EA 92/03

1. Shaul Mofaz
2. National Liberal Movement—Likud List for the Sixteenth Knesset

v.

3. Chairman of the Central Elections Committee for the Sixteenth Knesset
4. Central Elections Committee for the Sixteenth Knesset

The Supreme Court
[May 15, 2003]
Before President A. Barak, Vice-President S. Levin, Justices E. Mazza, T. Strasberg-Cohen, D. Dorner, Y. Turkel, D. Beinisch, I. Englard, E. Rivlin, A. Procaccia and E. Levi

Elections Appeal against the decision made by the Central Elections Committee on January 2, 2003.

Facts: Petitioner 1, who served as Chief of Staff of the Israeli Defense Forces, was included on the list of candidates submitted by petitioner 2 for elections to the Knesset. The Chairman of the Central Elections Committee determined that petitioner was ineligible to present his candidacy. Israeli law provided for a cooling off period—a certain amount of time had to pass from a candidate's discharge from the army or civil service and the time he presented his candidacy. The Chairman determined that petitioner had not met the requirements of the applicable cooling-off period. Petitioners appealed this decision. They asserted that the legislation of the cooling-off period was unconstitutional and that, in any event, he had waited the relevant cooling-off period before presenting his candidacy.

Held: The Supreme Court held that petitioner was ineligible to present his candidacy for the Knesset. The Court held that the legislation of the cooling-off period was constitutional, both with regard to its effect of the equality of the Knesset elections, and also with regard to the manner in which the law was passed by the Knesset. Additionally, the Court rejected petitioner's alternate method of calculating the relevant cooling-off period.

Basic Laws cited:

Basic Law: The Knesset, §§ 4, 6, 7, 7(8), 7(9), 7(10), 46

Basic Law: The Knesset (Amendment No. 13)

Basic Law: Human Dignity and Liberty

Legislation cited:

Knesset Elections Law (New Version)-1969, §§ 56(1A), 57(j), 64(a)

Permanent Service in the Israeli Defense Forces (Pensions) (New Version) Law-1985

Service in the Defense Forces—Cooling-Off Period (Legislative Amendments) Law-2001

Israeli Supreme Court cases cited:

[1] HCJ 3081/95 *Romeo v. Scientific Council of the Israel Medical Organization* IsrSC 50(2) 177

[2] CA 1842/97 *Ramat Gan Municipality v. Menachamei Ramat Gan David Towers* IsrSC 54(5) 15

[3] HCJ 10455/02 *Amir v. Bar Association* (unreported decision)

[4] HCJ 6652/96 *Association for Civil Right in Israel v. Minister of Interior* IsrSC 52(3) 117

[5] HCJ 7111/95 *Local Government Center v. The Knesset* IsrSC 50(3) 4

[6] HCJ 7157/95 *Arad v. Chairman of the Knesset* IsrSC 50(1) 573

[7] EA 2/84 *Neiman v. Chairman of the Central Elections Committee of the Eleventh Knesset* IsrSC 39(2) 225

[8] FH 10/69 *Bornowski v. Chief Rabbis of Israel* IsrSC 25(1) 7

[9] HCJ 4541/94 *Miller v. Minister of Defense* IsrSC 49(4) 94

[10] HCJ 3434/96 *Hofnung v. Chairman of the Knesset* IsrSC 50(3) 57

Israeli books cited:

[11] 2 A. Barak, Interpretation in Law—Interpretation of Legislation44 (1994)
[12] 3 A. Barak, Interpretation in Law—Constitutional Interpretation 44 (1995)

Appeal dismissed.

For appellant 1—A. Klegsbeld, A. Shraga and G. Blai
For appellant 2— A. Haberman
For the respondents— R. Haimowitz
For the party requesting to intervene as respondent— A. Lorch and B. Fail
For the Attorney-General— A. Helman

JUDGMENT

Justice E. Mazza

Petitioner 1, Mr. Shaul Mofaz [hereinafter the petitioner] was formerly the Chief of Staff and was discharged from the Israel Defence Forces with the rank of major general. He was included in the list of candidates submitted by petitioner 2 [hereinafter the Likud list] for the elections for the sixteenth Knesset. On December 25, 2002, the Chairman of the Central Elections Committee, Justice M. Cheshin, determined that the petitioner was ineligible to submit his candidacy for the Knesset election. This was due to the fact that at least six months—the "cooling-off" period established for an officer of his rank in section 56 (1A) of the Knesset Elections Law (New Version)-1969 [hereinafter Elections Law]—would not pass between the time at which he had ceased to serve in the military (August 11, 2002), and the time at which the elections were to be held (January 28, 2003). On January 2, 2003, the Central Elections Committee adopted the position of the Chairman of the Committee concerning the petitioner's ineligibility. The appeal before us was directed against this decision. In anticipation of the appeal, the Attorney-General submitted a statement supporting the decision of the Central Elections Committee. Attorney Amnon Lorch, a member of the Central Elections Committee, who petitioned the Chairman of the Committee regarding the petitioner's eligibility to submit his candidacy, requested that he be added as an additional respondent. On January 7, 2003, we heard the petitioner's arguments, as well as the arguments of

the representative of the Attorney-General and Attorney Lorch. On January 9, 2003, we were unanimous in dismissing the appeal. Our judgment stated that our reasoning would be given separately. These reasons are set out here.

