions set in the law. The Tribunal is allowed to examine the custody orders in a broader perspective and in doing so examine the constitutionality of the custody order. In other words: **The Tribunal must also apply the constitutional principles of protecting human dignity and liberty.** […] The authority to examine the constitutionality of a custody order is an inherent power of the Tribunal. […] If the Tribunal confined itself to the four grounds for release on bail without examining the constitutional basis for the custody, that itself would confer unconstitutionality to its decision.[66]

The District Court ruled similarly in another appeal,[67] and the Detention Review Tribunal has based decisions on these rulings and quoted them. But a search in thousands of Tribunal decisions from the years 2007-2010, which were published on the "Nevo" website, revealed that less than ten referred to the Basic Law of Human Dignity and Liberty, and in a majority of those that did the detainee was represented by a lawyer.[68] While some rulings by appellate courts expanded the Tribunal's authority, other decisions criticized its conduct, especially the lack of proper secretarial services, deficient translation services, the failure to summon detainees' lawyers, missing protocols and decisions that are issued without explaining the reasoning behind them.

> In an appeal on the matter of a minor who arrived in Israel as a trafficking victim without his parents and was held in custody for over eight months, Judge Shapira from the District Court in Haifa decided that "reviewing the Tribunal's protocols in his matter reveals that he had not been represented during the hearings by a lawyer who could assist him in presenting his

[66] Administrative petition (TA) 162/06 the Ministry of Interior Affairs the Attorney General of Israel v. Baary Tigian, verdict dated July 13 2006, page 9. The highlights were added.

[67] Guzman v. the Minstry of Interior Affairs, TK-MH 2005(2), 6018. Administrative petition (Haifa) 247/05

[68] An exception of this rule is Judge Carmi, who included in the beginning of all his decisions a section about "the normative framework", in which the following sentence was always included: "The provisions of the Basic Law of Human Dignity and Freedom also apply. Likewise, the administrative law rules apply as they have been set in various laws, in the case law (especially in the specific subject), and in the provisions and instructions of the Attorney General".

case. In fact, reviewing the protocols shows that the claims asserted in all of them were absolutely identical (and probably were copied from one hearing to the other). The Tribunal has indeed tried to find a solution to the minor's distress and yet **I do not think the hearing held there can be described as due process** in which the minor's rights were properly protected. […]The Entry to Israel Law does not set clear procedures on how to hold hearings in the Detention Review Tribunal. **The Tribunal is not a court in the sense of the Law of Courts. And yet that does not mean that the Tribunal is not bound by the basic principles of proper judgment."**[69]

[69] Administrative Petition 379/06 Unidentified Person (minor) and HRM v. the Ministry of Interior Affairs, TK-MH 2007(1), 2862, the highlights added.

9. How the Tribunal Exercises Its Authority

The judge's role is to examine the case before him, interpret the law that applies in that case and decide. The judge must be neutral and benefit from judicial independence to carry out his job.[70] The limited judicial independence of the Tribunal has been described above. On the one hand, the judges of the Tribunal are subject to pressures from the executive branch; their authority is very narrow according to the law; and they lack the power to enforce compliance with their decisions. On the other hand, there is no real supervision of the judges' work: the Tribunals are hidden and are not open to the public; most of their decisions are not published; the detainees who appear in front of them are "voiceless" in the Israeli public; the judges are not subject to the Ombudsman of the Israeli Judiciary; and their decisions almost never reach appellate courts.

As a result, as shown below, the Tribunal tends to interpret its authority narrowly. This is contrary to its duty to hold independent judicial review, as "a quasi-High Court". The Tribunal's conduct also contradicts the rulings on and norms of judicial interpretation, according to which every law must be interpreted in a way that realizes and promotes the basic rights of every person.[71] This conduct is also contrary to the general trend of establishing administrative bodies with quasi-judicial authority and expanding their authority: administrative tribunals and appeal bodies, which aim to reduce pressure on the courts, make the appeal instance more accessible to the individual and achieve speedy a quick resolution of conflicts between the individual and the State.[72]

Likewise, there are considerable differences in the way judges interpret their authority, in the manner of holding hearings, and in their inclinations. Whereas the Ministry of the Interior and the IPS have an option of moving the detainee from one place to another, and in doing so,

---

[70] Aharon Barak, "About the Judge", HaMishpat 11 (2001) 4.

[71] For example: Petition to the Supreme Court of Justice 693/91 Dr. Efrat v. the Ministry of Interior Affairs and others, PD 47 (1) 749

[72] See also appeal petition 2425/99 Raanan municipality v. H. Iyzum and investment ltd, 54 (4) 481;

transferring him from one judge to another, the detainees themselves have no control over which judge handles their case, and in most cases their matter is examined by the same judge again and again throughout their entire stay in prison. A numerical comparison between the judges can be seen in Chapter 3 above and provides a glimpse to the differing tendencies of Tribunal judges to order releases. Lower courts may also reach different decisions, yet the legal discussion that takes place there is wider in scope and more appeals are filed, following which the appellate courts issue binding decisions.

The substantial difference between the various Tribunal judges can be gleaned from a number of recent decisions. Between July and September 2013, HRM filed dozens of release requests based on the ground that nine months had passed from the date the petitioners' asylum requests had been filed but a decision had not yet been handed down. In all the cases that were assigned to him, Judge Marzouk held that unless a decision about their asylum request was given within one week, the detainee should be released and set bail at 2,500 NIS. Judge Zilbershmidt ordered release if a decision on the asylum request were not given within two weeks and set a bail of 5,000 NIS. Judge Peleg dismissed all the appeals, saying that he would consider them after another month, and finally ordered the release of the detainees in question, subject to a deposit of 10,000 NIS as bail. Most could not meet these demands and remained in prison.

Alongside judges who hand out ‘cautious’ decisions, there are judges who try to interpret their power in a wider manner. Such an interpretation does not always favor the detainees. We draw information on these cases from appeals against Tribunal decision and our casework at the HRM:

In August 2012, HRM appealed to the Tribunal in Giv'on Prison on behalf of a man whose two small children in Israel were left without supervision because his had been hospitalized due to what appeared to be tuberculosis following childbirth. Judge Pashitzky turned down the request because: "I doubt the fact that the detainee is the father of the children." Yet immediately afterwards added, "It should be ensured that the detainee is able to fly home to his country together with his children" (the same children the judge doubted were indeed his). The judge ordered the Ministry of the Interior: "The minor children of the detainee must

promptly be brought to the detention facility in Ben Gurion Airport". This decision is outside the scope of the judge's authority, as they cannot order to arrest or transfer people to detention facilities[73]. HRM appealed the Tribunal's decisions in the District Court, which ruled that the Tribunal lacked the authority to order the children's' detention, and that there were humanitarian grounds for the detainee's release.[74]

A detention order can stem only from a deportation order, without which there is no purpose for keeping a migrant in detention. In January 2013, Judge Halabja ordered the release of a person who was held without a valid deportation order for two and a half months. The judge stressed that despite the fact that during the hearing there was already a new deportation order, the fundamental flaw in his case justified his immediate release. However, in similar cases other judges decided that "the flaw had been remedied" if a deportation order was given following the request.

Legal Grounds for Release from Immigration Detention under Israeli Law:

9.1 "Exited Israel by Himself"

According to the Entry to Israel Law, detainees can be released from immigration detention when the Tribunal is convinced that they will leave Israel by themselves on a predetermined date, and that they will be easily located for this purpose. In such cases, the Tribunal has the authority to order release on bail. How does the Tribunal determine that a detainee is likely to leave Israel? As always, this depends on the judge:

A migrant worker, arrested while her employment agency claimed it was taking care of her visa extension, requested to be released in order to take care of her affairs ahead of departure from Israel. The Tribunal rejected the request. The District Court ruled in favor of the appellant, and criticized the Tribunal's conduct in her case:

[73] Judge Manny Pashitzky's protocol from 27.8.12 regarding a detainee prison number was 1374419.

[74] Administrative petition (BS) 153/13 Oko v. the Ministry of Interior Affairs, verdict dated August 29, 2012.

"The appellant was brought before the Detention Review Tribunal, stated that she is not going to continue staying in the country and asked to be released from detention to be able to take care of pending matters. The Detention Review Tribunal, in an unsubstantiated decision dated February 10, 2010, wrote: 'I do not believe the detainee will leave the country on the set date, and therefore I reject the detainee's request for release. I hereby approve the detention order with no changes.' The Tribunal's decision must be reversed.

The Detention Review Tribunal, which decided that it does not believe the appellant […] and thereby denied her freedom until the date of her deportation, must specify and explain why it does not believe the appellant. This distrust must be based on proven facts. A vague statement is not enough to deprive a human of her liberty, even if she is staying in Israel illegally."[75]

Even the question of the amount of bail varies among different judges and tribunals. The judges in Giv'on prison usually deal with migrant workers arrested in Israel after having worked there for a long time, and therefore set high bails. In contrast, the tribunals in the detention centers near the border with Egypt deal with people who fled their home countries in Africa and arrive in Israel penniless; therefore their bails are usually set in accordance. Sometimes setting bail in an automatic and rigid manner impedes the release. In addition, even in cases of asylum-seekers from Africa, the sum of the bail can be arbitrary and depends on the judge. For example, in January 2013 Judge Dorfman decided to order the release of a citizen of the Republic of Benin who had been detained for four and a half months on a relatively low bail of NIS 2,000 (about $600 at the time).[76] Yet, in the matter of a citizen of Guinea who wanted to leave to return to his country but was forced to stay in Saharonim Prison for three years due to difficulties in

[75] Administrative petition (TA) 21832-02-10 Joan v. the secretary of the Tribunal, verdict dated March 1, 2010.