Facts

2. On July 9, 1998, appellant was appointed Chief of Staff of the Israeli Defense Forces. Upon his appointment, he was promoted from the rank of general to major-general. On July 9, 2002, Major-General Moshe Yaalon replaced appellant as Chief of Staff. Appellant took retirement leave, pursuant to the Dep't of Human Resources Standing Orders in the Matter of "Retirement Leave and Conditions of Service—Pension Leaves for Soldiers in Permanent Service." Soon after taking leave, appellant accepted employment at a research institute in the United States. He approached the head of human resources of the Dep't of Human Resources General Staff, Colonel Miriam Zersky, on August 11, 2002 and requested an immediate discharge from the military. The head of Human Resources saw no reason to deny the request for an immediate discharge from the army. However, she explained that, in light of the provisions of the Permanent Service in the Israeli Defense Forces (Pensions) (New Version) Law-1985, [hereinafter the Pensions Law], granting a discharge prior to the middle of the month could cause financial loss to the appellant. As such, she suggested that appellant's discharge be considered effective retroactive from the end of July 2002. After finding that this suggestion did not deviate from the standard practice, appellant agreed. Appellant was discharged from the IDF on August 11, 2002. However, in the documentation regarding the discharge process, the date of discharge was recorded as July 31, 2002.

On November 5, 2002, the Prime Minister announced that, pursuant to his authority, he was dissolving the fifteenth Knesset and advancing the date of the elections. Elections for the sixteenth Knesset were set to take place on January 28, 2003. The appellant was selected to be a candidate for the list of the Likud party, which was submitted to the Central Elections Committee. Objections were submitted to the

Chairman of the Central Elections Committee as to the eligibility of the appellant to be a candidate for the elections. A similar petition was also submitted by Amnon Lorch, a member of the Central Elections Committee on behalf of the Labor Party. The petition requested that the Chairman of the committee determine the appellant ineligible to be a candidate. After holding a hearing, the Chairman of the Central Elections Committee determined that the appellant was ineligible to be a candidate in the elections. After the Central Elections Committee approved the Chairman's determination, the appellant's name was removed from the Likud list.

The Normative Framework

3. Section 7 of the Basic Law: The Knesset provides that certain persons may not be candidates for the Knesset elections. For convenience, I will here cite section 7 in full, while emphasizing the provisions at the center of our discussion here:

> 7. *Who Shall Not Be A Candidate*
>
> 7. The following shall not be candidates for the Knesset:
>
> 1. The President of the State;
> 2. The two Chief Rabbis;
> 3. A judge;
> 4. A judge of a religious court;
> 5. The State Comptroller;
> 6. **The Chief of the General Staff of the Israeli Defense Forces;**
> 7. Rabbis and ministers of other religions, so long as they receive a salary for holding office;
> 8. Senior state employees and **senior army officers of such grades or ranks and in such functions as shall be determined by Law;**

9. Police officers and jailors **of such grades or ranks and in such functions as shall be determined by Law;**
10. Employees of corporations established by law, **of such grades or ranks and in such functions as shall be determined by Law;**

Unless such persons have ceased to hold the stated office or function, prior to the date for the submission of Knesset candidate lists, **or, if the law prescribes an earlier date, prior to the date mentioned.**

The latter part of section 7 determines that those holding the offices or functions listed in the section are not longer precluded from presenting their candidacy if they cease to hold the offices or functions "prior to the date for the submission of Knesset candidate lists." However "if the law prescribes an earlier date," the period of preclusion will expire only if the person holding that office or function ceases to do so "prior to the date mentioned." Thus, with regard to the time at which the preclusion period expires, the latter part of the section distinguishes between those holding offices or functions, with regard to whom the law does not prescribe a cooling-off period and those holding offices or functions, with regard to whom the law does provide a cooling-off period. The preclusion regarding the former expires if they cease to hold that office or function before the date provided by section 57(i) of the Election Law, for the submission of the Knesset elections lists. Preclusion regarding the latter, however, expires only if they cease to hold that office or function before the date of the commencement of the cooling-off period, as provided by law.

We are here dealing with a former Chief of Staff who was released from permanent service holding the rank of major-general. There is no specific provision which prescribes a special cooling-off period for a former Chief of Staff, who desires to present his candidacy for the Knesset. However, the standard cooling-off period set for officers of his

rank do apply to him. Section 56 (1A) of the Elections Law provides cooling off periods for state employees, soldiers, police officers and jailors. I will here cite the language of section 56 (1A), while highlighting the sections at the center of our discussion:

> 56 (1A) *Provisions Regarding State Employees, Soldiers, Police Officers and Jailors*
>
> The following shall not be candidates for the Knesset:
>
> 1. State employees of one of the four top ranks;
> 2. State employees in a grade lower than 3, under the top rank of each ranking, if a range of ranks comprising the said rank 3 has been fixed for their posts;
> 3. **Military officers of any rank whatsoever in the permanent service of the Israeli Defense Forces;**
> 4. A police officer in the Israeli Police and a jailor in the Prison Service,
>
> unless they have ceased to be State employees, military officers, police officers or jailors, as said, before the determining day.
>
> **For the purposes of this sub-section, "the determining day" shall be—**
>
> 1. With regard to the head of General Security Service, the head of the Mossad—The Institute for Intelligence and Special Tasks, **military officers of the rank of general or above**, police officers of the rank of commissioner or above, and the Commissioner of the Prison Service—**six months before**

election day;

2. With regard to state employees, **military officers**, police officers or jailors, **not listed in paragraph (1)**—100 days before election day; regarding early elections, where such are announced less than 100 days prior to the time they are to be held—10 days from the day of the determination of the said time.