[76] Judge Dorfman's decision in the Ktziot Tribunal from 7.1.2013 in the matter of a detainee whose prison number was 77507.

obtaining his travel documents, Judge Pashitzky demanded a bail of NIS 20,000 ($6,000). Only following an appeal to the District Court was the amount lowered.[77]

9.2 General – humanitarian reasons

The Tribunal is authorized to order release from custody when "special humanitarian reasons" exist. The question of what constitutes a humanitarian reason is left to the interpretation of the judges. However, it appears that over the years the interpretation of what should be considered a "humanitarian reason" has become more stringent. Once the Anti-Infiltration Law came into force this interpretation constricted even further. According to the Anti-Infiltration Law this ground for release applies only "in exceptional cases" and specific reasons for release are listed. This rigid interpretation can be observed in the following examples:

> On June 2012, a 20-year-old woman from Darfur was detained upon crossing the border from Egypt while in the sixth month of her pregnancy. The Tribunal ordered her release, yet the Ministry of the Interior quickly issued a detention order for her under the Anti-Infiltration Law. During her stay in Saharonim Prison she complained of severe stomach aches, but only weeks later was she examined by a doctor, who recommended that she drink more water. Two months into detention, her health deteriorated and she was hospitalized and gave birth to a dead fetus. After the end of her hospitalization, she was returned to prison, and the Tribunal ruled repeatedly that her special circumstances do not amount to a special humanitarian reason. The District Court accepted the appeal against the Tribunal's decision and instructed her release, stating that "the difficult experience of the appellant within the walls of an Israeli prison create a moral debt of the state toward her."[78]

The interpretation of a "humanitarian reason" differs among judges. For example, in September 2012 Judge Dorfman from Saharonim ordered the release of a detainee for 30 days due to

[77] Administrative petition (center) 19658-03-12 Dialo v. the Ministry of Interior Affairs, verdict dated April 29, 2012.

[78] Administrative petition (center) 51961-09-12 Ibrahim v. the Minister of Interior Affairs, TK-MH 2012(4), 24671.

humanitarian reasons, so that he can try to raise a ransom of $30,000 outside of prison. The ransom was demanded by the kidnappers of his wife and son who were held in the torture camps in Sinai. In contrast, Judge Marzouk rejected a similar request, stating that it was unclear how the applicant would raise the necessary sum for the ransom.[79]

9.3 Specific categories

9.3.1 Asylum-seekers

Background – the Entry to Israel Law

The detainees most often brought before the Tribunal are those who cannot be deported from Israel because deporting them to their home country would put their lives in danger, or because they lack identifying documents and thus are unable – or unwilling – to prove where they came from. As of July 2014, over 2,000 asylum-seekers are detained under the 4th amendment to the Anti-Infiltration Law in the Holot open-air detention facility and Saharonim Prison. About 70% of the detainees are from Sudan and the rest are mostly from Eritrea. Israel declares that it does not forcibly deport 'infiltrators' to these countries, yet due to the indefinite nature of detention under the 4th amendment and the pressure exerted on the detainees to leave Israel "voluntarily", over 5,000 asylum-seekers have left Israel, mostly to their countries of origin.

The Convention Relating to the Status of Refugees forbids punishing a person or limiting his liberty due to illegal entry to the country in which he seeks asylum. Likewise, according to the UNHCR Detention Guidelines, asylum-seekers must not be held in detention for a time longer than required to ascertain their identity, other than in exceptional cases, and they must not be detained in order to deter other asylum-seekers from coming to said country.[80] The State of Israel signed the Convention Relating to the Status of Refugees in 1951, and the Israeli Government ratified it in 1954.

---

[79] Judge Marzouk's decision from 31.10.2012 regarding the case of a detainee whose prison number was 1444879.

[80] See Article 31(1) of the Convention Relating to the Status of Refugees, Article 3 of the UNHCR Guidelines regarding arrest.

Yet, a review of tens of thousands of the Tribunal's transcripts from 2008-2010 showed that the Convention was directly mentioned in only 12 decisions. In all those cases, the person in front of the Tribunal was represented by a lawyer who presented arguments based on the Convention. The Convention was quoted in only two of those decisions, and both quotes were used to criticize the asylum-seeker: The first referred to the asylum-seeker's obligation to abide by the laws and regulations of the state, the second invoked their obligation to report to the authorities in a timely fashion after their arrival in the country.

In its ruling on *al-Tay vs. the Minister of Interior*[81] the High Court of Justice determined that Israel was bound to the non-refoulement principle set in the Convention Relating to the Status of Refugees, according to which a person must not be deported to a place where his life or liberty would be endangered. As a result, in most cases, filing an asylum request in Israel prevents the deportation of the asylum-seeker until a decision is made regarding his request.

In an appeal in 2007 the Jerusalem District Court overturned the Tribunal's decision that "the fact that the asylum-seeker must wait for a long period of time in detention, until the inquiry of the UNHCR into her matter, was not a reason to release her from custody." In its decision, the District Court stated that when the initial examination of the person's asylum request takes a long time, the Tribunal must examine the possibility of releasing the detainee. The Court added that filing an asylum request could not be regarded as lack of cooperation with removal procedures, which would justify the continuation of detention.[82]

What is "a long time" according to the Tribunal? This matter also depends on the judge. In the case of a citizen from Ivory Coast who filed an asylum request in 2007 and could not prove his citizenship, the Tribunal repeatedly approved the extension of his detention for a total of three years. The District Court rejected the appeal against his continued detention, partially because

[81] El Tay and others v. the Minister of Interior Affairs and others, vol. 49 (3) 843. Petition to the Supreme Court of Justice 4702/94.

[82] Administrative petition (HI) 468/07 Lestor v. the State of Israel, TK-MH 2007(4), 5179; see also: Administrative petition (HI) 448/07 Unidentified person v. the Tribunal, TK-MH 2007(3), 2283.

at the same time asylum requests were examined by UNHCR and not by an administrative authority. Despite this, the Court decided that unless a decision on his status was made within 60 days, the Tribunal must consider releasing him. After a request for permission to appeal this decision in the Supreme Court was filed, the Ministry of the Interior hurriedly rejected the asylum request, and hence the Court decided that the Tribunal's decision which was the subject of the appeal was no longer relevant.[83] Later on, District Courts ruled that even when an asylum request is rejected and the asylum-seeker appeals the decision, this cannot be seen as constituting lack of cooperation with deportation.[84]

In 2007, as numbers of people entering Israel through Egypt were rising, prisons ran out of room to hold them, and hundreds of asylum-seekers were released by the army upon their arrival in Israel. Whether someone was detained and had to wait for a release decision from the Tribunal or was released immediately upon arrival depended on the availability of beds in prison at the time of entry to Israel.[85]

> "In the past year, the Tribunal has been notified of the MoI's decision to grant six-month work visas to 2,000 Eritrean refugees as temporary protection for humanitarian reasons […] Later, the Border Control Officer decided on a number of systematic releases from detention of detainees from Eritrea. In all these cases, detention and deportation orders were issued and nevertheless some were released before they came before a Tribunal, while others were released only after they were brought in front of the Tribunal. The Border Control Officer decided on their release, whether after having canceled the detention order in their case or not. The Border Control Officer set restrictions regarding areas in which the infiltrators could not go [they were barred from setting foot in central Israel]. Accordingly, the Tribunal mentioned in a periodical review of the detention of a detainee from Eritrea that **it is unclear why some of the detainees in the same situation are released by the Border Control Officer**

[83] Petition 1584/10 Kolivli v. the Tribunal, decision dated August 11 2010.

[84] Administrative petition (HI) 222/08 Unidentified Person (minor) v. the Ministry of Interior Affairs, TK-MH 2008(2), 8496; Administrative petition (TA) 1268/09 Herdam v. the Tribunal, TK-MH 2009(1), 7857; Administrative petition (BS) 8797-004-12 The Ministry of Interior Affairs v. Yaba, TK-MH 2012(2), 13574.

[85] The Refugee's right forum, 'Detention of Asylum-seekers in Israel', June 2008.

while others are not. The Tribunal added in its decisions that this conduct of the Ministry of the Interior, in addition to the practice of not deporting detainees from Eritrea back to their home country or to a third country, implies inability to do so, or alternatively at least a non-exercise of the deportation order, for whatever reason. Following this, after examining other specific circumstances in every detainee's case, the Tribunal ordered release from custody under certain conditions it set."[86]

The Anti-Infiltration Law

Under the third amendment to the Anti-Infiltration Law, which came into force in June 2012, asylum-seekers were to be jailed for a minimum period of three years in all but exceptional circumstances. In this manner, about 2,000 asylum-seekers from Sudan and Eritrea were held in detention, despite the fact that they could not be deported. The Tribunals' decisions in the periodical review of asylum-seekers detained under the law are similar to each other, and express the judges' feeling that their hands are tied:

"Indeed, it has not escaped me that there is no operative way at present to deport infiltrators from Eritrea back to their country, as the citizens of that country are granted group protection in Israel due to the threat to their lives in their home country. Yet the Anti-Infiltration Law does not distinguish between an infiltrator who is under such protection and one who is not, and therefore I think that the practical interpretation of the Anti-Infiltration Law does not allow a distinction between different groups of infiltrators, and there is no provision in the law that states that temporary group protection is a ground for release."

The wording of the Anti-Infiltration Law, according to which any person who crossed into Israel without authorization is an "infiltrator", has been adopted by the Tribunal. The Anti-Infiltration Law almost entirely disregards the circumstances in the countries of origin of the asylum-

[86]The Tribunal's decision from 23.3.2009 in the matter of a detainee whose prison number was 85612.

seekers. As a result, the protocols of the hearings in cases of "infiltrators" are repetitive, appear in the same formats that seem cold and alienated towards the person held in prolonged detention:

On day X the Tribunal approved the deportation order against the infiltrator. After I heard the infiltrator, and in view of the unchanged circumstances, I am satisfied that there is no new reason to order her release under Article 30k of the Anti-Infiltration Law. I hereby approve the extension of the infiltrator's detention in custody as written in the deportation order.[87]

When the third amendment of the Anti-Infiltration Law had just come into effect, individuals who had been detained under the Entry to Israel Law still received release orders from the Tribunal because they were under group protection. But in many of these cases the Ministry of the Interior hurried to issue arrest warrants under the Anti-Infiltration Law to prevent their release.

A young mother and her three-year-old daughter arrived from Eritrea in November 2012. The Tribunal decided that they belong "to a group that deserves group protection and therefore there is no basis for the detention order against them". The Tribunal ordered their release after they underwent medical tests. The tests revealed that the mothers might have tuberculosis and she had to undergo medical treatment. As she was undergoing treatment, the MoI issued a detention warrant for her under the Anti-Infiltration Law. The Tribunal approved the warrant and left her in detention. In a periodical review two months later the Tribunal approved the extension of the arrest. The mother succeeded in contacting a lawyer who appealed in the District Court. The Court ruled in favor of the appellant and ordered her release.[88]

[87] An example of a decision in a periodical review of December 2012, which was identically copied in decisions of different judges.

[88] Administrative petition (BSh) 21060-10-12 Brahaha v. the Minister of Interior Affairs, *Nevo* legal database 2012(4), 24011.

The third amendment to the Anti-Infiltration Law does state that the Tribunal is authorized to order released if a person filed an asylum request and this request was not examined within three months, or left undecided for nine months. In practice, the Ministry of the Interior makes it difficult for asylum-seekers in prison to file their requests, requires that they fill out long forms in English and delays examination of the filed requests. Despite this, the Tribunal refrains from intervening in such cases. Instead, it suggests to asylum-seekers who with difficulties to file an asylum request to petition against the Ministry of the Interior in court. Filing a petition, however, requires legal representation that the overwhelming majority of asylum-seekers cannot afford.

"As far as the Tribunal knows, as of today, there is no orderly mechanism detailing the procedure in which Eritrean citizens, who are detained and under temporary group protection, can file an individual request for asylum. I am not stating this definitively, yet, in any case, reviewing the Anti-Infiltration Law shows that it does not contain a provision granting the Detention Review Tribunal authority to instruct the immigration authority to examine individual asylum request. Therefore, if the detainee's lawyer thinks that the immigration authority has been neglectful in its examination of the detainee's individual request for asylum in Israel, she must turn to the authorized body in a formal administrative appeal"[89]

Although the Tribunal lacks the authority to intervene in the MoIs decision not to recognize someone as a refugee, some of the judges do not hide their personal opinions regarding refugee status, and determine, of their own initiative, within their decisions that the detainee is not a refugee.

T.A. came to Israel from Eritrea, and suffered from severe torture during six months in Sinai. He testified in front of the Tribunal about the severe torture he had undergone: "I paid the kidnappers $23,000. They beat me, tied my hands and legs, shut my eyes and beat me with electricity cords, dripped hot plastic on me. I still have not completed my medical treatment". In March 2012 the Tribunal instructed his release, unless there was a medical

[89] Judge Dorfman's decision from the Saharonim Tribunal, 13.12.2012, regarding the matter of the detainee whose number in prison is 1449124.

reason not to. Due to the injuries he had suffered, T.A. needed to undergo treatments in prison. During the treatments, the Ministry of the Interior hurried to issue an arrest warrant against him under the Anti-Infiltration Law. HRM petitioned the Tribunal to release him due to the torture he suffered and because of the group protection he enjoys as a citizen of Eritrea. Tribunal Judge Dvir Peleg rejected the release request, stating: "**It is clear that the applicant is a migrant worker, who wishes to settle in Israel unlawfully."**[90]

It appears that under the Anti-Infiltration Law, the Tribunals became another tool of the State to complicate the lives of asylum-seekers in Israel and use them to deter other asylum-seekers who may consider reaching Israel.

On September 2012 the Ministry of the Interior's "criminal Procedure for Infiltrators"[91] was issued. According to the procedure, a person who entered Israel unlawfully and was previously released from immigration detention, can be re-confined in the following cases: If they are under suspicion of having committed a misdemeanor but there is insufficient evidence for an indictment; or when there is sufficient evidence for an indictment for a misdemeanor, but no public interest to hold a trial; or situations in which a person completed serving his sentence and was released, or was supposed to be released from prison. These people are immediately transferred from a criminal procedure to an administrative one, and they are confined under the Anti-Infiltration Law. The application of the procedure created chaos among the asylum-seekers in Israel, who were released from immigration detention but were suddenly liable to be detained for an unlimited period of time. Even if a complaint was filed for a petty offence, they could be detained without further investigation or the need to produce evidence to justify an indictment. Nor did they have a right to either a trial or an attorney. The Tribunal was the first and often sole judicial body before which these people appeared. As repeatedly stated herein, the Tribunal has no authority to void a deportation order. The implementation of the criminal procedure demonstrated the problems and absurdity stemming from that limitation: even in cases in which the procedure's implementation was significantly flawed, and when people were unlawfully arrested, the Tribunal declined to release them.

[90] Judge Peleg's decision from 18.3.2013.
[91] The Population and Immigration Authority's procedure number 10.1.0010 dated September 24, 2012.

In October 2012, an asylum-seeker from Eritrea filed a complaint against an acquaintance, claiming that he had raped her. The acquaintance was arrested and the Ministry of the Interior issued a deportation order against him under the Criminal Procedure. The complainant, who feared that her husband would find out that she had had sexual intercourse with the said acquaintance, albeit against her will, turned to the police and told them she had fabricated the story. Instead of releasing the acquaintance, the Police decided to use the procedure to arrest the complainant as well, for filing a fraudulent complaint. HRM filed a motion to release her to Judge Greenberg at the Tribunal in Giv'on prison, arguing that the procedure was illegal and that there was a substantial flaw in its implementation, since the offense she was accused of posed no threat to public safety, as required in the provisions of the procedure. The judge rejected the motion, did not refer to the detainee's arrest, and stated that the Anti-Infiltration Law "applies to the detainee as well, regardless of the fact that she had committed perjury". Only after the District Court received an appeal did the MoI rush to order her release. The District Court's verdict, which required the State to compensate the complainant for legal expenses, also stated that "the arrest was flawed from its inception, and there was no ground to arrest the appellant."[92]

In another case the Tribunal ordered the release of a detainee from custody due to flaws in the implementation of the provisions of the Criminal Procedure. The Ministry of Interior appealed the Tribunal's decision and the Court ruled that if the Tribunal finds substantial flaws in the implementation of the criminal procedure according to which the deportation order was issued, it is authorized to issue an order of release[93]. Despite this decision, the Tribunal's judges continued to deny their authority to release people due to flaws in the procedure's implementation.

In November 2012 the police searched rented apartment in which an asylum seeker from Sudan lived in and found military equipment. The Israeli landlord explained that he is a film decoration

[92] Administrative petition (center) 28773-13 Hagus v. the Ministry of Interior Affairs, decision dated February 2 2013; see also administrative petition 52337-09-12 Gvartansa v. the Ministry of Interior Affairs, Nevo legal database2012(4), 15742.

[93] Administrative petition (BSh) 40042-12-12 The State of Israel v. Asbahah, decision dated December 23, 2013.

designer and he uses the equipment for his work weren't sufficient and the asylum seeker was taken to detention according to the criminal law. Judge Zilbershmied rejected her application for release that was filed by the HRM. The judge said: "[…] I do not accept the interpolation that the tribunal has the authority to determine regarding the validity of the process", and he referred the detainee to file for an administrative appeal. The HRM appealed on the decision to the district court[94] and as a result, the Ministry of Interior withdrawal from his position and released the appellant.

Judge Liberty of the Giv'on Tribunal repeatedly criticized the Procedure and the manner in which it was implemented. In his decision from October 23, 2012, the judge stated: "The detainee denies the charges against him. Accordingly, his file was closed due to lack of public interest. Therefore, the claim that he is dangerous is at the most lip service, since being dangerous and having a file closed due to lack of public interest cannot coexist." In a decision from November 11, 2012 he stated: "As the Tribunal noted many times, this case brings up a disturbing trend. Instead of granting a person the right to prove his innocence in court or be lawfully convicted, by substituting the criminal procedure for an administrative one the enforcement agencies have found an option that bypasses basic rights. This is a dangerous and slippery slope. If an indictment is not filed by the due date I will order the detainee's release."