Thus, the law applies a cooling-off period to any person who has been a military officer in the permanent service. With regard to the length of the cooling-off period, the law distinguishes between military officers of the rank of "general or above" and military officers of lower ranks. The former must leave their position six months before elections to be eligible for candidacy. With regard to the latter, the law is satisfied with a cooling-off period of 100 days or, in early elections, under the conditions provided, with an even shorter cooling-off period. Under section 56 (1A), appellant, as one who served in the permanent service and was a "military officer of the rank of general or above," is eligible for candidacy only if he ceases to be a military officer at least six months before elections. It should also be emphasized that the latter part of the section, which allows for the shortening of the cooling-off period where it has been announced that early elections will be held, applies only to military officers of a rank lower than general. Thus, it does not apply to appellant.

4. It should be noted that the language of section 56 (1A) is the product of an amendment made to the Elections Law in 2001. Until this amendment, the section provided for a uniform 100-day cooling-off period for all those listed, including military officers of all ranks. This was changed with the legislation of the Service in the Defence Forces—Cooling-Off Period (Legislative Amendments) Law-2001 [hereinafter Cooling-Off Period Law]. Section 1 of this act replaced the definition of the "determining day" in the latter part section 56 (1A). The amended version provides that military officers of the rank of general or above, as

well as police officers of the rank of commissioner or above and the Commissioner of the Prison Services, are subject to a six-month cooling-off period. It should also be noted that the latter part of section 7 of the Basic Law: The Knesset—from the section which begins with the words "unless they have ceased to hold the stated office or function"—was also added to the Basic Law in an amendment made in 2001. *See* Basic Law: The Knesset (Amendment No. 33). The two legislative amendments were made within a week's time of each other in July of 2001. The Cooling-Off Period Law was passed in Knesset on July 16, 2001, while amendment 33 of the Basic Law was passed by the Knesset on July 23, 2001.

Does the Appellant Have Standing to Appeal?

5. In his response to the appeal, the Attorney-General argued that the appellant does not have standing to appeal the decision of the Central Elections Committee. This claim rests upon section 64(a) of the Elections Law. The provisions of the section provide that where the Central Election Committee has refused to approve a candidate list, or one of the candidates included in that list, the list may appeal the refusal to the Supreme Court. From the language of this provision, it does in fact seem that an individual candidate, whose candidacy has not been approved by the Central Elections Committee, does not have standing to appeal the decision.

As we have come to the conclusion that, substantively, the appeal itself should be dismissed, we can leave the question of standing undecided. The following considerations support this approach: an appeal on behalf of the Likud—which utilized its right to appeal under section 64(a), and whose claims are identical to those of the appellant—is also before us. It should also be noted that the Attorney-General agreed that, even if the appellant did not have standing to appeal, he had the right to petition the decision of the Elections Committee to the High Court of Justice. It also agreed that if this Court finds cause to intervene in the decision of the Elections Committee, it would be allowed to decide in the matter of the appellant's appeal as if it were a petition in which an *order nisi* had been issued. Under these circumstances, I shall turn to the

petition itself without resolving the question of standing.

The Bounds of the Conflict and the Decision of the Chairman of the Central Elections Committee

6. The appellant's position, before the Chairman of the Central Elections Committee as well as in this appeal, was that there is no legal cause to disqualify him from eligibility to be a candidate in the Knesset elections. First, appellant claims that section 1 of the Cooling-Off Period Law, under which section 56 (1A) of the Elections Law was amended, does not meet the constitutional requirements of the Basic Law: The Knesset. Therefore, it should be declared null and void. According to this claim, military officers of the rank of "general or above" should only be subject to the 100-day cooling-off period, as provided by section 56 (1A) prior to its amendment.

Second, even if we assume that the appellant is subject to the six month cooling-off period, as provided by the amended section 56 (1A), appellant asserts that the cooling-off period should not be calculated from August 11, 2002—the date that appellant was discharged from service. It should rather be calculated from July 9, 2002, the date that appellant ceased to serve as Chief of Staff or, alternatively, from July 31, 2002, which the military records note as the date of the appellant's discharge.

As a supplement to this alternative claim that the cooling-off period should be calculated from July 31, 2002, appellant additionally asserts that the cooling-off period should be calculated according to the Hebrew calendar and not according to the Gregorian calendar. This latter argument does not affect either of the other two dates in question. If calculation of the cooling-off period should begin on July 9 2002, use of either calendar would lead to the conclusion that the appellant is eligible to present his candidacy for the elections. If the calculation begins on August 11 2002, use of either of the calendars would lead to the conclusion that the appellant is not eligible to be a candidate. However, appellant's alternative claim that the cooling-off period should be calculated from July 31, 2002, would only help him if the cooling-off period is calculated according to the Hebrew calendar. Calculating the

period according to the Gregorian calendar would not have helped the appellant, since only five months and twenty eight days pass between the two dates—from July 31, 2002 to January 28, 2003. However, according to the Hebrew calendar six months and three days pass between the two Hebrew dates parallel to the Gregorian dates above—beginning from the 22nd of Av, 5762 and ending with the 25th of Shvat, 5763.

7. The Chairman of the Central Elections Committee believed that he did not have the authority to address appellant's claim that the amendment of section 56 (1A) of the Elections Law was inconsistent with the constitutional provisions of the Basic Law: The Chairman, however, did note as an aside that he saw such claims as groundless. The Chairman based his decision on the interpretation of the current language of the provisions of section 7 of the Basic Law: The Knesset and section 56 (1A) of the Elections Law. He examined which of the three alternative dates should constitute the "start day" that would touch off appellant's cooling-off period. He explained why the appellant's claims should be rejected. In clear and strong language, he decided that the cooling-off period should being on August 11, 2002 since it is the day upon which the appellant ceased to be a military officer of the rank of "general or above." As such, the Chairman found it unnecessary to address appellant's claim that the cooling-off period should be calculated according to the Hebrew calendar.

8. In my opinion, all of the considerations upon which the Chairman of the Central Elections Committee based his decision are correct. However, before addressing the substance of these considerations and appellant's objections to them, I will first explain my reasons for rejecting appellant's constitutional claim, which was not addressed by the Chairman. Significantly, in the proceedings before the Chairman, the appellant largely directed his energies towards the interpretive question—what is the "determining day" for the beginning of the calculation of the cooling-off period. However, in his arguments before us, he focused on the claim that the amended provision of section 56 (1A) should be declared null and void.

The Constitutional Matter— Validity of the Cooling-Off Period Law

9. The appellant attempted to convince us that section 1 of the Cooling-Off Period Law and the 2001 amendment to section 56 (1A) of the Elections Law do not meet the requirement of the Basic Law: The Knesset. He based this position on four arguments. Two of them were directed against the validity of the Cooling-Off Period Law, while the two others were directed against section 56 (1A) of the Elections Law, and the question of whether it meets the constitutional standards of the Basic Law. I will first address the first two arguments.

10. Appellant asserts that the Cooling-Off Period Law is null and void. In making this assertion, appellant points to a deficiency in the legislation of the law as well as to a lack of authority to legislate such an act. The first argument goes as follows: in extending the cooling-off period which applied to military officers of the rank of "general or above," the legislature violated the principle of equality, which is one of the foundations upon which elections for the Knesset are based, and which is enshrined in section 4 of the Basic Law. Since this constitutes a "change" according to section 4 of the Basic Law, and in light of the conditions of sections 4 and 46, in order to pass the Cooling-Off Period Law, an absolute majority of Knesset members was needed in each of the three readings in which the Law was brought before the assembly. This condition was not met. During the second and third readings a majority of Knesset members did in fact vote in favor of the law, however, during the first reading on February 20 2001 (*see* Minutes of the Knesset 2001, 2791-2800), the bill was only passed by a regular majority. Appellant asserts that this flaw in the legislative process means that the law is null and void.

The second argument goes as follows: the Cooling-Off Period Law is in conflict with the fundamental right to be elected, which every citizen is entitled to under section 6 of the Basic Law. The language of section 56 (1A) of the Elections Law, prior to enactment of the Cooling-Off Period Law, limited the right of those holding the offices and functions listed in the section to present their candidacy. With regard to some of these—including military officers in the permanent service—the right to present candidacy was conditioned upon a 100-day cooling-off period. With the

amendment of the provisions of section 56 (1A), made by the Cooling-Off Period Law, the cooling-off period applicable to military officers of the rank of general or above was extended to six months. According to appellant, since legislation of the Cooling-Off Period Law preceded legislation of Amendment no. 33 of the Basic Law, the extension of the cooling-off period had no legal foundation in the Basic Law. Absent explicit authorization in the Basic Law itself, the legislature was not allowed to extend the cooling-off period applicable to the appellant. Amendment no. 33 to the Basic Law, which was legislated after the legislation of the Cooling-Off Period Law, does not have the power to retroactively remedy this flaw. Appellant asserted that this means that the law is null and void.

11. It is appropriate to begin by stating that, even if section 1 of the Cooling-Off Period Law is found to be flawed as the appellant suggests, the necessary conclusion would not be that it is null and void but rather that, at the time at which the law was passed in the Knesset, it was invalid. *See* 2 A. Barak, Interpretation in Law—Interpretation of Legislation 44 (1994). Appellant's claim that the section is null and void rests upon the doctrine of absolute nullification, which provides that deviation from authority leads to "automatic" nullification of the legislation or administrative decision. However, for over a decade, the doctrine of relative nullification has become more and more established in our caselaw, while earlier approaches—such as the approach of absolute nullification—are gradually fading. The doctrine of relative nullification has generally been applied in the context of the review of administrative decisions. *See, e.g.,* HCJ 3081/95 *Romeo v. Scientific Council of the Israel Medical Organization* [1]; CA 1842/97 *Ramat Gan Municipality v. Menachamei Ramat Gan David Towers* [2]; HCJ 10455/02 *Amir v. Bar Association* (unreported decision) [3]. However, it seems that the model of relative nullification is also appropriate—even perhaps preferable—for our review of legislation. *See* 3 A. Barak, Interpretation in Law—Constitutional Interpretation 724 (1994). *See also* HCJ 6652/96 *Association for Civil Right in Israel v. Minister of Interior* [4]. There is considerable significance to the application of the doctrine of relative nullification here.