9.3.2 Stateless Persons

Since its establishment, the Tribunal has found it difficult to deal with individuals whose place of origin was difficult to ascertain. Many come to Israel with no documents. Some are unable to obtain documents that will prove their citizenship, for example because their country and Israel lack diplomatic relations, and some refuse to do so because they fear deportation. In the past, when there were difficulties to identify the citizenship of some individuals who had entered from the former Soviet Union,, a District Court ruled that these individuals could not be held in

[94] Administrative petition 25569-02-13 Bakit vs. Ministry of Interior, verdict dated March 3rd, 2013.

detention indefinitely, even when they were not cooperative, and emphasized that it would be easier for them to prove their citizenship outside of prison.[95] However, another District Court ruling stated that tracking a person without identifying documents would be difficult after release, and that this would render deportation impossible.[96]

In the case of a person who claimed to have come from Sudan yet was not identified as Sudanese by the UN, the Tribunal's judge voiced his dissatisfaction with the behavior of the Ministry of the Interior: "Despite the Tribunal's decisions from 20/11/08, 26/01/09 and 26/02/09, the detainee has thus far not undergone further questioning regarding his identity. **To the Ministry of the Interior: It is outrageous that for six months a detainee is defined as someone whose citizenship is unknown, and yet no steps are taken to determine his citizenship**". Another year passed and the citizenship issue remained undecided. In a hearing before Judge Greenberg in Giv'on prison the detainee expressed his frustration: "I came from Sudan, you tell me that the UN did not identify me as a Sudanese. In that case you tell me where I am from. They drove me crazy. All my family is from Sudan. I am from the Nyala region in Darfur. You tell me you cannot help me because I was not identified as a Sudanese". The Tribunal approved his detention yet again.[97]

The frustration of the Tribunal under such circumstances can also be gleaned from the case of Leo, the subject of the article "The arrest of the foreigner who refused to identify himself" by Dr. Yuval Livnat: "More than three years after Leo's arrest Judge Lary-Bavly wrote in bold letters: 'Since the detainee refuses to provide identifying details, among them his citizenship – there is not a chance I will order to release him on any condition'. She also instructs the immigration police to 'immediately interrogate the detainee intensively, until his identity and country of origin are determined'. She expressed her frustration with the failure to deport

[95] Administrative petition (TA) 251/06 Pisanko v. the Ministry of Interior Affairs, Nevo database 2006(4), 11989.

[96] Administrative petition (TA) 247/02 Shushang v. the Ministry of Interior Affairs, decision dated January 6, 2003.

[97] The Tribunal's decision in the matter of the detainee whose prison number was 85087. Original emphasis.

Leo from Israel during those years: '**Holding the detainee in detention has so far cost the State of Israel over NIS 150,000!!!! I have no doubt that hiring an investigator to interrogate the detainee regarding his identity would have cost the taxpayer less.**' Despite the judge's anger and frustration, it seems she did not lose all hope that the authorities would succeed in deporting Leo: 'Indeed', she writes, 'the detainee is […] 'a tough nut', yet the interrogating bodies in Israel have in the past cracked tougher nuts than him". Leo was finally released after five years in detention - after he was diagnosed mentally unstable.

Following a petition by the Association for Civil Rights in Israel, Israel formulated a 'Procedure for Treating a Foreigner Claiming to be Stateless'.[98] This Procedure applies to stateless persons, for instance, those whose citizenship has been abrogated, or those who were never citizens in the country they were born in or lacked citizenship due to other circumstances. According to the Procedure that was amended in 2012 a person claiming to be stateless can be held in detention. If no country to which he may be deported is found within one year, the director of the Immigration Enforcement Department will examine the option of releasing him on conditions. But the procedure does not apply to those who did not enter Israel through a regular border crossing and stateless person who do so are considered "infiltrators" and hence the Anti-Infiltration Law applies to them.[99]

9.3.3 Victims of torture and human trafficking

The Tribunal sometimes reviews the detention of people who did not choose to come to Israel and were victims of human trafficking, and also those who were subjected to torture on their way through Sinai. According to International Law these victims are entitled to special protection. Although the circumstances of their arrival may impact the Tribunal's decision on their case, the Tribunal is not adapted to interviewing people in a way that would provide them a feeling of security and encourage them to open up, and the questioning depends on the good will of the judges. In the absence of legal representation, the lack of knowledge that their

[98] Administrative petition (TA) 2887/05 Alxeyev v. the State of Israel, decision dated January 29, 2007; Administrative petition (Jerusalem) 34499-04-01 Alxeyev v. the State of Israel, decision dated September 14, 2010.

[99] Procedure on Foreign Citizens Declaring Statelessness, No. 10.1.0015 dated November 12, 2012.

circumstances could bring about their release, and due to cultural sensitivities, many detainees do not reveal these painful experiences at all. In addition, most of the Tribunal's judges are male and women brought in front of them usually refrain from reporting that they were sexually assaulted.[100] Even men often refrain from revealing the fact that they were victims of sexual abuse.

Between June and September 2012, 1,543 asylum-seekers reached Israel via the Sinai and were detained under the Anti-Infiltration Law. In only 30 of these cases did the Tribunal pass on their file to an extended examination in order to determine whether they were victims of slavery or human trafficking. In nine of these cases the Tribunal noted that there were evident physical marks of torture on the survivors' bodies. All the survivors who reported that they were abducted made this declaration before Judge Dorfman, and therefore it can be assumed that he explicitly inquired about this.

Victims of Slavery and Human Trafficking

Detainees recognized by the Israeli Police as victims of slavery and trafficking are entitled to free legal representation by the Legal Aid Department of the Ministry of Justice. However, as discussed below, not every person who has survived torture is recognized as a trafficking victim. The Israeli Prison Service introduced a procedure for recognizing victims of trafficking in February 2012. According to this procedure, the Tribunal judge must notify the Legal Aid Department in the Ministry of Justicewhen he suspects that a detainee underwent torture.,. The Legal Aid Department then writes an assessment for the police to determine whether the detainee is a victim of trafficking. Subsequently, the detainee is granted representation and the Tribunal can release him to a shelter. However, Tribunals sometimes have to wait several months until the police have determined that a person is indeed recognized as a victim of trafficking and only then can release be ordered. The judges themselves lack the authority to determine that a detainee is a victim of trafficking. This is despite the fact that the judge, unlike

[100] For extensive reading on victims of trafficking and torture see HRM's report "Tortured in Sinai, Jailed in Israel", a report on survivors of torture and slavery that are imprisoned under the Anti-Infiltration Law, October 2012. The data in this chapter is taken from that report.

the police, can examine the person in a direct manner, to question and observe him in person. Following judges' complaints on this issue, an appeal was filed to the Attorney General requesting his opinion on the matter, but a reply has not yet been forthcoming. Furthermore, it is common that recognized victims of trafficking and torture are not transferred to a shelter due to a lack of available spots .

A young Eritrean woman who suffered from especially cruel torture in Sinai, including daily rape over a period of months, was recognized as a trafficking victim after arriving in Israel. Despite this, she was held in Saharonim Prison for eight months, solely because there was no available room in a shelter. The Tribunal Judge Dvir Peleg repeatedly rejected her requests to be released to her family in Israel until a room in a shelter became available. In an appeal against the Tribunal's decision to keep her in detention, the District Court ruled that "due to the humanitarian reasons that are so evident in this case, the appeal should be accepted [i.e. judgment rendered for the Appellant]."[101] Following that ruling, approximately 30 trafficking victims were released to live with relatives that year, while they awaited vacancies in a shelter. Until recently, 14 other trafficking victims continued to be held in prison solely due to the lack of shelter room, while the Tribunal approved of the extension of their detention. They were released only after the Supreme Court's ruling striking down the Anti-Infiltration Law.

Victims of Torture

Victims of torture who are not recognized as human trafficking victims are not entitled to representation and are not released to a shelter. In the past, Tribunals had recognized torture as "a special humanitarian reason" justifying release from custody under the Entry to Israel Law. On many occasions the release of torture victims from prison was – at least in the primary stage – to their disadvantage, since they received medical treatment in prison but not after their release. Therefore, the Tribunal judges often notified HRM of their decisions to release torture victims, so that that person would receive treatment and assistance after his or her release. When the Anti-Infiltration Law came into force, according to which humanitarian reasons need

[101] Administrative petition (BSh)22981-02-13, decision dated March 6, 2013 (not published).

to be "exceptional", judges stopped releasing torture victims, and they were to be left in detention for a minimum period of three years.

A 20-year-old Eritrean woman escaped Eritrea, planning to go to Sudan, and on the way was kidnapped by a group of Bedouin, who took her to Sinai. She was held there for about two and a half months, during which she was subjected to severe torture: brutal violence, burns, handcuffing and rape. She was released from captivity only after her family paid the high ransom demanded by her captors and then arrived in Israel. During the first hearing in her case, the Tribunal ordered her release within 14 days, should there be no medical reason to prevent release. As an Eritrean citizen she was entitled to group protection. However, due to the torture she had undergone, the woman required medical treatment in prison. The Ministry of the Interior exploited the delay in her release and quickly issued an arrest warrant against her under the Anti-Infiltration Law. HRM filed a request to the Tribunal to release her due to humanitarian reasons, yet Judge Marzouk rejected the request. In his decision he went as far to say: "**It is unreasonable to hide these important facts. The applicant did not bother to explain why she did not tell the Tribunal about the rape she suffered**. Finally, the judge decided that her circumstances were not an exceptional humanitarian reason that would justify her release. Only after an appeal against the Tribunal's decision was filed to the District Court, did the MoI decide that she should be released.[102]

The Tribunal's decisions regarding torture victims are arbitrary, with different detainees appearing before the same judge receiving different decision. In February 2013 Judge Marzouk decided to release (subject to an adequate detention alternative) a 26-year-old woman from Eritrea. She had arrived in Israel after several weeks in Sinai, during which she had been raped and became pregnant as a result. During the crossing of the border, she was injured and broke her pelvic bone. The Tribunal ordered to release her, but prior to her release she was hospitalized and underwent an abortion. Exploiting the delay in her release, the Ministry of the Interior rushed to issue an arrest warrant against her under the Anti-

[102]Administrative Appeal (Beer Sheva Court) 44333-12-12 Teweldebra vs. Ministry of the Interior

Infiltration Law. In his decision, Judge Marzouk stated that she should be released due to the difficult circumstances, the rape she suffered and her severe injury, and added: "**The detention facility where the applicant resides does not have the rehabilitation and treatment resources that the applicant requires. By comparison, victims of slavery and trafficking, most of whom underwent rape, are usually transferred to a special shelter that can address their needs of mental recovery and medical treatment**".