12. In examining the appellant's first two arguments, I will presume that the process through which the Cooling-Off Period Law was passed was in fact flawed in the two ways asserted—first, that in its first reading, the law was passed by a regular majority despite the fact that an absolute majority was required in all three readings and, second, that at the time it was passed, the Basic Law did not include any provision which authorized legislation of the Cooling-Off Period Law. It should be noted that consideration of the second flaw does not raise any complex issues, whereas addressing the question of the first flaw would require dealing with the problematic matter of HCJ 7111/95 *Local Government Center v. The Knesset* [5]. The issue in *Local Government* was whether section 4 of the Basic Law, which provides that the elections be "equal," should be interpreted as requiring equality between individual candidates or only between candidate lists. Of course, extension of the cooling-off period violated, at most, any requirement of equality between candidates, and not any requirement of equality between candidate lists. As such, if section 4 of the Basic Law only requires equality between the candidate lists, then the "absolute majority" requirements of sections 4 and 46 would not apply to the Cooling-Off Period Law.

However, as stated, I choose to presume that the appellant is correct with regard to both flaws. In light of this presumption, I will excuse myself from discussing what kind of equality is required by the Basic Law. I have chosen this path for practical reasons: Amendment no. 33 of the Basic Law: The Knesset was only intended to remedy the second flaw—the absence of a provision in the Basic Law which would authorize the Knesset to set a cooling-off period. However, the enactment of Amendment no. 33 of the Basic Law, which in itself was passed by an absolute majority of members of the Knesset, would retroactively remedy the first flaw—the question of equality—as well.

13. Appellant asserted that Amendment no. 33 of the Basic Law: The Knesset does not have the power to retroactively remedy the flaw in the legislation of the Cooling-Off Period Law. The Attorney-General responded that amendment of the Basic Law remedied the flaw in the legislation of the Cooling-Off Period Law. Without generally ruling that an amendment of a Basic Law has the power to retroactively remedy the

fact that a statute conflicted with a Basic Law prior to the amendment of the latter, it seems to me that in the special circumstances here, Amendment no. 33 of the Basic Law: The Knesset does have the power to remedy the flaws in the legislation of the Cooling-Off Period Law.

As noted, Amendment no. 33 of the Basic Law was passed a week of the Cooling-Off Period Law. Awareness of the need for the amendment to the Basic Law, as a condition for the validity of the Cooling-Off Period Law, already arose in the hearings of the Constitution, Law & Justice Committee of the Knesset on March 27, 2001, at which time the Committee approved the Cooling-Off Period Law for its second and thirds readings. This awareness led the Constitution, Law & Justice Committee to publicize the bill for the amendment of the Basic Law. *See* the proposed Basic Law: The Knesset (Amendment 45) (Limitations on Knesset Candidacy for Persons Holding Office), Bill 3014-2001, from June 18, 2001. In the notes to the bill, it was explicitly noted that the addition of the latter part of section 7 of the Basic Law, as amended, was intended to be "authorize legislation regarding cooling-off periods in a regular law."

Examination of the legislative history of Amendment no. 33 does not leave any doubt as to the object of the proposed amendment, which was brought before the Knesset together with the proposed Cooling-Off Period Law with the intention of discussing both bills and approving them simultaneously. I will briefly recount the development of the situation: On July 3, 2001, the Knesset assembly held a joint hearing with regard to the proposed amendment of the Basic Law and the proposed Cooling-Off Period Law. In the discussion, the Chairman of the Constitution, Law & Justice Committee, MK Ophir Paz-Pines, explained that the amendment of the Basic Law was intended to constitutionally validate the Cooling-Off Period Law (Minutes of the Knesset 2001, 5980-5986). The two bills were once again placed on the table of the Knesset assembly on July 16, 2001. Once again MK Paz-Pines explained the need to amend the Basic Law in order that the Cooling-Off Period Law be constitutionally valid (Minutes of the Knesset 2001, 6519-6521). In that same meeting, close to the time at which the Cooling-Off Period Law passed its second and third readings, the Knesset approved, be a

majority of its members, Amendment no. 33 of the Basic Law, in its first reading. However, voting with regard to the second and third readings was postponed for a week. It is significant to add that when Amendment no. 33 of the Basic Law was brought to a vote of its second and third readings, on July 23, 2001, MK Paz-Pines yet again mentioned that the amendment constituted an integral part of the legislative process of the Cooling-Off Period Law (Minutes of the Knesset 2001, 684-6865).

14. Amendment no. 33 of the Basic Law: The Knesset, which was passed by a majority of the members of Knesset in all of its three readings, added the following to the end of section 7 of the Basic Law:

> Unless they have ceased to hold the stated office or function, prior to the date for the submission of Knesset candidate lists, or, if the law prescribes an earlier date, prior to the date mentioned.

This amendment authorized the Knesset to establish, in a regular law, cooling-off periods for those holding the offices and functions listed in section 7. Examination of the commentaries to the bills and the legislative histories of both Amendment no. 33 and the Cooling-Off Period Law make it clear that this was the purpose, or at least one of the purposes, of Amendment no. 33. There was indeed a defect in the manner in which the legislative process was managed. Amendment no. 33 should have been enacted prior to, or at the same time as, the Cooling-Off Period Law. The Knesset, however, passed the Cooling-Off Period Law one week before enacting Amendment no. 33. Under these circumstances, I cannot accept appellant's claim that Amendment no. 33 could not remedy the flaws in the legislative process of the Cooling-Off Period Law. I am not of the opinion that the flaws in enacting the Cooling-Off Period Law could only have been remedied by bringing the law to a new vote before the Knesset, subsequent to the passing of Amendment no. 33. As I have already stated, the flaws in the legislation of the Cooling-Off Period Law, did not absolutely nullify its enactment. All that may be concluded from these flaws is that at the time at which the Knesset passed the law, it was not valid. As stated, I do not wish to state, as a general rule, that a Basic Law has the power to retroactively remedy a

constitutional flaw in the enactment of legislation. Nevertheless, in the special circumstances here, I find it appropriate to hold that Amendment no. 33 of the Basic Law did in fact remedy the flaws in the legislation of the Cooling-Off Period Law.

It seems to me that this decision is the proper interpretation of the law. The doctrine of relative nullification allows the Court to reach a proportional and balanced decision with regard to the validity of section 1 of the Cooling-Off Period Law, and I see no reason to doubt its application to the matter at hand. Although at the time it was passed the section was in conflict with section 6 of the Basic Law: The Knesset—and perhaps also with section 4 of the Basic Law—after the amendment of the Basic Law, the flaw in the legislation of the Cooling-Off Period Law was remedied. We need not hold that the amendment remedied the flaw retroactively, that is to say, from the day the Cooling-Off Period Law was passed. It is sufficient to hold that the flaw was remedied from the time of the enactment Amendment no. 33 of the Basic Law.

Position of the Cooling-Off Period Law in the Constitutional Scheme of the Basic Law: The Knesset

15. As noted, the Cooling-Off Period Law amended section 56 (1A) of the Elections Law. Appellant asserted that even if the Cooling-Off Period Law is presumed to be valid, it does not meet the constitutional standards of the Basic Law: the Knesset. For the following reasons, appellant claims that the amendment is not valid. First, it discriminates against military officers of the rank of "general or above," in comparison to the other office holders listed in section 7 of the Basic Law, such as the President, the Chief Rabbis, and judges, who are not subject to any cooling-off period. Furthermore, it also discriminates them in comparison to persons in positions similar to theirs, such as military officers of the rank of brigadier general and below, who are only subject to a 100 day cooling-off period. Second, the law denies them the right to the shortening of the cooling-off period upon the announcement of early elections, which all military officers in permanent service were entitled to prior to the amendment of section 56 (1A). After the amendment, however, this right is only granted to military officers who are subject to

a 100 day cooing period. As such, senior officers such as the appellant lost the right to choose whether to retire from their service immediately and present their candidacy for early elections, which they were entitled to do under section 56 (1A) prior to its amendment. Appellant asserts that depriving them of their right to choose is not only a limitation of the right to be elected, but also an absolute denial of that right. As such, appellant requests was that we apply the "choice doctrine," which the Court discussed in HCJ 7157/95 *Arad v. Chairman of the Knesset* [6].

16. These two arguments should be rejected. No one contests the fact that "the right to be elected is a fundamental political right, in which the ideas of equality, freedom of expression and freedom of assembly are manifest, and that this right is one of the significant symbols of a democratic society." EA 2/84 *Neiman v. Chairman of the Central Elections Committee of the Eleventh Knesset*, [7] at 264 (Shamgar, P.). It is, of course, important that every citizen who wishes to run for election be given the opportunity to realize this right. However, against this consideration stands the need to guarantee the independence of the civil service. The provisions of the Basic Law: The Knesset and the Elections Law, which place certain limitations on the right to run for election, are intended to guarantee that independence. My colleague, President Barak, has addressed this issue in *Arad*, [6] at 587.

:

> The realization of these rights, to vote and be voted for, lies at the foundation of the political structure of the State of Israel. However, the Basic Law: The Knesset sees the opposing consideration as primary, in order to ensure the apolitical nature of the civil service. Indeed, active involvement in the political struggle as a candidate for the Knesset is perceived by the Basic Law as a violation of the apolitical nature of the civil service, so much so that in the eyes of the Basic Law, a choice was necessary between continuing in the civil service or submitting one's candidacy for the Knesset. According to this choice, the "purity of the civil service" is a superior consideration. It seems that at the base of this preference stands the recognition that the key to the realization of

> the right to be elected is in the hands of the civil servant. He usually has the power to resign from his position in the civil service, thus paving the way for the realization of the right to be elected.

We see that it is essential to preserve the independence of the civil service. This requires the restriction of the right of those holding office in the civil service to run for election. Section 56 (1A) of the Elections Law distinguishes between those holding some positions in the civil service, who may not present their candidacy only so long as they are in office, and those holding other positions, to whom the limitations on their right to run continues for a period of time after they have left office. Among the latter, who are subject to a cooling-off period, the legislature was especially strict regarding those who have held the highest positions in the defence forces: the head of the General Security Service, the head of the Mossad, military officers in permanent service of the rank of general and above, police officers of the rank of commissioner and above, and the Commissioner of the Prison Service. Only this group of senior officers is subject to a six month cooling-off period. Only they are not entitled to the shortening of the cooling-off period in the event of early elections. Does this stringency with regard to these senior positions constitute a violation of equality? I am of the opinion that the answer to this question is in the negative.

The legal standard is that relevant differences between parties may justify distinguishing between them. Such distinctions are not in conflict with the requirement of essential equality between those parties. As is known, this is the difference between unacceptable discrimination and permissible distinctions. *See* FH 10/69 *Bornowski v. Chief Rabbis of Israel*, [8] 35. This is true so long as the nature and degree of the distinction is indeed necessary and justified, under the circumstances, for the achievement of the purpose for which the distinction is being made. *See* HCJ 4541/94 *Miller v. Minister of Defense*, [9] at 100. The application of this rule to the case at hand leads to the conclusion that the strict cooling-off regulation does not violate the principle of equality.