In the matter of S.W., an Eritrean citizen who suffered from severe torture in Sinai for three months before he arrived in Israel, Judge Dorfman decided that he should not be released, since "the vast majority of infiltrators who have entered Israel in the last months have undergone severe torture." The District Court rejected the appeal filed by HRM against the Tribunal's decision, yet on April 4, 2013 the Supreme Court ruled for the appellant. The Court stated that the difficult experiences of men and women on their way to Israel, including abduction, captivity, torture and rape, fall under "exceptional humanitarian reasons" that are grounds for release under the Anti-Infiltration Law. The Court added that the state of the detainee should be individually examined in relation to the outcome of keeping him in custody, in light of his difficult experiences suffered on his way to Israel.[103] The Court ordered an examination to diagnose the detainee's health and mental status. He was directed to a social worker of the Israeli Prison Service, who filed a laconic opinion according to which the detainee was "stable, organized, with no exceptional anxiety in custody." His file was returned to the Tribunal, where Judge Dorfman decided to release him after he found the diagnosis unworthy of serious attention, and since he had formed his own direct impressions of the detainee and his description of what he had suffered. This impression convinced the judge that the extended imprisonment of the detainee was negatively affecting his mental

[103] Administrative Request to Appeal (unpublished), 18.4.2013

state.[104] The MoI appealed the release decision based on the social worker's review. The Court ruled for the Ministry, but ordered that a thorough examination be made.[105] Finally, a re-examination was conducted by a psychiatrist, following which the Tribunal ordered, for the second time, that the detainee should be released.[106]

Following the above case of S.W., HRM filed a request to the Tribunal to conduct mental examinations for a number of detainees who had described the torture they underwent in Sinai to HRM staff. Some of the requests were rejected immediately by the Tribunal and in the rest of the cases the detainees were referred to the social workers in prison. However, the social workers in the prison, employees of the Israeli Prison Service, have not been trained to interview victims of torture and to conduct psychological assessments, and their reviews are brief. Additionally, assessments are made based on the translations of fellow detainees, which makes it difficult for the detainee to describe the torture, especially sexual abuse. HRM filed a number of requests to conduct reassessments in cases where the Tribunal based its decision on the social worker's brief opinion. We are not familiar with any cases in which the Tribunal ordered a psychological assessment of its own initiative. Most detainees, at the same time, are unrepresented and unaware of their right to request such an assessment by themselves.

9.3.4 Minors

[104] In this case, the review was filed by the Ministry of the Interior only after a decision of the Supreme Court. Article 29 of the Administrative Courts Law, which applies to the Tribunals, states that the Tribunal can appoint its own expert to write the said review. Despite this, we are unaware of any case in which the Tribunal exercised this authority.

[105] Administrative petition 39258-05-13 dated June 3, 2013 (not published).

[106] The Tribunal's decision from June 24, 2013 in the matter of the detainee whose prison number was 501404.

The detention of children, even in prisons that according to the authorities have been modified to suit minors, violates the Convention on the Rights of the Child.[107] That convention mandates that the best interest of the child shall always be "a primary consideration", and the detention of a child should take place "only as a measure of last resort and for the shortest appropriate period of time". The United Nations Committee on the Rights of the Child has issued an interpretation of the Convention dealing with foreign and unaccompanied minors ruling that lack of legal status cannot justify children's detention. The official interpretation also stated that children must be cared for in appropriate settings through welfare bodies which have experience in dealing with children in such situations.

Detention of children of migrant workers and their parents began in March 2011. To date, over 200 children and their families have been arrested, detained and deported. Most of these children were under the age of six. Families are detained at Ben Gurion Airport, in the only detention facility in Israel that is operated by inspectors of the Ministry of the Interior instead of by the Israeli Prison Service or the Police.

According to official data, 3% of the people who entered Israel from Africa through Sinai in 2010 and 2011 were minors. Some arrived together with their parents; others were born on the way or in Israel following the rape of their mothers in Sinai. Others arrived in Israel alone, after their parents had died, after they escaped their country on their own or after their parents had sold them.

Children under the age of 14 were held in the section for women and children in Saharonim Prison with their mothers. Male minors over the age of 14 were held in the men's section. This policy meant that a minor over the age of 14 who was confined without his father, would be separated from his mother and his younger siblings, secluded in the men's section, and allowed to see his mother only once a week for an hour.

[107]The Convention on the Rights of the Child (1989) 21 1038, volume 31, 221, ratified by the State of Israel in 1991.

A woman who come to Israel from Eritrea with her young son had been held in detention by the power of the Entry to Israel Law since November 2011. In a hearing before the Tribunal, the judge ordered her release conditioned upon medical examinations. These examinations revealed that she needed medical treatment, and thus she remained in detention for months. After she recovered, the Ministry of the Interior issued a new arrest warrant against her under the Anti-Infiltration Law. Her case was appealed in the District Court, where in January 2013 Judge Eilon ordered her release on humanitarian grounds. Her son was three years old at the time, and had been imprisoned for 14 months.[108] Based on this decision, Judge Dorfman ordered the release of another mother and her one-year-old son, after both had been held in detention for nine months. However, Judge Marzouk rejected a similar request during the same month, distinguishing between the Court's decision and the case before him: the minor whose detention he approved was 12 years old.

A woman from Eritrea and her daughters (8, 11) were held in Saharonim prison for a year. Their case was reviewed several times by the Tribunal, which ordered the extension of their detention each time. In his opinions, Judge Marzouk stated that because the Anti-Infiltration Law mandates that unaccompanied minors must be released, he concludes that minors who are accompanied by a parent are not to be released. HRM appealed the decision to keep them in detention and the Administrative Court in Be'er Sheva ruled in favor of the appellants, and criticized the Tribunal's position: "As a judge in an Administrative Court in the State of Israel I am not willing to accept the respondent's [the Ministry of the Interior] claim that holding an eight-year-old girl and her eleven-year-old sister for months in a detention facility – is not by itself "a special humanitarian reason". This is obvious based on elementary moral and social principles… the extension of their detention for an unlimited period will doubtlessly harm their mental and social development.[109]

[108] Administrative petition (BSh) 21060-10-12 Zarai v. the Ministry of Interior Affairs dated January 17 2013.

[109] Administrative petition (BSh) 44920-03-13 (not published) decision dated April 29 2013.

Following this ruling, HRM filed requests for another review of nine decisions by the Tribunal that had approved continued imprisonment of mothers and their children. Before the Tribunal had a chance to rule on the request, a few days later, in early May 2013, these women and their children were released by the Ministry of the Interior.

Unaccompanied Minors

Until 2006, the policy was not to detain minors for remaining in Israel illegally if they were in the country without their parents. In May 2006, this policy changed after the *Michal* detention facility for minors was established. However, no procedure regarding the detention of unaccompanied minors was formulated. Thus, a minor from Ghana was held in custody after both his parents were deported from Israel. The Tribunal approved her detention, stating that "the detainee is not a helpless minor; she will turn 18 in February 2007, in four months' time. The detainee is not expected to stay in the detention facility for a long time, and in a short while, with the help of the consulate that is trying to locate her family, the detainee will be flown back to her country." In the ruling on the appeal filed against the Tribunal's decision \in the District Court of Tel Aviv, Judge Fogelman stated: "As mentioned in the Rotlevi Report (p. 103), children are in the midst of a meaningful and accelerated development phase, during which a violation of one or more of their rights could harm their development, sometimes irreversibly, and sometimes in a way that means infringing upon other rights", and stated that the detention of the minor for a month and a half was a satisfactory humanitarian reason for her release.[110] In another matter the District Court stated that minors held in custody must be provided with legal representation by the State.[111]

In 2008, HRM and ACRI filed an appeal to the Supreme Court in the name of four female minors, three of them from Ghana and the fourth from Nigeria, who were living in Israel without their parents and who were held in custody pending their deportation. Following appeals, the

[110]Administrative petition (TA) 282/06 Victoria Ageman Jan v. the State of Israel, decision dated October 30, 2006.

[111]Administrative petition 379/06 Unidentified person (minor) v. the Ministry of Interior Affairs and others, decision dated January 24, 2007.

Ministry of the Interior announced that the Youth Law also applies to minors in detention, and formulated a "procedure for handling foreign unaccompanied minors."[112]

The procedure, which was periodically updated, states that minors held in custody must be brought before a Border Control Officer within 24 hours of their detention. Those under 14 will be transferred "without delay" to an appropriate facility of the Ministry of Social Services or the Ministry of Education, or to a guardian. Minors over 14 may be held for up to three weeks in custody in a facility that has been adapted for holding minors. An attorney from the Legal Aid Department at the Ministry of Justice will be appointed, and the minor will meet with a social worker who will examine the case and is authorized to recommend release.[113]

The implementation of this procedure encountered difficulties from its inception, which were added to the list of pre-existing shortcomings of the Tribunal, such as translation deficiencies and the failure to summon the detainees attorney. These were described in the preceding sections[114] and seem especially grave in the cases of minors.