17. However, even if I presume that the regulation does violate the

principle of equality, I am still of the opinion that there is no basis to claim that the violation exceeds the limits of the Basic Law: The Knesset. In this situation, we have resort to the three-part test of section 8 of the Basic Law: Human Dignity and Liberty, which looks to ensure that the law in question accords with the values of the State of Israel, that it has a proper purpose, and that it is proportional. Of course, the Basic Law: The Knesset does not include a limitations clause analogous to section 8 of the Basic Law: Human Dignity and Liberty. The question has been raised whether, in reviewing legislation which allegedly conflicts with the principle of equality in the Basic Law: The Knesset, the Court may apply the tests of the limitations clause of section 8 of the Basic Law: Human Dignity and Liberty. *See* HCJ 3434/96 *Hofnung v. Chairman of the Knesset*, [10] at 69-70 (Zamir, J.). I myself see no reason to refrain from doing so. The three-part test of the limitations clause is now seen as the proper judicial tool for testing the constitutionality of a law. As it has become one of the foundational principles of our constitutional system, the Court may implement it even in the absence of an explicit limitations clause in the relevant Basic Law.

The establishment of strict cooling-off regulations for the highest level of officers and commanders in the armed forces is in harmony with the democratic values of the state, and it does not conflict with its Jewish values. The purpose of the regulations is also proper. In as much as the preservation of the independence of the civil service, including the armed forces, is important, preservation of the independence of the senior command in the armed forces and security services is especially and particularly important. When a person runs for election, where only a few months prior he wore an army uniform and held the rank of major-general or general, this raises the suspicion that recent decisions which he made in the military were influenced by his political views, which became public upon submission of his candidacy for political office. Moreover, when a person who recently held authority in one of the state's armed forces presents his candidacy for the Knesset, this can raise suspicions of improper conduct. Subjecting senior officers and commanders to a cooling-off period, which is longer than that period imposed upon officers of a lower rank, was intended to assuage these suspicions. As such, the purpose of the law is a proper one. Moreover, in

my opinion, there is no basis for the claim that the period prescribed does not meet the requirement of proportionality. The six month cooling-off period is the time that the legislature believed to be necessary for the achievement of this purpose.

It is indeed true that an officer of the rank of the appellant does not have a "right to choose," such as that granted to military officers of the rank of brigadier general or lower, or to those of a parallel rank in the other security services by the latter part of section 56 (1A). This latter category of officers may choose to retire from their service upon the announcement of early elections and be eligible to present their candidacy. However, the preservation of the independence of the armed forces demands and justifies stringency with regard to persons of senior rank, who are well-known to the public at large. This is in contrast to persons of junior rank, most of whom are unknown to the general public. Depriving these higher ranks of their right to choose, as well as imposing upon them an obligation to meet a longer cooling-off period, is a part of the restrictions demanded of their high rank and the senior positions which they filled during their service.

This ruling applies to the appellant. With this in mind, and not only due to the differences between the circumstances of the two cases, the "choice doctrine," which the Court discussed in *Arad* [6] is of no aid to the appellant.

The Interpretive Perspective

18. The main question before the Chairman of the Central Elections Committee was when the appellant's cooling-off period began, as defined by section 56 (1A) of the Elections Law. Those who requested the disqualification of the appellant argued that this period should be calculated from August 11, 2001, since on that day the appellant was discharged from his service in the army, and he ceased to be a military officer in the permanent service of the rank of "general or above." The appellant argued that the calculation should begin on July 9, 2002, or, alternatively, on July 31, 2002. The first of these two is the date upon which the appellant ceased to hold the position of Chief of Staff. The

second is the date which, in the army's official records, is noted as the date of appellant's discharge from service. As stated, the Chairman of the Central Elections Committee rejected appellant's arguments and determined that appellant's cooling-off period should be calculated from August 11, 2002. In light of this conclusion, he saw no reason to make a decision with regard to appellant's claim that the cooling-off period should be calculated according to the Hebrew calendar.

In the appeal before us, the appellant repeated his claims regarding the calculation of the cooling-off period. During oral arguments, the Attorney-General supported the evaluation and reasoning of the Chairman of the Elections Committee. As I have noted, I find the reasons given by the Chairman of the Elections Committee for his decision to be acceptable.

19. Appellant's central argument was that the cooling-off period should be calculated from the day he ceased to hold the position of Chief of Staff. He argued that the provisions of section 56 (1A) of the Elections Law should not be interpreted literally. Rather, they should be interpreted according to their purpose, in other words, according to the rationale for the establishment of the cooling-off period. He asserted that the impetus for subjecting a military officer of the rank of general or above to a six month cooling-off period does not stem from his high military rank *per se*, but rather from the senior position which he held during his service. He argues that this interpretation emerges from section 7 of the Basic Law: The Knesset, under which the restrictions placed upon those listed in the section expire if "they have ceased to hold the stated office or function, prior to the date." Thus, the restrictions exist so long as the person holds his office or function. If he is subject to a cooling-off period, it would be proper to calculate the cooling-off period from the day he ceased to hold his office or function. Therefore, when the appellant ceased to hold the position of Chief of Staff, took retirement leave, and no longer filled any military position, the restrictions upon his candidacy ended and his cooling-off period began.