Despite the implementation of the procedure, many minors are not released even after they've spent long periods in detention, due to several factors necessary for their release. Cases of unaccompanied minors once again demonstrated the Tribunal's incompetence, whose judges, time after time, refused to order release from detention. One factor that limits the Tribunal is the difficulty in determining the age of detainees who claim that they were minors or appeared

---

[112] Administrative petition 4878/05 Unidentified person v. the Ministry of Interior Affairs, decision dated November 6, 2008.

[113] In 2010 the Legal Aid Department filed a petition on behalf of 24 unaccompanied minors against their confinement. During the time the petition was filed, the minors were held in the prisons Giv'on and Saharonim. Following the petition and a conditional order that was given in the matter, an exclusive detention facility for unaccompanied minors was opened – Matan (support facility for youth), in which minors are held until their release. Petition to the High Court of Justice 1254/10 Unidentified person (minor) v. the Ministry of Interior Affairs, Supreme Court database 985 (36) 2012.

[114] Administrative Petition (Ha) July 15 2007; Administrative Petition (Ha) 17361-12-08 Unidentified person v. the Ministry of 448/07 Unidentified person v. the Tribunal, decision dated January 9, 2009; Administrative Petition (Ha) 7876-11-08 Nancy Eduard Alimo v. the Ministry of Interior Affairs, decision dated November 18, 2008.

to be minors, yet have no identifying documents. In several cases, the Population and Immigration Authority, which is responsible for age examinations,[115] did not conduct the tests. In a decision from November 2012, Judge Azar stated: "There are a number of detainees in the Matan Detention Facility who have been waiting for many weeks for an age examination. Needless to say, it is thus impossible to progress with their cases." In the case of three male asylum-seekers from Eritrea who refused to undergo invasive examinations by a female doctor, the Tribunal determined their age based solely on an x-ray examination of their wrists, which has an accuracy rate of 75%. Upon appeal, the District Court stated that such cases require a certainty degree close to the one required in criminal law, and that they should have been examined by a male doctor.[116]

The main obstacle the Tribunal faces when implementing the procedure is the lack of available spots in suitable facilities for the minors. The Ministry of Social Affairs and the Ministry of Education are responsible for placing minors in those facilities, such as boarding schools, but as there are often no places available, the minors remain in detention for long periods of time. Due to the lack of detention alternatives, the advocates of unaccompanied minors try to find relatives in Israel who can act as guardians, or another person from the community to whom the minor can be safely released. Yet many times social workers have advised that a relative is not a suitable guardian. The Tribunal usually relies on the opinion of the social worker, and thus refrains from ordering release. Thus, for example, the Tribunal kept approving the extension of detention of two minors from the Ivory Coast for several months, adopting the opinion of the social worker, who rejected their request to be released to guardians they had offered. They were released only following an appeal to the District Court. The Court pointed out the delay in the procedure's implementation, which was due to budget deficits and lack of facilities, and

[115] Endocrinology Test Procedure dated August 27, 2012.

[116] Administrative Petition (Ha) 209/08 Taulda Gakilmerim v. the State of Israel, decision dated February 20, 2008.

stated that as long as another solution is not found, the state must find a placement for the minors within 60 days.[117]

In the case of a 16-year-old minor from Eritrea held in custody for five months, Judge Azar accepted the social worker's recommendation not to release him to the guardian who was proposed for him. The guardian was absent from home during most of the day, and based on previous cases, the judge feared that the minor would succumb to the pressures of his family to work instead of studying. The Judge ended his decision with the statement: "To conclude, it should be noted that it was recently published that three Eritrean citizens were arrested for being suspected of committing a cruel rape of an Israeli citizen. It was also mentioned that at least one of them was a minor. It is possible that the suspects were or still are minors, who arrived in Israel unaccompanied by a parent, and due to these circumstances, fell into a life of crime." Upon appeal, the District Court stated that it would have been better if this statement had not been made, and ordered the Tribunal to re-examine the case of the minor, while taking into consideration the fact that he could not be integrated in a boarding school.[118]

In an appeal filed in the case of two minors from Eritrea held in detention for six months, the District Court stated that the Tribunal was wrong to repeatedly extend their detention: "Even though the detention facility has been built to suit minors, conditions in detention are not appropriate for minors, certainly not for a long stay. A child's place is not in detention facilities, whatever their name may be… When there is no practical option to deport the appellants from the country, and legal proceedings take a long time due to no fault of theirs, I believe that there is no basis to continue holding them in detention, and the State must

[117] Administrative petition 7146-11-08 Unidentified person v. The Ministry of Interior Affairs and others, decision dated November 23, 2008.

[118] Administrative petition 56367-05-12 (HA) Minor v. The Ministry of Interior Affairs and others, decision dated June 11, 2012.

examine every way of releasing them from custody […] immediately, even if the living conditions of their family are not optimal."[119]

In another case the Tribunal refrained from ordering a minor's release to a guardian because at the time there was no social worker at the Michal Detention Facility. Upon appeal, the District Court criticized the Tribunal's decision, stating that the Tribunal should have exercised discretion through other means available to it, examined the proposed alternative to detention and made a decision.[120]

The Tribunal's working procedures do not include deadlines. A long time may pass between stages when the Tribunal failss to push the authorities involved so it can release the unaccompanied minor. For example, the Tribunal ordered an age examination for a minor but failed to set a deadline for the examination. His age was determined only a month after they examination was ordered and the Tribunal set a hearing for the following month. When a suitable alternative to detention was not provided, the minor's attorney suggested that he be released to a guardian. The Tribunal then ordered a review of the guardian, again failing to set any deadline and the review was only submitted a month later. Six months after the minor had entered detention, the Tribunal handed down the decision not to release him to a guardian.[121]

9.2.3 Deadlines

<u>The Entry to Israel Law</u>

[119] Administrative Petition (Ha) 22990-03-11 D. v. the Ministry of Interior Affairs, decision dated March 31, 2011.

[120] Administrative Petition (Ha) 7876-11-08 Nancy Eduard Alimo v. the Ministry of Interior Affairs, decision dated November 18, 2008.

[121] Administrative Petition (Ha) 47855-06-12 Minor v. the Ministry of Interior Affairs, decision dated June 27, 2012. The District Court sustained the verdict and remanded it for re-examination by the Tribunal, stating that it is possible to use the police's monitoring mechanisms.

Article 13n of the Entry to Israel Law states that a detainee will be brought before a Tribunal within 96 hours of his arrest (or at the latest 72 hours afterwards, if the Border Control Officer submits an explanation for the delay). Said article also states that whoever is arrested for a second time will be brought before the Tribunal within 72 hours. Failure to adhere to these deadlines is a ground for release. In a 2004 High Court decision, Judge Barak stated in a minority opinion that "only in exceptional circumstances, when there are special and significant reasons to extend the detention, is it allowed to deviate from this rule" (the majority opinion did not refer to this issue).[122]

As described in chapter 1, in 2006 people from African countries began entering Israel via Egypt, crossing the border away from official border crossings. At the early stages they were arrested according to the old Anti-Infiltration Law whose initial purpose was to prevent infiltration from enemy countries. The tribunal, deliberating the matter of 38 detainees who had been detained for two months without a warrant, decided to release them unconditionally. An appeal held by the state was partly accepted, in that the Court determined that they should have been conditionally discharged. In addition, the Court determined that the state can arrest the one who entered to Israel via Egypt under the old Anti-Infiltration Law, but that they should be brought in front of the tribunal within 14 days, in accordance with the Entry to Israel Law (prior to the amendment that shortened the period to 96 hours).[123]

Yet, the Tribunal's decisions were not adhered to. In 2007, the Tribunal saw 27 people who had been held in detention for over 30 days without seeing a judge. The tribunal released them according to article 13N but the Ministry of interior appealed on the decision. The district court accepted the appeal and ordered that the release in such cases will not be automatic but will be

[122]Administrative Petition 223/04 Drakua v. the Ministry of Interior Affairs and the border inspection's supervisor, Nevo database 54(3).

[123] Administrative Petition (TA) 162/26 the Ministry of Interior v. Tygian, TK-MH 2006(3), 1724.

explained and it will be considered in conjunction with the dangers that might be hidden in the release.[124]

As greater numbers of asylum-seekers entered Israel, the Tribunal refrained from releasing detainees who were not brought before it before the deadlines set in the law. Today, the Tribunal tends to rule that even if someone was brought in front of it after the due date; his eventual appearance in front of the Tribunal mends the legal defect. Thus, a detainee's right to be brought in front of a judge as soon as possible is violated.

Another trend of increasingly rigid interpretation of the law pertains to the total time in detention. The Entry to Israel Law states that the detainee should be released after 60 days unless there are concrete reasons to keep him in detention. That is, after the detainee has been held in detention for 60 days and the state has failed to deport him, the balance shifts in favor of the detainee. An exception to this rule is given if the detainee himself prevented his deportation, or if his release endangers public health or safety. The Court held that this ground for release, too, is not automatic, but is subject to the Tribunal's discretion.[125]

After the Tribunal kept extending his detention for 14 months, an appeal was filed on behalf of a migrant who claimed to be Sudanese, but whose nationality was contested by the authorities. The District Court ruled that the purpose of the detention is not to "break a man's spirit" until he retracts his claims. The Court held that the man was indeed Sudanese and ordered his release.[126] In another case, the Tribunal repeatedly extended the detention of a man from Niger until more than a year head passed. The man was willing to cooperate with his deportation, but the State failed to deport him since Israel lacks diplomatic relations with Niger. Upon appeal, the District Court stated that the Tribunal's decision was unreasonable, and ordered release on

[124] Administrative Petition (BS) 10/07 The Ministry of Interior Affairs v. Wi Waill Tur Or, decision dated October 10, 2007

[125] Administrative Petition 173.03 The Ministry of Interior Affairs v. Fadi Suliman Oda Salama, decision dated May 9, 2005

[126] Administrative Petition (center) 21423-09-10 Isa Ibrahim Muhamad v. The Ministry of Interior Affairs, decision dated November 3, 2010.

condition of a guarantee by a third party and a bail deposit of NIS 30,000 in cash.[127] Following an appeal against that ruling, the Supreme Court decided that the terms of the release thwart the decision to release the detainee, and it considerably reduced the bail.[128] A citizen of Togo who agreed to leave the country but lacked travel documents was kept in prison for seven years, during which the Tribunal repeatedly approved the extension of his detention, until the Tribunal finally accepted the requests of HRM to release him on bail.[129]

The Tribunal also handed down decisions stating that "the defect has been remedied" in cases of people who were not brought before the Tribunal for a periodical hearing within 30 days. These decisions were affirmed by a District Court ruling,[130] which is now being cited by the Tribunal to justify such decisions. The periodic hearings are of special importance considering the powerless positions of the detainees, who in absence of a periodic review are unable to appeal to the Tribunals themselves.[131] The District Court ruled that the periodic hearings are important for reviewing the state of the detainee, and also to examine the balance between the person's actions to prevent his deportation, and the State's efforts to deport him without his cooperation. What is this balance point? There is no answer, and as described above, not all the judges follow the requirement to hold periodic hearings in time. After Judge Dorfman ordered the unconditional release of a person who had been detained for three years after he had not been brought in front of a Judge for five months, the District Court reversed this decision because the detainee had not cooperated with his deportation.[132]

The Anti-Infiltration Law

---

[127] Administrative Petition (BSh) 7/09 Sumeili v. The State of Israel and The Ministry of Interior Affairs, decision dated June 28, 2009.

[128] Administrative Petition Sumeili v. the Ministry of Interior Affairs decision dated December 21, 2009.

[129] The case of the detainee whose prison number was 54920 in the Tribunal in Giv'on Prison. Release decision from 30.10.2011.

[130] Administrative Petition (BSh) 16/09 Pupana, Ivory Coast v. The Tribunal, decision dated September 9, 2009.

[131] Administrative Petition 696/06 Alkonov v. The Tribunal, decision dated December 18, 2006.

[132] Administrative Petition (BSh) 21066-09-11 The Ministry of Interior Affairs v. Samkai Musa decision dated September 9, 2011.

The Anti-Infiltration Law set longer permissible time periods for bringing a detainee before of a judge than those set in the Entry to Israel Law. Under the Anti-Infiltration Law, the first judicial review must be held within 14 days of detention, and a periodic review must be held every 60 days at least. These periods of time are not in line with international law, and are far longer than in other countries.[133] The permitted lengths of detention time are also extreme and are contingent upon the decision of the Ministry of the Interior: According to the Anti-Infiltration Law a detainee may be released from detention if a review of his asylum request has not begun within three months since its filing, or if a decision is not given within nine months since its filing, or if the person has been held in custody for three years.

In the matter of a person who filed an asylum request via a letter sent by HRM, and whose request had not begun examination within three months, the Tribunal accepted the position of theMoI. According to the MoI the letter requesting asylum was not relevant and the request could only be considered filed once the person had completed the appropriate forms, which had

[133] This was described in the UNHCR's request to join as amicus curiae the petition against the validity of the Anti-Infiltration Law, which several Israeli human rights organizations filed in the High Court of Justice (7146/12): According to international law, refugees and asylum-seekers in detention must be brought in front of the judicial authority or an independent authority without delay in order to have the decision of their detention examined (article 9(4) of the ICCPR). This examination should be automatic, and ideally be made by the first instance within 24-48 hours from the first decision of detention. The setting of a maximum period of 14 days for examination by the Detention Review Tribunals is not in line with the procedure in other signatory countries of the 1951 Convention. Whereas there are limited provisions regarding what constitutes an acceptable examination period, a research conducted by The European Agency for Fundamental Rights shows that over half of the countries that are members of the EU set time restrictions of 48-72 hours, with the longest time being 10 days (Latvia).

UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, Guidelines 7 (para. 47(iii)), available at: http://www.unhcr.org/refworld/docid/503489533b8.html.

Back to Basics: the Right to Liberty and Security of Person and Alternatives to Detention of Refugees, Asylum-seekers, Stateless Persons and Migrants, April 2011, p.g 38, sec. 5.2 Periodic review, available at: http://www.unhcr.org/refworld/pdfid/4dc935fd2.pdf

not been available in the prison at the time the letter was sent. In response to an appeal filed by HRM, the District Court ordered the detainee's release, ruling that when a request has not begun examination within three months of the date it was filed, the person must be released.[134]

In July 2013, Judge Marzouk ordered the release of an Eritrean woman because nine months had passed since she had requested political asylum, and no decision had yet been given (Article 30a(c)(2) of the Anti-Infiltration Law). On the date scheduled for her release, the Ministry of the Interior rushed to notify the Tribunal that it had rejected her asylum request, and the Tribunal reversed its decision. Upon appeal, the District Court in Beer Sheva ordered immediate release as interim relief, stating that "the obvious purpose of the mentioned provision is to incentivize the respondent [the Ministry of the Interior] to make decisions regarding asylum requests before nine months have elapsed since filing. This is not only an incentive for administrative efficiency, but also a balancing of interests between the public interest of keeping infiltrators in detention and the importance of every person's right not to be held in conditions of disproportionate deprivation of liberty. Since the legislator has restricted the administrative leeway to nine months, I find it difficult to see a good reason to accept conduct that means that even 'nine months and a bit' is 'okay'." [135] In line with this decision, the Tribunal ordered the release of other individuals. The significant differences between judges' attitudes on this subject where described in the beginning of this chapter.

Due to the limited powers of the Tribunal, the detainees' lack of representation or understanding of Israeli law, and the absence of a representative from the Ministry of the Interior, the periodic review hearings are often identical and it seems that the Tribunal judges feel frustrated by the obligation to hold hearings. Thus, in the matter of a detainee from Liberia, who refused to sign travel documents and return to his country, Judge Liberty of the Giv'on Tribunal questioned him during a hearing held in March 2012: "You think it's a waste of time that we are talking?" The detainee replied: "No, I do not know what a waste of

[134] Administrative Petition 46175-03-13 Unidentified Person v. the Ministry of Interior Affairs (published in the *Nevo* database) decision dated April 2, 2009.

[135] Administrative Petition 10380-08-13 Tokulo v. the Ministry of Interior Affairs (not published) decision dated August 11, 2013.

time means, all I know is that I do not want to return." In his decision, the Judge stated that "holding additional reviews of the detainee every 30 days is superfluous ", and that therefore, from now on he would only examine the case every 60 days.[136]

9.3.6 Migrant Workers

When the Tribunal began its work, the vast majority of detainees appearing before it were migrant workers[137] who had originally entered Israel with a valid visa. In the first year of its operation, the Tribunal helped expose detestable phenomena of mistreatment of migrant workers at the hands of Israeli employers, such as delay of payment and withholding of passports. In 61% of the cases before it, the Tribunal referred the cases to the Ministry of Trade and Labor, the Ministry of the Interior or the Police, so that they would investigate the claims made against the employers, and whether the workers were arrested without cause. Such cases included workers who were transferred between employers without their knowledge, workers who lost their legal status because their employer did not pay the fee for employing them, and employers falsely reporting that their workers had run away.

In 2002 the government decided to reduce the number of migrant workers in Israel by reducing the number of additional workers who could enter the country. The employers were required to employ workers who were already in Israel. Based on this policy, on January 7, 2003 the Ministry of the Interior published the "Closed Skies" procedure, which allowed employers to employ workers who were in detention awaiting their deportation, but had not been in Israel for more than 51 months. In accordance, the Tribunal referred a number of people who met this criteria to find an employer. Despite this procedure, it is quite difficult for people in detention for find an employer by themselves, and thus they wait until an employer comes along to request their release.

---

[136] Judge Liberty's protocol from 18.3.12 in the case of a detainee whose prison number was 1414159.

[137] The use in this report of the term "migrant workers" instead of "foreign workers" is in line with the international term. The term "foreign workers" labels the people as workers and emphasizes their foreignness, while the term "migrant workers" describes them as people who left their country in order to work.

10. Summary and Recommendations

The Detention Review Tribunals review the detention of thousands of people held in immigration detention facilities each year. The Tribunal can expose phenomena affecting the disadvantaged population in prison, and examine the state of the person brought before it, as well as the circumstances enumerated by law to order release. As described in Chapter 2, HRM and ACRI filed a petition in 2002 to abolish the Tribunal and transfer its functions to the Magistrate Courts, due to fundamental flaws in the Tribunal's conduct.[138] Many of these flaws have been remedied, but there are still substantial differences between the Tribunal and a Court, most importantly the Tribunal's lack of judicial independence. This affects its decisions and causes it to refrain from fully exercising its powers, limited as they are.

The Tribunal's tendency to interpret its authority narrowly and refrain from issuing release orders can be seen in the Tribunal's interpretation of the grounds for release, the manner in which hearings in its chambers are held, and the treatment of detainees brought before it. Examples abound: The Tribunal refrains from determining the legality of imprisoning people whom it has already released in the past and who have been re-arrested under the Criminal Procedure (see Chapter 9.3.1 above). The Tribunal also refrained from ordering release of people in the 90 days after the Supreme Court ruling on case 7146/12, even when it came to requests that were based on humanitarian reasons that justify an immediate release, as described in the introduction.