I cannot entertain this claim. Section 7 of the Basic Law lists those officers who "shall not be candidates for the Knesset." Among those who

are restricted from presenting candidacy are, as provided by sub-section 7(8), "senior state employees and senior army officers *of such grades or ranks and in such functions* as shall be determined by Law." Similar provisions are included in the Basic Law with regard to police officers and jailors, in sub-section 7(9), and with regard to employees of corporations established by law, in sub-section 7(1). With regard to each of these, the Basic Law authorized the legislature to deprive those involved of their right to be elected, whether due to their *rank* or due to their *function*. The legislature was also granted the authority to determine who would be subject to a cooling-off period. The legislature conditioned the preclusion of most of those listed in sections 7(8) and 7(9) of the Basic Law upon the officers' rank, not upon the position they filled. Thus, for example, the Elections Law does not state that the limitations on the right to be elected apply to the Chief of Staff of the Israeli Defense Forces or to the Inspector General of the Israeli Police. The limitations apply to military and police officers of the two highest ranks—"general or above" and "commissioner or above." In this context, we note that another proposed bill, which served as the basis for the legislation of the Cooling-Off Period Law and the amendment of section 56 (1A), it was suggested that senior officers should be subject to a one year cooling-off period, which was to begin when active duty ended. The notes accompanying the bill clarified that "this year will include retirement leave, during which those officers do not actively serve, although they are still officially a part of the body in which they served." *See* Proposed Knesset and Prime Minister Elections (Amendment) (Cooling-Off Period for Senior Officers) Law-2002, Bill 2969, 2001, 404. This bill, however, was not passed. The Cooling-Off Period Law chose a different balance. On the one hand, it limited the cooling-off period to six months while, on the other hand, it provided that the cooling-off period would be calculated from the date the officer is discharged from permanent service.

Thus, it is clear from latter part of section 56 (1A) of the Elections Law that the restrictions on officers' candidacy continue to apply "unless they have ceased to be … military officers [in permanent service] before the determining day." This is the date upon which the calculation of the cooling-off period begins. In this, the legislature showed its intention, that it is not enough that a military officer cease to hold the position he

held in the army in order to mark the beginning of the cooling-off period. Rather, the "determining day" is the day upon which the officer is discharged from permanent service. The law is clear; its language and intentions are clear, and they should be applied accordingly.

Moreover, I am of the opinion that the legislature's directive, according to which the cooling-off period for officers should be calculated from the date of their discharge from the army, and not from the date upon which they cease to hold their last active position, is in harmony with the rationale of the cooling-off period. An officer on leave is still an officer in the permanent service in all respects—not only from a formal perspective, but also in light of the essential duties and prohibitions imposed upon him and from the perspective of the public. Of course, on the authority of military orders, he may be permitted to carry out certain acts during his leave as part of his preparation for civilian life. This, however, does not affect his status as an officer in the permanent service.

20. Appellant's alternative claim was that if we wish to interpret the provisions of section 56 (1A) of the Elections Law literally, the date which should be considered the "determining day" for the beginning of the cooling-off period is July 31, 2002—which the army's official records note as the date of appellant's discharge.

This claim should also be rejected. All agree that appellant was actually discharged from service on August 8, 2002. The fact that the head of Human Resources—for reasons concerning the provisions of the Pension Law and with the intention of preventing the appellant from incurring financial losses—recorded in the army's records that appellant was discharged on a different date does not change the situation. The date which begins the cooling-off period, as was correctly determined by the Chairman of the Central Elections Committee, is August 11, 2002. Only on that date did the appellant cease to be a military officer of the rank of major-general in the permanent service. This conclusion makes it unnecessary to address the appellant's claim that the cooling-off period should be calculated according to the Hebrew calendar.

21. For these reasons, at the time of the decision, I supported the dismissal of this appeal.

President A. Barak

I agree.

Vice President S. Levin

I agree. I am of the opinion that, as a matter of interpretation, Amendment no. 33 of the Basic Law: The Knesset remedies the presumed flaws in the enactment of the Cooling-Off Period Law. This makes resort to the doctrine of relative nullification unnecessary.

Justice D. Dorner

I agree with the judgment and reasoning of my colleague, Justice Eliyahu Mazza.

Justice Y. Turkel

I agree.

Justice D. Beinisch

I agree.

Justice I. Englard

I agree.

Justice E. Rivlin

I agree.

Justice A. Procaccia

I agree with the judgment and reasoning of my colleague, Justice Eliyahu Mazza.

.

Justice E. Levi

I agree.

Justice A. Grunis

I agree.

Justice T. Strasberg-Cohen

As my colleague, Justice Mazza, I fully accept the reasoning of the Chairman of the Elections Committee, which brought him to the conclusion that the appellant is ineligible to present his candidacy. This is sufficient to dismiss the appeal of the appellant. I shall add that the flaws in the enactment of section 1 of the Cooling-Off Period Law—if they are indeed flaws—were remedied by Amendment no. 33 of the Basic Law: The Knesset. In any case, under the circumstances, the law should not be absolutely nullified.

Appeal dismissed, as per the opinion of Justice E. Mazza.
15 May 2003

TRANSLATED BY: Leora Dahan
EDITED BY: Eli Greenbaum

Comments, questions and suggestions are all welcomed, and may be directed towards elig@supreme.court.gov.il

---