Recommendations

The opinion of HRM, like the opinion of UNHCR, is that, except in extreme cases, asylum-seekers should not be imprisoned for a period longer than necessary to determine their identity. They must not be detained in order to deter other asylum-seekers from coming to the country. It is HRM's position that the starting point should be that asylum-seekers must not be imprisoned.

We would like to provide our recommendations in light of the Tribunal's conduct, as described in this report:

---

[138] Petition to the High Court of Justice 6535/02 HRM and the Human Rights Association v. the Minister of Interior Affairs, *Nevo* database 2006(1), 118.

Representation – Lack of legal representation is probably the worst flaw in the proceedings before the Tribunal. People are being imprisoned for long periods of time without knowing the law and without being able to effectively argue for their release. Detainees must be provided with representation, at the very least those who face detention of more than a month. It must be ascertained that every detainee has a practical option of being represented and examined which body or mechanism, such as the Legal Aid Department or the Public Defender, can provide them with legal representation. As early as 2007, Judge Shapira at the District Court stated that the rules obligating the State to appoint attorneys in criminal proceedings should also apply at the Tribunals since being held in immigration's custody is detention.[139]

Judicial independence, neutrality and enforcement power– Judicial independence of the Tribunal must be ensured, and the judges must not be subjected to pressure by the Ministry of the Interior. Likewise, links between these two institutions should be prevented, at least in appearance, for example by physical separation between the Ministry of the Interior and the Tribunal. In addition, the Tribunal must be provided with means of enforcing its decisions, for example by sanctioning governmental bodies and ordering the state to pay legal expenses. At

[139] Administrative Petition 379/06 Unidentified Person (minor) and HRM v. The Ministry of Interior Affairs, *Nevo* database 2007(1), 2862. The detainee in question in this case was a minor, yet the Judge's words regarding the obligation of representation apply to all the detainees: "When we are dealing with detention, and in fact an arrest, an obligation of representation can be deduced from the Criminal Procedures Law (Consolidated Version)-1982. Although this is not a criminal procedure, I believe that one can deduce the basic principles that should apply to such a procedure as well. Article 15 states the cases in which an attorney should be appointed in a criminal procedure. Among other, an attorney should be appointed when dealing with an accused younger than 16 (article 15(a)(2)) or with somebody who lacks financial means (article 15(c)) in a procedure in which imprisonment may be involved (article 15(a)(5)(6)). Similar standards were set in the Public Defense Law, clause 18, 1955. As said before, these laws were not explicitly included in the procedure held by the Entry to Israel Law, and yet I believe that the principles on the basis of this law are also binding to any judicial and quasi-judicial body that has the power to order a person deprived of his liberty, whatever the name of that deprivation of liberty may be called".

present, the Ministry of the Interior and the Israeli Prison Service routinely ignore Tribunals' decisions (see Chapter 6.2 above).[140]

Appointment of judges – The requirements asked of Tribunal judges, the manner of their appointment and their working conditions should be likened to those of a judge in the regular court system.

Review – Routine review of the Tribunal's conduct should be held. Judges should be subject to the review of the Ombudsman of the Judiciary.

Publicity of hearings – The public nature of the trial must be ensured, in accordance with the provision of article 25 of the Law of Administrative Tribunals, 1992. The Tribunals must be located outside the area of the detention facilities and be made accessible. Likewise, the Tribunal's decisions must be published on the day they are made, as with Court decisions.

Physical conditions while awaiting hearings –Detainees should have the option of waiting for their hearing in a room with decent and appropriate conditions, and the waiting period must be as short as possible.

Translation – The translators of the Tribunal must be familiarized with relevant legal terms and guided to translate in such a manner that would encourage the detainees to speak freely. The translator must be of the same sex as the detainee, and must go through exams and periodical retraining in the relevant language. Everything said in the hearing, including the decision, must be translated to the detainees. The detainee must also have the option of obtaining the assistance of a translator of his own choosing.

The right to be heard – To fully realize the detainees' right to be heard, they must be made aware of their rights. They must be familiar with the relevant grounds for release and humanitarian exceptions contained in the law, and of their right to file an asylum request. The

[140] This is especially significant due to a wider phenomenon of the state's failure to comply to Court decisions. See: Tomer Zarchin and Or Kashti, "How the state constantly disregards the decisions of the Supreme Court of Justice", *Haaretz* March 5, 2010; The Attorney General of Israel's guidance 1.1006 dated August 1, 2010.

Tribunal must ensure that detainees are aware of their rights and are asked all the relevant questions.

Referral to a specialist – The Tribunal must ensure that a detainee who may have a psychological or medical reason entitling release on humanitarian grounds must be properly diagnosed. Hence, the Tribunal must have explicit authority to order medical/psychological examinations, or alternatively, the Tribunal must interpret its authority in a way that grants it the said power as derived from its authority to examine the matter of the detainee before it.

Typing services – The Tribunal must be assigned the same typing services as in the regular court system. The Judge needs to be free to consider the case before him and to hold the hearing, and not devote himself to typing up the protocol.

Bail and Guarantors – Since most of the detainees are arrested upon entering Israel and are destitute, the Tribunal must cease setting monetary bail sums that the detainee cannot pay, and ensure his detectability after release through different means.

Issuing Decisions– According to the rules guiding its operation, the Tribunal must issue a decision regarding a release request within four days of its filing. In practice, decisions on release requests are sometimes delayed for months, during which the Tribunal repeatedly orders the Ministry of the Interior to submit a statement of its position, even when the Ministry has not requested an extension. It must be made clear that the Tribunal must render a decision within four days on every release request, except in exceptional cases when there are clearly documented reasons. Unless the MoI files a request for an extension including supporting reasons, the Ministry must file a response within this time period. If it does not, the Tribunal will base its decision on the release request alone. The Tribunal must refrain from deciding on a stay of release when it has not been asked to do so. The decision in the detainee's case must be translated and explained to him. If the decision is not given in the presence of the detainee, it must be delivered in writing and explained to him as soon as possible.

Responses

The response of the Office of the Commissioner on the Detention Review Tribunals

The Detention Review Tribunal acts by the power of the Entry to Israel Law (1952) and the Anti-Infiltration Law (1954).

The Tribunals are an independent judicial body, and they are subject to the law alone. We reject the claims in the report that "it is apparent" that the Tribunal "is subject to pressure of the Ministry of the Interior." If HRM has concrete information regarding this matter, it is welcome to deliver it as soon as possible to the Ministry of Justice so that it can be investigated.

Detainees are given their day in court in a proper and adequate manner. Due to the detainees' lack of knowledge of the Hebrew language, the hearings are held with the assistance of translators of languages they speak. The translation service has been provided for eight years, managed by an external company that supplies approximately eight translators a day. They provide translators who speak Amharic, Tigrinya, Arabic, French, Chinese, Russian, Thai, Romanian, Turkish, and Georgian daily on a regular basis; and occasionally by special request also to Italian, Spanish and English. In cases of speakers of tribal languages, every effort is made to provide an adequate response.

Anyone who wishes to critique the Tribunal's decisions has the option of doing so by filing appeals to the relevant instance. Complaints regarding judges can be filed with the Ministry of Justice and the Civil Service Commission.

During the past three years, the number of judges has been doubled, and now stands at nine. The administrative staff has also been expanded to seven, so as to provide adequate assistance to the number of hearings the Tribunal is required to hold.

A large part of the criticism in the report refers to the Tribunals' activity shortly after they were established 12 years ago. Since then, a long time has passed during which efforts have been made to improve the Tribunal's work, and ensure that the rights of the detainees during hearings held by the Tribunals are upheld.

Regarding the public nature of the hearing, the doors of the Tribunal are open before all, except for hearings that the law requires be held *in camera*. The decisions of the Tribunal are published

and can be reviewed the day after they have been handed down on the website of the Ministry of Justice.

Best regards,

Ariella Kalay

Commissioner on the Detention Review Tribunal

The response of the Unit of Coordination of the Struggle against Human Trafficking

The report is clearly comprehensive and raises a number of points; my comments refer only to the parts in Chapter 9.3.3 regarding the work of the Unit of Coordination of the Struggle against Human Trafficking.

In general, regarding the said chapter and especially its first paragraphs, it seems that the phrasing may be misleading, regarding the difference between a victim of trafficking and a torture victim. Not all torture victims are recognized as victims of trafficking. The former are only recognized as such after an examination by the police, according to the definition of the relevant offense as it is outlined in the Israeli Criminal Code. Only human trafficking victims are clearly eligible for a number of rights granted in Israel, stemming from international law.

Regarding the victims of trafficking who have been recognized as such – indeed, regrettably, some of them are being held in detention facilities (about 14) due to lack of available room in shelters. Yet, it should be noted that in decisions of the Tribunal over the past year some of them have been released to the community to stay with relatives About 30 trafficking victims are residing in the community awaiting placement in a shelter. One of the decisions has been mentioned in this chapter, yet to be precise it should be mentioned that there have been a number of additional decisions following it. The chapter that mentions one decision to release these victims should have noted the number of additional decisions which followed this precedent: that the victims will be transferred in the future to a shelter, when a place will be made available and the new shelter that is now being built will be opened).

Regarding the statements before the judges, I will only mention generally that the Unit has conducted training for judges in the past on the subject of human trafficking, and intends to hold additional training sessions soon.

As to your letter to the Attorney General, it is known to us and we will act to expedite the attending to it.

Thank you very much for the review.

Best regards,

Adv. Dana Bittan

Unit of Coordination of the Struggle against Human Trafficking

The Ministry of Justice

Published with the generous supported of the PRO ASYL Foundation: